

**Testimony Before the House Judiciary Committee
Subcommittee on Crime and Corrections
on
Commonwealth's Right to a Jury Trial
House Bill 1521**

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Good afternoon Chairman Birmelin and members of the Subcommittee on Crime and Corrections. I want to thank you for the opportunity to testify in support of House Bill 1521 today and to congratulate Representative Gannon for introducing this important measure in the House of Representatives.

I would like to begin with the history behind House Bill 1521, as well as its counterpart in the Senate, Senate Bill 555, and why this history is relevant today.

In 1935, the state legislature enacted Section 786 of Title 19, allowing a criminal defendant to waive jury trial so long as the judge approved and the prosecution consented. The Act provided, in pertinent part: "In all criminal cases, except murder and treason, the defendant shall have the privilege, with the consent of his attorney...the judge and the district attorney, to waive trial by jury." So, as you can see, a defendant could be tried without jury only if a prosecutor consented.

In 1968, after the Constitution gave the Pennsylvania Supreme Court the authority to promulgate rules of procedure for the courts, the Supreme Court adopted Rule 1101 of the Rules of Criminal Procedure. Rule 1101 read as follows:

In all cases, except those in which a capital crime is charged, the defendant may waive a jury trial with the consent of his attorney, if any, the attorney for the Commonwealth, and approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury.

The comment appended to this rule noted that “requiring both the court and the prosecutor to approve the waiver of a jury trial has been held constitutional.” For this proposition, the comment cited the United States Supreme Court case of Singer v. United States, 380 U.S. 24 (1964).

Five years later, in 1973, the Supreme Court changed Rule 1101 to its present form: It allows any defendant to waive a jury trial and, important for present purposes, it deleted the requirement for the prosecutor’s consent. A defendant needs only the judge’s approval to waive a jury trial. Did the Supreme Court explain why it was changing almost forty years of

law under its relatively new rule-making authority? No. The comment to the rule states simply that “the 1973 modification by the Court...deleted the requirement of the approval of the attorney for the Commonwealth.”

In 1977, after four years experience with this rule, the General Assembly again acted and passed Act 50 which gave the Commonwealth the same right to a jury trial as the defendant. In 1978, this body put identical language in the Judiciary Act Repealer Act at Section 5104(c), which read “In criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.” Although it was worded differently, Section 5104(c) had the same effect that House Bill 1521 will have.

Since Rule 1101 did not require the prosecutor’s consent and Section 5104(c) did, there was a conflict. The Supreme Court resolved the conflict in the 1982 case, Commonwealth v. Sorrell.

In that case, the Commonwealth argued that the right to a jury trial was a substantive right of the Commonwealth. But the Supreme Court said that jury trial waiver was a matter of court procedure, over which the

Supreme Court had total rule-making authority by the tenth section of the fifth article of the Constitution. Since Section 5104(c) conflicted with the Supreme Court rule, the Court found Section 5104(c) unconstitutional.

This historical background is significant for two reasons.

First, the principle embodied in House Bill 1521 is not a new legal concept. It represents the resumption of a law that had been long standing in Pennsylvania jurisprudence since at least 1935. Only in 1973, a time of great experimentation in the legal system, did the law change.

Secondly, the people of the Commonwealth support the law the way it was before 1973. Three times the people, represented by their legislators, have spoken. Each time they said that the defendant's motion to waive a jury trial ought to be subject to the prosecutor's consent. This bill would represent the fourth time, and, hopefully, the final time, that the people will have to speak on this issue.

It is the sworn duty of every prosecutor in the Commonwealth to seek

justice, not merely convictions. That duty is sometimes hampered when the Commonwealth cannot present its case to a jury of the defendant's peers from the community where the crime occurred. House Bill 1521 would give the Commonwealth that ability. It should be pointed out that it is only in criminal cases that the Commonwealth is denied a right to a jury trial. In civil cases, the Commonwealth may demand a jury trial just as any other litigant.

I do not believe that prosecutors will often object to a defendant's request to waive a jury trial. The consensus is that, by and large, the judges in the Commonwealth conduct trials that are fair to both the defendant and the Commonwealth. However, there may be a particular case in which a certain judge, with an otherwise impeccable and honored record, may be considered as unduly biased in favor of the defense or against the prosecution because of his or her past actions from the bench. In such instances, it would be appropriate for the prosecution to object to the defendant's jury trial waiver motion in order to protect the rights of the victim and the public.

Such an objection should not be seen as the prosecution attacking the defendant's rights. As recently as February of this year the same Supreme Court that in 1973 took away the Commonwealth's right to demand a jury trial in a criminal case reiterated, in the case of Commonwealth v. Whitney [_ Pa. _ , _A.2d_ (1998), 1998 WL 79066(Pa.)]-- a capital case--that "[w]hile a defendant has a constitutional right to a trial by jury, he has no such right to a bench trial." And the Pennsylvania Supreme Court has relied on the United States Supreme Court's Singer decision for that proposition! [Commonwealth v. Miller, 541 Pa. 531, 553, 664 A.2d 1310,1321 (1995).] Yet a mere court-made right can deprive the Commonwealth of the ability to put its evidence before a jury.

Nor is the prosecution attacking the judge's record. In these few cases, the prosecution is only seeking a level playing field on which to participate in an orderly trial seeking justice. In the words of former Chief Justice Nix, who dissented from the Sorrell decision, House Bill 1521 merely creates "in the Commonwealth a corresponding right possessed by the accused."

A prosecutor, moreover, will be held accountable for his or her decisions to object to a jury trial waiver motion. As with all other aspects of a criminal trial, the prosecutor's exercising the Commonwealth's rights under this provision will be placed on the record for public review. An additional layer of accountability exists, of course, in the fact that prosecutors are elected officials.

For these reasons, I support House Bill 1521, as well as its counterpart, Senate Bill 555. They do not represent a radical departure from Pennsylvania jurisprudence. Rather, they represent the resumption of a long standing part of that jurisprudence. The people of the Commonwealth of Pennsylvania have supported this concept for several decades. These bills do not infringe on the rights of a criminal defendant. They only ensure that a criminal trial will be a fair pursuit of justice.

I would like to close with a quote from former Chief Justice Earl Warren of the United States Supreme Court from the case of Singer v. United States, the case referred to in the 1968 Comment to Rule 1101. Chief Justice Warren, the leading proponent of the rights of the accused

said:

“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 fact-finding 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.”

Thank you for allowing time for these remarks. I will be pleased to answer any questions.