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COMMENTS OF JULES EPSTEIN, ESQUIRE
CONCERNING THE PENNSYLVANIA SUPREME COURT
AND "JUDICIAL ACTIVISM"

I am an attorney in Philadelphia with 19 years experience in criminal defense. I teach as adjunct faculty at Penn Law School; I lecture and publish regularly; I have argued before the Court repeatedly; and I have read every criminal law decision from that Court in my nearly two decades of practice.

I begin by noting that, in today's political climate, the concept of "judicial activism" is often a codeword for an accusation of being "liberal" or "too liberal." This concept is wrong in two regards. First, there is activism in/on all points in the judicial spectrum - if activism is defined as reaching out for issues, or going beyond a particular claim to address broader issues.

Second, the Pennsylvania Supreme Court is decidedly not liberal, particularly in almost all areas of criminal law. Indeed, a review of death penalty cases makes clear that the court is decidedly conservative, or 'tough-on-crime', or whatever

the catch-phrase is. Indeed, I suspect that in some areas of death penalty litigation the Court has been so restrictive in interpreting federal constitutional law that cases may be reversed on federal habeas.

The same is true in the area of sentencing law. The Court has made it easier and easier for trial courts to impose tougher, and more consecutive sentences. The irony, as I sit here today, is that in this area in my opinion the Court has been extremely activist, perhaps in disregard of legislative intent. This is because this Legislature passed a uniform Crimes Code, in 1972, with a structure of more severe and 'lesser' offenses, and with the implicit understanding that greater crimes would subsume lesser ones in sentencing. The Court has changed all that, without ever referencing Legislative history, by continually making and altering its own, common law based, definition of sentencing "merger." This was activism, or perhaps just policy making, but it was also done with a conservative or tough-on-crime approach.

Turning to two criminal-law related areas, capital unitary review and the evidence code, I wish to comment on each, in terms of both merit and process.

The decision to suspend CURE was correct on the merits. The unitary review process was fraught with constitutional frailties/predicaments. And there was a petition for extraordinary review before the Court, seeking invalidation of this process. Finally, the need for prompt action was clear, and should be appreciated by those in this body who support the death

penalty. Had this process not been examined promptly, it would have occasioned years of litigation and, perhaps ironically, the opposite of what was intended - great delay.

What is more dubious is the process of review. The Pennsylvania Supreme Court seems to operate without rules, or with rules that are indecipherable. Why was the issue not called for briefing? Why was the petition before the Court not addressed? This, indeed, is a recurring phenomenon. It is a constant refrain among lawyers that filing an emergency-type petition before the Supreme Court means nothing except that the petition will be lost and surface only in a random fashion (if ever).

As to the evidence code, I will confess less familiarity with the issue of whether that is the function of the Court or the Legislature. I know that the Court is limited to rule-making in areas of <u>procedure</u>, and the evidence code is more than that. At the same time, the Court has used its common-law rule-making authority for 200 years to promulgate decisions that are as binding as rules of evidence. And at least there is a somewhat orderly process there, one that involved the preparation of a draft code and the solicitation of comments on a statewide basis.

In conclusion, there are several points that I wish to make:

§ First, in appraising the conduct of the Pennsylvania Supreme Court we need to dispense with labels such as "activist." This is a codeword with political overtones, and is both incorrect as applied to this Court and a dangerous precedent - the independence of the judiciary needs to be safeguarded, and not subject to the whims or currents of political ideology.

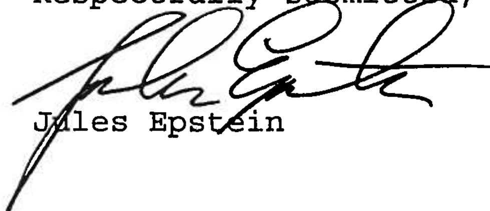
§ Second, it is clear that the Court fails itself and this Commonwealth by not proceeding in an orderly

fashion, and therefore hurts itself and its credibility when it appears to be issuing advisory opinions or acting without uniformity. The Court should be encouraged to establish guidelines, published guidelines, for the treatment and timely and orderly disposition of petitions.

§ Third, the Court would enhance the legitimacy of its actions by soliciting briefs amici curiae on matters of public importance.

§ Fourth, using capital unitary review as an example, the need is greater for caution in drafting legislation that implicates or directly impinges upon significant constitutional protections.

Respectfully submitted,



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