2929 NORTH FRONT STREET
HARRISBURG, PA 17110
(717) 238-5416
FAX (717) 231-3912

FOUNDED 1912

PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION

October 23, 1997

**TESTIMONY OF RALPH GERMAK
DISTRICT ATTORNEY OF JUNIATA COUNTY
BEFORE THE HOUSE JUDICIARY COMMITTEE
CONCERNING THE PENNSYLVANIA SUPREME COURT'S
OVERREACHING INTO THE LEGISLATIVE FUNCTION**

Good morning members of the Judiciary Committee and ladies and gentlemen. As Vice-President of the Pennsylvania District Attorneys Association ("PDAA"), I appreciate the opportunity to testify today on behalf of Pennsylvania's prosecutors concerning the growing trend of our Supreme Court to overreach into the legislative arena, striking down many valid statutes in the name of the state constitution's rule-making provision and search and seizure provision. I will address first the rule-making issue and then the issue of search and seizure.

RULE-MAKING

Art. 5, § 10 of the Pennsylvania Constitution provides:

> (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts... All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

This particular power of the Court has come to weaken law enforcement's abiity to protect victims, witnesses and all of our citizens from the ravages of crime. The Supreme Court more and more is asserting authority over matters historically left to the Legislature, in the name of its state constitutional rule-making power. The Court has been less and less able to exercise self-restraint, overruling or modifying a broad spectrum of legislation, including laws of evidence, capital punishment proceedings, child videotaped/closed circuit TV testimony and the Commonwealth's right to a jury trial, to name just a few. Even the academic community has commented on our Supreme Court's propensity to wield it's rule-making authority in Pennsylvania as a powerful check on legislative action it does not like. Mulcahey, Separation of Powers in Pennsylvania: The Judiciary's Prevention of Legislative Encroachment, 32 Duq. L. Rev. 539 (1994).

The Supreme Court typically expands its rule-making authority in such a fashion as to reduce law enforcement's ability to protect our citizens from crime. Let me provide some examples:

Death penalty collateral appeals. The state Supreme Court has always deferred to the General Assembly's authority to promulgate legislation in the realm of state habeas corpus law (currently the P.C.R.A., formerly the P.C.H.A.). However, when the legislature moved to shorten the time period for death penalty appeals by consolidating the direct and P.C.R.A. appeals, the state Supreme Court did a complete about-face, implicitly taking over the role of legislating state habeas corpus law, as it applies to death penalty defendants. The Court has thrown out the Capital Unitary Review Act ("CURA") contained in Act 32, of 1995, re-instating, the much lengthier double appeal process. The court, at least for now, has graciously permitted the General Assembly to retain its power to enact PCRA legislation for non-capital defendants. Our citizens are outraged by the lengthy delay between the death penalty verdict and the carrying out of the penalty. As their representatives, you properly enacted sound legislation to do something about it. But our Court has said no, there is nothing you can do about it, there is nothing the public can do about it, that no matter what you or your constituents want, these seven individuals will decide.

Child-videotaped and closed circuit testimony. After the Court struck down legislation allowing traumatized child abuse victims to testify, the General Assembly pursued the only avenue available - constitutional amendment. The legislature approved this amendment in two consecutive sessions, and presented it to the public, which approved this change overwhelmingly. However, the Commonwealth Court held that even this isn't good enough. It struck down the amendment, holding that because of the constitutional rule-making clause, the question before the voters was two fold: 1) should child-videotaped and closed circuit testimony legislation be permitted? and 2) should the legislature be empowered to enact laws in this area.

It might seem readily apparent to most of us that these are simply two sides to the same question, but our opinions don't count. Once again, the rule-making clause is used as a weapon against those who would protect victims and fight crime.

Commonwealth right to a jury trial. Throughout most of its history, the Commonwealth has been placed on an equal footing with the defendant with respect to having a jury hear a case. However, in the 1970's, the Supreme Court took that right away. The General Assembly, offended by

this inequity, statutorily reinstated the Commonwealth's right to a jury trial by an overwhelming vote. Never deterred, our Supreme Court, in a split decision, stripped away your power to legislate in this area. Commonwealth v. Sorrell, 456 A.2d 1326 (Pa. 1982). So, even though the General Assembly wants victims to be on an even playing field with the criminal defendants, the Court has the our rule-making clause to say that what the public wants, and what you, as the public's representatives want, simply doesn't matter. These seven will decide, by virtue of the rule-making clause.

Evidence Code: The General Assembly's power to promulgate evidentiary rules has historically never been questioned. See 42 Pa.C.S. §§5901-5981, §§6101-6159. When the General Assembly moved, however, to consolidate all of the evidentiary rules into a comprehensive and organized Evidence Code, (See Senate Bill 965 of 1995), the Supreme Court decided to use the rule-making clause as a means to take over this area of law-making as well. Why this was not impermissible rule-making before, but is today, no one has ventured to explain; no one has ventured to speculate where it will stop.

The Court's usurpation of traditionally legislative functions undermines fundamental principles of democracy. Once the Court assumes an area of law within its rule-making power, the process of developing rules moves behind the cloak of judicial secrecy, beyond the reach of the other branches of government and beyond the power of our citizenry. Indeed, by founding their actions on the state Constitution, the court renders any statutory provisions on the point of law it - assumed null and void. Indeed, one author, who is himself a criminal defense attorney and law professor, has strongly set forth that he believes the rule-making power of our Supreme Court is completely out of control, offends the separation of powers doctrine, robs the Pennsylvania Legislature of its power and ultimately thwarts the will of the people. Ledewitz, What's

Really Wrong with the Supreme Court of Pennsylvania?, 32 Duq. L. Rev. 409 (1994).

The federal system does not lend itself to such problems.[1] Neither do the rule-making systems in a vast majority of states[2]. These jurisdictions recognize the danger of the courts using rule-making to become a super-legislature. Absent some kind of checks and balances, rules of court can be expanded to regulate more than technical, housekeeping matters but to instead affect important social policy questions -- such as the revelation of prior sexual conduct to attack rape victims, the release of dangerous criminals on bail, the availability of sanctions for frivolous suits and the right of victims of crime to have their cases heard by a jury of their peers.

Accordingly, in most of the country, the court rules are subject to the democratic process. The legislature delegates to the courts the initial function of developing proposed rules, usually through a system of advisory committees. The legislature then must approve these rules or, in particular cases, itself formulates them. In this way, the public benefits both from the expertise of its judiciary and from the perspective of its elected officials.

This public hearing today is a significant step in the right direction. The prosecutors of this state have unanimously endorsed the concept of bringing Pennsylvania in line with most other

jurisdictions by assigning to the Court system the initial responsibility for proposing rules, while reserving to the legislature its proper power to approve or disapprove rules before they can become law.

The rule-making power, although perhaps esoteric in its particulars, has significant impact on the many citizens who must at one time or another have recourse to the court system. The PDAA urges you to move forward with a constitutional amendment providing democratic oversight of the rule-making powers of the Court.

SEARCH AND SEIZURE

Introduction. Last session, the General Assembly considered Senate Bill 806, which proposed an amendment to the Pennsylvania Constitution to stop our state supreme court from expanding criminals' rights beyond those provided by the United States Constitution. It would have done nothing more than permit the voters to decide whether to grant criminal defendants the same search and seizure rights guaranteed by the Fourth Amendment of the United States Constitution, but no more.

With increasing frequency, our state supreme court has been rejecting the holdings of our United States Supreme Court. Our

state supreme court is manipulating the Pennsylvania Constitution to create new weapons to fortify the already bloated arsenal of Pennsylvania criminals who seek to avoid punishment for their crimes. We are not aware of any other state supreme court that has used its state constitution so aggressively to handcuff its police officers in their uphill fight to keep our citizens safe from harm.

Succinctly stated, Pennsylvania's grant of numerous state-based rights broader than federal rights effectively frustrates the truth-determining process and gives criminals an unfair advantage at the expense of public safety. These extra rights for criminals result in dangerous offenders being freed to commit more crime, as well as countless other criminals never being apprehended because Pennsylvania police are forced to fight crime with one hand tied behind their backs.

Federal and State Constitutional provisions. All of this has occurred in spite of the virtually identical language of the state and federal constitutions. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

As you can see, there is no substantive difference between the two provisions.

Examples of impact on public safety. Let's take a look at the impact of some of these state supreme court decisions; you will see, in concrete terms, how much our ability to fight crime has been weakened:

1. **Police can no longer chase criminals who flee.** In Commonwealth v. Matos, McFadden and Carroll, 672 A.2d 769 (Pa. 1996), the court broke truly new ground in expanding criminals' rights by holding that police are not entitled to seize firearms, drugs, or other contraband even after the criminal has fled and discarded or dropped the contraband. In all of the above cases, the police never attempted to arrest or search the defendants, but merely approached them to ask questions (which of course the police or any other citizens are always permitted to do). When the defendants in the above cases ran away, the police pursued them. When the defendants, while fleeing, discarded their contraband (drugs or guns), the police, of course, picked them up.

   According to the state supreme court, the police violated the state constitution when they chased the defendant. Moreover, when they saw the discarded guns or drugs on the ground, the state constitution required that they leave them there. The police, of course did not leave them there but instead picked the guns and drugs up, further violating the state constitution, according to our state supreme court.

   Not only did the state supreme court suppress the evidence which the defendants discarded in these cases, but it also implicitly created an entirely new grounds by which criminals may sue the police. Under Matos, McFadden & Carroll, if a police officer approaches an individual who then flees, and the officer chases after the individual, that individual can now sue the police department because the officer simply ran

after the suspect. And if the suspect then drops a gun, drugs or other evidence of a crime, that suspect can now sue the police department if the officer stoops down and picks it up.

2. **Criminals' rights to make totally inconsistent claims as to seized property.** In Commonwealth v. Sell, 504 Pa. 46 (1983), the state supreme court rejected the United States Supreme Court holding in United States v. Salvucci, 448 U.S. 83 (1980), where a defendant claimed that he had a fourth amendment right against search and seizure as to property that he alleged didn't even belong to him! The United States Supreme Court properly rejected this inconsistent and legalistic claim, stating that "arcane distinctions developed in property and tort law ought [not] to control our Fourth Amendment inquiry." Salvucci, at 92. The Salvucci court cited Rawlings, v. Kentucky, 448 U.S. 98 (1980) and Rakas v. Illinois, 439 U.S. 128, 138 (1978)("[T]he rights assured by the Fourth Amendment are personal rights, [which]...may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure...").

   Our state supreme court rejected the United States Supreme Court's common sense approach, in Commonwealth v. Sell, supra, holding that the state constitution confers "automatic standing" on defendants charged with possessory offenses. Thus, criminals in Pennsylvania can have their cake and eat it too, arguing the inconsistent position that even though the seized property wasn't theirs, somehow its seizure violated their privacy and property rights.

3. **Drug dealers' right to destroy evidence before police execute search warrant to find that evidence.** In Commonwealth v. Chambers, 528 Pa. 403 (1991), the state supreme court applied to police executing a search warrant a stricter interpretation of the "knock and announce" rule than that mandated by the federal Fourth Amendment, which only requires that the police act reasonably. In Pennsylvania, law enforcement must a) knock on the door, 2) announce that it is the police, and 3) wait at the door for at least a couple of minutes for a suspected drug dealer to let them into the home to execute the search warrant.

   Obviously, even the dullest drug dealer will, during the mandated waiting period, quietly take his drugs and flush them down the toilet. Moreover, if the drug dealers wish to set up an ambush for the police, they are now given a state constitutionally required period of time in which to comfortably do so.

6. **Pennsylvania, unlike the rest of the nation, may not use "dog sniffs" to catch drug traffickers.** The United States Supreme Court, over a decade ago, resolved that a dog sniff is not a "search" subject to constitutional protection. U.S. v. Place, 462 U.S. 696 (1983). Declaring that a canine sniff is "much less intrusive than a typical search," the court stated that "[w]e are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." Place, at 707.

   The Pennsylvania Supreme Court, however, has used the state constitution to outlaw the use of dogs in investigatory stops of drug dealers. A dog's mere "sniff" of a drug suspect, in the opinion of our state supreme court, is indistinguishable from a full body strip search. Full probable cause to arrest is necessary. Commonwealth v. Martin, 534 Pa. 136 (1993). The state supreme court thus reduces the dog sniff to a redundant exercise; where there is probable cause to arrest, a dog sniff isn't necessary.

7. **Police officers in Pennsylvania may not take certain common sense measures to protect their lives during a house search.**

   It may seem obvious that when police are engaged in the dangerous procedure of a house search, they need to protect themselves by temporarily detaining the occupants during the search. See Michigan v. Summers, 452 U.S. 692 (1981)("a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted"). But Pennsylvania police, who put their lives on the line every day in the fight against crime, are not permitted to take this simple, common sense precaution. The Pennsylvania constitution won't allow it, according to the state supreme court. See Commonwealth v. Rodriguez, 532 Pa. 62 (1992).

Unfortunately, there are more examples, all to the benefit of drug dealers and criminals, and at the expense of the public safety and the safety of our police officers. See Commonwealth v. Mason, 535 Pa. 560 (1993)(Pennsylvania's police officers are not permitted to secure a residence while obtaining a warrant, but instead police must politely wait outside even though they have "credible,

independent information that crimes [are] being committed at that time inside the [residence]."). Mason, 535 Pa. at 575 (dissenting opinion); Commonwealth v. White, 669 A.2d 896 (Pa. 1995) (rejecting the well-established principles of New York v. Belton, 453 U.S. 454 (1981) that where police, having probable cause to arrest a criminal in his car and properly make such an arrest, they may for their own protection search the passenger area of the car for weapons as a search incident to an arrest).

Necessity of constitutional amendment. It is unfortunate that there is no other solution to this problem other than a constitutional amendment. Because the state supreme court based all of its pro-criminal rulings on the state constitution, any legislation addressing the problems by statute would automatically be struck down by the state supreme court. The only way to stop the state supreme court from using the state constitution to help criminals and from making our streets and homes ever more dangerous, is by prohibiting them from doing so in the state constitution itself.

Constitutional amendments envisioned by founding fathers. In fact, it is clear that the founding fathers clearly believed that the state constitution should be amended when necessary; they wrote the constitution with specific procedures for amending it. Moreover, such efforts to repeal unwise state cases is not without precedent in Pennsylvania. In 1984, Article 1, § 9 was amended in

response to Commonwealth v. Triplett, 452 Pa. 244 (1975), which held that a confession obtained as the result of a violation of Miranda rights could not be used to impeach a defendant's denial of guilt at trial. The people of this state used a constitutional amendment to throw the brakes on the state supreme court. As a result, suppressed evidence is now properly admissible at trial when a defendant lies on the witness stand. Similarly, in 1995 the voters amended the state constitution to reverse the state supreme court and make clear that closed circuit or videotaped child testimony could be used at trial in child abuse cases.

Other states. Moreover, since 1970, at least nineteen important amendments to bills of rights in at least fourteen other states, all reigning in "run-away" state supreme courts, and all limiting criminal procedural rights, have been adopted.

In 1982, Florida altered its state constitutional provision corresponding to the Fourth Amendment of the United States Constitution in a manner similar to that proposed in Senate Bill 806. In the same year, California also limited the exclusionary rule by adopting a constitutional truth-in-evidence amendment. Both have been upheld by the courts.

Other states passed amendments permitting some form of preventive detention of criminal defendants awaiting trial. Three of the amendments restored the death penalty and a Connecticut

constitutional amendment reduced the size of juries in non-capital cases to six persons.

U.S. Constitutional rights of defendants cannot be undercut. One concern that has been expressed is that if the United States Supreme Court expands the rights of criminals in the future, the proposed amendment might lock Pennsylvania into those United States Supreme Court decisions. However, we would be locked into those U.S. Supreme Court decisions regardless of whether the proposed constitutional amendment passes. The United States Constitution (as interpreted by the U.S. Supreme Court decisions) sets the minimum floor of rights for criminal defendants, which all states must adhere to no matter what. All 50 state supreme courts are prohibited from cutting back on criminals rights beyond what the U.S. Constitution provides. The only thing a state supreme court can do is to expand the rights of criminals, which is, of course, exactly what our court has been doing. The proposed constitutional amendment would simply put a stop to that expansion of criminals' rights, at least in the realm of search and seizure.

Constitutional amendment necessary to protect federalism. The proposed constitutional amendment protects federalism and the right of Pennsylvanians to set their own rules, by giving this power to the people's elected representatives in the state legislature. If the state legislature decides that search and seizure rights should be expanded, they will be able to do so, under this amendment.

Thus, federalism and democracy are even better protected, since the power to determine an accused's state-based rights will be taken from the court and given to the representatives of the people.

As stated above, the founding fathers envisioned that their state constitution would need to be amended, and they provided for such a process. We are convinced that the founding fathers would approve of this amendment to the state constitution as particularly necessary because the state supreme court has thrown the constitutional structure of goverment into imbalance: the court has anointed itself as a super-legislature and has used the state constitution's search and seizure provision to legislate ever more sweeping rights for drug dealers and other criminals, at the expense of law-abiding citizens. We are certain that the founding fathers would be shocked at the illogical and dangerous rulings of our state supreme court; we believe that, if they were alive today, they would be leading the charge for this constitutional amendment.

Summary. Unless Pennsylvania acts to limit its exclusionary rule, criminals in this state will continue to be a specially protected class. The erosion of the ability of state government to protect its citizens from crime will continue its acceleration. Our state supreme court recently has granted allocatur on several defense appeals seeking to further expand criminals' state constitutional rights at the expense of public safety. The court appears bent on

adopting ever more rules that are making Pennsylvania the safest state in the nation - to commit crime.

The citizens of this Commonwealth pay a high price - with their lives, their health, their property and their peace of mind - for this bloated arsenal of state procedural protections for criminal activity. Our citizens deserve the chance to go to the ballot box to decide - in accordance with the state constitution's provisions for its own amendment - whether or not their constitution may be abused in this way.

ENDNOTES

1. The United States Constitution is silent on the subject of rule-making. The federal rule-making model, however, is premised on the assumption that Congress has the authority to make rules of procedure and to delegate that power to the Supreme Court. See, Sibbach v. Wilson & Co., 61 S. Ct. 422, 425 (1941). The federal rule-making process has been described as "judicial rule-making pursuant to a legislative delegation and subject to a Congressional veto." Wright and Miller, Federal Practice and Procedure, §1001, p. 6 (2d. ed. 1987).

2. At least thirty-seven (37) states provide direct legislative, shared authority and/or legislative oversight of the rule-making function.