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June 17, 1993

Honorable Thomas R. Caltagirone
Chairman, House Judiciary Committee
Main Capitol Building
Harrisburg, Pa 17120

Dear Chairman Caltagirone:

The Defender Association of Philadelphia and the Public Defender Association of Pennsylvania oppose H.B. 1502, which proposes to amend Article I Section 8 of the Pennsylvania Constitution to include a proviso that:

> No evidence shall be suppressed if it has been obtained in objectively reasonable reliance on a subsequently invalidated search warrant issued by a neutral and detached issuing authority.

In United States vs. Leon 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2nd. 677 (1984), the United States Supreme Court announced the so-called "good faith" exception for violations of the Fourth Amendment to the United States Constitution. In Commonwealth v. Edmunds 526 Pa. 374, 586 A.2d 887 (1991), the Pennsylvania Supreme Court refused to adopt the "good faith" exception as a matter of Pennsylvania Constitution law. H.B. 1502 is a legislative override of Edmunds - altering the text of Article I Section 8 of the Pennsylvania Constitution to explicitly allow for the admission of items seized pursuant to an invalid search warrant, thus condoning violations of the state and federal constitutions.

Unfortunately, the organizations for which we speak wield little political clout. We can present reason in support of our position - and nothing more. It may be politically difficult for legislators to oppose what will no doubt be labeled as "anti-crime legislation". However political expediency should yield to thoughtful analysis where, as here, at issue is preservation of a bedrock constitutional provision, drafted two hundred years ago by our forefathers, that has honorably withstood the test of time. Pennsylvanians today, no less than those of colonial times, deserve the protections of Article I Section 8 as presently written and presently interpreted.

Article I Section 8, as it now appears (and as it will remain under H.B. 1502) provides that no warrant shall issue without probable cause, or without particularly describing the place to be searched or the person/thing to be seized. H.B. 1502, however, goes on to change the law of this Commonwealth to allow for the admission of evidence obtained in violation of Article I Section 8 so long as police reasonably rely on a deficient search warrant. This is unwise policy for a number of reasons.

First of all, the right to be free from unreasonable searches and seizures is, and should remain, a personal right of each Pennsylvanian that contains two coordinate components - the right to be free from police invasions of privacy and the right to exclude from trial evidence seized in violation of this precious right. To splinter this right, and say that Pennsylvanians have a right to be free from police invasions of privacy, but that there is no remedy for violation of this right[1], reduces the stature of this fundamental right to that of a triviality. It is no overstatement to say that a right without any meaningful remedy for its violation, is no right at all.

Article I Section 8, as it presently exists, is not some technical device that protects only the guilty. Only by enforcing Article I Section 8 when cases come before the courts - i.e. when criminal defendants object to illegal conduct - can the rights of all Pennsylvanians be protected. The citizen whose home is searched without result will never be charged with a crime, will never appear in court, and will never obtain redress. By undercutting constitutional protections in those cases where contraband or evidence is found, H.B. 1502 significantly undercuts those same protections for the truly innocent. If evidence gathered pursuant to an invalid warrant (e.g. a warrant without probable cause) is not admissible at trial, police have little incentive to seek such warrants, and magistrates have little incentive to issue them. However if, as in H.B. 1502, evidence gathered pursuant to an invalid warrant is nonetheless admissible at trial, such warrants will increasingly be sought by police "engaged in the often competitive enterprise of ferreting out crime", and such warrants will increasingly be issued by magistrates who realize, and correctly so, that seizures will be validated no matter what the search warrants say, so long as the magistrate signs them. This will cause a significant increase in the issuance of warrants which should never have issued, and subject countless innocent Pennsylvanians to undeserved invasions of privacy.

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[1] That an aggrieved party can file a civil suit against an offending government agent is no answer. Given the time and expense in filing and litigating such law suits, and the lack of monetary damages as a result of almost all violations, the remedy of civil liability has been recognized as largely illusory.

There is also something morally offensive with having our courts, which are dedicated to upholding the rule of law, admitting into evidence items which are the fruit of violations of the law. The judiciary's indirect participation in the illegality by allowing admission of the unconstitutionally obtained evidence undermines the very integrity of the judiciary. For the judiciary to close its eyes to, and allow the prosecution to exploit at trial, illegally obtained evidence, is anomalous.

Not only is H.B. 1502 bad policy - it is also unnecessary. Article I Section 8 "ain't broke", so there is no need to "fix it".

Perhaps there was a day when Article I Section 8 was interpreted by our courts in a hypertechnical or rigid manner, thereby invalidating what this General Assembly may believe to have been too many warrants. If that day ever existed, it has come and gone. In Commonwealth v. Gray 509 Pa. 476, 503 A.2d 921 (1985), the Pennsylvania Supreme Court adopted the United States Supreme Court's "totality of circumstances" standard, and held the Article I Section 8 probable cause standard satisfied when, viewing the totality of the circumstances in a common sense and practical way, there was "a fair inference" of criminal activity. This non-exacting standard greatly defers to the judgments of trained police officers. Today, under the Gray standard, if a search warrant fails to establish probable cause, then a search in reality - and not merely in legal hypertechnicalities divorced from the real world - is unreasonable and should not be permitted.

Nor are the "costs" of suppressing evidence obtained pursuant to invalid warrants particularly high (in terms of failed prosecutions). Contrary to what the untutored might suspect based upon exposure to news hype or anecdotal testimonials from partisans on the issue, even the United States Supreme Court majority opinion in Leon noted that "many of these researches have concluded that the impact of the exclusionary rule is insubstantial..." 104 S.Ct. 3412 FN 6. Justice Brennan, dissenting in Leon, observed that the majority opinion acknowledged that "recent studies have demonstrated that the 'costs' of the exclusionary rule - calculated in terms of dropped prosecutions and lost convictions - are quite low" 104 S.Ct. at 3440. Supporting his conclusion, Justice Brennan cited the following:

> In a series of recent studies, researchers have attempted to quantify the actual costs of the rule. A recent National Institute of Justice study based on data for the 4-year period 1976-1979 gathered by the California Bureau of Criminal Statistics showed that 4.8% of all cases that were declined for prosecution by California prosecutors were rejected because of illegally seized evidence. National Institute of

> Justice Criminal Justice Research Report - The Effects of the Exclusionary Rule: A Study in California 1 (1982). However, if these data are calculated as a percentage of all arrests, they show that only 0.8% of all arrests were rejected for prosecution because of illegally seized evidence. See Davies, 1983 A.B.F.Res.J., at 619.
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> In another measure of the rule's impact--the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded - the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example, a study based on data from nine midsized counties in Illinois, Michigan, and Pennsylvania reveals that motions to suppress physical evidence were filed in approximately 5% of the 7,500 cases studied, but that such motions were successful in only 0.7% of all these cases. Nardulli, the Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A.B.F. Res.J. 585, 596. The study also shows that only 0.6% of all cases resulted in acquittals because evidence had been excluded. *Id.*, at 600. In the GAO study, suppression motions were filed in 10.5% of all federal criminal cases surveyed, but of the motions filed, approximately 80-90% were denied. GAO Report, at 8, 10. Evidence was actually excluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in acquittals or dismissals after evidence was excluded. *Id.*, at 9-11. See Davies, *supra*, at 660. And in another study based on data from cases during 1978 and 1979 in Dan Diego and Jacksonville, it was shown that only 1% of all cased resulting in nonconviction were caused by illegal searches. F. Feeney, F Dill, & A. Weir, Arrests Without Conviction: How Often They Occur and Why (National Institute of Justice 1983). See generally Davies, *supra,* at 663

104 S.Ct. at 3441, FN. 11. Of course, these statistics include all suppression orders for violations of search and seizure provisions, including situations (such as improper execution of valid search warrants) that would not even fall within H.B. 1502's "good faith" exception. It is fair to say that H.B. 1502 will not, in any appreciable measure, resurrect what would otherwise be failed prosecutions.

Pennsylvania does not march alone in its rejections under state constitutional law of the Leon "good faith" exception. The Pennsylvania Supreme Court in Edmunds gave a non-exclusive list of states that, as of 1991, had rejected Leon under their state constitutions, including New Jersey, New York, Connecticut, North Carolina, Tennessee, Wisconsin, Michigan, and Minnesota.

Constitutional "tinkering" is risky business. H.B. 1502 - amending Article I Section 8 - is both unnecessary and bad policy. It should be firmly rejected. Pennsylvanians should continue to receive what their founding fathers wisely gifted to them.

Respectfully submitted,

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PR:mc

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