

COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
JUDICIARY COMMITTEE

In re: House Bill 1502, Search Warrants

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Stenographic record of hearing held in  
Room 140, Main Capitol, Harrisburg,  
Pennsylvania

Monday, July 26, 1993, 10:10 a.m.

HON. THOMAS R. CALTAGIRONE, Chairman

MEMBERS OF THE COMMITTEE

Hon. Christopher R. Wogan  
Hon. Tim Hennessey

Also Present:

William H. Andring, Chief Counsel

Mary Woolley, Counsel

Galina Milohov, Research Analyst

Margaret Tricarico, Secretary

Reported by:  
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I N D E X

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22  
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25

Speakers

Page

Rep. Christoper R. Wogan Prime Sponsor	3
Richard Lewis, Esquire District Attorneys Association	7
Peter Rosalsky, Esquire Public Defenders Association	22
Larry Frankel, Esquire American Civil Liberties Union	37
Robert N. Tarman, Esquire Pennsylvania Association of Criminal Defense Attorneys	65

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1                   CHAIRMAN CALTAGIRONE: I would like to get  
2 started with the House Judiciary Committee Hearing regarding  
3 search warrants, House Bill 1502, the prime sponsor, Chris  
4 Wogan's bill.

5                   I would like everybody on the dais to introduce  
6 themselves for the record. I would like to let it be known  
7 that Representative LaGrotta was here and will be coming  
8 back. We're expecting Representative Birmelin and  
9 Representative O'Brien also to be here. But if we could,  
10 the staff members would please introduce themselves.

11                  MS. WOOLLEY: Mary Woolley, minority counsel to  
12 the committee.

13                  MR. ANDRING: Bill Andring, majority counsel to  
14 the committee.

15                  REPRESENTATIVE WOGAN: Chris Wogan,  
16 representative and culprit of the day.

17                  MR. SUTER: Ken Suter, minority counsel.

18                  MS. MILOHOV: Galina Milohov, research analyst.

19                  CHAIRMAN CALTAGIRONE: At this time, I would  
20 like to turn the hearing over to Chris. It's his bill and  
21 he'll be running the show.

22                  REPRESENTATIVE WOGAN: Good morning. At the  
23 start I would like to thank our chairman, Representative  
24 Caltagirone, for scheduling this public hearing in order to  
25 allow interested citizens and groups to express their

1 opinions on House Bill 1502.

2           House Bill 1502 has 55 listed co-sponsors in the  
3 lower chamber of our General Assembly, as well as several  
4 additional co-sponsors who will be officially added when the  
5 bill receives a new printer's number. House Bill 1502 is a  
6 proposed amendment to Article 1, Section 8, of the  
7 Pennsylvania Constitution which would establish a good faith  
8 exception to the exclusionary rule in Pennsylvania when the  
9 evidence in question has been obtained in a reasonable  
10 reliance upon a search warrant issued by a neutral and  
11 detached magistrate but later invalidated by a court.

12           The bill, if passed by two consecutive sessions  
13 of the General Assembly, and of course, if approved by the  
14 voters of the Commonwealth in a referendum, would become  
15 part of Article 1, Section 8, of our Pennsylvania  
16 Constitution. It would then bring Pennsylvania into line  
17 with the holding of the United States vs. Leon, the case in  
18 which the U.S. Supreme Court held that the Fourth Amendment  
19 to the U.S. Constitution allowed such a good faith exception  
20 to the exclusionary rule.

21           The court examined the origin and purposes of  
22 the Fourth Amendment, and held that the question of whether  
23 the remedy to safeguard Fourth Amendment rights through its  
24 deterrent effect, must be resolved by weighing the cost and  
25 benefits of preventing the introduction of inherently

1 reliable and trustworthy evidence in the prosecution's case  
2 in chief.

3           The court continued by noting that the  
4 indiscriminative application of the exclusionary rule which  
5 impedes the ability of the criminal justice system to  
6 ascertain the truth and allow some guilty defendants to go  
7 free, may well generate disrespect for the law and the  
8 administration of justice.

9           Unfortunately, in my opinion, the Pennsylvania  
10 Supreme Court and Commonwealth vs. Edmunds, a 1991 case,  
11 held that it would not follow Leon in allowing a good faith  
12 exception to the exclusionary rule in Pennsylvania. It did  
13 this despite the fact that the language of Article 1,  
14 Section 8, of the Pennsylvania Constitution, uses  
15 essentially the same language as is contained in the Fourth  
16 Amendment to the U.S. Constitution.

17           While it is true that the highest court in each  
18 state is free to give more protection to those accused of  
19 crimes than that required by a federal constitutional  
20 interpretation, it is equally true that the systems and  
21 their legislature are also free to utilize the state  
22 constitutional amendment process to adopt a good faith  
23 exception to the exclusionary rule.

24           A good faith exception in accordance with the  
25 terms set by United States vs. Leon, as the late Justice

1 James McDermott wrote in his dissenting opinion in Edmunds,  
2 the United States vs. Leon does not open the gates to  
3 unauthorized search and it does not dissolve the need for  
4 probable cause. It simply and properly shifts the  
5 responsibility for determining probable cause to a neutral  
6 magistrate and frees the police of his or her mistake. They  
7 must present their case to a neutral magistrate. The facts  
8 they present must be true, the magistrate must act within  
9 his bounds, and as the final test, the police must employ  
10 their experience in recognizing whether a warrant is illegal  
11 despite the authorization of the magistrate. All these  
12 contentions remain alive and subject to scrutiny at a  
13 suppression hearing.

14           House Bill 1502, then, if adopted, would clearly  
15 not result in the diminution of the rights of our citizens  
16 to be secure in their persons, houses and possessions from  
17 unreasonable searches and seizures. It would enhance the  
18 ability of our courts and juries to find the truth by  
19 allowing evidence to be introduced at trial. This search  
20 for the truth is given short shrift by those who argue for  
21 the inflexible and inexorable application of the  
22 exclusionary rule.

23           The social costs of this, I believe, has been  
24 very great, indeed. To paraphrase Justice McDermott, it has  
25 forced law enforcement authorities to ignore mountains of

1 illegal contraband that were otherwise palpable indicia of  
2 guilt. Need I mention how much of these ignored mountains  
3 of contraband consist of narcotics and drug-related items,  
4 mountains which grow larger with the passage of time.

5 I believe that we have an obligation, especially  
6 to our younger Pennsylvanians, the boys and girls who have  
7 not yet been exposed to the real plague of our era, drug  
8 trafficking, to take every measure that we can, consistent  
9 with a democratic society that recognizes basic civil  
10 liberties, to ensure that this scourge which has ravaged our  
11 young for at least a quarter of a century, becomes but a  
12 distant, though unpleasant, memory.

13 The adoption of House Bill 1502 would be a solid  
14 step in this direction.

15 Thank you, Mr. Chairman.

16 CHAIRMAN CALTAGIRONE: My understanding is that  
17 our next witness will be the Honorable Richard A. Lewis, the  
18 District Attorney of Dauphin County. The committee welcomes  
19 you, Mr. Lewis.

20 MR. LEWIS: Thank you.

21 REPRESENTATIVE WOGAN: Thank you for coming.  
22 You are representing the Pennsylvania District Attorneys  
23 Association this morning?

24 MR. LEWIS: That is correct. Good morning, Mr.  
25 Chairman, and Representative Wogan, ladies and gentlemen.

1 As indicated, I'm representing the position of the  
2 Pennsylvania district attorneys, and if I just may point out  
3 for the record, the district attorneys, at their recent  
4 annual meeting, unanimously passed a resolution in support  
5 of House Bill 1502, which is attached to the back of the  
6 testimony, prepared testimony that I have submitted.

7           With the chairman's permission, I'm not going to  
8 read the prepared text. I would rather just explain our  
9 position in a few words. Hopefully, the prepared text will  
10 be made part of the record and be considered by the  
11 committee in its deliberations, but to save time, I see you  
12 have several other witnesses, I would rather just summarize  
13 our position.

14           Basically, the District Attorneys Association  
15 feels that the Pennsylvania Supreme Court in interpreting  
16 Leon in the Edmunds decision went a little too far, that  
17 their decision is overly broad in denying good faith in  
18 Pennsylvania, in denying good faith in Pennsylvania. In  
19 denying the existence of the good faith, as least not  
20 applying it to Pennsylvania.

21           I think you have to look, to get a flavor of  
22 this I think you have to look at the amendments in both  
23 state constitutions, the Fourth Amendment in the federal  
24 Constitution, and the applicable amendment, Article 1,  
25 Section 8 of the Pennsylvania Constitution. Both of those



1 amendments, or both of those paragraphs, are based on the  
2 premise, a very, very sacred premise in constitutional law,  
3 be it in Pennsylvania or in the United States, that in order  
4 for a warrant to be issued, probable cause must be presented  
5 to a neutral and detached magistrate.

6 No matter how insistent the Pennsylvania Supreme  
7 Court is on interpreting things differently than the United  
8 States Supreme Court, that one basic bedrock fact cannot be  
9 ignored.

10 The good faith exception as promulgated in U.S.  
11 vs. Leon back in the mid-1980s, 1984, recognizes the fact  
12 that probable cause must always be present for a search  
13 warrant to be issued. Good faith exception does not skirt  
14 around probable cause. Good faith exception does not say,  
15 well, every once in a while, if the police are acting in  
16 this good faith, we can just ignore the absence of probable  
17 cause. It doesn't say that at all. So inherent in the  
18 Fourth Amendment, and in Article 1, Section 8, is the  
19 protection afforded to the citizenry by the standard of  
20 probable cause.

21 Now, the standard of interpreting that in the  
22 United States is, and in Pennsylvania, is the totality of  
23 the circumstances. The point is that a neutral and detached  
24 magistrate, in reviewing a search warrant, must still be  
25 satisfied that probable cause does indeed exist for the

1 issuance of that warrant. So what we are dealing here in  
2 the good faith exception are not cases that lack probable  
3 cause. There are still, if this amendment passes and this  
4 becomes the law of the land in Pennsylvania, there will  
5 still be ample avenues to challenge a warrant that is  
6 lacking in probable cause, just as there is today.

7           So the good faith exception will not change the  
8 status of that, the status challenges to the existence of  
9 probable cause. What this does is basically to say when  
10 there are technical defects in a warrant, a date is  
11 inadvertently left out, that that warrant shall not be  
12 defeated if the officer is acting objectively reasonably, in  
13 objectively reasonable reliance on that warrant, that was  
14 reviewed by this impartial magistrate. So what we're  
15 dealing here with are not lapses in probable cause, but  
16 technical defects to the warrant.

17           In the Edmunds case itself, the only thing that  
18 ruined that probable cause affidavit was the absence of a  
19 date. Edmunds was a case where a police officer obtained  
20 information that some people, two informants had, I think  
21 they were out hunting, had observed marijuana growing in the  
22 shed on land and so forth. And that was all incorporated in  
23 the warrant, properly so, detailing their information, but  
24 the only thing that was left out was the date that this  
25 information came to the officer, the affiant, the officer

1 who sought the warrant. Actually, the information either  
2 came the same day or the day before but it was left out.  
3 That was the only difficulty with that warrant.

4           Now, there was another procedural rule that the  
5 court relied on, Rule 2003, but at the heart of the matter  
6 was a technical defect in the warrant, there was no date.  
7 There was no date. Probable cause existed but there was a  
8 technical defect of no date. The Pennsylvania Supreme Court  
9 decided not to apply Leon and not to apply the good faith  
10 exception.

11           There are tons of other examples, one outlined  
12 in my testimony from a Philadelphia case, but another may be  
13 even more telling that I could have included from a Dauphin  
14 County case, and I think maybe sums up the good faith  
15 exception and the latitude that the courts may have in  
16 addressing technical defects.

17           We had a murder case here several years ago, and  
18 the police officer had what he felt was sufficient probable  
19 cause to make an arrest. The police officer prepared a  
20 warrant of arrest, and under Pennsylvania law and the Rules  
21 of Criminal Procedure, Rule 119, I believe it is, the  
22 officer has to prepare an affidavit of probable cause which  
23 he has to swear to in front of the magistrate, justifying  
24 the issuance of a warrant for the arrest of this individual  
25 on the charge of murder. That affidavit was perfect. There

1 was nothing wrong with it. It was a good, solid affidavit  
2 of probable cause for the issuance of a warrant of arrest.

3           Several hours later, there was a change of shift  
4 and another group of officers come on the scene and they  
5 sort of picked up the pieces and so forth. Now they want to  
6 get a search warrant to search the suspect's house. In  
7 preparing the search warrant, granted, a separate sheet of  
8 paper, in preparing the search warrant, they summarized some  
9 of the information in the prior affidavit but don't do a  
10 very good job in summarizing it, and that search warrant  
11 application, the affidavit of probable cause in the search  
12 warrant, doesn't have all the information in it. If it  
13 would have been copied verbatim or just xeroxed and slapped  
14 onto that affidavit or whatever, everything would have been  
15 fine. But instead, the officer summarizes it and does a  
16 lousy job of summarizing and leaves some facts out.

17           A search was conducted. It found the murder  
18 weapon in the suspect's house. That search was later held  
19 to be invalid because of the lack of probable cause in that  
20 second search warrant.

21           Now, here is a case where there was probable  
22 cause properly sworn to in front of a magistrate. Probable  
23 cause that would have justified the search of the suspect's  
24 house and, quite frankly, the probable cause in that first  
25 warrant was so solid it would have justified a search of the

1 whole block, but it was good, solid probable cause, that if  
2 it had been used in the second warrant, no problem would  
3 have existed. But for whatever oversight on the part of the  
4 police officer summarizing and making up that second warrant  
5 did not include all the relevant information.

6           Now, here a magistrate had already reviewed  
7 probable cause and found it to exist in the issuance of a  
8 warrant for the arrest of the individual. And that same  
9 affidavit would have easily, easily, easily, justified a  
10 search of that home because all the facts were in that first  
11 affidavit. So what we have is a technical defect, a  
12 technical oversight. Was there a probable cause? Sure.  
13 It's proven by a sworn affidavit in front of a neutral and  
14 detached magistrate. Was it included in the search  
15 warrant? No. So the murder weapon is thrown out and the  
16 case is lost.

17           Now, if there had been a good faith law, I can  
18 only speculate that good faith might have saved that second  
19 warrant, I don't know for sure. A court still has to review  
20 it. But at least it would have given the prosecution a very  
21 solid argument to uphold the execution of that search  
22 warrant. Instead, it was rejected, it was tossed out.

23           So a good faith exception to the search warrant  
24 requirement might have, might have, saved it.

25           I use the word might have very, very purposely,

1 because even with a good faith exception in Pennsylvania, it  
2 doesn't mean that all search warrants are going to be good,  
3 just as long as the cop stands up and says, yeah, I'm acting  
4 on good faith. It doesn't mean that at all. You still have  
5 a suppression hearing, you still have a review, not  
6 necessarily by the magistrate that issued the warrant, but  
7 by a judge of the Court of Common Pleas, that again, does a  
8 second review to determine the existence of probable cause  
9 under the totality of the circumstances standard.

10           Even Leon was not saying to us, to law  
11 enforcement and to the courts, that you ignore the existence  
12 of probable cause. Leon insisted that the court still must  
13 find that the magistrate had a substantial basis for  
14 determining the existence of probable cause. It still must  
15 exist.

16           If the magistrate's evaluation of probable cause  
17 based on the totality of the circumstances test is improper  
18 or unreasonable, then it's no good. Out it goes, and no  
19 good faith exception is going to save it.

20           All the good faith does is say, when you do have  
21 probable cause, and you have a technical defect in that  
22 warrant, it might save that warrant, subject to the review  
23 of the court.

24           This legislation, and the proposed  
25 constitutional amendment, will not restrict the review of

1 the court. It will just change the standard for review.  
2 Sure, the government still has to show by a preponderance of  
3 the evidence at a suppression hearing in front of the judge  
4 that there is probable cause existing in this particular  
5 case. But a technical defect may be defeated now under the  
6 good faith exception.

7           Again, the good faith exception does not cure  
8 any information that was falsely presented to the  
9 magistrate. If a police officer or whoever dummies up  
10 information and presents it to the magistrate, that's a  
11 no-no. Good faith exception doesn't cover that, nor should  
12 it. If the magistrate does not make an objective reasonable  
13 evaluation, then the good faith exception under Leon would  
14 not apply, either.

15           The point I'm trying to make is that I feel and  
16 the District Attorneys Association feels that the  
17 protections for the individual are still there. That a good  
18 faith exception, although it may cure some technical defects  
19 in warrants, is not going to open the flood gates of abuse  
20 or is not going to open the flood gates for corruption or  
21 improper police conduct. All the statistics show that  
22 police pretty much are following the mandates of the  
23 exclusionary rule as it was originally intended. There are,  
24 however, mistakes that occur, technical oversights that  
25 occur. Warrants that maybe could have had just another

1 sentence or two to wrap it up, could have included that  
2 date, for example. Probable cause is there but some defect  
3 in that warrant invalidates that warrant. And that's what  
4 this legislation, I think, is all about.

5           It doesn't change the whole law of search and  
6 seizure, doesn't do that at all. The protections are still  
7 there, the review of the court is still there, and I think  
8 individual rights are not sacrificed, in balance, in balance  
9 with the public's right, are not unduly sacrificed by  
10 creating a good faith exception to the search warrant  
11 requirement. Thank you.

12           REPRESENTATIVE WOGAN: Thank you very much, Mr.  
13 Lewis.

14           Do any members of the committee, I should say,  
15 the other member of the committee perhaps have a question,  
16 or any staff members?

17           CHAIRMAN CALTAGIRONE: He very well summarized  
18 the questions I was going to ask him. Very good job.

19           REPRESENTATIVE WOGAN: I want to thank you, Mr.  
20 Lewis.

21           MR. ANDRING: I just have a couple questions.

22           REPRESENTATIVE WOGAN: Fire away, Mr. Andring.

23           MR. ANDRING: Rich, in looking over this, I'm  
24 having trouble putting this whole package together as to  
25 exactly what you're attempting to accomplish here. And if



1 you could maybe work through the example you have on page 2  
2 of your testimony, I think it would help people understand  
3 better what you're attempting to accomplish.

4 Now, in this case, you say a search warrant was  
5 issued which was subsequently invalidated because the date  
6 of the prior buy was not included on the warrant.

7 MR. LEWIS: Yes.

8 MR. ANDRING: Now, as I understand the law,  
9 unless the police testify before the district magistrate and  
10 provided that date at the time they were seeking the  
11 warrant, then the magistrate would not have a basis to  
12 determine if there was probable cause, that that's a  
13 substantive matter that has to be included in the  
14 application at some point.

15 MR. LEWIS: Well, basically, it gets to the  
16 staleness doctrine, that the information could be deemed to  
17 be stale, because in other words, probable cause must exist  
18 that the drugs are there at the present time.

19 Now, here, the information, again, and I'm  
20 receiving this secondhand, I'm not directly familiar with  
21 the case, but the information was that the buy was made  
22 within 24 hours of the issuance of the search warrant. That  
23 fact, for whatever reason, was not included.

24 Now, the Rules of Criminal Procedure provide in  
25 Pennsylvania the magistrate can take oral testimony prior to

1 the issuance of that warrant, but it must be reduced to  
2 writing by the time that the warrant was executed, and I  
3 think that was the problem here. And I don't have all the  
4 -- I must admit I don't have all the facts on this  
5 particular example as far as what was said to the magistrate  
6 prior to the issuance of a warrant and how detailed it was,  
7 that I don't know, no.

8 MR. ANDRING: Okay. Well, I think that goes  
9 back then to the Leon case. As I recall that case, they  
10 didn't have, was that a California case? I really don't  
11 know.

12 REPRESENTATIVE WOGAN: Yes, it was.

13 MR. ANDRING: But I don't think they had a  
14 comparable provision to Rule 2003, that you have, you know,  
15 that probable cause is determined on the basis of what's in  
16 the warrant. And in that case, the court actually went back  
17 and attempted to reconstruct the probable cause hearing on  
18 the assumption that this, if this information had been  
19 provided to the magistrate, that he had not put it in the  
20 affidavit, that that was a technical error, not that failure  
21 to provide the information to the magistrate was the  
22 technical error, but the failure to put it into the  
23 affidavit was the technical error. And if, you know, if  
24 that's a correct reading of that case, then I don't see how  
25 what you're doing would impact in Pennsylvania at all so

1 long as Rule 2003 remains in effect, or they don't care what  
2 you said to the magistrate, if it's not in the affidavit  
3 then it's not to be considered. You know, that's one of the  
4 major problems I have in figuring out how this is going to  
5 go into work in Pennsylvania.

6 MR. LEWIS: Well, I guess there is the question  
7 whether Rule 2003 in this same situation would still be  
8 pertinent. Even if all the information were included, I  
9 mean, 2003 basically says you get it all down in writing  
10 before the warrant is executed, and that's basically all it  
11 says, it's the four corners rule in Pennsylvania.

12 But I think the problem is, if you have that  
13 technical defect, like the example I gave, you already have  
14 a warrant, already reviewed by a magistrate that has  
15 everything you need in it, all right? Now you have a second  
16 warrant that didn't include the information from the first  
17 warrant. Should there not be a good faith exception for  
18 something like that? Notwithstanding Rule 2003.

19 MR. ANDRING: I can see that example. I guess  
20 what I don't understand is whether you, through this  
21 amendment, intend to repeal Rule 2003. Would it no longer  
22 be in effect in Pennsylvania? Or not? I don't think that  
23 question has really been answered.

24 MR. LEWIS: And I don't necessarily have an  
25 answer for it. I certainly think it would initiate a review

1 of 2003. But whether or not it would call for a repeal of  
2 2003, I don't know. But the point I think is that even  
3 under Leon, they suggest a case-by-case review. There may  
4 be cases where the court says, hey, you know, the probable  
5 cause here is a little bit weak and the omissions under 2003  
6 were a little too much, it just wasn't one little date you  
7 left out, you left out A, B, C and D as well and so  
8 therefore, we think 2003 applies and we're not approving  
9 this warrant, good faith exception or no good faith  
10 exception. I can still see that and I don't think there's  
11 any problem with that, all right?

12 I still think a court has to look at the  
13 situation in toto, the totality, if you will, of the  
14 situation with the good faith exception as well as Rule 2003  
15 and balance that.

16 But maybe to answer your question a little more  
17 specifically, there may be an occasion where 2003 is  
18 violated because of one date left out, where the court may  
19 say if this becomes law that the good faith exception  
20 overrides that, because it was inadvertent.

21 MR. ANDRING: In the Leon case, the police came  
22 in whenever they did the suppression hearing and said, well,  
23 we didn't put the date in or whatever it was that was  
24 missing, I don't remember right offhand, but we testified to  
25 that before the district justice, so he had that

1 information. And as I recall, they brought the magistrate  
2 in and he said, I really don't remember exactly what  
3 happened, but I think they did and like I said, they tried  
4 to reconstruct that hearing, which struck me as being one of  
5 the most ridiculous things you could possibly attempt to  
6 do.

7 If you're going to do something like this  
8 amendment, do you think we ought to start recording those  
9 probable cause proceedings in some manner?

10 MR. LEWIS: You raise a couple issues. First of  
11 all, the district justice courts are courts not of record,  
12 all right? And that's the basic problem. And they're not  
13 equipped with the necessary facilities. They don't have a  
14 stenographer or court reporter there when court is in  
15 session which is not required by law.

16 MR. ANDRING: Which is why we have Rule 2003.

17 MR. LEWIS: Sure. So whether or not those  
18 proceedings should be recorded, I think you may have to look  
19 at whether or not the magistrate should be a court of record  
20 or not.

21 Again, the manner in which it is handled in  
22 Pennsylvania today is to have an evidentiary hearing, a  
23 suppression hearing, if you will, where the magistrate may  
24 be called in to testify, as well as the officers, as far as  
25 what was said to the magistrate prior to the issuance of the

1 warrant.

2 I still think you have the obligation, a judge  
3 will have the obligation to review the entire record, to  
4 consider testimony from the magistrate if it's pertinent, to  
5 consider testimony from the officers as far as what was said  
6 to the magistrate, to look at the circumstances of why this  
7 information was not put down in writing within the four  
8 corners of the affidavit, to consider Rule 2003, but to also  
9 consider a good faith exception.

10 MR. ANDRING: Thank you.

11 REPRESENTATIVE WOGAN: Thank you, Bill.

12 Any other questions? Mr. Lewis, thank you very  
13 much.

14 MR. LEWIS: Thank you.

15 REPRESENTATIVE WOGAN: We appreciate your being  
16 here this morning.

17 I believe our next witness will be Peter  
18 Rosalsky from the Public Defenders Association, I assume of  
19 Philadelphia County?

20 MR. ROSALSKY: Yes.

21 REPRESENTATIVE WOGAN: Good morning, Mr.  
22 Rosalsky.

23 MR. ROSALSKY: Thank you. Good morning. Thank  
24 you for inviting me here.

25 Our basic feeling is that if it ain't broke,

1 don't fix it, especially when the thing we're talking about  
2 is the constitutional provision that has honorably withstood  
3 the test of time for 200 years.

4           The amendment House Bill 1502 still provides  
5 that no search warrants shall issue except upon probable  
6 cause and describing the person to be seized or the premises  
7 to be searched. The bill goes on, however, and changes the  
8 amendment such that if there's a violation of the rules --  
9 the rules stay the same, still can't search without  
10 probable cause -- but if there's a violation of the rules,  
11 there's no remedy.

12           Now, we suggest that any right without a  
13 meaningful remedy is really no right at all. And I would  
14 just like to give an example. Suppose we passed an  
15 amendment saying it's unlawful to drive on our highways over  
16 55 miles an hour, but if somebody is driving over 55 miles  
17 an hour, the courts shall not entertain jurisdiction of  
18 speeding tickets. In a situation such as that, you would  
19 have a rule preventing speeding, but if the courts won't  
20 hear speeding cases, then it's as good as having no rule, no  
21 legislation at all on the subject. And that, essentially, I  
22 suggest, is what we're doing here. If you take away the  
23 remedy, then there's not much left of the right.

24           My comments, I think, can be broken down into  
25 two categories. First of all, that the amendment, House

1 Bill 1502, is unnecessary, and the second group of arguments  
2 are that it's bad policy.

3 As to being unnecessary, I would suggest that  
4 under today's standards of evaluating search warrants, the  
5 so-called totality of circumstances test, there is great  
6 deference placed to the expertise of a search warrant, there  
7 are not hypertechnicalities that would offend people of  
8 reason, no matter what side of the liberal or conservative  
9 aisle they're on.

10 The rules now on invalidated search warrants  
11 place great deference to police officers and give all  
12 reasonable inferences to allowing search. So if there was a  
13 time in this Commonwealth when search warrants were viewed  
14 hypertechnically, that date has long since come and gone.

15 A prior speaker spoke about the amendment as  
16 only invalidating search warrants based on technicalities.  
17 Well, I've looked at the wording of the amendment and I  
18 don't see the word technicality there at all. They talked  
19 about an invalidated search warrant, and search warrants are  
20 not, well, search warrants, the good faith exception doesn't  
21 go to just curing so-called technicalities. The basic  
22 premise of a search warrant that there must be probable  
23 cause is out the window as long as the magistrate signs that  
24 search warrant.

25 The example that the district attorney gave as



1 to the cocaine in Philadelphia and he also mentioned, I  
2 believe, the Edwards case, and they both suffered from, I  
3 think, what he perceived as the same defect, that is, lack  
4 of date. Well, really in both those situations, this is  
5 what happened. In order to search a premises, you have to  
6 believe that there's probable cause that there's contraband  
7 there now. If you have probable cause to believe there was  
8 contraband there last week, last month, last year, last  
9 decade or last century, that doesn't give you the right to  
10 search it right now. There's a requirement, and I think a  
11 reasonable one, that before you search my house today, you  
12 have to have some reason to believe today that there's some  
13 contraband in my house. The fact that my son, eight years  
14 ago, might have possessed marijuana, doesn't give you carte  
15 blanche to come and search my house every single day  
16 thereafter.

17           Now, the date requirement in both the example  
18 given as to the cocaine in Philadelphia and in the Edwards  
19 case was that the search warrant said that there was  
20 something going wrong at the house, but there was given no  
21 specification of the date. And what the Supreme Court held  
22 in Edmunds. And I assume, what the trial court held in  
23 Philadelphia, is that if we don't know when the unlawful  
24 actions occurred, if we don't know how ripe they are, we  
25 can't give somebody carte blanche to search a place forever

1 with no end point in time.

2 And that's the underlying reasoning of Edmunds.

3 And I assume also of the Philadelphia case that the  
4 example's given for, and I don't consider that a  
5 technicality. It goes to the basic core question, do you  
6 have reason to believe today that there's contraband there.

7 Now, under this amendment, would it matter? If  
8 a magistrate signed the search warrant, that's the end of  
9 that. And it doesn't just to go to technicalities, the  
10 amendment goes to rescuing any search warrant that's invalid  
11 for any reason.

12 I said that my first remarks would deal with the  
13 fact that the amendment is unnecessary. It's not only  
14 unnecessary but I also suggest that it's not needed.

15 The next speaker will discuss some of the more  
16 recent studies, but the United States Supreme Court in Leon  
17 said that the costs of suppression have not been shown to be  
18 significant. They quote statistics, the majority of Leon  
19 showing that cases have been thrown out of court very, very,  
20 very infrequently because of suppression.

21 The minority, the dissent in Edmunds goes on in  
22 some detail, and I quote that in my letter explaining how,  
23 notwithstanding anecdotes and not withstanding testimonials  
24 from people, from protestants on the issue, that the amount  
25 of cases that get discharged because of adverse suppression

1 rulings are very, very low. And therefore, not only does  
2 this rule make bad sense, but it's not even that needed  
3 because suppression really is like lightening striking. And  
4 no question, no question that this body can see cases that  
5 they thought were poorly decided and probably that were  
6 poorly decided, but again, 95, 99 percent of the time,  
7 suppression is denied. It's not that there are mountains of  
8 evidence and people walking free with that. Suppression is  
9 a very rare occurrence indeed.

10           On top of not being necessary, I suggest this is  
11 bad policy for a number of reasons. On top of the amendment  
12 as it exists now, Article 1, Section 8, the constitutional  
13 provision, gives people a right to be free from  
14 unjustifiable intrusion. If you take away the remedy for  
15 that right, you don't have any right anymore. That was what  
16 I said in my introductory remarks.

17           I think that's a basic flaw with House Bill  
18 1502. If there's no reason to abide by the rule, it's not  
19 going to be abided by. And this doesn't just protect the  
20 guilty. This also goes to protecting the innocent, because  
21 you have to realize, when law enforcement officers realize,  
22 well, an invalid warrant is just as good as a valid one, and  
23 when the magistrate realizes that when they sign an invalid  
24 warrant, it's just as good as valid ones, in other words,  
25 whether the warrant is good or bad doesn't matter, the

1 results are the same. What that's going to do, that's going  
2 to increase the amount of faulty warrants that are being  
3 requested, and it's going to increase the amount of faulty  
4 warrants that are being issued. And the people who are  
5 going to pay for that are not necessarily the guilty. It's  
6 the innocent as well.

7           And that's why it's kind of a funny situation,  
8 in Fourth Amendment or in Article 1, Section 8 context, we  
9 see the cases where the guilty get free, but what we don't  
10 see are the cases where the innocent get unlawfully  
11 searched. If an innocent person gets unlawfully searched,  
12 his case doesn't go to criminal court. If an innocent  
13 person gets unlawfully searched, he doesn't file or she  
14 doesn't file a lawsuit, that case kind of goes away and  
15 there's no publicity. The publicity comes in the criminal  
16 context.

17           I would suggest by way of Article 1, Section 8,  
18 what you're doing is, sure, you're making convictions easier  
19 for the guilty, but you're also greatly increasing the  
20 amount of searches for the innocent. And that's a very  
21 important public policy consideration I would ask that this  
22 body to consider. You're not just talking about criminals  
23 getting free, what you're doing is you're freeing the hand  
24 of law enforcement agents, and that's going to have a  
25 significant impact on noncriminals, on innocent people who

1 get searched.

2 Another policy consideration is what I'll call  
3 the imperative of judicial integrity and that's simply  
4 this. You don't want police to do unlawful acts and that's  
5 why you have Article 1, Section 8. But there's another  
6 equal branch of the government to the executive, that's the  
7 judiciary. And you also don't want the judiciary doing  
8 unlawful acts. And by the judiciary closing their eyes and  
9 saying, well, police, you may have done something wrong but  
10 that's okay with us, introduce that evidence, what you're  
11 doing is you're sanctioning the use of unlawfully obtained  
12 evidence by the judiciary. The courts are allowing evidence  
13 to come in that they say was unlawfully seized. Don't  
14 forget, under this amendment, unlawful acts are still  
15 unlawful. The only difference is the criminal defendant  
16 doesn't get the evidence suppressed. So a court is going to  
17 say, yes, we agree, it was an unlawful seizure, but we can't  
18 do anything about it, Mr. Commonwealth, Mr. District  
19 Attorney, put that evidence in.

20 There's something anomalous about having a  
21 co-equal branch of the government, the judiciary, allowing,  
22 sanctioning the use of unlawful police tactics. And I think  
23 that's significant as to how we want our citizens to view  
24 our judiciary.

25 And finally, I would like to say Pennsylvania

1 doesn't march alone in its rejection of the good faith  
2 exception. It's not that we have a bunch of hotheads on our  
3 Supreme Court. Many state supreme courts have viewed their  
4 own state constitutional provisions, which are virtually  
5 indistinguishable from ours, and they, too, have held as  
6 Pennsylvania has held up until now, that there is no good  
7 faith exception.

8           Don't forget, the good faith exception is a  
9 pretty recent invention of the United States Supreme Court.  
10 If you would read the Leon opinion, you would see that the  
11 Supreme Court majority goes on to say that the lower court  
12 in that case, which was the court of appeals, dared not even  
13 suggest that the evidence should come in under a good faith  
14 exception because it was unheard of at that point. The  
15 Supreme Court in Leon in the mid '80s changed the course 180  
16 degrees when it came up with the good faith exception.  
17 Prior to that, it had not existed, and many states after  
18 Leon said, wait a minute, we're going to hold the line  
19 because for some of the reasons I suggested and for some  
20 other reasons, it just makes bad sense and it's  
21 unnecessary.

22           So we would ask you to, I understand that if you  
23 would draw sides, there's no question that law enforcement  
24 interests would be in favor of the amendment and if you  
25 would draw sides the criminal bar, the liberal interests

1 might be against it. But I would ask you to look beyond  
2 that, and just to say as a question of policy, do we really  
3 want to mess significantly with something that's worked  
4 honorably for 200 years. Thank you.

5 REPRESENTATIVE WOGAN: Thank you, Mr. Rosalsky.  
6 I have a question or two. You talk about this rule having  
7 stood the test of time over 200 years. I kind of liked  
8 that, because it seems to enlist Thomas Jefferson and James  
9 Madison to your position, but I quite frankly don't  
10 understand what you mean when you say that. We didn't have  
11 an exclusionary rule even in the federal system, I  
12 understand, until Weeks vs. United States in 1914, and till  
13 Matt vs. Ohio in 1961, there was no such thing as the  
14 exclusion of evidence in the state systems.

15 So I guess my question would be, what do you  
16 mean when you talk about this rule having stood the test of  
17 time for 200 years? What rule are you talking about? Since  
18 the exclusionary rule is certainly of a recent vintage, not  
19 as recently as the 1984 case, United States vs. Leon, that  
20 brought us back to having a good faith exception, but what  
21 exactly is it that you mean when you talk about this rule  
22 being around for so long?

23 MR. ROSALSKY: Leon did not bring it back  
24 because there was good faith exception. The good faith  
25 exception did not exist until Leon in 1984, I guess it is.

1 Therefore, I'm suggesting that this perception that a  
2 warrant that's invalid is nonetheless okay if a magistrate  
3 in good faith issues it, it's a novel proposition at the  
4 time that Leon made it. And Pennsylvania prior to that did  
5 not allow, did not say, let's call a bad warrant good if a  
6 magistrate in good faith signed it. So that's what I mean.

7 I understand that the exclusionary rule started  
8 in the federal system in the teens. You said 1914, I assume  
9 that's the correct date. And so therefore, the remedy of  
10 suppression wasn't around 200 years ago, but the principle  
11 that a warrant must have probable cause to be valid, and an  
12 invalid warrant doesn't become valid because somebody signs  
13 it, those principles have been around.

14 REPRESENTATIVE WOGAN: You're talking about this  
15 really when you're referring to a period of time from Matt  
16 vs. Ohio, 1961, until United States vs. Leon in 1984, when  
17 the law in the federal level existed as you would like it.  
18 Isn't that correct?

19 MR. ROSALSKY: Yes, if the federal government at  
20 some point said things aren't working and in order to ensure  
21 compliance with the Fourth Amendment, we are going to  
22 exclude evidence and we're going to require the states to do  
23 something. States don't have to exclude evidence but they  
24 have to do something, and Pennsylvania did as the other  
25 states and said, well, we'll try your system, federal



1 government, we'll try excluding evidence, so that's  
2 correct. You didn't have exclusion of evidence in 1793, no  
3 question about it.

4 REPRESENTATIVE WOGAN: Nor did we in the state  
5 system in 1960.

6 MR. ROSALSKY: I don't know the answer to that  
7 question. I'm sorry. I don't know the answer to that  
8 question.

9 REPRESENTATIVE WOGAN: Okay. Supreme court  
10 decision is, my understanding starting in, well, even  
11 starting before United States vs. Leon, have admitted that  
12 exclusionary rule is a judicially created remedy. Would you  
13 agree with that statement? That's contained in United  
14 States vs. Leon and a number of other United States Supreme  
15 Court cases.

16 MR. ROSALSKY: I think that is the whole  
17 controversy, no question about it. The majority of the  
18 Supreme Court in Leon said exactly that, very vocal minority  
19 said you're wrong, and that the exclusionary rule is based  
20 upon many things which I listed in my discussions.

21 The Pennsylvania Supreme Court agreed with the  
22 minority of the United States Supreme Court, as did other  
23 states. So that's correct, Leon said that it's a judicially  
24 created remedy, but the dissenters there and the highest  
25 courts of other states said that that was rewriting history,

1 which I have read all the cases last week prior to coming  
2 here, and there were many cases before Leon which held that  
3 the exclusionary rule is not simply a remedy but it's part  
4 of the underlying right. You have a right not to be  
5 searched in violation of the Fourth Amendment and you have a  
6 right not to have that evidence introduced against you. And  
7 that's how it was viewed in many earlier cases.

8 REPRESENTATIVE WOGAN: But that's not how it's  
9 used now by the United States Supreme Court.

10 MR. ROSALSKY: Correct.

11 REPRESENTATIVE WOGAN: Okay. You mentioned that  
12 the introduction of the type of evidence that I would like  
13 to see introduced would take it against the integrity of our  
14 courts, against the judicial integrity. But isn't it true  
15 that this type of evidence is already admissible, say, in  
16 front of grand juries? Do you think that that means that  
17 there's a lack of integrity in the grand jury process in the  
18 United States?

19 MR. ROSALSKY: I think that when you say to a  
20 judicial system, evidence that's unlawfully obtained, you  
21 can use, what you're saying is that the ends justify the  
22 means, and what you're saying is that the judicial system is  
23 not part of the government of Pennsylvania which is  
24 dedicated to preserving the right to integrity. To say that  
25 police, you can't do unlawful things, but if you do it,

1 well, jury, yeah, you can get it into evidence and you can  
2 base your conviction upon that. To me, that strikes me as  
3 being peculiar and talking out of both sides of our mouth,  
4 because Article 1, Section 8, is applicable to all sections  
5 of government.

6           The police are generally the people who enforce  
7 the criminal laws, but not only the executive but the  
8 judiciary and the judicial all have an obligation to abide  
9 by Article 1, Section 8, and I think it's anomalous to say  
10 to the judiciary, judiciary, you can allow illegally seized  
11 evidence to be used in your proceedings.

12           And that perception was the basis, going back to  
13 one of your original questions, that was the basis for the  
14 original executionary rule in Weeks. It was that  
15 something's wrong with telling police you can't do  
16 something, but once they do it, what they can't do, the  
17 judiciary say, come on in, let's use it all. That was  
18 perceived to be unjust.

19           REPRESENTATIVE WOGAN: Getting back to my  
20 question, does that mean you think it's presently a bad  
21 policy that's in effect, that this type of evidence, this  
22 good faith evidence could be used in the grand jury  
23 proceeding? Do you think the United States Supreme Court  
24 and the state courts which have ruled on this are wrong?  
25 Yes or no?

1           MR. ROSALSKY: I don't think Pennsylvania has  
2 ruled on it, and I would say, now that doesn't offend me  
3 because I think there's something fundamentally different  
4 with the proceeding to determine someone's guilt and  
5 innocence.

6           REPRESENTATIVE WOGAN: So then you can use this  
7 type of evidence without destroying the integrity of the  
8 judicial system?

9           MR. ROSALSKY: Okay. If I'm going to stick to  
10 my principle of judicial integrity rationale, then I would  
11 have to stick with it straight through and I can follow it  
12 to its logical conclusion and say, no, they can't use it for  
13 anything in any circumstance for any reason whatsoever. But  
14 I also try to be practical and look at things. And it seems  
15 to me that a grand jury, even though it might be technically  
16 a judicial proceeding, is also largely an investigative  
17 proceeding and since it's largely that, I can say I could  
18 understand allowing evidence seized pursuant to an invalid  
19 warrant to be at a grand jury proceeding.

20           I'm making the distinction and I'm sticking to  
21 my guns to the rational, to the logical conclusion, and you  
22 know, fault me for that, perhaps. But I could understand  
23 allowing it in that situation, but I think criminal  
24 proceedings are a wholly different matter.

25           REPRESENTATIVE WOGAN: Okay. Thank you, Mr.

1 Rosalsky.

2 Any questions from any of the members who are  
3 present? Or the chair welcomes Timothy Hennessey from  
4 Chester County.

5 REPRESENTATIVE HENNESSEY: Thank you, Mr.  
6 Chairman.

7 REPRESENTATIVE WOGAN: Thank you. Our next  
8 witness scheduled will be Larry Frankel, who is legislative  
9 director of the Pennsylvania American Civil Liberties Union  
10 in Harrisburg.

11 Good morning, Mr. Frankel.

12 MR. FRANKEL: Good morning, Representative  
13 Wogan, and Chairman Caltagirone, Representative Hennessey,  
14 members of the staff.

15 I do have prepared testimony which I'll get to  
16 in a minute but I would like to address just one of the  
17 matters that was raised already, and that was the discussion  
18 by Mr. Lewis with regard to the question of probable cause.

19 As I read the amendment to Article 1, Section 8,  
20 it can't eliminate the need for there to be probable cause.  
21 All you need is a search warrant that has been issued by a  
22 magistrate. It might be invalidated for lack of probable  
23 cause, but if a court determines that a police officer  
24 nevertheless reasonably relied on that warrant, the evidence  
25 could come in.

1           So for the District Attorneys Association to  
2 argue that there's going to still be a requirement of  
3 probable cause that is not mandated by the language of this  
4 amendment, and I can envision situations where evidence  
5 would come in even though there was a lack of probable  
6 cause. And I think that that needs to be addressed in the  
7 context of the arguments that have been made as to why there  
8 is little danger with the passage of this kind of an  
9 amendment.

10           The ACLU opposes this particular piece of  
11 legislation because it violates the privacy rights of all  
12 Pennsylvanians, and undermines everybody's right to be  
13 protect from unlawful searches.

14           We are also troubled by the willingness of some  
15 legislators to use the amendment process to override  
16 decisions of the Pennsylvania Supreme Court. We think that  
17 this tendency to approach the Constitution in this manner  
18 minimizes the important role that the Pennsylvania  
19 Constitution has searched for over 200 years.

20           As you've heard, House Bill 1502 proposes an  
21 amendment to Article 1, Section 8, and if that amendment  
22 were documented, evidence could be introduced in a criminal  
23 proceeding even though the evidence was obtained via an  
24 unlawful search. In essence, it proposes an exception to  
25 Article 1, Section 8, which has been interpreted to prohibit

1 the introduction of such evidence.

2           As you've also already heard, in 1991, the  
3 Pennsylvania Supreme Court expressly rejected a suggestion  
4 by prosecutors that a good faith exception be grafted onto  
5 Article 1, Section 8. I would point out that was a 6 to 1  
6 decision. There was only one dissent, there was one  
7 concurrence by Justice Papadakos who didn't feel that they  
8 needed to adopt some of the language that they did, but  
9 there was only one justice of the Pennsylvania Supreme Court  
10 who was prepared to adopt this exception. It wasn't even a  
11 close call by that court.

12           This proposed legislation is nothing but an  
13 attempt to circumvent a decision by the majority of that  
14 court.

15           I would like to review the Edmunds case, some of  
16 the language used therein, to give you a context for your  
17 consideration of the bill.

18           Justice Cappy wrote the opinion in Edmunds and  
19 he offered some historical background on the Pennsylvania  
20 Constitution in general and Article 1, Section 8, in  
21 particular.

22           The Pennsylvania Constitution was adopted in  
23 1776, so it's older than the United States Constitution.  
24 The Pennsylvania Constitution contained a Declaration of  
25 Rights, which was adopted well in advance of the Bill of

1 Rights by the United States. And the Declaration of Rights  
2 in Pennsylvania contained the specific language that Article  
3 1, Section 8 contains now, but it contains language very  
4 similar and is quoted in my testimony and I won't read it to  
5 you.

6           The provision was revised in 1790 and remained  
7 in what is pretty much the form of Article 1, Section 8,  
8 today except for the addition of a phrase "subscribed to by  
9 the affiant," which was added in 1873. But in essence,  
10 Article 1, Section 8, has been in the Constitution for 200  
11 years. I'm not going to argue the exclusionary rule has  
12 been around that long, but the Article 1, Section 8, as it  
13 stands except for that phrase being added, has been around  
14 for over 200 years, so that's the kind of provision you're  
15 talking about amending. Not something recent, but something  
16 that has been there for quite a period of time.

17           The Pennsylvania Supreme Court has repeatedly  
18 found that Article 1, Section 8, embodies a strong notion of  
19 privacy. That is what it is grounded on, not on questions  
20 of police misconduct but protecting the interests of  
21 Pennsylvanians and privacy.

22           The Pennsylvania Supreme Court has steadfastly  
23 safeguarded the privacy interest protected by Article 1,  
24 Section 8. In *Edmunds*, they specifically stated that  
25 Article 1, Section 8, is unshakably linked to a right of



1 privacy in this Commonwealth and they cited a number of  
2 cases for that proposition.

3 In order to fully protect and bolster that right  
4 of privacy, the Pennsylvania Supreme Court has refused three  
5 times in the last few years to interpret Article 1, Section  
6 8, in as narrow a manner as the United States Supreme Court  
7 has interpreted the Fourth Amendment to the United States  
8 constitution. In Commonwealth vs. Edmunds, they declined to  
9 adopt the good faith exception.

10 In Commonwealth vs. Sell, they rejected  
11 suggestions that there be a standing requirement for the  
12 bringing of a motion to suppress. The U.S. Supreme Court  
13 has made rules whereby a defendant must show that they have  
14 some standing to challenge the introduction of evidence.  
15 Our Supreme Court has said we're not going to adopt that  
16 rule. We are going to protect the rights of everybody which  
17 the Article 1, Section 8, is designed to protect, by not  
18 adopting a standing requirement. And that was in a 1983  
19 case.

20 In Commonwealth vs. Melilli, which is a 1989  
21 case, the court held that a pen register device could not be  
22 installed without probable cause, even though it would be  
23 permitted by the United States Supreme Court under the  
24 Fourth Amendment.

25 So those are three occasions within the last 10

1 years where we have seen our Pennsylvania Supreme Court say  
2 Article 1, Section 8, that protects privacy of the citizens,  
3 and we're going to maintain that protection, even though the  
4 U.S. Supreme Court interprets the Fourth Amendment  
5 differently.

6           In Commonwealth vs. Miller in 1986, the Supreme  
7 Court, Pennsylvania Supreme Court in, from my review of the  
8 cases, their best description, the most eloquent defense of  
9 the privacy rights protected by Article 1, Section 8, wrote  
10 about that provision: "It is designed to protect us from  
11 unwarranted and even vindictive incursions upon our  
12 privacy. It insulates us from dictatorial and tyrannical  
13 rule by the state and preserves the concept of democracy  
14 that assures the protection of its citizens. This concept  
15 is second to none in its importance in delineating the  
16 dignity of the individual living in a free society."

17           This Commonwealth has a fine history and  
18 tradition of protecting the privacy interests of its  
19 citizens against the police powers of the state. We have a  
20 wire tap act that is much stronger at protecting the  
21 interests of citizens. We have the cases that I have just  
22 mentioned which show a much stronger interest in protecting  
23 the rights of Pennsylvania citizens.

24           Our Supreme Court has refused to sacrifice the  
25 rights of Pennsylvanians. The highest court of this state

1 has not made civil liberties a victim of the war on crimes.  
2 The ACLU urges you to follow this wise course of action. We  
3 think that you should be just as vigilant in safeguarding  
4 the privacy interests of your constituents, and the  
5 constituents of your fellow representatives who are not  
6 present here today.

7 I have submitted along with my testimony copies  
8 of an article by Dr. Craig Uchida and Dr. Timothy Bynum  
9 entitled "Search Warrants, Motions to Suppress and Lost  
10 Cases: The Effects of the Exclusionary Rule in Seven  
11 Jurisdictions." This was the most recent article that I  
12 could find in, at least listed in the legal literature, from  
13 the Journal of Criminal Law and Criminology, 1991. They  
14 reviewed data that was actually from the mid '80s because  
15 that was the data that had been collected. They reviewed  
16 over 2,000 search warrants and interviewed about 185  
17 individuals from seven jurisdictions, individuals involved  
18 in the criminal justice system in those jurisdictions from  
19 around the country.

20 They studied the effects of the exclusionary  
21 rule on search warrant-based cases. I would draw your  
22 attention to the conclusion. Those of you who are good at  
23 statistics may want to read the whole article, but if you  
24 don't have a statistics background, it can be difficult.  
25 But they, the authors of that article, found that the

1 exclusionary rule served as an incentive to law enforcement  
2 officials to comply with constitutional provisions regarding  
3 search and seizures. They even found that in some of the  
4 jurisdictions, the quality of the search warrants was  
5 improved dramatically since the adoption of the exclusionary  
6 rule, that the magistrates were taking a more aggressive  
7 approach to reviewing, and in some cases, district attorneys  
8 were more involved in developing the warrants and they had a  
9 higher quality of search warrant issued and more effective  
10 searches done as the result of compliance with the rule.

11           They also found from their interviews that the  
12 police were willing to follow guidelines established by the  
13 Constitution, the district attorneys' offices and the courts  
14 when writing search warrants. The police wanted to ensure  
15 that warrants met the standards of probable cause and that  
16 evidence seized would not later be suppressed.

17           So there has been a benefit that the  
18 exclusionary rule has caused by requiring and therefore  
19 encouraging better police work in drawing up the  
20 affidavits. In fact, it probably requires better work by  
21 the magistrates. And another danger which I haven't noted  
22 in my testimony is that because the amendment would provide  
23 as long as the warrants were issued by a neutral and  
24 detached issuing authority, you're taking away the incentive  
25 for the authority to be more critical or even to engage in

1 further training so that they better understand what has to  
2 be in a warrant. And I believe that the evidence as cited  
3 in this article indicates that you have higher standards  
4 being complied with as a result of the rule as it exists  
5 now.

6           The authors also found that the costs of the  
7 exclusionary rule in terms of lost cases were limited, and  
8 that the critics of the exclusionary rule were inaccurate in  
9 their claims as to the high costs imposed on society by the  
10 exclusionary rule.

11           The analysis engaged by the authors demonstrates  
12 that motions to suppress were successful in only 0.9 percent  
13 of the cases they reviewed. Judges sustained motions for 2  
14 percent of the defendants and few cases were, in fact,  
15 lost. And most of these cases, in fact, did not even  
16 involve crimes that normally a criminal sentence of  
17 incarceration would have been imposed.

18           So the costs that are imposed by the  
19 exclusionary rule are not as high as have been indicated by  
20 proponents of relaxing the exclusionary rule.

21           Therefore, in light of the study which  
22 demonstrates that there are tangible benefits to society  
23 through proper police procedure, from adherence to the  
24 exclusionary rule, and minimal costs in terms of lost cases,  
25 it would appear that there is no factual justification for

1 weakening the exclusionary rule. There is no compelling  
2 reason for abandoning the protections provided the  
3 Pennsylvanians by Article 1, Section 8.

4           At the outset of my testimony, I also mentioned  
5 that the ACLU is concerned by a tendency to propose  
6 constitutional amendments to override decisions of the  
7 Pennsylvania Supreme Court. We think that both the United  
8 States Constitution and the Pennsylvania Constitution  
9 represent the collective wisdom of many generations as to  
10 how our government should function. Those documents provide  
11 certain powers to government and offer citizens significant  
12 protections against powerful government. Many of the  
13 provisions in those constitutions, such as the one that we  
14 are considering today, are more than 200 years old. Most of  
15 them have been subject to interpretation by our courts,  
16 interpretations which have changed over the course of time.

17           While we certainly would not take a position  
18 that no constitution should ever be amended, we are  
19 skeptical about amendments which are drafted with the  
20 intention of overruling specific court decisions regarding  
21 constitutional provisions. When such amendments are  
22 offered, we think that the legislature should proceed with  
23 great care. Questions should be asked as to whether  
24 substantial harm will actually occur if the constitution is  
25 not amended. Consideration should be given to waiting for

1 the outcome of further litigation and interpretation by the  
2 courts. The proposed amendment should be analyzed to  
3 determine whether it expands our freedom or restricts our  
4 liberties.

5           Constitutions are meant to be enduring  
6 documents, not the product of transient political  
7 pressures. They should not be viewed as vehicles for  
8 expressing and imposing the will of the majority. Rather,  
9 they should be understood as the fundamental bases for  
10 protecting individual rights.

11           Each of you, well, at least three of you who are  
12 here, have taken an oath in which you promise to uphold the  
13 Pennsylvania Constitution. We urge you to remain true to  
14 that oath and to resist the temptation to tinker with the  
15 work of those who have produced those fine documents. Thank  
16 you.

17           REPRESENTATIVE WOGAN: Thank you, Mr. Frankel.

18           CHAIRMAN CALTAGIRONE: We as policy makers, the  
19 General Assembly, and we really are the policy makers of  
20 this government, it's not the executive, it's not the  
21 judiciary, although I think at times both tend to play in  
22 our backyard with policy, we are the policy makers. We have  
23 a duty and an obligation when we take that oath of office,  
24 also, to, I think in my mind, protect and defend our society  
25 as we now know it. The scourge of drugs that we're coping

1 with in our society today can very well lay the foundation  
2 for the destruction and dismantling of our society, forget  
3 the constitution, because if you have no societal controls  
4 as we once knew, it could be the seeds for the actual  
5 destruction of this country.

6           And I understand where you're coming from about  
7 protecting rights, but the law-abiding citizens and the  
8 people that elected us to these offices, want something done  
9 about the problems that we have to deal with. One of the  
10 major problems, and we just came back from tours of several  
11 facilities, we're continuing going to others, the new state  
12 correctional institutions, which has taken a tremendous  
13 amount of our increasing state resources.

14           The largest increase in the budget that we just  
15 passed in May went to the Department of Corrections,  
16 \$624,000,000. In addition to that, the number of facilities  
17 that we're opening this year will continue to eat up a  
18 tremendous amount of the budget. And the concern that I  
19 have is that we continue to plow in money for these  
20 institutions, taking it away from other social programs and  
21 educational programs, education itself, where we could  
22 hopefully have an impact on society, especially with the  
23 younger people.

24           That being the case, you know, is this a little  
25 price that we pay to hold our society together as we now



1 know it? Or are the seeds being sewn for the actual  
2 destruction of all of our rights by not allowing, not only  
3 in the law enforcement area but the prosecutorial area to do  
4 their job and to help effectively contain and/or control, if  
5 not eliminate, the problem that we're dealing with. I mean,  
6 make no mistake about it, in going to these institutions,  
7 70, 80, 90 percent of the people that are being  
8 incarcerated, and we've gone to the juvenile facilities as  
9 well as the adult state correctional institutions, it's not  
10 getting any better.

11 MR. FRANKEL: I think that if you already have  
12 70, 80, 90 percent of people in the institutions that will  
13 either have a drug problem or they're on drug-related  
14 offenses, that that demonstrates that that's a problem not  
15 with law enforcement of those offenses, but with the fact  
16 that we don't provide sufficient treatment, we don't provide  
17 sufficient incentive for young people to be earning levels  
18 in other ways, not having a problem with finding people who  
19 are committing drug offenses and incarcerating them.

20 I think that this amendment itself is not going  
21 to, you know, if it passed, will beat the drug problem. I  
22 don't think that the statistics and the study which I have  
23 enclosed indicates that you're going to solve the drug  
24 problem. And in fact, I think one of the benefits of the  
25 new United States Attorney General, that she brings from her

1 experience as a prosecutor is that we're not going to solve  
2 the drug problem alone by increasing penalties and  
3 increasing placement of people in prisons. We have to start  
4 addressing the problem of lack of treatment and lack of  
5 other opportunities for young people. And without those  
6 tangible benefits, I don't think anybody has demonstrated  
7 from amending the constitution, that it would actually  
8 reduce the drug problem. I do not think we should be  
9 sacrificing the interests of every citizen against  
10 unreasonable searches and seizures and the right to have  
11 their privacy protected.

12 CHAIRMAN CALTAGIRONE: You keep saying  
13 unreasonable, but according to the legislation that we're  
14 looking at, I think that there's enough safeguards within  
15 that legislation that they're not going to trample on our  
16 rights and they're certainly not going to use the  
17 Constitution as a doormat. You still have checks and  
18 balances.

19 MR. FRANKEL: Let me take you back to a problem  
20 with the Edmunds case. Yes, there was a date missing and  
21 that is why the search warrant was invalidated. But in  
22 fact, the drugs that were found were not even found in the  
23 place that was described. Okay? The police officer and the  
24 magistrate knew each other. The police officer testified or  
25 the magistrate testified, I don't remember which, that the

1 person regularly comes in and we know what they mean.

2           When you have all of the seeds there for a  
3 police officer and a magistrate who have had a close  
4 relationship to, you know, can't that relationship be  
5 abused?

6           These are not merely situations where the lack  
7 of a date was necessarily inadvertent. The date is very  
8 important to determine that we're not talking about an  
9 incident that was six months, a year ago or that the  
10 informant is actually reliable. There are all sorts of  
11 instances, and I think that if one reviews the cases that  
12 led up to the adoption of the exclusionary rule where there  
13 was an abuse of discretion by either the police officer or  
14 the magistrate.

15           And as I pointed out, there is no requirement in  
16 the language of the bill as it is drafted that there had  
17 been probable cause and that the search warrant was  
18 invalidated for some other reason.

19           A search warrant could be invalidated for lack  
20 of probable cause and evidence could still come in as long  
21 as the police officer testified that they relied on that  
22 warrant. They relied on the warrant, not even the  
23 affidavit, they continued to rely on the affidavit, that  
24 that accompanies the warrant in executing the warrant.

25           So there are avenues for all sorts of dangers to

1 occur, and there's not enough protection built in as the  
2 amendment is written.

3 CHAIRMAN CALTAGIRONE: Thank you.

4 REPRESENTATIVE WOGAN: Just a comment on your  
5 comment on Edmunds. The opinion which I have in front of me  
6 indicates that marijuana was seized from two different  
7 places, not only Mr. Edmunds' home, but also a white  
8 corrugated building that Mr. Edmunds obviously had access  
9 to. And you mentioned we don't have to worry about  
10 hypertechnical objections for violations of search warrants,  
11 but Justice McDermott stresses in his dissenting opinion in  
12 Edmunds that although a specific time is not placed in a  
13 search warrant, the search warrant did mention that there  
14 was marijuana growing, that Mr. Edmunds had access to, and  
15 if that's not a hypertechnical objection to a warrant, I  
16 don't know what is. Because a growing marijuana plant  
17 presupposes that it's still there and if it weren't still  
18 there when the state troopers arrived, then obviously it was  
19 harvested and that's why it was in Mr. Edmunds' home and his  
20 white corrugated building.

21 MR. FRANKEL: I would first point out the  
22 footnote 2 in the opinion says the fact contradicts the  
23 statements in the affidavit, and that is in the opinion  
24 which you have just cited. So the facts as they were found  
25 were not consistent with the affidavit that was submitted.

1 And every court, the trial court, the Superior Court and the  
2 Supreme Court said that the affidavit was deficient on its  
3 face.

4 REPRESENTATIVE WOGAN: I still regard that as a  
5 hypertechnical objection, because what that would mean to a  
6 reasonable person is that the informant saw the marijuana  
7 when it was growing and it could have been harvested the  
8 next day because the marijuana ended up in Mr. Edmund's home  
9 and his white corrugated building. That may not be  
10 hypertechnical to you and the ACLU, but it's hypertechnical  
11 to me.

12 MR. FRANKEL: We have a difference as to what we  
13 think is hypertechnical.

14 REPRESENTATIVE WOGAN: Mr. Andring?

15 MR. ANDRING: Yes. Could you explain at the  
16 federal level the interpretation of this good faith  
17 exception under the federal constitution subsequent to  
18 Leon? Has it applied the good faith exception to the  
19 establishment of probable cause? Or is that a base that has  
20 to be established prior to this good faith rule kicking in?  
21 That's an area I'm still not clear on.

22 If at no point before the magistrate or in the  
23 affidavit there is not probable cause established, does the  
24 good faith exception go to that? Or does it kick in only  
25 after that probable cause is established?

1           MR. FRANKEL: I can't answer that with any body  
2 of evidence, or any, you know, citations of my own, so I  
3 probably should decline.

4           What I will do is, I will see if there are  
5 either some cases that specifically talk about it or if  
6 there's been any articles written. Most of what I've read  
7 about has focused on what state courts have done, not what a  
8 federal, either federal cases or the federal courts in  
9 interpreting and reviewing state cases have determined. So  
10 I don't want to prematurely answer the question.

11           MR. ANDRING: How do the state courts address  
12 that issue?

13           MR. FRANKEL: Well, many of the bigger states  
14 have refused to adopt a good faith exception. The other  
15 ones that have adopted good faith exceptions, it's my  
16 understanding that there still must be requirement of  
17 probable cause. But I still would not -- that can vary  
18 based on the language of their specific constitutions. I  
19 only look at the language here, and if I were a judge, I  
20 could reasonably interpret that language to negate the  
21 requirement of probable cause.

22           REPRESENTATIVE WOGAN: The chair recognizes  
23 Representative Hennessey.

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

1           Mr. Frankel, if you would turn back to page 5 of  
2 your prepared statement, I would like to direct your  
3 attention to the concept in the second sentence. The first  
4 full paragraph there, it talks about the exclusionary rule  
5 serving as incentive to police officers to do their work  
6 more thoroughly and completely.

7           A few moments ago, somebody had made the comment  
8 that we don't interfere with the police doing their job, and  
9 it seems to me under our constitutional system, the police,  
10 part of the policeman's job is to understand, at least to  
11 some extent, what constitution safeguards there are that he  
12 has to respect in treating individuals that he encounters on  
13 the street and may wish to arrest. But I'm wondering if you  
14 could give us a little bit more from your point of view what  
15 it is that you talked about or you mean when you talk about  
16 this searching as an incentive to law enforcement. And I'll  
17 have follow-up questions. And by the way, before you answer  
18 that, is there anybody here still from the DA'S office?

19           (No audible response.)

20           REPRESENTATIVE HENNESSEY: Well, I might have a  
21 few more questions that I would prefer to direct to them,  
22 but you go ahead and answer that one, if you would.

23           MR. FRANKEL: From my understanding and my  
24 perspective, the incentive is that the police officers know  
25 that unless they produce a good affidavit to support the

1 search warrant, and execute that warrant in accordance with  
2 the law, there's a chance that the evidence will be thrown  
3 out of court.

4           The police officers in terms of doing a good  
5 job, want to make sure that the evidence that they have gone  
6 to the trouble of obtaining is admissible in court. So  
7 they're more careful in terms of drafting the affidavit of  
8 probable cause that supports the search warrant to make sure  
9 that they list those elements which are necessary,  
10 particularly in cases where informants are involved, where  
11 the law is a little more specific about what kind of  
12 information you have to put down so that you demonstrate,  
13 you, the police officer, demonstrate that the informant is  
14 reliable, that it isn't somebody who just called up on the  
15 phone and you never talked to before.

16           And because police officers understand or should  
17 understand the kind of detail that must be in there to, you  
18 know, to successfully support the affidavit of probable  
19 cause throughout the process, both before the magistrate and  
20 ultimately in court, the warrants are better drafted, the  
21 affidavits are better drafted. And in the article, though  
22 they don't name the cities, they give all the jurisdictions,  
23 some kind of theoretical forest city or port city and I  
24 think somebody probably can figure out what places they're  
25 talking about, but in at least one of those jurisdictions,



1 the district attorney's office actually has a liaison who  
2 helps prepare the affidavits so that they are certain that  
3 if evidence is obtained, it's obtained on a valid  
4 affidavit.

5           Now, what it also results in is that the  
6 district attorneys themselves are more sensitive to looking  
7 at evidence which was obtained to make sure that they can  
8 support it if a search warrant is challenged. So they have  
9 more interest in making sure that the police officers, even  
10 if they don't directly supervise them with regard to each  
11 warrant, understand what has to be in them. So that their  
12 training, the information that they supply back down to the  
13 police officers, includes what needs to be in their  
14 paperwork before the search warrant is issued and the search  
15 conducted so that when they take the case to court, they  
16 know it will be supported.

17           So it's caused the police officers to be more  
18 careful and the district attorneys to be more involved to  
19 make sure that the police are properly carrying out their  
20 duties. All of which leads to searches that are based on  
21 reasonable probable cause, and not searches that are based  
22 on unreasonable situations.

23           REPRESENTATIVE HENNESSEY: I think you  
24 understand what I mean by the concept and I understand it,  
25 but explain briefly, very, very briefly if you can, what the

1 concept of judge shopping is.

2 MR. FRANKEL: Judge shopping means you're going  
3 to go shopping for a judge. I mean, everybody has the right  
4 to do it, whether you're on the defense side or prosecution  
5 side. It happens in civil cases, too. But you go to the  
6 judge you know who might be inclined to give you the result  
7 you want.

8 So if a magistrate has a reputation in the  
9 context of the bill we're talking about, for a lenient  
10 review of the affidavit of probable cause, you as the  
11 prosecutor or the police officer will want to go to that  
12 magistrate because it's more likely you'll have your search  
13 warrant approved and you'll be able to conduct your search,  
14 than you would if you have a more strict magistrate who is  
15 more careful about reviewing the particulars to make sure  
16 that the warrant can be sustained if challenged later on.

17 REPRESENTATIVE HENNESSEY: Now, in all fairness,  
18 I think throughout the system that applies, you inferred a  
19 few moments ago, not only to the prosecutorial side but also  
20 to the defense side, maybe not with regard to the issuance  
21 of a search warrant because the defense isn't involved with  
22 that process, or that point in the process, but certainly  
23 defense lawyers as well as prosecutors try to find ways to  
24 have their case in front of the judges that are more likely  
25 to decide with them. Is that a fair statement?

1           MR. FRANKEL: From my experience, it is quite a  
2 fair statement, that everybody tries to get the judge they  
3 would most like to have hear the case.

4           REPRESENTATIVE HENNESSEY: I'm a little  
5 concerned with the language in this proposed constitutional  
6 amendment that talks about objective good faith -- I'm  
7 sorry, objectively reasonable reliance. Can you tell us  
8 from your point of view what objective reliance means in a  
9 judicial context? As compared to subjective reliance.

10          MR. FRANKEL: My understanding would be that it  
11 means what a reasonable person in the situation, I guess, of  
12 a police officer, had reason to believe, as opposed to what  
13 this particular police officer's reliance was in terms of  
14 objective as opposed to subjective means; what the average  
15 standard reasonable person would do as opposed to looking  
16 what was in this particular police officer's mind.

17          REPRESENTATIVE HENNESSEY: If that's the case,  
18 can you envision many or any, for that matter, circumstances  
19 where a policeman is going to be objective, considered to be  
20 more of an expert in this kind of decision making than a  
21 judge would be?

22                 I guess what I'm asking is, I can sketch out a  
23 scenario where a new district justice takes the bench and is  
24 immediately presented with an application for a search  
25 warrant by experienced officers and to some extent, some

1 people might say that the officers have more ammunition in  
2 their arsenal than the judge who has just been elected and  
3 perhaps has not had much judicial training at all,  
4 especially at the district justice level. But under an  
5 objective standard, it would seem to me that the law that  
6 was interpreted as I expect it might be, might say that the  
7 police officers could rely on a mistakenly issued warrant,  
8 to some extent, might even take advantage of the  
9 inexperience of the district justice judge to get him to  
10 issue something that wouldn't be issued by some other judge  
11 with more experience, and yet it would seem to me that an  
12 objective standard means that you can't raise those  
13 questions.

14 Do you interpret the objective standards the  
15 same way I do? Or am I missing something in the process  
16 here?

17 MR. FRANKEL: I think that, following your  
18 question, I think we agree, and I think here is the  
19 situation that I would sketch out. That you have a police  
20 officer who supplied the information for the affidavit of  
21 probable cause, also being the officer executing the  
22 warrant, and if you were able to make a subjective  
23 determination because of that police officer's years and  
24 years of experience, you would say, an officer who has been  
25 that experienced who supplied that information to the

1 magistrate knew that that was not sufficient for a warrant  
2 to issue, but since you are back on an objective standard  
3 where you can't really examine how much this police officer  
4 knew, what he failed to tell the magistrate, and what he  
5 also knows from his years of experience, you're precluded  
6 from looking into any of that and rather, you look at what  
7 the objective, the reasonable officer would have done and  
8 not the fact that that is the same officer that supplied the  
9 information for the affidavit.

10           So there's two dangers there, that an  
11 experienced officer purposely fails to supply information  
12 that would support or would defeat in actuality the  
13 affidavit of probable cause because he knows it would defeat  
14 it, executes the warrant, and then he said, look, I was just  
15 relying on the warrant, it's what any other officer would  
16 have done, and you can't get into that issue under the  
17 standard here.

18           REPRESENTATIVE HENNESSEY: Well, I wasn't  
19 referring to any kind of hiding of additional evidence by a  
20 police officer or a choice by that officer not to present  
21 it, but I am trying to figure out a situation where the  
22 courts might say that a police officer who relies on even  
23 what he subjectively knows is a bad warrant, is not still  
24 acting in objective good faith, because everybody is going  
25 to tell us, I think, that police officers have to respect

1 the opinions of judges after the warrant has been issued.

2 MR. FRANKEL: I think that's accurate. Maybe I  
3 was painting too Machiavellian a picture, but I think if you  
4 don't have any incentive for the officer who knows that the  
5 warrant is defective, to not go ahead and exercise, execute  
6 it, anyway. You've taken that away.

7 REPRESENTATIVE HENNESSEY: Having talked about  
8 that particular side of the equation, let's talk about the  
9 fact of what happens when the news media reports that a  
10 particular case, generally sensational, if you will, some  
11 sort of a sensational case that the suppression has  
12 occurred. It's fine and good to sit here in the Majority  
13 Caucus room here and talk about the rights of privacy that  
14 the Supreme Court is trying to protect, but it doesn't do  
15 much for the John Q. Public on the street in terms of  
16 enhancing his respect for the system if what he hears from  
17 the news media is that somebody who we think they think is  
18 guilty, goes free on some sort of technicality.

19 How do we strike the balance in terms of trying  
20 to establish some respect on the part of the public and a  
21 recognition on the part of the public for the kinds of  
22 rights that the court system tries to protect if we have  
23 this constant, or I shouldn't say constant, but occasional  
24 but repetitive type of idea that the criminals always go  
25 free in our society because of some sort of

1 hypertechnicality?

2 MR. FRANKEL: I think some of the correction of  
3 that perception, or the ability to correct that perception,  
4 lies with both elected officials who do understand that it  
5 isn't just always hypertechnicalities that cause people to  
6 go free, and others of us who maybe are not elected but have  
7 an ability to address these issues publicly, to explain what  
8 is happening and what is occurring.

9 What I don't think helps correct that situation,  
10 however, is sacrificing anybody's rights in the name of  
11 satisfying a need created possibly by a media that doesn't  
12 necessarily understand what occurred at the motion to  
13 suppress, but to satisfy a need for some rough sense of  
14 justice that does not go through courtroom procedures and  
15 the laws and rules that we have established in this  
16 Commonwealth.

17 So I understand and I think you agree that there  
18 is a need to somehow explain why these rules are important.  
19 The fact that they're not understood, however, does not  
20 justify, in our minds, doing away with the rules that we  
21 believe have served us well.

22 REPRESENTATIVE HENNESSEY: With regard to the, I  
23 think everybody can generally agree that hypertechnical  
24 arguments get on most peoples' nerves, they annoy most of  
25 us. When they're made by the prosecution, they annoy the

1 defense, and vice versa, and they generally annoy the judges  
2 in every case when they hear them. But it seems to me that  
3 in fairness, there has to be some sort of addressing of the  
4 problem of hypertechnical construing, construction by the  
5 courts of warrants so that we don't have the kind of inane  
6 decisions that sometimes come out. And unfortunately, those  
7 are the ones that hit the press and those are the ones that  
8 get blown up and made to seem like the norm, and I don't  
9 know that they are. I think my experience would tell me  
10 that they're not. But how do we address that, if we don't  
11 address it by virtue of some sort of amendment to the  
12 Constitution?

13 MR. FRANKEL: I think that the Pennsylvania  
14 Supreme Court already addressed it when they adopted the  
15 standard in Commonwealth vs. Gates. I believe it is a  
16 totality of circumstances approach to these questions. So  
17 that hypertechnicalities should not prevail, and as Mr.  
18 Rosalsky from the Public Defenders Association testified  
19 with regard to that, that that is what has cured some of the  
20 more egregious examples of courts' reliance on the  
21 hypertechnicalities to throw out entire cases.

22 And I would also point out and it's indicated in  
23 this study that even when motions to suppress are granted,  
24 oftentimes those cases can proceed anyway. Cases are not  
25 totally lost because a motion to suppress has been granted.



1 And that's another perception that we have to correct.

2 REPRESENTATIVE HENNESSEY: Thank you. I don't  
3 know whether I was here when Mr. Rosalsky spoke to the  
4 totality of circumstances test, but I do think it's  
5 important that the panel knows of the existence of that  
6 test. Thank you.

7 MR. FRANKEL: Thank you.

8 REPRESENTATIVE WOGAN: Thank you, Representative  
9 Hennessey.

10 Are there any other questions?

11 (No audible response.)

12 REPRESENTATIVE WOGAN: Okay. Well, thank you  
13 very much, Mr. Frankel.

14 We have a late addition to this morning's  
15 agenda. A Robert N. Tarman, attorney from Harrisburg. Good  
16 morning, Mr. Tarman.

17 MR. TARMAN: I'm here on behalf of the  
18 Pennsylvania Association of Criminal Defense Attorneys. I  
19 just got out of a long trial up in Juniata County and I have  
20 not prepared written comments and I apologize to the panel  
21 for that. And I think Mr. Frankel and Mr. Rosalsky have  
22 eloquently and thoroughly made all the legal arguments here,  
23 and I would also say that I agree with them.

24 I thought maybe I could just throw out some  
25 practical things from my review of this. I'm familiar with

1 the cases. I haven't read them in depth. As I said, I just  
2 got notice yesterday after I got out of my trial on Friday,  
3 that this hearing would be held today.

4 Let me start out and it's already been stated  
5 but I think it's extremely important, I agree with the fact  
6 that a hypertechnicality in this situation does frustrate  
7 the public, it frustrates police. But you know, basically  
8 we're not talking about technicalities. And I've heard  
9 district attorneys and judges and sometimes even defense  
10 attorneys, it's almost becoming common in our vocabulary to  
11 use this word technical defect. In fact, most of the Bill  
12 of Rights is now commonly referred to by a lot of people as  
13 technical defects, and it scares me.

14 When we start talking about the press and how  
15 the press manipulates us all because, even as defense  
16 lawyers, we try to adopt to that in front of a jury, to try  
17 to make an argument that they're going to accept, that's not  
18 phrased in words of technicalities.

19 But I really think that we really have to raise  
20 ourselves to a higher standard and we have to remind  
21 ourselves that these are not technicalities, such as the  
22 time of the warrant and the staleness and these things,  
23 they're not technical at all. The whole idea of the search  
24 warrant is that probable cause should exist, and more than  
25 that, it should be stated to a district justice or an

1 independent authority, and it should be stated at that time,  
2 of course, should be put on the record at that time. And I  
3 don't believe that that's an unreasonable request or an  
4 unreasonable rule.

5           A warrant really isn't that complicated. The  
6 theory of probable cause, putting down the time, the date,  
7 and the things that are required under our Rules of Criminal  
8 Procedure really are not that complicated. There was a  
9 tremendous stir when the Miranda decision came in, and we  
10 talked about how in many cases that caused police to adapt,  
11 and they adapted very well. Even though it's almost to some  
12 extent comical to see the police officer haul out the little  
13 card and read the rights, every policeman has that card, and  
14 they read out those rights, and basically they adhere to the  
15 Miranda very strictly, and even the smallest police  
16 departments do that. And it's become common knowledge among  
17 police that they must do that.

18           It's to the benefit of us all in the sense that  
19 people are made aware of the Fifth Amendment, and also to  
20 the public because when confessions are made, they stick in  
21 court and people who are truly guilty, that evidence can be  
22 used against them. And if not, of course, it's thrown out.  
23 And that does offend a lot of people. If a person makes a  
24 confession, everybody knows it's a confession, and if it  
25 doesn't live up to Miranda, it goes out. And again, we have

1 to rise above the rancor that we hear out there on cases  
2 like that, to really know what we're doing here.

3 I don't think that these rules can exist unless  
4 they're hardfast and uniformly adopted.

5 So I would submit to you that a warrant is not  
6 that complicated, and I don't really see, I think there may  
7 be a little bit of laxness in the whole warrant procedure we  
8 talked about. I'm reversing my argument because I do agree  
9 that these rules such as Miranda shake people up. They  
10 shake us all up. But I believe in the arrest search  
11 warrants, I believe there has been some shoddiness. I know  
12 that many times these warrants are in drug cases, that the  
13 overwhelming use of search warrants is in drug cases,  
14 especially now because drugs, as we all know, are a horrible  
15 problem that affects urban and suburban and rural areas.  
16 But what happens many times in the smaller areas, and maybe  
17 even in the cities, and I know in Dauphin County where I've  
18 practiced as a public defender and a private attorney for  
19 years, that many times the issuing authority is on night  
20 duty, or they're called in, the policeman is in many cases  
21 running the show and you know the I's aren't dotted and the  
22 T's aren't crossed and the basic things that should be put  
23 into the search warrant are not. And now I'm looking at  
24 this as a way to maybe attack the problem of doing away with  
25 these cases, and you know, shake us up on these warrants

1 rather than trying to change our constitution, which again,  
2 I just thoroughly agree with Mr. Frankel and Mr. Rosalsky on  
3 their comments about that.

4           But I'm really wondering if maybe some better  
5 training on the local level with the issuing authorities to  
6 make sure, maybe even have each county have a counsel  
7 available to the issuing authority, or have special training  
8 in this area, I think would eliminate a lot more of these  
9 problems than the effect of this bill.

10           So reform of the procedure, and again, if it is  
11 really a hypertechnical, really a hypertechnical thing such  
12 as a typo or something like that, then the courts are there  
13 to take care of that. And you know, just because there's  
14 some decision of a court that's wrong, I believe the courts  
15 do adjust to that, and under Gray, under the totality of the  
16 circumstances, that is a good safeguard for a lot of these  
17 things, that they can be addressed. It's not like we have  
18 such a rigid standard presently that some of these things  
19 can't be taken care of. And I would submit that the  
20 totality of the circumstances was meant just for that  
21 reason.

22           One, in the area of deterrents, deterrents I  
23 believe applies to us all, whether we're lawyers or  
24 policemen or issuing authorities, but one comment that I did  
25 want to address briefly, even though I told you I didn't

1 read these cases, basic constitutional law, there was a  
2 comment that we didn't have this until Matt vs. Ohio, which  
3 I heard 1961 and that sounds about the right date. But  
4 really, there was a horrible situation prior to 1961 and  
5 before the warrant court, even though many of us would  
6 disagree with some of their decisions. There was a horrible  
7 history of law in this country, and especially in the area  
8 of civil rights, and it was called the silver platter  
9 doctrine. And there was this difference between the federal  
10 and the state that the constitution, of course, applied in  
11 the federal court but it did not apply a lot of the Bill of  
12 Rights and a lot of federal law was not held out for a  
13 couple of states. And many times the federal authorities  
14 would, on a silver platter, hand the prosecution over to  
15 state authorities.

16           And there were some horrible, horrible cases and  
17 horrible decisions, and that was, when you look at deterrence  
18 and you look at the history of constitutional law in our  
19 country, whether you agree with all the warrant court  
20 decisions or not, it really did bring the states into line.

21           Now, on this area of search and seizure, we also  
22 have in our Constitution this very, very thorough provision  
23 for search and seizures, and I'm talking about other areas  
24 of the law.

25           And it's true that it possibly happened more in

1 the southern states than up here, but from a deterrent  
2 standpoint, it was a horrible thing and it happened  
3 frequently. So even though it is true that, you know, we  
4 didn't have some of these things until the 1960s, we should  
5 have had them a long time before that.

6           One of the other things that, when I talk about  
7 really trying to make sure that all these warrants are good,  
8 I remember back in the 1970s when I was chief public  
9 defender, late '70s in Dauphin County, they passed a rule  
10 saying that when somebody was arrested, now, for probable  
11 cause, an arrest had to be put in writing. And there was a  
12 tremendous stir in the newspapers and everybody was  
13 interviewed and virtually everybody that was interviewed,  
14 prosecution and even some defense lawyers, said that they  
15 thought that this was something that might cause criminals  
16 to be left go if it wasn't put in writing. I remember my  
17 comment at that time was, we always look for probable cause  
18 for an arrest, and there was always the rule that if they  
19 didn't have it, you could get a case thrown out. I said now  
20 the police are simply going to have to put it in writing.

21           And that, I believe, that the effect of that  
22 rule has been beneficial to us all. I know that when I go  
23 to a preliminary hearing and even before that, when a  
24 defendant comes into my office, I ask him for his complaint,  
25 and many times the probable cause is attached. If it isn't,

1 I ask for it immediately over the phone from the district  
2 justice. And when I see the probable cause affidavit I can  
3 many times make my decision as to whether or not I'm going  
4 to waive that hearing, whether or not I'm going to tell that  
5 person to plead guilty, because then it's in writing. It's  
6 there for us all to see. And aside from the fact that a  
7 policeman might be lying, if that's not the case, then you  
8 know where you stand in the case, and the same goes for a  
9 search warrant.

10           If the search warrant is done by these simple  
11 rules, which aren't that complicated, if it's filled out  
12 correctly, then the defense lawyer sees it, and in the  
13 majority of the cases, he can tell his client, you better be  
14 prepared to go to jail, I want you to know exactly what  
15 you're facing here, don't spend the extra money for a jury  
16 trial, or I'm not going to ethically charge you for that,  
17 not on this.

18           But in these cases where you don't know or where  
19 you're going to go back later on and try to determine what  
20 the probable cause was after the fact, I believe we're  
21 opening a can of worms. We're going to cause a lot of  
22 problems, especially in an area that's as really serious as  
23 this, an invasion by the police of somebody's home. And  
24 although we do have get this horrible publicity in these  
25 cases, somebody gets off on a technicality. I say this to



1 you, when a search warrant is conducted, a search is  
2 conducted, illegally and wrongly, that also creates a stir  
3 among the public, and that's something that I think you  
4 should consider.

5           Those are just some practical comments. I do  
6 believe that there are many ways that this could be  
7 addressed that would be more effective than trying to change  
8 the Constitution.

9           REPRESENTATIVE WOGAN: Thank you, Mr. Tarman.

10           Just a comment from me on your relating as to  
11 how horrible things were prior to Matt vs. Ohio in 1961 in  
12 this country. Back in 1961, in the neighborhood where I  
13 grew up, it was common back then for people not to lock  
14 their doors of their homes. The teachers in my neighborhood  
15 tell me that the high school just a few blocks from my home,  
16 they relate that the most serious problems they had back  
17 then would be students daydreaming or students being late.  
18 The problems today are what kind of drugs are being used on  
19 school property, what sort of weapons have been smuggled in  
20 on school property.

21           I don't think many people would share your idea  
22 of what was horrible in this country before 1961, and you've  
23 hit the nail right on the head, because when you mention the  
24 warrant court, those decisions, I think, have brought a  
25 revolution in this country where we, especially in our big

1 cities, have seen in many parts of those cities virtual  
2 breakdowns in law and order.

3           Now, don't get me wrong, I don't have the  
4 experience that Representative Hennessey has and I don't  
5 have the experience that you have, but I appear in criminal  
6 courtrooms in my other capacity as an attorney, but as  
7 Representative Caltagirone mentioned earlier, we as  
8 legislators have a duty to all of the members of society,  
9 not just to those who are accused of crimes, and what we see  
10 in our cities and what we see in this country we don't like,  
11 and our people are demanding that something be done about  
12 what they and we observe. I just want to make a comment  
13 that horrible, I guess, is again a descriptive word and we  
14 can disagree with what is horrible, but.

15           MR. TARMAN: I didn't mean in this country was  
16 horrible. I agree with you, really, you and I agree the  
17 breakdown of morality in this country has been a terrible  
18 thing. Before I became a public defender, I was a  
19 schoolteacher, and I saw the breakdown in the schools right  
20 before my eyes. My father had just retired in the city  
21 schools here in Harrisburg at that time, and he was a man  
22 who was a coach and a teacher for years, and used to discuss  
23 it with me, told me what I would see. I saw it, and I  
24 talked to the other faculty members. It hurt me.

25           I agree with you that people can't leave their

1 doors open. We have just a general breakdown in morality.  
2 We can sit here and discuss that for days, the breakdown in  
3 the family system, and you know, law and morality are tied  
4 together. I just made a big point in my case to the jury, a  
5 man was charged with theft and the attorney general tried to  
6 get up and say that morals had nothing to do with it, and I  
7 said it has everything to do with it. It goes right to the  
8 first Ten Commandments. He's either a thief or he isn't,  
9 and to tell me that I shouldn't bring in character witnesses  
10 and talk about the morality of this man is wrong.

11           And I truly agree with you, that we have to find  
12 some answers to this overall breakdown in our country. And  
13 we really see it in the youth. It amazes me even today's  
14 parents worry that they have to keep their kids busy all the  
15 time and which I think is good, but when I was a kid, nobody  
16 had to keep me busy all the time to make, and if I did get  
17 in trouble, I knew what I was going to have to pay for it.  
18 And all these things are, I agree with you, but I just don't  
19 think changing the Constitution is the answer.

20           Even from a lawyer's standpoint, I can give you  
21 about three or four things that I think would be more  
22 effective. But I truly do not, don't mistake me to mean  
23 that things were bad here in country in the '60s and '50s,  
24 or even before that. I'm just saying that there were some  
25 bad decisions in the area of civil rights and when you look

1 at this deterrent under the silver platter doctrine, there  
2 was that incentive to violate, really skirt the law in those  
3 areas.

4 REPRESENTATIVE WOGAN: Thank you, Mr. Tarman.  
5 Some of us are so desperate that if you, at any time, would  
6 like to get those three or four things together and send a  
7 letter to Chairman Caltagirone and the other members of the  
8 committee, I know I, for one, and I think I speak for the  
9 chairman, would welcome such a letter.

10 MR. TARMAN: And I really thank you for letting  
11 me talk here today on the late notice.

12 REPRESENTATIVE WOGAN: Thank you, Mr. Tarman.  
13 Representative Hennessey?

14 REPRESENTATIVE HENNESSEY: Thank you, Mr.  
15 Chairman.

16 Mr. Tarman, before you go, I think you were  
17 probably here when we had the discussion. I had a  
18 discussion with Mr. Frankel about the objectively reasonable  
19 reliance. Can you tell us what it means to you and whether  
20 or not we're on the right track in terms of analyzing that?

21 I guess I'm trying to figure out whether or not  
22 there's any court anywhere that's going to say that police  
23 officers should secondguess a judge after he executes a  
24 warrant if it's an objective standard, and maybe I'm reading  
25 too much into it.

1           MR. TARMAN: I don't know if the goal can be  
2 attained to it. I'm confused by it, to tell the truth. Mr.  
3 Frankel, when he answered it, I was sitting over there  
4 saying, I'm glad that question wasn't asked of me because as  
5 I sat there and read -- I'm confused by it. But as I heard  
6 him explaining it, and I'm going to take the easy way out, I  
7 do believe that it would allow looking at the phrase more  
8 for what I think it means, it would allow a policeman to  
9 come in and use his experience and make decisions and hide  
10 them from the issuing authority.

11           I don't really know as to these words  
12 objectively reasonable reliance, I mean, what's objective is  
13 what he's going to come in and tell you after the search  
14 warrant was already issued, and what he's going to know  
15 after the fact. And whether or not he knew it before the  
16 fact or after the fact in some cases could even get  
17 confused. No record is ever kept of these proceedings, and  
18 I see a lot of problems with it. I mean, it's supposed to  
19 be an objective standard, and I guess the argument could be  
20 made, well, it's objective, it's one, two, three and four so  
21 we're really not opening this up to all kinds of things, but  
22 I'm not so sure that wouldn't happen, anyway. But to tell  
23 you the truth, when I first looked at it, I really wasn't  
24 quite sure what it meant, myself.

25           REPRESENTATIVE HENNESSEY: Thank you. Nothing

1 else, Mr. Tarman.

2 REPRESENTATIVE WOGAN: Thank you once again, Mr.  
3 Tarman.

4 I don't believe we have any witnesses, so with  
5 the chairman's permission, I'm going to enter a letter from  
6 the police commissioner from the City of Philadelphia into  
7 the record. Actually, it's from Thomas Seman, the deputy  
8 commissioner, who wrote the letter on behalf of Commissioner  
9 Neal. I won't take the committee's time up by reading it.

10 Thank you. Good morning, everyone. Thank you  
11 for coming. Appreciate it.

12 (Whereupon, the hearing was concluded at  
13 12:00 noon.)

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1 I hereby certify that the proceedings and  
2 evidence are contained fully and accurately in the notes  
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