



OFFICE OF THE DISTRICT ATTORNEY
CUMBERLAND COUNTY
ONE COURTHOUSE SQUARE
CARLISLE, PENNSYLVANIA 17013

M.L. EBERT, JR.
DISTRICT ATTORNEY

(717) 240-6210
(717) 697-0371, EXT 6210
(717) 532-7286, EXT 6210
FAX: (717) 240-6164

TESTIMONY OF M. L. EBERT, JR.,
DISTRICT ATTORNEY OF CUMBERLAND COUNTY

BEFORE THE HOUSE JUDICIARY COMMITTEE

APRIL 15, 1998

REGARDING: HOUSE BILL 1521 - SENATE BILL NUMBER 555:
COMMONWEALTH RIGHT TO JURY TRIAL

GOOD MORNING. MY NAME IS SKIP EBERT AND I AM PRESENTLY THE ELECTED DISTRICT ATTORNEY OF CUMBERLAND COUNTY. PREVIOUSLY, I HAVE SERVED AS AN ASSISTANT DISTRICT ATTORNEY IN DAUPHIN COUNTY, FIRST ASSISTANT DISTRICT ATTORNEY OF CUMBERLAND COUNTY, CHIEF OF CRIMINAL PROSECUTIONS IN THE ATTORNEY GENERAL'S OFFICE AND FINALLY EXECUTIVE DEPUTY ATTORNEY GENERAL, IN CHARGE OF THE AG'S CRIMINAL LAW DIVISION. ALL TOLL, I HAVE BEEN A CRIMINAL PROSECUTOR FOR OVER 16 YEARS. ADDITIONALLY, FROM 1993 TO 1996, I WAS A MEMBER OF THE GOVERNING COUNCIL OF THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE SECTION WHICH REPRESENTS OVER 8,000 DEFENSE ATTORNEYS, PROSECUTORS, JUDGES, COURT PERSONNEL, AND LAW PROFESSORS INVOLVED IN THE CRIMINAL JUSTICE PROCESS NATIONWIDE. I SERVED AS THE NATIONAL ASSOCIATION OF ATTORNEY GENERALS REPRESENTATIVE TO THE ABA CRIMINAL JUSTICE STANDARDS COMMITTEE WHICH IS RESPONSIBLE FOR FORMULATING AND PUBLISHING ABA POLICY REGARDING CRIMINAL JUSTICE ISSUES.

TODAY WE AGAIN REVISIT THE RIGHT OF THE PEOPLE OF THE COMMONWEALTH OF PENNSYLVANIA TO HAVE A JURY TRIAL IN CRIMINAL CASES. ON THE SURFACE, A SIMPLE READING OF THE CONSTITUTION OF PENNSYLVANIA CLEARLY STATES "THAT TRIAL BY JURY SHALL BE AS HERETOFORE, AND THE RIGHT THEREOF REMAIN INVIOLETE." YOU WILL NOTE THAT THERE IS NO DISTINCTION BETWEEN THE RIGHT OF A DEFENDANT AND THE RIGHT OF THE PEOPLE. IT IS THE RIGHT TO A JURY TRIAL FOR ALL PEOPLE THAT IS GUARANTEED IN THE CONSTITUTION.

IN FACT, THIS RIGHT WAS CLEARLY RECOGNIZED BY OUR SUPREME COURT WHEN IT FIRST ADOPTED RULE 1101 OF THE RULES OF CRIMINAL

PROCEDURES IN 1968. AT THAT TIME, WAIVER OF JURY TRIAL BY DEFENDANT REQUIRED THE CONSENT OF THE PROSECUTOR. HOWEVER, IN 1973, THE COURT CHOSE, THROUGH IT'S RULE-MAKING AUTHORITY, TO DENY THE PEOPLE OF THE COMMONWEALTH THE RIGHT TO JURY TRIAL BY CHANGING RULE 1101 TO ITS PRESENT FORM. IN 1978, THE LEGISLATURE, REALIZING THE INEQUITY OF THE SUPREME COURT'S RULE, ENACTED 42 PA.C.S. §5104(C) WHICH PROVIDED THAT THE PEOPLE OF THE COMMONWEALTH, "SHALL HAVE THE SAME RIGHT TO TRIAL BY JURY, AS DOES THE ACCUSED." IN REACTION TO THIS LEGISLATIVE ENACTMENT, THE SUPREME COURT, BY THE NARROWEST OF MARGINS, A VOTE OF 4 TO 3, DECLARED THE LEGISLATIVE ENACTMENT UNCONSTITUTIONAL IN THE CASE OF COMMONWEALTH V. SORRELL, 456 A.2D 1326, (1982). JUSTICE MCDERMOTT, DISSENTING IN THAT CASE STATED, "UPON THE THINNEST SEMANTIC GROUND, IN A USURPATION OF AUTHORITY, NAKED OF PRECEDENT, THE MAJORITY IS DILUTING THE RIGHT OF THE PEOPLE TO TRIAL BY JURY. THE COURT HAS PEREMPTORILY DECLARED UNCONSTITUTIONAL AN ACT OF THE LEGISLATURE REAFFIRMING THE PEOPLE'S ABSOLUTE RIGHT TO TRIAL BY JURY."

DISTINGUISHED MEMBERS, SINCE 1982, MY EXPERIENCE IN PROSECUTION HAS REVEALED TO ME THAT THIS SUPREME COURT RULE AND THE DECLARATION CONTAINED IN COMMONWEALTH V. SORRELL, HAS BEEN USED BY CRIMINALS THROUGHOUT THIS STATE TO OBTAIN LENIENT TREATMENT FROM JUDGES WHO ARE OPPOSED TO THE LEGISLATURE'S MANDATORY SENTENCING LAWS. I CANNOT BELIEVE IN THIS DAY AND AGE, UNDER THE SIMPLE PROVISION OF SECTION 6 OF OUR CONSTITUTION, THAT THE PEOPLE OF THIS STATE ARE NOT ENTITLED TO THE SAME TYPE OF

TRIAL GUARANTEED TO A CRIMINAL DEFENDANT.

I ASSURE YOU THAT THIS IS NOT JUST SOME BIG CITY PROBLEM. FOR EXAMPLE, I ONCE TRIED A DEFENDANT FOR CHARGES OF DRIVING UNDER THE INFLUENCE; HOMICIDE BY VEHICLE; HOMICIDE BY VEHICLE WHILE DRIVING UNDER THE INFLUENCE; INVOLUNTARY MANSLAUGHTER; AND A SUMMARY STOP SIGN VIOLATION. THE DEFENDANT IN THAT CASE WENT THROUGH A STOP SIGN AND CRASHED INTO ANOTHER VEHICLE ON A SUNDAY AFTERNOON, KILLING A 60-YEAR-OLD GRANDMOTHER WHO WAS WITH HER FAMILY ON THE WAY TO HER VERY OWN BIRTHDAY PARTY. THE DEFENDANT HAD A .23 BLOOD ALCOHOL LEVEL AT THE TIME. THE DEFENDANT WAIVED TRIAL BY JURY AND CHOSE A BENCH TRIAL. THE DEFENDANT WAS FOUND GUILTY OF DRIVING UNDER THE INFLUENCE, HOMICIDE BY VEHICLE, INVOLUNTARY MANSLAUGHTER AND THE FAILURE TO STOP AT A STOP SIGN. MORE RELEVANT FOR OUR PURPOSES HERE TODAY, THE DEFENDANT WAS FOUND NOT GUILTY OF HOMICIDE BY VEHICLE WHILE DRIVING UNDER THE INFLUENCE, THE ONLY CHARGE WHICH CARRIED A MANDATORY 3-YEAR PRISON SENTENCE. INSTEAD, THAT DEFENDANT WAS SENTENCED TO A PERIOD OF 4 MONTHS IN THE COUNTY JAIL. I WAS TOLD BY THE COURT, "LOOK, I'M NOT PUTTING HER IN JAIL FOR 3 YEARS."

THERE WAS NO QUESTION IN MY MIND THAT THAT VERY EXPERIENCED DEFENSE ATTORNEY KNEW HE COULD GAIN AN ADVANTAGE BY WAIVING JURY TRIAL, KNOWING THERE WAS NOTHING I COULD DO TO PREVENT IT AND NO WAY OF APPEALING THE RESULT. WHILE WINNING A JURY TRIAL IS NEVER A CERTAIN THING, I AM POSITIVE THAT BEFORE AN IMPARTIAL JURY OF THE DEFENDANT'S PEERS, SHE WOULD HAVE BEEN CONVICTED OF ALL OF THE CHARGES GIVEN THE EVIDENCE. THIS TACTIC WAS SIMPLY A WAY TO

AVOID THE MANDATORY SENTENCE. I ASK YOU TO PUT YOURSELVES IN THE POSITION OF THAT GRANDMOTHER'S FAMILY, WHEN I TRIED TO EXPLAIN TO THEM THAT THEY, AS VICTIMS OF A CRIME, WERE NOT ENTITLED TO THE SAME RIGHT TO A JURY TRIAL THAT THE CRIMINAL WHO KILLED THEIR GRANDMOTHER HAD. FOR THIS VERY REASON, THE COALITION OF PENNSYLVANIA CRIME VICTIMS ORGANIZATIONS SUPPORTS SENATE BILL 555.

THIS PROBLEM ALSO OCCURS IN REGARD TO MANDATORY DRUG CASES. I HAVE SEEN CASES WHERE A DEFENDANT CHARGED WITH POSSESSION WITH INTENT TO DELIVER, OR DELIVERY OF COCAINE, TAKES A NON-JURY TRIAL BEFORE A JUDGE IN ORDER TO HAVE THE JUDGE RULE THAT THE QUANTITY OF COCAINE THAT THE DEFENDANT POSSESSED WAS LESS THAN THE AMOUNT REQUIRED FOR A MANDATORY SENTENCE. FOR EXAMPLE, A DEFENDANT WHO POSSESSES 15 GRAMS OF COCAINE WOULD BE FOUND GUILTY OF POSSESSING ONLY 7 GRAMS OF COCAINE BECAUSE THAT WAS THE WEIGHT THE REPRESENTATIVE TESTED SAMPLE WEIGHED. IN SHORT, TO MEET THE STANDARDS REQUIRED BY SOME OF THESE JUDGES, IT WOULD BE NECESSARY TO TEST EVERY LEAF OF MARIJUANA OR EVERY GRAM OF COCAINE SEIZED TO ENSURE THAT THE TOTAL SUBSTANCE WEIGHT WAS TRULY ALL CONTROLLED SUBSTANCE. BENCH TRIALS HAVE REACHED THIS RESULT EVEN THOUGH THE REASONABLE INFERENCES, COMMON SENSE AND APPELLATE COURT DECISIONS DICTATE OTHERWISE.

TO A LESSER EXTENT, THE PROBLEM ALSO SURFACES IN CASES WHERE THE COMMONWEALTH IS REQUIRED TO TAKE AN INTERLOCUTORY APPEAL AFTER A DEFENSE PRE-TRIAL MOTION WHICH RESULTS IN THE SUPPRESSION OF EVIDENCE. IF THE COMMONWEALTH IS SUCCESSFUL ON APPEAL, AND

THE DECISION OF COURT OF COMMON PLEAS IS REVERSED, IT IS NOT UNUSUAL FOR A DEFENDANT TO REQUEST WAIVER OF A JURY TRIAL IN ORDER TO GIVE A JUDGE THE OPPORTUNITY TO RENDER A NOT GUILTY VERDICT WHICH VINDICATES HIS OR HER PRIOR SUPPRESSION RULING. IN SUCH CASES, IF THE COMMONWEALTH RECEIVES A NOT GUILTY VERDICT FROM A JUDGE, THE CASE IS ABSOLUTELY OVER WITH NO APPEAL POSSIBLE. WHILE I DO NOT MAINTAIN THAT SUCH CASES ARE WIDESPREAD, I DO SEE DEFENSE ATTORNEYS REQUESTING MORE NON-JURY TRIALS IN SUCH SITUATIONS THAN IN OTHER CASES WHERE THE JUDGE HAS NOT DECIDED IN FAVOR OF THE DEFENDANT PRE-TRIAL. THE LOGIC OF THIS TACTIC IS QUITE OBVIOUS. FRANKLY, THE DEFENSE ATTORNEY RECOGNIZES THAT HE HAS ALREADY GOTTEN A SYMPATHETIC EAR FROM A JUDGE ON THE CASE, AND THEREFORE, WILL HAVE AN EASIER TIME OF CONVINCING SUCH A JUDGE THAT A NOT GUILTY VERDICT IS WARRANTED, THEREBY VINDICATING THE JUDGE'S PREVIOUS DECISION TO SUPPRESS EVIDENCE. IF THE COMMONWEALTH HAD THE RIGHT TO JURY TRIAL, SUCH PRACTICES COULD NOT OCCUR.

THE CURRENT PROCESS ALSO IMPACTS UPON VICTIMS AND WITNESSES IN ANOTHER MANNER. OFTEN, DEFENDANTS CALL THEIR CASES FOR JURY TRIAL. THE COMMONWEALTH PREPARES, CALLS THE VICTIMS AND ITS WITNESSES INTO COURT AND IS READY TO GO. AT THE LAST MINUTE, THE DEFENDANT WAIVES HIS JURY TRIAL. UNDER MANY COURT SYSTEMS IN THIS COMMONWEALTH, THE CASE IS THEN CONTINUED AND RESCHEDULED. THE VICTIMS AND WITNESSES ARE SENT HOME, AND ASKED TO RETURN AGAIN. IN SHORT, ASKED TO AGAIN DISRUPT THEIR LIVES, MISS MORE WORK, AND DANCE TO THE DEFENDANT'S TUNE. AND REMEMBER, PRIOR TO

THE NEW SCHEDULED WAIVER TRIAL, THE DEFENDANT CAN WITHDRAW THE WAIVER AND ONCE AGAIN DEMAND A JURY TRIAL; FOR HE IS, AFTER ALL, THE ONLY PERSON IN THIS COMMONWEALTH WHO HAS SUCH A RIGHT.

AS I INDICATED PREVIOUSLY, I WAS THE NATIONAL ASSOCIATION OF ATTORNEY GENERALS REPRESENTATIVE TO THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE. IN THAT CAPACITY, I SERVED ON THE TASK FORCE FOR THE THIRD EDITION OF THE TRIAL BY JURY STANDARDS WHICH WERE APPROVED AND PUBLISHED IN 1996. THE TASK FORCE WHICH HAS REVISED THESE JURY TRIAL STANDARDS MET REGULARLY SINCE 1991. THE CRIMINAL JUSTICE SECTION AND THE ABA GAVE IT'S FINAL APPROVAL IN 1995. AS MANY OF YOU ARE AWARE, THE AMERICAN BAR ASSOCIATION IS NO RIGHT-WING, CONSERVATIVE BODY WHEN IT COMES TO CRIMINAL JUSTICE ISSUES. FRANKLY, IN THE EYES OF MOST PROSECUTORS, THE ABA IS VIEWED AS AN EXTREMELY LIBERAL BODY WHEN IT COMES TO DEFENDANTS' RIGHTS. THAT IS WHY FOR THE PURPOSES OF THIS TESTIMONY I THINK IT IS EXTREMELY IMPORTANT TO NOTE THAT THE THIRD EDITION OF THE ABA TRIAL BY JURY STANDARDS STATES AS IT'S FIRST PROPOSITION UNDER STANDARD 1.1 - RIGHT TO JURY TRIAL: "JURY TRIAL SHOULD BE AVAILABLE TO A PARTY, INCLUDING THE STATE, IN CRIMINAL PROSECUTIONS IN WHICH CONFINEMENT IN JAIL OR PRISON MAY BE IMPOSED." THE COMMENTARY TO THAT STANDARD SPECIFICALLY STATES THAT "THIS STANDARD ALSO RECOGNIZES THAT THE AVAILABILTY OF JURY TRIAL IS BENEFICIAL TO THE PROSECUTION AND TO SOCIETY AS A WHOLE, NOT SIMPLY TO THE ACCUSED. ACCORDINGLY, SECTION (A) PROVIDES THAT THE RIGHT SHOULD BE AVAILABLE TO BOTH THE PROSECUTION AND THE DEFENSE." I WOULD HUMBLLY SUGGEST TO THIS

COMMITTEE THAT THE FIVE YEARS OF ANALYSIS GIVEN TO THIS TOPIC BY CRIMINAL JUSTICE PRACTITIONERS NATIONWIDE SHOULD NOT GO UNHEEDED.

THE AMERICAN BAR ASSOCIATION CAME TO THIS CONCLUSION BASED ON THE SOUND LOGIC WHICH IS BEST EXEMPLIFIED BY CHIEF JUSTICE WARREN IN THE CASE OF SINGER V. THE UNITED STATES, 380 U.S. 24 (1965). CHIEF JUSTICE WARREN STATED, "NOT ONLY MUST THE RIGHT OF THE ACCUSED TO A TRIAL BY A CONSTITUTIONAL JURY BE JEALOUSLY PRESERVED, BUT THE MAINTENANCE OF THE JURY AS A FACTFINDING BODY IN CRIMINAL CASES IS OF SUCH IMPORTANCE AND HAS SUCH A PLACE IN OUR TRADITION, THAT, BEFORE ANY WAIVER CAN BECOME EFFECTIVE, THE CONSENT OF GOVERNMENT COUNSEL AND THE SANCTION OF THE COURT MUST BE HAD, IN ADDITION TO THE EXPRESS AND INTELLIGENT CONSENT OF THE DEFENDANT." IN CONCLUSION, A DEFENDANT'S ONLY CONSTITUTIONAL RIGHT CONCERNING HIS METHOD OF TRIAL IS TO AN IMPARTIAL TRIAL BY JURY. THIS AMENDMENT TO THE CONSTITUTION PROPOSED IN THIS BILL CORRECTS OUR SUPREME COURT'S BLATANT REFUSAL TO ACCEPT THE PLAIN WORDS OF OUR CONSTITUTION: THE RIGHT OF BOTH THE PEOPLE AND THE ACCUSED TO A JURY TRIAL. IN THIS COMMONWEALTH, NO ONE SHOULD OBJECT TO CONDITIONING A WAIVER OF THE RIGHT TO A JURY TRIAL ON THE CONSENT OF THE PROSECUTING ATTORNEY AND THE TRIAL JUDGE. 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. WE HAVE LONG RECOGNIZED THE ADVERSARIAL SYSTEM AS THE PROPER METHOD OF DETERMINING GUILT. THE PEOPLE AS A PARTY IN THAT DETERMINATION HAVE A LEGITIMATE INTEREST TO SEE THAT CASES WHICH THEY BELIEVE WARRANT A

CONVICTION ARE TRIED BEFORE THE TRIBUNAL WHICH THE CONSTITUTION REGARDS AS THE MOST LIKELY TO PRODUCE A FAIR RESULT. I TRULY BELIEVE IN THIS COMMONWEALTH THAT TRIBUNAL IS A JURY TRIAL.

IN CONCLUSION, I URGE FAVORABLE CONSIDERATION OF THIS BILL FOR THE FOLLOWING REASONS:

1. FIRST, IT WILL PREVENT COURTS FROM CIRCUMVENTING MANDATORY SENTENCING LAWS BY RENDERING UNFAIR, YET UNAPPEALABLE VERDICTS.

2. SECOND, IT PROMOTES SOCIETY'S BELIEF IN THE FAIRNESS OF OUR CRIMINAL JUSTICE SYSTEM BY GIVING THE VICTIM AND THE PEOPLE THE SAME RIGHT TO JURY TRIAL AS A DEFENDANT.

3. THIRD, IT PROMOTES ORDER AND EFFICIENCY IN THE CONDUCT OF TRIALS BY DENYING A DEFENDANT A LAST MINUTE VEHICLE TO DELAY HIS CASE, THEREBY FURTHER DISRUPTING THE LIVES OF VICTIMS AND WITNESSES.

FINALLY, SUCH ACTION RECOGNIZES THE FIVE YEARS OF STUDY DONE BY THE ABA WHICH RECOGNIZES THAT THE PEOPLE'S RIGHT TO A JURY TRIAL BENEFITS SOCIETY AS A WHOLE.