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COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
COMMITTEE ON JUDICIARY

In re: Blood Alcohol Content Levels

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

Monday,  
August 3, 1992  
1:00 p.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN

MEMBERS OF COMMITTEE ON JUDICIARY

Hon. Kevin Blaum	Hon. David Heckler
Hon. Gregory Fajt	Hon. Gerard Kosinski
Hon. James Gerlach	Hon. Frank LaGrotta

Also Present:

David Krantz, Executive Director  
Galina Milahov, Research Analyst  
Paul Dunkelberger, Republican Research Analyst  
Mary Beth Marshik, Republican Research Analyst  
Suzette Beemer, Republican Staff

Reported by:  
Ann-Marie P. Sweeney, Reporter

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1                   CHAIRMAN CALTAGIRONE: The hour is here.  
2 We might as well get rolling.

3                   I'm State Representative Tom Caltagirone,  
4 Chairman of the House Judiciary Committee. We're going  
5 to take testimony today on the public hearing dealing  
6 with the blood alcohol content levels and some of the  
7 controversy that has resulted from some of the rulings  
8 dealing with that particular issue. There are other  
9 members of the panel here and there will be other  
10 members joining us, but I'd like for them to introduce  
11 themselves, if you would, to my left.

12                   REPRESENTATIVE LaGROTTA: Representative  
13 LaGrotta from Lawrence County.

14                   MR. KRANTZ: Dave Krantz, Executive  
15 Director of the House Judiciary Committee.

16                   REPRESENTATIVE GERLACH: Representative  
17 Jim Gerlach from Chester County.

18                   MR. DUNKLEBERGER: Paul Dunkleberger,  
19 Republican staff.

20                   MS. MARSCHIK: Mary Beth Marschik,  
21 Republican staff.

22                   MS. BEEMER: Suzette Beemer, House  
23 Judiciary staff.

24                   MS. MILAHOV: Galina Milahov, Democratic  
25 staff.

1                   CHAIRMAN CALTAGIRONE: Okay, we're going  
2 to hear from the first testifants, Kathy McDonnell and  
3 George Leone from the District Attorney's Office in  
4 Philadelphia. If you would introduce yourself for the  
5 record and present your testimony.

6                   MS. McDONNELL: Sure. Good afternoon,  
7 Chairman Caltagirone and members of the House Judiciary  
8 Committee, ladies and gentlemen. My name is Kathy  
9 McDonnell. As the Chairman said, I'm from the  
10 Philadelphia District Attorney's Office, in the  
11 Legislation Unit. Both myself and my colleague Mr.  
12 Leone are here to speak on behalf of the Pennsylvania  
13 District Attorneys Association in support of the  
14 proposed amendments to House Bill 355, specifically  
15 those that concern the amendments to the DUI law 3731.  
16 Mr. Leone accompanied me here today because he is in  
17 our appellate unit and has kept a watchful eye both in  
18 helping to draft these amendments and also in following  
19 recent Supreme Court case law which has forced us into  
20 the provision we're here today, so if it's okay, I  
21 would like to pass the microphone over to Mr. Leone.

22                   MR. LEONE: Good afternoon. As Kathy  
23 mentioned, I'm George Leone, and I appreciate the  
24 opportunity both for myself and for the office and for  
25 the Pennsylvania District Attorneys Association of

1       testifying before you today. I have some prepared  
2       testimony which I will go through and I hope that  
3       copies have been given to you.

4               As you probably know, this bill is a  
5       direct response to two Supreme Court cases that have  
6       guttled, essentially decriminalized, the Commonwealth's  
7       ability to obtain DUI convictions for driving with a  
8       blood alcohol level above the legal limit of .10.  
9       These provisions pose a direct threat to the public  
10      safety of the Commonwealth.

11             In Commonwealth vs. Luther Jarman, a York  
12      County case, and Commonwealth vs. James Lee Modaffaro,  
13      a Clearfield County case, the respective defendants  
14      were tested 59 and 110 minutes after being stopped.  
15      The results for both defendants were above .10. One  
16      was .114 and one was .108. Both defendants were, thus,  
17      over the legal limit of .10 set by the General  
18      Assembly, but in both cases the defendants argued that  
19      while their blood was over the legal limits at the time  
20      of the test, the Commonwealth could not prove that  
21      their blood was over the legal limit at the time of  
22      driving.

23             The defendant's theory, which I have  
24      turned "chug-and-drive," runs like this: It's  
25      generally accepted that alcohol when drunk does not

1 instantly pass from your mouth to your blood. It takes  
2 about 60 to 90 minutes of absorption through your  
3 stomach to make it into your bloodstream and for your  
4 blood alcohol level to reach its peak level. If a  
5 driver drank all of his alcohol immediately before he  
6 got into his car, his rising blood alcohol level might  
7 still be below .10 at the time of driving, even though  
8 it later rose to above .10 at the time of testing.  
9 Thus, even though a driver drank enough alcohol before  
10 driving to render him legally intoxicated and seriously  
11 impaired, if he did his driving quickly enough after  
12 drinking, he would not be legally accountable.

13           The defendant's theory is clearly  
14 contrary to the goals of the DUI statute. It was not  
15 this General Assembly's goal to encourage people to  
16 consume their alcohol by chugging it rather than by  
17 consuming it with moderation. It was not the goal of  
18 this General Assembly to encourage people to jump into  
19 their cars immediately after drinking rather than wait.  
20 I mean, one only needs to think of the cards that are  
21 issued available to people saying how long you have to  
22 wait after consuming a particular amount of alcohol.  
23 It's clear you want people to wait and sober up, not  
24 rush into their cars and try and race home before the  
25 alcohol takes effect.



1 defendant's blood test result was over .10 and if a  
2 defendant, as in Modaffare, who said, no, I didn't do  
3 all that drinking right before I got in the car, I did  
4 it over a period of time, does not claim to have taken  
5 his last drink immediately before driving, the evidence  
6 is still insufficient unless the Commonwealth can prove  
7 that a defendant has absorbed all of his alcohol before  
8 driving.

9           The burden that the defendants in these  
10 cases would pose on the Commonwealth is practically  
11 unmeetable. The police officer who encounters a drunk  
12 driver encounters him on the road. He does not know  
13 where he has come from, he does not know where he  
14 drank, he does not know when he drank, he does not know  
15 what he drank. The defendant knows, of course, but the  
16 Commonwealth cannot compel him to tell them. And if  
17 the defendant decides to lie about what he did, the  
18 Commonwealth can't disprove it.

19           Under the theory of the defendants in  
20 Jarman and Modaffare, any blood test result over .10 is  
21 inadequate evidence to convict any defendant because  
22 the Commonwealth cannot know when and what drinks he  
23 took and when he took them. This, again, was clearly  
24 not the intention of the General Assembly in enacting  
25 the .10 provision. This provision was put in there to



1 provide a scientifically accurate and easily and fairly  
2 justicable standard. You didn't want people to get  
3 into their cars with enough alcohol in their blood to  
4 get them above .10. That was the intent. If you were  
5 going to drink that much, you didn't drive. If you  
6 were going to drive, you didn't drink that much. But  
7 unfortunately, the Supreme Court in these two  
8 decisions, accepted the defendant's theory. They ruled  
9 that blood test results over .10 were inadequate to  
10 convict those defendants because without knowing when  
11 the defendants had done their drinking, it was only  
12 speculative what the defendant's blood alcohol level  
13 was, whether it was above .10 at the time of driving.  
14 Essentially, what the Supreme Court did was to say that  
15 it would presume that every defendant, as a matter of  
16 law, had done all of his drinking before the time of  
17 driving and it would be up to the Commonwealth to  
18 disprove that.

19 Now, in those two cases the Supreme Court  
20 cited two things. They cited the 50-minute time lapse  
21 between the time the test was taken and the time the  
22 driving had ended in those cases, and they said that's  
23 one factor in our decision. Unfortunately, given the  
24 time necessarily consumed in stopping and questioning  
25 an apparent drunk driver, giving him the opportunity to

1 pass a field sobriety test, taking them into custody,  
2 arranging for the safe keeping of his vehicle,  
3 obtaining his consent to the test, taking him to a  
4 blood testing location and doing the prerequisite  
5 pre-test preparation, it is unusual that a blood sample  
6 can be obtained in less than 50 minutes.

7 Now, I speak as an attorney who sees  
8 these cases that come to me. I understand that later  
9 in the day you're going to be hearing from a police  
10 officer and his testimony will be exactly the same.  
11 It's very unusual to get anything faster than 50  
12 minutes. It just is not possible -- you can't jump  
13 into their car and stab them with a needle. It doesn't  
14 work that way.

15 The Supreme Court in Jarman and Modaffare  
16 also cited what they called the small amount by which  
17 the .108 and .114 blood test results exceeded .10.  
18 Now, this legislature set .10 as the number. It picked  
19 the number. The Supreme Court said the leads were only  
20 a small amount more than that number. Well, as I  
21 understood the General Assembly's intent, it picked a  
22 number and it wanted that number to be enforced. But  
23 when these decisions first came out there was some hope  
24 that, well, maybe the Supreme Court has decriminalized  
25 between .10 and .114, but above that we'll still be

1 able to get convictions, and any hope of that was  
2 dashed by a Superior Court decision in a Mercer County  
3 case. The case name is Commonwealth vs. Tamara Sue  
4 Osborne, and they followed the Supreme Court's lead and  
5 said -- the Supreme Court said it was constrained.  
6 That's their word. They felt they were required by the  
7 Supreme Court to discharge a driver whose blood alcohol  
8 level at the time of testing was .148, .15 essentially.  
9 That's a high, that's an extraordinarily high blood  
10 alcohol level. But they felt they were constrained to  
11 do that under the Supreme Court's decision, and that  
12 essentially they blamed the Commonwealth for not  
13 presenting expert testimony to what's called relate  
14 back or extrapolate the .15 result back to the time of  
15 driving. And that goes back to the basic problem here,  
16 the Commonwealth does not know, and its experts do not  
17 know, when or what a particular person drank. And in  
18 fact, the Supreme Court in their earlier decision,  
19 Commonwealth vs. Gonzalez, said that expert testimony  
20 is inadmissible. If the expert needs to know--and any  
21 honest expert would tell you he would--what the person  
22 was drinking and when he drank it, if the expert says,  
23 oh, I don't know that but here's my opinion, his  
24 testimony is inadmissible. So essentially, the  
25 Superior Court is asking us to do something the Supreme

1 Court has already told us that we can't do.

2 One might hope, I suppose, that this was  
3 just -- even though this is now the law of  
4 Pennsylvania, that even though .15 results are not good  
5 enough, and by the way, in our office it is my  
6 understanding we no longer attempt to prosecute A(4)  
7 prosecutions where the result is .15 or below. It is  
8 clear to us under Osborne and Jarman and Modaffare that  
9 our case will be thrown out. So they've essentially  
10 decriminalized driving in that fairly large range of  
11 fairly intoxicated people.

12 But any hope that this was just one  
13 Superior Court panel's reaction and that another panel  
14 might change it, I think that that's a vain hope.  
15 Another Superior Court case, Commonwealth vs. Frederick  
16 Weiss, which was not cited here, it was decided in  
17 June, that case didn't even have an A(4) prosecution.  
18 The defendant was acquitted of A(4), but on appeal they  
19 still have the A(1), the visibly intoxicated driving  
20 clearly under the influence statute prosecution, and  
21 there the Superior Court went out of its way, this is a  
22 different panel, to say we presume that the  
23 Commonwealth is aware of the Supreme Court's recent  
24 decisions in Commonwealth vs. Jarman and Commonwealth  
25 vs. Modaffare and that it will conform its prosecution

1 of future drunk driving cases accordingly. So both  
2 courts have taken the position essentially that under  
3 Jarman and Modaffare we just can't bring these  
4 prosecutions under A(4) anymore.

5 And I should point out that although  
6 Osborne dealt with .15, which as I said is a pretty  
7 high level, there's no logical constraint to keep going  
8 on that scale. There's no reason why point .14, .15 or  
9 .2 or .3 are any more a situation where you cannot,  
10 where the Commonwealth doesn't have to come back with  
11 "relation back" testimony under this statute, and as I  
12 said, we cannot. We just don't have that information.  
13 It's in the sole position of the defendant, and we have  
14 no rights to compel him to give it to us.

15 In Jarman and Modaffare, two Justices,  
16 Justices Cappy and McDermott, late Justice McDermott,  
17 dissented complaining that it was impossible for the  
18 Commonwealth to procure meaningful expert testimony  
19 because it could not compel the defendant to say what  
20 and when he drank, and that we are imposing an  
21 impossible burden on the Commonwealth to prove its  
22 case. And this majority of the Supreme Court responded  
23 that it was the General Assembly's fault essentially,  
24 that the General Assembly had made Pennsylvania's DUI  
25 statute depend on the time of driving, that other State

1 statutes differed, that other State statutes might be  
2 more responsive to societal concerns about drunk  
3 driving, and the Supreme Court concluded: "Such  
4 arguments could properly be addressed to our  
5 legislature, rather than to this Court, for we are  
6 constrained to apply the plain language of the existing  
7 statute."

8           The amendments to Section 3731 embodied  
9 in House Bill 355 correct the Supreme Court's  
10 disastrous decisions by making clear that if a  
11 defendant, before or during his driving, drinks so much  
12 alcohol that his blood alcohol level goes over the  
13 legal limit, he is legally responsible for his  
14 dangerous mixture of drinking and driving. The House  
15 Bill amendments also eliminate the "chug and drive"  
16 defense and discourage drinkers from rushing to their  
17 cars and racing home in the hope that their driving  
18 will be faster than their liquor. Because House Bill  
19 355's requirements are based on the time of testing  
20 rather than on the time of driving, it eliminates the  
21 impossible burden of knowing what and when a defendant  
22 drank in attempting to relate back blood alcohol test  
23 results. The amendment also includes a general  
24 requirement that the sample be drawn within three  
25 hours, with a special proviso, a proviso for additional

1 time in cases such as where a driver has caused an  
2 accident pinning him in his car, or where a driver  
3 conceals himself after a hit-and-run where it is  
4 reasonable to allow the police additional time to get  
5 the defendant and get the sample drawn.

6 And I should point out here that  
7 logically if a defendant is tested, let's take, for  
8 example, six hours after the accident and still has a  
9 blood alcohol level of .10, remember, he's absorbed all  
10 of his alcohol within an hour and a half of stopping  
11 driving. If his blood alcohol level six hours later is  
12 still above .10, that only tells you that he drank vast  
13 quantities of alcohol to keep it up that high that  
14 long. If he drank that much alcohol to drive his blood  
15 alcohol level eventually that high, you don't want him  
16 to be driving.

17 The association canvassed its members and  
18 picked the three-hour limit as a limit that would  
19 prevent people from being shocked by what they would  
20 term delays in testing, which, as I said, only goes to  
21 show the defendant drank more than the defendant who  
22 had that same alcohol level three hours before them.  
23 That level is in there to create a level of comfort  
24 both with you and the courts so that we don't have  
25 problems with people saying, well, you waited too long.

1 I want to just close by saying that this  
2 proposed amendment specifically addresses the serious  
3 damage done by the Supreme Court decisions, damage that  
4 essentially destroyed the Commonwealth's abilities to  
5 hold persons accountable for driving and drinking above  
6 the legal limit. It's crucial to future successful  
7 prosecutions of individuals who drive our streets drunk  
8 and to the safety of our citizenry that these  
9 amendments be enacted as quickly as possible, and I  
10 thank you very much for giving me an opportunity to  
11 comment. And I would be happy to entertain any  
12 questions you might have.

13 CHAIRMAN CALTAGIRONE: We had some  
14 additional members that joined the panel, if they would  
15 just please introduce themselves for the record.

16 REPRESENTATIVE KOSINSKI: Representative  
17 Jerry Kosinski from Philadelphia, fresh in from a  
18 vacation.

19 REPRESENTATIVE HECKLER: Representative  
20 Dave Heckler from Bucks County, fresh in from Bucks  
21 County, where it is always a vacation.

22 REPRESENTATIVE KOSINSKI: Let me tell  
23 that to some of your property taxpayers.

24 REPRESENTATIVE FAJT: I'm not even going  
25 to follow that one. Greg Fajt from Allegheny County.



1 CHAIRMAN CALTAGIRONE: Thank you.

2 Are there any questions from members or  
3 staff?

4 (No response.)

5 CHAIRMAN CALTAGIRONE: I want to thank  
6 you for your testimony. We certainly appreciate it.

7 MS. McDONNELL: Thank you for having us.

8 MR. LEONE: Thank you very much.

9 CHAIRMAN CALTAGIRONE: We do hope to get  
10 some action on that bill.

11 MS. McDONNELL: Thank you.

12 CHAIRMAN CALTAGIRONE: Next we would like  
13 to hear from Judge Jeffrey K. Sprecher from my home  
14 county, Berks County, and a good personal friend.

15 Judge.

16 JUDGE SPRECHER: Good afternoon, Mr.  
17 Chairman. Good afternoon, everyone. My name is  
18 Jeffrey K. Sprecher from Berks County, and I was  
19 elected judge last year, so I'm new at this position,  
20 but I've been assigned the responsibility of handling  
21 all of the driving under the influence cases in Berks  
22 County, which in the highest volume years has been  
23 about 890, but this year we expect it to be perhaps  
24 1,000, so we have a large number of cases that we're  
25 handling driving under the influence. And I have a

1 prepared statement, if it pleases the Chairman, and  
2 I'll very quickly read through this and then perhaps  
3 there may be some discussion or question.

4 Of course, this all has to do with the  
5 Supreme Court decisions of Modaffare and Jarman, as  
6 well as a Superior Court ruling in the Osborne case,  
7 which is the one that has really brought it home, and  
8 that has rendered Section 3731(a)(4) of the Vehicle  
9 Code virtually unenforceable, and of course what we're  
10 concerned about is 3731(a)(1) and 3731(a)(4). And  
11 3731(a)(4), of course, as you well know, is the section  
12 that prohibits the operation of a motor vehicle while  
13 the amount of alcohol in the blood is .10 or greater.

14 The Commonwealth, of course, bears the  
15 burden of proving the level of alcohol at the actual  
16 time of driving, and that's, of course, the problem  
17 that we're dealing with now in Pennsylvania. The  
18 Commonwealth's evidence always consists of chemical  
19 test results conducted of samples taken at some point  
20 after the motorist stops driving, and typically one  
21 hour passes before a motorist is tested. Prior to  
22 Modaffare, Jarman, and Osborne, jurors were permitted  
23 to use their common sense and experience to relate a  
24 blood alcohol test result back to the time of driving.  
25 Now under Modaffare, Jarman, and Osborne, a jury

1 presented with a motorist with a blood alcohol level of  
2 as high as .15 as determined by a test conducted as  
3 quickly as 50 minutes after driving would not, absent  
4 any expert testimony, have sufficient evidence to find  
5 guilt beyond a reasonable doubt.

6 An expert testimony of the requisite  
7 quality is, of course, very difficult to produce. To  
8 state with any authority what a motorist's blood  
9 alcohol level was while driving based on a latter test,  
10 the expert must know the amount and time of food and  
11 alcohol consumption, and precious few defendants will  
12 opt to reveal this information to the Commonwealth, of  
13 course. There was testimony previously about the  
14 length of time and the amount of this chug-a-lug  
15 defense, and one case that was before me where the  
16 blood alcohol level was over .2, the expert who  
17 testified, and Mr. Barnes is here, and I believe Mr.  
18 Barnes had actually prosecuted that case on behalf of  
19 the district attorney's office, the expert in that case  
20 stated that without knowing the amount of food that was  
21 consumed and the time that the food was last consumed,  
22 let alone the issue of how much alcohol was consumed,  
23 without having that information, there was simply no  
24 way that this person could tell what the blood alcohol  
25 level might have been, and in our case it was exactly

1 like Osborne. Our case that I was trying at that time  
2 was 50 minutes, and I tried to get the expert to reveal  
3 with some certainty that it could not have dropped or  
4 it could not have increased that large an amount in  
5 such a short period of time so that it had to be .10 or  
6 greater, but the expert wouldn't, of course, say that.  
7 And when I asked the expert, the expert basically said  
8 that it is possible that the person could have consumed  
9 so much alcohol before they got into a car that at the  
10 time of driving they did not have a blood alcohol level  
11 above .10, even though at the time of testing 50  
12 minutes later it might be .2 or .3. So that's the  
13 problem that we're dealing with.

14           A great cloud of uncertainty and  
15 confusion has descended upon the conduct of the actual  
16 DUI trial. While it is clear that expert testimony is  
17 required at the trial of an individual tested within 50  
18 minutes with the blood alcohol level of .15, such  
19 certainty diminished as other levels and times are  
20 plugged into this equation. The cases indicate that as  
21 the blood alcohol level rises and the time decreases  
22 between the test, the inference of guilt increases and  
23 the need for expert testimony decreases. Now, that  
24 isn't something I made up to tell you, that's something  
25 that comes out of the appellate court cases, and I'll

1 repeat it. These appellate court cases indicate that  
2 as the blood alcohol level rises, so if it's a higher  
3 blood alcohol level, and the time decreases, if it's a  
4 shorter period of time, the inference of guilt  
5 increases and the need for expert testimony decreases.  
6 That's what the cases would have us follow. The  
7 problem is that if an expert can't really tell us even  
8 with the highest of blood alcohol levels and the  
9 shortest period of time that the person was not over  
10 .10 at the time of driving, it doesn't really do us  
11 much good what the inference is.

12 The appellate courts have refused to draw  
13 any bright lines in this regard, and those of us who  
14 work at the trial level must wait perhaps years for  
15 enough decisions to determine with any degree of  
16 confidence when there is enough evidence to sustain a  
17 guilty verdict.

18 The conduct of recent DUI trials in my  
19 courtroom provides examples of the adverse effects of  
20 the current confusion. If the prosecutor elects to  
21 proceed on charges based on blood alcohol level,  
22 defense counsel will rightly request a demurer upon  
23 completion of the Commonwealth's case for failure to  
24 meet its evidentiary burden. I'm then faced with the  
25 difficulty of measuring this efficiency of the evidence

1       against the standard which the appellate courts have  
2       failed to articulate, except in the roughest of  
3       outlines.

4                   In the overwhelming likelihood that the  
5       demurer is granted, and I guess we've had four or five  
6       cases like that already, the jury is then placed in the  
7       difficult and frustrating position of having heard  
8       testimony concerning the defendant's blood alcohol  
9       level but being instructed that they may not consider  
10      such evidence. In other words, if the Commonwealth has  
11      charged (a)(1) and (a)(4), then of course there's  
12      evidence that's submitted of (a)(4), and that would be  
13      the blood alcohol level, but then if there's a demurer  
14      that's sustained, in other words, we have to dismiss  
15      the (a)(4), then all that goes to the jury is (a)(1),  
16      which is driving under the influence to a degree that  
17      renders you incapable of safe driving, and then the  
18      jury said, well, whatever happened to the blood  
19      alcohol? All of a sudden that's taken out, and at best  
20      it creates confusion.

21                   One option available to the legislature  
22      would be to do nothing and let stand the appellate  
23      court's interpretation of the statute. Perhaps in time  
24      the uncertainty of which I spoke will pass, but the  
25      inability of the Commonwealth to successfully prosecute

1 motorists on the basis of their blood alcohol level  
2 will remain in all but the most egregious cases.

3           It's my experience as a judge that the  
4 use of blood alcohol levels to prosecute drunk drivers  
5 provides an important compliment to (a)(1) of the  
6 Vehicle Code, which, of course, as I said prohibits the  
7 operation of a motor vehicle while under the influence  
8 of alcohol to a degree which renders a person incapable  
9 of safe driving. And just as there are situations  
10 where blood alcohol results are not available, there  
11 are circumstances where evidence of an individual's  
12 actual incapacity is weak. The defendant's injuries in  
13 an accident, for example, may have rendered field  
14 sobriety tests impossible. There may be sufficient  
15 probable cause to request testing, but a jury may have  
16 reasonable doubt as to incapacity. In such a case,  
17 blood tests may be the only evidence of truth supplied  
18 to the jury to determine if the defendant is guilty  
19 beyond a reasonable doubt. And juries, in my short  
20 experience, really rely and look for this blood alcohol  
21 content, and I think that they were conditioned to do  
22 that since you enacted this legislation 10 years ago.  
23 That's what everybody looks for. A jury that's trying  
24 a case wants to know what the blood test results are.

25           And, of course, tragically, there are

1 individuals whose tolerance for alcohol is so great  
2 that they can function with a blood alcohol level above  
3 the legal limits to a degree which gives the jury pause  
4 before finding incapacity, and we in Berks County  
5 videotape the field sobriety tests and sometimes that  
6 comes up before the jury, and I look at this and I see  
7 the blood alcohol level and I see that this person is  
8 functioning very well because he has such a high  
9 tolerance, so I can see where without the blood test  
10 that kind of evidence that goes before a jury will  
11 convince the jury that probably the person is not  
12 driving under the influence to a degree which renders  
13 him incapable of safe driving.

14 In setting the legal limit of .10, you  
15 people made the determination that no one above that  
16 limit could safely operate a motor vehicle, and in my  
17 opinion that determination was wise. New legislation  
18 should be drafted to return blood tests to the crucial  
19 function they formerly played in fighting the great  
20 carnage visited upon the roads of this Commonwealth by  
21 drunk drivers. And as I said, in Berks County the  
22 numbers are not decreasing. We're going to have a  
23 record year. Wow.

24 I am aware that there is proposed  
25 legislation prohibiting the operation of a motor



1 vehicle with a blood alcohol level above a certain  
2 amount as shown or as determined by chemical tests  
3 conducted within a set period of time after the person  
4 stops driving, and I think that that probably is the  
5 way to go. I would very much support that type of  
6 legislation. Recently, I went to a school in Reno,  
7 Nevada, where it was a school on driving under the  
8 influence, and I was very anxious to go to that school  
9 because it involved judges from all across the country,  
10 and I conducted an informal survey. There were 25  
11 different States and territories represented there, and  
12 about half of them have a law that does say that.

13 In other words, our law, of course, talks  
14 about if you're driving at 1:00 o'clock and you're  
15 tested at 2:00 o'clock, what was the level at 1:00  
16 o'clock? But the other laws apparently state that if  
17 you're driving at 1:00 o'clock, what is the blood  
18 alcohol level, and if the blood alcohol level is drawn  
19 by 2:00 o'clock, 12:30, 3:00 o'clock, whatever it might  
20 be, then of course in other words it's above .10 as  
21 determined by a test that is drawn within a certain  
22 period of time, and I think that that's really the way  
23 to go on this legislation. And I would request that of  
24 course the committee and its staff look into some of  
25 the case law of these other States. I know that

1 there's quite a history of this, and if that is the way  
2 that the committee feels that we should go, I certainly  
3 would welcome that move. And I would welcome it as  
4 soon as possible.

5 In Berks County, I'm sure Mr. Barnes is  
6 going to talk about this a little bit more, but in  
7 Berks County the prosecution does commence. It's not  
8 just a failure to prosecute if it's .15 or lower,  
9 because we try to encourage getting the person into the  
10 system somehow, because many of these people, in fact I  
11 would said 80, 90 percent of these people have some  
12 alcohol problem, and getting them into the system, even  
13 if they plead guilty to public drunkenness, which is  
14 added on by the district attorney now. When the case  
15 comes in from the district justice they add the summary  
16 offense of public drunkenness, even if they plead  
17 guilty to that and we negotiate something where they  
18 will be evaluated for their problem and they will agree  
19 to get into treatment, whatever the treatment is, at  
20 least we're doing something with those people. But  
21 that's really a makeshift type situation that we're  
22 dealing with now under this situation that we have as a  
23 result of these appellate court cases.

24 So I thank you very much for the  
25 opportunity to be here. I thank you for the

1 invitation. It certainly was a pleasure, and I thank  
2 you for the tour that you arranged for us ahead of  
3 time. Incidentally, we have an exchange student with  
4 us from England who is here, she just flew in last  
5 night, and we were discussing this on the way down and  
6 she said that that's not a problem in England because  
7 they apparently draw the breath from the driver as soon  
8 as they stop them, and of course we can't deal with  
9 that sort of thing because those field sobriety tests  
10 where you draw the breath out in the street is not  
11 admissible. Otherwise, I guess we wouldn't be having  
12 this meeting today.

13 I'd welcome any discussion or questions.

14 CHAIRMAN CALTAGIRONE: Thank you, Judge.

15 JUDGE SPRECHER: Thank you very much.

16 CHAIRMAN CALTAGIRONE: Any questions?

17 (No response.)

18 CHAIRMAN CALTAGIRONE: Could we next have  
19 William Tully? And then we're back to Dr. Winck.

20 MR. TULLY: Good afternoon. I want to  
21 thank you for the opportunity of being here, and I,  
22 too, would apologize for I guess not knowing exactly  
23 that you were going to deal with House Bill 355 at this  
24 particular point as it's amended into the current  
25 legislation. It was posed to me that there was simply

1 an inquiry about possible language to address the issue  
2 of whether there should be time limitations placed on  
3 the officer in making an arrest before a breath test is  
4 administered. Fortunately, I planned on working 355 in  
5 there anyway, so I can probably still stick with most  
6 of the statement.

7           It's my understanding that the purpose of  
8 today's hearing was to determine whether the General  
9 Assembly should place restrictions on how much time an  
10 arresting officer can allow to pass between the time of  
11 apprehension and the time of alcohol testing in DUI  
12 cases. Apparently, someone has expressed concern that  
13 an officer could theoretically use such a delay to the  
14 detriment of a driver by allowing his or her blood  
15 alcohol level to rise above the per se .10 percent  
16 level before administering the test. Because of the  
17 recent decisions that have already been discussed by  
18 our Supreme Court, I would like to address this issue  
19 first in light of the current law, and second, in light  
20 of the proposed legislation, namely House Bill 355.

21           Under current law, breath or blood tests  
22 of blood alcohol levels of non-commercial drivers are  
23 used primarily in prosecutions under the 3731(a)(4)  
24 provision which makes it illegal to drive, operate, or  
25 be in actual physical control of the movement of a

1 vehicle while the amount of alcohol by weight is .10  
2 percent or greater. In effect, the law was to make a  
3 per se violation to drive at a time when a person's  
4 blood alcohol level is .10 or greater without any  
5 concern for whether the person appears to be  
6 significantly impaired by the alcohol.

7 On January 22 of this year, the  
8 Pennsylvania Supreme Court issued two opinions which  
9 appear to require evidence that BAC tests relate back  
10 to the actual time of driving, and I've provided the  
11 cites. The two cases read in conjunction with each  
12 other appear to hold that a conviction based solely  
13 upon a BAC of .14 percent or lower taken 59 minutes or  
14 longer after driving would not be sufficient to prove a  
15 defendant's guilt beyond a reasonable doubt.  
16 Unfortunately, the court did not indicate what level  
17 would be sufficient.

18 In April of this year, the Superior Court  
19 applied Jarman and Modaffare decisions to the Osborne  
20 case, which also has been mentioned, and determined  
21 that a .148 percent obtained 50 minutes after driving,  
22 absent expert extrapolation evidence, cannot satisfy  
23 the requisite burden of proof. Currently, under  
24 current date of the law, we're unable to imagine a fact  
25 pattern where an officer could help a prosecution by

1       delaying testing. Obviously, any delay certainly works  
2       to the detriment of the case at trial currently under  
3       the legislation we have as it's interpreted by the  
4       Supreme Court.

5                       I'd like to move on then in light of the  
6       proposed legislation. Immediately prior to the General  
7       Assembly's summer recess, the State Senate amended 355  
8       by adding the contents of House Bill 2566 and sent the  
9       bill to the House for its concurrence. Since we  
10      anticipate hopefully some action this fall, it would  
11      appear to be appropriate to consider that legislation  
12      then, which is what I originally thought was the  
13      purpose for being here today.

14                      The proposed language would add a  
15      subsection (a)(5)(5) to the provisions of 3731, which  
16      would make it a crime to drive, operate or be in  
17      physical control of the movement of a vehicle if indeed  
18      a blood test administered within three hours of the  
19      time of driving or additional time under the  
20      appropriate circumstances. Essentially, the proposed  
21      legislative change would specifically allow for a  
22      three-hour window within which a sample of breath,  
23      blood, or urine must be taken for sampling. However,  
24      there would be provisions for additional time under  
25      exceptional circumstances, such as a serious accident

1       which involved delayed extrication from the car or a  
2       hit-and-run where the driver flees from pursuit for  
3       more than three hours.

4                   And the reason we put that exception in  
5       there, certainly our most serious offenses are those  
6       involving the serious crashes many times involving  
7       fatalities. In those situations where officers on the  
8       scene are tied up with important priorities such as  
9       avoiding additional crashes, protecting the people at  
10      the scene, and coordinating emergency assistance, it  
11      would be unreasonable many times to expect them,  
12      especially in rural parts of the State, to get that  
13      person to a testing location within three hours. So in  
14      those important cases we thought it was important to  
15      allow additional time, if, of course, the court  
16      determines it to be reasonable under those  
17      circumstances.

18                   Putting it in perspective though, in 1982  
19      the General Assembly passed what was then referred to  
20      as a new drunk driving law, which included that per se  
21      violation of .10 percent. Pennsylvania's legislation  
22      was about a part of a national drive to provide an  
23      objective standard for the prosecution of drunk  
24      drivers. When the law took effect in 1983, it was  
25      perceived to have established a strict liability rule

1 of law which would minimize confusion and provide  
2 uniformity and perhaps predictability of enforcement.  
3 I used the law review article written by Edward  
4 Tompkins, "The New Pennsylvania Drunk Driving Law: Last  
5 Call For One For The Road," in 87 Dickinson Law Review  
6 805, wherein it basically spells out that they perceive  
7 that to be exactly that workhorse provision that would  
8 make it very easy for the cases to proceed on an  
9 objective standard where you wouldn't have to get into  
10 a great deal of subjective testimony.

11 Obviously, the Supreme Court's recent  
12 decisions in Jarman and Modaffare have proved Mr.  
13 Tompkins' conclusions to be incorrect for Pennsylvania.  
14 In virtually every other jurisdiction in this nation,  
15 the per se provisions are still in force. In  
16 Pennsylvania, our Supreme Court has rendered ours  
17 impotent.

18 Apparently, the defense challenges arose  
19 from a concern that someone's blood alcohol content  
20 could theoretically be rising while they are driving,  
21 and therefore an officer could arrest them with their  
22 BAC under .10 percent, and by the time they are tested  
23 their BAC would be over .10 percent. At first blush  
24 the argument could sound convincing. However, when one  
25 views the basis for the .10 BAC limit and the practical



1       implications in the field, the argument becomes absurd.  
2       In order to appreciate the significance of .10 percent  
3       level, one must view it historically, scientifically,  
4       medically, and legally, but at the same time not lose  
5       sight of one's common sense.

6                   For practical time purposes, it would be  
7       unreasonable to attempt a detailed analysis here. I  
8       understand you may have some expert doctors testifying,  
9       which makes it a lot easier to briefly fly over it, but  
10      I would like to provide a brief synopsis as I think it  
11      would apply to the proposed legislation.

12                   When the nation began to adopt a per se  
13      approach to DUI enforcement, the vast majority of  
14      States adopted the .10 level as the point after which  
15      the majority of drivers are no longer capable of safe  
16      driving. However, the States of California, Maine,  
17      Oregon, Utah, and Vermont have accepted a .08 percent  
18      BAC as their per se violation level. Many nations,  
19      including most of Europe, have much lower levels. For  
20      example, the legal limit is .05 percent in Sweden,  
21      Finland, Norway, and the Australian States of New South  
22      Wales and Tasmania. It should also be noted that the  
23      Commercial Motor Vehicle Safety Act of 1986 has  
24      established .04 percent as the legal limit for  
25      commercial drivers. In Pennsylvania's drunk driving

1 law, which has been changed in April of this year, has  
2 accepted that .04 level. And it's not necessarily, I  
3 submit, because tractor trailers are that much more  
4 difficult to operate, but instead commercial vehicles,  
5 namely those vehicles of high tonnage, of hazardous  
6 materials on board or large numbers of passengers, just  
7 pose such a great risk to the traveling public that  
8 we've decided a .04 level cannot be exceeded to insure  
9 that such drivers can drive safely.

10 I'm mentioning this information not so  
11 much to support a reduction in Pennsylvania's BAC level  
12 but to rather show that the current .10 level is not a  
13 border line level. In other words, it cannot be said  
14 that a person whose BAC is .099 percent is a safe  
15 driver and a person whose BAC is .101 percent is  
16 unsafe. Instead, we are concluding that people should  
17 not drive if their BACs are over that .05, and if they  
18 are caught with a BAC over .10, it is automatically a  
19 violation of the law, because the per se level is, in  
20 effect, twice the level at which most people should not  
21 drive. Such a law would be a reasonable exercise of  
22 legislative authority and discretion.

23 The scientific and medical conclusions  
24 are equally compelling. In its 1991 report to  
25 Congress, the U.S. Department of Transportation

1 provided the following results of its comprehensive  
2 review of national studies.

3           One, neuromuscular interference becomes  
4 significant at levels as low as .04 percent and .05  
5 percent.

6           Vision. Peripheral vision, length of  
7 fixation, and glare recovery is significantly impaired  
8 at .08 percent.

9           Time sharing and attention. Time shared  
10 tasks are significantly impaired at levels as low as  
11 .04 percent. And divided attention tasks are  
12 significantly impaired at levels between .05 percent  
13 and .08 percent.

14           Reaction time, significantly impaired at  
15 levels as low as .04 percent.

16           Ability to track a moving object.  
17 Impairment becomes evident at .02, and becomes  
18 significant at levels as low as .05 percent.

19           Information processing. Impairment  
20 evident at .05 percent; impairment significant at .08  
21 percent.

22           Vigilance. Significantly impaired at .08  
23 percent. And psychomotor performance, that ability to  
24 make fine, highly controlled muscular movement and  
25 coordinate movement among several limbs, significantly

1       impaired at .05 percent.

2                       Each of the aforementioned abilities are  
3 certainly indispensable to the driver of any motor  
4 vehicle. After placing this issue in context where  
5 most driving skills are significantly impaired at BAC  
6 levels as low as .05 percent, it is very hard to be  
7 sympathetic to a person who chugs several drinks before  
8 leaving a bar and races home in an alleged attempt to  
9 reach his or her destination prior to the blood alcohol  
10 content reaching or exceeding .10 percent. If that  
11 person just happens to be arrested before his level is  
12 .10 percent and is tested after his level exceeds .10  
13 percent, is that the sort of fact situation we should  
14 be concerned with? I would submit that anyone who is  
15 that reckless and disregards the danger that he and she  
16 poses to the general public is not worthy of further  
17 consideration, but I'm not alone in that conclusion.

18                       A. W. Jones, a distinguished Swedish  
19 toxicologist addressed this consideration in his  
20 publication, "Enforcement of Drunk Driving Laws by Use  
21 of Per se Legal Alcohol Limits: Blood or Breath  
22 Concentration as Evidence of Impairment." He  
23 established that acute alcohol tolerance occurs in all  
24 individuals, and to contrast it with the other forms,  
25 an acute alcohol tolerance allows the body to

1 eventually adapt to alcohol in his system. For that  
2 reason, he concludes that drivers with rising BACs are  
3 more dangerous than those who have peaked and their  
4 bodies have yet to adapt to the alcohol in their  
5 system. Therefore, a person whose BAC is lower than  
6 .10 but which is rising at the time could actually be a  
7 more dangerous driver than an individual who has a  
8 level over .10 which has already peaked, or, as Dr.  
9 Jones states, the rate of increment of BAC can be more  
10 significant than actual BAC achieved. Under those  
11 circumstances, the "chug and drive" defense becomes  
12 inconsequential, and any person who is arrested for  
13 driving under the influence and subsequently tests  
14 positive for a level of .10 percent or greater should  
15 be subject to the penalties regardless of the rate at  
16 which he or she consumed alcohol and/or ate food.

17 For these reasons, I would urge this  
18 committee to avoid the temptation to legislate an order  
19 to protect someone who chugs and drives but rather  
20 support the legislative changes which would improve the  
21 objectivity and predictability of DUI enforcement.  
22 It's essential that the efforts to reduce the carnage  
23 on our highways not be dealt a major setback. Instead  
24 of making a game out of DUI cases by rewarding clever,  
25 sleight of hand defenses, let us renew our citizens'

1 confidence in their criminal justice system. Let them  
2 be assured that a person who chooses to drink and drive  
3 will be successfully prosecuted if their blood alcohol  
4 level is shown to be .10 percent, period.

5 Thank you for your kind attention. I  
6 would be more than happy to answer any questions you  
7 might have.

8 CHAIRMAN CALTAGIRONE: Any questions?  
9 (No response.)

10 CHAIRMAN CALTAGIRONE: Thank you very  
11 much.

12 MR. TULLY: Thank you.

13 CHAIRMAN CALTAGIRONE: Doctor, we'll hear  
14 from you next. If you would just identify yourself for  
15 the record.

16 DR. WINEK: I'm Dr. Charles Winek. I am  
17 the Chief Toxicologist for Allegheny County and  
18 Director of Laboratories for Allegheny County,  
19 including the crime laboratory that we need some money  
20 for so we can keep functioning. I have no prepared  
21 statement. I've been preparing for this for 27 years,  
22 and I've testified in criminal court in drunk driving  
23 cases well over 2,000 times, and some of the things  
24 that go on in court have been addressed here already.

25 And I would like to say just a few

1 things, that I agree with some of the changes. I  
2 didn't find out about this new bill until last Friday  
3 when I met with the M.A.D.D. mothers in Pittsburgh, and  
4 I agree with several of the recommended changes, and I  
5 have a few additional things I would like to add  
6 myself.

7 I think what has to be done to eliminate  
8 the business of the need for an expert to back  
9 extrapolate is to do just what's being suggested, that  
10 is to do what other States have done with the  
11 philosophy that we're putting drivers on alert that if  
12 you drink and drive and up to three or four hours after  
13 you drive you're at .10--and that probably should be  
14 lowered to a .08 or .07 instead of a .10--with the  
15 clarification of the definition of blood alcohol that's  
16 in our bodies is in the blood but in the liquid portion  
17 of blood called serum, or plasma, and is a serum or  
18 plasma alcohol level, which is referred to in hospitals  
19 as a medical alcohol, more accurately reflects your  
20 actual blood alcohol than does a whole blood alcohol,  
21 which takes into consideration the weight of the red  
22 cells, the white cells, and the platelets, and the way  
23 we do blood alcohol on a whole blood alcohol level  
24 gives the defendant a break because it lowers his  
25 actual physiological alcohol. It says he is less drunk

1 than he actually is to begin with.

2                   So we do have to make that change and not  
3 continue to say "blood." That causes lots of problems  
4 in court, because most of the test methods today do not  
5 test whole blood, they test serum or plasma, and I  
6 would strongly suggest that that be included and the  
7 language changed to define what we mean by "blood."  
8 The State Health Department, the Bureau of  
9 Laboratories, licenses laboratories to do blood tests,  
10 as well as serum and plasma tests, but it also does not  
11 define "blood" as meaning whole blood. I think if we  
12 put drivers on a alert that regardless of when their  
13 blood alcohol is measured after an event, a stop, an  
14 accident, that it removes all of the questions that  
15 arise.

16                   Most of the testimony that I give in  
17 court cases deals with back extrapolation simply  
18 because no one ever has a blood alcohol or a breath  
19 test done at the time of an accident, at the time of  
20 the stop. It is always a half hour, 45 minutes, an  
21 hour, depending upon the condition of the road, the  
22 location, where the facility is. It may be two hours.  
23 So that it's literally impossible to get a blood or  
24 breath sample at the time of a specific event.

25                   Most frequently I testify for the



1 prosecution. It doesn't do the defense any good to  
2 call me. I was asked that last week in a town not too  
3 far from here of how many times I've testified for the  
4 defense in a drunk driving case, and I said I believe  
5 one time, and I proceeded to say why, and he said, I  
6 didn't ask that. I was going to tell him why, because  
7 I'm an expert and I can't take a fact and make fantasy  
8 out of it. But in cross-examination, which I generally  
9 refer to as the sobering up part of my testimony,  
10 regardless of what the defendant has said, what he has  
11 admitted to the police, what he has indicated at the  
12 time of trial, it may be totally changed.

13           It is true that absorption time will vary  
14 depending upon how much food someone has consumed. I  
15 was asked that last week already, if I was aware that  
16 the Supreme Court of the State of Pennsylvania said  
17 that absorption time was 60 to 90 minutes, and the  
18 judge quickly shut him up with a sidebar. He's asking  
19 me a legal question. I don't care what the Supreme  
20 Court says the absorption time is, absorption time can  
21 be zero. If you drink on an empty stomach, liquids in  
22 the stomach go right through. You get drunk really  
23 fast. Absorption times vary simply because people are  
24 studied under different conditions. If you eat a pound  
25 of mashed potatoes and drink 8 ounces of bourbon, your

1 absorption curve will be subtle. The slope of the  
2 curve will be subtle. If you're eating potato chips  
3 and drinking, it won't be quite as subtle. If you  
4 don't eat anything and drink, it will go straight up.

5 So certainly food in the stomach does  
6 something to the absorption of alcohol. It doesn't  
7 negate the fact that alcohol does get absorbed. When  
8 you drink, alcohol goes into your mouth, down your  
9 esophagus, into your stomach, and it's in the stomach  
10 and you are stomach doesn't empty like a truck, it  
11 empties gradually over a period time with your  
12 sphincter contracting and relaxing. And if you're  
13 drinking a carbonated beverage - beer, champagne,  
14 Seagram's and 7-Up, or anything that you put a  
15 carbonated beverage into - your stomach empties faster  
16 than if you drink bourbon and water, whiskey and water.  
17 The absence of gas in the stomach slows the emptying.  
18 Anyone that's had a good Italian feast and needs some  
19 Brioski can relate to that, that you've got to get some  
20 gas in there to facilitate the emptying of your  
21 stomach.

22 Once alcohol gets out of the stomach into  
23 the small intestine, that's where it's actively  
24 absorbed. Very little alcohol is absorbed in the  
25 stomach because you have a thick mucous there that

1 protects your stomach from the acid that's secreted  
2 there, so literally nothing is absorbed in the stomach.  
3 It has to get from the stomach to the small intestine.  
4 And the emptying of the stomach is what's required. So  
5 if you're drinking beer and eating potato chips, you  
6 say, well, I wasn't drinking hard stuff, you can't get  
7 drunk on beer, that's nonsense. The fact that you have  
8 a blood alcohol means alcohol got absorbed. And as I  
9 said, I end up being the defense witness because on  
10 cross-examination the guy's got a .164. Well, what if  
11 he had one drink immediately before the stop? Wouldn't  
12 he be higher after he was stopped? Yes.

13 Let's subtract that then. Let's take all  
14 of it away. If it was 10 minutes before, let's take it  
15 all away. So I took it all away based on his weight.  
16 Depending on your weight, alcohol distributes over the  
17 mass of your body, and on a weight basis it takes so  
18 many drinks. If you weigh 300 pounds versus 150 pounds  
19 and you both drink the same, the 150-pound guy is going  
20 to have twice the blood alcohol of the 300-pound guy.  
21 So you have to take the weight into consideration, and  
22 that's where the expert testimony comes in. If you're  
23 doing a back extrapolate, you have to add on what he  
24 got rid of during that hour or two hours, and that's a  
25 rather narrow amount, .015 to .02 per hour. Fifteen to

1 20 milligrams per hour. So if someone is two hours  
2 after a stop, an accident, has a blood drawn and it's a  
3 .12, his blood alcohol, that's two hours, two times 15  
4 and two times 20, so you're adding on a .03 and a .04,  
5 and that's his range. Now, if he says, I had one drink  
6 10 minutes before, then you have to subtract that.

7 I was told that I was putting innocent  
8 people in jail, it was Winck's law in Pittsburgh, and  
9 that I was making people more drunk than they were and  
10 I should resign. They hired a public relations firm to  
11 get a lot of attention over it. I think that was maybe  
12 to build their law practice. It got them nowhere  
13 because the law -- I was not making the law, I was  
14 simply stating what happened. In that case, I sobered  
15 the guy up all the way down to a .077, and it comes  
16 down to believability, if it's a jury trial, whether  
17 the jury understands it or not and believes if the guy  
18 says, okay, immediately before I chugged 8 ounces of  
19 bourbon, and that's usually the way it is.

20 Once the defense attorney understands  
21 this, then he starts asking these "what if" questions.  
22 Some judges allow it, some judges don't allow it. I  
23 usually let the DA's office know in the various  
24 jurisdictions that if the individual has not boxed  
25 himself in, in just those words, because during a

1 sobriety test they'll say, were you drinking? Yes.  
2 When was your last drink? About 11:30. You got an  
3 accident at 2:00 o'clock and he says his last drink was  
4 at 11:30. Clearly, he's on the down side. Although  
5 some defense attorneys can dig back in the literature  
6 and find a statement that says it takes six hours for  
7 complete absorption of alcohol. It doesn't take six  
8 hours for complete absorption of alcohol. The most  
9 recent study on the absorption of alcohol under social  
10 settings where people are talking and drinking and  
11 snacking says 18 minutes. Difficult to convince a  
12 jury. You say it takes six hours for absorption. Six  
13 hours for absorption. Even two hours for absorption.  
14 I say, why do people drink? I'm drinking now, I'm  
15 going to be drunk two hours later? It takes that long?  
16 That's ridiculous. So certainly we do need a law that  
17 says, hey, don't drink and drive, but if you're going  
18 to drink enough that's going to make you at a given  
19 level.

20 One other thing I would like to add, just  
21 for educational purposes, that most people pay a lot of  
22 attention to your vision, depth perception. Alcohol  
23 changes the shape of your cornea and lens and things  
24 look further away than they actually are. That's one  
25 of the signs of visible intoxication, if someone's

1 sitting at a bar drinking and they go to reach for  
2 their drink and they spill. Why? Because it's right  
3 here but looks like it's over here and they go through  
4 it. The same thing when you're driving, things look  
5 further away. The higher your blood alcohol, the lower  
6 your percentage of peripheral vision.

7           The highest alcohol level I've seen in 27  
8 years was a .60, a gentleman that drove through the  
9 Liberty tubes. And that's one of the questions defense  
10 attorneys will ask me, well, how did they get all the  
11 way from here to here without an accident? There was  
12 nothing to -- they had the whole road. They had four  
13 lanes, and the guy did make it through the Liberty  
14 tubes, but he had no peripheral vision, he had tunnel  
15 vision, so it was easier for him to get through the  
16 Liberty tubes, but he wrecked on the other side and  
17 died; killed himself.

18           The phenomenon of tolerance is brought up  
19 in defenses and I should point out also that tolerance  
20 doesn't equal immunity. People say, oh, he's got  
21 fantastic tolerance. Sensory and motor functions go.  
22 That's sight, hearing; people start talking louder,  
23 they lose control over their musculature as generally  
24 measured in reaction time.

25           But the first thing that goes with

1 everyone is your judgment. Your judgment. Alcohol  
2 depresses your brain, the central nervous system, and  
3 in so doing removes your normal control mechanisms and  
4 you begin to do and to say some things that you would  
5 not do nor say in your normal sober state. Like, I  
6 never liked you anyway. That's an ugly tie. You're  
7 fat. You're ugly. And you say things that you would  
8 not normally say and do. And once those control  
9 mechanisms are gone, and they go at .07 and .08, people  
10 lose the understanding that they shouldn't get in that  
11 car and drive. They shouldn't get in that car. Their  
12 risk-taking attitude increases. Damn it, I pay my  
13 taxes, this is my road and I'm going to use all of it.  
14 Not to worry about the sensory functions and the motor  
15 functions, it's that judgment that goes first. The  
16 judgement that goes first. If you didn't lose your  
17 judgment, you wouldn't be in that car driving. That's  
18 one of the main reasons why I have been in favor for a  
19 long time of lowering the level, as they have in other  
20 countries. We pay too much attention to the sensory  
21 function - depth perception and reaction time - as  
22 opposed to the brain up here that's running everything,  
23 that you're not thinking in your normal sober state.  
24 You're doing things that you wouldn't normally do and  
25 saying things that you wouldn't normally say. I think

1 they're both very important.

2                   Certainly absorption time varies.  
3 There's no such thing as an absorption rate, because as  
4 you're absorbing alcohol, the upside of a blood alcohol  
5 curve, you're drinking and absorbing, but as the  
6 alcohol gets into the bloodstream it goes to the liver,  
7 and the liver begins to immediately metabolize it, to  
8 break it down into carbon dioxide and water. It goes  
9 to the sweat glands, where it's excreted. It goes to  
10 the kidneys, where blood is filtered, and alcohol ends  
11 up in the urine, so the body immediately gets rid of  
12 it. And there's a good rule to follow: You will never  
13 become legally intoxicated if you have only one drink  
14 per hour. One drink per hour. And that's good as a  
15 social host or an employer or a bar owner to remember,  
16 one drink per hour and you won't have any problems,  
17 because the individual will get rid of it faster, and  
18 one drink is defined as one 12-ounce beer, of all beers  
19 except Straubs, I guess, because it has more alcohol  
20 generally. It's good beer up from St. Mary's. And one  
21 ounce of 100-proof whiskey. And just for your  
22 information, there's more alcohol in a 12-ounce can of  
23 Iron City beer than there is in a 1-ounce shot of  
24 Seagram's 7. Seagram's 7 is 80 proof. There is more  
25 alcohol in a 12-ounce can of Iron City than there is in



1 a 1-ounce shot of Seagram's 7, or any 80-proof  
2 alcoholic beverage. So when people say they can't get  
3 drunk on beer, they're getting more alcohol in beer and  
4 the alcohol is getting into their bloodstream faster.

5 One other thing, the judge mentioned the  
6 videotaping and that some people have tolerance but you  
7 don't show judgment generally on those videotapes.  
8 People do develop tolerance, and that simply means it  
9 takes more for them to get intoxicated. When we were  
10 having all kinds of problems in Allegheny County with  
11 serum versus whole blood, with the ratio that our  
12 instruments are set at in the United States, our ratio  
13 of alveolar air to blood is 2,100 to 1, and the actual  
14 is 2,280. In Europe they're 2,300 to 1. We, again,  
15 with our breath tests give them a lower reading. We  
16 would simply go back to the old system, say we are not  
17 going to present a breath test or a blood test and  
18 we're going to go on a sobriety test. And you get  
19 about 66 to 67 percent convictions on sobriety tests  
20 alone. If all else fails, we still have sobriety  
21 tests. It is nice to have a blood alcohol, but we've  
22 become too reliable on the magic of the .10. So  
23 certainly we have to do something about the magic of  
24 the .10, lower it, clarify serum versus whole blood,  
25 and a time element that permits the police officer to

1 get to a facility, to get a blood sample in time and  
2 have a piece of useful evidence to gain more  
3 convictions.

4 Thank you.

5 CHAIRMAN CALTAGIRONE: Very good, Doctor.  
6 Questions?

7 REPRESENTATIVE FAJT: Dr. Winek is the  
8 only representative here today from Allegheny County.  
9 I would just like to say publicly that I found your  
10 testimony to be very, very informative. I learned a  
11 lot just listening to you, and I guess in 27 years of  
12 public service that that's a natural cause of somebody  
13 with your experience, but we're very proud to have you  
14 as an employee of Allegheny County, and what you do is  
15 a tremendously valuable service.

16 I also recently started a substance abuse  
17 caucus here in Harrisburg to bring members of the  
18 legislature--a number of the members of this committee,  
19 as a matter of fact, are on that caucus--to make  
20 education, drug-related education an important part of  
21 what we do here, and also to work in funding for the  
22 prevention of substance abuse, and perhaps you and I  
23 can sit down sometime and talk about those issues.

24 But thank you, again. I found your  
25 testimony to be outstanding.

1 DR. WINEK: Thank you.

2 CHAIRMAN CALTAGIRONE: Thank you, Doctor.

3 We will next hear from Curt Barnes,  
4 Assistant District Attorney from Berks County.

5 MR. BARNES: Good afternoon, Mr.  
6 Chairman, members of the committee. My name is Curt  
7 Barnes. I'm an Assistant DA with Berks County, and  
8 I've been with the Berks County District Attorney's  
9 Office since January of 1990. However, since that time  
10 I've only been in Judge Sprecher's courtroom actually  
11 handling DUI cases since about April of this year. So  
12 although my experience is somewhat limited,  
13 nevertheless I think I've had enough experience in  
14 these four months handling these cases to relate to you  
15 or give you an idea just how frustrating it can be  
16 trying to prosecute these DUI cases, especially now in  
17 light of the cases of Jarman, Modaffare, and Osborne.

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18 So what I thought I would do is basically go over a  
19 couple of cases that we've had recently and try and  
20 point out a few of the difficulties that we've had  
21 while going through them.

22 The very first case that I had in the  
23 courtroom that actually went to trial was a case by the  
24 name of Commonwealth vs. Michael Stout, and this case  
25 went to trial on May 28 and 29 of this year.

1 Basically, we had one witness testify, it was a  
2 prosecuting officer whose name was Vincent Phillips of  
3 Bern Township, and he testified that back on May 5 of  
4 1991, he was out patrolling in Bern Township on a  
5 stretch of roadway called Palisades Drive, and about  
6 4:30 in the morning he was traveling westbound on this  
7 section of road. Now, the point that he was at he  
8 described as being a long distance of roadway, and it  
9 was a two-lane country road. As he was driving  
10 westbound he encountered another vehicle coming from  
11 the opposite direction, and as the two vehicles got  
12 closer and closer, eventually the eastbound car, driven  
13 by the defendant, Mr. Stout, swerved completely into  
14 the officer's lane of travel and actually forced him  
15 off the road. As a result of that, he decided to turn  
16 around and pursue this vehicle and did so, and he  
17 testified that while he was following the vehicle he  
18 watched it swerve over the double yellow lines numerous  
19 times, and then for that reason decided to pull the car  
20 over.

21           Once he got the vehicle stopped, he went  
22 up to him again to speak to Mr. Stout, and immediately  
23 he noticed all the standard indicia of intoxication -  
24 the strong alcoholic odor on his breath, bloodshot  
25 eyes, et cetera. So based upon his observations, he

1 asked Mr. Stout to get out of the vehicle and to  
2 conduct some field sobriety tests, which he did. I  
3 believe he testified that the defendant did the  
4 heel-to-toe walk down the straight line, he did the  
5 finger-to-nose test, and also did the one-leg stand,  
6 all three of which he failed. Because he failed these  
7 tests, Officer Phillips placed Mr. Stout under arrest  
8 and then transported him back to Reading to the  
9 basement of the courthouse where we have a DUI  
10 processing center set up.

11 Now, it was interesting in this case  
12 because the facts of this case really did parallel  
13 Osborne somewhat in that the defendant was brought to  
14 the processing center within 50 minutes, his blood was  
15 tested and the results of it was a .148. It was  
16 exactly the same as Osborne. And based upon all that  
17 we had, we went to trial, and of course we presented  
18 our case and at the conclusion of the Commonwealth's  
19 case, after we rested, the defense asked for a demurer,  
20 basically suggesting that the evidence was insufficient  
21 to support the charges and should therefore be  
22 dismissed.

23 When we went back into chambers with the  
24 judge, I thought to myself, well, this is going to be  
25 real quick and easy and will be over before we know it.

1 My problem was, though, the Osborne case came out on  
2 April 23 of this year, and by the date that we had gone  
3 to trial in this case, the Osborne case had not made it  
4 into the advance sheets in the Pennsylvania Reporter.  
5 This is where we go to find the most recent law. So I  
6 was actually going into the case not even aware of the  
7 Osborne decision.

8 Now, unfortunately for me, the defense  
9 had access to an electronic research, I don't know if  
10 it was Alexis or West Law, one of those types, and he  
11 did have a copy of the case and he presented it to the  
12 judge and to myself, and after we reviewed the case the  
13 judge was constrained to dismiss the (a)(4).

14 Well, even though the (a)(4) was gone, I  
15 wasn't happy about this, of course, but I figured,  
16 well, we've got a strong case on the (a)(1), that he  
17 was driving, that he was apparently intoxicated to the  
18 point that he could not safely drive, and I figured,  
19 okay, we'll go out and we'll argue the (a)(1). We did.  
20 And at the conclusion -- well, let me back up. The  
21 defense took the stand, the defendant did, and he said  
22 basically in his testimony when he was asked by his  
23 attorney, did you cross over the double yellow lines?  
24 No, I didn't. Did you run anyone off the road? No, I  
25 didn't. He said, do you have any reason why you were

1 stopped that night? No, I don't.

2 So at the end of the defendant's  
3 testimony, in closing arguments I suggested to the  
4 jury, now you have quite a job before you because you  
5 have two very divergent stories. And I said, you want  
6 to take into consideration the various interests that  
7 the parties have and weigh the credibility. And I  
8 said, you know, in my opinion it would be that you're  
9 certainly not going to be able to find the defendant  
10 not guilty, but you guessed it, they found him not  
11 guilty. So that was a very frustrating first case in  
12 Judge Sprecher's courtroom.

13 The following week, on June 1, we had  
14 another trial, and this one involved a Richard Allen  
15 Sabet was the defendant. Basically, Officer William  
16 Wyant of the Kutztown Police Department, which is in a  
17 small college town about 15 miles north of Reading,  
18 testified that he was patrolling on Main Street on the  
19 night in question, which was August 18, 1991. He said  
20 that while he was patrolling he observed the defendant  
21 driving a gray Chevrolet Camaro without his lights on.  
22 This was at 1:30 in the morning. As the result of  
23 that, he decided to follow the car and followed it a  
24 short distance and noticed it was weaving over the  
25 line, that it was tailgating another car, and again,

1 for all these reasons, he stopped the vehicle. Again,  
2 the standard field sobriety tests were taken and they  
3 all were failed and the defendant was then arrested and  
4 taken down to the DUI processing center back in  
5 Reading.

6 I believe that the results of his test  
7 was at 2.0, and that was approximately one hour after  
8 he was stopped. Now, in this case, I think this is the  
9 one that Judge Sprecher was referring to, we had our  
10 expert witness, the phlebotomist from St. Joseph's  
11 Hospital in Reading. She had done the actual testing  
12 of the blood. And unfortunately, though, when she came  
13 in she took the stand and we had briefly discussed what  
14 I wanted her to do was to relate the information back.  
15 I think she was assuming, of course, that I would have  
16 the various elements that she needed to put into her  
17 equation to extrapolate the BAC back to the time of the  
18 offense. Unfortunately, of course, we didn't, and this  
19 has already been mentioned by several of the speakers,  
20 a real problem with the case law as it now stands by  
21 requiring us to put on evidence relating the BAC back,  
22 because the defendant, of course, has a Fifth Amendment  
23 right not to testify or provide evidence against  
24 himself. So that leaves us with, unless we're lucky  
25 enough to have a guy make an admission as to what he



1 was drinking, when he last drank, what he ate, et  
2 cetera, we really have no way to give the information  
3 that the experts need to make an opinion, even on a  
4 hypothetical question. And that's one of the real  
5 problems that we're facing right now.

6 As a result, as Judge Sprecher testified  
7 earlier, the (a)(4) charge was dismissed, and of course  
8 on the (a)(1) we argued it, but I was not quite so  
9 surprised when they came back not guilty on that one,  
10 because it was a rather somewhat standard routine type  
11 of case.

12 One thing I would point out that I have  
13 noticed, I think it is very difficult to prove an  
14 (a)(1) case especially when you don't have the support  
15 of an (a)(4) charge along with it. And I think jurors,  
16 for some reason, it's been my experience--again, as I  
17 say, it's been brief--but jurors seem to sympathize  
18 with the defendants when you have no serious injury or  
19 damage of any sort, and I don't know whether it's  
20 because they consider it to be a victimless crime, but  
21 they don't seem to approach it in the serious outlook  
22 that we do. Now, that's not to say in all cases, but  
23 when you have no injury or damage, that seems to be the  
24 way things are going.

25 The last case I wanted to mention was a

1 case by the name of Commonwealth vs. Timothy Duane  
2 Butts, and this one I think was interesting. It has a  
3 neat procedural history to it. This case actually  
4 began back on April 3 of 1990 when a police officer in  
5 the Borough of Topton stopped Mr. Butts. The reason he  
6 stopped him was because he had clocked him doing about  
7 55 miles an hour in a 35 zone. What happened then, he  
8 had the signs of intoxication, failed the tests and was  
9 placed under arrest. What the officer did though at  
10 the scene was to issue a speeding citation to Mr. Butts  
11 and then later filed a complaint for DUI on the (a)(1)  
12 and (a)(4). Mr. Butts then went into the district  
13 justice for a preliminary hearing and the district  
14 justice actually acquitted Mr. Butts on the speeding  
15 charge. Then he went ahead and bound in the (a)(1) and  
16 (a)(4) and DUI charges. And the problem that we faced  
17 then was in a pretrial conference the defendant's  
18 attorney argued that because of the double jeopardy  
19 grounds, the DUI charges should be barred, and his  
20 reasoning was because we would have to present  
21 testimony regarding the poor driving and the speeding  
22 in order to show the (a)(1) offense.

23 We appealed this case to the Superior  
24 Court because the judge did, in fact, grant his motion  
25 and dismissed the charges. We appealed it and the

1 Superior Court sent back a 50-50 split decision,  
2 basically. They agreed with the defense that the  
3 (a)(4) was barred -- or excuse me, the (a)(1) was  
4 barred because of double jeopardy grounds, but they  
5 said, Commonwealth, you're free to go ahead and go to  
6 trial on the (a)(4) because you have other evidence  
7 independent of the speeding violation to support it,  
8 specifically the blood alcohol test and what not.

9 Now, the only problem was when they sent  
10 that case back to us, remanded it back, the defendant  
11 then tried to petition to the Supreme Court. However,  
12 his petition was denied. Now, what actually happened,  
13 we just got the case back, I think, about five or six  
14 weeks ago, and unfortunately this was post-Osborne so  
15 here we are, we're left with an (a)(1) charge that  
16 Superior Court found could not go, and we were left  
17 with the (a)(4) charge only, and of course without the  
18 testimony that we needed to present or the evidence we  
19 needed to present to the expert, we really had no case  
20 to go on.

21 Now, I was to the point where I was just  
22 about ready to dismiss the case, but for some reason,  
23 and I still really haven't figured it out, the  
24 defendant went ahead and pled guilty to the (a)(1)  
25 charge. And, you know, I was talking to his attorney

1 afterwards and he said basically that since this thing  
2 has been going on for two years, his client wanted to  
3 just get this case behind him. And that might well be  
4 the case, but also my more cynical side would think  
5 that perhaps he didn't have the money to keep going on  
6 with the fight.

7                   These are just three cases I wanted to  
8 mention, and if you have any questions, I'm happy to  
9 try and give you a response.

10                   CHAIRMAN CALTAGIRONE: Thank you.

11                   Questions?

12                   (No response.)

13                   CHAIRMAN CALTAGIRONE: Thank you.

14                   MR. BARNES: Thank you very much on  
15 behalf of the DA's office. It has been a pleasure and  
16 an honor.

17                   CHAIRMAN CALTAGIRONE: We will next hear  
18 from Corporal James Adams from the Upper Allen Township  
19 Police Department.

20                   CPL. ADAMS. Good afternoon. My name is  
21 James Adams. I am a full-time police officer with the  
22 Upper Allen Township Police Department located in  
23 Cumberland County, Pennsylvania, which is just across  
24 the river. I also am a chief deputy with the  
25 Cumberland County District Attorney's Office in the DUI

1 department, and we run the central processing  
2 videotaping centers, and also oversee the operation of  
3 the DUI sobriety checkpoints, which we run on a  
4 countywide basis in Cumberland County.

5 I also am a deputy coroner in Cumberland  
6 County, specifically to provide accident reconstruction  
7 work in fatality accidents. Unfortunately, a majority  
8 of those are alcohol-related. I also am an instructor  
9 for the Municipal Police Officers Education and  
10 Training Commission, and I teach in the police recruit  
11 school under the Act 120 program, also in the mandatory  
12 police in-service. I'm also a faculty member at  
13 Harrisburg Area Community College where I teach on a  
14 part-time basis in their criminal justice program.

15 More specific to the information ahead of  
16 us today, I'm also an instructor with the National  
17 Highway Traffic Safety Administration and Department of  
18 Education for the improved field sobriety testing and  
19 DUI detection program. In the classes that I've taught  
20 so far, I have been directly involved in the dosing of  
21 approximately 176 drinking volunteers so that the  
22 members of the class can see in a controlled drinking  
23 situation blood alcohol concentrations of .10, and also  
24 knowing the amount of alcohol consumed.

25 As far as police officers in

1 Pennsylvania, as you well know, the recent Pennsylvania  
2 State Supreme Court decisions in Commonwealth vs.  
3 Jarman and Commonwealth vs. Modaffare, followed by the  
4 Pennsylvania Superior Court decision in Commonwealth  
5 vs. Osborne, as they relate to the time lapse between  
6 the actual time of driving and the collection of  
7 breath, blood, or urine for testing purposes has placed  
8 a very heavy burden on law enforcement, specifically  
9 the police officer. You've heard testimony from  
10 attorneys and from the judge, and these are the cases  
11 that make it that far. Unfortunately, I have to deal  
12 with the ones that don't even get that far.

13 Many defense attorneys are convincing the  
14 district justices that the police officer must be able  
15 to prove the blood alcohol concentration of the  
16 defendant at the time of driving at the preliminary  
17 hearing stage of the case due to the current language  
18 of our driving under the influence law and the recent  
19 line of appellate court decisions. It is impossible  
20 for a police officer to obtain an accurate test  
21 immediately upon stopping a defendant. It is  
22 ridiculous to require the police officer at every DUI  
23 preliminary hearing to bring in toxicologists and/or  
24 medical experts to relate the alcohol testing back to  
25 the exact time of driving. This requirement is very

1 time consuming and very costly and should not be  
2 required.

3 Most police officers must assume the role  
4 of the prosecuting attorney at the preliminary hearing  
5 level. Defense attorneys are successfully utilizing  
6 Osborne to prohibit the admission of chemical testing  
7 that occurred more than 50 minutes after the time of  
8 driving. This is very frustrating to those of us who  
9 are trained in DUI protection and know that a person  
10 who was a .148 when tested was also under the influence  
11 of alcohol 50 minutes earlier. Research has shown that  
12 at a .03 blood alcohol concentration, a person's  
13 reaction time has doubled, the peripheral vision has  
14 been reduced, and other factors have been affected to  
15 reduce a person's ability to safely operate a motor  
16 vehicle.

17 It routinely takes a police officer 50  
18 minutes or more to secure a breath, blood, or urine  
19 sample from a DUI subject, even when there are no  
20 extenuating circumstances involved. I speak from the  
21 perspective of a an Upper Allen Township police officer  
22 who has the luxury of having three available testing  
23 sites - one being the West Shore Cumberland County DUI  
24 Central Booking Center, which is anywhere from 5 to 12  
25 miles from Upper Allen Township, depending on the

1 location of the arrest; Holy Spirit Hospital, which is  
2 anywhere from 7 to 14 miles from Upper Allen Township;  
3 and Harrisburg Hospital, which is anywhere from 8 to 15  
4 miles from Upper Allen Township.

5           The 21 DUI arrests that I have made so  
6 far this year have taken, on the average, 1 hour and 33  
7 minutes from the time of driving until the submission  
8 of a test. The shortest time period was 39 minutes;  
9 the longest time period was 3 hours and 40 minutes.  
10 The case in which it did take 3 hours and 40 minutes  
11 was a vehicle crash with injuries in which the operator  
12 still had a blood alcohol concentration of a .11 3  
13 hours and 40 minutes after the crash. This case was  
14 dismissed at the district justice level due to the time  
15 lapse.

16           A routine DUI arrest--which I hate to use  
17 the term "routine" because there is no such thing,  
18 every DUI arrest is unique--can be broken down in the  
19 following time periods to show why there was such a  
20 time delay after the traffic stop is made. First of  
21 all, we have a personal contact with the operator.  
22 This, on the average, takes from two to five minutes.  
23 This is the initial interview with the operator by the  
24 police officer. The operator is requested to exhibit  
25 his driver's license, registration, and insurance



1 cards. The operator is given an explanation as to why  
2 he was pulled over. Usually, the operator is given is  
3 the opportunity to provide an explanation. If the  
4 police officer suspects DUI, the operator will be asked  
5 questions concerning his alcohol consumption.

6           Field sobriety testing. On the average,  
7 this can take anywhere from three to seven minutes. A  
8 police officer suspects an operator to have been  
9 consuming alcohol and/or drugs, the operator will be  
10 asked to exit his vehicle for the purpose of field  
11 sobriety testing. A police officer trained in DUI  
12 detection will usually use the standardized field  
13 sobriety test battery of three tests. The first one  
14 being the horizontal gaze nystagmus test, which is a  
15 simple check of the eyes to check the manner in which  
16 they follow a stimuli. A walk-and-turn test, which is  
17 a balance and coordination test in which a person is  
18 asked to walk heel-to-toe nine steps, turn in a  
19 specific manner, than walk an additional nine steps.  
20 Then a one-leg stand test, which is also a balance and  
21 coordination test in which a person is asked to stand  
22 on one leg for 30 seconds.

23           Prior to any of these tests being  
24 conducted by the suspect, they are explained and  
25 demonstrated by the police officer to assure that the

1 suspect understands what this police officer wants them  
2 to do.

3 Post-testing conversation. This can take  
4 anywhere from one to three minutes. A police officer  
5 who is trained in DUI detection will repeat several of  
6 the questions asked earlier looking for inconsistencies  
7 in the person's responses.

8 Arrest, handcuffing, and search. Average  
9 time, one to two minutes. Upon the police officer  
10 making the decision to arrest, the DUI suspect must be  
11 told that he's being placed under arrest for DUI. He  
12 is handcuffed and he is searched. His person is  
13 searched. He then is secured in the police vehicle.

14 We then have the vehicle search and  
15 securing of the defendant's vehicle. The police  
16 officer will search the vehicle incident to the lawful  
17 DUI arrest. Any evidence such as alcoholic beverage  
18 containers must be properly collected as evidence,  
19 along with any other contraband found. From the time  
20 of driving until the time the police officer is ready  
21 to leave the scene of a traffic stop with a DUI  
22 prisoner will routinely take from 10 to 22 minutes,  
23 depending on how cooperative a person is.

24 The DUI prisoner is now transported to  
25 the testing site. The drive to the testing site will

1 take an Upper Allen police officer anywhere from 10 to  
2 20 minutes. If the prisoner is taken to a hospital for  
3 a blood test, the hospital requires a minimum amount of  
4 paperwork to be completed. Although it is a minimum  
5 amount, it must be completed before the phlebotomist is  
6 summoned from the laboratory to the emergency care unit  
7 to actually draw the blood. Assuming the hospital is  
8 not busy, this will take anywhere from 10 to 20 minutes  
9 from the time the DUI suspect arrives at the hospital  
10 until the blood is drawn.

11 If the DUI prisoner is taken to a DUI  
12 central processing center, it is mandated by  
13 Pennsylvania regulation that the breath test operator  
14 observe the subject for 20 minutes prior to him  
15 submitting to a breath test to insure that nothing has  
16 been consumed orally.

17 In a best case scenario DUI arrest, it  
18 routinely takes an Upper Allen Township police officer  
19 50 minutes from the time of the traffic stop until the  
20 submission of the chemical test.

21 Some of the situations the police  
22 officers commonly encounter that take additional time:

23 Uncooperative or confused subjects that  
24 require everything to be explained two, three or more  
25 times.

1                   Passengers that have been drinking and  
2 continually interfere with the process. Even if they  
3 do not interfere, arrangements must be made to  
4 transport them somewhere. We cannot leave intoxicated  
5 people out along a highway unattended. One DUI arrest  
6 that I made this year was a mother with her three  
7 children. Their ages were 2 through 9 years of age  
8 that she had with her. In this situation, I felt it  
9 necessary to contact a family member, not just  
10 transport them to a convenience store or something like  
11 that, so it took additional time to contact a family  
12 member to come and get these children.

13                   Securing the defendant's vehicle to  
14 maintain the safety and security of the vehicle and its  
15 contents. If the traffic stop is at a dangerous  
16 location or there are valuables in the car, a wrecker  
17 will be summoned to tow the vehicle to a place of  
18 security and safety. If a second police officer is not  
19 available, the arresting police officer must wait for  
20 the wrecker to arrive.

21                   Collection and preservation of other  
22 evidence and/or contraband that is found requires  
23 additional time. This year so far one person that I  
24 have arrested for DUI had a concealed handgun in his  
25 vehicle, and three persons had illegal drugs concealed

1 in their vehicle. The proper collection and  
2 preservation of this evidence requires time.

3 A DUI arrest resulting from a collision.  
4 They easily take anywhere from an additional 15 minutes  
5 to even an hour more due to the on-scene accident  
6 investigation. A police officer cannot leave the  
7 accident scene unprotected or before collecting the  
8 accident report information.

9 Test availability many times creates a  
10 time delay. It is common for hospitals and DUI booking  
11 centers to be very busy, especially on Friday and  
12 Saturday nights. Depending on how many people are  
13 waiting, there may be an additional 45 minutes or more  
14 time delay.

15 I could go on for hours telling you  
16 personal stories of people who have jumped out of their  
17 cars and ran. Some of them run into the woods, some of  
18 them run into their house and slam the door in my face.  
19 Stories that all show how some DUI arrests take time.  
20 These are just a few of the more common situations the  
21 police officers have little or no control over. The  
22 police officer must still deal with these situations  
23 when arresting DUI suspects.

24 The point is, a DUI arrest does take  
25 time. Keep in mind that I speak from the perspective

1 of an Upper Allen Township police officer. Many police  
2 officers do not have the luxury of three test sites  
3 within 20 miles of their respective municipality. Many  
4 have an hour or more drive to the nearest testing site.

5 I have seen a dramatic increase in DUI  
6 arrests over the past several years. More and more  
7 police officers are becoming trained in DUI detection  
8 and they are taking the time to make good, solid DUI  
9 arrests. The recent court decisions are placing police  
10 officers in a dilemma between taking a reasonable  
11 amount of time to collect and document the evidence,  
12 thus risking the 50-minute Osborne case argument, or  
13 rushing through the initial steps of a DUI arrest and  
14 risk overlooking valuable DUI evidence and appearing to  
15 be overzealous to the DUI suspect in the hopes of  
16 getting a chemical test within 50 minutes.

17 It is obvious the way to return some  
18 common sense to the area of DUI enforcement is through  
19 legislation by making a test of .10 percent or greater  
20 within three hours of driving a per se conviction.  
21 This will allow police officers to go back to the  
22 business of making good, solid DUI arrests and  
23 detection and enforcement.

24 Thank you very much.

25 CHAIRMAN CALTAGIRONE: Questions?

1 MR. KRANTZ: Yes.

2 Sir, when do most drunk driving stops  
3 happen? Is it during the day or in the evening?

4 CPL. ADAMS: I would say the majority is  
5 the Friday, Saturday nights into Saturday/Sunday  
6 mornings. However, I have made DUI arrests basically  
7 24 hours of the day, 7 days a week. There are people  
8 out there 24 hours a day driving under the influence.

9 MR. KRANTZ: Thank you.

10 CHAIRMAN CALTAGIRONE: Thank you.

11 We will next hear from Bill Shiner,  
12 Pennsylvania chapter of M.A.D.D.

13 MS. WALKER: I'm Sherry Walker.

14 I first just want to thank you very much.  
15 We appreciate the opportunity to give testimony here,  
16 specifically about the amendments as they pertain to  
17 DUI testing times in House Bill 355. My name is Sherry  
18 Walker, and I'm the Executive State Director of Mothers  
19 Against Drunk Driving in Pennsylvania.

20 Mothers Against Drunk Driving's mission  
21 is to stop drunk driving and to aid the victims of this  
22 violent crime. In the recent Supreme Court decisions  
23 Commonwealth vs. Jarman and Commonwealth vs. Modaffare,  
24 the Justices have demonstrated a profound lack of  
25 understanding of what it means to be a victim of a DUI

1 crash or what it means to try to enforce a law rendered  
2 unenforceable by their legal machinations. M.A.D.D. is  
3 concerned that many judges who hear drunk driving cases  
4 and appeals have a limited understanding of something  
5 we call statistical morality. Statistical morality  
6 refers to the fact that we make decisions which benefit  
7 the many, even though a few will be harmed. For  
8 example, when whooping cough vaccine is given to 1  
9 million children, about 100 will have serious side  
10 reactions; however, no doctor in his right mind would  
11 stop giving the vaccine to the many because of the few  
12 who react. To do so would risk a major epidemic.

13 We are on the verge of a major epidemic  
14 of DUI offenses and ineffectual prosecution of these  
15 offenses in the State of Pennsylvania unless we can  
16 rectify the serious mistake in the original wording of  
17 the law and the Supreme Court's interpretation of that  
18 law in a very narrow way. The Supreme Court's limited  
19 interpretation of the DUI law sends a clear message to  
20 every would-be drunk driver, that they can flaunt the  
21 law and get away with it on a technicality. This  
22 unwarranted leniency toward DUI offenders is a slap in  
23 the face to every innocent victim of DUI and the  
24 hardworking law enforcement personnel who are the first  
25 line of defense in the war against drunk driving.



1                   Leniency toward drunk drivers is  
2 frequently justified with the rationale, well, nothing  
3 we do here can bring the victim back, so let's not be  
4 too hard on the drunk driver. If you are courageous  
5 enough, put yourself in the shoes of a grieving mother  
6 or father whose child has been brutally killed by a  
7 drunk driver. Hear those words. Do they make sense?  
8 In fact, everyone already knows that nothing can bring  
9 the victim back, so we continue to be amazed at how  
10 many times a judge or a defense attorney spews out the  
11 words as if it were a new revelation.

12                   The legislative and judicial systems were  
13 never developed to bring back victims, but they do  
14 exist to deter future criminal acts. Most reasonable  
15 people believe that swift, sure, and uniform punishment  
16 does deter future crime. If we respond to convicted  
17 offenders in such a way as to discourage them from  
18 committing further acts of violence, we must require  
19 just consequences for their wrongdoings. The Supreme  
20 Court of Pennsylvania has removed the threat of swift,  
21 sure, uniform punishment from the DUI law. How can we  
22 expect anything but an increase in the perpetuation of  
23 this violent crime?

24                   We have before us today the means to  
25 restore sanity to the justice system for DUI offenses.

1 This pending legislation deals strictly with the core  
2 of the Supreme Court's argument, overturning the  
3 convictions of Jarman and Modaffare. Specifically,  
4 that the law as currently written can only result in a  
5 conviction that the alleged perpetrator is determined  
6 to be intoxicated while driving a vehicle. M.A.D.D.  
7 supports wholeheartedly the proposed changes to the DUI  
8 law which would, in essence, redefine the DUI offense  
9 in terms of the blood alcohol content of the offender  
10 at the time of testing, not while driving the vehicle.

11 M.A.D.D. earnestly seeks your support of  
12 this legislation. Your swift adoption of this measure  
13 will send a message of hope to all victims who look to  
14 you and the courts for true justice. Don't let them  
15 look in vein. Don't let them be revictimized by a  
16 system which defies logic. Victims are not an  
17 amorphous mass of statistics quantified and juggled in  
18 search of an irreducible minimum. Each victim is a  
19 unique and irreplaceable individual with a name, a  
20 family, and dreams which must now go unfulfilled. Each  
21 represents far more than a faceless number to his or  
22 her family and friends caught in a tragic ripple effect  
23 set off by each crash. We hope that you will recognize  
24 your responsibility to give a voice to these victims  
25 and to assist them through the trials and tribulations

1 that follow these tragedies.

2 I was supposed to have Bill Shiner or  
3 Blaine Mears join me today, and I'm really sorry that  
4 Blaine could not be with us. He would have brought a  
5 real unique piece to this important testimony that I'm  
6 giving today. Blaine himself is a retired Pennsylvania  
7 State Police officer with over 20 years of experience.  
8 He also lost his only daughter in a DUI crash in which  
9 the offender ended up not having any charges brought  
10 against him because of the testing time factor.  
11 Unfortunately, he could not join us because of health  
12 reasons.

13 But I do want to -- I would be remiss  
14 without saying that there were some things stated here  
15 today that I just want to emphasize that M.A.D.D. is  
16 very supportive of. First of all, we're very glad to  
17 hear people like Bill Tully and Dr. Winck emphasize  
18 again the need for our BAC in general to be lowered.  
19 As you know, the original piece of this legislation did  
20 bring it down to .08, and M.A.D.D. is very hopeful,  
21 it's one of our prime goals for this legislative  
22 session, and next if we don't get it this time, to see  
23 the BAC lowered to .08. When you have people like the  
24 American Medical Association saying that with as little  
25 as .02 and .03 people are significantly impaired, I

1 don't think it's too much to ask.

2 In addition, we do want to reiterate Dr.  
3 Winek's concern to be able to have a true definition of  
4 blood in this State. It is really the other important  
5 piece to that that is needed for the DUI law to make it  
6 comprehensive and make it as tough as what we would  
7 like to see it.

8 And I would like to just add, when I  
9 heard the testimony by the Philadelphia District  
10 Attorneys Association that they are not even  
11 prosecuting people with BACs of .15 because they are  
12 going to lose it, I just can't help but feel how many  
13 people are we going to lose, either through their death  
14 or through their serious injuries, by not having these  
15 drunk drivers stopped before they do injure someone? I  
16 think it's very important that we realize that DUI is a  
17 violent crime not only when someone is killed or  
18 seriously injured, but also from the fact that the  
19 potential of it to be a violent crime later is very  
20 real. I just wanted to add that.

21 Thank you. I would be happy to take any  
22 questions.

23 CHAIRMAN CALTAGIRONE: Questions?

24 REPRESENTATIVE HECKLER: Thank you, Mr.  
25 Chairman.

1 BY REPRESENTATIVE HECKLER: (Of Ms. Walker)

2 Q. One difficulty, and we heard it from at  
3 least one of the prosecutors who testified today, in  
4 the best of all possible worlds, the remaining sections  
5 of the driving under the influence law should be  
6 sufficient at least where there have been sufficient  
7 indicia observed by the officers upon which to base a  
8 case to begin with. I think one of the reasons we went  
9 to the per se offense, and I certainly agree with you,  
10 one of the reasons we've got to move forward with this  
11 legislation and get back a genuine per se offense  
12 again, is that juries simply show a great reluctance to  
13 use what I, at least, would think of as common sense.  
14 A police officer's attention is called to a vehicle by  
15 the manner in which it's being operated, he smells  
16 alcohol, observes other physical indicia and performs a  
17 coordination test which the subject fails, that ought  
18 to be enough to convict in and of itself.

19 I am finally getting to a question.  
20 Certainly, Mothers Against Drunk Driving over the years  
21 has done a great deal to raise the consciousness of the  
22 public as a whole to the fact that drunk driving is a  
23 crime. It's not a there-but-for-the-grace-of-God-go-I  
24 kind of thing. Are you folks these days doing anything  
25 in particular, and what might we all be able to do to

1 educate and sensitize jurors, the public from whom jury  
2 panels are ultimately drawn, to the proposition that  
3 this is unacceptable behavior?

4 A. We don't have any particular program  
5 aimed right at juries, but we do our best through our  
6 public awareness and our prevention campaigns. We have  
7 about 250,000 members and supporters in Pennsylvania,  
8 and we have 23 chapters around the Commonwealth, and  
9 through that we're trying to educate the people, the  
10 public, that drunk driving is a crime and try to give  
11 them the training that they need so that when they are  
12 called for jury duty they can do something that is the  
13 right decision instead of one that is perhaps colored a  
14 little bit by some of the individual rights concerns  
15 that they have. I would welcome the opportunity,  
16 though, to work with someone on doing some kind of  
17 program with the jury system or again with the judicial  
18 system, but I don't think you're in a position to do  
19 that.

20 Q. Let me hasten to say, especially since we  
21 have a judge present, yeah, certainly once people are  
22 drawn as part of an overall venire, or group of people  
23 from whom juries would be selected, I don't think that  
24 would be legally permissible to have one of you folks  
25 come in and speak to them just before they're

1 selected--

2 A. We'd love to. I don't think we can.

3 Q. --before someone appears for a drunk  
4 driving case. Certainly, I was addressing myself to  
5 jurors in their generic sense. The public, I've had  
6 this hope over the years, that we could succeed in  
7 getting people to think of drunk driving the way  
8 somehow or other in my youth I got to think about  
9 littering. One of the things I don't think I could  
10 bring myself to do is throw something, at least not  
11 biodegradable, out of a car window, and I think I'm  
12 bipartisan and assume maybe it had something to do with  
13 Lady Bird Johnson or my mother or something. But it  
14 would really be helpful if at least a substantial part  
15 of the population thought of drunk driving as simply  
16 something completely irresponsible and unacceptable,  
17 and that that was reinforced throughout their peers  
18 within society.

19 A. Well, I think we're seeing a lot of that  
20 now. There is, just to give you a brief overview,  
21 there is a lot of it. When you hear from small  
22 children when they get in the car with their parents,  
23 it's not just "don't smoke," or not just "buckle up,"  
24 you're beginning to hear loud and clear, "don't drink  
25 and drive, Mommy and Daddy." We have a lot of amusing

1 stories that get sent in to us from parents who are  
2 drinking a can of Coca Cola and their 3-year-old or  
3 their 4-year-old says, Mommy, don't drink and drive.  
4 So I believe we are making a difference.

5 And the kind of education and training I  
6 was talking about to do with the judicial, because not  
7 everyone is as committed, I think, to the DUI issue as  
8 some of the judiciary are, but we would really welcome  
9 the opportunity to work further with them. I certainly  
10 did not mean that we would educate the jurors as they  
11 were going in the band box, but that would be very nice  
12 if we could.

13 We have some judges who literally ask  
14 people if they are a member of M.A.D.D. and if support  
15 M.A.D.D., and if they say "yes," they are removed from  
16 jury duty by the judge himself, and we have that  
17 documented in at least 20 or 30 cases. So that's the  
18 kind of training and education that we are moving  
19 towards.

20 Thank you for the opportunity.

21 Q. If I could, one more. Do you have  
22 programs in the schools? Do you get into the public  
23 schools?

24 A. We have programs geared toward underage  
25 drinking. Definitely. We have an underage drinking



1 brochure that tries to help youth and teenagers work  
2 with their own peers that are having some kind of a  
3 drug or alcohol problem.

4 REPRESENTATIVE HECKLER: Thank you.

5 BY MR. KRANTZ: (Of Ms. Walker)

6 Q. Along the lines of Representative  
7 Heckler, you have no statistics as to the young people  
8 in the schools who have heard your message, whether or  
9 not they drink less or anything?

10 A. Well, we're not Students Against Driving  
11 Drunk, we're Mothers Against Drunk Driving, but the  
12 best that I could do with that is say that we just  
13 participated with Pennsylvania Aware in a youth  
14 conference where over 500 young people from around the  
15 State were brought together to educate and teach them  
16 about not just drinking and driving but drugs in  
17 general, and these kids are going back to their schools  
18 and helping to work with their peers. So there are  
19 some statistics, I think, that you're beginning to see  
20 that while underage drinking arrests may indeed still  
21 be very significant and very high, there is beginning  
22 to be, from what we can see from listening to the young  
23 people themselves, a new education about the fact that  
24 drinking and driving, or taking drugs and driving, is  
25 something that can get them in trouble. The biggest

1 thing is their loss of a driver's license. They're not  
2 afraid of death or even serious injury, but the loss of  
3 that driver's license really has a heavy impact.

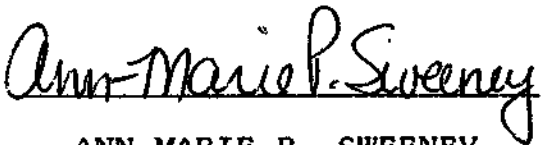
4 MR. KRANTZ: Thank you.

5 CHAIRMAN CALTAGIRONE: Thank you very  
6 much. We'll adjourn the hearing for today. Thank you.

7 (Whereupon, the proceedings were  
8 concluded at 3:00 p.m.)

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1 I hereby certify that the proceedings  
2 and 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  
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