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## PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION

April 1, 1996

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**Testimony of Gary Tennis  
on behalf of the  
Pennsylvania District Attorneys Association  
before the  
House Judiciary Subcommittee on  
Courts  
in support of  
Senate Bill 752**

Good morning members of the Judiciary Committee, and thank you very much for the opportunity to comment on this important legislation. My name is Gary Tennis and I am Chief of the Legislation Unit of the Philadelphia District Attorney's Office. I am testifying on behalf of the Pennsylvania District Attorneys Association in support of Senate Bill 752, which gives the Commonwealth the right to a jury trial.

The right to a trial by jury is one of the fundamental rights guaranteed to United States citizens. It is a right provided not only to

those who are charged with crime but also to those seeking a just resolution of contract disputes, tort liability issues, and other civil law issues. Remarkably, the only Pennsylvania citizens denied this right in matters of legal significance are victims of crime and those representing both them and the public safety: the prosecutor.

**Background.** This unjust disparity came to the attention of the General Assembly nearly two decades ago. In 1978, the legislature enacted 42 Pa.C.S. §5104(c) which placed the Commonwealth and the victims of crime on an equal footing with the criminal defendants. This enactment provided:

In criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.

Four years later, the Pennsylvania Supreme Court declared the statute unconstitutional, claiming that the right to trial by jury is procedural and not substantive, and therefore under the control of the Court. Commonwealth v. Sorrell, 500 Pa. 355, 456 A.2d 1326 (1982). The Court held that the General Assembly exceeded its powers by enacting a statute conflicting with the Court's own rule, Pa. R. Crim. P.1101. Moreover, the Court declined to change its rule to reflect the even-handed approach of §5104(c).

**Argument.** The reason for Senate Bill 752 could not be more straightforward. We are simply asking that the victims of crime (and those representing the public) be

placed on an even playing field with the criminal defendant. If a defendant feels that he must have a jury in order to have the fairest possible trial he is entitled to that. Similarly, the prosecutor and victim will, on occasion, determine that their case cannot be fairly heard by a judge without a jury.

For example, a date-rape victim whose case is listed in front of a senior judge who has displayed his hostility to date-rape victims or who has consistently refused to convict date-rape defendants in the past, obviously would wish to have her case heard by a jury. Another example and one that occurs on an almost daily basis in Philadelphia, is the judge (and we have several) who personally opposes the five-year gun mandatories, and subverts the law by refusing to convict any defendant of such crimes, convicting instead of only lesser included offenses.<sup>1</sup> Denied the right to trial by jury, the public and the victims of crime are, in front of such judges, denied a fair trial. This is patently unfair; it causes the criminal justice system to compound the harm already suffered by victims of crime, and justifiably undermines the public's

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<sup>1</sup> This policy of refusing to fairly adjudicate the cases and apply the law is even more severe in the realm of drug mandatories. In a recent case where a defendant was caught red-handed with 25 pounds of marijuana, the court, realizing that the defendant was facing a three-year mandatory, suggested in open court to defense counsel that he argue "mere possession"! Defense counsel first hesitated, questioning whether he could legitimately tender such an absurd argument, but then presented the "mere possession" argument. The judge then convicted the defendant only of mere possession, implicitly finding that the entire 25 pounds of marijuana was exclusively for the defendant's personal consumption.

confidence in the criminal justice system.<sup>2</sup>

Furthermore, criminal defendants in Philadelphia exploit this unfair disparity in order to delay their trials, thereby increasing the prospect that discouraged witnesses may give up on the prosecution. Each time a defendant announces that he wants a jury, or wants to waive a jury, the case is re-assigned to a different program (either the jury or non-jury program) and listed for a later date. So long as the courts permit these dilatory tactics to occur, the prosecution is powerless to bring them to a halt. The Commonwealth could stop this nonsense if it could by simply demand a jury trial.

By way of example, in Commonwealth v. Luis Duprey, CP 9501-1111, the defendant did not request a jury trial until his third trial listing on October 5, 1995. The case was re-listed in the jury program for December 12, 1995, but defense counsel was on trial elsewhere and the matter was continued to February 5, 1996. On that date, the defendant changed his mind and decided to waive the jury. The case was re-listed in the non-jury program, where the defendant changed his mind yet again, and re-demanded a jury. The defendant, who was arrested for his crime on December 14, 1994, is now scheduled for a jury trial on April 23rd of this year. So

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<sup>2</sup> This not just a Philadelphia problem. See attached letters from District Attorneys of Cumberland, Montgomery and Northhampton Counties. Two other instances of the Commonwealth being blatantly denied a fair trial under the law are cited in the letter from Cumberland County District Attorney M.L. Ebert.

long as the Commonwealth does not share Mr. Duprey's right to a jury trial, it has no way to bring this case to trial.

Finally, defendants gain an additional inappropriate advantage when such flip-flopping is permitted to go unchecked: judge-shopping. If a defendant is not happy with the judge assigned to his case, he can simply change judges by changing his mind about whether or not he wants a jury. This is not theoretical; it happens every day. If the Commonwealth is given the right to a jury trial, it will be able to severely limit these opportunistic criminal defendants' ability to judge-shop.

**Other Jurisdictions.** In, Singer v. United States, 380 U.S. 24, 85 S.Ct. 783 (1965), the United States Supreme Court upheld Federal Rule of Criminal Procedure 23(a), which requires that the government must consent to a criminal defendant's waiver of his right to a jury trial, does not encompass the right to decline a jury trial:

A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him.

380 U.S. at 36, 85 S.Ct. at 790.

Twenty-four states and the District of Columbia also give the prosecution the

right to a jury trial.<sup>3</sup> This right is generally given either by state constitutional provisions, by statute, or by rule of criminal procedure, although in some states it seems to be common law rule. The different ways of giving that state the right to a jury trial are probably the result of disagreement among the states as to whether the right to a jury trial is substantive or procedural; some states, recognizing the right as substantive, have allowed the legislature to pass a statute on jury waiver, whereas in other states (such as Pennsylvania) only the Supreme Court may promulgate such a rule.<sup>4</sup>

Those state constitutions which give the government the right to a jury trial generally do so in one of two ways. Most of these constitutions contain language to

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<sup>3</sup> Singleton v. State, 262 So. 2d 768, 769-70 (Ala. 1971) (common-law rule); Alaska Rule of Crim P. 23 (a) (adopted 1975); Arizona Const. Art. 5, §17, Rule Crim. P. 18.1(b), A.R.S. §13-3983; Ark. Stat. Ann. §43--2108 (Repl. 1964); California Const. I §16; Del. Rule of Crim P. 23(a) (adopted 1953); District of Columbia, Super. Ct. Crim R. 23(a) (adopted 1971); Florida Crim. P.R. 3.260 (adopted 1967); Idaho Const. Art. I, §7; Indiana Code Ann. §9-1803 (Burns 1905); 1949 Kansas Sess. Laws §62-1401; Crone v. Commonwealth, 680 S.W.2d 138 (Ky. Ct. App. 1984) (common-law rule, apparently established 1975); Michigan C.L. §763.3, Michigan S.A. §28.856 (both effective 1988) and Michigan C.R. 6.401 (effective 1989); Nevada Const. Art I, §3; New Mexico Rule Crim P. 38; North Dakota, N.D.R.C. §29-1602; Oklahoma Const. Art 7, §20; South Dakota, S.D.C.L. 23A-18-1 (enacted 1978); Tennessee Rule Crim P. 5(c)(2) (effective 1978); Texas, Code of Crim P. Art. 1.13 (adopted 1965); Utah, Rule of Crim P. 17(c); Vermont Const. Chap. I art. 10; Virginia Code Ann. §19.2-257; Wisconsin, Stats. §972.02 (adopted 1949); Wyoming Rule of Crim P. 23(a) (adopted 1968).

<sup>4</sup> See, e.g., Waldman v. Cohen, 125 A.D.2d 116, 512 N.Y.S.2d 205 (1987) (right to jury trial in New York is substantive); Goodman v. State, 644 P.2d 1240 (Wyo. 1982) (right to jury trial in Wyoming is substantive); State v. Garcia, 229 So. 2d 236 (Fla. 1969) (in Florida, jury right is procedural).

the effect that the right of trial by jury may be waived "by the parties".<sup>5</sup> Other states are more specific, conditioning the defendant's waiver of a jury on "the consent of the prosecuting officer."<sup>6</sup>

**Conclusion.** The General Assembly has, over the past fifteen months, demonstrated its commitment to ensuring that victims of crime can obtain justice in our criminal justice system. However, these sweeping legislative changes will not provide justice to victims and to the public unless they have their cases heard in front of impartial fact-finders. Granting the Commonwealth the right to have a jury decide these cases is absolutely necessary to ensure true justice to crime victims and greater protection of the public against crime. The Pennsylvania District Attorneys Association urges the House to approve Senate Bill 752 and to permit the citizens of the Commonwealth to decide whether or not to grant the Commonwealth the right to jury trial.

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<sup>5</sup> See, e.g., Arizona Const. art 6, §17 ("The right of jury trial as provided by this Constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause").

<sup>6</sup> See, e.g., Vermont Constitution, Chapter I, article 10 ("the accused, with the consent of the prosecuting officer entered of record, may in open court, waive his right to a jury trial and submit the issue of his guilt to the determination and judgment of the jury without a jury").



JOHN M. MORGANELLI  
DISTRICT ATTORNEY

## COUNTY OF NORTHAMPTON

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February 23, 1996

The Honorable Thomas P. Cannon  
Chairman of the House Judiciary Committee  
129 Main Capitol Building  
Harrisburg, PA 17120

Attention: Brian Preski

RE: Senate Bill No. 752

Dear Mr. Cannon:

Please know that I am aware that Senate Bill No. 752 is currently in committee. Bill 752 would amend the Pennsylvania Constitution to require that the defendant may only waive his right to a jury trial with the consent of the Commonwealth.

As the District Attorney of Northampton County, I support Bill 752. Bill 752 will provide that the Commonwealth has the same right to a trial by jury as the accused. The right to a jury trial should protect not only the accused but also the community by bestowing upon the citizens of the community the responsibility and the right to participate in a group determination in which twelve members of the community unanimously agree on a verdict.

Recently, our office has been presented with several cases where defendants and/or defense counsel were under the impression that the defendant would possibly receive an advantage by removing the determination of guilt from a jury by requesting a nonjury trial without our consent.

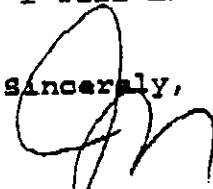
In those cases, I believe that it was a disservice to the citizens of my county, where the defendant was allowed to control the issue as to whether or not his case would be heard by a jury of his peers.



The Honorable Thomas P. Gannon  
February 23, 1996  
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In the event that I can be of any assistance to your  
Committee regarding this matter, I will make myself available at  
your convenience.

Sincerely,



JOHN M. MORGANELLI  
District Attorney of  
Northampton County

JMM/js



**OFFICE OF THE DISTRICT ATTORNEY**

MICHAEL D. MARINO  
DISTRICT ATTORNEY

BRUCE L. CASTOR, JR.  
FIRST ASSISTANT DISTRICT ATTORNEY

OSCAR P. VANCE  
CHIEF COUNTY DETECTIVE

ANNE C. METZ  
OFFICE ADMINISTRATOR

**COUNTY OF MONTGOMERY**

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COUNTY DETECTIVE BUREAU (810) 278-3368 FAX (810) 278-3843

February 23, 1996

Representative Thomas P. Gannon  
Chairman of Judiciary Committee  
49 East Wing  
House Box 202020  
Harrisburg, PA 17120-2020

Dear Representative Gannon:

As District Attorney of Montgomery County, I offer my strong support for Senate Bill 752, proposing an amendment to the Constitution of the Commonwealth of Pennsylvania providing that in criminal cases the accused may waive the right to a jury trial only with the consent of the Commonwealth.

The Amendment is of tremendous importance to the entire law enforcement and criminal justice community.

Very truly yours,

MICHAEL D. MARINO  
DISTRICT ATTORNEY

MDM:js

cc: Brian Preski



JOHN M. MORGANELLI  
DISTRICT ATTORNEY

## COUNTY OF NORTHAMPTON

OFFICE OF THE DISTRICT ATTORNEY  
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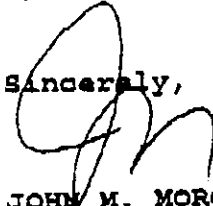
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The Honorable Thomas P. Gannon  
February 23, 1996  
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Sincerely,



JOHN M. MORGANELLI  
District Attorney of  
Northampton County

JMM/js



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M.L. EBERT, JR.  
DISTRICT ATTORNEY

February 23, 1996

Honorable Thomas P. Gannon  
House Box 202020  
Main Capitol  
Harrisburg, PA 17120-2020

RE: Senate Bill 752

Dear Representative Gannon:

It is my understanding that hearings on the above-referenced Bill will be coming up shortly. I have been advised that one of the concerns raised in regard to this measure is the perception that it deals only with a "Philadelphia" problem. Having been a prosecutor for over 14 years, I can tell you that there is nothing further from the truth.

While I was First Assistant District Attorney of Cumberland County, I tried a Homicide by Vehicle While Driving Under the Influence case involving the death of a 60 year old grandmother, who was on her way to her birthday party on a Sunday afternoon. A female drunk driver ran a stop sign and crashed into the victim's vehicle, killing her. The defendant had a blood alcohol content in excess of .20 at the time. In addition to the Homicide by Vehicle DUI Related charge, additional charges of Homicide by Vehicle, Driving Under the Influence, and various summary charges were also filed. Defense counsel waived a jury trial and chose a trial by judge. I sensed what was happening, but had no power to prevent a non-jury trial. The judge found the defendant guilty of every charge except Homicide by Vehicle While Driving Under the Influence, which was the only charge which carried a mandatory sentence. Afterward, the judge told me directly that he simply was not going to sentence this defendant to three years imprisonment as required. She got three months in jail.

I have enclosed a copy of a recent Superior Court opinion filed in a Cumberland County case. In this case, a crack cocaine dealer chose a trial by judge in order to avoid the mandatory penalty. In reviewing the case, you will note that the judge was overruled in his attempt to avoid the Legislature's mandatory sentencing policy with regard to dealing in certain quantities of cocaine. I know that the judge specifically told the defense attorney to take a "waiver" trial in this case to insure that he could thwart the mandatory sentence.

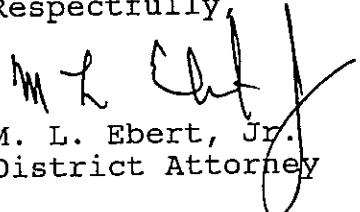
Honorable Thomas P. Gannon  
Page 2  
February 23, 1996

I assure you that these instances are not isolated. It is no secret that many judges dislike the mandatory sentencing policies set by the Legislature and that trial by judge alone allows them to make findings of fact which circumvent mandatory sentences. Obviously, if the Commonwealth had the right to demand trial by jury, this could not occur.

I am presently a member of the governing body of the American Bar Association's Criminal Justice Section. I served as the National Attorney Generals Association liaison to the Criminal Justice Standards Committee, and I know that even the American Bar Association, not particularly known for its pro-prosecution positions, has in its recently-approved Jury Trial Standards, approved a standard which requires the prosecution's concurrence before a defendant may waive the right to a jury trial.

I urge the passage of this amendment. I tell you this is not an isolated "Philadelphia" problem. The purpose of a trial is to find facts. The use of the "waiver" trial by some judges to circumvent the law is simply unfair. The people of this state deserve the same right as a defendant has to a fair trial. Should you wish to discuss this matter further, do not hesitate to call.

Respectfully,



M. L. Ebert, Jr.  
District Attorney

MLE/ses

Enclosure

bcc: Kathleen McDonnell  
Janice Martino-Gottshall