

ORIGINAL

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
JUDICIARY SUBCOMMITTEE HEARING

IN RE: HOUSE BILL 569, VOLUNTARY ALCOHOL INTOXICATION
AND VOLUNTARY DRUGGED INTOXICATION

VALLEY FORGE TOWERS COMMUNITY ASSOCIATION
CLUB HOUSE
4000 VALLEY FORGE CIRCLE
KING OF PRUSSIA, PENNSYLVANIA

FRIDAY, JUNE 22, 2001, 9:02 A.M.

BEFORE:

HON. LITA INDZEL COHEN, CHAIRWOMAN
HON. KATE HARPER
HON. CONNIE WILLIAMS

ALSO PRESENT:

JOHN CHERRY
KAREN DALTON
BERYL KUHR
MICHAEL RISH

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1 CHAIRWOMAN COHEN: Good morning. The
2 hearing from the Pennsylvania House of
3 Representatives Judiciary Subcommittee on Crime and
4 Corrections will come to order on this Friday, June
5 22, 2001. We are in the Valley Forge Towers
6 Community Association's Club House in King of
7 Prussia, Pennsylvania. Welcome to all of you.

8 I think that the first order of
9 business is that we will introduce ourselves. I am
10 State Representative Lita Cohen of the 148th
11 Legislative District here in Montgomery County.

12 To my right, John.

13 MR. CHERRY: I'm John Cherry. I'm
14 Judiciary Staff.

15 MS. DALTON: Karen Dalton, counsel to
16 the Committee.

17 MS. KUHR: I'm Beryl Kuhr.

18 MR. RISH: Mike Rish, Executive
19 Director.

20 CHAIRWOMAN COHEN: Thank you.

21 We are here today to take testimony
22 relative to House Bill 569. Unfortunately, the
23 Members -- the prime sponsor of the bill is unable
24 to be here. We are expecting other Members of the
25 House and Subcommittee on Crime and Corrections of

1 which I am the Chair. However, we were in
2 legislative session last night or this morning until
3 well past 2 in the morning in Harrisburg. So it is
4 doubtful that we will have as many Representatives
5 here to hear your testimony. So my apologies on
6 that.

7 House Bill 569 is sponsored by
8 Representative Chris Sainato from Lawrence County.
9 We know what current Pennsylvania law is concerning
10 these issues. I will just summarize a bit, because
11 this House Bill 569 amends Section 308 of Title 18
12 of the Pennsylvania Consolidated Statutes.

13 It deals with voluntary alcohol
14 intoxication and voluntary drugged intoxication and
15 whether or not such conditions are admissable as
16 defenses to a criminal charge, except, of course,
17 murder in the first degree.

18 There are currently under current
19 Pennsylvania law various standards concerning
20 voluntary alcohol intoxication and voluntary drugged
21 intoxication and whether or not this condition or
22 these conditions are admissible in court to negate
23 the element of intent or the mental state of intent.
24 And all of these are conditions, except dealing with
25 murder in the first degree, and whether or not these

1 conditions can be used as a defense to reduce murder
2 from a higher degree to a lower degree.

3 What House Bill 569 does is not allow
4 the introduction of evidence of this voluntary
5 alcohol intoxication and voluntary drugged
6 intoxication to reduce a higher charge of murder to
7 a lower charge of murder.

8 Before I introduce the first person to
9 testify, I want to thank the folks at Valley Forge
10 Towers for inviting us here, and I want to welcome
11 the residents who came into this room looking for an
12 exercise class. We hope we'll exercise your brain,
13 and maybe we will do some push-ups or something when
14 we finish our testimony. But we do want to welcome
15 you and thank you for your hospitality.

16 The first person to join us is a
17 familiar face and certain our neighbor, is our own
18 Montgomery County District Attorney, Bruce Castor.

19 District Attorney Castor, welcome. We
20 appreciate your being here. And you have presented
21 testimony. You may either read your testimony or
22 just give us your thoughts and discussions, whatever
23 will please you.

24 MR. CASTOR: Thank you. I appreciate
25 the Subcommittee coming here to very safe Montgomery

1 County for our convenience.

2 The testimony that I have submitted is
3 more extensive than the testimony that I prepared to
4 offer that I thought I would just read just to get
5 it out, and then I would answer any questions that
6 the Committee might have.

7 CHAIRWOMAN COHEN: That's fine.

8 MR. CASTOR: I will ask the
9 Committee's permission after I've completed
10 testimony if I might be excused because I'm leaving
11 on vacation today. And I am quite certain that my
12 colleagues on the other side will be very clear in
13 their opposition to my testimony, but I think that
14 this is not a particularly complex issue, although
15 it is an important one to the citizens of
16 Pennsylvania.

17 So if I may begin?

18 CHAIRWOMAN COHEN: Yes, please. And
19 we thank you for taking time for your vacation.
20 Please apologize to your family for us.

21 MR. CASTOR: I blamed it on you.

22 As you know, I'm Bruce Castor,
23 District Attorney of Montgomery County, and I am
24 pleased to be here today to represent the
25 Pennsylvania District Attorneys' Association.

1 Thank you for allowing me to address
2 the Committee on this important legislation, House
3 Bill 569, which would abolish the so-called
4 voluntary intoxication defense. It is unanimously
5 supported by the Pennsylvania District Attorneys'
6 Association.

7 This much-needed piece of legislation
8 amends Section 308 of Title 18 to remove the
9 Defendant's ability to introduce evidence of
10 voluntary drunkenness or drug impairment to avoid a
11 conviction of first degree murder.

12 Good morning, Representative Williams.
13 As I mentioned, I submitted formal testimony and
14 would like to address some salient points here
15 today.

16 As prosecutors, we have a
17 responsibility to ensure the public safety. It is
18 our duty to protect innocent members of our
19 communities and seek justice for victims of crime.
20 Justice should always be balanced with fairness,
21 allowing the accused to put on a proper defense. We
22 must guard against the use by Defendants of archaic
23 and incongruous laws, however, to avoid criminal
24 liability.

25 Our sympathies must lie not with the

1 person who becomes inebriated intentionally and then
2 slays an innocent person, but rather with the
3 victims of such heinous crimes. Getting drunk
4 should not be a license to kill.

5 To prove a person guilty of any crime,
6 the prosecution must show that the Defendant had the
7 requisite intent or mens rea. The level of intent
8 is different depending on the crime. In
9 Pennsylvania, a person is guilty of the crime of
10 murder of the first degree if he commits an
11 intentional killing; that is, a killing by means of
12 poison, or by lying in wait, or by any other kind of
13 willful, deliberate and premeditated murder.

14 The prosecution must prove the person
15 had a specific intent to kill. The Defendant may
16 present any and all relevant evidence, even evidence
17 of intoxication. Neither the burden on the
18 Commonwealth nor the evidence available to the
19 defense will change with the amendment offered in
20 House Bill 569. What will change is the confusion
21 created by this outdated statute.

22 At the outset, I would like to make
23 clear that we are dealing with a principle of
24 evidence, not a fundamental right to present a
25 defense. When the legislature and the courts

1 designed a way a jury hears evidence, they must do
2 so in a way that a lay person can understand.

3 House Bill 569 would remove the confusion jurors
4 face when they are instructed as to the use of the
5 voluntary intoxication evidence.

6 As a practical matter, what the jury
7 hears is that if a Defendant is drunk or high, he
8 gets a pass. Opponents of this proposed legislation
9 would argue that the current law is necessary
10 because an intoxicated person cannot form the
11 specific intent to commit a murder in the first
12 degree. But House Bill 569 would not prevent a
13 Defendant from presenting evidence of diminished
14 capacity. It would, however, prevent the jury from
15 erroneously thinking that the consumption of alcohol
16 or drugs leads to an automatic reduction in the
17 charge and degree of murder.

18 Existing case law is consistent with
19 the provisions of House Bill 569. The Pennsylvania
20 Supreme Court has held that Section 308 allows
21 voluntary intoxication to be introduced to reduce
22 the crime of murder from first degree to third
23 degree, but that evidence of intoxication does not
24 by itself negate otherwise sufficient evidence of
25 specific intent. The Defendant must show that he

1 was overwhelmed by the intoxicant to the point of
2 losing his faculties, which is a question for the
3 fact finder.

4 Just because the Defendant can prove
5 he consumed alcohol and/or controlled substances
6 does not prove that he was intoxicated to the point
7 of not being able to form the intent to kill. Under
8 the proposed statute, a Defendant would be able to
9 offer evidence in an effort to prove that he was
10 intoxicated to the point of losing his faculties;
11 e.g., unconscious and unable to walk or load or aim
12 the gun or, as we might say in common parlance,
13 falling down drunk.

14 The prosecution could also present
15 evidence to counter the Defendant's claims; for
16 example, that he was able to drive to the victim's
17 house, the witnesses said his speech was not
18 slurred, his motor skills were not impaired, perhaps
19 he was able to load and unload the gun.

20 A Defendant may claim that he does not
21 remember the killing so, therefore, must have been
22 too intoxicated to form the requisite mens rea.
23 Simply because the Defendant does not remember his
24 actions after the fact does not mean that at the
25 time he committed the crime he was not able to form

1 the requisite intent.

2 There is a big difference between
3 intending to do something and remembering that you
4 did it. This also creates confusion for jurors.

5 I point out that first degree murder
6 is the only crime where Defendants are afforded an
7 excuse for their crime. The intoxication defense is
8 not available for crimes of assault, for rape, for
9 robbery or theft or arson or any of the other major
10 felonies that we face on a day-to-day context in
11 court. Why should it be allowed only in the most
12 egregious crime?

13 This is not allowed at trial when
14 there is a murder committed during the commission of
15 a felony. If an intoxicated Defendant goes into a
16 store intending only to rob it and his accomplice
17 shoots and kills the clerk, the Defendant is guilty
18 of second degree murder and is sentenced to life in
19 prison. The Defendant cannot present evidence of
20 his intoxication to reduce the conviction and
21 sentence. The Defendant is not convicted of a
22 lesser offense or lesser degree of murder, even if
23 he shows that he did not know that his accomplice
24 had planned to kill the victim.

25 On the other hand, if a Defendant

1 purposely becomes inebriated and shoots and kills
2 his wife, he is entitled to present evidence that he
3 was intoxicated. The jury is instructed to consider
4 this evidence, and is thereby led to believe that
5 this entitles the Defendant to a reduced sentence.
6 A third degree murder conviction carries a maximum
7 of 20 to 40 years in prison, as opposed to a
8 possible sentence of death or life imprisonment for
9 first degree murder. And parenthetically further,
10 third degree murder sentence of maximum 20 to 40 has
11 no minimum. So unless it was committed during the
12 course of a shooting which has a five year mandatory
13 minimum, there would be no minimum sentence at all.

14 This is a glaring inconsistency in the
15 law. House Bill 569 would cure this unfairness.

16 The voluntary intoxication excuse is
17 incongruous in other ways. It allows a person to
18 become voluntarily intoxicated, commit the most
19 heinous crime and avoid true accountability. We
20 need to ensure that every person be held criminally
21 liable for his crime, even if that person is drunk
22 or under the influence of drugs.

23 It is our job as law enforcement to
24 protect the public from harmful criminals, and to
25 see that victims of crime receive justice. A family

1 member of a murder victim doesn't much care whether
2 the person who killed his or her loved one was drunk
3 or sober. Why should the Defendant be treated
4 differently by the criminal justice system based on
5 his level of sobriety?

6 It is simply good public policy to
7 hold a person accountable for their actions. If an
8 epileptic who knows that he is prone to seizures
9 gets behind the wheel of a car, suffers a seizure,
10 and causes the death of another person, we hold him
11 responsible for that death. If a person knowingly
12 gets drunk or high and shoots somebody but does not
13 kill the victim, he is not allowed to excuse his
14 crime with the voluntary intoxication defense. But
15 if the victim dies, the Defendant can introduce
16 evidence of his voluntary intoxication and avoid
17 full responsibility. It is difficult to make sense
18 out of that.

19 House Bill 569 does not take away any
20 right of the Defendants but simply addresses the
21 fairness of an evidentiary issue. In 1996, the
22 United States Supreme Court examined a Montana
23 statute prohibiting evidence of voluntary
24 intoxication as a mens rea defense.

25 The Montana statute is very similar to

1 that proposed in House Bill 569. It provided that
2 voluntary intoxication may not be taken into
3 consideration in determining the existence of a
4 mental state, which is an element of the offense.

5 After an examination of the
6 intoxication defense in its historical context, the
7 Supreme Court of the United States held that the
8 Montana statute did not violate due process and was,
9 therefore, constitutional. A Defendant's right to
10 have a jury consider voluntary intoxication evidence
11 to determine whether he possess the requisite mental
12 state is not a fundamental principle of justice, and
13 a State statute may disallow the consideration of
14 such evidence.

15 The Court held that the Montana
16 statute does not offend a fundamental principle of
17 justice, given the lengthy common-law tradition that
18 prohibited the defense of voluntary intoxication and
19 the adherence of a significant minority of the
20 States to that position today.

21 This issue deals solely with
22 intoxication as a defense to the mental element or
23 mens rea of an offense. Apparently in Montana and
24 other jurisdictions with similar statutes, voluntary
25 intoxication would still be admissible to negate the

1 actus reus -- the Defendant could not have
2 physically committed the act because at the time of
3 the offense he was so intoxicated that he was
4 unconscious.

5 There is no pertinent distinction
6 between the Montana statute and the proposed
7 amendment to our statute. Furthermore, there are
8 ten other States that statutorily prohibit admission
9 of evidence of voluntary intoxication for the
10 purpose of negating criminal intent. These are
11 Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho,
12 Indiana, Missouri, Montana and Texas.

13 House Bill 569 would bring
14 Pennsylvania in line with the modern shift in laws
15 throughout the country.

16 The relationship between alcohol and
17 drug abuse in crime is widely known. The danger to
18 society is actually increased when a potential
19 murderer abuses drugs and alcohol. This is an
20 overwhelming problem in the criminal justice system,
21 which is responding through prevention and treatment
22 programs, not by allowing a person to avoid
23 responsibility for his actions while under the
24 influence of drugs and alcohol.

25 The elimination of the voluntary

1 intoxication defense will protect society from those
2 who kill because they have lowered their inhibitions
3 through the use of drugs and alcohol. House Bill
4 569 would add some parity to punishment of the crime
5 of murder. As I mentioned earlier, a person can
6 serve a life sentence for participation in a robbery
7 gone awry, but faces only a maximum of 20 to 40
8 years, with no statutory minimum, for an intentional
9 murder, just because he was intoxicated.

10 Furthermore, a person whose murder is
11 reduced to third degree because he is intoxicated
12 may eventually be released from prison and go on to
13 commit more crimes or, in fact, may not face any
14 prison as all.

15 Finally, this type of evidence is
16 easily fabricated. As stated by the Pennsylvania
17 Supreme Court, all that the crafty criminal would
18 require for a well-planned murder would be a
19 revolver in one hand to commit the deed and a quart
20 of intoxicating liquor in the other with which to
21 build his excusable defense.

22 Thank you for allowing me this
23 opportunity to speak on behalf of the Pennsylvania
24 District Attorneys' Association and myself on this
25 important proposed amendment to Section 308.

1 CHAIRWOMAN COHEN: Thank you, Mr.
2 Castor. I have just a few questions. I want to
3 welcome Representative Williams who has come in to
4 join us.

5 You have vast experience in the area
6 of criminal law. Of all the murder trials that
7 you've been involved with and perhaps all the
8 criminal trials, although 569 deals with murder,
9 except murder in the first degree. But of all the
10 murder trials and, as I said, perhaps the other
11 criminal trials where this issue does not arise,
12 what is the percentage or the incidence of the
13 defense of voluntary intoxication that you have
14 experienced?

15 MR. CASTOR: In murder cases, it is
16 used relatively frequently. Two cases come to mind
17 that I was personally involved in. And the way the
18 jury instruction is delivered in court from the
19 model jury instructions, all the Defendant has to do
20 is raise the spector that he was intoxicated without
21 any evidence at all, medical evidence or anything
22 beyond what he says, and it shifts the burden to the
23 government to disprove it. It becomes an
24 affirmative defense.

25 In a case I had out of Abbington where

1 a man shot his son to death by shooting him point
2 blank range in the chest, which would be a classic
3 first degree murder because you have a deadly weapon
4 used against a vital part of the body, you're
5 permitted to presume a specific intent to kill. He
6 offered evidence that he was too intoxicated to be
7 able to do that.

8 And because I know how these cases
9 play out in court, we were compelled to negotiate a
10 resolution to that case, for fear of actually losing
11 in court and getting less than we thought we would
12 get with the negotiated sentence.

13 CHAIRWOMAN COHEN: But that defense
14 under current law isn't applicable for first degree
15 murder.

16 MR. CASTOR: It is applicable. That's
17 the only charge it is applicable to.

18 CHAIRWOMAN COHEN: Oh, it is. Got it.

19 MR. CASTOR: You can readily see how
20 silly the state of the law is relative on this
21 point, because almost all crimes -- and there are
22 very few, what they call, strict liability crimes.
23 In other words, if you do these things, you are
24 guilty whether you intended the consequence or not.

25 Most crimes, as it should be, it's

1 necessary that the criminal intend to do something
2 bad before he would be punished for doing that.

3 You have -- when you walk into the
4 store with your revolver and you stick the gun in
5 the clerk's face, give me all your money, you have
6 to be intending to rob him. Take a woman behind the
7 bushes that you see in the park and you rape her,
8 you have to intend to rape her. You have the
9 husband who beats his wife within an inch of her
10 life and she is now paralyzed but does not die, he
11 had to intent to hurt her.

12 All of those instances which are
13 specific intent crimes, it does not matter under
14 Pennsylvania law whether the Defendant was stoned or
15 drunk out of their mind, so long as they were
16 capable of committing the crime, regardless of what
17 they were thinking.

18 However, in the example I gave about
19 the woman who was beaten within an inch of her life,
20 if she dies he now can say I was intoxicated to the
21 point where I didn't know what I was doing.

22 Now, this grows out of a 1975
23 Pennsylvania Supreme Court decision, which
24 essentially ruled that evidence of voluntary
25 intoxication, as distinguished from involuntary

1 where somebody slips a mickey into your drink and
2 you don't know that you are imbibing. But
3 voluntary, where you intentionally make yourself
4 drunk or high, a 1975 Supreme Court of Pennsylvania
5 decision ruled that in every case if the Defendant
6 wanted to present that evidence he was permitted to,
7 and if the government couldn't disprove that it
8 would be as though the crime never happened.

9 Now, obviously society can't condone
10 such a thing. So the legislature, which can move in
11 this State with astounding speed, as we've seen some
12 recently with some things.

13 CHAIRWOMAN COHEN: As we saw at 2:00
14 this morning, yes.

15 MR. CASTOR: That Pennsylvania Supreme
16 Court decision came down, I believe, in March of
17 1975. By July of 1975, the legislature had amended
18 the statute to eliminate the defense in every place
19 except for first degree murder. Now we are asking
20 for the remainder of it.

21 And it is used because it is -- from
22 the perspective of the Defendant, it is an easy one
23 to raise. It's difficult to raise alibi, for
24 example, if you can't find people to come and say
25 you were elsewhere at the time of the crime. It's

1 difficult to raise insanity because if you can't
2 find psychiatrists to come in and say you were legal
3 insane at the time of the offense.

4 But to say you were intoxicated, all
5 the Defendant has to do is say it. He doesn't have
6 to say anything beyond that. And then we have to
7 disprove that beyond a reasonable doubt. So it
8 makes it much more difficult.

9 And I think there's a societal
10 interest here, too. Remember, it's like the person
11 who intentionally gets drunk and gets behind the
12 wheel of a car and kills somebody. He may not have
13 intended that somebody die as a result of his
14 driving, but he certainly intended to drink and he
15 intentionally drank to excess and intentionally got
16 in the car and operated it on a highway of the
17 Commonwealth.

18 And what we are asking for is that
19 sort of this incongruous statute to be changed in
20 line with more modern thinking.

21 CHAIRWOMAN COHEN: Thank you.

22 Counsel Dalton has some questions.

23 MS. DALTON: Good morning, Mr. Castor.

24 MR. CASTOR: Good morning.

25 MS. DALTON: You mentioned that if

1 this bill is enacted into law, it would not affect
2 the diminished capacity doctrine. Can you tell us
3 how that would play out?

4 MR. CASTOR: Well, the Defendant would
5 have the burden of demonstrating that he operated
6 under diminished capacity, and simply saying so
7 would not be sufficient to shift the burden back to
8 the government. Diminished capacity is a mental
9 condition and a medical condition that would have to
10 be proven. And you would have to presumably use
11 extrinsic evidence to do so.

12 There are a number of cases in the
13 common law where the concept of diminished capacity
14 is recognized not from the drug and alcohol
15 component, but from some mental health component.
16 It would seem to me that the diminished capacity
17 would have to be pled under the rules in advance, so
18 notice would have to be given. And if some
19 component of that diminished capacity was voluntary
20 intoxication, it could be presented, but would have
21 to have more evidence presented than simply the
22 Defendant saying so.

23 MS. DALTON: Thank you.

24 CHAIRWOMAN COHEN: Well, we thank you.
25 And, again, thank you so much for taking the time

1 from your vacation. Enjoy.

2 MR. CASTOR: My pleasure. I thank the
3 Committee for hearing me so politely.

4 CHAIRWOMAN COHEN: The next person to
5 join us is Arthur Donato. Welcome.

6 Mr. Donato is a Media Criminal Defense
7 Attorney, a member of the Pennsylvania Association
8 of Criminal Defense Lawyers and Legislative Liaison
9 National Association of Criminal Defense Lawyers.
10 Thank you.

11 Welcome, and you may begin any time
12 you're ready. Are both of you testifying together?
13 Do you want me to introduce you also?

14 MR. WINNING: Yes, my name is William
15 J. Winning, W-I-N-N-I-N-G.

16 CHAIRWOMAN COHEN: Mr. Winning,
17 welcome. You are a Philadelphia criminal defense
18 attorney, member of the Pennsylvania Association of
19 Criminal Defense Lawyers and the National
20 Association of Criminal Defense Lawyers. Thank you.

21 MR. DONATO: With your permission, I
22 will begin. Thank you for giving us the opportunity
23 to come here today and speak on this issue.

24 I want to preface my remarks, if I
25 may, with a couple of things. I want to begin by

1 saying Bruce Castor is a friend of mine and a person
2 for whom I have great respect for his courtroom
3 talent, as well as for his legal ability, and for
4 whom I have personal affection. We do, however,
5 disagree on this.

6 The second thing I feel I need to say,
7 and I usually do in these situations, I hope it goes
8 without saying but if it doesn't I'll say it,
9 criminal defense lawyers like public order and
10 safety. We do not like disorder.

11 We have families and loved ones, and
12 we want to live in a safe society, too. So I want
13 to preface our remarks to assure you that we are not
14 here to let criminals go free. That's not our
15 purpose.

16 The National Association of Criminal
17 Defense Lawyers is composed of about 10,000 criminal
18 defense lawyers across the country whose mission it
19 is to encourage equal protection under the law,
20 fairness and due process in the criminal justice
21 system.

22 The Pennsylvania Association of
23 Criminal Defense Lawyers is comprised of
24 approximately 650 lawyers across Pennsylvania, many
25 of whom are former prosecutors, who are committed to

1 the same goals.

2 We oppose House Bill 569, and we do so
3 because we disagree with Mr. Castor that it will not
4 have an effect on the diminished capacity defense.
5 In fact, it will have a substantial effect on the
6 diminished capacity defense, and it will change the
7 Commonwealth's burden of proof on the elements of
8 first degree murder. And it will make those
9 elements of first degree murder much easier to
10 prove, and it will equate the mental state of
11 someone who is incapable of forming a specific
12 intent to kill with that person who is not only
13 capable but purposefully forms the specific intent
14 to kill.

15 The mental state of specific intent,
16 premeditation and deliberation are elements of the
17 offenses which the Commonwealth is obligated to
18 prove beyond reasonable doubt in a first degree
19 murder case. The diminished capacity defense based
20 on voluntary ingestion of drugs or alcohol cannot
21 and never does result in a verdict of acquittal.

22 Under the law, if you plead voluntary
23 intoxication or drug condition, the best you can do
24 in the Commonwealth of Pennsylvania is reduce first
25 degree murder to third degree murder, a malicious

1 killing with wanton disregard for the rights of
2 others, but lacking specific intent. That's all the
3 voluntary intoxication defense does.

4 And it is also erroneous to state that
5 by enacting this bill, a Defendant will still be
6 permitted to go into court and talk about his mental
7 state as it relates to the voluntary ingestion of
8 drugs or alcohol. What the House of Representatives
9 does matters.

10 So next time -- if this bill passes,
11 next time I go in and say, Your Honor, my client
12 voluntarily ingested drugs or alcohol and as a
13 result lacked a specific intent to kill, and I have
14 Dr. Smith and Dr. Jones, a psychiatrist and
15 psychologist, who will testify to a reasonable
16 degree of medical certainty on those points, the
17 Judge is going to look at me after the District
18 Attorney stands up and says, oh, no, Your Honor, not
19 any more, not any more, the House of Representatives
20 has passed House Bill 569. Now that is not a
21 defense.

22 Mr. Castor is right that all voluntary
23 intoxication does is provides an evidentiary basis
24 for a jury to evaluate a Defendant's mental state.
25 It concedes the conduct.

1 Mr. Castor spoke to you about the mens
2 rea or the mental state, and the actus reus, the act
3 or the conduct. And what he says is, well, now we
4 will be able to go to court and we'll be able to say
5 he was so drunk he couldn't do it. That isn't the
6 point, Members of the Committee. That is not the
7 point.

8 The criminal law, the substantive
9 criminal law, punishes the act and the mental state.
10 And the reason it punishes the mental state, and
11 that's the more important element, is because it is
12 recognized that social order is more threatened by
13 an evil mental state than it is by conduct.

14 And by enacting this legislation, what
15 will happen is the mental state will become less
16 relevant than the conduct, and it will be equated,
17 someone who could not form a specific intent will be
18 treated precisely the way someone who could and did
19 form a specific intent.

20 The opposition to these defenses falls
21 into three main areas. Mr. Castor touched on two of
22 them.

23 First, that the legislation is
24 confusing. That is, that voluntary intoxication as
25 a defense confuses a jury. We disagree with that.

1 First of all, it is not easy to plead. Voluntary
2 intoxication is more than a lawyer standing up and
3 saying, hey, my client was drunk. That doesn't do
4 it. And I can tell you, Members of the panel, that
5 I have used this defense a handful of times in 21
6 years. I've attempted to use it about five times.
7 In four of those instances, my experts came back and
8 said, yes, he was drunk. But, no, I can't help you
9 on the issue of whether he was capable of forming an
10 intent.

11 Remember that what is required in
12 order to prove this defense in court is not that I
13 was so drunk that I didn't form the intent. What's
14 required is that I was so drunk that my mind was
15 unable cognitively to form any intent. That's how
16 drunk you have to be.

17 The confusion issue does not come from
18 the voluntary intoxication defense. The confusion
19 issue comes from the jury instructions on first and
20 third degree murder. Imagine this. You are on a
21 jury and the judge says to you, now, ladies and
22 gentlemen of the jury, I want to define first degree
23 murder for you.

24 First degree murder is the intentional
25 killing of another with specific intent to kill,

1 with premeditation, deliberation, and malice, with
2 no justification, mitigation or excuse.

3 Third degree murder is the intentional
4 killing of another without the specific intent to
5 kill, but with malice, hardness of heart, cruelty
6 of disposition.

7 Voluntary manslaughter is the
8 intentional killing of another with specific intent
9 to kill but without malice. You can presume malice
10 if someone intends to use a deadly weapon on a
11 specific part of the body.

12 That is confusing. That's why in
13 every one of the murder cases I've handed, and
14 there's been more than 20 of, in every one, whether
15 it's been voluntary intoxication or not, the jury
16 has come back and said to the judge during
17 deliberations, could you redefine the elements of
18 murder in the first, third and voluntary
19 manslaughter, because they don't get it. That's
20 what's confusing.

21 The second objection to legislation
22 like this is that it results in compromised
23 verdicts. What happens, it's theorized, is that the
24 jury goes back to deliberate and six of them want to
25 find the Defendant guilty of first degree murder and

1 six want to find the Defendant guilty of voluntary
2 manslaughter. And so they compromise and they find
3 him guilty of third degree murder.

4 Remember again, if you would,
5 voluntary intoxication or drug condition cannot
6 result in an acquittal. It can only reduce first
7 degree murder to third degree murder.

8 The response to that objection is that
9 there are many opportunities for a jury to
10 compromise in any criminal case. Whether there are
11 different charges, whether there are different
12 degrees of one charge, compromise is always
13 available to a jury in both civil and criminal
14 cases. That's the way it's supposed to be. And
15 compromise is not necessarily a bad thing for a jury
16 to engage in as an alternative to a hung jury, a
17 deadlocked jury.

18 Third, the objection is one of the
19 ones Mr. Castor raised, which is protection of the
20 public. I want to emphasize that we want to protect
21 the public too, but this is not a real concern in
22 Pennsylvania. And the reason it's not a real
23 concern is because if I get convicted of first
24 degree murder in Pennsylvania, I either get
25 sentenced to death or life. If I get convicted of

1 third degree murder, I can be sentenced to up to 40
2 years in jail.

3 In New Jersey if I get convicted of
4 first degree murder and sentenced to life, I am
5 automatically eligible for parole in 30 years. But
6 if I come across the river in Pennsylvania and I get
7 sentenced to life, I'm never eligible for parole.
8 And if I get sentenced on third degree murder to 20
9 to 40 years, my first opportunity for parole, I'm
10 eligible after 20 years. So it's 10 years less than
11 first degree in New Jersey. It is an extraordinary
12 amount of time.

13 And as you'll see in our papers,
14 commentators have said -- and in fact, there isn't a
15 commentator that disagrees with this -- that it's
16 not a real concern because the sentences for lesser
17 degrees of homicide are so long, that if a judge
18 wants to keep someone in jail for a long period of
19 time, he can do so until that person is cured or is
20 no longer a threat to society.

21 I want to address another issue that
22 Mr. Castor raised. He said to you that a person can
23 get drunk and then go out and commit a crime. He
24 quoted a Pennsylvania Supreme Court opinion in which
25 dicta said all I need is a gun in one hand and a

1 bottle of liquor in another hand. Not true. Not
2 true.

3 If I intend to kill my wife and then I
4 get drunk to get the courage up to go do it and then
5 I go do it, the fact that I did not have the intent
6 at the time of the act does not mean that I am
7 allowed to plead or prevail on diminished capacity.
8 One commentator wrote this. Once again, too, he
9 must not before becoming intoxicated have
10 premeditated and deliberated and formed an intent to
11 kill, then drinking to get up his nerve, he is
12 eligible for a first degree murder conviction even
13 though at the time of the killing he may have become
14 so intoxicated that he was no longer capable of
15 premeditation.

16 I want to also say to you that this
17 defense is extraordinarily rare, as are most mental
18 defenses. If you think about it, when a defense
19 lawyer is trying to select a defense, the best one
20 is he didn't do it. He wasn't there, and we can
21 show it. The government can't prove it beyond
22 reasonable doubt.

23 The second best one is he didn't do
24 that, he didn't do murder, but he did do this. Or
25 he didn't do robbery but he did commit a theft. In

1 other words, choosing a charge. He didn't commit
2 involuntary manslaughter but he was driving drunk,
3 and he did while driving drunk commit a death in the
4 street and so he's guilty of homicide by vehicle,
5 DUI related, but he's not guilty of involuntary
6 manslaughter.

7 That's a good one. Alibi is a great
8 one if you have good witnesses. But as I agree with
9 Mr. Castor, it is hard to find them.

10 And the last one is a mental defense.
11 The last one is, yes, I committed the conduct, but I
12 didn't mean it, but I didn't have the requisite
13 frame of mind. That's the worst defense to use, and
14 it's the worst defense to use across the board.
15 It's the least accepted defense. Yes, my conduct
16 was a mail fraud, but I did not have fraudulent
17 intent at the time. I thought it was okay. The
18 good faith defense. It rarely works.

19 Entrapment; yes, I did it, but I was
20 entrapped. I didn't want to do it, but I was
21 entrapped by the government. It rarely works.

22 I've tried to summarize in our papers
23 the authority on this point. Approximately 90
24 percent of all criminal cases in this country,
25 depending on the jurisdiction, don't go to trial.

1 They're resolved with a guilty plea. Of the
2 remaining 10 percent, 50 percent approximately are
3 tried on the basis that the government can't prove
4 its case beyond reasonable doubt. Of the remaining
5 percent, 5 percent of all cases, in less than 1
6 percent of those, any mental disease defense is
7 used. And only a fraction of those are voluntary
8 intoxication. And when they're used, more than
9 three out of four times they're not accepted by the
10 jury.

11 Because of these facts and because
12 it's important for the criminal law we believe to
13 address simultaneously the concurrence of the actus
14 reus, the act, and the mens rea, the mental state,
15 passage of this bill will diminish the importance of
16 that time-honored principle.

17 For those reasons I ask you to
18 defeat this bill. Do not pass it. It is a bad
19 idea. There is no problem to address by its
20 passage. And passing it will result in unfair
21 results because people who specifically intend and
22 premeditate will be treated just like people who
23 through their own fault could not form any intent.

24 Thank you.

25 CHAIRWOMAN COHEN: Thank you, Mr.

1 Donato. Just some housekeeping. I want to welcome
2 Representative Kate Harper, Member of the Judiciary
3 Committee and the Subcommittee, and also Montgomery
4 County Representative.

5 Second bit of housekeeping, before we
6 get to questions, Mr. Winning, do you want to make
7 your presentation?

8 MR. WINNING: I just have a very few
9 brief comments.

10 CHAIRWOMAN COHEN: Why don't you make
11 your presentation. Some of our questions really may
12 go to both of you anyway.

13 MR. WINNING: Sure. I will try not to
14 repeat what Mr. Donato pointed out but just add to
15 the sense and content of his remarks.

16 The first point I would like to make
17 is I agree with some part of Mr. Castor's
18 presentation and all of Mr. Donato's presentation,
19 particularly on the concept or the idea that the
20 defense of voluntary intoxication or drug impairment
21 is used in a very, very small percentage of homicide
22 cases.

23 But in those cases where it is used as
24 a defense, most, if not all, times the defense of
25 voluntary intoxication or drug impairment must be

1 established not just by the testimony of a lone
2 Defendant, as Mr. Castor suggested. On the other
3 hand, it's established by competent expert testimony
4 in the form of a medical opinion, psychiatric
5 opinion, psychiatrist or other form of expert that
6 is qualified to testify on this particular defense.

7 I would point out that in my view
8 there is no need or value in totally removing this
9 defense as an appropriate defense in an appropriate
10 criminal case, because the existing rules of
11 evidence in Pennsylvania and in the Federal court
12 and the existing case law that govern the
13 admissibility of expert testimony sufficiently
14 provide the type of protection for juries to listen
15 to and accept only reliable evidence.

16 And I point out specifically, the
17 Pennsylvania Rules of Evidence which were adopted by
18 the legislature and put into effect in October of
19 1998, and specifically Rule 702 of the Pennsylvania
20 Rules of Evidence that deals with testimony by
21 experts -- and it's a short rule. I'll read the
22 entire rule if I may.

23 And the rule provides as follows:

24 If scientific, technical or other
25 specialized knowledge beyond that possessed by a lay

1 person will assist the trier of fact to understand
2 the evidence or to determine a fact in issue, a
3 witness qualified as an expert by knowledge, skill
4 or experience, training or education may testify
5 thereto in the form of an opinion or otherwise.

6 Now, Members of the Committee, under
7 this rule the trial judge either in a nonjury
8 setting or in a jury setting must first determine
9 whether or not the expert that's offered by the
10 Defendant who is trying to establish the defense of
11 impairment or intoxication must first establish the
12 reliability of his testimony, his qualifications,
13 that there is a valid evidentiary basis for the
14 testimony to be offered on this defense, and the
15 admissibility of this defense under the Rules of
16 Court and particularly under this rule.

17 So as a bottom line here, there is no
18 need for the legislature to take an ax to this
19 defense because there is an adequate protection
20 already built into the law to provide for only the
21 consideration by a jury of a valid defense that's
22 demonstrated by a qualified expert who has an
23 evidentiary basis and an otherwise reliable base of
24 information to so provide that testimony.

25 Secondly, there is a line of cases

1 decided by the United States Supreme Court, starting
2 with the case of United States versus Daubert,
3 D-A-U-B-E-R-T, which is a court adoption so to
4 speak, of the Rules of Evidence. And that is, that
5 the Supreme Court has ruled that trial courts must
6 determine before any evidence of this type is
7 admissible, the trial court must determine first
8 before the jury hears it that it is reliable, that
9 there is a basis in fact and law for this defense,
10 that there is an evidentiary basis for it and that
11 it is otherwise admissible.

12 So there is no danger here, as Mr.
13 Castor seemed to suggest, that this defense can just
14 come in with no basis, that a Defendant can just
15 walk into court and say, I was intoxicated,
16 therefore I have to get a pass. That really doesn't
17 happen in the real world under the Rules of
18 Evidence, particularly in Pennsylvania which has a
19 very strict rule for the admissibility of expert
20 testimony under Rule 702.

21 And as I pointed out when I first
22 started, I would say most, if not every case, of
23 being intoxicated or being under the impairment of
24 drugs is established or demonstrated not solely by
25 the testimony of the Defendant. But on the other

1 hand, by the testimony of competent physicians and
2 medical doctors and psychiatrists who have to
3 testify, even if they are allowed pursuant to the
4 rules that I just pointed out.

5 I also would like to follow up on a
6 couple of comments that Mr. Castor made about -- and
7 I have these in quotes. I might not be exactly
8 right. His position was that this law has to be
9 passed because "getting drunk is not a license to
10 kill", and people that assert this defense get a
11 pass. That's really not the case at all. And as
12 Mr. Donato, I think, very accurately pointed out to
13 the Committee, never never does a person asserting
14 this defense get acquitted. Because as a matter of
15 law, it is not the basis of an acquittal. It's only
16 the possible evidentiary basis for a reduction of a
17 conviction from first degree murder to third degree
18 murder, which carries with it a sentence, a maximum
19 sentence, of 40 years in the State penal
20 institution.

21 So I think it's very important for the
22 Committee not to come away from this hearing with
23 the notion that this defense under the statute as it
24 now exists somehow allow Defendants to have a
25 license to kill or to get a pass for the commission

1 of murder when that's really not the case at all.

2 Lastly, I believe that there is a very
3 valid distinction and a very valid reason why this
4 defense is available, the defense of intoxication or
5 drug impairment, why this defense is available in a
6 first degree murder case as opposed to another type
7 of crime that Mr. Castor referred to, as a robbery
8 or something, a rape.

9 As the Committee knows, in
10 Pennsylvania in order to establish first degree
11 murder, there are very important elements that the
12 Commonwealth has to prove; specific intent to kill,
13 a deliberate and premeditated act, with malice
14 aforethought. And other crimes don't necessarily
15 have those essential elements.

16 So there is a valid distinction here
17 because intoxication, drug impairment, can very well
18 as a medical matter, as a physiological matter, as
19 an expert -- as the basis of expert testimony can
20 very well negate the intent that is part of a first
21 degree murder charge, that is not necessarily a part
22 of any other or some other charge under the
23 Pennsylvania Penal Code.

24 So with those comments, I will
25 conclude. If the panel has any questions, we would

1 certainly be happy to answer them.

2 CHAIRWOMAN COHEN: I think we probably
3 do. I'm an attorney, but I have not practiced
4 criminal, so forgive me if I don't know certain
5 things. One of the things, you kept saying
6 intoxication. Just to be sure and make sure the
7 record is clear, we are all talking about voluntary
8 intoxication?

9 MR. DONATO: Yes. Involuntary
10 intoxication is always a defense.

11 MR. WINNING: The statute so provides
12 voluntary intoxication nor voluntary drug condition.
13 And the voluntary intoxication and voluntary drug
14 condition is the subject of our testimony today.

15 CHAIRWOMAN COHEN: Exactly. I think
16 that District Attorney Castor indeed made the
17 distinction early in his testimony. We are not
18 discussing involuntary intoxication. I just wanted
19 to make that very clear.

20 Secondly, you quoted District Attorney
21 Castor using the word gets a pass. The way I
22 interpreted his statement, not getting a pass
23 walking out of the courtroom a free person, but
24 rather going to reducing the degree of the crime
25 from first degree to third degree. I think that was

1 the intention, I think, of his comment. That's how
2 I read it.

3 But I believe he said that -- and both
4 of you have mentioned the maximum penalty for third
5 degree murder. I believe the District Attorney said
6 but there is no minimum for third degree murder?

7 MR. DONATO: There is no mandatory
8 minimum for third degree murder, unless it falls,
9 third degree murder that is, falls under one of the
10 sentences statutes that provides for it, like if the
11 murder is committed with a gun or if the murder is
12 committed by someone over a certain age or under a
13 certain age.

14 But it is also true to say that
15 sentencing in the Commonwealth of Pennsylvania is
16 now and since 1978 has been a guideline sentencing
17 scheme. And guideline sentencing as you probably
18 know is based on an offense gravity score and a
19 prior record score; how serious is the offense and
20 how bad is your prior record. And that results in a
21 grid that tells the judge a guideline of where he or
22 she should sentence the offender.

23 Most cases are sentenced pursuant to
24 the guidelines. The Sentencing Commission comes out
25 with a report every year and talks about what

1 departures there were. But the vast majority of
2 cases, well over 90 percent, are sentenced within
3 the guidelines. And the guideline sentences for
4 third degree murder are all around at least 5 years.
5 So that's one point.

6 The second point that I would like to
7 make in response to your question is this. There
8 are not judges out there like there were maybe 20,
9 25 years ago, in front of whom you can go and say,
10 yeah, my client committed third degree murder and,
11 yes, someone's dead, but, gee, judge, he is a nice
12 guy and he comes from a good family and he gets
13 probation. That doesn't work. I don't know. If
14 there are, I want to know where they are because I
15 want to go practice there.

16 Because I never met a judge in 21
17 years that had a hard time beating somebody over the
18 head if they deserved a beating over the head. And
19 in the typical third murder case where someone is
20 dead, regardless of what the mental state was, if
21 you get convicted of third degree murder, it's a
22 violent malicious act. That violence and malice is
23 taken into account by the judge, and he or she
24 usually imposes a very severe sentence.

25 Sentences on third degree murder that

1 aren't negotiated pleas with the government are
2 commonly, in the suburban counties at least,
3 commonly 10 to 20, 12 and a half to 25 years. I
4 mean, people don't get county sentences for third
5 degree murder convictions. So if it's a pass, it's
6 not much of one.

7 CHAIRWOMAN COHEN: Let me just ask
8 because both of you -- Mr. Winning particularly
9 talked about expert testimony.

10 If you have a case where there are two
11 people in a room somewhere and all the Defendant can
12 remember is that there was a -- I'm not a vodka
13 drinker -- a gallon bottle of vodka and all he
14 remembers is he opened the bottle and then the
15 police come in and there is a dead body and an empty
16 gallon bottle of alcohol. So he is -- his defense
17 is voluntary intoxication, diminished capacity, etc.

18 There is no expert to testify unless,
19 of course, you bring in an expert that says, yes, if
20 someone drinks a gallon of vodka within five
21 minutes -- he's dead. But there really is no -- as
22 the District Attorney said, there is only one person
23 present. We started with two, and there is one
24 person present.

25 How can you say -- and this is what

1 I'm assuming that you said, there has to be expert
2 testimony, that you simply cannot walk into a
3 courtroom and say, yes, Your Honor, I drank a gallon
4 of vodka and I was drunk. I had diminished
5 capacity. Yes, I opened the bottle, so therefore
6 it's voluntary intoxication. Where is the justice
7 there?

8 MR. WINNING: Well, I didn't mean to
9 say that every single, absolutely every single case,
10 rises and falls on the issue of expert testimony.
11 What I did say was in most cases, in the fair
12 proportion of cases, the defense of impairment is
13 established or may be established by expert
14 testimony in the form of a psychiatrist or a
15 psychologist or a physician, some type of medical
16 doctor.

17 And the point is that before that
18 testimony is deemed admissible and before that
19 testimony is even presented to a jury, under the
20 Rules of Evidence in Pennsylvania there must be a
21 determination made by the trial judge on the unique
22 and particular facts of that case, that this
23 testimony -- first off, that the person, that the
24 doctor or the psychologist or psychiatrist is indeed
25 qualified to so testify; and, secondly, that there

1 is -- under this case that there is an adequate
2 evidentiary basis, factual basis, for the
3 presentation and admissibility of that testimony.

4 So the point I was trying to make, the
5 most important point I was trying to make, is that
6 in these intoxication cases and drug impairment
7 cases that there is this sort of gatekeeper
8 approach, so to speak, where a trial judge is not
9 going to let any and all evidence without basis just
10 come into the record and somehow interfere with or
11 confuse the jury, that there must be an adequate
12 legal and factual foundation for the expert
13 testimony before that testimony is even presented to
14 the jury.

15 Secondly, the testimony of an expert
16 in these cases doesn't necessarily just have to come
17 from the Defendant. It may come from a series of
18 witnesses. It may come from other third party
19 witnesses who have seen the incident who could
20 testify, for example, that I was with the Defendant
21 and the Defendant drank a case of beer, for example.
22 So it's not solely limited to information provided
23 by the expert -- by the Defendant to the expert on
24 that issue.

25 Does that answer your question?

1 CHAIRWOMAN COHEN: Yes. Thank you.
2 Mr. Donato.

3 Excuse me. How is our reporter?

4 MR. DONATO: If I could, I would just
5 like to describe how that case would play itself
6 out. The Defendant would meet with his lawyer and
7 say I drank a gallon of vodka. The lawyer would
8 say, okay, do you remember anything. No, I don't
9 remember anything. All right.

10 The lawyer would then call a
11 psychologist. The psychologist would meet with the
12 Defendant. And one of the things he would do is he
13 would give him the Minnesota Multiphasic Personality
14 Inventory, which tells us about his personality, and
15 it also tells us how reliable a historian he is. In
16 other words, is he a liar. When he says he doesn't
17 remember, is he telling the truth.

18 Then you'd have to get a physician, an
19 M.D., whether it's a psychiatrist or not, to talk
20 about his blood alcohol content, which probably
21 would have been taken on his arrest, assuming he was
22 arrested close in time to the event.

23 The best you could do is call an
24 expert to say, I believe that because of voluntary
25 ingestion of alcohol he lacked the ability

1 cognitively to form a specific intent, any intent.

2 On cross examination, he would be
3 asked by someone in Mr. Castor's office or by Mr.
4 Castor himself, on what do you base that. Are you
5 relying on what he told you? Well, him and his
6 blood alcohol content.

7 All the best you can tell us, Doctor,
8 is this, that someone with his blood alcohol -- and
9 if you assume that he is telling the truth that he
10 lacked the ability, right. But you don't know, you
11 weren't there, you didn't have a chance to observe
12 him, you don't have any independent witnesses to
13 interview who have no interest in the outcome.

14 That's a classic example,
15 Representative Cohen, of a fact scenario where
16 voluntary intoxication may be alleged and it would
17 fail, because a jury is not going to accept it.
18 The only one that I ever had where a jury accepted
19 it is where I could call the Defendant's mother and
20 father and brother, talking about how he was a
21 heroin addict and an alcoholic and they had tried to
22 treat him and they couldn't, and that they saw him
23 that day and that he was under the treatment of a
24 psychiatrist regularly who knew what his mental
25 frame of mind was. And it was factually the kind of

1 a case where everyone could accept that it happened
2 on the spur of the moment.

3 So they're rare. They're very rare.

4 MR. WINNING: The last comment I have
5 is following up on what Mr. Donato just said, and
6 that is that I think that the jury system and the
7 system of trying cases by jury and by judge, indeed,
8 very much works.

9 In 999.9 times out of a thousand,
10 after the conclusion of a trial the jury reaches a
11 just and fair decision. And I think that it's wrong
12 and unfair here to remove this impairment absolutely
13 as a defense, because it deprives a fair-minded jury
14 and a fair-minded judge sitting as the fact finder
15 of the ability to find what is or what may be a
16 valid defense on the issue of specific intent.

17 And I think that across the
18 Commonwealth we have extremely experienced trial
19 judges, we have knowledgeable and fair-minded jurors
20 who invariably make ultimately the right decision.
21 And if this defense is there and if it's valid, it
22 will be accepted by the jury. If it's not there, if
23 it's not admissible, if it's not a valid defense, it
24 will be rejected.

25 And I believe that we should continue

1 to place our trust in judges and in jurors to make
2 the right decision in an appropriate case, because
3 in an appropriate case voluntary intoxication or
4 extreme drug impairment can and is an obstacle to
5 forming the type of specific intent that is required
6 for first degree murder. And in those cases where
7 that defense is established, under the Rules of
8 Evidence the jury should have the right to make that
9 decision.

10 And, as I said, in almost every case,
11 if not every case, the right decision is made by a
12 jury based upon the facts of that case, the evidence
13 presented under the rules, and there is really no
14 need for the legislature to interfere or to
15 eliminate that defense.

16 CHAIRWOMAN COHEN: I think it's
17 heartening to hear to have confidence in our system.
18 You've really almost paraphrased Winston Churchill
19 who says it's cumbersome and slow, etc, but it is
20 the best system that we have.

21 MR. WINNING: And it works.

22 CHAIRWOMAN COHEN: And it works.

23 Representative Harper has questions.

24 REPRESENTATIVE HARPER: One of the
25 advantages of having hearings on locations instead

1 of in Harrisburg is that we do get to hear from
2 practitioners such as yourself who have actually
3 tried cases in this area involving these things. So
4 either one of you can answer this or both.

5 I was actually interested in your
6 distinction between what happens in the real world
7 and what happens in the theoretical. And I was
8 sitting here thinking that you could have a murder,
9 a shopkeeper murdered in the course of a robbery; or
10 you could have a murder, a bunch of guys go to a
11 hunting cabin and things get out of hand over a long
12 weekend of drinking. What is your practical
13 experience of when this defense is used?

14 MR. WINNING: Art has more actual
15 experience in trying these types of cases than I
16 have. I have tried some, and certainly have
17 represented Defendants in some. I think as a
18 practical matter it's rarely used or infrequently
19 used. It's hard to put a percentage on it. I think
20 that Mr. Castor described it as infrequently used.
21 I don't know.

22 REPRESENTATIVE HARPER: Can you think
23 of any factual patterns?

24 MR. DONATO: Here is my experience,
25 and then I'll tell you what I've read about when

1 it's used. My experience is in the convenience
2 store robbery setting -- my experience is that in
3 the convenience store robbery setting, everybody is
4 either drinking or on drugs all the time. I don't
5 think I have ever had a robbery case in 21 years
6 where they weren't doing speed or cocaine or
7 drinking or a combination of those.

8 But you can't use it in that
9 situation. If we all agree to go into the
10 convenience store, rob it and kill the clerk, that's
11 a conspiracy to commit first degree murder.
12 Voluntary intoxication defense cannot be used for
13 conspiracy. It's not a defense to a conspiracy
14 charge, because a conspiracy, all that it requires
15 is that I have the intent to agree with one or more
16 other persons to commit an unlawful act.

17 If we go in and all we've agreed to
18 do, all the conspiracy is is to rob the store and
19 things get out of hand and somebody whacks the
20 clerk, then it is still not a defense. But the
21 reason it's not a defense is not because it's second
22 degree murder rather than first, not because it's
23 felony murder that's charged, the reason it's not a
24 defense is because it's the underlying conspiracy to
25 rob that triggers the second degree murder

1 conviction.

2 In other words, the government does
3 not have to prove the element of premeditation,
4 deliberation and malice in a felony murder case.
5 All they have to do is prove that we intended to
6 commit a felony and during the course of the felony
7 it was reasonably foreseeable that someone could get
8 killed and, in fact, they did.

9 And how do they prove that it's
10 reasonably foreseeable? Well, two ways. If one of
11 my guys has a gun with him, then it's reasonably
12 foreseeable he's going to shoot somebody. And there
13 are also cases where it's been held that it's
14 reasonably foreseeable in such a conspiracy that
15 somebody is going to get killed, because it's
16 reasonably well understood that shopkeepers keep
17 guns, so they may have to shoot somebody.

18 REPRESENTATIVE HARPER: So if the
19 perpetrator is dead drunk in a convenience store
20 robbery, they wouldn't want to use this defense --

21 MR. DONATO: They couldn't use it.

22 REPRESENTATIVE HARPER -- because it
23 wouldn't defend them from the things that's going to
24 send them to jail.

25 MR. DONATO: They couldn't use it, and

1 they're going to get convicted of second degree
2 murder, which is a mandatory life sentence without
3 the possibility of parole.

4 Where it has been used in my practice
5 is where there is a conversation going on between
6 some guys and they are telling my client that his
7 wife is having an affair and they know where she is.
8 He gets distraught, they begin drinking. There is
9 no discussion, and all of them confirm it. There is
10 no discussion about let's go over and get her.

11 After he's drunk, he wants to go see
12 her. He goes to see her. And when he sees her in a
13 car pull up, she is engaged in a sexual activity
14 with the person with whom she is having an affair.
15 He gets out of the car, goes in his trunk, gets his
16 shotgun because he's a hunter and keeps his guns in
17 the trunk and kills her.

18 Now, number 1, that's a terrible crime
19 and everybody feels sorry for the woman killed, but
20 the momentum of sympathy in that jury was for him
21 anyway. And, in fact, if he hadn't been drunk, he
22 might have still gotten away with first degree
23 murder. They may not have convicted him of first
24 degree murder just because of that momentum.

25 REPRESENTATIVE HARPER: What was he

1 convicted of?

2 MR. DONATO: He was convicted of
3 voluntary manslaughter so.

4 I can give you another example. I
5 represented an individual who for, I believe it was,
6 40 years was an Amtrack police officer. We proved
7 at trial that this police officer had been
8 confronted with violence during his career at least
9 12 times, all of which with a deadly weapon, and he
10 never once drew his weapon in all those times. He
11 ran, he radioed, he talked people out of it, but he
12 never once drew his weapon.

13 He retired at the age of 65. He lived
14 with his wife and her sister. He went out one day
15 uncharacteristically for him and he had three
16 martinis. He came back home to Upper Darby,
17 Pennsylvania. He went upstairs and got his service
18 revolver. He shot his wife in the back of the head,
19 he shot her sister in the back of the head, and he
20 shot himself in the head. He lived. He dialed 911
21 and reported three murders at his house.

22 Why did he do all that I asked my
23 psychiatrist, psychologist, neuropsychologist and
24 his treating physician and geriatric physician? Why
25 did he do all that? And they all say he ingested

1 alcohol, he disassociated, he wasn't forming any
2 intent and we can all say it to a reasonable degree
3 of certainty.

4 He goes to trial on a double murder
5 case. He's acquitted of first degree murder,
6 acquitted of third degree murder, convicted of
7 voluntary manslaughter. And that man who never
8 committed a crime in his life up to that point, who
9 raised children and sent them to college, was
10 sentenced by a judge who said the law requires that
11 I put in you jail for at least five years because
12 this was committed with a gun.

13 The judge had tears in his eyes when
14 he did it and put him in jail, that man. And if a
15 judge can put that man in jail, I guarantee you some
16 lesser person would have gotten more time.

17 CHAIRWOMAN COHEN: Thank you. Counsel
18 Dalton.

19 MS. DALTON: Good morning.

20 MR. DONATO: Good morning.

21 MS. DALTON: I have a question for Mr.
22 Donato. The little bit of reading that I have done
23 in preparation for this hearing and also it kind of
24 dovetails with the testimony we've heard so far, is
25 there seems to be this dichotomy between specific

1 intent and general intent. I know that you've used
2 the term that there's no intent.

3 I just want you to distinguish for us,
4 if you could, with respect to this defense, are you
5 saying that the specific intent, the lying in wait,
6 the hardness of heart, the premeditation not being
7 formed, but the specific intent could still be and
8 that's why you get third degree murder?

9 MR. DONATO: It's a great question.
10 And the reason it's a complicated question is
11 because if you take a look at the cases that have
12 been decided on this area, they are all over the
13 place. Some say that the Defendant has to prove
14 that he was incapable of forming a specific intent,
15 and they don't say to do what. Some say he was
16 incapable of forming a specific intent to kill, and
17 many of them say he is incapable of premeditation
18 and deliberation.

19 General intent is best described as an
20 evil intent. In other words, if I go out to rob
21 somebody, they don't have to prove that I know that
22 robbery is bad or even that I know that robbery is
23 illegal. They have to prove that I had the general
24 intent to remove property from another by force.
25 That's what general intent is.

1 But in homicide, specific intent is
2 different. Specific intent means that at the time
3 you commit the act, you specifically intend the act
4 and the consequences of the act.

5 And so what voluntarily intoxication
6 does is it provides an evidentiary basis for someone
7 to say, look, and remember the act is conceded; yes,
8 I shot her; yes, I knifed her; yes, I killed her; I
9 strangled her, whatever you say my conduct was. In
10 order for me to prove voluntary intoxication, I have
11 to first agree that I did that stuff that you say I
12 did.

13 But what voluntary intoxication does
14 is it says, look, cognitively, the brain when it
15 thinks about something does things in a rational
16 order, in a rational way and processes information
17 in a rational way. If you were capable of doing
18 that but you just didn't, like if a jury wanted to
19 find somehow that you were capable of forming
20 specific intent but you just didn't at the time,
21 then you lose.

22 What they have to find is that your
23 sensibilities were so overwhelmed that you couldn't
24 process any information, you couldn't form any
25 intent, any general intent, any specific intent, any

1 intent to premeditate, deliberate or any malicious
2 intent.

3 I'll give you an example of that. I
4 tried a case on diminished capacity, one of the
5 elements of which was voluntary ingestion of
6 cocaine. And this was a murder similar to the other
7 murder that I told you about earlier, where he goes
8 and kills his girlfriend, an art student, a tragic
9 case.

10 He is on the witness stand. And I
11 said to him, now, Tommy, tell the jury what
12 happened. Well, I saw her and I was so enraged and
13 I shouldn't have had all this to drink, I shouldn't
14 have had all this to eat -- to snort or whatever he
15 was doing with it, and I shot her and killed her.

16 The expert testifies before he does,
17 two experts, a psychiatrist and psychologist. Cross
18 examination. Well, when you went there to the
19 apartment, who did you go with? I went with this
20 person. What did you intend to do with the gun?
21 The answer to that question is I didn't even realize
22 there was a gun and I didn't intend to do anything.
23 He says, I only intended to scare her with the gun.

24 When he says that, the District
25 Attorney stands up and says, judge, no more evidence

1 of diminished capacity based on voluntary ingestion
2 of drugs or alcohol, because the Defendant just
3 admitted that he had the capability of forming some
4 intent. And if he was capable of forming some
5 intent to scare, then he is capable of forming some
6 intent to kill. And the mere fact that he says that
7 he didn't form a specific intent to kill is
8 irrelevant. He was capable of forming intent. And
9 the judge said, you are right, first degree murder,
10 he is doing life.

11 MS. DALTON: I think at least on a
12 theoretical basis it does kind of hinge on this
13 dichotomy, because I was quite taken with District
14 Attorney Castor's testimony that if someone did
15 ingest the same substances and then went out and
16 committed a crime that was heinous, short of a
17 homicide, this defense wouldn't be available. So
18 I'm just trying to sort out those issues.

19 MR. DONATO: That would be a general
20 intent. That would be different. That's why the
21 statute reads this way, because it only goes to
22 negate specific intent.

23 CHAIRWOMAN COHEN: We are running
24 close on time. If we can keep questions and maybe
25 answers a little bit abbreviated.

1 MR. DONATO: I'm sorry.

2 CHAIRWOMAN COHEN: No, that's fine.

3 Counsel Cherry.

4 MR. CHERRY: Thank you. Mr. Winning,
5 this question is for you. Since you've spoken to
6 judges and juries, you know that juries give great
7 weight to jury instructions by the judge, just the
8 mere fact that it is a judge telling them this and
9 he's up on the bench.

10 MR. WINNING: Sure. Many times jurors
11 even request that the instructions be regiven or be
12 repeated.

13 MR. CHERRY: Do you feel that jurors
14 would give -- I'm referring to Mr. Castor talking
15 about diminished capacity and voluntary intoxication
16 and still using the diminished capacity defense. Do
17 you feel the jurors would still give the same weight
18 to the diminished capacity instruction as they would
19 to a voluntary intoxication instruction?

20 MR. WINNING: I don't think so. I
21 think that what happens here is that under the bill,
22 if passed, it's inadmissible. In other words, the
23 bill reads now neither voluntary intoxication nor
24 voluntary drugged condition is a defense to a
25 criminal charge nor may evidence of such condition

1 be introduced to negative the element of intent of
2 the offense.

3 So were this bill to be passed, the
4 jury would not be allowed to hear, it would be ruled
5 inadmissible under any type of new version of the
6 bill. The element of diminished capacity or the
7 defense or the evidence of diminished capacity would
8 not be admissible on the issue of intent, which is
9 essentially the most important issue in a first
10 degree murder case, because the law requires
11 obviously evidence beyond a reasonable doubt of
12 specific intent to kill.

13 So under the bill as proposed, such
14 diminished capacity or impairment defense would not
15 be admissible at all on the question of intent.

16 MR. CHERRY: Thank you.

17 CHAIRWOMAN COHEN: Counsel Kuhr.

18 MS. KUHR: I did not practice criminal
19 law. I have two practical questions. You
20 mentioned, Mr. Donato, that testing is sometimes
21 done at the time a person is arrested. I'm just
22 curious. Is it typical that if these police arrive
23 and realize a person is intoxicated or high, that
24 they do some kind of test for alcohol or drugs?

25 MR. DONATO: It is. It's typical

1 that they'll give him a blood test if he's looking
2 like he's under the influence of something. It is
3 very typical that in any arrest situation a police
4 officer will say, have you been drinking, have you
5 ingested any drugs or alcohol?

6 MS. KUHR: So your expert has that
7 information?

8 MR. DONATO: Yes. And if the blood
9 test result comes back and it is .11 or .12, it's
10 not going to get you very far. But if the blood
11 test result comes back and it's a .31, your expert
12 is going to have a little more ammunition, but he's
13 still not going to be able to say, I know to a
14 reasonable degree of scientific certainty that this
15 man did not. He's going to say, I know that the
16 literature says that with this blood alcohol,
17 depending on metabolism rates and tolerance rates, I
18 know this could impair one's ability to form intent,
19 cognitive ability to form intent.

20 MR. WINNING: In a homicide
21 investigation, the investigating officer would
22 certainly be interested in blood alcohol content, as
23 Art just pointed out in response to your question.
24 But there would be much more detailed information
25 that would be developed in terms of the overall

1 condition of the assailant, sort of the
2 environmental situation around him, cans of alcohol,
3 evidence of drug use, his alertness, his eyes. All
4 types of other physical emotional indicia of
5 diminished capacity and impairment that would be
6 developed by the police and would provide the basis
7 for the offering of expert testimony on the person's
8 mental state, in addition to the blood alcohol
9 content.

10 MR. DONATO: And it is worth keeping
11 in mind, too, that the police are there to gather
12 incriminating evidence, not exculpatory evidence.
13 So what they are going to do, what good homicide
14 investigators do -- everybody will tell you this,
15 not just defense lawyers -- is they're going to do
16 their best to get a confession out of the guy.

17 And the confession is going to look
18 like, did you know you had a gun, did you know the
19 gun was loaded, when did you load the gun? He's
20 going to get him to answer those questions in
21 anticipation of some claim later that he couldn't
22 form an intent. They have the advantage because
23 they get there first.

24 MS. KUHR: In terms of other crimes
25 where this evidence is not admissible for intent, I

1 assume it is admissible for other purposes?

2 MR. DONATO: It's admissible for
3 incriminatory purposes. And in some jurisdictions
4 and historically up until recently, by recently I
5 mean 50 years or so, it was always admissible for
6 every crime at common law. If you were drunk, you
7 were able to come in and say, look, I committed this
8 act but I didn't have the general intent, I didn't
9 possess the general intent to do it.

10 It's only been recently that courts
11 have said and legislatures have said, look, we want
12 to limit this. Some states, largely the southern
13 ones, don't have it at all, but most urban areas,
14 populated places, do have it.

15 MR. WINNING: I think your question
16 points out sort of the dichotomy of what we are
17 talking about here. And that is that in many
18 instances the Commonwealth or the prosecutor is the
19 first party to attempt to introduce evidence of
20 intoxication. For example, maybe in a sexual
21 assault case or a rape case, the first thing you
22 will hear from the prosecutor is our client or the
23 Defendant was intoxicated or drug impaired;
24 therefore, did not have -- he was the one that got
25 involved in the situation. He didn't have the right

1 sense to stay away from the woman, or he was the one
2 that provoked this incident by his intoxication.

3 But when it comes to a defense or a
4 possible explanation or negation of intent, the
5 prosecution wants to keep it out. So it's, I think,
6 extremely unfair in that sense.

7 CHAIRWOMAN COHEN: Well, we want to
8 thank both of you. This has been most enlightening.
9 I can only reiterate what Representative Harper
10 said, you are a perfect example of why we come into
11 the areas to meet with the folks that are in the
12 trenches and in the real world practicing everyday
13 to enlighten us. So we really thank you for the
14 time and effort that you have given to this project.

15 MR. DONATO: Thank you for giving us
16 this opportunity.

17 MR. WINNING: Thank you for the
18 opportunity.

19 CHAIRWOMAN COHEN: Is our reporter
20 okay? The last person to make a presentation is
21 Larry Frankel, the Executive Director of the
22 American Civil Liberties Union of Pennsylvania.

23 MR. FRANKEL: Thank you,
24 Representative Cohen. I congratulate and commend
25 all of you for making it here today. I know you had

1 a late night last night. And I apologize for not
2 having written testimony, but I didn't stay as late
3 as you did. I didn't have time to prepare written
4 testimony.

5 Also, I wanted to really hear what the
6 other witnesses had to say. I'm not one in the
7 trenches unless you consider Harrisburg the
8 trenches. But I do think that I have some
9 observations that I would like to make.

10 I would also like to just really
11 commend the Subcommittee for having a hearing. You
12 look at the bill and the bill looks like, well,
13 what's it really doing. It's going to make some
14 cases first degree murder instead of third degree
15 murder. Do we really need to have a hearing on
16 that? What's so hard to understand?

17 I think it's very important, even in
18 cases where bills are just changing the grading of
19 an offense, to really begin to explore the issues
20 more deeply than I think has been the experience in
21 Harrisburg, because I think there are consequences.

22 In this instance, it may be how many
23 more life sentences are there going to be, can we
24 estimate that instead of the sentences under third
25 degree murder, what are the costs to the

1 Commonwealth going to be, are we really talking
2 about very many cases.

3 When you asked the District Attorney,
4 Castor, he said two and then he talked about one,
5 and it also feels very anecdotal. But how many
6 cases are we really talking about? I think that's
7 an important fact. What are the consequences in
8 terms of the overall criminal justice system?

9 And I know all of you supported
10 Representative Birmelin's legislation about prison
11 impact statements. And it's gotten out of the
12 Senate Judiciary Committee, maybe it will be
13 enacted. But it seems like the Committee itself can
14 use this as a vehicle to get more information. And
15 I know I spoke to Mr. Cherry. What about the
16 Sentencing Commission? What about PCCD, what
17 information can they provide so people will know,
18 legislators will know, what number of cases are we
19 talking about.

20 How many cases when this evidence is
21 used does it even work? Is this a problem? We
22 don't have anything other than, I think, some
23 theoretical statement that it is a problem that
24 needs to be addressed. So I commend you for having
25 the hearing today, and I hope you will follow up

1 with maybe some questions to the Sentencing
2 Commissioner or PCCD or whomever to find out what is
3 it that we are talking about in terms of the real
4 world, the number of cases, is this a step we should
5 take.

6 I also just wanted to use this
7 opportunity, in Pennsylvania we already have the
8 largest population of lifers in the country. We
9 don't have a problem with putting people away for
10 life. We must be very successful at doing it. And
11 that is the real consequence if you pass this bill.
12 Even if it's two cases a year, you might end up with
13 two more life sentences and what does that mean.

14 I think, I know others think, and I
15 think some folks even in the Department of
16 Corrections are beginning to wonder, what are we
17 going to do with the geriatric population we have in
18 prison. You heard the maximum sentence can be 40
19 years. You can put somebody away for a very long
20 time for third degree murder. What is going to be
21 the consequence of adding to the life population
22 again if you change this particular statute in
23 question.

24 I would submit it's time to start
25 looking at what we can do to resolve some of the

1 lifer situations for prisoners over 65 and 70. And
2 probably no one thinks they're ever going to commit
3 a crime again. I'm not saying release them all, but
4 we don't even have a mechanism for figuring out
5 whether some might be appropriate.

6 CHAIRWOMAN COHEN: That's another
7 day's hearing.

8 MR. FRANKEL: But that issue is raised
9 by this bill, and I don't think you can ignore the
10 fact that you are going to add to the problem if the
11 bill passes.

12 And the final comment I would make is
13 sitting here reminded me of the hearings and the
14 efforts a few sessions ago to really abolish the
15 insanity defense, which unfortunately in the wisdom
16 of the legislature they did not do. And because
17 that was the recognition that there is a difference.
18 There is a difference between the person who has the
19 specific intent, not affected by drugs and alcohol,
20 versus the person who is so intoxicated or so
21 drugged up that they really can't form that specific
22 intent. And that as a society we want to maintain
23 that distinction, that they are not all the same
24 person deserving of the same punishment.

25 And I think the legislature recognizes

1 that when it comes to insanity and issues of mental
2 health that there is a difference between the person
3 who has got such a mental illness that they can't
4 form the specific intent, and the person who does,
5 who premeditates and plots and plans.

6 I think those distinctions are
7 important if we are going to have a criminal justice
8 system that is fair, that is just, and that in the
9 end is honored and respected by the general
10 population who, I think, does understand the
11 differences between someone who is so drunk and
12 someone who really plans and plots and commits those
13 crimes.

14 So I would submit that to continue to
15 maintain this distinction is tremendously important,
16 even if it is very few cases because I think it says
17 that we as a society here in Pennsylvania -- unlike
18 Montana and Idaho and Texas may have a law. I hope
19 Pennsylvania is not Montana, Idaho or Texas, and
20 that's one of the reasons I'm probably living in
21 Pennsylvania because it isn't some of those other
22 places. But that we recognize and we understand as
23 a matter of public policy that these two individuals
24 are not equally culpable. And that's why I think
25 it's important to maintain the distinction, and why

1 we would urge you not to pass this piece of
2 legislation.

3 CHAIRWOMAN COHEN: Thank you.

4 MR. FRANKEL: And I attempted to be
5 brief.

6 CHAIRWOMAN COHEN: You have, indeed,
7 and we appreciate that and you have given us a lot
8 of food for thought.

9 That will then conclude the hearing
10 today on the Subcommittee on Crime and Corrections
11 from the Pennsylvania House of Representatives
12 Judiciary Committee. We appreciate everyone that's
13 been here. Thank you very much. We want to thank
14 the folks at the Valley Forge Towers for welcoming
15 us. Thank you Representative Harper, Representative
16 Williams for being here.

17 Copies of the testimony will be
18 presented to all of the Members of the Subcommittee.
19 Additionally, anyone else that has any kind of
20 written testimony, the desk, as we say, is open for
21 other written testimony to be presented to us, which
22 we will examine and then distribute to the other
23 Members of the Subcommittee. And then we will make
24 a report and a presentation to the Chairman of the
25 Judiciary Committee.

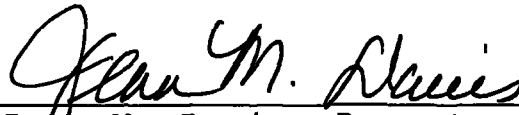
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So we thank you all, and this hearing
is duly adjourned.

(The hearing concluded at 10:32 a.m.)

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I hereby certify that the proceedings
and evidence are contained fully and accurately in
the notes taken by me on the within proceedings and
that this is a correct transcript of the same.



Jean M. Davis, Reporter
Notary Public

Notarial Seal
Jean M. Davis Notary Public
Derry Twp. Lehigh County
My Commission Expires Mar. 29, 2004
Member, Pennsylvania Association of Notaries

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