

STATEMENT OF JEROME BALTER, ESQUIRE
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TO THE PENNSYLVANIA HOUSE JUDICIARY COMMITTEE

IN RE: SUPREME COURT'S KING'S BENCH AUTHORITY
AUGUST 3, 1995

Good morning. My name is Jerome Balter, I am an attorney employed by the Public Interest Law Center of Philadelphia.

I appear here today at the invitation of Representative Jeffrey Piccola, Chairman of the House Judiciary Committee. He has asked me to share with the Committee my recent experiences with the Pennsylvania Supreme Court's exercise of King's Bench authority.

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By way of introduction I wish to provide the committee with some background to the Supreme Court's exercise of King's Bench authority in respect to the Thermal Pure Systems' infectious waste facility in Chester, Pennsylvania:

In 1988 the Pennsylvania General Assembly enacted the Infectious and Chemotherapeutic Waste Disposal Act, 35 P.S. §6019.1 et seq. The Act instructed the Department of Environmental Resources to promulgate a Comprehensive Plan to regulate the capacity and geographical distribution of commercial facilities for the "incineration or other disposal" of infectious waste thereby to minimize the transportation of infectious waste from the places where the waste is generated (hospitals, medical offices, laboratories, etc.) to the places where the waste is to be made non-infectious.

Pursuant to the Infectious Waste Act the DER, in 1990, promulgated an infectious waste Plan which regulated the capacity of incineration facilities but did not regulate the capacity of steam sterilization facilities.

Subsequently, in July 1993 DER issued a permit to Thermal Pure Systems for an infectious waste facility in Chester, Pennsylvania. Because the Thermal Pure facility operates by means of steam sterilization its capacity was not subject to the capacity controls of the DER Plan. The largest possible incineration facility under the Plan would have a capacity of less than 30 tons per day, but the Thermal Pure permit was for a capacity of 288 tons per day, almost ten times as large. The entire state of Pennsylvania generates less than 80 tons of infectious waste per day. It was obvious that the purpose of the Infectious Waste Act, to develop a geographical distribution of facilities so as to minimize the transportation of infectious waste, was absolutely destroyed by the permit issued to Thermal Pure.

Chester Residents objected to the Thermal Pure permit and appealed. This past February the Commonwealth Court in Chester Residents v. DER and TPS, 655 A.2d 609 (Pa. Cmwlth. 1995) upheld the residents' appeal. The Court ruled that DER's arbitrary exclusion of steam sterilizing facilities from the Comprehensive Plan, invalidated the Plan, and consequently invalidated Thermal Pure's permit.

Thermal Pure requested the Commonwealth Court to stay its judgment but the request was denied. Then Thermal Pure requested

the Supreme Court to issue a stay but a unanimous Supreme Court denied the request (3/31/95).

Thermal Pure again requested the Supreme Court to reconsider and to issue a stay. Again the Supreme Court denied the request but this time the Court was split with Justices Nix, Cappy and Zappala voting to deny, and Justices Flaherty, Castille and Montemuro voting to grant the stay (4/10 - 4/12/95).

The fact that Thermal Pure had lost its Permit imposed a statutory duty on DER to shut down Thermal Pure's operations. Solid Waste Management Act, 35 P.S. 6018.610. Accordingly, on April 7, 1995 DER issued a cease and desist order to Thermal Pure.

As you can imagine DER's order triggered considerable legal maneuvering by four law firms acting simultaneously for Thermal Pure in the Commonwealth Court, the Supreme Court of Pennsylvania and in the U. S. District Court.

In response to the DER cease and desist order of April 7, Thermal Pure on April 11 filed a so-called "Petition For Review" with the Commonwealth Court. In fact it was not a Petition For Review because Thermal Pure had never submitted an appeal to the Environmental Hearing Board. The Petition For Review TPS v. DER, No. 140 M.D. 1995 (Cmwlth. Ct.), complained that DER did not have the right to close down Thermal Pure even though Thermal Pure did not have a permit. This action against DER was a separate action, distinct from the Chester Residents' action to invalidate the Thermal Pure permit.

The next day, April 12, Thermal Pure petitioned the Supreme Court to assume King's Bench authority of its Petition For Review against the DER. Chester Residents and DER opposed the Petition on two grounds: First, the Supreme Court did not have subject matter jurisdiction because Thermal Pure had failed to exhaust the available administrative remedy through the Environmental Hearing Board, and Second, because this was not a case of "immediate public importance" -- a condition required for King's Bench jurisdiction under 42 Pa. C.S.A. §726.

On April 19 the Supreme Court responded to Thermal Pure's petition with an order to the following effects:

- The Supreme Court stayed all proceedings on Thermal Pure's Petition For Review before the Commonwealth Court.

- The Supreme Court stayed the DER's cease and desist order to Thermal Pure; in effect allowing Thermal Pure to operate without a Permit.

- The Supreme Court granted Chester Residents' Petition to Intervene.

- The Supreme Court ordered the parties to appear for an Emergency Hearing on April 24.

The Supreme Court's April 24 Emergency Hearing was held pursuant to the Court's King's Bench authority but as a threshold matter the Supreme Court had need to determine whether it had subject matter jurisdiction and whether the case presented a matter of "immediate public importance" to warrant the exercise of King's Bench jurisdiction.

The April 24 hearing was convened without benefit of any previous record with respect to Thermal Pure's complaint against the DER and without benefit of any lower court opinion with respect to the objections from DER and Chester Residents. Therefore at the April 24 hearing the Supreme Court was in fact a trial court but it conducted the hearing as an appellate court, without witnesses or cross-examination to determine facts and without a court reporter or any other means for recording the proceedings.

It is now almost 100 days since the April 24 Emergency Hearing but the Supreme Court has still not issued any opinion or issued any order based on the Hearing. During these 100 days the Supreme Court's April 19 stay of DER's cease and desist order remains in effect and Thermal Pure continues to operate. During these 100 days Thermal Pure has violated the emission regulations on numerous occasions causing discomfort, mucous membrane disorders and respiratory problems among the area residents. Very recently the Thermal Pure facility operations were shut down due to mechanical problems but Thermal Pure failed to notify the Chester Health Department and DER, as required by their permit, or to undertake other procedures to minimize the dangers from non-refrigerated infectious waste, particularly in the hot weather.

The Supreme Court's grant of relief to Thermal Pure has been sustained for more than 100 days under the aura of King's Bench jurisdiction even though the Supreme Court has never declared that it has even assumed King's Bench authority. In response to Chester Residents' "Motion For the Supreme Court to Vacate Its April 19

Order", former Supreme Court Justice Bruce Kauffman, who is the attorney for Thermal Pure, declared as recently as July 27, 1995 that:

"the [Supreme] Court has not yet assumed jurisdiction over Thermal Pure's Petition but rather has only conducted a hearing on whether such jurisdiction should be exercised." (TPS' Br. 7/27/95, p. 6).

The action of the Supreme Court in respect to the petition of Thermal Pure demonstrates an obvious and dangerous abuse of King's Bench power. First, the Court reached down to assume trial court status over the petition; Second, it granted the relief requested prior to any hearing and before determining whether the Court even had subject matter jurisdiction or whether the matter presented was of "immediate public importance"; Third, the Court convened an appellate not a fact finding hearing without a court reporter; Fourth, more than 100 days have passed since the April 24 hearing but the Court has failed to issue an opinion or order, and Fifth, the April 19 court order remains in effect.

The Supreme Court's assumption of power to act as both a trial court and appellate court, as they have done in behalf of Thermal Pure, is a violation of the Pennsylvania Constitution and of the statutory authority of the Supreme Court.

The general powers ascribed to the Supreme Court are stated in 42 Pa. C.S.A. §502:

"The Supreme Court shall have the power vested in it by the Constitution of Pennsylvania, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or

any of them, could or might do on May 22, 1722..." (Emphasis added.)

Thus the General Assembly established the Supreme Court's King's Bench authority to be similar to that of the Supreme Court in pre-revolutionary Pennsylvania. And the Act of 1722 provided that Pennsylvania Supreme Court decisions in cases of original jurisdiction were to be appealable to the House of Peers in Westminster. The House of Peers was, in fact, the court of last resort but it had no jurisdiction to act as a trial court.

The inherent benefit of a system which denies a trial court the power to be the court of last resort was also recognized in post-revolutionary Pennsylvania when the legislature by the Act of 1780 created the Pennsylvania High Court of Errors and Appeals whose only jurisdiction was to hear appeals from Supreme Court judgments. The High Court consisted of members of the Supreme Court, the Court of Admiralty, the President of the Executive Council and "three persons of known integrity and ability."

Thus the present day statutory designation of Supreme Court jurisdiction, 42 Pa. C.S.A. §502, is a reminder that the Supreme Court is not intended to be the court of last resort in cases where it assumes original jurisdiction as a trial court.

The Pennsylvania Constitution of 1968 reinforces the view. In unequivocal terms Article 5 Section 9 of the Pennsylvania Constitution guarantees that litigants in Pennsylvania Courts are entitled to at least one judicial appeal, as a matter of Right:

"There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of

appeal from a court of record or from an administrative agency to a court of record or to an appellate court..." (Emphasis added.)

Pa. Const. Article 5 Section 9. The Supreme Court has acknowledged this Right in Pa. Dept. of Aging v. Lindberg, 469 A.2d 1012 (Pa. 1983).

Accordingly, our Constitution in combination with the limited jurisdiction provided for the Supreme Court by 42 Pa. C.S.A. §502 make clear that the Supreme Court cannot have trial court jurisdiction under its King's Bench authority because the legislature has not established a Court, such as the High Court for Errors and Appeals, to hear appeals from original judgments of the Supreme Court.

The Supreme Court attempts to avoid this Constitutional limitation on its jurisdiction in Rule 3309, Pa. Rules of Appellate Procedure, where it declared that the exercise of King's Bench authority, even as a trial court, shall be deemed "the taking of an appeal as of right." Rule 3309(d). But Rule 3309 cannot take precedence over the Constitution, and Rule 3309 cannot convert an illusion to a fact. The Right of appeal has meaning only when the appeal is reviewed by a court other than one which made the original judgment. It would be ^{IN}an error to made the Right of Appeal a mockery.

The Supreme Court's exercise of King's Bench authority to assume trial court status of the Thermal Pure's Petition For Review, demonstrates that the Supreme Court does not recognize this constitutional limitation on its jurisdiction. This question is

the subject of a pending motion presented by Chester Residents to the Supreme Court. The fact that it will be the same Supreme Court which will rule on the motion suggests this question may not receive the friendliest of receptions. It is up to the General Assembly to make clear the limits of the Supreme Court's King's Bench authority under the Pennsylvania Constitution.

There is also a need for the legislature to establish limitations on the Supreme Court's exercise of King's Bench authority whether as a trial court or as an appellate court.

In the Thermal Pure case the Supreme Court issued an order providing the petitioner with relief even before the Court had convened a hearing and even before the Court had any basis for determining whether the matter at issue was of "immediate public importance." Thus the Supreme Court, on April 19, acted under the guise that the King's Bench jurisdiction was warranted. The abuse that such abuse of authority makes possible is manifest.

The Supreme Court should be prohibited from providing relief under the appearance of King's Bench authority; there must be a reasoned opinion by the Supreme Court to justify any action under King's Bench jurisdiction. And such a determination must be based on a factual determination in which the parties have the opportunity to present witnesses and cross-examine witnesses. And the hearing before the Court should be recorded to preserve the evidence and the ruling of the Court.

The Supreme Court, in the Thermal Pure case, issued its order staying the DER cease and desist order on April 19, five days

before the April 24 hearing, it is now August 3, some 100 days after the hearing and the Supreme Court has still not said whether King's Bench applies, nevertheless, Thermal Pure has benefitted from the April 19 order and Chester Residents have suffered from that Order.

And the King's Bench authority should not provide jurisdiction for the Supreme Court to exercise jurisdiction over cases for which it does not have subject matter jurisdiction, a practice which the Court has undertaken from time to time to enlarge its jurisdiction. Such a practice opens up the opportunities for abuse, and undermines the credibility of the courts.

Thermal Pure completely bypassed the Environmental Hearing Board administrative procedures for appealing actions of the DER. Thermal Pure filed a complaint -- which they mislabeled as a "Petition For Review" -- in the Commonwealth Court. Such complaints are regularly dismissed by the Commonwealth Court for lack of subject matter jurisdiction; but before the Commonwealth Court could act the Supreme Court reached down and took control of the case with their King's Bench powers. But then the Supreme Court didn't even bother to determine if it had subject matter jurisdiction let alone King's Bench jurisdiction.

The unfairness and abuses which can result from such arbitrary, and unreasoned operations of King's Bench jurisdiction require the General Assembly undertake the necessary reforms of the King's Bench authority and thereby to restore confidence in the

quality of justice that can be expected through our Judicial System.

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In 1994, Common Pleas Court Judge Bernard F. Scherer wrote an article on the Supreme Court and the origins of King's Bench Power, 32 Duq. L.R 525, 536-37 (1994) in which he concluded:

"...the unfettered King's Bench prerogative both as a fact finder and a court of final recourse...differs markedly from the role intended for the Supreme Court of Pennsylvania."

There is a need for the General Assembly to clarify the limits and practices of the King's Bench jurisdiction to bring it into line with the traditions of King's Bench, to have it comply with Article V Section 9 of the Constitution and assure fair and objective treatment to all parties before the Courts of Pennsylvania.

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