

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HOUSE JUDICIARY COMMITTEE

IN RE: PUBLIC HEARING ON SENATE BILL 628

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MONDAY, AUGUST 16, 2010, 1:04 P. M.

BEFORE:

HON. THOMAS R. CALTAGIRONE, MAJORITY CHAIRMAN
HON. JAMES E. CASORIO, JR.
HON. NICK KOTLIK
HON. RONALD G. WATERS
HON. JOSEPH I. BRENNAN
HON. JOHN R. EVANS
HON. VANESSA LOWERY BROWN
HON. CHRIS SAINATO
HON. LAWRENCE H. CURRY
HON. BRENDAN BOYLE
HON. JOHN E. PALLONE
HON. H. SCOTT CONKLIN

ALSO PRESENT:

HON. MARY JO WHITE

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1 CHAIRMAN CALTAGIRONE: I would like to open
2 today's hearing on Senate Bill 628. I'm Tom
3 Caltagirone, Chairman of the House Judiciary Committee.

4 I would like the members of the staff starting
5 with my right and members that are here and the Senator
6 who is here with us identify themselves for the record.

7 MR. TYLER: Good afternoon, David Tyler,
8 Executive Director.

9 MS. COATES: Karen Coates, Chief Counsel for
10 Chairman Caltagirone.

11 MR. McGLAUGHLIN: Good afternoon. David
12 McLaughlin, Acting Chief Counsel of the Judiciary
13 Committee.

14 SEN. WHITE: Sen. Mary Jo White. I represent
15 the 21st Senatorial District.

16 REP. WATERS: Brian Waters, 191st District,
17 West Philly and Delaware County.

18 REP. KOTIK: Representative Nick Kotik, 45th
19 District, Allegheny County.

20 MR. BELLMAN: Kurt Bellman, Research Analyst
21 with the House Judiciary Committee.

22 CHAIRMAN CALTAGIRONE: I would like to start
23 with our first comments from Sen. White and let her
24 Co-Chair the hearing.

25 SEN. WHITE: Thank you, Mr. Chairman. First of

1 all, I would like to thank the Chairman for scheduling
2 this most very important hearing on this very important
3 issue.

4 I want to make it clear at the outset that we
5 are talking about a very small number of cases in PA
6 where the Defendants would be ineligible for the death
7 penalty.

8 But as a result of the US Supreme Court Atkins
9 case about eight years ago now, they ruled that states
10 could not execute the mentally retarded but that it
11 would be up to each state to revise the policies,
12 procedures, and definitions for implementing that.

13 I had a bill similar to the bill that is before
14 this Committee today that has passed the Senate on three
15 different occasions.

16 Most recently, by a vote of 45 to 2. So in the
17 Senate at least, we have reached almost consensus on
18 procedure.

19 I thought the battle would be on the
20 definitions or the diagnosis of mental retardation.
21 That has not been the case.

22 It turns out that the differences of opinions,
23 which are strong, revolve around the process, who should
24 make the decision of mental retardation and when should
25 that procedure be made.

1 I think we have to recognize right now that our
2 criminal justice system is in danger. It is a budget
3 buster for the states, for the counties, for the big
4 cities that have a lot of capital cases.

5 We need to do things smarter. We're looking at
6 drug courts, mental health courts, diversions, better
7 parole policies, and clearing houses. All of this is
8 because the money involved in the criminal justice
9 system is immense.

10 The District Attorneys want the decision on
11 mental retardation to be made post-trial. Now, that
12 means you go through a capital trial and at the end of
13 the case decide whether or not the person is eligible
14 for the death penalty. To me, that doesn't make sense.

15 It might be possible to devise a very fair
16 process with a post-trial determination. I think that
17 would be doable, but why would we do it.

18 Capital cases are expensive. We have Criminal
19 Rule of Procedure 801 where the Supreme Court has set
20 down the rules for who may try a capital case, who may
21 defend it.

22 You have to be competent, trained, experienced
23 capital defense attorneys. In the big cities, they have
24 units that specialize in capital cases.

25 Most counties, including mine, have no

1 attorneys in the county who qualify to defend a capital
2 case, none. My husband estimated that there may be six
3 in western PA and they come at a very high price. One
4 of my neighboring counties said the legal fees for
5 defense counsel were \$700,000.

6 The other issue is in small counties, which are
7 most of our counties, there are issues that these are
8 highly sensational cases. They garner pre-trial
9 publicity, sometimes resulting in a change of venue.
10 Meaning, you have to move the case out of the county or
11 bring in jurors from other counties; two very expensive
12 propositions.

13 So in short, why would you spend millions of
14 dollars on the capital case and then decide after the
15 case is over that the person is mentally retarded and
16 not eligible for execution?

17 So if we can't come to agreement, the Senate
18 has passed this three times and if the House and Senate
19 cannot agree, perhaps we just need to put it up to a
20 vote and make that determination and perhaps do what FL
21 did where their Supreme Court ruled that there would be
22 a pre-trial determination by a judge and they did by a
23 rule of criminal procedure. It is another alternative
24 if we cannot agree.

25 Again, thank you everyone for attending today

1 and listening and testifying. Thanks especially to the
2 Chairman for giving the attention it deserves. It has
3 been eight years. We need to give the Court some
4 guidance. Thank you.

5 CHAIRMAN CALTAGIRONE: Thank you, Senator.

6 We'll start off with the first testifier,
7 Elisabeth Shuster, Chair of the PBA's Civil and Equal
8 Rights Committee, and John Bergdoll, IV, Co-Vice Chair
9 of the PBA's Civil and Equal Rights Committee.

10 MS. SHUSTER: Good afternoon, Representatives
11 and staff. I am Elisabeth S. Shuster, Chair of the
12 Civil and Equal Rights Committee of the Pennsylvania Bar
13 Association and next to me is John G. Bergdoll, IV, the
14 Co-Vice Chair of the Committee.

15 We are here at the behest of the PA Bar
16 Association President Gretchen A. Mundorff representing
17 the 28,000 lawyers of the PA Bar Association.

18 Thank you for inviting us to testify in favor
19 of Senate Bill 628, which prohibits the death penalty in
20 cases of mental retardation.

21 On May 11, 2001, the PA Bar Association adopted
22 a Resolution for Abolition of Capital Punishment in PA
23 for Mentally Retarded Persons.

24 As part of that Resolution, the PBA supported
25 the enactment of legislation barring the execution of

1 defendants with mental retardation.

2 We appear here today in furtherance of that
3 Resolution and in the hope that it will, at long last,
4 be achieved.

5 In 2002, the United States Supreme Court in the
6 case of *Atkins v. VA* ruled that imposing the death
7 penalty on the mentally retarded was excessive
8 punishment and therefore violated the Eighth Amendment.

9 The Court specifically left to the States the
10 task of developing appropriate ways to enforce the
11 constitutional restriction upon its execution of
12 sentences.

13 Senate Bill 628, which has already passed the
14 Senate overwhelmingly by a vote of 45 to 2, answers the
15 Supreme Court's charge in *Atkins*.

16 With respect to those to be tried, the bill
17 establishes a process whereby a defendant can establish
18 that he or she suffers from mental retardation.

19 The bill amends 42 Pa. C. S. Section 9711,
20 sentencing procedure for murder of the first degree,
21 establishing a pre-trial procedure for determining
22 whether the defendant is a person with mental
23 retardation and therefore not eligible for the death
24 penalty.

25 The legislation is clear that the jury is not

1 to be informed of these mental retardation determination
2 proceedings.

3 There are those that favor the bill's current
4 procedure of determining mental retardation prior to
5 trial and those who favor a post-trial determination.

6 The PA Bar Association has not taken a position
7 on this. However, the PBA does strongly feel that after
8 more than eight years, it is time for there to be an
9 established procedure that will provide a uniform
10 application of the law for everyone throughout the
11 Commonwealth. This will benefit prosecutors,
12 defendants, and the judiciary as a whole.

13 Those arguing for pre-trial determination
14 assert that it is the best method of following the
15 Atkins ruling.

16 A post-trial determination of mental
17 retardation would be made by a death-qualified jury,
18 which it is argued is less trusting of mental health
19 experts and more likely to believe that those with
20 mental retardation should be executed.

21 Moreover, it is argued that a post-trial jury
22 would have to make its decision as to the defendant's
23 mental retardation after having convicted him or her of
24 a heinous crime, which can create a prejudicial
25 environment for making such a decision.

1 There are also practical arguments made in
2 favor of a pre-trial determination. It avoids the
3 additional difficulty in going through a larger pool of
4 veniremen in looking for a death-qualified jury.

5 A pre-trial determination also avoids the
6 additional costs in paying mitigation counsel so that
7 they can sit through the trial and run up bills doing a
8 mitigation investigation.

9 Those arguing for a post-trial determination
10 allege that a pre-trial process will encourage claims of
11 mental retardation by defendants, will raise pre-trial
12 costs, and will permit judges opposed to capital
13 punishment to obstruct the imposition of the death
14 penalty.

15 The argument has also been made analogizing the
16 process for mental retardation determinations to those
17 of the sanity defense.

18 If the Commonwealth does not want judges making
19 pre-trial determinations as to sanity, why should judges
20 make such decisions as to mental retardation?

21 It is also claimed that prosecutors exercise
22 discretion when deciding on whether to bring a capital
23 case and do not want to sentence the mentally retarded
24 to death.

25 As has already been noted, the PBA has not

1 adopted a position as to whether there should be a
2 pre-trial or post-trial determination of mental
3 retardation.

4 However, the PBA strongly asserts the need for
5 PA to adopt, without further delay, a process that
6 abolishes capital punishment in PA for mentally retarded
7 persons as was required more than eight years ago by the
8 United States Supreme Court.

9 Therefore, we call upon the House to follow the
10 Senate and pass Senate Bill 628 this fall so that the
11 bill can proceed to the Governor's desk.

12 Thank you.

13 If the committee has any questions, we would be
14 happy to respond.

15 CHAIRMAN CALTAGIRONE: Thank you.

16 MR. McGLAUGHLIN: Good morning, ma'am. David
17 McGlaughlin again.

18 Is there a -- do you have an explanation or a
19 reason why the PBA has not taken a position on pre- or
20 post-trial?

21 Does that -- I mean, maybe that is an unfair
22 question, but I was just curious as to whether or not
23 there is a reason why PBA or you know what the reason
24 would be.

25 MS. SHUSTER: To some degree, I can give you at

1 least an educated guess as to why. The PA Bar
2 Association is composed of attorneys who represent a
3 broad spectrum, both prosecutors and defense counsel and
4 therein lies the bug.

5 MR. McGLAUGHLIN: Yes, ma'am. I understand.

6 MS. SHUSTER: As Chair of the Civil and Equal
7 Rights Committee, I can tell you that our Committee,
8 which was the Committee that brought the initial
9 Resolution back in 2001 to the PA Bar Association, has
10 taken very firm positions; but as you may know, the PA
11 Bar Association positions are only communicated when
12 they are positions of the Bar Association as a whole and
13 not of individual Committees.

14 MR. McGLAUGHLIN: Yes, ma'am. Thank you very
15 much.

16 REP. WATERS: Thank you, Mr. Chairman.

17 Thank you, Miss Shuster for being here.

18 Earlier in your testimony, you mentioned a cost of about
19 \$700,000 for a return.

20 MS. SHUSTER: I believe that was the Senator.

21 MR. BROWN: I'm sorry. I don't know if I can
22 ask you a question then. Are you aware of what the cost
23 would be?

24 MS. SHUSTER: I am not aware of what the
25 specific cost would be. However, we have heard from

1 various members including some judges of Court of Common
2 Pleas who have not given us permission to specifically
3 cite their names as to their concerns about the various
4 pre-trial costs if there would be post-trial
5 determinations for the various factors that we have
6 articulated including the additional costs not only of
7 the specifically qualified attorneys necessary for the
8 defense but also for the mitigated counsel.

9 I don't know whether the Senator's \$700,000 is
10 including the cost of the mitigating counsel sitting
11 through the trials.

12 REP. WATERS: Okay. So now, the levels of
13 retardation, how do they -- how are they factored into
14 this, the different levels? Is it severely retarded or
15 maybe slightly retarded?

16 MS. SHUSTER: The bill specifically provides
17 for a proceeding and the bill specifically requires that
18 the individual have been determined to be mentally
19 retarded by the age of 18 years.

20 Now, there are specific procedures that are
21 involved. I do not claim to be an expert in this, and I
22 do understand that there are persons with specific
23 expertise who will be following me. I would really
24 prefer to defer to them.

25 I would note that the term mentally retarded is

1 not the favored term at this time. However, we did use
2 it in our testimony because that is the term being used
3 in the bill and that was in the Supreme Court decision.

4 REP. WATERS: Thank you, Mr. Chairman.

5 CHAIRMAN CALTAGIRONE: Any other questions?

6 Thank you for your testimony.

7 MS. SHUSTER: Thank you for the time.

8 MR. BERGDOLL: Thank you.

9 CHAIRMAN CALTAGIRONE: The next group that we
10 will next hear from will be Chris Carusone, Chief Deputy
11 Attorney General, Annmarie Kaiser, Acting Chief of
12 Staff, Director of Legislative Affairs from the Attorney
13 General's Office, and Ed Marsico, President of the PA
14 District Attorney's Association.

15 We do have a couple new members that have
16 joined us, just for the record.

17 REP. BRENNAN: Thank you, Mr. Chairman, Rep.
18 Brennan, Lehigh, Northampton Counties.

19 REP. EVANS: Thank you, Mr. Chairman. Rep.
20 John Evans from Erie and Crawford.

21 CHAIRMAN CALTAGIRONE: And Mark Koch from the
22 Police Association.

23 MR. KOCH: Fraternal Order of Police.

24 CHAIRMAN CALTAGIRONE: Fraternal Order of
25 Police. I'm sorry.

1 MR. KOCH: Yes, Mr. Chairman.

2 CHAIRMAN CALTAGIRONE: Too much coffee. You
3 can start.

4 MR. MARSI CO: Good afternoon, Mr. Chairman.
5 Thank you for inviting the PA District Attorney's
6 Association to give input into this bill. I also want
7 to thank Senator White for her longstanding interest in
8 this particular issue and for her work on this
9 particular issue.

10 As noted, I am joined today here by members of
11 the Office of Attorney General and the Fraternal Order
12 of Police of PA. I'm here to offer testimony on behalf
13 of the PA District Attorney's Association's position on
14 Senate Bill 628, which would remove the longstanding
15 decision of whether a capital murderer is mentally
16 retarded from the jury and give this decision to a judge
17 before the underlying trial even starts.

18 It is only appropriate for the determination of
19 mental retardation be made after a trial by a jury. It
20 is only a post-trial determination by a jury that
21 respects the victim's rights and follows the proper role
22 of juries in our judicial process and that recognizes
23 the medical criteria that truly establish mental
24 retardation by discouraging malingerer claims, bias of
25 judges, and unnecessary trial expenses.

1 The timing and responsibility of a mental
2 retardation determination in death penalty cases has
3 been debated in the Commonwealth, as Sen. White said,
4 for the last several years since the Supreme Court
5 decision in Atkins versus VA, which the court rightly
6 held that the offenders who are mentally retarded must
7 not receive the death penalty.

8 Atkins, however, did not hold what Senate Bill
9 628 mandates, that judges, not juries, decide before a
10 trial whether the Defendant is mentally retarded.

11 Senate Bill 628 would be devastating to
12 victims' families. It would put them through additional
13 and unnecessary pain and suffering while they wait for
14 the opportunity to seek justice and to try to find
15 closure for their murdered loved ones.

16 The interruption of pre-trial proceedings to
17 conduct a hearing on mental retardation would
18 necessitate an investigation into the entire life of the
19 Defendant and everyone who knew the Defendant from
20 teachers to friends, to victims of other crimes at the
21 hand of the Defendant.

22 Expert witnesses would need to undertake
23 evaluations of the Defendant. This process would be
24 long and costly. The living relatives of the slain
25 victim would be the ones who truly suffer through that

1 wait.

2 Even after the initial hearing a pre-trial
3 determination of mental retardation will almost always
4 dictate the filing of an interlocutory appeal.

5 At present, this would add about an additional
6 three-year delay, which is around the average time for
7 an interlocutory appeal to go up through the Courts
8 before the case could be tried.

9 During this unnecessarily prolonged process,
10 while the victims' families and society wait for the
11 chance to seek justice, we are likely to see witnesses
12 to the case subject to intimidation and threats by the
13 killer and his or her cohorts.

14 In the Commonwealth, it is difficult enough to
15 protect and provide assurances for witnesses in the
16 standard delay of a homicide trial. Adding to this
17 delay, unfortunately, would make witness intimidation
18 far easier.

19 The longer a trial goes on, the more
20 opportunity there are to intimidate victims and
21 witnesses.

22 Unless the Commonwealth is willing to
23 supplement funding for witness intimidation programs,
24 murderers and their associates will be able to scare
25 victims and witnesses from testifying. This is

1 certainly not going to help public safety.

2 In an area when witness intimidation -- in an
3 era when witness intimidation is getting worse, why
4 would we increase the delay prior to the start of a
5 trial?

6 Mr. Chairman, it is not inappropriate for a
7 jury to be deciding the issue of mental retardation. We
8 have always placed our trust in the system where a jury
9 acts as a factfinder and has the ability to reach a fair
10 and just verdict based on the evidence presented.

11 When it comes to the death penalty, we give
12 even more responsibility to a jury. We relegate to
13 jurors the sentencing function traditionally reserved
14 for the judge.

15 We trust juries to decide factual issues,
16 especially those that concern the level of culpability
17 of a criminal defendant.

18 We trust juries to determine whether a
19 defendant is insane. We trust juries to decide when a
20 defendant is mentally ill.

21 We trust juries to decide when a defendant is
22 acting under duress, in self-defense, or in response to
23 entrapment.

24 In fact, we leave no decision regarding
25 culpability in the hand of the judge alone. The only

1 deci si on regardi ng the defendan t that we l eave to a
2 j udge i s whether a defendan t i s competen t to stand
3 tri al .

4 Passi ng thi s bi ll i s an eli ti st response to a
5 probl em that does not exi st. Thi s bi ll tel ls our
6 ci ti zens they aren' t smart enough to deci de thi s i ssue
7 even wi th i nstructi ons from a j udge.

8 Competen cy, whi ch i s deci ded by a j udge, i s far
9 di fferen t from mental retardati on. Most i mportantly,
10 competen cy i s i n no way a cul pabi li ty determi nati on.

11 Someo ne found to be i ncompeten t to stand tri al
12 cannot go through any part of the j udi ci al process of a
13 tri al , i ncl udi ng j ury sel ecti on. Si nce a j ury cannot
14 even be sel ected, the j udge, of course, makes the
15 determi nati on of competen cy.

16 Mental retardati on does not precl ude a
17 defendan t from bei ng put on a tri al before a j ury. The
18 only thi ng mental retardati on affects i s the possi ble
19 penal ty and the possi ble penal ty i s death.

20 Under no l ogi c can i t be argued that the j udge
21 i s the proper party to make that mental retardati on
22 determi nati on.

23 Our j usti ce system i s bui lt on the foundati on
24 of al l owi ng a j ury of our fellow ci ti zens to deci de
25 gui lt or i nnocence, to make the factual determi nati ons

1 in a trial, and decide the level of culpability of a
2 defendant.

3 In fact, as most members of the Committee
4 recall, just a few years ago, there was a constitutional
5 amendment that gave the Commonwealth the right to a
6 trial by jury as well as the defendant who had the right
7 to a trial by jury.

8 That movement, of course, came out not only
9 from the Legislature but involved overwhelming support
10 from the voters of this Commonwealth who were tired of
11 seeing judges in many cases make inappropriate decisions
12 on culpability and that is why we have a constitutional
13 amendment that allows the Commonwealth to have the right
14 to a jury.

15 It particularly makes sense to have the jury
16 determine mental retardation after the trial and at the
17 sentencing hearing, since the defendant's conduct during
18 the commission of the crime or crime spree may well
19 bolster or undermine the defendant's claim of mental
20 retardation.

21 A killer who conceived and executed a
22 sophisticated, complex murder scheme will, of course,
23 wish to have a retardation claim decided only by a judge
24 who has not heard the facts of the case at hand, but
25 justice would not be served under those circumstances.

1 In reality, as Sen. White said, mental
2 retardation is only an issue in a small percentage of
3 cases.

4 The number of first degree murders committed by
5 individuals who truly have mental retardation is tiny.
6 From that, the number of first degree murders that are
7 so atrocious and barbaric as to merit the death penalty
8 are even smaller.

9 In many capital cases, if the jury reaches a
10 verdict of a lesser degree of murder or manslaughter or
11 acquits, there would be no penalty phase and no need to
12 even reach this question.

13 Further, I truly doubt that prosecutors that
14 are seeking the death penalty on those who are truly
15 mentally retarded.

16 Despite these small percentages; however, many
17 defendants now since Atkins who are charged with capital
18 murder are claiming to have mental retardation to avoid
19 a capital sentence.

20 Any defense attorney who is worried about being
21 subject to ineffective assistance of counsel claims is
22 going to bootstrap a claim of mental retardation into a
23 pre-trial hearing without a doubt.

24 Therefore, as currently drafted, Senate Bill
25 628 encourages criminal defense attorneys and defendants

1 to file claims of mental retardation even if no credible
2 evidence exists.

3 Doing so will exploit the anti-death penalty
4 sentiments of concerned judges, as well as make mental
5 retardation claims more common by desperate murderers
6 willing to exploit any measure to avoid the death
7 penalty.

8 As a result of a recent PA Supreme Court case,
9 Commonwealth versus Vandivner, a mental retardation
10 hearing involved the testimony of three expert witnesses
11 despite the fact the defendant maintained full-time
12 employment as a licensed commercial truck driver, did
13 not receive any disability benefits, and never exhibited
14 any signs of mental retardation before he reached the
15 age of 18.

16 We respectfully request that Senate Bill 628
17 would better serve justice if these claims were made
18 post-trial only if we get to that sentencing phase.

19 It would then allow a jury, as a factfinder, to
20 look at the factors deemed important by the Diagnostic
21 and Statistical Manual of Medical Disorders in
22 classifying mental retardation.

23 First, the defendant's IQ or intelligence
24 quotient. Second, the limitations of the defendant's
25 adaptive functioning as well as onset before the age of

1 18.

2 Sen. White mentioned that there is currently
3 not any debate on the definition, which she assumed
4 would be a battle; and as Sen. White points out, this
5 bill in one incarnation or another has been around for
6 many years.

7 There was a battle over the definition. In
8 fact, the DA's Association compromised. We met
9 repeatedly with different members that were interested
10 and both sides of the General Assembly, as well as other
11 interested parties to try to come to a definition that
12 we believe was appropriate.

13 So we did make great strides in that realm and
14 have the definition that is currently -- the current
15 version of Senate Bill 628.

16 A jury, after hearing the facts of the case and
17 the defendant's actions, has the best picture in which
18 to observe limitations in the defendant's adaptive
19 functioning present at the time of the murder.

20 This would inhibit a large number of defendants
21 from bringing false mental retardation claims,
22 manipulating anti-death penalty mental health experts,
23 and judges by purposefully underperforming on tests and
24 in interviews.

25 Many anti-death penalty advocates claim that

1 the expense of capital trial weighs in favor of
2 pre-trial determination. Such a claim certainly sounds
3 good, but I believe is inaccurate.

4 This claim neglects to factor in the even
5 greater expense of hiring and paying expert witnesses to
6 conduct testing, prepare reports, and testify in
7 rebuttal to false claims of mental retardation.

8 A hearing like this in Dauphin County about two
9 years ago cost my office over \$20,000 in just expert
10 fees alone, as well as several days in court with the
11 result, of course, being that a judge overturned a
12 jury's death sentence.

13 Moreover, the current version of Senate Bill
14 628 would permit a defendant to litigate the issue of
15 mental retardation twice at the pre-trial hearing with
16 the judge; and then if he loses, at sentencing as a
17 mitigating factor in front of the jury.

18 This two bites at the apple approach is
19 extremely expensive and will require the prosecution to
20 rebut the defendant's expert testimony twice with
21 significant additional costs. Believe me, the experts
22 are going to charge every time they come to court.

23 In that Dauphin County case, while the
24 prosecution retained two experts from PA at our cost for
25 around \$20,000, the defense had an expert from FL, an

1 expert from CA, and I'm sure the defense expert claims
2 were well, well above those of the prosecution.

3 While, as Sen. White is correct, it is
4 important to be smarter on crime and I think the
5 Chairman and members of this Committee know that
6 prosecutors have been up here repeatedly in front of
7 this Committee to be able to appear before the Committee
8 and have been proponents of things like restrictive
9 intermediate punishment, funding for drug court, and
10 funding for mental health court.

11 Most of the time, it is prosecutors that have
12 pushed those approaches to crime. With regard to death
13 penalty cases, there is this aura that these cases are
14 incredibly expensive and they can be.

15 I would submit to this Committee that most of
16 those expenses are going to be there whether this is a
17 pre-trial or post-trial claim.

18 The defense is going to have to hire a
19 mitigation expert well in advance of trial. The experts
20 that would testify on mental retardation for both the
21 defense and prosecution will all be hired prior to trial
22 whether it is a sentencing phase determination by the
23 jury or a judge determination prior to trial.

24 In either of those scenarios most of the money
25 is already having to be spent. If the defense is

1 unsuccessful in a mental retardation claim, then we
2 would have to relitigate it again, not just with the
3 judge but before the jury in the penalty phase.

4 If the defense is successful at the pre-trial
5 stage, then we're going to have appellate delay that I
6 referred to earlier.

7 So the costs are going to be the costs, I think
8 in some ways giving the defendant two bites of the
9 apple, which Senate Bill 628 does, is actually more
10 expensive.

11 Now, you would not have mitigation counsel
12 sitting there; but in most counties I'm aware of,
13 counsel is going to be there regardless. There are
14 going to be other factors that may implicate the death
15 penalty in those types of cases.

16 Proponents of the current version of Senate
17 Bill 628 may also claim that jurors who have heard the
18 facts of the trial are no longer able to fairly
19 determine the issue of mental determination.

20 I have tried many death penalty cases and that
21 is just not right. The public courts have repeatedly
22 rejected those and other similar arguments.

23 In capital cases, death-qualified juries are
24 asked whether they can decide a case based on the law
25 and evidence, not based on their personal beliefs about

1 the death penal ty.

2 The deci si on of mental retardati on i s another
3 deci si on l i ke i nsani ty and other defenses that woul d
4 fall squarel y wi thi n the hands of the j urors.

5 I trust the system of thi s Commonweal th. I
6 don' t want to take thi s deci si on away and gi ve i t to a
7 j udge who may have an agenda agai nst the death penal ty,
8 a l aw that thi s General Assembl y has passed.

9 Consider the case of Si mon Pi rel a. Si mon
10 Pi rel a was convi cted of fi rst degree murder and
11 sentenced to death by a j udge si tti ng wi thout a j ury.

12 One of hi s many ki lli ngs i nvol ved beati ng a
13 vi cti m, forci ng hi m to be i njecte d wi th batter y aci d,
14 and then orderi ng one of hi s accomplices to strangl e the
15 vi cti m. After he threatened to ki ll the accomplice, the
16 accomplice tol d on hi m.

17 Two years after hi s convi cti on, he fi led a PCRA
18 peti ti on, i n the course of whi ch he was eval uated and
19 deemed nei ther mental l y retarded or mental l y i ll .

20 Shortl y after Atki ns was deci ded, Pi rel a
21 obtai ned a new l awyer, who presented test resul ts of hi s
22 al l eged mental retardati on, and the j udge changed the
23 sentence to l i fe i mpri sonment, 19 years after the
24 convi cti on. Si mi lar stori es can del ve from Dauphi n
25 County and other pl aces.

1 It is clear that these types of malingering
2 claims are encouraged by the decision in Atkins. It is
3 up to the Legislature to make sure that murderers are
4 prevented from wasting judicial resources, inflicting
5 further pain and suffering on the victims and appealing
6 to biased judges by requiring the mental retardation
7 claims be made post-trial to a jury.

8 As the Chairman knows, this is an issue I have
9 been involved with for many years. I don't take this
10 position lightly as the father of someone who is
11 mentally retarded.

12 I'm well aware of the community, The Arc that
13 is here in opposition to this bill, but it is not a
14 decision that DAs take lightly. It is not a decision
15 where we are seeking to execute those who are truly
16 mentally retarded.

17 What we are trying to do is prevent criminal
18 defendants who have committed atrocious crimes, the
19 worse we have, from using that excuse to get out of that
20 just sentence. So thank you.

21 CHAIRMAN CALTAGIRONE: Thank you.

22 We have had two other members appear before the
23 Committee. It is Chris Sainato and Larry Curry, just
24 for the record.

25 MR. CARUSONE: Thank you. Mr. Chairman, Sen.

1 White, members of the Committee. My name is Chris
2 Carusone.

3 I'm a Chief Deputy Attorney General with the
4 Office of Attorney General. I'm in charge of the
5 Appeals and Legal Services Section of the office.

6 One of the units within my section is the
7 Capital Litigation Unit where we specialize in handling
8 capital cases, primarily those that are on appeal.
9 Although we do handle trial and provide trial supports
10 for other attorneys and DAs prosecuting these cases
11 across the state.

12 I want to thank the Committee for allowing the
13 Attorney General's Office to speak on Senate Bill 628.
14 I want to compliment District Attorney Marsico for his
15 very eloquent remarks.

16 Our office is in full agreement with the
17 positions that he has stated on the record and we echo
18 those statements.

19 I believe a letter written by the Attorney
20 General of PA has been submitted as part of the record.
21 What I would like to do is just read that letter. It is
22 very brief, Mr. Chairman.

23 It is dated August 16th, 2010 addressed to the
24 both the Majority and Minority Chairmans of the House
25 Judiciary Committee. It is written by Tom Corbett

1 Attorney General .

2 I am writing to express my opposition on Senate
3 Bill 628, which is currently pending before the House
4 Judiciary Committee.

5 This legislation seeks to address the issues
6 raised in Atkins versus VA. In this case, the United
7 States Supreme Court ruled that the execution of a
8 person with mental retardation violates the Eighth
9 Amendment's prohibition against cruel and unusual
10 punishment.

11 The Court recognized that the assessment of
12 mental retardation requires a careful examination of
13 multiple factors, including test results and diagnostic
14 information coupled with life skills and behavioral
15 considerations.

16 Such determinations would be most appropriately
17 handled by the jury during the penalty phase. Thus, the
18 jury will have the benefit of hearing a thorough
19 presentation of evidence on the subject, including
20 evidence regarding the defendant's behavior during the
21 commission of the crime.

22 I, along with my law enforcement colleagues,
23 respectfully urge you and other members of the Committee
24 to oppose Senate Bill 628.

25 Determinations of mental retardation in capital

1 cases, like critical decisions regarding the existence
2 of aggravating and mitigating factors, should be left in
3 the capable hands of Pennsylvania jurors.

4 Thank you for your consideration of this
5 important matter. Sincerely, Tom Corbett, Attorney
6 General.

7 Just off the letter, I'm not going to repeat
8 everything that District Attorney Marsico said. I do
9 want to emphasize one thing since cost seems to be of
10 paramount concern to the Committee.

11 We are in agreement with the District
12 Attorney's Association that the procedure set forth in
13 628 is ultimately going to prove to be more expensive,
14 not less expensive.

15 If that is the goal, to make this less
16 expensive, we believe the bill is counterproductive to
17 that.

18 I don't think there has been much disagreement
19 on the proposition stated by Sen. White that it may be a
20 small number of defendants actually commit murder who
21 are mentally retarded, but that does not mean that a
22 large number of defendants will try to claim that they
23 are mentally retarded.

24 In fact, I would submit, just as District
25 Attorney Marsico indicated and based on my 17 years as a

1 prosecutor in both trial and in cases involving
2 homicides, that I believe that counsel appointed or
3 hired to represent a capital defendant is going to feel
4 compelled to raise claims like claims of mental
5 retardation if there is any question at all about the
6 defendant's mental competency.

7 If there is any question at all, and I have
8 seen this in court time and time again; and I'm sure
9 District Attorney Marsico has seen it as well.

10 Counsel want to make sure they raise every
11 issue even if it is fruitless, and they will raise this
12 question. If there is any question at all, anything in
13 their background which indicates some type of mental
14 disorder, the question will get litigated.

15 Now, if it is true that the vast majority of
16 these individuals are not mentally retarded, then what
17 we are in essence talking about are expert expenses at
18 the pre-trial hearing, assuming that that is denied and
19 it may not be, but assuming the trial court denies it,
20 when we go to a trial, expert expenses associated with
21 the trial and then potentially expert expenses
22 associated with post-trial litigating the effectiveness
23 of counsel.

24 Keep in mind, as you know, we are talking about
25 experts on both the prosecution and defense side and we

1 could be talking about multiple experts.

2 In my experience, it is not uncommon to see a
3 capital defendant hire three to four mental health
4 experts to support their claims. That is not at all
5 uncommon; including a psychiatrist, neuropsychologist,
6 psychologist, etc.

7 I can't agree strongly enough if the goal of
8 this bill is to reduce cost, I believe, based on my
9 experience in handling cases, that that is going to be
10 counterproductive and be more expensive than less
11 expensive.

12 MR. KOCH: How are you doing, Mr. Chairman?
13 Thank you very much for the opportunity to be here
14 representing, of course, the more than 40,000 law
15 enforcement officers in PA.

16 I would just like to add to that testimony that
17 we stand with both the District Attorney and the
18 Attorney General's Office on this issue.

19 It is clear. We are very concerned about the
20 prosecution of these cases, of the safety and welfare of
21 the public, and of course, of the many cases we have of
22 our own officers that end up murdered.

23 So until they work out a procedure or there is
24 a procedure that can be acceptable to both the Office of
25 the Attorney General and the District Attorney's Office,

1 we will stand with them. Thank you.

2 CHAIRMAN CALTAGIRONE: Members of the
3 Committee?

4 REP. WATERS: I would like to add some points.
5 Again, thank you for being here today. The question I
6 have is on here, there is a term used as qualified.

7 CHAIRMAN CALTAGIRONE: Your microphone.

8 REP. WATERS: I'm sorry. I turned it off. Let
9 me see. The question I have is the term here qualified
10 jurors the ones that can make the determination. What
11 is a qualified juror?

12 MR. MARSICO: In a capital case during the jury
13 selection process, the prosecution in defense of the
14 judge engage in a process to assure that jurors who are
15 selected in the case could follow the law and; that is,
16 that they could in an appropriate case impose a sentence
17 of death.

18 So if someone were to say that they have a
19 moral or conscientious objection to the death penalty,
20 if it is a religious-based objection to the death
21 penalty, that in no case could they ever impose the
22 death penalty, that person then could not follow it.

23 If they said they could not follow the law,
24 they would be excused from service. It is a
25 death-qualified juror is what is vernacular is for that

1 process where we ask a lot of questions.

2 Jurors in a death penalty case are individually
3 questioned. They take the witness stand. I assume in
4 most counties they have completed a questionnaire like
5 they do in our county and they are asked.

6 I specifically ask, do you have any moral or
7 conscientious or religious objection in an appropriate
8 case imposing the death penalty.

9 That is, a case of first degree murder, prove
10 them beyond a reasonable doubt, a case where the
11 aggravating circumstances that warrant the death penalty
12 outweigh any mitigating evidence and all of the other
13 jurors agree if that were the case could you vote to
14 impose the death penalty. If the person says, no, I
15 could never impose the death penalty, then they are
16 excused from service.

17 MR. CARUSONE: Just to add to that, the other
18 side is true too, a juror who would automatically vote
19 in favor of a death penalty on a first degree murder
20 would similarly be disqualified if they are unable to
21 follow the law, if they determine that there are no
22 aggravating factors, then they need to have the ability
23 to come back and say life sentence.

24 So a person -- a qualified juror would not only
25 be someone who is death qualified but also life

1 qualified as well that could render a life sentence.

2 It all comes down to, as the District Attorney
3 indicated, can you follow the law. Can you follow the
4 Court's instructions. That is ultimately what
5 determines whether the person is qualified or not.

6 REP. WATERS: Thank you for clearing that up,
7 both sides. Another question I have is in a case of
8 this type where we're dealing with a person mentally
9 retarded, will the interrogation that that person went
10 through also be videoed in cases like this?

11 I'm a strong proponent of interrogations being
12 videoed. I do hear of people who are mentally retarded
13 who don't have a clue, can't always separate reality.

14 MR. MARSICO: Sure.

15 REP. WATERS: Now, we have a person who has had
16 some problems of their own. I don't know that they can
17 handle how they are being questioned or how they are
18 answering these questions. Will there be a video of
19 interrogation being submitted as evidence at trial?

20 MR. MARSICO: Currently, Rep. Waters, under PA
21 law, there is no requirement that an interrogation be
22 videoed.

23 It varies from police department to police
24 department, frankly, and what procedures they use. They
25 may have police services that have the manpower to and

1 resource to employ video for interrogations. There are
2 others that certainly don't have the resources or
3 manpower.

4 There is a lot of debate about whether that is
5 a best practice or not. From a practical standpoint, a
6 lot of defendants or suspects when being told they are
7 going to be videoed who otherwise might talk more to the
8 police will no longer talk to the police.

9 There is a lot of debate. It is a hot issue
10 that you brought up, certainly, in regard to mental
11 retardation and a suspect that has mental retardation.

12 Prior to trial, a defense attorney could also
13 litigate whether that person gave consent, whether they
14 knowingly waived, for example, their Miranda warnings.

15 It would subjectively -- the Court would look
16 at the background of that defendant. We do that now
17 with juveniles. We treat juveniles different for
18 interrogation and confession purposes than we do adults.

19 There are different factors and circumstances
20 that the court explores in determining whether a
21 confession is valid based on whether it is a 14-year-old
22 as opposed to someone my age, age, education, all of
23 that factor into that.

24 So it would come into play there; but with
25 regard to your core question about video, no, there is

1 no requirement along those lines.

2 REP. WATERS: I know I keep hearing the matter
3 of costs come out --

4 MR. MARSICO: Sure.

5 REP. WATERS: -- during the testimony that was
6 presented. I'm quite sure there is going to be some
7 added cost in capital cases anyway.

8 MR. MARSICO: Sure.

9 REP. WATERS: I don't believe that we want to
10 send the wrong person or try the wrong person for the
11 death penalty. I'm sure you wouldn't want to do that.

12 MR. MARSICO: Believe me, I totally agree with
13 you, Rep. Waters.

14 REP. WATERS: But there are some cases where we
15 have a person in the courtroom who is not even mentally
16 retarded, but based on the way they are charged during
17 the interrogation because they can't afford to get a
18 good attorney, they are not that well educated. They
19 don't really know the difference.

20 They have taken a plea for something; and later
21 on, they say, I didn't do that. We've got a person that
22 is not retarded saying that they pled guilty to a crime
23 to take a lesser sentence.

24 MR. MARSICO: I agree with you, sir. The
25 integrity and the confidence in the criminal justice

1 system has always been something very important to me.
2 When mistakes happen whether intentional or otherwise,
3 that is a problem.

4 Most murder cases though and a lot of the
5 capital cases aren't who done it's. A lot of times we
6 are litigating at a capital trial isn't whether this is
7 the guy that did the crime. It is what was his intent.
8 His specific intent to kill. Was it in third degree
9 murder? Was he acting in self-defense? Was it a heat
10 of passion? Is it a voluntary manslaughter type of
11 case? A lot of times that is what is being litigated.

12 In a capital case a lot of times also the focus
13 might not be on who did it but, you know, what can the
14 defense do to mitigate it to show that the defendant
15 deserves a life sentence as opposed to a death sentence.

16 Death sentences are difficult to come by, as
17 they should be. They are very difficult to come by.
18 You know it only takes one juror to say at sentencing
19 phase that the defendant deserves life and then that
20 will be the sentence or in a hung jury and the defendant
21 gets life.

22 We need to build every safeguard we can in the
23 system as a whole but especially in the death penalty
24 case. Although not in PA, we don't execute anybody; but
25 in other cases where there may not be the potential of

1 going back.

2 REP. WATERS: Thank you.

3 CHAIRMAN CALTAGIRONE: Senator?

4 SEN. WHITE: I just have a point of
5 clarification, the right to an interlocutory appeal and
6 the potential three-year delay in the beginning of a
7 trial.

8 Is it not the case if the pre-trial hearing
9 finds the defendant mentally retarded, obviously, the
10 defendant is not going to appeal, so the only appeal
11 that would be taken there would be by the prosecution?

12 MR. MARSI CO: That is correct.

13 SEN. WHITE: So it would be completely within
14 the control of prosecution whether there was a
15 three-year delay?

16 MR. MARSI CO: Well, it would be our decision
17 whether to exercise an appeal. Although I wouldn't say
18 that would be within, you know, totally our decision.
19 The judge would have made a decision that we disagreed
20 with and choose to appeal based on that.

21 SEN. WHITE: But your choice to appeal, you are
22 weighing in there all of the factors you have mentioned,
23 a potential delay of trial, and the hardship.

24 MR. MARSI CO: That is correct, Senator; and
25 there are certain times, you know, where interlocutory

1 appealing may not be worth taking because of the delay.

2 MR. CARUSONE: I would just add that, Senator,
3 I believe -- I understand your question and certainly
4 your concern -- your statement and your concern; but I
5 think that while we may make the decision to appeal,
6 that appeal is obviously necessitated by an adverse
7 finding of the trial judge.

8 If we have a case where, let's say, multiple
9 police officers have been murdered. The families have
10 been devastated. The families are demanding justice.
11 You know, it is a difficult decision not to appeal that.
12 It is a difficult decision --

13 SEN. WHITE: The issue here is not the crime
14 but it is the status of the defendant. In other words,
15 when you keep talking about his behavior and want to
16 look at his behavior, that is really irrelevant.

17 It is whether the person was mentally retarded
18 before the age of 18 and has the limited IQ and has the
19 adaptive problems and those things are either there or
20 they're not.

21 I simply do not believe that there are
22 attorneys out there -- judges who don't follow the law
23 and attorneys who file frivolous claims. To me, it is
24 unethical.

25 MR. MARSI CO: It is, Senator. There was an

1 article in the Harrisburg paper last week about an
2 attorney who was a former Auditor General of this
3 Commonwealth who was forced to pay \$40,000 in fees for
4 frivolous unethical filings. So our profession,
5 unfortunately, does have its share.

6 With regard to the status of the defendant that
7 you brought up though, while the tests -- that is looked
8 at, that prong of the definition is looked at prior to
9 18.

10 Adaptive functioning continues up to the time
11 -- the second phase of your definition continues up to
12 and including the time of the trial, as I understand it.
13 It is not what the person's adaptive functioning was by
14 the age of 18.

15 So the commission of the crime, I believe, is a
16 big factor. I lost a case a couple of years ago where
17 the defendant was married, had children, had jobs,
18 purposefully targeted overweight African American woman
19 who he met in bars.

20 He was a Caucasian male. He would torture them
21 and rape and kill them. He was able to -- despite
22 police throughout this area in a couple of counties
23 trying to solve these, he was able to elude detection
24 for many years.

25 I thought that his course of conduct in

1 commi ssi on of those crimes rebutted the adapti ve
2 functi oni ng.

3 So the onset of the age 18, that is i mportant
4 for the IQ functi oni ng. The adapti ve functi oni ng
5 conti nues up through and i ncl udi ng the time of tri al ,
6 whi ch, I bel i eve, is what the mental heal th
7 professi onal s woul d tel l us i t shoul d.

8 SEN. WHITE: Wel l , I' l l ask for some
9 cl ari fi cati on on that when we have mental heal th
10 professi onal s.

11 MR. CARUSONE: I f I coul d j ust add to that,
12 Senator, i f I may, pl ease. We have a number of capi tal
13 cases pendi ng i n the Capi tal Li ti gati on Uni t now and i n
14 those -- i n every one of those cases that I coul d thi nk
15 of ri ght now, whi ch i s al most everyone, there i s some
16 cl ai m of a mental defect.

17 Now, are al l of these peopl e -- wi l l they al l
18 have mental probl ems or i s thi s j ust the hottest i ssue
19 ri ght now i n cri mi nal j usti ce where they end up hi ri ng
20 the same experts who gi ve them the same opi ni ons every
21 si ngl e ti me.

22 When we have those opi ni ons eval uated by our
23 experts, we fi nd qui te often -- and I can suppl y Court
24 opi ni ons and testi mony from these cases -- where these
25 experts are doi ng hal f the tests or have al ways found

1 some sort of a mental health problem, have never had a
2 situation whether they found a defendant who didn't have
3 some type of a mental health problem. It happens. I
4 see it.

5 SEN. WHITE: But there is a big difference
6 between mental health and mental retardation.

7 MR. CARUSONE: Not to an attorney -- if I may,
8 Sen., not to --

9 SEN. WHITE: In the context of which we are
10 taking today.

11 MR. MARSICO: Exactly.

12 MR. CARUSONE: Correct. But I believe though
13 that this will be something that will be raised more
14 often than you are portraying. It will be raised often.

15 If there is any hint of a mental problem, I
16 believe very strongly that defense counsel even in good
17 faith is going to be concerned in a capital case about
18 not raising the issue of mental retardation and it will
19 be raised. We have seen it.

20 MR. MARSICO: That is the fallout from Atkins.

21 MR. CARUSONE: Yes.

22 MR. MARSICO: That is not Senate Bill 628 that
23 created that. That is, you know, whether you guys
24 decide not to pass a bill today, we will probably be
25 dealing with that. Our concern is we will be dealing

1 with it more under this process.

2 CHAIRMAN CALTAGIRONE: I just want to mention
3 that Rep. Brendan Boyle from Philadelphia has joined us
4 and Vanessa Brown.

5 REP. WATERS: I have a question.

6 CHAIRMAN CALTAGIRONE: Yes, sir.

7 REP. WATERS: Can you answer the question about
8 the level of retardation that you are looking for in a
9 trial?

10 MR. MARSICO: Sure. The definition that is in
11 Senate Bill 628 talks about basically two components.
12 One is an IQ. Generally, an IQ less than 70 is what we
13 are talking about here.

14 As you have referenced, Rep. Waters, there are
15 different degrees of retardation. You know, there are
16 those who are profoundly mentally retarded who cannot
17 feed, cannot clean themselves, require around-the-clock
18 care.

19 There is other individuals that, you know, have
20 a much higher level of functioning. With different
21 diagnoses of mental retardation, you have a range of
22 abilities, a range of mental abilities, as well as the
23 adaptive functioning.

24 Where I think a lot of this is going to come
25 down is to this adaptive functioning piece, how well

1 does the individual adapt in society.

2 You know, fortunately, we made great strides
3 the last 30 or so years in assisting those with, you
4 know, mental challenges, you know, to get help, to get
5 services they need.

6 Representative O'Brien, you know, from the
7 House has been a champion for years. Ironically, he has
8 been the proponent of our version of legislation
9 throughout the years; that is, in opposition to the
10 Senate's version and I believe the House passed
11 Representative O'Brien's, which called for the
12 post-trial determination.

13 So, there are, Rep. Waters, different levels.
14 You know, no prosecutor is going to go after someone
15 that is of such a degree that they really can't function
16 in society.

17 With that said, there are those that are
18 mentally retarded that do commit crimes under any
19 definition or any commonly used definition of mental
20 retardation.

21 What Atkins says is while they may commit
22 crimes, we should not execute them. We certainly agree
23 with that.

24 A lot of this plays out, as I see it, at least,
25 this is in Dauphin County. I'm not speaking for the

1 rest of the state now.

2 Experts will come in and I had experts that
3 testified for the prosecution in Philadelphia about
4 being married, having a child, raising a family, saying
5 for the prosecution that that shows that that individual
6 could adaptively function in society.

7 They turned around and testified for the
8 defense in Dauphin County when I brought up those same
9 things having read the Philadelphia transcripts and the
10 fact that this defendant held a job and this defendant
11 did other things. It is a little bit different in this
12 case. I got very frustrated, frankly, with the experts
13 and the battle of the experts.

14 REP. WATERS: So it really is a clear benchmark
15 or determination right now --

16 MR. MARSICO: I think the definition that is in
17 Senate Bill 628 is a clear definition.

18 REP. WATERS: How about some people in that
19 status have the ability to be coached or encouraged or
20 influenced to do things in a way that other people might
21 have more stronger willpower? So then what happens with
22 the culprit in that case that puts the person up to it?

23 MR. MARSICO: We would go after the person that
24 put the person up to it. I tried a case here when I was
25 an Assistant DA of an individual who had limited mental

1 abilities.

2 They robbed a taxi cab driver and killed the
3 taxi cab driver. We went after the person who was the
4 brains behind the operation in that. It secured a
5 lesser sentence for the other individual involved. I
6 think that is probably how it would play out.

7 REP. WATERS: Thank you.

8 CHAIRMAN CALTAGIRONE: Thank you.

9 MR. McGLAUGHLIN: Just a quick question. Thank
10 you, Mr. Chairman. Thank you, gentlemen for coming in.
11 My question is this: What do they do now? Now it is
12 pre-trial, isn't it?

13 MR. MARSICO: No. It is -- you know, different
14 states have varied.

15 MR. McGLAUGHLIN: I'm talking about our state.

16 MR. MARSICO: In PA, it varies county to
17 county, as I understand it.

18 MR. McGLAUGHLIN: In other words, if I have a
19 case and I'm a lawyer and I see that it is death
20 qualified, if I have information that my guy is mentally
21 retarded, I'm going to file a pre-trial motion, aren't
22 I?

23 MR. MARSICO: You are, and I'm going to argue
24 that that mental retardation part of that motion be
25 heard at the sentencing phase after trial.

1 MR. McGLAUGHLIN: What is your experience as to
2 how the Court has been ruling on that?

3 MR. MARSICO: I don't know enough, Counsel, to
4 give you from across the Commonwealth on that.

5 MR. McGLAUGHLIN: I'm talking about Dauphin.

6 MR. MARSICO: Our court -- it depends on the
7 judge.

8 MR. McGLAUGHLIN: Understood.

9 MR. MARSICO: Certain judges would put it off
10 until the sentencing phase. A lot of times, we never
11 reach that phase.

12 MR. CARUSONE: Just to follow up on that, I
13 tried a case two years ago in front of Judge Ludgate in
14 Court of Common Pleas in Bucks County. It was a death
15 penalty case. It was actually a drug gang in Reading
16 that committed a series of murders in Reading.

17 Because it involved drug trafficking, our
18 office was involved. We had a wiretap and that is how
19 we got involved in the case.

20 I tried the case with another attorney in our
21 office and pre-trial motions, of course, that very issue
22 came up as to what we do. There is no legislation on
23 this question. So now it is up to the trial judge to
24 decide which version to adopt.

25 We argued our position and the defense argued

1 their position. I can tell you just in that one case,
2 Judge Ludgate ruled that this was an issue to be
3 submitted to the jury. She declined to hold a pre-trial
4 hearing.

5 MR. MARSICO: Counsel, that is the general
6 jurisprudence not with regard to mental retardation but
7 with regard to aggravating circumstances that the Court
8 should not make a pre-trial determination whether a case
9 is capital or could go forward. I think that is
10 probably where that line comes from.

11 MR. McGLAUGHLIN: Don't you think that could be
12 part of an omnibus pre-trial motion though?

13 MR. MARSICO: Sure. We have defendants file
14 all of the time. I'm not talking about mental
15 retardation. Maybe it is insufficient evidence on a
16 certain aggravating circumstance.

17 The case law is pretty clear on that, PA
18 Supreme Court caselaw that there should not be a
19 pre-trial determination as to whether aggravating
20 circumstances exist made by the Courts.

21 You know, it gets back to that whole philosophy
22 of let the jury decide. Unfortunately, we have had some
23 judges who deviated from the law in those cases.

24 But, again, I applaud Sen. White for taking the
25 efforts to introduce this legislation. We certainly --

1 the statutory framework was necessary. I respectfully
2 disagree, you know, with the way the process is to go.

3 At least someone is there, whether it is Rep.
4 O'Brien in the House, trying to give us a framework as a
5 result of Atkins.

6 MR. McGLAUGHLIN: Thank you very much.

7 MR. CARUSONE: Thank you.

8 CHAIRMAN CALTAGIRONE: Counsel?

9 MS. COATES: I just have a quick question. Has
10 the Supreme Court weighed in on this? Has it issued --

11 MR. MARSICO: In the Miller case in Dauphin
12 County, that I was talking about, where they first said
13 something last year in a footnote to a case.

14 Again, it made mention that the Legislature
15 should -- I don't know the case name. I know it was
16 within the last year. Within the last or so, they made
17 mention that there was no statutory framework.

18 MS. COATES: They haven't ruled on the
19 pre-trial versus post-trial?

20 MR. CARUSONE: They have ruled on the standard
21 to be employed, the burden, etc.; but they have not
22 ruled on this question.

23 MS. COATES: Has the Criminal Rules Committee
24 looked at that?

25 MR. MARSICO: I think surprisingly as much as

1 everything seems to be rulemaking, I believe they have
2 deferred to the Legislature.

3 SEN. WHITE: They did ask us to please act on
4 this, but they didn't specify how. I should note that
5 the State of FL passed a post-trial by a jury and their
6 court was so unhappy with it and overruled it and
7 adopted a criminal rule of procedure. I think they have
8 the power if they choose to exercise it or not.

9 CHAIRMAN CALTAGIRONE: Thank you. We will next
10 hear from Jim Ellis, NM School of Law, and Bill Burke
11 from Arc.

12 MR. ELLIS: Mr. Chairman and members of the
13 Committee, my name is Jim Ellis. I am a law professor
14 at the University of NM, where, after tomorrow, I'll
15 begin my 35th year of teaching.

16 I am here, however, because of my involvement
17 with the American Association on Mental Retardation,
18 which now has the American Association on Intellectual
19 and Developmental Disabilities and the Arc of the United
20 States and have represented them not only in State
21 Legislatures and in the Congress but also in the Supreme
22 Court 14 or 15 times on issues primarily not involved in
23 criminal justice system but also involving the criminal
24 justice system including the Atkins case.

25 I both represented them in that case and also

1 ultimately ended up arguing for Darryl Atkins in that
2 case.

3 In the eight years since the Atkins decision, I
4 have attempted to be helpful to State Legislatures and
5 to courts in implementing the Atkins decision once it
6 came down from the Supreme Court.

7 With regard to Legislatures, I put together a
8 guide that the American Bar Association published for
9 State Legislatures on the issues, and a copy of that
10 guide is attached to my testimony for whatever help it
11 might provide.

12 So my background is from the disability
13 community and also having worked with courts and
14 Legislatures since then in implementing the Atkins
15 decision.

16 The Legislation before you has two principal
17 components. I want to address them both but focus more
18 on the second.

19 Senate Bill 628 first provides a legislative
20 definition of the term mental retardation. It has been
21 the experience in other states that some states where
22 the Legislature has not acted either -- that has not
23 acted either before Atkins or subsequently that Courts
24 are left to come up with the definition. In other
25 states, the Legislature has adopted a definition.

1 As it turns out, it is of some help that the
2 Legislature comes up with a definition and the Courts
3 start a case knowing what the definition is but not an
4 awful lot of help because the Courts have pretty much
5 come up with the same definition after some struggle and
6 some expense in working it out.

7 The definition they come up with is the
8 definition used by the American Association on Mental
9 Retardation. It is the definition that is in this
10 legislation.

11 So there would be some value, I suppose, to the
12 Courts in the Commonwealth to have that set out from the
13 Legislature and to have that choice made by the
14 Representatives and Senators in the Legislature rather
15 than by the judges.

16 Ultimately, the definition is going to be about
17 the same as in this legislation. What this legislation
18 does is it adopts the professional definition that
19 clinicians use when they make the diagnosis with regard
20 to mental retardation; whether it is in the criminal
21 division, whether it involves Social Security, whether
22 it involves educational placement. This is the
23 definition they use.

24 As was suggested by previous witnesses, it has
25 three principal components. In each of those, there

1 must be a finding, a positive finding for the definition
2 to apply.

3 These are not just factors to consider. These
4 are three requirements. The first is the level of
5 intellectual functioning, and that is measured by IQ
6 tests.

7 If all of the states that have passed
8 legislation and the definition adopted by the Supreme
9 Court of the United States or recognized by the Supreme
10 Court of the United States in Atkins, that definition
11 requires mental functioning as measured by IQ tests two
12 standard deviations below the mean, the bottom 2 and a
13 half percent of the population.

14 If you don't have that, you don't go on to the
15 second and third prongs of the definition. That is the
16 first, it is measured by objective tests.

17 Psychometricians can measure this. Evaluations
18 will be prepared on the basis of that testing. Some of
19 these defendants will have had testing earlier in their
20 lives.

21 One of the things about the demographics of the
22 changes in the criminal justice system over the years is
23 that most of the people who commit crimes across the
24 board are of a certain age.

25 The age, as we enter the second decade of this

1 century, is that almost all of the criminal defendants
2 we have, who are the majority of the criminal defendants
3 we have, were in public school since the enactment of
4 the education law of the Handicap Children Act in 1975.

5 Not in every case but in a lot of cases, there
6 will have been evaluation in the course of the schools
7 and that can be part of the consideration as well.

8 The second prong of the definition, which
9 requires deficits in adaptive behavior is designed to
10 make sure that the label of mental retardation about
11 which the profession that mental disability
12 professionals are very cautious and careful about
13 because of their concern, not about these cases but
14 because of their concern about the stigmatization
15 particularly in the schools bearing the label of mental
16 retardation with all of the baggage that that entails
17 when they don't have a real disability.

18 So the second prong of the definition says in
19 addition to testing at this level, you must also have
20 real world disabilities in your life, real world
21 practical impairments in your life to fall within the
22 definition of mental retardation.

23 In other words, it is designed to exclude
24 people who are merely crummy test takers and have a
25 realistic disability.

1 As a result, the clinical evaluation of
2 adaptive behavior tends to do with the IQ testing.
3 There will be anomalous cases in which somebody tests
4 low but doesn't have a disability. We don't encounter
5 it much. It isn't a practical disability.

6 For the existence of the second prong that is
7 in this bill provides a determination. It inquires
8 whether or not a person in their overall everyday
9 performance have an impairment.

10 There are measures of that. Measures are not
11 dispositive, but there are measures of that adaptive
12 behavior scales, and courts around the country deciding
13 Atkins cases start with, in many cases, in most the
14 results of an adaptive behavior scale.

15 In addition, there may be people, for example,
16 school teachers when the individual is in school who can
17 testify whether or not the person performed at a level
18 of disability or not.

19 There may be social service workers who
20 evaluated the family, who may have made judgments.
21 There is other evidence beyond the adaptive behavior
22 scale.

23 It is not an inquiry does this person have the
24 ability to do some things that we might not think people
25 with mental retardation can do. Everybody with mental

1 retardation has things that they can do.

2 The inquiry is whether there are things that
3 they cannot do. If the things they can do are of a
4 significance to warrant mental retardation. In that,
5 Senate Bill 628 echoes the professional definition.

6 The third prong, which is in a way the least
7 significant, it doesn't decide a lot of cases, but in
8 another sense may have some recurrence, is the
9 disability has to have been encountered when the person
10 at birth or when the person was a child during the
11 developmental period.

12 So the idea that people could discover or
13 decide that someone has mental retardation is an inquiry
14 not about a disability acquired but only about
15 misdiagnosis when someone was a kid and that happens
16 sometimes that a person went through, had a disability
17 but nobody wrote it down, nobody did a formal
18 evaluation.

19 This doesn't require that there be a formal
20 evaluation, but it does require that the disability
21 happened during childhood and that inquiry as with the
22 IQ testing, as with the adaptive behavior, the burden of
23 persuasion under this legislation, as in the legislation
24 in all of the other states that have passed the law,
25 that burden is on the defendant.

1 So a defendant who wants to claim mental
2 retardation for these purposes bears the burden of
3 persuasion on all three of those prongs and must succeed
4 on them.

5 The second principal issue and one that has
6 been a subject of discussion today in this legislation
7 is when to hold proceedings to decide whether a
8 particular individual has mental retardation is entitled
9 to Atkins statutory relief and who does not.

10 The two principal models -- and there are some
11 variations on them. The two principal models are to do
12 this before a trial, before a judge, pre-trial
13 determination or to do it after the trial has concluded.

14 Some states have done it in different ways to
15 meet that model but basically making the judgment after
16 the verdict has come in and in one way or the other.

17 The organizations that I represent have taken a
18 strong position that it ought to be a pre-trial. Let me
19 talk a little bit about why they decided that.

20 The legislative guide that I attached to this
21 testimony, I would only modify with eight years
22 experience one thing in that.

23 In that legislative guide, I left open the
24 possibility that the Courts might conclude that as a
25 constitutional matter, it had to be -- a defendant had a

1 right to a jury determination of whether or not they had
2 mental retardation. They are entitled to a jury verdict
3 on that.

4 In the eight years since it has been clear that
5 courts almost unanimously around the country have
6 rejected that.

7 So that concern that there might be a Sixth
8 Amendment issue involved in Atkins cases, I think is not
9 a realistic concern now and so the Court doesn't -- the
10 Court's making their own rules have the ability to
11 decide whether to take this a pre-trial determination.

12 There are several reasons why a pre-trial
13 determination has been adopted by a majority of states.
14 In some of the states, it was mentioned in FL, which
15 started off with post-verdict determination, have moved
16 to pre-trial and there are practical reasons why that is
17 an attractive option.

18 The determination of whether somebody has
19 mental retardation -- and I will touch back on what I
20 said before about the definition.

21 It is a diagnosis made by clinicians in the
22 context of whether somebody gets Social Security, SSI,
23 whether somebody is placed in special education classes.

24 For a variety of reasons, social services they
25 may receive, that is a judgment that is made in the

1 first instance by clinicians. That clinician is then
2 going to be reviewed by courts.

3 The attraction of doing it before a judge
4 pre-trial is that that judgment, those factors can then
5 be considered right away and a judgment made as to
6 whether or not a defendant has succeeded because the
7 defendant bears the burden, whether the defendant has
8 succeeded in persuading that he is a person with mental
9 retardation.

10 You do that at the outset and you base that on
11 the clinical data including observation. You get it
12 over with. Once that is done, the case can then
13 proceed.

14 The Commonwealth under this legislation would
15 have the right to raise an appeal from that adverse
16 judgment but a defendant would not. It is a unilateral
17 appeal.

18 So the concern about delay is, as what is
19 suggested, a concern that is within the option of the
20 prosecution and they can decide one way or decide the
21 other but a defense does not under this legislation have
22 that option and that is the judgment that most states
23 have made with regard to this case.

24 Let me talk a little bit about why doing things
25 pre-trial has made sense in other states that have

1 addressed this.

2 The concern is of evaluating whether someone
3 has mental retardation. That cost is pretty much fixed.
4 There isn't much that can be done about that.

5 The person who is doing the evaluation is going
6 to submit the same invoice whether they are doing that
7 pre-trial or post-trial. The investigators are going to
8 do the best investigation.

9 The cost is the cost of the capital trial. The
10 cost of the capital trial is huge. We don't have, as I
11 understand, reliable figures across the Commonwealth.

12 There have been costs in states including
13 neighboring states that suggest the cost of a capital
14 trial can be as much as -- if there is a million dollars
15 -- you get different numbers from other states. That
16 one is from Maryland. Even if PA trials are
17 substantially less expensive than that, they are still
18 very expensive.

19 The question is how many capital trials they
20 are going to have. If somebody -- if a defendant is a
21 person with mental retardation for whom the death
22 penalty is inapplicable, there isn't much reason from
23 the perspective of professional organizations that I
24 represent for holding a capital trial.

25 I'll offer an analogy that may suggest this.

1 It is unlawful to use the death penalty for somebody who
2 is a minor, who is a juvenile at the time of the
3 offense. All states agree with that.

4 It is now a constitutional ruling. You could,
5 I suppose, design legislation that said, okay, we know
6 we can't execute people who are teenagers but we're
7 going to conduct a capital trial.

8 After it is done, we're going to open their
9 birth certificate and see whether or not we can do all
10 of this. It makes sense to do all of that before. Then
11 a capital trial is not necessary.

12 Noncapital trials are substantially less
13 expensive. There is another experience from other
14 states. PA bears some of the burden of not having done
15 this earlier because of differences around the
16 Commonwealth and so on.

17 PA also has acquired the benefit of the
18 experience of other states and our experience in other
19 states in doing this for eight years or in some cases
20 longer. KY has been doing it for many years.

21 One of the experiences I would point to TN and
22 NC particularly are states that have a lot of death
23 penalty cases, what they discovered is that with a
24 pre-trial determination as both those states have, lots
25 of cases don't even go to a hearing.

1 When that evaluation is done pre-trial, there
2 may be consensus either that this is a meritorious
3 claim, the guy has mental retardation or that it is not.

4 So often, we have found cases resolved in
5 particular by pleas, pleas of guilty, of being not just
6 the need for a mental retardation hearing but for a
7 trial altogether.

8 When a case resolves by pleading, you not only
9 save the cost of a capital trial but you save the cost
10 of a noncapital trial as well.

11 One of the things that happens in those cases
12 is after they have been doing this for a while, because
13 they haven't been operating under a statute, is the
14 prosecutors and defense lawyers in a particular county
15 and the evaluating experts that they use gain experience
16 and can spot cases in which there is a meritorious
17 claim, a frivolous claim, and one that is close enough
18 to require adjudication.

19 So there is a substantial amount of informal
20 determination that resolves cases without going through
21 the full expense of a capital trial. A determination by
22 a judge pre-trial will surely save resources. It also
23 saves on the other kinds of wear and tear that a capital
24 trial imposes.

25 The burdens of a community facing a capital

1 trial, when that capital trial is not going to result in
2 the death penalty because that person is ineligible for
3 the death penalty, that is a level of stress that we
4 can't quantify; but that is real.

5 If we can avoid capital trials when the person
6 is not death eligible, substantial saving can be
7 accomplished.

8 I commend Sen. White for offering this
9 legislation and I commend the Committee for its
10 attention to it.

11 The experience in other states suggest that the
12 legislation that Sen. White has offered is, in fact,
13 most efficient and fair in order to resolve these
14 questions.

15 CHAIRMAN CALTAGIRONE: Thank you. I do want to
16 mention for the record Representative John Pallone has
17 joined the Committee.

18 If you would like to do your testimony and then
19 we will have questions.

20 MR. BURKE: Sure. Good afternoon, Mr. Chairman
21 and members of the House Judiciary Committee and Sen.
22 White.

23 My name is Bill Burke. I'm here as a
24 representative of the Arc of PA, a statewide advocacy
25 organization for citizens with intellectual and

1 developmental disabilities.

2 I am a current member of the Arc of PA's Board
3 of Directors and have served in the past as its Board
4 President. I am not paid staff. I am a volunteer
5 having gotten involved with the Arc together with my
6 family over five decades ago because of my brother,
7 Donald, who has an intellectual disability.

8 You have my full written testimony; but in the
9 interest of time, rather than reading it in its
10 entirety, I would just like to summarize a few key
11 points at this time.

12 The two primary issues for the Arc of PA when
13 deciding how to implement the Supreme Court Atkin's
14 decision are, No. 1, defining mental retardation
15 appropriately; and 2, making sure a defendant's mental
16 retardation status is determined before the trial.

17 Senate Bill 628 clarifies these issues to the
18 Arc of PA's satisfaction. The Arc of PA supports Senate
19 Bill 628. Our reasons are as follows:

20 If a defendant with mental retardation is not
21 eligible for capital punishment, then they should not
22 have to go through a capital trial.

23 Mental retardation cannot be faked. Pre-trial
24 determination will enable judges to become skilled in
25 deciding what does and what does not constitute mental

1 retardation. This is a better way than having to
2 educate the jury each time.

3 What's more, juries are simply not qualified to
4 make what is essentially a clinical judgment. They will
5 not be unbiased after hearing evidence of what is
6 admittedly a very heinous crime.

7 A defendant's mental retardation makes them
8 vulnerable during the trial itself, which is why it is
9 important to resolve the question of capital punishment
10 before the trial commences.

11 Individuals with mental retardation often have
12 the desire to please persons in authority. They may
13 look to authority figures for answers if they do not
14 know the answer.

15 People with mental retardation are often
16 ashamed of their label and will go to great lengths to
17 hide it.

18 They may wrap themselves in, quote, a cloak of
19 confidence, unquote, and try to appear, quote, smarter,
20 unquote. To that end, they may even deny having mental
21 retardation when asked during a trial.

22 Finally, I am a taxpayer. Taxpayers should not
23 have to foot the bill for a capital trial only to find
24 out afterward the defendant was never eligible in the
25 first place for capital punishment.

1 I am pleased to remind the Committee that it is
2 for this reason that the County Commissioners'
3 Association of PA support Senate Bill 628.

4 To sum up, the PA House of Representatives
5 should pass Senate Bill 628 because PA needs a law to
6 implement the US Supreme Court's decision banning
7 capital punishment with persons with mental retardation.
8 Senate Bill 628 does just that.

9 In addition to CCAP and the Arc of PA, Senate
10 Bill 628 is supported by every major disability group,
11 as well as the PA Catholic Conference and the PA Council
12 of Churches. It has already passed the Senate in a
13 bipartisan matter by an overwhelming 45 to 2 vote.

14 Eight years ago I testified on this very issue
15 before the Senate Judiciary Committee. That was when I
16 was President of the Arc of PA.

17 I admit I am disappointed that eight years have
18 gone by and legislation implementing Atkins has yet to
19 be passed into law in PA.

20 I am hopeful, however, that because you are
21 holding this very hearing on Senate Bill 628, your
22 Committee will pass it without amendment and allow the
23 full House to consider it before this legislative
24 session ends.

25 I thank you, again, for your very kind

1 attention. We will answer any questions you may have.

2 CHAIRMAN CALTAGIRONE: Thank you.

3 Members?

4 SEN. WHITE: I would like -- I certainly want
5 the members to have the first opportunity to ask
6 question and not take up the time from the questions.

7 REP. BOYLE: Thank you. I just have two quick
8 questions. I appreciate your testimony and the
9 testimony of the folks before you.

10 When you talked about other states taking an
11 approach similar to this Senate bill, I was wondering
12 specifically approximately how many?

13 MR. ELLIS: Representative, Mr. Chairman, with
14 regard to the definition, essentially all states have
15 adopted a definition that is either this definition word
16 for word or something very close to it.

17 The variations among the definitions are not
18 many and are pretty trivial. I mean, they are not -- I
19 don't want to say with any death penalty that the
20 wording doesn't matter but the similarities are so
21 strong and the consensus to adopt a clinical definition
22 is so strong that this bill is not in any way a variant
23 from what other states have done.

24 With regard to the pre-trial, post-verdict
25 determination, which is the one I think you're talking

1 about --

2 REP. BOYLE: That is what I was getting at.

3 MR. ELLIS: I don't have a count of the states
4 that I can offer you. I can tell you for certain that a
5 majority of the states, both prior to Atkins, which is a
6 different kind of determination than now because they
7 were just making a policy choice rather than
8 implementing a constitutional question, which is what
9 faces PA now, whether it's before Atkins or after
10 Atkins, a majority of the states have gone to a
11 pre-trial determination.

12 Of those, almost all of them have made a
13 pre-trial bench determination a determination made by
14 judges rather than a determination made by jurors.

15 There is a constitutional right for every
16 defendant. For example, if a defendant is unsuccessful
17 in an Atkins claim in a pre-trial setting set by this
18 Legislature or adopted by the Court that a defendant has
19 a constitutional right to go for a jury determination of
20 whether his mental functioning was a mitigator, that was
21 a right that preexisted.

22 So in that sense, every state at least
23 theoretically that has jury involvement has a mitigating
24 circumstance, but this isn't about mitigation. This is
25 about eligibility for exclusion of the death penalty and

1 a majority of the states have adopted it.

2 REP. BOYLE: And just because there was a lot
3 there, I just want to make sure I have this correct
4 because it is helpful to know what the other states are
5 doing. A majority have made it pre-trial and a majority
6 have made it a bench determination?

7 MR. ELLIS: That is my understanding, Rep.,
8 that that is true prior to Atkins and true subsequent to
9 Atkins.

10 A number of the states particularly in the
11 south have at least in the first instance adopted or
12 made room for a post-verdict situation.

13 As was mentioned before, at least one of them
14 have moved away from that, the State of FL. That
15 continues to be a litigated question. There is another
16 consideration with regard to that.

17 It is absolutely clear that it is
18 constitutional to do it pre-trial. It is not absolutely
19 clear that it is constitutional to deny a defendant a
20 pre-trial determination that is being litigated in other
21 states.

22 So in addition to costs of the capital cases,
23 there is also the cost of litigating that question,
24 which is a cost that may happen in PA if this
25 Legislature doesn't adopt something that is in the

1 general vicinity of Senate Bill 628.

2 REP. BOYLE: The other -- thank you. The other
3 area that I wanted to get your comment on was we talked
4 about costs in terms of money but I think the other
5 consideration is in terms of timing.

6 District Attorney Marsico, in his written
7 testimony, mentioned up to a three-year delay if we move
8 in the direction the Senate bill wants to move us
9 toward. Would you agree with that or what are your
10 comments?

11 MR. ELLIS: Representative, Mr. Chairman,
12 members of the Committee, I don't know the PA experience
13 to be able to precisely address that, but I can give you
14 the experience in other states, which is that the
15 pre-trial determination of mental retardation resolves
16 cases more quickly.

17 Part of that is because if it isn't going to be
18 a capital trial, the noncapital trial can occur more
19 expeditiously than a capital trial, as the
20 representative from the District Attorney pointed out.

21 Capital trials are expensive in part because of
22 the requirements of the American Bar Association
23 guidelines, in their various permutations and other
24 legal-ethical rules that involve more work by the
25 defense in anticipation of the capital trial. Those

1 preparations are not needed if a case is not going to be
2 a capital trial.

3 Now, the delay that may be occasioned by an
4 interlocutory appeal; that is to say if the state goes
5 forward and takes to the appellate courts the question,
6 did the district court get it wrong when the district
7 court determined that this was someone entitled eligible
8 under whatever the codification number is.

9 That has not been a widespread experience in
10 other states, but I hesitate to say that it wouldn't be
11 common here because I don't know.

12 Other states have not experienced substantial
13 delays from interlocutory appeals, but all I can offer
14 is the experience of those states.

15 REP. BOYLE: Well, it is -- it is an area as I
16 evaluate this and I think this hearing is very helpful
17 and I thank Chairman Caltagirone for it and the
18 hardworking staff of this Committee because this is, I
19 think, a very difficult issue on how to accurately and
20 correctly apply the Atkins decision in our state.

21 At least from my perspective, it is not an easy
22 -- it is not an easy answer. I raise the question
23 about the possibilities for delays pre-trial because
24 President Marsico, President of the DA's Association
25 points out in his written testimony an issue I care

1 about deeply and that is the enormous problem of witness
2 intimidation that we have in our state and particularly
3 in Philadelphia where I happen to represent.

4 Every single, every single murder trial last
5 year in Philadelphia had an element of witness
6 intimidation.

7 So if we do have greater delays in those sorts
8 of cases and they are strung out longer, then it only
9 increases the possibility and probability that we will
10 have greater instances of witness intimidation.

11 So it is just one aspect of a number of things
12 that we have to balance in drafting this legislation. I
13 appreciate your comments and thank you for your
14 testimony.

15 Again, thank you, Mr. Chairman.

16 MR. ELLIS: If I could respond just briefly,
17 one aspect to this. The total duration of pre-trial
18 period, it seems to me might not be affected by the
19 adoption of Senate Bill 628 in exactly the way that some
20 are anticipating.

21 If you are a defense lawyer in a regime in
22 which this is going to be a post-verdict determination,
23 not only just as a matter of tactics but under the
24 American Bar Association standards, you are going to do
25 the same pre-trial investigation, the same type of

1 preparation, the issue of mental retardation.

2 It is not like the defense is going to delay
3 nor is the prosecution going to delay whether the person
4 has mental retardation until the end of the trial.

5 They are going to do it before the trial
6 whether there is a pre-trial hearing or not. I'm a
7 little skeptical that it is going to take the overall
8 length of time and make it longer because any lawyer
9 whether prosecutor or defense lawyer is going to start
10 doing that investigation at the beginning in
11 anticipation of the trial.

12 So I bring some skepticism that the length of
13 time would be longer. That hasn't been our experience
14 in other states, but I don't have experience with the
15 particulars in PA.

16 If I could offer one other thing, I am
17 currently over the last two years writing a guide for
18 courts on how to evaluate Atkins cases and co-authoring
19 it with a psychology professor from the University of
20 AL, who has testified in both prosecution and defense.

21 As I draft this quite long guide to judges as
22 to what they are to do and write to them about all of
23 the aspects we talked about, IQ testing and adaptive
24 behavior, the advice -- it has to be courts across the
25 country -- advice for judges who have post-verdict

1 determi nati ons are substanti ally more compl ex than i s
2 the advi ce gi ven to judges to have a pre-tri al
3 determi nati on because i n addi ti on to all of the other
4 consi derati ons, they have to fi gure out how to shape
5 both voi r di re of jurors who are goi ng to be maki ng that
6 determi nati on and the ways i n whi ch evi dence i s to be
7 presented to them and the ways i n whi ch i nstructi ons are
8 to be gi ven i f the juri es are to make those judgments.

9 Advi si ng judges on pre-tri al determi nati ons i s
10 rel ati vel y strai ghtforward. Advi si ng judges i n a
11 post-verdi ct regi me i s substanti ally more compl ex i n a
12 pl ace more burdensome on those judges.

13 CHAI RMAN CALTAGI RONE: Rep. Pal l one?

14 REP. PALLONE: A 21-year-practi ti oner of l aw, I
15 do not do cri mi nal defense work. I have no i nterest i n
16 cri mi nal work, so I' m not fami li ar wi th the cri mi nal
17 process; but I am fami li ar wi th the tri al preparati on
18 process.

19 Just so I' m clear because I am not the
20 bri ghtest bul b of the bunch all of the ti me, we' re
21 tal ki ng about mental retardati on or i ntel lectual
22 di sabi li ty that are clear from the l egi sl ati on anyway
23 from ei ther bi rth or chi ldhood that thi s i sn' t the cri me
24 that was commi tted and the defendan t then cl ai ms
25 temporary i nsani ty, correct?

1 MR. ELLIS: It is not in several ways. It is
2 different from the insanity defense both in the way you
3 suggest and in a number of other ways.

4 This is a clinical determination not about
5 culpability, as was suggested earlier. It is whether or
6 not someone has this diagnosis or warrants this
7 diagnosis.

8 REP. PALLONE: And I agree with my colleague
9 Rep. Boyle that the prosecution's counterargument is
10 upfront costs associated with some of the evaluations
11 and so forth.

12 I can tell you that one of the concerns that I
13 have is the impact it has on the law enforcement
14 community.

15 I have family members that are police officers
16 and the last thing I want to see is that we have a
17 detriment to protecting the citizens of our society, not
18 just the taxpayers but the citizens of our society and
19 somewhere back in the Reagan administration, people
20 became taxpayers instead of citizens.

21 I like to focus on the citizen. That is the
22 issue that needs to be balanced against it, too. We
23 need to protect the citizens and certainly our law
24 enforcement community.

25 We also need to protect those who can't protect

1 themselves, particularly, those who have blatant
2 disabilities of some sort.

3 I have always been an advocate in the
4 disability community to help Children and Youth as well
5 as adults with disabilities.

6 I'm looking at this very objectively. I'm
7 looking at the cost component that is being suggested by
8 the District Attorney's Association and perhaps the
9 Attorney General's Office, that whether or not we do the
10 evaluation pre-trial, post-trial, we are still going to
11 incur some of those same costs, correct?

12 MR. ELLIS: We are going to incur some of them
13 but not all of them. The investigation, the evaluation,
14 those costs will be the same whether it is pre-trial or
15 post-trial.

16 But the expense of a capital trial, the added
17 expense, the reason they are more costly will only be
18 incurred if we have a capital trial.

19 If we decide in advance before the trial that
20 the person is not eligible for the death penalty, we
21 then have a less expensive trial as suggested in states,
22 like NC says in some cases you won't have a trial
23 because you will have a guilty plea.

24 But leaving that aside, you will have less
25 expensive trials than you will if every case has to be

1 treated as a capital case.

2 REP. PALLONE: Then it begs the next question
3 for me then, is if we don't do some type of mental
4 disability pre-trial review, then -- because I'm not
5 familiar with the criminal rules, isn't there a
6 competency standard to stand trial in the first place so
7 we're going to do part of that review anyway because as
8 soon as I'm retained to represent John Q. Public that
9 committed the crime, I have to determine his or her
10 competency to even stand trial. So wouldn't that
11 disability be part of that competency review?

12 MR. ELLIS: Rep., Mr. Chairman, that is correct
13 and as the District Attorney and the Attorney General's
14 Office, both, I think correctly pointed out, there is a
15 parallel between the determination of whether someone is
16 competent to stand trial and whether someone is eligible
17 for protection from the death penalty by this
18 legislation.

19 But as was pointed out by the District Attorney
20 and the Attorney General, it is not a perfect match
21 because, for several reasons, but primarily because some
22 of the individuals for whom competence will be a
23 question will be individuals who have mental
24 retardation. Others will be for people who are on
25 different subject matter altogether.

1 They are incompetent to stand trial or
2 potential incompetence to stand trial stems from mental
3 illness.

4 When someone who has disability of a mental
5 illness which may give rise has no relevance under this
6 legislation, this is only people with mental
7 retardation.

8 Whether this legislation took place or not,
9 going back to your original question, everybody involved
10 in the trial has an obligation to determine that the
11 defendant standing before them is competent to stand
12 trial and that will be true whether this legislation is
13 enacted or not.

14 Whether -- and similarly, if a defendant may
15 have mental retardation, both the prosecution and the
16 defense will start preparing for that in anticipation of
17 the trial, whether they have a separate proceeding or
18 merely preparing for the trial.

19 In that sense, you are correct that that
20 evaluation will take place in any event.

21 REP. PALLONE: And I guess you made a point
22 that I wasn't clearly aware of. We are clearly
23 distinguishing and separating the MH part from the MR
24 part of that. Because I may have a mental health
25 problem, doesn't mean that I'm necessarily

1 intellectually disabled.

2 Clearly, I have to meet the mental retardation
3 standards that go with IQ and other qualifying issues
4 relative to that community.

5 MR. ELLIS: Rep., Mr. Chairman, it is a small
6 percentage of people who have mental health problems who
7 fall within the definition. The separate inquiry of
8 mental retardation is exactly right.

9 REP. PALLONE: Because I'm looking at all of
10 the variety of disciplines, if you want to call it that,
11 under the MR category. The spectrum is huge.

12 I have a family member myself that has mental
13 retardation issues relative to the autism spectrum and
14 there are so many other disciplines contained within
15 there that we want to protect the whole community.

16 I don't want to exclude; but at the same time,
17 I don't want to create, if you want to call it that, an
18 excuse for a defendant.

19 So, you know, I'm looking for a fair balance
20 here. I recognize in the eastern part of the state, we
21 have issues with witness intimidation. It has not
22 filtered into the southwestern part of the state yet,
23 but that is always a risk that that is going to filter
24 across the Commonwealth.

25 I think given the Atkins decision, I think it

1 is in PA's best interest to do something in that vein
2 and I think that Senate bill -- this Senate bill
3 certainly heads in the right direction.

4 But as I'm looking at it more thoroughly and
5 taking formal action on this particular issue, I'm
6 looking at some issues to the up-front piece that would
7 it be prudent if we contained a provision that said --
8 it may be in there and I missed it, would it be prudent
9 if we put a provision in there if this particular
10 individual has already been diagnosed, participated in
11 all of the programming throughout his or her life, you
12 know, 3 through 50 however old, that if all of that is
13 in place, there is no need to do the evaluation.

14 I'm looking at -- you know, I don't know, the
15 category always changes. Every five years, the Mental
16 Health and Mental Retardation Committee change the
17 education categories. It is a whole new learning curve
18 every five years.

19 If a profound or severely or mentally retarded
20 individual all of their life and then all of a sudden we
21 come to this heinous murder trial and they have to prove
22 it all over again, this almost seems ridiculous.

23 Here are the records for the last 30 years, you
24 know, this young man or young woman has been part of
25 this special community. Can't we just forego all of

1 this? Is that part of the bill or should that be part
2 of the bill?

3 MR. ELLIS: Mr. Chairman, Rep., it is not part
4 of the formal bill. I think it should not be. I think
5 the way in which it is drafted is now correct. Let me
6 explain why.

7 There will be cases and it certainly has been
8 the experience. NC may be the best example because they
9 did it all at once, once they enacted legislation in
10 2001. So they had all of their cases within a finite
11 period of time.

12 There were a substantial number of cases, which
13 are the cases that you designated, but the NC law, as
14 with this piece of legislation, leaves the burden of
15 persuasion with the defendant regardless of background
16 or not, it was always the formally burden falls to the
17 defendant to establish mental retardation; but in the
18 kind of case you described, it is going to be clear to
19 everyone upon examination of all of that experience that
20 this is someone with mental retardation.

21 Under those circumstances, there may be
22 agreement whatever the formal procedures are, whether as
23 an exercise of prosecutorial discretion or by a
24 pre-trial determination that we don't have to go through
25 the business of making this a capital trial.

1 Prosecutors have that opportunity both now and
2 under -- this legislation would not reduce the ability
3 of prosecutors to make that judgment.

4 I think it would be mistaken for the
5 Legislature to carve out a separate category for those
6 cases because they can be provided for under the
7 procedures under this bill.

8 REP. PALLONE: Thank you. I appreciate your
9 expertise where I know very little or not enough about.
10 The last question that I have is relative to the whole
11 issue of intellectual disability, that I'm looking at it
12 from a prudence point of view.

13 If we determine that at the front side of the
14 trial, then doesn't that also restrict the ability to
15 even enter into some kind of a guilty plea or some kind
16 of a mitigating plea of some sort?

17 Now I'm deemed to have been intellectually
18 disabled. Am I able -- it kind of goes back to -- I
19 don't want to mix the words and I'll screw you all up
20 with the competency piece but then am I able to make an
21 intellectual choice where I better plead guilty to this
22 instead of that or does some kind of a guardianship or
23 conservatorship or some third party come in and makes
24 that decision for you?

25 I'm not educated in most certainly the capital

1 offenses but certainly criminal work, criminal trials.

2 MR. ELLIS: Rep., Mr. Chairman, you are correct
3 that those are separate inquiries. If a defendant
4 because of his mental retardation is incompetent to
5 stand trial, then you don't do any of the rest of this.

6 But if you have decided that this is somebody
7 who is competent to stand trial and you get to the
8 determination of whether he is entitled Atkins relief or
9 Senate Bill 628 relief and it is determined that he has
10 mental retardation in other states, and I don't see a
11 reason why PA would be different because the legislation
12 is identical, those are then resolved by plea because
13 the only real question and the District Attorney touched
14 upon this, there are cases where the only real question
15 has to do with a mental component to the trial and not a
16 who done it. It is our experience that some of these
17 will have be resolved.

18 REP. PALLONE: Life versus --

19 MR. ELLIS: That is within the discretion of
20 the defense counsel and the prosecutors as to whether
21 they can reach an agreement on that. Other states have.
22 That is all I can report on that.

23 MR. PALLONE: Thank you very much. Thank you
24 Mr. Chairman.

25 CHAIRMAN CALTAGIRONE: Sen. White?

1 SEN. WHITE: I would like to make an
2 observati on. There is a category of person who has been
3 so long a part of the mental disability community that
4 everyone knows they have been mentally retarded in those
5 cases and I think the District Attorney would agree with
6 me, the prosecutors would look at that case and say this
7 is a person who is mental retarded.

8 You don't need an elaborate set of testing to
9 make that realization. That is probably of the small
10 universe of cases to begin with, that is probably half
11 of them, maybe more.

12 So what we're looking at are the ones that are
13 on the cusp. The District Attorney talked about it is a
14 clinical determination, which, of course, he is talking
15 about the battle of the experts or where you have
16 clinical evaluator bias and they never found a person
17 that was never mentally retarded.

18 Has that been a problem in other states?

19 MR. ELLIS: Senator, Mr. Chairman, other states
20 have confronted -- and other states have their rules as
21 to expert testimony and have confronted that problem.

22 Let me -- let me start from the assumption that
23 that problem is going to be the same no matter what you
24 do, that the defense will in the same degree have the
25 experts that they turn to and the prosecution will have

1 their experts.

2 SEN. WHITE: We'll have them at the beginning
3 or have them at the end?

4 MR. ELLIS: Well, at the beginning or at the
5 end, but also who the decision maker is.

6 A jury, a capital jury is not in the same
7 position as a judge who hears capital pre-trial motions
8 and a good bit.

9 A judge will know, this is somebody that comes
10 in and always says the same thing. A jury won't know
11 that. So a judge can be skeptical whether it is a
12 defense witness who always find mental retardation or a
13 prosecution witness who never does.

14 The judge may be in a better position to bring
15 skepticism that that witness was wrong in this case, but
16 you bring more skepticism to their judgment in a certain
17 case. A pre-trial bench determination may be better
18 suited.

19 SEN. WHITE: That is certainly true in the big
20 cities and a lot of places where capital cases are
21 tried.

22 My county has not had a capital case since
23 something like the 1930s. I don't think our judge is
24 any more expert than the jury -- he is my husband, by
25 the way, to decide on mental retardation.

1 So, I mean, I don't know what the cost of an
2 eval uati on i s where you don' t have a very well
3 documented hi story on a parti cul ar person to do a mental
4 eval uati on.

5 Everybody who gets accused of a capi tal cri me
6 i s goi ng to assert a capi tal retardati on defense and
7 thi s i s goi ng to dri ve up cost.

8 Do you know about what i t costs to do a
9 pre-tri al mental heal th workup to determi ne the i ssue of
10 retardati on?

11 MR. ELLI S: I don' t and that vari es a good bi t
12 among the states.

13 SEN. WHI TE: I s there a range?

14 MR. ELLI S: I woul d not be comfortabl e offeri ng
15 a parti cul ar range.

16 SEN. WHI TE: I need to talk to a cl i ni ci an to
17 get an esti mate.

18 MR. ELLI S: Correct. But goi ng to the other
19 aspect of your questi on, the legi sl ati on that you have
20 offer ed woul dn' t change that i n any event because that
21 eval uati on i s goi ng to take pl ace.

22 The second thi ng, whi ch we do have qui te cl ear
23 data about across j uri sdi cti onal l i nes, i s the frequency
24 i n whi ch cl ai ms are rai sed.

25 There i s i n parti cul ar a study by John Bl oom

1 and his colleagues at Cornell in looking at data from
2 all of the states that have capital --

3 SEN. WHITE: Is this post-Atkins?

4 MR. ELLIS: Yes. I can give you the citation
5 to that. What they discovered is that the concern
6 raised by some including by Justice Scalia in his
7 decision in Atkins that any defendant or substantial
8 number of defendants would raise these claims and could
9 fabricate claims has not been worn out in our
10 experience.

11 Again, the best measure is NC because they did
12 all of their cases at once. They found that initial
13 claims were raised by fewer than 25 percent. I think if
14 they crafted the legislation more carefully, it would
15 have been fewer. For people under sentence of death --
16 they should have made it longer.

17 By making it so short a lot of people put in
18 files -- use it or lose it. It was clear that even at
19 that larger level the substantial majority of defendants
20 did not raise an objection on an Atkins claim.

21 SEN. WHITE: If you could provide the Chairman
22 a copy of the report or the citation?

23 MR. ELLIS: I will send that to you when I get
24 back to NM.

25 CHAIRMAN CALTAGIRONE: Please hold still for a

1 mi nute.

2 If the Presi dent of the DA' s Associ ati on Ed
3 Marsi co woul d come up, he has a few statements he woul d
4 like to make. I will cer tain ly gi ve you the oppor tuni ty
5 for rebuttal .

6 MR. MARSICO: Mr. Chair man, I just want to talk
7 brief ly about the cost. I think Professor Ellis all uded
8 to thi s later in hi s testi mony.

9 The costs on thi s i ssue are goi ng to be borne
10 up front whether there is a pre-tri al determi nati on or a
11 post-tri al determi nati on.

12 The professor sai d, any defense attorney who is
13 goi ng to assert such a cl ai m is goi ng to have all of
14 that eval uati on done pri or to tri al , the experts will
15 prepare thei r reports, as Sen. White was goi ng to get
16 at, the costs of those are goi ng to vary; but that will
17 all be done pri or to a pre-tri al -- pri or to tri al .

18 I don't see that much addi ti onal cost in goi ng
19 forward with a tri al then whether it is capi tal or not.
20 In my 20 years of experi ence in tryi ng cases in Dauphi n
21 County, fi gures of a mi lli on dol lars for a capi tal tri al
22 are outrage ous. It is ri di cul ous. It is used by the
23 Anti -death Penal ty Movement to try and gi ve some wei ght.

24 My staff is worki ng in the courthou se whether
25 they are tryi ng a retail theft or whether they are

1 trying a death penalty case.

2 The cost -- the jurors are getting paid whether
3 they are trying a death penalty case or whether they are
4 trying, you know, a DUI. That is true in Sen. White's
5 county where her husband is a judge and true in my
6 county where Mrs. Coates' husband is a judge. The
7 jurors are getting paid.

8 What adds cost to capital trials are the costs
9 of experts. That cost is going to be borne under either
10 scenario prior to the trial.

11 So going forward with a trial is not going to
12 add that much additional cost; maybe a couple more days
13 of jury selection but not anywhere near the lines that
14 some of these studies are talking about millions of
15 dollars for a trial.

16 In my 20 years of experience, I don't think
17 other than one particular recent trial did we have a
18 trial near that expensive in Dauphin County. That was
19 not a case involving murder.

20 So the, you know, the cost factor that is
21 there, I don't see. With regard to the question about
22 guilty pleas, I agree, I think all of us are on the same
23 page.

24 These cases are where someone is truly mental
25 retarded. They are not seeing the light of day in a

1 courtroom. That is going to be worked out.

2 It is not though a determination like age. It
3 is not that easy that we open up the Court at the end
4 and say, oh, okay. He was 16. We can't execute him.

5 Having been on the ground trying these cases,
6 and Chris and I are also professors of Widener Law. We
7 don't know whether that garners any additional credit
8 here or not, not near along the lines of the esteemed
9 professor that is here today.

10 We can't compete with his background on this
11 particular subject; but to look at these cases, it is
12 not that easy.

13 As I said, experts disagree. Judges disagree.
14 I just think that a lot of these determinations are not
15 the cases that you are thinking of.

16 These are people that, as we pointed out, are
17 holding jobs and doing things that you wouldn't think of
18 as someone with an intellectual disability.

19 If you look at that adaptive functioning
20 component of the definition, you know, it is not as
21 easy. One of the defendants we had, he had some IQ
22 tests that were 55 or 77. Those can vary also but at
23 least there is a number there.

24 When you are talking about this adaptive
25 functioning piece, it gets crazy. We have experts

1 testi fyi ng. We have three-day hearings that are
2 expensi ve.

3 When you gi ve i t to a judge to determi ne, now
4 the standard of revi ew on appeal i s di d the judge abuse
5 hi s or her di screti on?

6 So there i s not much room a lot of times to
7 appeal the fi ndi ngs that are made by those judges, you
8 know, i n those parti cul ar cases.

9 So, when i t comes to costs, I agree costs
10 shoul d be a concern. The justi ce system i s the justi ce
11 system.

12 We have to bear some costs as part of i t. We
13 try to be prudent stewards of the money. I know thi s
14 Legi sl ature tri es very hard and spends many months up
15 here to do that.

16 So I don' t see that much addi ti onal cost under
17 ei ther of the scenari os that were presented here today.

18 MR. ELLI S: I f I coul d gi ve one observati on on
19 that. I agree wi th the attorney that the pri nci pal
20 addi ti onal expenses whatever they are i n the state
21 determi nati ons of thi s have vari ed and have been the
22 most reli abl e of them have been connected and
23 accumul ated by state admi ni strati ve offi ces and courts
24 and pi nned academi c i nqui ri es rather than by advocates.

25 A pri nci pal , i f not the pri nci pal addi ti onal

1 cost of a capital trial is not on the prosecution side.
2 It is on the defense side, the obligations on the
3 defense counsel, what responsibilities they have.

4 Where the costs in a capital trial go up isn't
5 on the prosecution side primarily. It is on the defense
6 side. It is because of constitutional rulings about the
7 particular rights of capital defendants to effective
8 assistance, which is different than the rights of
9 noncapital.

10 CHAIRMAN CALTAGIRONE: Counsel Coates has a
11 question.

12 MS. COATES: Mr. Marsico, noting your testimony
13 regarding the witness intimidation and what you believe
14 to be a devastating impact on victims potentially
15 associated with the delays in the pre-trial procedure,
16 have you had any discussions with the victims rights
17 organizations? Have they weighed in or do they oppose
18 the pre-trial finding?

19 MR. MARSICO: I thought at some point and this
20 is just my recollection, again, in this eight-year
21 process of different bills with different numbers, I
22 thought at some point whether it was the victim advocate
23 or someone had taken a position with us in this regard.
24 I don't want to say that with certainty with regard to
25 the victims rights organizations.

1 MS. COATES: Thanks.

2 CHAIRMAN CALTAGIRONE: Okay. I want to thank
3 everybody that participated today. I appreciate your
4 testimony.

5 I also want to mention we have written
6 testimony from the County Commissioners' Associations
7 that we would like to submit for the record. Thank you.

8 (The hearing concluded at 3:13 p.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.

Hillary M. Hazlett, Reporter
Notary Public