ACLU of Pennsylvania
125 South 9th Street, P.O. Box 1161
Philadelphia, PA 19105-1161
(215) 592-1513
fax: (215) 592-1343
email: aclued@aol.com

James D. Crawford
President

Larry Frankel
Executive Director

TESTIMONY ON HOUSE BILL 1521 & SENATE BILL 555

"COMMONWEALTH RIGHT TO A JURY TRIAL"

BEFORE THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME AND CORRECTIONS

APRIL 15, 1998

Good afternoon Representative Birmelin and other members of the House Judiciary Committee Subcommittee on Crime and Corrections. My name is Larry Frankel and I am the Executive Director of the American Civil Liberties Union of Pennsylvania. I would like to thank you for this opportunity to testify on the proposed constitutional amendment that would grant the Commonwealth the right to demand a jury trial in criminal cases.

The ACLU believes that this proposal raises many difficult questions. It is not just a simple matter of "leveling the playing field." The proposed amendment touches on complex issues that deserve thorough and balanced consideration.

One of the first issues that we think you should consider is the impact this change will have on the **entire** judicial system. Our courts are already straining to keep up with their civil and criminal dockets as well as the ever-growing number of domestic relations matters. If dozens of criminal cases are tried before juries rather than before judges, there will undoubtedly

808-M

be an adverse impact on attempts to clear this backlog. Jury trials last longer than judge trials. Fewer judges will be available to dispose of criminal non-jury cases and all of the other kinds of judicial proceedings. More criminal jury trials will impose additional expenses on the courts, prosecutors, public defenders, and ultimately the taxpayers. These extra costs will be felt beyond Philadelphia and Allegheny County. The added expenses will be particularly troubling for smaller counties with few judges. Many of these counties will find **their** budgets stretched by even a small increase in the number of criminal cases tried before a jury.

The ACLU is also concerned about the impact this proposal may have on the relationship between private defense counsel and defendants. Generally, defense counsel charge higher fees for jury trials. If the Commonwealth has the right to demand a jury trial, reasonable defense counsel will need to charge their clients a fee to cover a jury trial even though defendants may barely be able to afford such a fee. A defense lawyer, knowing that a case could become a jury trial will undoubtedly charge higher fees. Therefore, in all likelihood, this proposed amendment will serve either to enrich criminal defense attorneys or result in more cases being handled by the public defender at taxpayer expense.

The ACLU fears that the Commonwealth will use their right to demand a jury trial as additional leverage in extracting guilty pleas. Once a prosecutor knows that a middle-class defendant does not qualify for a public defender, he or she can increase the costs to the defendant merely by demanding a jury trial. A defendant with insufficient funds to pay for a jury trial may feel compelled to plead guilty to lesser charges. We do not think that providing the Commonwealth with that kind of bargaining advantage really advances justice or confidence in our judicial system.

Fundamentally, we believe that the right at stake here is the right of a defendant to a trial before an impartial decision-maker. After all it is the defendant who faces the potential loss of liberty. Some defendants may fear that jurors will be unable to set aside their prejudices based on race, religion or political views. Those defendants may have more confidence in a judge's ability to decide a case without being influenced by stereotypes or biases. A defendant's interest in a neutral decision-maker could be severely compromised by the Commonwealth's demand for a jury trial.

This concern regarding the biases of jurors was highlighted last year, when the District Attorney of Philadelphia disclosed that Jack McMahon, a former Assistant District Attorney, had made a training tape for prosecutors on jury selection. In the videotape, Mr. McMahon is heard instructing his coworkers to avoid "blacks from low-income areas" as jurors. This tape was made after the United States Supreme Court had held that a prosecutor's use of peremptory challenges on the basis of race is unconstitutional. Batson v. Kentucky, 476 U.S. 79 (1986).

According to an article that appeared in the Philadelphia Inquirer, on the training tape, Mr. McMahon said:

> -- "In selecting blacks, you don't want the real educated ones. This goes across the board. All races. You don't want smart people. If you're sitting down and you're going to take blacks, you want older black men and women, particularly men. Older black men are very good."
>
> -- "The case law says the object of getting a jury . . . is to get a competent, fair and impartial jury. Well, that's ridiculous. You're not trying to get that. Both sides are trying to get the jury most likely to do whatever they want them to do. You are there to win . . . If you think that it's some noble thing, some esoteric game, you're wrong and you'll lose."

While some have questioned the motivation behind the release of that training tape, the

District Attorney of Philadelphia is to be commended for disclosing the fact that prosecutors were being explicitly instructed to pollute the jury selection process. The tape, however, merely confirmed what courts throughout the state have found since the Batson decision. I have attached to my testimony a summary of some recent decisions which have found that prosecutors have acted in a discriminatory manner in the jury selection process. These cases involve discrimination based on race, gender and even ethnic background.

The infamous training tape and these cases establish a further reason for opposing this proposed constitutional amendment. Unfortunately, at times attorneys for the Commonwealth place too great an emphasis on winning their cases, with insufficient regard for prevailing legal standards. Discrimination in jury selection is an ongoing problem. The unfortunate legacy of the pre-*Batson* era lives on.

The ACLU does not deny the fact that some defense counsel also engage in dishonorable tactics. When they do, the courts should respond appropriately. See, Commonwealth v. Garrett, 689 A.2d 912 (Pa. Super. 1997). However, when the prosecutor engages in these maneuvers, he or she is acting in the name of all of us. The injury that is caused by such acts is harmful, not only to the criminal defendant, but also to the potential juror and the community at large. Powers v. Ohio, 111 S.Ct. 1364 (1991). As the Pennsylvania Supreme Court stated, one of the interests compromised by a discriminatory jury selection process is: "the rights of citizens in general to participate in society's mechanism of justice by engaging in jury duty." Commonwealth v. Dinwiddie, 601 A.2d 1216 (Pa. 1992).

We think that until there is substantial and credible evidence that discriminatory jury selection practices by prosecuting attorneys have been completely eradicated, it would be

inappropriate to permit the Commonwealth to exercise a veto over a defendant's request to waive a jury trial. The dangers to our criminal justice system are too great and the potential impact on our entire court system is too enormous.

Proponents of this constitutional amendment have claimed that defendants use their right to demand a jury trial to engage in "judge shopping." We believe that this concern can be addressed by far less extreme means. It is our understanding that some counties have instituted procedures for compelling defendants to indicate whether or not they want to waive a jury weeks in advance of trial. The current Rules of Criminal Procedure give the trial courts the authority to deny a defendant's request to waive a jury trial. PA Rule of Crim. Pro. 1101.

Less than two years ago, the Pennsylvania Supreme Court held that a trial judge had properly denied the defendant's request to be tried by a judge because the trial judge believed that the defendant's request "was designed solely for purposes of delay." Commonwealth v. Jones, 683 A. 2d 1181, 1190 (Pa. 1996). The Pennsylvania Supreme Court stated that Rule 1101 makes it "clear that a request for a non-jury trial is not a matter of right, but rather is subject to the discretion of the trial court." 683 A.2d at 1189. See also, Commonwealth v. Wallace, 561 A.2d 719, 726-727 (Pa. 1989) (right to waive a jury trial is not absolute); and Commonwealth v. Garrison, 364 A. 2d 388, 390-391 (Pa. Super. 1976) (jury trial waiver properly denied where the record indicates judge shopping.)

Thus, it is clear that trial courts in this Commonwealth already have the power to deal with defendants who request non-jury trials for improper purposes and that trial courts exercise that power. Amending the Pennsylvania Constitution is an exaggerated and unnecessary answer to the concern that has given rise to this bill.

Finally there is the bold assertion that this amendment is necessary because of "situations throughout the state where judges have shown an overriding bias against certain types of criminal cases. Under such circumstances, the victim and the Commonwealth can obtain a fair trial only by having a jury hear the case." *Pennsylvania District Attorneys Association - Position Paper on Commonwealth Right to a Jury Trial - Executive Summary.* While I am confident that the Honorable Linda Wallich Miller of the Pennsylvania Conference of State Trial Judges, who is scheduled to testify later today, can adequately refute that assertion, I would like to provide you with more information about just one of the cases discussed in that position paper.

The District Attorneys describe the case of Commonwealth v. Leon Williams as one in which an innocent 15 year old boy was shot by the defendant in a drive-by-shooting. The victim was killed because he was at the wrong place at the wrong time. The District Attorneys assert that the defendant deliberately chose a bench trial.

By sheer luck, I have had an opportunity to speak with Barnaby Wittels, Esquire, the attorney who represented the defendant in that case. He advised me that it was the **prosecutor** who first suggested to Mr. Wittels that the case be tried before a judge rather than a jury. Mr. Wittels then consulted with the defendant and the defendant then chose to waive his right to a jury trial. At trial, a key witness "went south." The defendant was convicted of third degree murder and was sentenced to 45 years in prison with parole eligibility at fifteen years. The trial judge was the Honorable Jane Cutler Greenspan, who, before she went onto the bench, was the head of the Appeals Unit of the Philadelphia District Attorney's office.

The fact that the prosecutor made the initial suggestion to try the case without a jury is omitted from the District Attorneys' description of the case. Also omitted were these facts: the

testimony of the key witness was flawed, the defendant received a substantial sentence and the judge was a former prosecutor. Certainly you should be aware of all aspects of any case before deciding whether a judge has not served justice.

The ACLU does not have the ability to verify all of the information about other cases described in the Pennsylvania District Attorneys Association's Position Paper. Nor do we think you should get bogged down by such anecdotal evidence. Rather, we believe that there are many compelling policy, fiscal and practical reasons to reject this proposal. We hope that you will give due consideration to the concerns expressed by us and many other interested groups and individuals.

Thank you for your time. I will be happy to try to answer any questions you may have.

APPENDIX TO ACLU TESTIMONY ON HOUSE BILL 1521 & SENATE BILL 555

Commonwealth v. Dinwiddie, 601 A.2d 1216 (PA Supreme Court 1992)

In this case, the Commonwealth struck five blacks from the jury. Defense counsel, on two separate occasions, objected to the prosecutor's challenges to these jurors. The prosecutor refused to justify his use of peremptory challenges. The Pennsylvania Supreme Court noted that the prosecutor "unequivocally refused to recognize any obligation on his behalf to provide any explanation whatsoever." (Page 1219) The Supreme Court affirmed the holding of the Superior Court which had ordered a new trial. In reaching this conclusion, the Supreme Court found the absence of a justification for striking the black jurors led to an inference of purposeful discrimination.

Commonwealth v. Horne, 635 A.2d 1033 (PA Supreme Court 1994)

The Pennsylvania Supreme Court held that a peremptory challenge based solely on the potential juror's residence was too closely tied to race and therefore improper. During jury selection, the prosecutor exercised three peremptory challenges that resulted in the exclusion of all blacks from the panel. The prosecutor explained one of his challenges:

> We discussed the fact that he lives in the 1600 block of Regina Street. My impression is that this is a high-crime area, and Detective Lewis's opinion was even greater than mine that it's a high crime area, and we felt together that a juror from that area would not be a good juror in a burglary and rape case because that kind of thing goes on in that area all the time; and, frankly, we wanted jurors who would be more shocked by this than somebody who lives in that kind of area. (Pages 1038-9).

The Supreme Court found that the prosecutor's explanation was not race neutral and the exclusion of this juror was unlawful.

Commonwealth v. Rico, 662 A.2d 1076 (PA Superior Court 1995)

In this case, the Superior Court found that the prosecution had engaged in illegal discrimination when it used seven peremptory challenges to exclude potential jurors of apparent or conceded Italian descent. The Superior Court rejected the Commonwealth's claim that Italian-Americans are not a cognizable group. The Superior Court wrote:

> If any identifiable group is excluded on the basis of race, gender, ethnicity, or other reason not related to a perception that the individual member would be unable to adequately perform the functions and duties required of a juror in the case presented, impermissible discrimination has occurred. (Page 1079)

The prosecutor offered the following explanation for excusing one of the jurors: "a very, very strange person," and "probably an extremely[,] very unusual person, probably gay," and "not because he's Italian. That's really true." (Page 1081). With regard to another juror, this explanation was given:

> "Yes, I didn't like the way he reacted to the question about his ears turned red, he turned red the question asked about organized crime and he said I guess so, something like that. I didn't like, I detected what I thought was fear in his demeanor and his voice when organized crime was mentioned and that in conjunction with his Italian background led me to believe he would not be a juror suitable with this case." (Page 1082)

With regard to another juror, the prosecutor explained: "I'm striking her because she lives in South Philadelphia in an area over which the mob will speak and I think she's subject to intimidation." (Page 1082) The Superior Court noted that the prosecutor accepted two jurors who did reside in South Philadelphia but were not of apparent Italian descent.

Commonwealth v. Tourscher, 682 A.2d 1275 (PA. Superior Court 1996)

In this case, the defendant represented himself on appeal and obtained a new trial. The Superior Court held that the prosecution may not strike prospective jurors solely on the basis of gender. The Superior Court relied on a United States Supreme Court decision, J.E.B. v. Alabama, 511 U.S. 127 (1994), which extended the holding in Batson to include peremptory challenges made solely on the basis of gender.

Harrison v. Ryan, 909 F.2d 84 (3rd Circuit 1990)

The federal appellate court affirmed the federal trial court's determination that the prosecutor had failed to satisfy the requirement of articulating a racially neutral reason for challenging a black juror and that the use of a peremptory challenge to exclude one black juror on the basis of race was sufficient basis for requiring a new trial. The Court wrote that in this case:

> "defense counsel timely objected to the use of peremptory challenges, the number of peremptory challenges exercised against Blacks was so great, the race neutral reasons given for striking other black jury venireperson were so weak, and the prosecutor was unable to articulate a race neutral reason for striking one of the black venirepersons." (Pages 87-88)

Johnson v. Love, 40 F.3d 658 (3rd Circuit 1994)

In this case the jury pool consisted of 52 people. Three of them were black. The defendant raised a Batson challenge based on the exclusion of a female black juror. At a hearing

in federal district court, the prosecutor claimed he could not recall any reason or reason for challenging specific jurors. He concluded his testimony with the following:

> The other thing that perhaps has not been noted for the record, counsel for the Defendant was also black and that was another factor that I had to take into consideration when selecting a jury. I certainly would not strike a black juror simply because the juror was black or because of the overall facts of this case and the fact that the subject was black and the attorney was black, that would not have been my reason for the strike." (Pages 662-663)

The district court had noted that the prosecutor purported to recall an overall strategy of excluding women from the jury panel due to the brutal nature of the crime. The district court found, however, that white women were not excluded from the panel. The district court found that Batson had been violated and the Court of appeals agreed.

Diggs v. Vaughn, 1991 U.S. Dist. LEXIS 3945 (Eastern District of PA 1991)

The District Court found that there had been a systematic exclusion of blacks from the jury which had convicted the defendant. The case had been referred to a magistrate judge who found a Batson violation after he had heard testimony from attorneys familiar with practices in the Philadelphia courts during the relevant period and testimony regarding jury selection at the defendant's trials (he had been tried three times). The District Court found that:

> "The record demonstrates conclusively that, at each trial, the prosecutor kept careful records of the race of each prospective juror, and a running tally of how many persons of each race remained on the venire for possible selection. I agree with the respondent that it is not a Batson violation to be aware of the race of prospective jurors, but in this case race seems to have featured very prominently in the thought processes of the trial prosecutor. Be that as it may, the clincher is that defense counsel at the trial which resulted in petitioner's conviction (which is after all, the trial with which we are concerned) repeatedly brought to the attention of the trial judge his contention that the prosecutor was using peremptory challenges to exclude blacks from the jury, in violation of petitioner's rights, and repeatedly sought a mistrial on that basis; and that the prosecutor did not then deny such was her intention, or attempt to justify her use of peremptory strikes on any other basis."