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Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future

Leonard N Sosnov

CRIMINAL PROCEDURE RIGHTS UNDER THE PENNSYLVANIA CONSTITUTION: EXAMINING THE PRESENT AND EXPLORING THE FUTURE

by Leonard Sosnov*

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* Associate Professor, Widener University School of Law. B.A. 1967, Temple University; J.D. 1971, Harvard University. I want to thank John Packel, Peter Rosalsky, and Esther Clark for their helpful comments in response to an earlier draft of this Article, and Elise Grossman, David Margolis, and Adrian Shchuka for their very useful research assistance.

I. INTRODUCTION

Two primary sources enable Pennsylvania courts to provide greater criminal procedural rights protection to the accused than is provided under the United States Constitution. One source is ancient and the other modern. The first source, the Pennsylvania Constitution's Declaration of Rights, which provides for specific criminal procedure protections, such as the right of confrontation, first appeared in Pennsylvania's original constitution of 1776.[1] In contrast, the second source only originated in 1968. In that year, Pennsylvania adopted a new constitution that gave the Supreme Court of Pennsylvania exclusive control over practice and procedure in Pennsylvania's courts.[2]

Over the past two decades, the general trend in the United States Supreme Court has been to give increasingly narrow interpretations of the Bill of Rights, thus diminishing federal constitutional rights in many areas of criminal procedure. Partly in reaction to this trend, partly in recognition of the dangers attending this diminution of procedural rights, and partly in response to its expanded power under the 1968 Pennsylvania Constitution, the Pennsylvania Supreme Court has assumed an active role in providing independent, criminal procedure protections as a matter of state law. As in many states, there has been an ever-increasing focus on the state constitution.[3]

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[1] Pennsylvania's Declaration of Rights is now contained in various provisions of Article I of the current version of Pennsylvania's Constitution. *See infra* notes 33-37 and accompanying text.

[2] PA. CONST. art. V, § 10(c). For the text of Article V, Section 10(c), see *infra* note 6.

[3] The Pennsylvania Supreme Court has thus noted that "[t]he past two decades have witnessed a strong resurgence of independent state constitutional analysis, in Pennsylvania and elsewhere." Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991); *see* Peter J. Galie, *The Pennsylvania Constitution and the Protection of Defendant's Rights, 1969-1980: A Survey*, 42 U. PITT. L. REV. 269 (1981); Andrew E. Faust, Comment, *Pennsylvania's Voluntary Confession Amendment: Majoritarian Control of Fundamental Rights*, 89 DICK. L. REV. 1003, 1006-07, 1025 (1985). *See generally* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 1-4 (1991) (discussing the use of state constitutions in the administration of criminal justice).

This Article first examines the history and extent of the Pennsylvania courts' constitutional power to grant criminal procedural rights beyond those guaranteed by the United States Constitution. Next, this Article will analyze the methodology employed by Pennsylvania's courts in assessing state constitutional claims. This Article focuses primarily on the affect the Pennsylvania Constitution has on specific areas of criminal procedure, such as search and seizure. After an overview of each area in which Pennsylvania has granted more protections under its constitution than those required by the United States Supreme Court, this Article will explore state constitutional issues that are in need of clarification or a new look, and it will explore significant issues that have not yet been addressed. The issues selected are those that the author believes may lead to a grant of greater constitutional protection than has been granted by the United States Supreme Court. Some of these conclusions may be viewed as predictions because they logically follow closely related issues already decided under the Pennsylvania Constitution. Other areas explored are more speculative, given the paucity of state constitutional interpretation of such claims. Nevertheless, they have been included because the Pennsylvania Supreme Court is willing to consider state law as an independent ground for relief and because the arguments for granting such rights are strong.

II. OVERVIEW OF PENNSYLVANIA CRIMINAL PROCEDURE: THE POWER AND EXERCISE OF CONSTITUTIONAL AUTHORITY

A. The Pennsylvania Supreme Court's Supervisory Power: Article V, Section 10(c)

Until 1968, the constitutional authority to control practice and procedure in Pennsylvania resided in the legislature.[4] It was only at the pleasure of the legislature that the Pennsylvania Supreme Court could prescribe rules for practice and procedure in criminal

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[4] *See, e.g.*, Penn Anthracite Mining Co. v. Anthracite Miners, 178 A. 291 (Pa. 1935); Commonwealth v. Hall, 140 A. 626 (Pa. 1928). *See generally* Thomas J. Pomeroy, Jr., *The Pennsylvania Supreme Court in Its First Decade Under the New Judiciary Article*, 53 TEMP. L.Q. 613 (1980).

cases, and the legislature did not confer this power until 1957.[5] With the adoption of Pennsylvania's present constitution in 1968, there was a dramatic shift in power. Article V, Section 10(c) of the constitution provides that the court has the power to prescribe rules governing the practice and procedure in all courts and that all inconsistent laws shall be suspended.[6] The exclusive power of the Pennsylvania Supreme Court to control practice and procedure now serves as a limit on legislative power. All laws that are inconsistent with court rules governing practice and procedure are unconstitutional.[7] In addition, even in the absence of a court rule on the subject, any statute that attempts to govern procedure is unconstitutional.[8]

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[5] Act of July 11, 1957, No. 380, P.L. 819.

[6] Article V, Section 10(c) provides:

> The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

PA. CONST. art. V, § 10(c). There was little opposition to the adoption of this constitutional provision. *See* ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 421 (1985).

[7] *E.g.*, Commonwealth v. Sorrell, 456 A.2d 1326 (Pa. 1982) (holding that a statute purporting to give the Commonwealth the right to insist on a jury trial in a criminal case is unconstitutional because it conflicts with rule 1101 of the Pennsylvania Rules of Criminal Procedure—providing that a defendant may have a nonjury trial if approved by the trial judge).

[8] *See, e.g.*, Garrett v. Bamford, 582 F.2d 810, 814 (3d Cir. 1978) (noting that in Pennsylvania "the legislature . . . is without power to control procedure"); Appeal of Borough of Churchill, 575 A.2d 550, 554 (Pa. 1990) (stating "we know of no authority which would vest power in the Legislature to

The principal Article V, Section 10(c) limitations on the court's power are that the court's rules must be "consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant."[9] Procedural law encompasses "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[10] Accordingly, substantive criminal law has generally been considered to be limited to the designation of what conduct constitutes criminal offenses and to provisions for the penalties for infractions, as well as to

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tell the Judiciary how to hear and dispose of a case"); Laudenberger v. Port Auth., 436 A.2d 147, 155 (Pa. 1981) ("As we have stated previously, the legislature is forbidden to act in the field of procedure . . . ."), *appeal dismissed sub nom.* Bucheit v. Laudenberger, 456 U.S. 940 (1982). In the leading case of *In re* 42 Pa. C.S. § 1703, 394 A.2d 444 (Pa. 1978), the Pennsylvania Supreme Court unanimously held that the legislature violated Article V, Section 10(c) and the separation of powers doctrine by enacting a statute that directed the court to have its rule-making sessions open to the public. The court stated that "the constitutional provision's *explicit* statement that court-made rules will prevail against any statute that might be inconsistent with them would be incongruous with a scheme in which the legislature exercised concurrent rule-making power." *Id.* at 448 (emphasis added) (footnote omitted).

Even without an explicit constitutional provision, such as Article V, Section 10(c), which grants judicial authority to control practice and procedure exclusively, several state courts have come to the conclusion that they inherently have such exclusive power. *E.g.*, Goldberg v. 8th Judicial District Court, 572 P.2d 521 (Nev. 1977); Puckett v. Cook, 586 P.2d 721, 723 (Okla. 1978); Holm v. State, 404 P.2d 740, 743 (Wyo. 1965). Legal scholars, Pound and Wigmore, long ago persuasively advocated this position. Roscoe Pound, *The Rule-Making Powers of the Courts*, 12 A.B.A. J. 599 (1926); John H. Wigmore, Editorial Note, 23 ILL. L. REV. 276 (1928).

[9] PA. CONST. art. V, § 10(c). For the text of Article V, Section 10(c), see *supra* note 6.

[10] Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). The Pennsylvania Supreme Court has noted that this attempt by the United States Supreme Court to define procedural law is not altogether successful because the line between procedural law and substantive law is often difficult to draw and "[a]s threads are woven into cloth, so does procedural law interplay with substantive law." *Laudenberger*, 436 A.2d at 150. The court has dealt with this problem by being hesitant to invalidate its rules because of an alleged unconstitutional encroachment on the substantive law. *Id.* at 155.

legislation, such as statutes dealing with privileges and privileged communications, that directly affects the relations between people outside the criminal justice system.[11] What is left to govern in the criminal justice system constitutes practice and procedure,[12] which is the exclusive domain of the Pennsylvania Supreme Court.

The other Article V, Section 10(c) limitation on the court's powers—that its rule-making be "consistent with this Constitution"[13]—prohibits the court from violating the constitution by abridging procedural rights that have been construed to be guaranteed by the constitution's Declaration of Rights in Article I. This limitation obviously does not mean that the procedural rights conferred by the Pennsylvania Constitution may only be duplicated in any rules promulgated, otherwise the power granted by Article V, Section 10(c) would be useless and redundant. The court may confer whatever procedural protections it deems appropriate, with the Pennsylvania and United States Constitutions providing only the minimum floor of rights that must be provided. Article V, Section 10(c) gives the court broad power to develop procedural protections as a matter of state law, independent of both the state and federal constitutions.

The Pennsylvania Supreme Court has utilized its powers in an attempt "to assure that the judicial system is uniform[] and efficien[t],"[14] while providing for "the just determination of every

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[11] *See, e.g.*, *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 65-66 (Fla. 1972) (Adkins, J., concurring); State v. Molnar, 410 A.2d 37, 42 (N.J. 1980); State v. Smith, 527 P.2d 674, 677 (Wash. 1974) (en banc).

[12] The Pennsylvania Supreme Court, in upholding one of its rules of civil procedure against a constitutional attack that it abridged, modified, or enlarged substantive rights, made it clear that its powers were to be given a broad interpretation. The court noted that the purpose and effect of the rule in question was procedural, but conceded that "its performance will touch upon substantive rights of both parties." *Laudenberger*, 436 A.2d at 155. The court stated that it would not interpret the provision barring abridging, modifying, or enlarging substantive rights "too narrowly." *Id.* Further, it felt that "[t]his Court should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right." *Id.*

[13] PA. CONST. art. V, § 10(c). For the text of Article V, Section 10(c), see *supra* note 6.

[14] Samuel J. Roberts, *Foreword: Pennsylvania Supreme Court Review, 1980*,

criminal proceeding."[15] That includes, where deemed appropriate, the protection of individual rights beyond the constitutional minimum required, through formal rule-making and through the resolution of cases involving individual rights issues. For example, the Pennsylvania Rules of Criminal Procedure provide for preliminary hearings,[16] a right to have a nonjury trial with the approval of the court,[17] and specified time limits for trial and pre-trial release if there is delay in the commencement of trial not caused by the defendant or his counsel.[18]

The *Campana* cases[19] provide a good example of the scope of the court's Article V, Section 10(c) power to provide procedural protections through judicial decisions in cases where justice is viewed as requiring a result not otherwise afforded by the federal or state constitutions. In what is now referred to as *Campana I*,[20] the Pennsylvania Supreme Court held that "the Double Jeopardy Clause requires a prosecutor to bring, in a single proceeding, all

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54 TEMP. L.Q. 403, 410 (1981).

[15] PA. R. CRIM. P. 2.

[16] *See* PA. R. CRIM. P. 140-144. There is no constitutional right to a preliminary hearing under the United States Constitution. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975). Nor is there such a right under the Pennsylvania Constitution. *See, e.g.*, Commonwealth v. Ruza, 511 A.2d 808 (Pa. 1986).

[17] PA. R. CRIM. P. 1101. There is no constitutional right to a nonjury trial under the United States Constitution. Singer v. United States, 380 U.S. 24 (1965). Nor is there such a right under the Pennsylvania Constitution. Commonwealth v. Hall, 140 A. 626 (Pa. 1928).

[18] PA. R. CRIM. P. 1100. The Speedy Trial Clause of the United States Constitution has never been interpreted to require trial within any specific time period. The right is delineated on a case by case basis, with the length of the delay being just one factor in the balancing test set forth by the Court. *See* Barker v. Wingo, 407 U.S. 514 (1972). Pennsylvania has thus far provided no greater protection under the speedy trial provision of Article I, Section 9 of the Pennsylvania Constitution. *E.g.*, Commonwealth v. Tilley, 595 A.2d 575 (Pa. 1991); Commonwealth v. Jones, 434 A.2d 1197, 1201 (Pa. 1981). Rule 1100 was adopted pursuant to an exercise of the court's supervisory powers. *See* Commonwealth v. Hamilton, 297 A.2d 127, 132-33 (Pa. 1972).

[19] Commonwealth v. Campana, 304 A.2d 432 (Pa.) (*Campana I*), *vacated and remanded*, 414 U.S. 808 (1973), *on remand* Commonwealth v. Campana, 314 A.2d 854 (Pa. 1974) (*Campana II*) (per curiam).

[20] *Campana I*, 304 A.2d 432 (Pa. 1973).

known charges against a defendant arising from a 'single criminal episode.'"[21] Reliance on the double jeopardy clause of either constitution seemed unwarranted. At the time, Pennsylvania's double jeopardy clause, not invoked in *Campana I*, was construed to apply only to capital offenses.[22] The clause had never been construed to provide greater protections than those guaranteed by the United States Constitution.[23] The United States Supreme Court had never held, and still has not held, that the Double Jeopardy Clause requires that all charges arising from an incident be joined in a single prosecution.[24] The *Campana I* court was not altogether clear about the source of its authority. Although it did state that its holding was based on the Federal Double Jeopardy Clause, the court also noted that it had the power to extend protections beyond the minimum federal constitutional standard.[25]

The Commonwealth petitioned for a writ of certiorari, which was granted. The United States Supreme Court remanded the case to the Pennsylvania Supreme Court to consider whether the judgments were based on federal or state grounds.[26] On remand, in *Campana II*, the Pennsylvania Supreme Court reaffirmed its holding, but now it explicitly relied on its Article V, Section 10(c) supervisory powers, as a matter of state law.[27]

> Our supervisory power over state criminal proceedings is broad, and this Court need not, as a matter of state law, limit its decision to the minimum requirements of federal constitutional law.

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[21] *Id.* at 441 (footnote omitted) (quoting MODEL PENAL CODE § 1.07(2) (Proposed Draft 1962)).

[22] *E.g.*, Commonwealth v. Baker, 196 A.2d 382 (Pa. 1964).

[23] This was true until very recently. *See infra* notes 484-88 and accompanying text.

[24] *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970) (holding that other charges arising from the same incident may be tried separately after an acquittal on the same charges unless collateral estoppel applies).

[25] *Campana I*, 304 A.2d at 441.

[26] 414 U.S. 808 (1973).

[27] Commonwealth v. Campana, 314 A.2d 854 (Pa. 1974) (*Campana II*) (per curiam).

> This Court views our May 4, 1973 judgements in *Campana* as state law determinations pursuant to our *supervisory powers*.[28]

In *Campana II*, the Pennsylvania Supreme Court insulated its holding from United States Supreme Court review by basing its decision entirely on state law.[29] The court "retreated altogether from constitutional adjudication, either federal or state."[30] It is somewhat surprising that the Pennsylvania Supreme Court has not relied more often on its supervisory powers, opting instead to decide issues based on interpretations of the Pennsylvania and United States Constitutions.[31] Perhaps the court is politically wise not to base most of its decisions on its supervisory powers when it grants greater protections than those guaranteed by the United States Constitution. By relying on Article V of the Pennsylvania Constitution, the court is most vulnerable to attacks that it is acting arbitrarily. In contrast, interpretations of the Pennsylvania Constitution are at least grounded in a document that provides for enumerated procedural protections that have been the supreme law of Pennsylvania for over two hundred years. However, such rulings have also not been immune from the same unjustified criticism that the court has exercised power inappropriately.[32]

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[28] *Id.* at 855-56 (emphasis added) (citations omitted) (footnotes omitted). The requirement that all charges arising from a transaction be tried in a single trial is now codified at PA. R. CRIM. P. 228, 1127, 1128 and 18 PA. CONS. STAT. §§ 109-110 (1990). *Campana II* was not the first case in which the Pennsylvania Supreme Court extended state law protections beyond the minimum required by the United States Constitution regarding double jeopardy and other areas. *See, e.g.*, Commonwealth v. Milliken, 300 A.2d 78 (Pa. 1973); Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971). However, *Campana II* was the first explicit declaration that such state law decisions under Article V, Section 10(c) were pursuant to broad supervisory power. *Campana II*, 314 A.2d at 855.

[29] *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983); Cooper v. California, 368 U.S. 58, 62 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966).

[30] *Campana II*, 314 A.2d at 859 (Pomeroy, J., dissenting).

[31] It is a well-settled principle of appellate review that constitutional questions are to be avoided if possible. *See, e.g.*, Commonwealth v. Galloway, 382 A.2d 1196 (Pa. 1978); Mount Lebanon v. County Bd. of Elections, 368 A.2d 648 (Pa. 1977).

[32] *See infra* note 61 and accompanying text.

B. The Pennsylvania Constitution—Article I Declaration of Rights

Pennsylvania's first constitution, adopted shortly after the Declaration of Independence in 1776, reflected the revolutionary spirit and the need to protect the individual against the state.[33] The constitution provided significant criminal procedure protections.[34] Dissatisfaction with many of the first constitution's provisions,[35] particularly among conservatives, led to the adoption of a second constitution in 1790. Significantly, conservatives and liberals were in agreement that the individual rights provided in the 1776 constitution should not be diminished.[36] In fact, the 1790 constitution added additional protections not contained in the 1776 constitution, such as the double jeopardy and cruel punishment prohibitions.[37]

In the last two hundred years there have been three more constitutions in Pennsylvania.[38] The framework of government has been significantly changed during the course of Pennsylvania's five different constitutions, but what has remained constant, through the current constitution, adopted in 1968, have been the Declaration of Rights provisions. As formulated in 1776, and supplemented in 1790, the provisions have not been changed

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[33] *See, e.g.*, ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 13-17 (1960); REFERENCE MANUAL NO. 1, THE CONVENTION—THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-68, at 2 (1967) ("Pennsylvania['s] Constitution of 1776 was one of the most liberal and influential to emerge from the American revolution . . . ."); THOMAS R. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 1 (1907).

[34] *See* PA. CONST. of 1776, ch. I (Decl. of Rights), § 9 (providing the right to be heard by counsel, a speedy trial, a trial by jury, confrontation, and the right not to be compelled to give self-incriminating evidence); ch. I, § 10 (providing search and seizure rights).

[35] *See* WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 123, 132 (1986).

[36] J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 259 (1971); REFERENCE MANUAL NO.1, *supra* note 33, at 2-3.

[37] PA. CONST. of 1790, art. IX, § 10 (double jeopardy clause); art. IX, § 13 (ban against cruel punishments).

[38] Pennsylvania has adopted constitutions in 1838, 1873, and 1968.

significantly.[39] Thus, since 1776, Pennsylvania has demonstrated a strong, uninterrupted constitutional commitment to individual liberties.[40]

When Pennsylvania and other states adopted their original constitutions, the view was that each state would provide for individual liberties within its borders. The United States Constitution, ratified in 1787, provided no protection of individual liberties, because the federal government perceived the states as protecting these rights.[41] The Bill of Rights was not adopted until 1791—fifteen years after Pennsylvania's Declaration of Rights—and it was modeled after Pennsylvania's provision and the provisions of some other state constitutions.[42] The Bill of Rights was not intended to supplant the rights provided in the state constitutions. Instead, it operated in a totally separate political sphere as a check only on the powers of the federal government.[43]

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[39] *See* WHITE, *supra* note 33, at xxiv. The only significant change in the 1968 constitution affecting criminal procedure rights was the addition of a new constitutional right, the right to appeal, found at Article V, Section 9. *See infra* text accompanying notes 528-47. Since the adoption of the 1968 constitution, there have been two amendments affecting criminal procedure rights. Article I, Section 10 was amended in 1973 to generally permit proceedings to be initiated by information instead of by indictment. Article I, Section 9 was amended in 1984 to permit the suppressed voluntary statement of an individual to be introduced at trial for impeachment purposes, prohibiting the courts from excluding the statement as a violation of the Pennsylvania constitutional right against self-incrimination.

[40] *See* Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983) (emphasizing this point with respect to Article I, Section 8, the search and seizure provision of the present Pennsylvania Constitution).

[41] *See, e.g.*, Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400-01 (1987); Note, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1327 (1982).

[42] *E.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977); Ken Gormley, *A New Constitutional Vigor for the Nation's Oldest Court*, 64 TEMP. L. REV. 215, 216-17 (1991). There were eight states' declarations of rights that served as models for the Bill of Rights in the United States Constitution. LATZER, *supra* note 3, at 2.

[43] *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights applied against the federal government, but not against the states).

It was not until the 1930s, when the Fourteenth Amendment was first interpreted as guaranteeing the accused certain fundamental protections in state prosecutions, that the Federal Constitution played any role in defining individual liberties for the states.[44] The role of the Fourteenth Amendment was insignificant until the 1960s when the United States Supreme Court began to hold that many of the protections in the Bill of Rights were incorporated in the Fourteenth Amendment and binding on the states.[45]

This history provides an ample basis for concluding that the Pennsylvania Constitution's Declaration of Rights is an independent source of power for an independent sovereign. In turn, this independence becomes crucial in cases interpreting Pennsylvania's Declaration of Rights provisions.

C. Deciding Pennsylvania State Constitutional Criminal Procedure Issues

Where the Pennsylvania Constitution contains a provision explicitly providing greater protections than the Federal Constitution, or employing significantly different language concerning the same protection,[46] there is no question that the Pennsylvania courts are on firm ground in concluding that their

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[44] The Fourteenth Amendment, adopted in 1868, provides, among other things, that the state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. In Powell v. Alabama, 287 U.S. 45 (1932), the Court held, in the circumstances of a particular state capital case, that the defendants had been denied due process of law because of a lack of counsel. *Id.* at 71.

[45] Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to state court proceedings as the initial criminal procedure incorporation decision); *see* Brennan, *supra* note 42, at 493-94.

[46] For example, unlike the Federal Constitution that only prohibits excessive bail, Pennsylvania's Constitution explicitly provides, in addition, that "[a]ll prisoners shall be bailable . . . unless for capital offenses when the proof is evident or presumption great." PA. CONST. art. I, § 14; *see infra* text accompanying notes 470-80. Likewise, Pennsylvania's confrontation clause, unlike its federal counterpart, explicitly provides that there is a right "to meet the witnesses face to face." PA. CONST. art. I, § 9; *see infra* text accompanying notes 442-62.

constitution provides more than the minimum protection guaranteed by the Federal Constitution. However, when provisions of the Pennsylvania and United States Constitutions contain similar or identical provisions, the question that has been raised is whether any justification is needed for Pennsylvania courts to construe the Pennsylvania provision to grant more rights than the United States Supreme Court's interpretation of the federal counterpart.

The Pennsylvania Supreme Court has correctly determined that no justification is required. As an independent sovereign interpreting its own constitution, which preceded the Federal Bill of Rights, no presumptive validity should be given to United States Supreme Court interpretations of the Federal Constitution.[47] The United States Supreme Court decisions interpreting similar provisions, just like decisions of other jurisdictions, are only entitled to persuasive value.[48] A state court should not abdicate its power and render the state constitution meaningless, by unthinkingly giving presumptive validity to United States Supreme Court decisions that interpret similar provisions.[49]

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[47] *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). The completely independent approach to Pennsylvania constitutional adjudication has not been embraced unanimously in Pennsylvania. *See, e.g.*, Commonwealth v. Gray, 503 A.2d 921, 926 (Pa. 1985) (plurality opinion) (citation omitted) (arguing that the court should only grant more rights to defendants than required by the Federal Constitution when there is "a compelling reason to do so"); Commonwealth v. Triplett, 341 A.2d 62, 66 (Pa. 1975) (Pomeroy, J., concurring) (stating that interests in uniformity and deference to United States Supreme Court pronouncements "indicate that we should chart a separate course only where compelling reasons for doing so are advanced"); Commonwealth v. Carroll, 628 A.2d 398 (Pa. Super. Ct. 1993) (Cavanaugh, J., concurring).

[48] *See, e.g.*, Commonwealth v. Sell, 470 A.2d 457, 459 (Pa. 1983); Commonwealth v. DeJohn, 403 A.2d 1283, 1288-89 (Pa. 1979), *cert. denied*, 444 U.S. 1032 (1980).

[49] Many commentators support the position that United States Supreme Court decisions should not be accorded presumptive validity in interpreting similar or identical state constitutional provisions. *E.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 1:12 (1992); Kaye, *supra* note 41, at 412; Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 741 (1988); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court*

Although similar language is employed, there were different Framers for each constitution. Therefore, the same original intent cannot be inferred from similar provisions.[50] More fundamentally, interpreting the constitution "should not be limited by some fiction designed to confine its terms to the intent of its framers,"[51] but, rather, it should be interpreted to reflect an evolving process of what fundamental liberties are to be provided for the citizens of Pennsylvania. That process is ongoing and is fostered not by a state constitution that is left moribund, but by a developing body of doctrinal interpretation, as has been taking place in Pennsylvania, particularly in the past twenty years.

In *Commonwealth v. Edmunds*,[52] decided in 1991, the Pennsylvania Supreme Court for the first time attempted to "set forth a methodology to be followed in analyzing future state constitutional issues that arise under our own Constitution."[53] The court stated:

> [A]s a general rule it is important that litigants brief and analyze at least the following four factors:
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> (1) text of the Pennsylvania constitutional provision;
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> (2) history of the provision, including Pennsylvania case-law;
>
> (3) related case-law from other states;
>
> (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.[54]

Reasoning and Result, 35 S.C. L. REV. 353, 385, 402 (1984). This view, however, is not unanimous. *See, e.g.*, Galie, *supra* note 3, at 280, 310; Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005, 1031 (1989).

[50] *See The Interpretation of State Constitutional Rights*, *supra* note 41, at 1397-98.

[51] Robert N.C. Nix, Jr., *Federalism in the Twenty-First Century—Individual Liberties in Search of a Guardian*, *in* FEDERALISM, THE SHIFTING BALANCE 65, 68 (1985).

[52] 586 A.2d 887 (Pa. 1991).

[53] *Id.* at 894.

[54] *Id.* at 895; *see* Ken Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. 55 (1993) (discussing the effects of *Edmunds*).

In *Edmunds*, the court utilized these general factors as a mode of analysis. The court examined each factor before concluding that a "good faith" exception to suppression of evidence obtained pursuant to a warrant, not based on probable cause, would not be recognized under the Pennsylvania Constitution.[55] It has become clear that although the *Edmunds* factors are useful considerations for litigants in presenting state constitutional issues to the courts,[56] they were not intended to formulate rigid criteria for court analysis.

Since *Edmunds*, there have been a number of Pennsylvania Supreme Court decisions that have not employed the four-factor methodology of *Edmunds* in deciding whether the Pennsylvania Constitution affords more criminal procedural rights than the Federal Constitution.[57] This is appropriate, because in a particular case, any factor, other than the "law from other states" factor, may be predominant in the analysis. On occasion, the language of a constitutional provision may be so clear and unambiguous, particularly if accompanied by any past interpretation indicating that it means what it says, that no further analysis is necessary or appropriate in reaching the correct result.[58] In some instances,

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[55] *Edmunds*, 586 A.2d at 895-905.

[56] A failure to explicitly brief those factors set forth in *Edmunds* may run the risk that the superior court will find a waiver of the state constitutional claim. *See* Commonwealth v. Lucas, 622 A.2d 325, 327 (Pa. Super. Ct. 1993); Commonwealth v. Peterfield, 609 A.2d 540, 543-45 (Pa. Super. Ct. 1992) (plurality opinion). When the state constitutional issue is squarely raised and discussed, it is doubtful that the Pennsylvania Supreme Court intended *Edmunds* to produce such a harsh result. It is only when the issue is not raised, that the court has considered the issue waived, and will refuse to consider it *sua sponte*. *E.g.*, Commonwealth v. Karash, 518 A.2d 537, 538 n.1 (Pa. 1986); Commonwealth v. Milyak, 493 A.2d 1346 (Pa. 1985); Commonwealth v. Mimms, 385 A.2d 334, 335 n.5 (Pa. 1978).

[57] *E.g.*, Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993); Commonwealth v. Hess, 617 A.2d 307 (Pa. 1992); Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992); Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992); Commonwealth v. Wilson, 602 A.2d 1290 (Pa.), *cert. denied*, 112 S. Ct. 2952 (1992); Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991). Justice Papadakos, in dissenting opinions in *Kohl*, 615 A.2d at 320-21 and *Rodriguez*, 614 A.2d at 1385-86, noted his dismay that the court was not employing the method of state constitutional analysis set forth in *Edmunds*.

[58] *See, e.g.*, Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991) (analyzing

"the history of the provision" will be a particularly dominant factor; not history in the sense of critical information from the Framers of Pennsylvania's original eighteenth-century constitution, because there is little available that provides guidance for deciding most issues,[59] but, rather, history in the sense of past Pennsylvania Supreme Court decisions that provide guidance for interpreting the values underlying the constitutional provision. Such history sometimes clearly points to the correct decision for related issues under the same constitutional provision. This is particularly true where the court has been most active in interpreting a constitutional provision, such as Article I, Section 8, which governs searches and seizures in Pennsylvania.[60]

There are many instances of constitutional interpretation in which neither the text nor history provides much guidance for deciding a particular issue. Here, "policy," the fourth *Edmunds* factor, becomes critical. A decision granting more rights under Pennsylvania's Constitution is often based on the simple conclusion that this is perceived as the more reasoned and just result.[61] The

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Pennsylvania's "face to face" confrontation clause provision in Article I, Section 9). For a discussion of this case, see *infra* text accompanying notes 506-16.

[59] On rare occasions, the intent of the "Framers" can be determined, because the constitutional provision is a new one inserted into the present constitution of 1968, such as the right to appeal. *See infra* notes 528-81 and accompanying text (discussing the right to appeal).

[60] *See, e.g.*, *infra* notes 102-21 and accompanying text (discussing the issue of whether suppression is mandated under the Pennsylvania Constitution for evidence found when police search an area belonging to a defendant, without a warrant, based on the consent of someone with apparent authority, who did not have actual authority).

[61] To some this may seem somewhat of a rudderless approach, based simply on the personal ideology and preferences of the justices of the Pennsylvania Supreme Court. *See, e.g.*, Galie, *supra* note 3, at 310-11 n.276. There is a twofold answer to this criticism. First, it is unavoidable that personal ideologies will play an important role in interpreting a generally worded constitution such as the Pennsylvania and United States Constitutions. One need look no further than the Warren Court's constitutional decisions in the area of criminal procedure as contrasted with the Burger and Rehnquist Courts' interpretations of the same provisions of the United States Constitution. Second, the more the Pennsylvania Constitution is independently interpreted and a precedential body of law is developed, the more firmly in place the state constitutional "rudder"

third factor set forth in *Edmunds*, the decisions of other states, is really more properly seen as no more than an occasional, useful subfactor in considering the fourth factor, "policy." As the court made clear in *Edmunds*, Pennsylvania, as an independent sovereign, need not construe its constitution consistently with similar provisions in other state constitutions.[62] The reasoning of other states' analyses, however, may be persuasive. The *Edmunds* court stated that "[a] mere scorecard of those states which have accepted and rejected *Leon* is certainly not dispositive of the issue in Pennsylvania. However, the logic of certain of those opinions bears upon our analysis under the Pennsylvania

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will become. *See id.* The principles of stare decisis will also provide some stability to guard against future Pennsylvania Supreme Courts quickly discarding past decisions. *See, e.g.*, Fadgen v. Lenkner, 365 A.2d 147, 152 (Pa. 1976); Smith v. Glen Alden Coal Co., 32 A.2d 227, 233-34 (Pa. 1943). Decisions such as Mapp v. Ohio, 367 U.S. 643 (1961) and Miranda v. Arizona, 384 U.S. 436 (1966), survive although they may not be preferred by a majority of the current United States Supreme Court, which has given them increasingly narrow applications. Similarly, it is doubtful that a fundamental decision such as *Commonwealth v. Edmunds* will soon be overruled despite any change in Pennsylvania Supreme Court personnel. This is not to say that stare decisis provides absolute stability. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (wherein the Court overruled two precedents that were only two and four years old).

Finally, if the decisions of the Pennsylvania Supreme Court interpreting the Pennsylvania Constitution are viewed as so out of step with the values of the people of Pennsylvania, the mechanism of constitutional amendment is available. It has been utilized in California and Florida, where anti-exclusionary rule amendments were enacted. CAL. CONST. art. I, § 28(d); FLA. CONST. art. I, § 12. In Pennsylvania, only once has there been a constitutional amendment promulgated to overturn a Pennsylvania Supreme Court decision. In response to Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975), in which the court held that a statement suppressed because it was unconstitutionally obtained without *Miranda* warnings could not be introduced at trial for impeachment purposes, Article I, Section 9 of the Pennsylvania Constitution was amended in 1984, effectively negating *Triplett*. For a discussion criticizing that constitutional amendment, and in general urging much more legislative restraint in proposing such constitutional amendments in response to Pennsylvania Supreme Court decisions, see Faust, *supra* note 3, at 1003.

[62] Commonwealth v. Edmunds, 586 A.2d 887, 899-901 (Pa. 1991).

Constitution . . . ."[63] Accordingly, the *Edmunds* four-factor methodology was not intended to be rigidly applied in all cases presenting state constitutional issues to the courts.[64]

The principal importance of *Edmunds*, aside from being an important search and seizure decision, is that it mandates all Pennsylvania courts to independently analyze the Pennsylvania Constitution, free of any perceived constraints from United States Supreme Court decisions construing similar provisions of the Bill of Rights. Significantly, United States Supreme Court precedent is not even included as a mandatory factor for analysis. The institutional purpose of including "related case-law from other states" as a factor, and excluding relevant United States Supreme Court precedent, was to underscore the need for an independent analysis. Of course, a United States Supreme Court case reaching an opposite conclusion than is urged under the state constitution is relevant and must be discussed, as the Pennsylvania Supreme Court did in *Edmunds*. However, the court made clear that it is not necessarily going to be a factor in determining the proper interpretation of the Pennsylvania Constitution. Similar to the decisions of sister states, the usefulness of United States Supreme Court precedent in reaching the correct state constitutional interpretation lies only in the persuasiveness of its underlying reasoning. "Depending upon the particular issue presented, an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance. However, it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution."[65]

Edmunds is the court's boldest and most articulate advocacy of independent constitutional analysis.[66] Furthermore, the decision

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[63] *Id.* at 900.

[64] For an expansion of this argument, see Gormley, *supra* note 54, at 67.

[65] *Edmunds*, 586 A.2d at 895.

[66] *Edmunds* may very well signal an openness to reconsider past Pennsylvania constitutional holdings that were not based on reasoned independent analysis. For example, for many years, the Pennsylvania Supreme Court held that Pennsylvania's double jeopardy clause provided coextensive protections, no greater than its federal counterpart. *See infra* notes 481-97 and

makes clear that it is the duty of all courts in Pennsylvania to reach a reasoned decision under the Pennsylvania Constitution when presented with such an issue.[67] If the proper result is to grant more rights under the Pennsylvania Constitution, then any court that abdicates this authority and duty acts unfairly to the accused. Important issues of first impression cannot be left to higher courts to decide, because a denial of relief under the Pennsylvania Constitution, for whatever reason, even deferral to a higher court's greater expertise, is a decision that materially affects the interests of the defendant, who may never be able to obtain review in Pennsylvania's highest court.[68]

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accompanying text. However, in Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992), the court held in the context of prosecutorial misconduct, that Pennsylvania's Constitution provided more double jeopardy protection than required by the United States Constitution. *Id.* at 325.

[67] The Pennsylvania Superior Court has on rare occasions independently analyzed the Pennsylvania constitutional issue, and on even fewer occasions has concluded that the Pennsylvania Constitution requires more protection than afforded by the Federal Constitution. *See* Commonwealth v. Parker, 619 A.2d 735 (Pa. Super. Ct. 1993); Commonwealth v. Danforth, 576 A.2d 1013 (Pa. Super. Ct. 1990); Commonwealth v. Beauford, 475 A.2d 783 (Pa. Super. Ct. 1984), *appeal denied*, 496 A.2d 1143 (Pa. 1985).

Unfortunately, much more frequently the court has followed what is known as the "lockstep approach," simply reaching the same result as relevant United States Supreme Court precedent without independent reasoning and analysis. *See* FRIESEN, *supra* note 49, at 1:49-1:51 (explaining generally the meaning of the "lockstep approach"); *see, e.g.*, Commonwealth v. Quiles, 619 A.2d 291, 297 n.4 (Pa. Super. Ct. 1993) (citation omitted) (noting in a case of first impression under the Pennsylvania Constitution that in the absence of a Pennsylvania Supreme Court decision rejecting the relevant United States Supreme Court decision, "we are uninclined to reject otherwise controlling authority of the United States Supreme Court"); Commonwealth v. Nissly, 549 A.2d 918 (Pa. Super. Ct. 1988) (ignoring relevant Pennsylvania Supreme Court precedent, the lower court cited to relevant United States Supreme Court cases and then simply held that "[w]e see no reason to adopt a different standard under the confrontation provision of the Pennsylvania Constitution"), *appeal denied*, 562 A.2d 319 (Pa. 1989).

[68] A defendant has no right to have his case heard by the Pennsylvania Supreme Court. After an adverse decision by the intermediate appellate court hearing criminal appeals, the supreme court review is discretionary. The defendant must file a petition for allowance of appeal. PA. R. APP. P. 1112-

The remainder of this Article reviews areas in which the Pennsylvania Supreme Court has decided that the Pennsylvania Constitution confers greater criminal procedure protections than the minimum provided under the United States Constitution, and it addresses selected areas where the Pennsylvania courts may extend greater protection in the future. Structurally, the issues are presented roughly in the order of the criminal justice process, starting from the investigatory stage and ending with the right to appeal.

In 1981, former Chief Justice Roberts of the Pennsylvania Supreme Court stated that "the constitution of this Commonwealth remains today a vital and independent bulwark of liberty."[69] The remainder of this Article is premised on the hope and belief that the Pennsylvania Constitution will continue to be interpreted by all courts in Pennsylvania as "a vital and independent bulwark of liberty."

III. SEARCH AND SEIZURE

In recent years, the United States Supreme Court has lessened Fourth Amendment protections in many areas, paying only lip service to values that were thought to underlie the protections provided by that Amendment.[70] The Pennsylvania Supreme Court has often refused to follow this lead, and a body of law has now developed independently, reflecting Pennsylvania's Article I, Section 8 constitutional prohibition against unreasonable searches and seizures.

In *Commonwealth v. Edmunds*,[71] the court provided its most detailed discussion of the history and purpose of Article I, Section 8, stating that the "twin aims of [that amendment are] . . . the safeguarding of privacy and the fundamental requirement that

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[69] Roberts, *supra* note 14, at 411.

[70] *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (1991); Illinois v. Rodriguez, 497 U.S. 177 (1990); Oliver v. United States, 466 U.S. 170 (1984); New York v. Belton, 453 U.S. 454 (1981).

[71] 586 A.2d 887 (Pa. 1991).

warrants shall only be issued upon probable cause."[72] The *Edmunds* court held that the Pennsylvania Constitution required the exclusion of evidence seized pursuant to a warrant not based on probable cause. The court explained that the Article I, Section 8 right to privacy is violated by such a search whether or not the police acted in good faith. The court further noted that the exclusionary rule in Pennsylvania serves to protect the right of privacy and not simply to deter improper police conduct.[73] The court rejected the Fourth Amendment approach of the United States Supreme Court in *United States v. Leon*,[74] which held that the exclusionary rule did not apply to evidence seized as the result of a warrant issued without probable cause obtained by police acting in good faith.[75]

The Pennsylvania Supreme Court has shown much more concern for privacy interests than the United States Supreme Court, and it has consistently protected the individual whenever there was a reasonable expectation of privacy.[76] The *Edmunds*

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[72] *Id.* at 899.

[73] *Id.*

[74] 468 U.S. 897 (1984).

[75] *Id.* at 925-26.

[76] 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.

PA. CONST. art. I, § 8.

In Katz v. United States, 389 U.S. 347 (1967), the Court held for the first time that a search, as defined by the Fourth Amendment, did not require a physical penetration of an area. It emphasized that the United States Constitution "protects people, not places," and that an individual was protected whenever there was a reasonable expectation of privacy. *Id.* at 351. In *Katz*, because there was no warrant, the Court held unconstitutional the placement of a listening device outside of a closed public phone booth even though there was probable cause to believe that the user of that phone was committing a crime. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 357 (footnotes omitted). Although the United States Supreme Court has retreated in

court noted that "a steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth."[77]

For example, the Pennsylvania Supreme Court has held that the individual has a reasonable expectation of privacy in bank records and telephone records under the Pennsylvania Constitution. The Pennsylvania Supreme Court held that police must obtain a warrant based on probable cause for an examination of bank records[78] or the installation of a pen register.[79] The court rejected the reasoning of United States Supreme Court decisions which have concluded that such records were not entitled to constitutional protection from police intrusion.[80] Likewise, the Pennsylvania Supreme Court has refused to treat a dog-sniff search of a person's footlocker for drugs as a nonsearch beyond constitutional search and seizure protections.[81] Furthermore, although the United States Supreme Court has taken an increasingly restrictive view toward standing to challenge unconstitutional police action,[82] the Pennsylvania Supreme Court

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practice from honoring the privacy component of the right to be free from searches and seizures, and it has created more and more exceptions to the warrant requirement, the Pennsylvania Supreme Court has embraced these privacy values in interpreting the Pennsylvania Constitution.

[77] *Edmunds*, 586 A.2d at 898.

[78] Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), *cert. denied*, 444 U.S. 1032 (1980).

[79] Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989).

[80] *See* Smith v. Maryland, 442 U.S. 735 (1979) (pen register); United States v. Miller, 425 U.S. 435 (1976) (bank records). Although the Pennsylvania Supreme Court viewed banks and telephones as necessities of modern life, engendering in their users a reasonable expectation of privacy from government intrusion, the court has agreed with the United States Supreme Court that any such expectation is not reasonable when there is a misplaced confidence in a person with whom you choose to speak. Commonwealth v. Blystone, 549 A.2d 81 (Pa. 1988) (holding that government wiretapping of conversations, with consent of one of the parties, does not violate the Pennsylvania Constitution), *aff'd on other grounds*, Blystone v. Pennsylvania, 494 U.S. 299 (1990).

[81] Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (rejecting the reasoning and Fourth Amendment holding in United States v. Place, 462 U.S. 696 (1983), that a canine sniff is not a search).

[82] *See* Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci,

has rejected the United States Supreme Court's approach. In *Commonwealth v. Sell*, the court held that a person who possesses an item has standing to challenge a search and seizure and that such standing is automatic if the person is charged with a possessory offense.[83]

The *Sell* decision is important not only because of its holding concerning standing, but also because of its underlying rationale, which affords more security to a person's possessions under the Pennsylvania Constitution than is afforded by the United States Constitution. The Pennsylvania Supreme Court ascribes meaningful, independent importance to the admonition in Article I, Section 8 that "[t]he people shall be secure in their . . . possessions" by conferring standing to challenge searches and seizures even in the absence of a reasonable expectation of privacy in the place to be searched.[84] The *Sell* court noted that "[the Pennsylvania Supreme Court has] held that personal possessions remain constitutionally protected under Article I, section 8 until their owner meaningfully abdicates his control, ownership or possessory interest therein."[85]

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448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). Collectively, these cases establish that ownership or possession of an item seized provides no basis for standing to challenge the constitutionality of the seizure of that item, nor does being present with the owner's permission at the place which is searched. Standing is conferred only on those whom the Court views as having "a legitimate expectation of privacy in the invaded place." *Salvucci*, 448 U.S. at 91-92 (quoting *Rakas*, 439 U.S. at 140).

[83] 470 A.2d 457, 469 (Pa. 1983).

[84] *Id.* at 468-69. However, the defendant will not prevail at the hearing unless the police have acted unconstitutionally. For example, entry into an abandoned house to effectuate an arrest does not require an arrest warrant. *See infra* notes 207-32 and accompanying text (discussing the need for an arrest warrant only for an arrest in a home). Therefore, a defendant with standing is still not entitled to suppression of evidence seized after a warrantless entry into an abandoned house to arrest him. Commonwealth v. Peterson, No. J-82-1993 (E.D. Pa. Nov. 5, 1993).

[85] *Sell*, 470 A.2d at 469. Before *Sell*, in the standing context, the court had stated that "an individual's *effects* and *possessions* are constitutionally protected from unreasonable search and seizure as well as his person." Commonwealth v. White, 327 A.2d 40, 42 (Pa. 1974) (citing U.S. CONST. amend. IV; PA. CONST. art. I, § 8), *cert. denied*, Pennsylvania v. White, 421 U.S. 971 (1975)).

Recently, the court emphasized that the protections provided by Article I, Section 8 of the Pennsylvania Constitution against unreasonable search and seizure will be viewed as particularly in need of safeguarding when it is the person that is affected, not simply the person's possessions. In 1987, in *Commonwealth v. Johnston*, the court held that the Pennsylvania Constitution requires that police have reasonable suspicion before they conduct a dog sniff of a person's footlocker in an effort to detect whether drugs are present.[86] In 1993, in *Commonwealth v. Martin*, the court addressed the issue of a canine-sniff search for drugs of a satchel being carried by a lawfully stopped person.[87] The court distinguished *Johnston*, and held that probable cause, not reasonable suspicion, was required because the search in *Martin* involved the belongings he was carrying on his person.[88] The *Martin* court stated, "[A]lthough privacy may relate both to property and to one's person, an invasion of one's person is, in the usual case, [a] more severe intrusion on one's privacy interest than an invasion of one's property."[89] The *Martin* decision is a good example of how the Pennsylvania Supreme Court demands a heightened degree of scrutiny in cases involving one's person and not merely one's property.

Martin is also significant because it emphasizes the importance of the warrant requirement under the Pennsylvania Constitution. Although the Pennsylvania Supreme Court did not believe that there was probable cause for the canine-sniff search, the court

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In a case after *Sell*, the court held that there was no standing after concluding that the defendant was not charged with a possessory offense in connection with the search and seizure and "appellant did not assert a possessory interest in the evidence seized." Commonwealth v. Peterkin, 513 A.2d 373, 378 (Pa. 1986), *cert. denied*, 479 U.S. 1070 (1987).

[86] 530 A.2d 74, 79 (Pa. 1987).

[87] 626 A.2d 556 (Pa. 1993).

[88] *Id.* at 560.

[89] *Id.*; *see* Commonwealth v. Reese, 549 A.2d 909, 910 (Pa. 1989) (holding that visitor's property can be searched during the execution of a valid search warrant at an apartment), *cert. denied*, 497 U.S. 1003 (1990). "We now believe there is a constitutional difference between the search of a visitor's person and the search of a visitor's personal property (property which is not on the person) located on premises where a search warrant is being executed . . . ." *Id.*

stated that "we also hold that once the police have probable cause and a sniff search has been conducted pursuant to that probable cause . . . the police must secure a search warrant"[90] to search the satchel. In *Edmunds*, the court stated that one aim of Article I, Section 8 is that warrants be based on probable cause.[91] That constitutional requirement would obviously be meaningless if no warrant at all is necessary. In 1984, the Pennsylvania Supreme Court explained that "[i]n order to insure the protection of [the Fourth Amendment and Article I, Section 8,] both this Court and the United States Supreme Court require law enforcement officers to obtain a judicially issued search warrant absent certain exigent circumstances."[92] Although that is no longer true of the United States Supreme Court,[93] *Martin* and other Pennsylvania Supreme Court decisions indicate that a core value of Article I, Section 8 is

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[90] *Martin*, 626 A.2d at 560. *Martin* was another instance of the Pennsylvania Supreme Court's refusal to extend Terry v. Ohio, 392 U.S. 1 (1968), as a matter of state law, beyond its circumstances. *Terry* held that when a police officer has reasonable suspicion that a person he observes on the street is engaged in criminal activity and armed, the officer may conduct a stop and frisk. *Id.* at 30-31. In Commonwealth v. Lovette, 450 A.2d 975 (Pa. 1982), *cert. denied*, 459 U.S. 1178 (1983), the court held as a matter of state law that an arrest occurs when an individual is transported from the scene of a stop, and that probable cause is therefore required for this intrusion. *Id.* at 978. Recently, in Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992), the court held that the Pennsylvania Constitution was violated by detaining a person found on the stoop of an apartment building when police were entering to search an apartment. The court held that there was no reasonable suspicion or probable cause and that it would not condone a new category of detentions beyond stop and frisk based on reasonable suspicion or arrest based on probable cause. *Id.* at 1382-84. It noted that it was rejecting a test dependent on a subjective balancing of the circumstances confronting the officer "just as we did a decade ago in Commonwealth v. Lovette, 450 A.2d 975 (Pa. 1982)." *Rodriguez*, 614 A.2d at 1382.

[91] Commonwealth v. Edmunds, 586 A.2d 887, 896-97 (Pa. 1991).

[92] Commonwealth v. Chandler, 477 A.2d 851, 855 (Pa. 1984).

[93] *See, e.g.*, California v. Carney, 471 U.S. 386 (1985) (holding that it is constitutional to search a mobile home parked on a downtown lot without a warrant and with no showing of exigent circumstances); United States v. Johns, 469 U.S. 478 (1985) (stating that it is constitutional to open packages and search them without a warrant three days after they were seized).

that search and seizure decisions are not to be left to the discretion of the police, absent exigent circumstances.[94]

The fact that the warrant requirement is of paramount importance,[95] in the view of the Pennsylvania Supreme Court, is

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[94] *E.g.*, Commonwealth v. Rodriguez, 585 A.2d 988 (Pa. 1991) (holding that a warrant is needed for the search of an automobile in Pennsylvania absent exigent circumstances; here there were exigent circumstances). "Generally, [under Article I, Section 8], a search or seizure is not reasonable unless it is conducted pursuant to a search warrant issued by a magistrate upon a showing of probable cause." Commonwealth v. Kohl, 615 A.2d 308, 315 (Pa. 1992) (taking of blood from a person after an auto accident without probable cause pursuant to implied consent law violated federal and state constitutions).

[95] Coolidge v. New Hampshire, 403 U.S. 443 (1971) recognized "[t]he classic statement of the policy underlying the warrant requirement." *Id.* at 449. The *Coolidge* Court quoted from earlier precedent.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

Id. (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Professor Phyllis T. Bookspan's comments on the import of the Fourth Amendment's warrant requirement are at least equally applicable to the role of the warrant in Pennsylvania's Constitution.

> Consistent with the genius of checks and balances of our constitutional democracy, the warrant requirement places the judiciary between the executive branch and the people. The police are an arm of the executive branch. Before the executive can invade the protected privacy rights of the people, it must get authority from a judicial officer. It is this judicial intercession in executive actions that provides security against unconstitutional intrusions. The probable cause requirement and reasonableness clauses also protect against unconstitutional intrusions. These provisions, however, only provide the measure by which intrusions are judged. The warrant requirement alone grants a procedural right and places another branch of government between the executive and the people.

also demonstrated by its interpretation of the warrant-clause particularity requirement of the Pennsylvania Constitution.[96] In *Commonwealth v. Grossman*,[97] the court held that all evidence seized pursuant to a warrant had to be suppressed because the warrant was overbroad in its description of the items authorized to be seized, and thus violated the Pennsylvania Constitution.[98] Only those items for which probable cause is provided in the supporting affidavit are authorized to be seized when the warrant is executed.[99] The court explained that the purpose of the particularity requirement is to make general searches impossible and to significantly limit the discretion of the executing officers.[100] The court also noted that the language of Article I, Section 8 differed significantly from the Fourth Amendment.

> The language of the Pennsylvania Constitution requires that a warrant describe the items to be seized "as nearly as may be . . . ." The clear meaning of the language is that a warrant must describe the items as specifically as is reasonably possible. This requirement is more stringent than that of the Fourth Amendment, which merely requires particularity in the description. The Pennsylvania Constitution further requires the description to be as particular as is reasonably possible.[101]

> The additional step of procuring a warrant before searching or seizing a person, place, or thing is neither outdated nor unnecessary. Rather, it is a strong symbol of limited government, a valuable check on unbridled police discretion, and an important protector of the right of the people to individual privacy.

Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 520-21 (1991).

[96] PA. CONST. art. I, § 8.

[97] 555 A.2d 896 (Pa. 1989).

[98] *Id.* at 900.

[99] *Id.*

[100] *Id.* at 899. Items not described in the warrant may be seized only when inadvertently discovered in plain view. *See infra* notes 151-71 and accompanying text (discussing the doctrines of plain view and inadvertence).

[101] *Grossman*, 555 A.2d at 898 (alteration in original) (footnote omitted) (quoting PA. CONST. art. I, § 8).

Thus, Article I, Section 8, as interpreted by the Pennsylvania Supreme Court, reflects core values that serve to protect the individual's privacy and possessions. In order to protect these interests, there is a strong constitutional preference, except in exigent circumstances, for particularized warrants based on probable cause. The suppression of seized evidence is the constitutionally mandated remedy when search and seizure rights are violated. This must be so regardless of the subjective intent of the police officer or other official responsible for the intrusion.

These constitutional guideposts lead the way to many search and seizure issues not yet definitively decided under the Pennsylvania Constitution; Pennsylvania courts may provide constitutional protections that the United States Supreme Court has not provided. Some of these issues are now discussed.

A. Warrantless Searches Based on Mistaken Belief of Authorized Third-Party Consent

In *Illinois v. Rodriguez*, a majority of the United States Supreme Court concluded that the Federal Constitution is not violated if police make a warrantless, nonexigent entry into an apartment based on a reasonable but mistaken belief that the person who consents to their entry was authorized to do so.[102] The majority found no constitutional violation because it focused exclusively on the actions of the police.[103] The Court held that the police had acted reasonably when they incorrectly concluded that the person who had consented to the entry had authority to do so, and that, therefore, no prohibited, unreasonable search and seizure had taken place.[104] A majority of a Pennsylvania Superior Court, sitting en banc, has followed *Illinois v. Rodriguez* as a matter of state constitutional law.[105] However, it is probable that the Pennsylvania Supreme Court will continue to focus on an

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[102] 497 U.S. 177, 185-86 (1990).

[103] *Id.*

[104] *Id.* at 186.

[105] Commonwealth v. Quiles, 619 A.2d 291 (Pa. Super. Ct. 1993) (en banc); *see also* Commonwealth v. Blair, 575 A.2d 593 (Pa. Super. Ct. 1990), *appeal denied*, 585 A.2d 466 (Pa. 1991).

individual's expectation of privacy rather than simply looking at the conduct of the police, and it will find a violation of the Pennsylvania Constitution under such circumstances.

In Pennsylvania and elsewhere, "[i]t is firmly established that a warrantless search of property is not precluded when consent is given by a person who possesses the authority to consent to a search."[106] In 1973, the United States Supreme Court explained in *United States v. Matlock*[107] that police have the right to enter and search when one who possesses common authority gives consent because that person has a right to do so, and the other coinhabitants or copossessors "have assumed the risk that one of their number might permit the common area to be searched."[108] In *Matlock*, the United States Supreme Court expressly left open the question, decided seventeen years later in *Rodriguez*, of whether a reasonable, mistaken belief in authority to consent would suffice.[109]

Both before and after *Matlock*, when addressing the issue of third-party consent, the Pennsylvania Supreme Court has not indicated that it believed that apparent authority could constitutionally replace actual authority to consent. The sole constitutional justification for permitting searches based on third-party consent is that the nonconsenting person has no reasonable expectation of privacy in the area that he shares with others, who, in turn, have the power to control and share access of that area with others.[110] Thus, twenty-five years ago in a case in which

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[106] Commonwealth v. Tedford, 567 A.2d 610, 625 (Pa. 1989).

[107] 415 U.S. 164 (1974).

[108] *Id.* at 171 n.7.

[109] *Id.* at 177 n.14.

[110] Psychological research on social relationships questions the underlying assumption that people who share premises have a diminished expectation of privacy concerning people outside the relationship searching their premises. *See, e.g.*, Dorothy K. Kagehiro & William S. Laufer, Illinois v. Rodriguez *and the Social Psychology of Third-Party Consent*, 27 CRIM. L. BULL. 42 (1991). The third-party consent doctrine is a legal conclusion that this expectation of privacy is unreasonable. The validity of the third-party consent doctrine has never been decided under the Pennsylvania Constitution. An argument can be made that sharing with others is significantly different than sharing with the police. Therefore, there still is a reasonable expectation of privacy, just as the

the Pennsylvania Supreme Court found that no constitutional violation occurred when a wife consented to a police search of an area shared with her husband, the court noted that the key inquiry was: "What was the nature of the appellant's privacy here?"[111] The continued focus in the Pennsylvania Supreme Court has been on whether the nonconsenting individual had a reasonable expectation of privacy in the place that was searched.[112] Whenever the nonconsenting defendant had a reasonable expectation of privacy because he did not share access and control with the person who consented to the police search, the Pennsylvania Supreme Court remedy has been suppression.[113] The good faith and reasonable but mistaken belief of the police in the authority of the consenter has never been a consideration, because the focus has been on the privacy interests of the person who has had his place searched, not on the thoughts and feelings of the police.[114]

Pennsylvania Supreme Court found with bank records and telephone records. *See supra* notes 78-80 and accompanying text. However, the Pennsylvania Supreme Court has already held that wiretapping of a conversation is not violative of the Pennsylvania Constitution when one party consents. Commonwealth v. Blystone, 549 A.2d 81 (Pa. 1988), *aff'd on other grounds*, 494 U.S. 299 (1990). The court found no reasonable expectation of privacy in the context of misplaced trust in another person who then shares with police what was thought to be private between the two people. *But see* Commonwealth v. Schaeffer, No. 53 M.D. 1988, 1993 WL 210862 (Pa. June 1, 1993) (opinion in support of affirmance for equally divided court) (secretly recorded conversations violate Article I, Section 8 when the informer is inside the individual's home). The result is likely to be the same as *Blystone* under the Pennsylvania Constitution with third-party consent to a police search by one with shared access and control.

[111] Commonwealth *ex rel.* Cabey v. Rundle, 248 A.2d 197, 199 (Pa. 1968).

[112] *See, e.g.*, Commonwealth v. Latshaw, 392 A.2d 1301 (Pa. 1978), *cert. denied*, 441 U.S. 931 (1979).

[113] Commonwealth v. Silo, 389 A.2d 62 (Pa. 1978), *cert. denied*, 439 U.S. 1132; Commonwealth v. Garcia, 387 A.2d 46 (Pa. 1978); Commonwealth v. Storck, 275 A.2d 362 (Pa. 1971).

[114] Under *Rodriguez*, with its focus only on police conduct, a person could be subjected to a police intrusion based on the consent of an intruder. If police arrived at a home and a persuasive, self-confident burglar answered the door and pretended to be a joint possessor of the house, the homeowner would have no constitutional cause to complain of any ensuing police search so long as the

Although the Pennsylvania Supreme Court's third-party consent decisions have not separately analyzed the Pennsylvania Constitution, the importance lies in the court's approach to the issue over a long period of time when it was an open question under Fourth Amendment jurisprudence.[115] The concerns for privacy in these decisions are entirely consistent with those decisions interpreting the Pennsylvania Constitution and its core values. A search of an individual's home or other area belonging to that person based only on the reasonable but mistaken police belief of authorized consent is a warrantless, nonexigent invasion of an area where a person has a reasonable expectation of privacy. Often, the search will be without probable cause as well. The constitutional justification for allowing a warrantless search is missing. The nonconsenting individual's privacy interest was never diminished because control was never shared with the individual consenting to the police search.

In short, this type of search violates the rights of the individual, and, as Justice Marshall noted in dissent in *Rodriguez*, "only the minimal interest in avoiding the inconvenience of obtaining a warrant weighs in on the law enforcement side."[116]

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police reasonably relied on the representations and consent of the burglar.

[115] While it was an open Fourth Amendment question, the states were divided as to whether apparent authority rather than actual authority would constitutionally justify a third-party consent search. The Supreme Court of Oregon, noting some other state decisions holding differently, emphatically rejected the good faith exception later adopted by the United States Supreme Court in *Rodriguez*.

> [C]onsent of a person who . . . has no status as a common occupant is, in effect, no consent at all. Such an entry, so far as the defendant is concerned, is identical to an entry in which no consent had been obtained. The defendant's expectation of privacy is the same and the interference with the defendant's privacy is identical in both cases. . . . The Fourth Amendment unquestionably affects police conduct; but it was not enacted for the primary purpose of encouraging police to act in good faith. It was enacted to protect people in their homes against unreasonable, warrantless searches. The exception proposed by the state would engorge the constitutional right.

State v. Carsey, 664 P.2d 1085, 1094 (Or. 1983).

[116] Illinois v. Rodriguez, 497 U.S. 177, 192 (1990) (Marshall, J., dissenting).

That interest carries very little weight under the Pennsylvania Constitution, which, without consent, requires a valid warrant for a police search when there are no exigent circumstances. When police have the opportunity to obtain a warrant, but instead choose to rely on consent by a third party as authorization for a search, they, not the nonconsenting citizen with a reasonable expectation of privacy, should constitutionally "accept the risk of error."[117] Further, "*Edmunds* teaches us that the reasonableness of police conduct is irrelevant when examining the strict protections afforded the citizens of this Commonwealth under our Constitution."[118] In *Edmunds*,[119] the Pennsylvania Supreme Court made it crystal clear that the Pennsylvania constitutional focus for exclusionary rule purposes is on whether the privacy rights guaranteed in Article I, Section 8 have been violated.[120] The *Edmunds* court rejected the good faith doctrine when police have obtained an invalid warrant by reasonably, but mistakenly believing there was probable cause. Therefore, it is unlikely that the court will extend the good faith doctrine to a warrantless situation when a citizen's privacy rights have been violated under the Pennsylvania Constitution.[121]

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[117] *Id.* at 193.

[118] Commonwealth v. Quiles, 619 A.2d 291, 303 (Pa. Super. Ct. 1993) (Del Sole, J., dissenting) (objecting to the holding that *Illinois v. Rodriguez* would be followed as matter of state constitutional law).

[119] 586 A.2d 887 (Pa. 1991); *see* discussion *supra* notes 52-68 and accompanying text.

[120] Many have criticized *Illinois v. Rodriguez* in particular, and the Court's approach in general, in interpreting the Fourth Amendment, focusing increasingly on the reasonableness of police behavior without adequately considering the warrant requirement of that provision or the privacy interests sought to be protected. *E.g.*, Frank C. Capozza, Comment, *Whither the Fourth Amendment: An Analysis of* Illinois v. Rodriguez, 25 IND. L. REV. 515 (1991); Gregory S. Fisher, Comment, *Search and Seizure Third-Party Consent: Rethinking Police Conduct and the Fourth Amendment*, 66 WASH. L. REV. 189 (1991); Gary L. Wimbish, Comment, *The U.S. Supreme Court Adopts 'Apparent Authority' Test to Validate Unauthorized Third Party Consent to Warrantless Search of Private Premises in* Illinois v. Rodriguez, 20 CAP. U. L. REV. 301 (1991); Tammy Campbell, Casenote, Illinois v. Rodriguez*: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481 (1992).

[121] At least with a warrant, a neutral authority has approved, in advance,

B. Warrantless Searches Based on Open Fields Doctrine

The United States Supreme Court has held that it is always constitutional for police to trespass on a person's property without a warrant and to search for criminal activity, so long as the area searched can be considered an open field.[122] An open field, as defined in *Oliver v. United States*[123] and *United States v. Dunn*,[124] means anything beyond the curtilage of the home.[125] Curtilage is determined by

> particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.[126]

Thus, the United States Supreme Court, under the guise of a doctrine mislabeled "open fields," has held that under no circumstances can a person be constitutionally protected from an unwarranted, governmental intrusion that is not very near to the home. Pennsylvania will likely join other state courts that have rejected the United States Supreme Court's open fields doctrine and have held as a matter of state law that there are no areas on a

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what police have done. However, whenever a good faith test is employed, the danger is that the objective standard for judging the police conduct has been obliterated. With a good faith exception to the warrant requirement, the question whether there was probable cause becomes constitutionally irrelevant. Likewise, recognizing an apparent authority exception to third-party consent makes the question heretofore thought critical to the constitutional analysis one that need not be answered. The constitutional question whether there was actual authority of the third person to consent is replaced by the question whether police reasonably believed that the person had the authority to consent.

[122] United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984).

[123] 466 U.S. 170 (1984).

[124] 480 U.S. 294 (1987). The "open fields" doctrine was first announced by the Court in Hester v. United States, 265 U.S. 57 (1924).

[125] *Dunn*, 480 U.S. at 304; *Oliver*, 466 U.S. at 180.

[126] *Dunn*, 480 U.S. at 301.

person's property that are per se deemed to be beyond constitutional protection.[127]

There is no way to square *Oliver* and *Dunn* with *Katz v. United States*.[128] In *Katz*, the United States Supreme Court held that it was not the area searched that determined whether search and seizure rights were violated, but whether the person had a reasonable expectation of privacy.[129] In *Oliver* and *Dunn*, the United States Supreme Court relied on dubious, historical, common-law analysis[130] and an exceedingly literal reading of the Fourth Amendment. The *Oliver* Court noted that "the term 'effects' [in the Fourth Amendment] is less inclusive than 'property' and cannot be said to encompass open fields."[131]

The Pennsylvania Constitution does not use the word "effects." Article I, Section 8 provides that people shall be secure in their "possessions," which would ordinarily be viewed to include the land one owns.[132] In other contexts, the Pennsylvania

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[127] People v. Scott, 593 N.E.2d 1328 (N.Y. 1992); State v. Dixson, 766 P.2d 1015 (Or. 1988); State v. Kirchoff, 587 A.2d 988 (Vt. 1991); *see* State v. Barnett, 703 P.2d 680 (Haw. 1985); State v. Thornton, 453 A.2d 489 (Me. 1982).

[128] 389 U.S. 347 (1967). For the same conclusion, see, e.g., *Oliver*, 466 U.S. at 185-88 (Marshall, J., dissenting); *Scott*, 593 N.E.2d at 1334; *Kirchoff*, 587 A.2d at 992.

[129] *Katz*, 389 U.S. at 351-53.

[130] Although a distinction between curtilage and the area beyond the curtilage was important at common law in defining certain criminal offenses, it is doubtful that those distinctions were intended to define Fourth Amendment rights. *See, e.g.*, *Dixson*, 766 P.2d at 1023; Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 15-16 (1986).

[131] *Oliver*, 466 U.S. at 177. "The Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Id.* at n.7.

[132] Justice Marshall, dissenting in *Oliver*, pointed out that whether something could be labeled an "effect" had been considered irrelevant in cases that the Court was not overruling. "For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation." *Id.* at 185 (Marshall, J., dissenting) (footnote omitted) (citing Katz v. United States, 389 U.S. 347 (1967)).

Supreme Court has extended more protection to a person's interest in his possessions than the United States Supreme Court has afforded under the Federal Constitution.[133]

Pennsylvania has not had occasion to interpret the application of the open fields doctrine under Article I, Section 8 since *Oliver* and *Dunn*.[134] However, in *Commonwealth v. Oglialoro*,[135] in 1990, the Pennsylvania Supreme Court analyzed a related Fourth Amendment issue by employing the *Katz* expectation of privacy test. In *Oglialoro*, the court stated that "[t]he controlling consideration is whether the individual contesting the search and seizure entertains a legitimate expectation of privacy in the premises or area searched."[136] In *Oglialoro*, the court noted that whatever is left exposed to the public is not entitled to constitutional protection, whether it is the inside of an apartment because windows are left open, or, as in *Oglialoro*, it is a pole barn with a translucent roof which, though within the curtilage, could be viewed by the government or anyone else from an airplane.[137] Having based its holding in *Oglialoro* on the absence of an expectation of privacy,[138] the Pennsylvania Supreme Court

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[133] *See supra* notes 81-85 and accompanying text.

[134] Before *Oliver* and *Dunn*, the Pennsylvania Supreme Court noted that under the Fourth Amendment, the open fields doctrine may still be viable (as beyond constitutional protection) as an exception to the *Katz* reasonable expectation of privacy test. Commonwealth v. Treftz, 351 A.2d 265, 270-71 (Pa. 1976). The superior court, under Fourth Amendment analysis, also treated open fields as a constitutionally unprotected area. *See* Commonwealth v. Beals, 459 A.2d 1263, 1267 (Pa. Super. Ct. 1983); *cf.* Commonwealth v. Cihylik, 486 A.2d 987, 994 (Pa. Super. Ct. 1985) (no constitutional protection in curtilage area because no reasonable expectation of privacy).

[135] 579 A.2d 1288 (Pa. 1990).

[136] *Id.* at 1291; *see* Commonwealth v. Eshelman, 383 A.2d 838 (Pa. 1978) (search within curtilage determined to be unconstitutional because defendant had reasonable expectation of privacy).

[137] *Oglialoro*, 579 A.2d at 1291-92.

[138] *Id.* Only in the context of a case involving the heavily regulated waste-disposal industry and a statute that permitted warrantless inspections has the Pennsylvania Supreme Court ruled that a warrantless entry and inspection on private property was constitutionally permissible under Article I, Section 8 of the Pennsylvania Constitution. *See* Commonwealth, Dep't of Envtl. Resources v. Blosenski Disposal Servs., 566 A.2d 845 (Pa. 1989). The court has not ruled

is likely to hold that the opposite is constitutionally true as well—that whenever there is a reasonable expectation of privacy demonstrated by a citizen's efforts to keep others out and the intent is to conceal property from plain view, then regardless of the proximity to a residence, the government is precluded from making warrantless intrusions. Accordingly, if presented with an "open fields" issue, the Pennsylvania Supreme Court will likely employ the *Katz* reasonable expectation of privacy test.

In both *Dunn* and *Oliver*, through posting and fencing, the defendants took careful precautions to exclude the public. The Court justified the entry and search by simply declaring, by judicial fiat, that in the area it had defined as open fields, there could be no reasonable expectation of privacy. The *Oliver* Court stated:

> The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.[139]

The Court went on to state, "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs."[140]

Unlike the United States Supreme Court, the Pennsylvania Supreme Court can be expected to properly ignore, as irrelevant, whatever criminal activity may be discovered as a result of the police intrusion. When the Pennsylvania Supreme Court showed more concern for privacy rights than the United States Supreme Court by holding unconstitutional warrantless searches of bank and

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under the Pennsylvania Constitution concerning police trespasses on private property in any other context. *Oglialoro* involved only a Fourth Amendment claim. Oglialoro prevailed because the court held that when the police flew their helicopter only fifty feet over his house, they created an unreasonable danger. *Oglialoro*, 579 A.2d at 1294.

[139] Oliver v. United States, 466 U.S. 170, 182-83 (1984).

[140] *Id.* at 182 n.13.

phone records and a person's satchel,[141] the court did not factor into its constitutional analysis whether the bank, phone, or satchel was being used to aid criminal activity. The whole point of the right to a reasonable expectation of privacy is that the government has no right to conduct a search to find out about a citizen's activities, legal or illegal.[142] There is no principle more fundamental to a constitutional analysis than the principle that the propriety of a search is not determined by what it turns up; no "drug exception" excuses unwarranted and unlawful searches and seizures simply because drugs are found.[143] The United States

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[141] *See* Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993) (search of satchel); Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (phone records); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) (bank records).

[142] As the Court has stated, "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Arizona v. Hicks, 480 U.S. 321, 329 (1987). The third prong of the United States Supreme Court's four factor curtilage test—the nature of the uses to which the area is put—should be constitutionally irrelevant. *See supra* text accompanying note 126. The Court apparently views only "intimate activit[ies] associated with the . . . home" worthy of protection. *Oliver*, 466 U.S. at 180. However, a central purpose of the warrant requirement is to require a showing of probable cause of criminal activity to a neutral authority before a government intrusion is justified. "No one would contend that, absent exigent circumstances, the police could intrude upon a home without a warrant to search for a drug manufacturing operation." United States v. Dunn, 480 U.S. 294, 310-11 (1987) (Brennan, J., dissenting).

[143] Others have observed that it is not insignificant that both *Oliver* and *Dunn* involved drugs. *E.g.*, Saltzburg, *supra* note 130, at 4. The so-called war on drugs is certainly aided if police, without reasonable suspicion or probable cause and with no judicial oversight, can enter a person's property and snoop around whenever they want, to look for marijuana growing or any other drug activity. The Pennsylvania Supreme Court has emphasized in different contexts that it will not join the war on drugs or any other crime by adopting an "ends justify the means" constitutional analysis and thereby fail "to recognize and respond to necessary constitutional constraints on excessive police conduct." Commonwealth v. Rodriguez, 614 A.2d 1378, 1383 (Pa. 1992); *see, e.g.*, Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993) (stating that canine-sniff searches of a person for drugs requires probable cause and warrant); Commonwealth v. Kohl, 615 A.2d 308, 316 (Pa. 1992) (holding chemical tests for alcohol from a driver after an accident pursuant to implied consent law unconstitutional without probable cause despite "compelling interest [of the state] in protecting its citizens from the dangers posed by drunk drivers"). The *Kohl*

Supreme Court chose to ignore the societal expectation of privacy that an individual has when one takes proper measures to exclude the public[144] and the fact that all sorts of noncriminal activities take place on private property.[145] Other state courts have questioned the Court's rationale.

The Vermont Supreme Court stated:

> Certainly it was a bold and unsupported pronouncement in *Oliver* that society is not prepared under any circumstances to recognize as reasonable an expectation of privacy in all lands outside the curtilage. Indeed, the fact that society may adjudge one who trespasses on such lands a criminal belies the claim.[146]

The Vermont Supreme Court's reference to a trespasser demonstrates a flaw in the United States Supreme Court's analysis.

Pennsylvania's summary offense of criminal trespass provides as follows:

> (b) Defiant trespasser.—
>
> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains

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court based this conclusion on the rationale that "[t]he protections afforded to individuals under the Pennsylvania Constitution may not be diminished . . . by the Commonwealth's vigilance in promoting that interest." *Kohl*, 615 A.2d at 316.

[144] *See, e.g.*, Jones J. Fyfe, *Enforcement Workshop:* Oliver v. United States—*Legitimate Police Illegality*, 20 CRIM. L. BULL. 442 (1984). A federal district judge, in denying relief, lamented the United States Supreme Court's constitutional rule that under no circumstances is there constitutional protection beyond the curtilage. The judge stated:

> As the dissent in *Oliver* predicted, most citizens would be surprised to learn that the protections of the Fourth Amendment begin at their "curtilage" rather than their property lines, and most citizens of Western Pennsylvania would be shocked to learn that the Pennsylvania Army National Guard can be ordered to active duty to conduct surveillance at a farm in Armstrong County, and bivouac on private property without the consent of the owner.

United States v. Benish, 782 F. Supp. 35, 37 (W.D. Pa. 1992).

[145] For a discussion of some of these activities, see *Oliver*, 466 U.S. at 191-93 (Marshall, J., dissenting).

[146] State v. Kirchoff, 587 A.2d 988, 993-94 (Vt. 1991).

> in any place as to which notice against trespass is given by:
> (i) actual communication to the actor;
> (ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
> (iii) fencing or other enclosure manifestly designed to exclude intruders.[147]

Accordingly, when a person has taken affirmative steps to exclude others, the person is granted the security that violators will be punished. Under the United States Supreme Court's analysis, police who commit a trespass under the terms of this statute are never punished, but are instead rewarded.

Truly open fields, where the individual has made no effort to exclude the public, will not be entitled to constitutional protection, but it is not the area that is constitutionally determinative. Individuals who post or fence their land in a manner designed to exclude intruders do have a reasonable expectation of privacy.[148]

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[147] 18 PA. CONS. STAT. § 3503(b) (1990).

[148] In *Oliver*, Justice Marshall, on behalf of three dissenting Justices, advocated "[a] clear, easily administrable rule" that constitutional protection should be provided when "[p]rivate land [is] marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies." *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting). Further, Justice Brennan stated that "I continue to believe that the rule suggested in dissent in *Oliver* is most faithful to the Fourth Amendment analysis set forth in *Katz v. United States*, and provides the clearest answer to the question of when persons possess a reasonable expectation of privacy in their property." Dunn v. United States, 480 U.S. 254, 313 n.3 (1987) (Brennan, J., dissenting).

Many commentators have agreed, criticizing the United States Supreme Court's approach on various grounds, among which is always the Court's serious denigration of privacy interests and property rights. *See, e.g.*, Clifford S. Fishman, *Police Trespass and the Fourth Amendment: A Wall in Need of Mending*, 22 J. MARSHALL L. REV. 795 (1989); Saltzburg, *supra* note 130; Thomas E. Curran III, Comment, *The Curtilage of* Oliver v. United States *and* United States v. Dunn: *How Far Is Too Far?*, 18 GOLDEN GATE U. L. REV. 397 (1988); Susan Gellman, Casenote, *Affirmation of the Open Fields Doctrine: The* Oliver *Twist*, 46 OHIO ST. L.J. 729 (1985); Stephen N. Goodrich, Case Note, *SEARCH AND SEIZURE—Home on the Range? A More Limited Concept of Curtilage Applied to Rural America.* United States v. Dunn, 107 S. Ct. 1134 (1987), 23 LAND AND WATER L. REV. 257 (1988).

As the Maine Supreme Court stated:

> The point is not that the area of the marijuana patches was accessible to the public, or that, under different circumstances, the defendant's land might have been open woods. The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place.[149]

In *Edmunds*,[150] the Pennsylvania Supreme Court held that evidence obtained under an invalid warrant had to be excluded in order to protect privacy interests and the warrant requirement—core values protected by Article I, Section 8 of the Pennsylvania Constitution. Those same interests are likely to be protected in this context when police, unlike those in *Edmunds*, do not act in good faith, but instead simply trespass and violate reasonable expectations of privacy, without cause and without a warrant, to look for evidence of criminal activity.

C. Plain View and Inadvertence

If police are lawfully in a place where they observe an item and there is probable cause to believe that it is evidence of a crime or contraband, they may seize the item under the Fourth Amendment.[151] These are the requirements of the Fourth Amendment's plain view doctrine, an exception to the warrant requirement. In *Horton v. California*,[152] in 1990, the United States Supreme Court further defined the plain view doctrine, explicitly holding that inadvertence was not a requirement for such a warrantless seizure.

In *Horton*, the warrant authorized only a search for and seizure of rings, but the officer seized, among other items,

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[149] State v. Thornton, 453 A.2d 489, 496 (Me. 1982) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[150] 586 A.2d 887 (Pa. 1991).

[151] *E.g.*, Horton v. California, 496 U.S. 128 (1990); Arizona v. Hicks, 480 U.S. 321 (1987); *see also* Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (item felt during a lawful frisk may be seized under "plain touch" exception that has same requirements as "plain view" exception).

[152] 496 U.S. 128 (1990).

weapons that he knew about before he obtained the warrant.[153] The officer was interested in finding the weapons in order to connect the defendant with the robbery that he was investigating.[154] The Court acknowledged that the weapons were not seized inadvertently.[155] In holding that there was no constitutional violation, the Court correctly observed that neither the scope of the search nor the invasion of privacy authorized by the warrant was any greater because of the seizure of the weapons observed during the execution of the warrant.[156] The police looked in no additional areas, other than those authorized for the rings, when they came upon the rifles.

It is unlikely that *Horton* will be followed in Pennsylvania. Before *Horton*, only the nonbinding, plurality opinion of the United States Supreme Court in *Coolidge v. New Hampshire*[157] set forth inadvertency as a plain view requirement.[158] However, the inadvertency requirement has long been accepted as a matter of state law by the Pennsylvania Superior Court,[159] and *Horton*'s elimination of the requirement has so far been ignored.[160]

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[153] *Id.* at 130-31.

[154] *Id.* at 131.

[155] *Id.*

[156] *Id.* at 133, 141.

[157] 403 U.S. 443 (1971) (Stewart, J., plurality opinion).

[158] *See* Commonwealth v. Davenport, 308 A.2d 85, 89 n.9 (Pa. 1973).

[159] *E.g.*, Commonwealth v. Doria, 574 A.2d 653, 656 (Pa. Super. Ct. 1990); Commonwealth v. Martin, 381 A.2d 491, 492 n.2 (Pa. Super. Ct. 1977); *see, e.g.*, Commonwealth v. Cassucio, 454 A.2d 621, 630 (Pa. Super. Ct. 1987); Commonwealth v. Kendrick, 490 A.2d 923, 927 (Pa. Super. Ct. 1985); Commonwealth v. Poteete, 418 A.2d 513, 517 n.4 (Pa. Super. Ct. 1980); *see also* Commonwealth v. Smith, 569 A.2d 337, 343 (Pa. 1990). As Justice Brennan stated in his dissent in *Horton*, 496 U.S. at 145 (1990) (Brennan, J., dissenting), Pennsylvania was one of 46 states that adopted inadvertence as a requirement for the plain view exception.

[160] Commonwealth v. Parker, 619 A.2d 735, 739 (Pa. Super. Ct. 1993); Commonwealth v. Robinson, 600 A.2d 957, 960 (Pa. Super. Ct. 1992); Commonwealth v. Daniels, 593 A.2d 895, 898 n.5 (Pa. Super. Ct. 1991); *cf.* Commonwealth v. Hendrix, 627 A.2d 1224 (Pa. Super. Ct. 1993). A few states have explicitly rejected *Horton* as a matter of state law. State v. Murray, 598 A.2d 206, 207 (N.H. 1991); People v. McCullars, 580 N.Y.S.2d 485 (N.Y. App. Div. 1992).

Although no rationale for the inadvertency requirement has been set forth in these decisions, and although the Pennsylvania Supreme Court has not yet ruled on the issue, the elimination of this plain view requirement would be inconsistent with the core values of Article I, Section 8.

Recently, the United States Supreme Court stated that "[t]ime and again, this Court has observed that searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'"[161] The plurality opinion in *Coolidge* had emphasized this very point in concluding that, where discovery of an item is anticipated in a search police are going to conduct and they intend to seize the item if they see it, to permit a seizure under the guise of "plain view" in such nonexigent circumstances would be "a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.'"[162]

In *Commonwealth v. Grossman*,[163] the Pennsylvania Supreme Court held that the particularity requirement of Article I, Section 8 of the Pennsylvania Constitution "is more stringent than that of the" United States Constitution.[164] It is important that the courts require that the items to be searched for be specified in the warrant before they may be seized, not only because particularity protects against general searches,[165] but also because it serves another important purpose, as noted by the court in *Grossman*:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the

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[161] Minnesota v. Dickerson, 113 S. Ct. 2130, 2135 (1993) (quoting Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984)).

[162] Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971) (Stewart, J., plurality opinion).

[163] 555 A.2d 896 (Pa. 1989).

[164] *Id.* at 900.

[165] *See* Commonwealth v. Reese, 549 A.2d 909, 910 (Pa. 1988).

warrant." The more rigorous Pennsylvania constitutional provision requires no less.[166]

The *Horton* Court ignored the fact that a central feature of the warrant requirement, aside from protection of privacy interests and prohibiting warrantless searches, is that it serves as a check on police discretion with respect to seizures.[167] The Court's decision to eliminate inadvertency as a requirement for the plain view exception to the warrant requirement denigrates possessory interests thought to be protected by the Fourth Amendment.[168] The Court also failed to hold true to its own admonition that "[a]lthough the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, . . . neither the one nor the other is of inferior worth or necessarily requires only lesser protection."[169]

The Pennsylvania Supreme Court has shown no inclination to permit police officers to seize items not named in a warrant.[170] This is exemplified by its more stringent particularity requirement and by its decision in *Commonwealth v. Sell*,[171] which

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[166] *Grossman*, 555 A.2d at 899 (quoting Marron v. United States, 275 U.S. 192, 196 (1927)).

[167] As Justice Brennan stated in his dissent, "A decision to invade a possessory interest in property is too important to be left to the discretion of zealous officers 'engaged in the often competitive enterprise of ferreting out crime.'" Horton v. California, 496 U.S. 128, 144 (1990) (Brennan, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

[168] *See, e.g.*, Robert Eyer, Comment, *The Plain View Doctrine After* Horton v. California*: Fourth Amendment Concerns and the Problem of Pretext*, 96 DICK. L. REV. 467 (1992); John A. Mack, Casenote, Horton v. California: *The Plain View Doctrine Loses Its Inadvertency*, 24 J. MARSHALL L. REV. 891 (1991); Joel Schwartz, Note, *The Inadvertence Requirement of the Plain View Doctrine in* Horton v. California*: A Foreseeable End*, 21 SW. UNIV. L. REV. 225 (1992).

[169] Arizona v. Hicks, 480 U.S. 321, 328 (1987).

[170] *See* Commonwealth v. Searles, 302 A.2d 335 (Pa. 1973) (holding it a violation of the Fourth Amendment for police to seize a notebook during a search pursuant to a warrant authorizing the seizure of a check and check-writing equipment). The Pennsylvania Supreme Court said it "could not be seized unless described with particularity in the warrant." *Id.* at 337.

[171] 470 A.2d 457 (Pa. 1983); *see supra* notes 83-85 and accompanying text.

demonstrated that possessory interests under the Pennsylvania Constitution are entitled to more protection than its federal counterpart. It is likely that, in order to justify application of the plain view exception to the warrant requirement, the Commonwealth will be required to show that the item was discovered inadvertently.

D. Police Chases and Other Coercive Conduct Without Reasonable Suspicion

Thus far, this Article has focused on issues involving privacy and possessory interests with respect to a person's property. Just as important as the right to be secure from searches and seizures concerning one's property is the Article I, Section 8 right to personal security.[172] Because of the existence of this important right, it would be surprising if the Pennsylvania Supreme Court chose to follow the United States Supreme Court holding in *California v. Hodari D.*[173] In that case, the United States Supreme Court held that police, without reasonable suspicion or any reason at all, may chase an individual without violating the United States Constitution.[174] The Court reached this conclusion by holding that such police activity was not covered by the Fourth Amendment; arriving at a new definition of seizure, defined as

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[172] Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993). "[A]lthough privacy may relate both to property and to one's person, an invasion of one's person is, in the usual case, more severe intrusion on one's privacy interest than an invasion of one's property." *Id.* at 560.

[173] 111 S. Ct. 1547 (1991).

[174] The United States Supreme Court left open the question in *Hodari D.* of whether flight by itself could provide reasonable suspicion of criminal activity, which is necessary under Terry v. Ohio, 392 U.S. 1 (1968), before an individual may be stopped. *Hodari D.* 111 S. Ct. at 1549 n.1. It is clear that in Pennsylvania, flight or otherwise avoiding police does not provide a basis for a reasonable suspicion of criminal activity. *E.g.*, Commonwealth v. DeWitt, 608 A.2d 1030, 1034 (Pa. 1992); Commonwealth v. Jeffries, 311 A.2d 914, 916 (Pa. 1973); *In re* Barry W., 621 A.2d 669, 678 (Pa. Super. Ct. 1993). There are many reasons why innocent people seek to avoid police. *See, e.g.*, Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 747-48 & n.110 (1992).

occurring only when an individual actually submits to a show of authority.[175] The Court held that Hodari, who dropped cocaine while police chased him without reasonable suspicion, did not have his Fourth Amendment rights violated at that time because he was not "seized" until he was actually tackled.[176]

Ignoring its own past definitions of what constitutes a seizure,[177] and relying principally on very dubious common-law precedent,[178] the decision has justifiably been the subject of severe criticism.[179] First, the decision encourages lawless conduct by the police and rewards what, at a minimum, is a severe intrusion marked by an attempt at unconstitutional conduct. It is clear that if Hodari had dropped the cocaine after, rather than right

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[175] *Hodari D.*, 111 S. Ct. at 1550.

[176] *Id.* at 1552.

[177] The United States Supreme Court has stated, "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion). The test first set forth in the plurality opinion in *Mendenhall* was later adopted by a majority of the Court. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 573 (1988); INS v. Delgado, 466 U.S. 210, 215 (1984).

[178] The Court concluded that for other purposes a seizure at common law meant a bringing within physical control, and that this defined an arrest. *Hodari D.*, 111 S. Ct. at 1549-50. As the dissent pointed out, at common law an attempt to unlawfully arrest someone was unlawful as well. *Id.* at 1553 (Stevens, J., dissenting); *see* Bruce A. Green, *"Power Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373, 403 (1992).

[179] *See, e.g.*, Green, *supra* note 178, at 400-04; 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2A, at 104-11 (2d ed. Supp. 1993); Maclin, *supra* note 174, at 745-51; Patrick T. Costello, Casenote, California v. Hodari D.: *The Demise of the Reasonable Person Test in Fourth Amendment Analysis*, 12 N. ILL. U. L. REV. 463 (1992); Kathy R. Mahrt, Casenote, *Seizure and the Fourth Amendment: The Meaning and Implications of* California v. Hodari, 25 CREIGHTON L. REV. 213 (1991); Randolph A. Pieurahita, Note, *A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure*—California v. Hodari D., 52 LA. L. REV. 1321 (1992); Hamida Abkal-Khallaq, Comment, *Precedent for* Hodari *in Modern Supreme Court Cases—Does It Exist? An Analysis of* California v. Hodari, 17 T. MARSHALL L. REV. 171 (1991).

before he was tackled, suppression would be necessary because of the unconstitutional seizure.[180]

More important, an entire range of intimidating and threatening police tactics may be used against individuals, at the unchecked discretion of police, under *Hodari*'s definition of seizure. The decision not only permits police to pursue those who try to avoid police contact, it also permits police to choose any individual or group of people standing on a street corner and charge them, with guns drawn, for the purpose of seeing whether such scare tactics will cause someone to respond by running and dropping contraband. Frighteningly, it may place the firing of police weapons at citizens beyond constitutional scrutiny when the shot misses.[181]

A bare majority of the superior court, sitting en banc, in *Commonwealth v. Carroll*,[182] a case with facts similar to *Hodari*, followed the *Hodari* definition of seizure as a matter of state constitutional law and reached the same result, denying the suppression of evidence discarded as the result of unlawful police activity. It principally relied as a matter of policy on what may charitably be called a shocking proposition. The court said:

> Carroll always had his own legal protections in his hands, and so long as he carefully exercised his right to privacy, that is, did not throw away or drop contraband within sight of a police officer, he would not have created the probable cause necessary to justify his arrest.
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> . . . .
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> The choice to provide probable cause for an arrest or reasonable suspicion for a detention lies with the citizen, not with the officer.
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> . . . .

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[180] *Hodari D.*, 111 S. Ct. at 1550. The Court stated that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.*

[181] *See id.* at 1552 (Stevens, J., dissenting); Kathryn R. Urbonya, *Accidental Shootings as Fourth Amendment Seizures*, 20 HASTINGS CONST. L.Q. 337 (1993).

[182] 628 A.2d 398 (Pa. Super. Ct. 1993).

> At all times, the citizen has control over the encounter; this is all the state and federal constitutions demand. . . . All of the choices are those of the citizen and all of the control lies in the hands of the citizen.[183]

To say in such circumstances that the individual chooses independently "to provide probable cause for [his] arrest" is both "absurd as well as unfair."[184] The conclusion completely ignores the psychologically threatening intimidation and coercive conduct of the police. According to the superior court's reasoning, if an officer placed a loaded gun to the head of an individual standing on a street corner and said nothing in doing so, and the defendant responded by running and dropping contraband, that would be an independent act born of his own choice; there would be no violation of his constitutional rights. The superior court's reasoning is nothing less than an assault on the well-established constitutional doctrine of taint.[185] Under the superior court's reasoning, those who are unlawfully stopped and then drop contraband in response to the stop can be said to have chosen, independently, to create the probable cause for their arrest. If the individual had not dropped the contraband after the stop, he could have proceeded on his way rather than providing a basis for his own arrest.[186] Perhaps the superior court will next hold that those who are arrested without probable cause and then confess rather than remain silent, can be said to have independently chosen to provide the proof beyond a reasonable doubt that led to their conviction on the basis of the confession.[187]

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[183] *Id.* at 403-04 (citation omitted).

[184] Pieurahita, *supra* note 179, at 1341.

[185] Evidence that is the fruit of unconstitutional police activity must be suppressed unless the connection is attenuated, which is clearly not the case with evidence discarded during the course of a police chase. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

[186] It is clear that evidence abandoned in response to an unconstitutional stop must be suppressed because it "was coerced by unlawful police conduct." Commonwealth v. Bennett, 604 A.2d 276, 280 (Pa. Super. Ct. 1992).

[187] The United States Supreme Court has held repeatedly that confessions obtained within hours of an unconstitutional arrest, even after *Miranda* warnings, must be suppressed as the fruit of an unlawful arrest. *E.g.*, Taylor v. Alabama, 455 U.S. 1014 (1982); Dunaway v. New York, 439 U.S. 979 (1978);

The superior court majority's rationale is both novel and unsupportable. More attention to Pennsylvania Supreme Court precedent would have led to the conclusion that *Hodari D.* should not be followed as a matter of state constitutional law.[188] Even with respect to property security interests, the Pennsylvania Supreme Court has not followed the lead of the United States Supreme Court in placing encounters at the whim of police and beyond constitutional scrutiny. In *Commonwealth v. Johnston*,[189] the Pennsylvania Supreme Court diverged from the United States Supreme Court's interpretation of the Federal Constitution and held that a canine sniff of a locker for drugs required reasonable suspicion.[190] The court stated,"it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason."[191] The

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Brown v. Illinois, 422 U.S. 590 (1975). *Hodari D.* encourages purposeful, lawless police conduct, exactly what was condemned in *Brown*.

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious. . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

Id. at 605.

[188] Other states are divided on the issue of whether to accept *Hodari D.* as a matter of state constitutional interpretation. For a discussion of those decisions, see Commonwealth v. Carroll, 628 A.2d 398, 402-03 nn.3-4 (Pa. Super. Ct. 1993) (Johnson, J., dissenting). The *Carroll* court did not discuss the very recent decision of the Minnesota Supreme Court rejecting *Hodari D.* on state constitutional grounds. *In re* E.D.J., 502 N.W.2d 779 (Minn. 1993).

[189] 530 A.2d 74 (Pa. 1987).

[190] *See* United States v. Place, 462 U.S. 696, 707 (1983) (stating that a canine sniff of luggage to determine whether drugs were present is not a search within the meaning of the Fourth Amendment).

[191] *Johnson*, 530 A.2d at 79. The only case in which the Pennsylvania Supreme Court has held that such an intrusion was permissible under the Pennsylvania Constitution, without individual suspicion, was when it sustained the practice of brief car stops conducted according to specific nondiscriminatory and nonarbitrary guidelines. Significantly, the court emphasized that such roadblocks would be constitutional only if conducted according to guidelines that assured that an individual "[was] not subject to arbitrary invasions solely at the

Pennsylvania Supreme Court has held, in the past, on Fourth Amendment grounds, in *Commonwealth v. Jeffries*[192] and *Commonwealth v. Barnett*[193] that evidence discarded during a police chase, not based on reasonable suspicion, is the product of unconstitutional police action.[194] In *Jeffries*, the court stated:

> The causative factor in the abandonment presently under consideration was the unlawful and coercive action of the police in chasing Jeffries in order to seize him. This is not a situation where the party spontaneously abandons the property upon sight of the police, or where the police are not involved in an unlawful act towards the accused. We instantly have an unlawful act which motivated the abandonment.[195]

Likewise, in *Barnett,* the Pennsylvania Supreme Court concluded that "[t]he police conduct here amounted to a coercive factor which was the main reason that appellee abandoned the weapon."[196] It is likely that the court will continue to construe the Pennsylvania Constitution to protect individuals against unwarranted coercive police activity that meaningfully interferes with a person's personal security, liberty, and freedom of movement.[197] This is how the Pennsylvania Supreme Court has

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unfettered discretion of officers in the field." Commonwealth v. Blouse, 611 A.2d 1177, 1180 (Pa. 1992).

[192] 311 A.2d 914 (Pa. 1973).

[193] 398 A.2d 1019 (Pa. 1979).

[194] *Barnett*, 398 A.2d at 1021; *Jeffries*, 311 A.2d at 917-18.

[195] *Jeffries*, 311 A.2d at 918 (citing Commonwealth v. Shaeffer, 288 A.2d 727 (Pa. 1972)).

[196] *Barnett*, 398 A.2d at 1021; *see* Commonwealth v. Pollard, 299 A.2d 233, 236 (Pa. 1973) (holding that a cocaine packet dropped by passenger of car as he responded to unconstitutional order to exit suppressed because "the police officer's unlawful and coercive action was the causative factor which motivated appellant's abandonment").

[197] This is the definition advocated by Professor LaFave. *See* LAFAVE, *supra* note 179, at 107. It is derived from the United States Supreme Court decision in United States v. Jacobsen, 466 U.S. 109 (1984), in which the Court stated that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* at 113. The Court explained that "this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful

interpreted what constitutes a seizure in other situations that involve police activity.

In the seminal case of *Commonwealth v. Jones*,[198] the court clearly stated that, although an officer may always approach a citizen and ask him questions, constitutional protections come into play when the officer uses a show of authority to restrain a *citizen's freedom of movement or attempts to do so*.[199] The *Jones* court's interpretation of seizure grants constitutional protection from unwarranted coercive police activity that unreasonably interferes with the individual's liberty interests. As the *Jones* court stated:

> If a citizen approached by a police officer is ordered to stop or is physically restrained, obviously a "stop" occurs. Equally obvious is a situation where a police officer approaches a citizen and addresses questions to him, the citizen attempts to leave, and the officer orders him to remain or physically restrains him; here too a "stop" occurs.[200]

This is an objective, constitutional test that depends on the conduct of the police as perceived by a reasonable person.[201] Thus, in *Commonwealth v. Hall*,[202] the Pennsylvania Supreme Court, employing the *Jones* standard, denied the suppression of evidence because the defendant dropped packets of heroin when he saw police officers exit their police car and walk toward him.[203] If "the circumstances [had] clearly demonstrated that the police officer was exercising force, i.e., showing authority, sufficient to warrant a conclusion by 'a reasonable man, innocent of any crime,' that the officer was attempting to effectuate a 'forcible

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interference, however brief, with an individual's freedom of movement." *Id.* at n.5.

[198] 378 A.2d 835 (Pa. 1977).

[199] *Id.* at 839-40.

[200] *Id.* at 839.

[201] *Id.* at 840 n.7.

[202] 380 A.2d 1238 (1977).

[203] *Id.* at 1239-41.

stop,' as opposed to a mere 'contact,'" suppression would have been warranted.[204]

Although *Jones* was decided on Fourth Amendment grounds, its approach to the issue of what police activity constitutes a seizure is well established in Pennsylvania.[205] Just as Pennsylvania has its own state-law definition of arrest,[206] the *Jones* approach is likely to be adopted as a matter of state law to prohibit police from exercising unfettered discretion to chase or otherwise harass individuals without reasonable suspicion.

E. Warrantless Arrests Without Exigent Circumstances

In 1984, the United States Supreme Court sustained a warrantless seizure because it had "only a *de minimis* impact on any protected property interest."[207] The Court further noted that "[o]f course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances."[208] That may be generally true, but there is at least one glaring constitutional exception. In 1976, a majority of the United States Supreme Court concluded in *United States v. Watson*,[209] that an arrest of a person, which the Court has recognized as "quintessentially a seizure,"[210] never necessitates a warrant under the Fourth Amendment when a felony is charged.[211]

The Court's justification for exempting all such serious seizures from the warrant requirement even in the absence of any

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[204] *Id.* at 1241 (quoting *Jones*, 378 A.2d at 840).

[205] *See, e.g.*, Commonwealth v. Peterfield, 609 A.2d 540, 549, 551 (Pa. Super. Ct. 1992) (Ford Elliott, J., dissenting); Commonwealth v. Brown, 565 A.2d 177, 179 (Pa. Super. Ct. 1989).

[206] Commonwealth v. Lovette, 450 A.2d 975 (Pa. 1982); Commonwealth v. Bosurgi, 190 A.2d 304 (Pa.), *cert. denied*, 375 U.S. 910 (1963); *see, e.g.*, Commonwealth v. Rodriguez, 614 A.2d 1378, 1384 (Pa. 1992); Commonwealth v. Duncan, 525 A.2d 1177, 1179 (Pa. 1987).

[207] United States v. Jacobsen, 466 U.S. 109, 125 (1984).

[208] *Id.* at 126 n.28.

[209] 423 U.S. 411 (1976).

[210] *Id.* at 428 (Powell, J., concurring).

[211] *Id.* at 423-24.

exigent circumstances was that the common-law rule, applicable at the time of the adoption of the Fourth Amendment and still followed in almost every jurisdiction, was that felony arrests could be made without a warrant.[212] As Justice Marshall noted in dissent, the decision was not even faithful to the common law, which required warrants for misdemeanors not committed in the presence of officers and which restricted the designation of felony to a specified short list of very serious crimes.[213] The term felony now refers to any crime so designated by the state, and it encompasses many crimes that were misdemeanors at common law and required a warrant for arrest.[214] More fundamentally, the Court's total reliance on common law and long-standing practice was contrary to the notion that history and practice alone do not determine constitutional rights.[215] In other Fourth Amendment contexts, the Court has emphasized that "[t]here are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions."[216]

The Pennsylvania Supreme Court may ultimately choose a different constitutional path and decide that Article I, Section 8 requires a warrant for all arrests unless there are exigent circumstances. Such a ruling would be consistent with the core values underlying Pennsylvania's constitutional search and seizure provision.

The common-law rule that permits arrests for felonies without a warrant developed because, generally, property interests were more valued than personal rights and because there was a fear that suspects might escape if a warrant was necessary.[217]

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[212] The only other reason offered by the *Watson* majority was the increase in litigation to determine whether there were exigent circumstances. *Id.* This "burden," of course, necessarily occurs whenever there is a recognized constitutional requirement for a warrant before an intrusion can occur, and should afford no basis for dispensing with constitutional protections.

[213] *Id.* at 438-42 (Marshall, J., dissenting).

[214] *Id.*

[215] *See id.* at 442 (Marshall, J., dissenting) and cases cited therein.

[216] Payton v. New York, 445 U.S. 573, 591 n.33 (1980).

[217] *See* Nancy L. Schons, Comment, Watson *and* Ramey*: The Balance of*

Pennsylvania has followed the common-law rule of permitting felony arrests without a warrant. This is reflected in its well-established decisional law[218] and in the Pennsylvania Rules of Criminal Procedure.[219] The underlying support for the practice came in an 1814 case, *Wakely v. Hart*,[220] which interpreted the Pennsylvania Constitution's search and seizure provision. The Pennsylvania Supreme Court stated:

> The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, or in so general and vague a form, as may put it in the power of the officers who execute them, to harass innocent persons under pretence of suspicion; for if general warrants are allowed, it must be left to the discretion of the officer, on what persons or things they are to be executed. But it is no where said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and *pursued* with or without warrant, he may be arrested by any person.[221]

The Pennsylvania Supreme Court, in essence, recognized the need for an exception to the warrant requirement whenever the exigent circumstance of an escape was imminent, but that exceptional circumstance has become the general rule.[222]

Interests in Non-Exigent Felony Arrests, 13 SAN DIEGO L. REV. 838, 844 (1976).

[218] *E.g.*, Commonwealth v. Peterson, No. J-82-1993 (E.D. Pa. Nov. 5, 1993); Commonwealth v. Jackson, 299 A.2d 213, 224 (Pa. 1973); Commonwealth v. Bosurgi, 190 A.2d 304 (Pa. 1963); Commonwealth v. Donnelly, 336 A.2d 632, 636 (Pa. Super. Ct. 1975).

[219] PA. R. CRIM. P. 101(3).

[220] 6 Binn. 316 (Pa. 1814).

[221] *Id.* at 318-19.

[222] *Wakely* thus adopted the common-law rule that "may have reflected an exigent circumstances rationale. The common-law, which was preoccupied with the danger of escape, contemplated that an arrest would be made shortly after the felony occurred." Joseph D. Grano, *Rethinking the Fourth Amendment*

The Pennsylvania Supreme Court may now be receptive to a reconsideration of this 1814 decision.[223] The warrantless arrest rule is simply an aid to law enforcement based on an assumption that an alleged felon will flee or destroy evidence.[224] However, exigent circumstances that would necessitate an arrest without a warrant are often not present, and there are no justifiable law enforcement interests in not obtaining a warrant.[225] Warrants can be obtained quickly and many arrests occur days, weeks, months, and even years after a crime is committed, with defendants frequently not even realizing that they are at risk of arrest, thus having no motive or inclination to flee. A presumption that warrants must be excused in all cases because felons are likely to flee before an arrest warrant can be obtained is belied by the FBI practice of obtaining warrants for arrests[226] and by decisions of

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Warrant Requirement, 19 AM. CRIM. L. REV. 603, 639 (1982).

[223] The only modern decision concerning the issue of warrantless arrests under the Pennsylvania Constitution was a superior court case that followed *Wakely*. Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990).

[224] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975); McCarthy v. DeArmit, 99 Pa. 63, 71 (1881). Any presumption that felons are likely to flee as a constitutional basis for sustaining warrantless arrests under Article I, Section 8, would be inconsistent with the bail provisions of the Pennsylvania Constitution. After arrest, where the impetus to flee would often be much greater than before arrest, the Pennsylvania Constitution requires that bail be set for all offenses, with the only exception being capital cases in some circumstances. PA. CONST. art. I, § 14; *see infra* notes 470-80 and accompanying text.

[225] The only justification for a warrantless arrest, other than an assumption of exigent circumstances with no factual basis, was offered by Justice Powell, who concurred in *Watson*. United States v. Watson, 423 U.S. 411, 430-31 (1976) (Powell, J., concurring). Justice Powell expressed fear that an arrest warrant would go stale. This fear was subsequently ignored by the Court in Payton v. New York, 445 U.S. 573, 602 n.55 (1980). *See, e.g.*, *Watson*, 423 U.S. at 440-41 (Marshall, J., dissenting); Marc E. Richards, Note, 7 SETON HALL L. REV. 891, 900-01, 908 (1976). Arrest warrants in Pennsylvania, unlike search warrants, need not to be executed within any specified period of time. *Compare* PA. R. CRIM. P. 119-124 (arrest warrants) *with* PA. R. CRIM. P. 2005(d) (search warrant must be executed within two days from issue date).

[226] *See Watson*, 423 U.S. at 440 (Marshall, J., dissenting opinion). A small minority of states require arrest warrants for felonies in the absence of exigent circumstances. *See, e.g.*, People v. Hoinville, 553 P.2d 777 (Colo. 1976);

the United States Supreme Court and the Pennsylvania Supreme Court that require warrants for arrests in the home.

In *Payton v. New York*,[227] the United States Supreme Court held that an arrest warrant is constitutionally necessary when an arrest occurs in the home unless there are exigent circumstances, noting that it viewed "with skepticism" government arguments that the warrant requirement would hamper law enforcement.[228] Likewise, the Pennsylvania Supreme Court reached the same Fourth Amendment conclusion earlier in *Commonwealth v. Williams*,[229] in which it set forth a multi-factored test for determining when the government did not need a warrant for a felony arrest at home. In *Williams*, the Pennsylvania Supreme Court held that a warrant was constitutionally necessary because the circumstances afforded police the time to get a warrant. The court stated, "[T]he police had no reason to believe that appellant was armed at the time of arrest. Even more importantly, the instant homicide pre-dated the date of arrest by approximately three years. There was little need of swift apprehension."[230]

Of course, the place of Williams' arrest, his home or some other place, was irrelevant to the determination that there were no exigent circumstances that should excuse the warrant requirement. A constitutional rule that permits felony arrests outside the home, but not inside the home, pays insufficient attention to the notion that the constitution "protects people not places."[231] Such a rule

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Payne v. State, 343 N.E.2d 325 (Ct. App. Ind. 1976); Milton v. State, 549 S.W.2d 190 (Ct. Cr. App. Tex. 1977).

[227] 445 U.S. 573 (1980).

[228] *Id.* at 602.

[229] 396 A.2d 1177 (Pa. 1978).

[230] *Id.* at 1180; *see* Commonwealth v. Lopez, 579 A.2d 854 (Pa. 1990) (evenly divided court as to whether a felony arrest, in home, minutes after the commission of a crime, was based on exigent circumstances justifying the lack of a warrant).

[231] Katz v. United States, 389 U.S. 347, 351 (1967) (stating that a warrant is required before police may listen to conversations of a person in a public telephone booth). Justice White's dissent in *Payton*, urging that no warrant should be required and that *Watson* should be followed, made the same point. "[T]he Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home

also ignores both the serious intrusion occasioned by an arrest and the important core purpose the warrant requirement plays in protecting individual liberty. Additionally, this rule fosters manipulation; to circumvent this rule an officer need only wait until the alleged felon is outside the home.

An arrest involves embarrassment, anxiety, possible disruption of job and family life, complete submission to the authority of police, and incarceration (at least until bail is set). A felony charge often carries higher bail,[232] and the alleged felon who cannot post bail must spend at least three days in jail before a court determines whether there is a lawful basis for the charges.[233] Obviously, the intrusion into an arrestee's home to effectuate the arrest, taking at most a matter of minutes, pales in comparison to the severity of the intrusion on personal security of the arrest itself wherever it may occur.

There are no constitutional exceptions to the warrant requirement for other searches and seizures based solely on the crime involved, whether it be murder, rape, or any other felony. There is no more reason to dispense with the warrant requirement and trust the judgment of police in their unfettered discretion when an arrest is involved. This is particularly true because we are dealing with an individual's right to personal security.

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rather than elsewhere." *Payton*, 445 U.S. at 615 (White, J., dissenting).

[232] The "nature of the offense charged" is a factor in determining bail. PA. R. CRIM. P. 4004(i); *see also id.* 4003(a)(1).

[233] The charging document, a complaint, need not present facts sufficient to establish probable cause for the arrest, because it is only intended to give notice of the charges. PA. R. CRIM. P. 132; *see, e.g.*, Commonwealth v. Siebert, 531 A.2d 800 (Pa. Super. Ct. 1987); Commonwealth v. Wilkinson, 420 A.2d 647 (Pa. Super. Ct. 1980). In felony cases, preliminary hearings are scheduled within three to ten days of the preliminary arraignment. PA. R. CRIM. P. 140. At the preliminary hearing the defendant is entitled to a discharge if the Commonwealth cannot establish a prima facie case of guilt. PA. R. CRIM P. 143. Generally, the Constitution guarantees some sort of judicial determination of probable cause to support the arrest. County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991). It does not, however, require that the procedure be adversarial in nature, like Pennsylvania's preliminary hearing. Gerstein v. Pugh, 420 U.S. 103 (1975).

As the Pennsylvania Supreme Court emphasized in *Commonwealth v. Edmunds*,[234] the warrant requirement is central to the values contained in Article I, Section 8.[235] The court has consistently proven that point by requiring warrants in situations in which the United States Supreme Court has not required a warrant under the Fourth Amendment.[236] The Pennsylvania Supreme Court recently held that a warrant is necessary to open a satchel that a person is carrying even if there is probable cause to believe there is contraband inside.[237] The court noted, "we do wish to emphasize the importance of a citizen's right to be secure against unreasonable government invasions of his person."[238]

Currently, the Pennsylvania Rules of Criminal Procedure provide that felony arrests may be made without a warrant and that misdemeanor arrests do not require a warrant where authorized by the legislature.[239] Therefore, with respect to misdemeanors, constitutional rights that relate to criminal procedure depend on the legislature,[240] and a confusing patchwork of statutes has developed with no common theme, sometimes permitting warrantless arrests.[241] The Pennsylvania Supreme Court, either through its Rules of Criminal Procedure or through a reevaluation of the issue under the Pennsylvania Constitution, may eventually opt for one clear rule governing all arrest situations, so that all arrests, absent exigent circumstances, will require a warrant.

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[234] 586 A.2d 887 (Pa. 1991).

[235] *Id.* at 899.

[236] *See supra* notes 46-69 and accompanying text.

[237] Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993).

[238] *Id.* at 560 n.1.

[239] PA. R. CRIM. P. 101; *see* PA. R. CRIM. P. 6003(a).

[240] This is at odds with the general framework of government in Pennsylvania where matters of criminal procedure are the exclusive province of the Pennsylvania Supreme Court. *See supra* notes 4-18 and accompanying text.

[241] *See* Francis B. McCarthy, *Warrantless Arrests by Police Officers in Pennsylvania*, 92 DICK. L. REV. 105 (1987).

F. Search Incident to Arrest as Basis for Searching Personal Effects and Automobiles When There Is No Danger to Police or Risk of Destruction of Evidence

In *Chimel v. California*,[242] the United States Supreme Court explained that an officer may search an arrested person without a warrant to fully protect the officer's safety against the possible use of a weapon and to prevent the possible destruction of evidence.[243] The Court explained that this rationale provided equal justification for a search of "the area 'within [the suspect's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[244] The Court held that the search of an area beyond the arrestee's immediate control, in this case his entire house where he was arrested, constituted an unlawful search.

In *Chimel*, the Court stated, "we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."[245] In subsequent decisions, however, further intrusions have been sanctioned. For example, in *United States v. Robinson*,[246] the Court held that a search of the person incident to arrest was permissible for all custodial arrests.[247] The Court permitted the search of a cigarette pack seized from Robinson when he was

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[242] 395 U.S. 752 (1969).

[243] *Id.* at 763.

[244] *Id.*

[245] *Id.* at 766-67 n.12.

[246] 414 U.S. 218 (1973).

[247] *Id.* at 235. *Robinson* involved a traffic offense. Although never explicitly held on state-law grounds, it seems well established that Pennsylvania does not permit a search incident to arrest of the person or the automobile after an arrest for a traffic offense. *E.g.*, Commonwealth v. Lewis, 275 A.2d 51 (Pa. 1971); Commonwealth v. Dussell, 266 A.2d 659 (Pa. 1970); Commonwealth v. Parker, 619 A.2d 735 (Pa. Super. Ct. 1993). The superior court has held that a search incident to arrest of the person may be conducted for any offense other than a traffic violation. *E.g.*, Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990).

searched incident to arrest.[248] The additional search was upheld even though it was clear that "it would have been impossible for respondent to have used it once the package was in the officer's hands."[249]

In *New York v. Belton*,[250] the Court nearly obliterated the rationale for the search incident to arrest exception when an individual is arrested inside a car. The Court held that even when the occupants have been removed from the car and placed under complete police control, the police may search the entire interior compartment and all containers, with the trunk being the only area that is off limits.[251]

However, as the dissent correctly emphasized, the Court's bright-line rule permitting such warrantless searches, under the guise of the search incident to arrest doctrine, ignored "the crucial question under *Chimel* [which] is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it at the time of arrest and search."[252]

The Pennsylvania Supreme Court may very well chart an independent path in this area, permitting only those warrantless searches incident to arrest that are consistent with the warrantless search exception's rationale.[253] That would mean that personal effects and containers could never be searched without a warrant

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[248] *Robinson*, 414 U.S. at 236.

[249] *Id.* at 256 (Marshall, J., dissenting).

[250] 453 U.S. 454 (1981).

[251] *Id.* at 459-61.

[252] *Id.* at 469 (Brennan, J., dissenting).

[253] Prior to *Belton*, the Pennsylvania Supreme Court held that the Pennsylvania Constitution was violated by the search of a trunk of a car after the driver, inside, had been arrested. Commonwealth v. Long, 414 A.2d 113 (Pa. 1980). A search of the trunk incident to arrest is also precluded under *Belton*; therefore, *Long* does not resolve the *Belton* issues.

The Pennsylvania Superior Court has followed *Belton* as a matter of state constitutional law, minimizing the approach of the Pennsylvania Supreme Court to such issues and stating its preference for a bright-line rule. Commonwealth v. Henry, 517 A.2d 559 (Pa. Super. Ct. 1986). *Henry* has been followed in Commonwealth v. Mickell, 598 A.2d 1003 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992), and in Commonwealth v. Jones, 578 A.2d 527 (Pa. Super. Ct. 1990).

once reduced to police control, whether seized from the person or from the inside of a car.[254] It would also mean that a car could not be searched at all if the arrested occupants were out of the car and completely under police control, unable to reach anything in the car.[255] In other words, the Pennsylvania Supreme Court may decide not to overlook the rationale "that the doctrine of search incident to arrest is designed to guard against real dangers; its function is not to give police officers a bonus for a job well done."[256] Although the Pennsylvania Supreme Court's search

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[254] The United States Supreme Court has held that a container, a foot locker, that was not searched until more than an hour after an arrest was not searched incident to an arrest and required a warrant for the intrusion. United States v. Chadwick, 433 U.S. 1, 15 (1977). The *Chadwick* Court noted:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Id. (footnote omitted). Of course, this observation is just as true whether the personal property under police control is searched one minute or one hour after the arrest. Also, where personal effects are found by police, inside or outside of a car, is irrelevant, because the effects, unlike a car, are always immobile. "The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate." United States v. Ross, 456 U.S. 798, 832 (1982) (Marshall, J., dissenting).

[255] Professor LaFave criticized *Belton* in part because it permits searches of the interior of the car in every case even though

> the cases surveyed . . . indicate a number of commonplace events which would put the passenger compartment beyond the arrestee's control—immediate removal of him to a patrol car or some other place away from his own vehicle, handcuffing the arrestee, closure of the vehicle, and restraint of the arrestee by several officers, among others.

LAFAVE, *supra* note 179, § 7.1(c), at 18.

[256] Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 275 (1984). *Belton* has also been criticized as creating "a free search zone under the pretext of lawful arrest." David M. Silk, *When Bright Lines Break Down: Limiting* New York v. Belton, 136 U. PA. L. REV. 281, 294 (1987) (footnote omitted).

incident to arrest cases have rested on Fourth Amendment grounds, an unbroken line of cases has upheld these warrantless searches only when the defendant has not yet been subjected to complete police control and was therefore able to reach the area that was searched.[257]

In *Commonwealth v. Timko*,[258] the Pennsylvania Supreme Court held that once a defendant was arrested and under the control of officers outside his car, police could not search a zippered bag inside his car incident to the arrest, even though there was probable cause to believe it might contain a weapon.[259] The court explained that the rationale for excusing a warrant for searches of personal property incident to an arrest is based on exigent circumstances. The court stated:

> In such a situation, absent exigent circumstances, a warrantless search of luggage or other personal property in which a person has a reasonable expectation of privacy is not permissible.
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> . . . .
>
> The Commonwealth asserts the exigencies of the situation were such that an immediate search was necessary to protect the safety of the officers. While the events leading up to the search were such as would lead a reasonable policeman to believe the zippered bag might contain a weapon, nothing further occurred to justify an immediate warrantless search. For example, there is no suggestion the bag contained explosives or some other item which might in some way endanger the police officers or others, nor is there a suggestion the bag or its contents were in danger of concealment or destruction.[260]

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[257] *E.g.*, Commonwealth v. Stanley, 446 A.2d 583, 586 (Pa. 1982); Commonwealth v. Bess, 382 A.2d 1212 (Pa. 1978); Commonwealth v. Harris, 239 A.2d 290 (Pa. 1968); *see* Commonwealth v. Zock, 454 A.2d 35 (Pa. Super. Ct. 1982); Commonwealth v. Rivera, 416 A.2d 1111 (Pa. Super. Ct. 1979).

[258] 417 A.2d 620 (Pa. 1980).

[259] *Id.* at 622-23.

[260] *Id.* at 623. One superior court panel recently followed *Timko*, observing that "[t]he rationale in *Timko* is persuasive." Commonwealth v. Parker, 619

The approach in *Timko* is entirely consistent with the court's recent analysis under the Pennsylvania Constitution in *Commonwealth v. Martin.*[261] In *Martin*, the court held that even if it was assumed arguendo that there was probable cause to conduct a canine-sniff search of a satchel that a defendant was carrying when lawfully stopped, a warrant was required to conduct the search.[262] In other words, as in *Timko*, once the arrestee and his personal effects have been subjected to police control, there simply are no exigencies that justify the further intrusion of a warrantless search, whether the theory advanced is search incident to arrest or some other one.[263] Thus, the Pennsylvania Supreme Court has granted more protection to privacy interests in personal effects than the United States Supreme Court. The court has emphasized the core values of Article I, Section 8: the protection of reasonable expectations of privacy and the warrant requirement.[264] It is doubtful, therefore, that the court will follow the lead of the United States Supreme Court and permit searches incident to arrest when there is no danger to the arresting officer or risk of destruction of evidence.

G. Warrantless Searches of Automobiles and Their Containers With Probable Cause but Without Exigent Circumstances

Under the well-established "automobile exception" to the Fourth Amendment's warrant requirement, police officers may stop a vehicle and conduct a warrantless search if they have probable cause to believe that the automobile contains evidence of criminal activity.[265] This rule was established in the seminal case of *Carroll v. United States.*[266] In creating this exception, the United States Supreme Court recognized that such a rule, which

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A.2d 735, 741 (Pa. Super. Ct. 1993).

[261] 626 A.2d 556 (Pa. 1993).

[262] *Id.* at 561.

[263] *See supra* notes 71-101 and accompanying text.

[264] *Id.*

[265] *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981).

[266] 267 U.S. 132 (1925).

lessens the privacy interest in vehicles, was justified because of the inherent mobility of automobiles.[267]

Emphasizing the perceived diminished expectation of privacy in automobiles, the Court developed a doctrine that permits the search of an automobile whenever probable cause exists.[268] The original rationale for the exception to the warrant requirement, recognized in *Carroll*, was the existence of exigent circumstances. Exigency has subsequently been ignored by the Court altogether, as the Court has approved warrantless searches of parked mobile homes on downtown lots[269] and warrantless searches of packages found in cars searched on the highway, days after the seizure of those packages.[270]

In contrast, the Pennsylvania Supreme Court has not created an "automobile exception" absent exigent circumstances. In 1968, in a decision condemning a warrantless search of a parked car without exigent circumstances, the supreme court stated:

> Certainly a search without a warrant is not reasonable simply because the officers have probable cause to believe that incriminating evidence will be disclosed. If this constituted "exigent circumstances," it would be almost impossible to think of a case in which a warrant would be necessary. And certainly an automobile is not *per se* unprotected by the warrant procedure of the Fourth Amendment.[271]

Recent decisions have continued to emphasize that exigency is still the guiding principle under the Pennsylvania Constitution. In so doing, the Pennsylvania Supreme Court has upheld warrantless

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[267] *Id.* at 151.

[268] For a persuasive criticism of the Court's finding of a diminished expectation of privacy in automobiles and its abandonment of exigency, see Grano, *supra* note 222, at 605, 629-38.

[269] California v. Carney, 471 U.S. 386 (1985).

[270] United States v. Johns, 469 U.S. 478 (1985). Three days after seizing an automobile, containers found within the seized vehicle were lawfully searched because the officers had probable cause to believe that the containers contained marijuana. *Id.* at 486-88.

[271] Commonwealth v. Cockfield, 246 A.2d 381, 384 (Pa. 1968) (citations omitted); *see also* Commonwealth v. Linde, 293 A.2d 62 (Pa. 1972).

searches of vehicles stopped on the highway only after determining whether it would have been practical to obtain a warrant.[272]

When a warrantless search is constitutionally permissible, the question whether any closed containers found inside the vehicle may be searched without a warrant still remains. The ensuing debate over the extent to which police could also search closed containers found within automobiles was resolved in favor of law enforcement in *United States v. Ross*.[273] The Pennsylvania Supreme Court, however, is likely to agree with Justice Marshall's dissent in *Ross*.[274] Justice Marshall maintained that there was no

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[272] *See, e.g.*, Commonwealth v. Ionata, 544 A.2d 917 (Pa. 1988) (opinion of affirmance for evenly divided court); Commonwealth v. Baker, 541 A.2d 1381, 1382 (Pa. 1988) ("This is not a case where . . . it would have been reasonably practicable to obtain a search warrant before encountering the vehicle to be searched."); *cf.* Commonwealth v. Rodriguez, 585 A.2d 988 (Pa. 1991). The *Rodriguez* court did not discuss the Pennsylvania Constitution, but relied instead on *Baker* for the court's constitutional test and upheld the search because "both probable cause and exigent circumstances existed to justify the warrantless search of appellant's automobile." *Id.* at 991. *But cf.* Commonwealth v. Milyak, 493 A.2d 1346 (Pa. 1985) (suggesting that exigent circumstances may not be a constitutional requirement but not reaching an analysis of the Pennsylvania Constitution because the issue was not preserved). The court stated, "[w]e therefore do not address the applicability and effect of Article I, § 8 of the Pennsylvania Constitution." *Id.* at 1348 n.3. A few state courts have held under their state constitutions that searches of cars require a warrant in the absence of exigent circumstances. State v. Larocco, 794 P.2d 460, 469-70 (Utah 1990); *see* State v. Parker, 355 So. 2d 900, 906 (La. 1978).

[273] 456 U.S. 798 (1982). In California v. Acevedo, 111 S. Ct. 1982 (1991), the Court held that no warrant was necessary to open a container found in a car where, unlike *Ross*, there is only probable cause to search the container, not the entire car. *Id.* at 1987-88.

[274] At least one panel of the Pennsylvania Superior Court has concluded that *Ross* applies as the law in Pennsylvania. In Commonwealth v. Bailey, 545 A.2d 942, 945 (Pa. Super. Ct. 1988), the superior court, applying the holding of *Ross*, held "[i]t follows from the foregoing that if a police officer possesses probable cause to search a motor vehicle, he may then conduct a search of the trunk compartment without seeking to obtain probable cause relative to the particularized area." *Id.* at 944. Other superior court opinions have followed *Ross* without analyzing the issue under state law. *See, e.g.*, Commonwealth v. Elliott, 611 A.2d 727 (Pa. Super. Ct. 1992); Commonwealth v. Jenkins, 585 A.2d 1078 (Pa. Super. Ct. 1991).

diminished expectation of privacy in the contents of personal effects and, more important, found no justification for ignoring the warrant requirement in a decision that he concluded "utterly disregards the value of a neutral and detached magistrate."[275] Pennsylvania, in keeping with its resolve to require exigent circumstances, will probably require a warrant for a search of a container, whether a paper bag or a suitcase,[276] once it is under the complete control of the police. Under these circumstances, with an immobilized object, the warrant requirement is paramount because the evidence is not in danger of being destroyed.[277]

H. Ordering People out of an Automobile Without Reasonable Suspicion After a Stop for a Traffic Offense

The search and seizure of an automobile is constitutionally permissible when a person is lawfully arrested while driving his car or when there is probable cause to search the car.[278] When there is no probable cause to arrest or to search, and the police are justified in stopping the car only for a traffic violation or for investigative purposes,[279] the question remains whether police may order occupants out of a car without any reasonable suspicion justifying this further intrusion.

On Fourth Amendment grounds, the Pennsylvania Supreme Court has held that it was unconstitutional to order the driver[280]

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[275] *Ross*, 456 U.S. at 827 (Marshall, J., dissenting).

[276] In *Ross*, the Court recognized that "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper" and that all are entitled to the same constitutional scrutiny. *Id.* at 822.

[277] For a discussion of the importance of the requirement in this circumstance, see *supra* notes 253-64 and accompanying text.

[278] *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (search based on probable cause); New York v. Belton, 453 U.S. 454 (1981) (search incident to arrest).

[279] Police may stop a car in Pennsylvania if there is probable cause to believe a traffic offense has been committed or reasonable suspicion of other criminal activity. *See, e.g.*, Commonwealth v. DeWitt, 608 A.2d 1030 (Pa. 1992); Commonwealth v. Adams, 605 A.2d 311 (Pa. 1992); *cf.* Commonwealth v. McElroy, 630 A.2d 35 (Pa. Super Ct. 1993) (en banc).

[280] Commonwealth v. Mimms, 370 A.2d 1157 (Pa.) (*Mimms I*), *rev'd per*

or a passenger[281] out of a vehicle. In *Commonwealth v. Mimms* (*Mimms I*),[282] the Pennsylvania Supreme Court found that ordering a driver out of a car, after a stop for a traffic offense, in the absence of reasonable suspicion, is an "indiscriminate procedure."[283] That is to say, it is a procedure that interferes with personal liberty without any "objective appraisal of the given circumstance"[284] that would justify the intrusion.

Mimms I was reversed by a divided United States Supreme Court in *Pennsylvania v. Mimms*.[285] The majority agreed that ordering the individual out of the car was a seizure,[286] but characterized it as "de minimis."[287] The Court thus held that to order an individual out of a car, the police need not have a reasonable suspicion because "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety."[288] In its analysis, the Court examined a 1963 study outlining dangers of potential violence to police who stop cars for traffic violations.[289] The Court added that "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations."[290] The Court noted that the officers may prefer to require the motorist to pull the vehicle onto the shoulder and away from traffic, "where the inquiry may be pursued with greater safety to both."[291]

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curiam, 434 U.S. 106 (1977), *on remand*, 385 A.2d 334 (1978).

[281] Commonwealth v. Pollard, 299 A.2d 233 (Pa. 1973).

[282] *Mimms I*, 370 A.2d at 1160.

[283] *Id.* at 1161.

[284] *Id.*

[285] 434 U.S. 106 (1977) (per curiam).

[286] *Id.* at 116 n.2 (Stevens, J., dissenting) ("The Court does not dispute, nor do I, that ordering Mimms out of his car was a seizure.") Because the individual has submitted to the coercive police action by exiting the car, it is clear that there is a seizure under federal and Pennsylvania law. *See supra* text accompanying notes 172-206.

[287] *Mimms*, 434 U.S. at 111.

[288] *Id.*

[289] *Id.* at 110 (citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L. & POLICE SCI. 93 (1963)).

[290] *Id.* at 111.

[291] *Id.* This additional rationale appears to be an insignificant add-on. The

On remand, the Pennsylvania Supreme Court granted a new trial. Four members of the court in *Mimms II*[292] awarded Mimms a new trial on other grounds.[293] The three members of the court who did address the issue at hand stated that they would reach the same result as in *Mimms I* under the Pennsylvania Constitution because "a contrary result 'would invite intrusion upon constitutionally guaranteed rights based on nothing more substantial than inarticulable hunches.'"[294] Since 1978, when *Mimms II* was decided, the issue still has not been resolved. The Pennsylvania Supreme Court has not revisited the issue, and the Pennsylvania Superior Court, although recognizing that it is "conceivable that defendant's state constitutional challenge might prevail," has not decided the issue.[295]

Pennsylvania may not wish to follow "the *Mimms* Court [which] effected a major doctrinal shift in fourth amendment jurisprudence by creating a new class of 'tertiary' seizures governed by no articulable standard other than the police officer's fancy."[296] Prior to the United States Supreme Court decision in *Mimms*, further intrusions were not left solely to the officer's discretion even when there was a lawful stop and the safety of the

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Court's holding does not require officers to proceed to the shoulder of the road after ordering a driver out. In fact, because many officers will not proceed to the shoulder, this is actually another reason why the intrusion should not be viewed as de minimis. The driver will now, because of the Court's decision, be placed in this less safe situation by being forced to stand outside the car on the road, rather than being permitted to remain inside.

[292] 385 A.2d 334 (Pa. 1978).

[293] *Id.* at 336.

[294] *Id.* at 337 (Roberts, J., concurring) (quoting Commonwealth v. Mimms, 370 A.2d 1157, 1160 (1977), *rev'd*, Pennsylvania v. Mimms, 434 U.S. 106 (1978)).

[295] Commonwealth v. Toanone, 553 A.2d 998, 1001 (Pa. Super. Ct. 1989); *see* Commonwealth v. Elliott, 546 A.2d 654, 658 n.5 (Pa. Super. Ct. 1988), *appeal denied*, 557 A.2d 721 (Pa. 1989); *see also* Commonwealth v. Robinson, 582 A.2d 14 (Pa. Super. Ct. 1990), *appeal denied*, 598 A.2d 282 (Pa. 1991).

[296] Yale L. Rosenberg, *Notes From the Underground: A Substantive Analysis of Summary Adjudication By the Burger Court: Part II*, 19 HOUS. L. REV. 831, 890-91 (1982); *see* Esther J. Windmueler, Note, *Reasonable Articulable Suspicion—The Demise of* Terry v. Ohio *and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 551-52 (1991).

officer was the alleged basis for the additional intrusion. *Terry v. Ohio*[297] protects an individual lawfully stopped for something more serious than a traffic offense from suffering the additional intrusion of a frisk unless there is a reasonable belief that the person is armed.[298] A search after the frisk may not be conducted unless the officer feels what appears to be a weapon during the frisk.[299] The *Mimms* decision grants greater discretion to officers than did *Terry*, and it allows the police to order an individual out of an automobile without requiring reasonable suspicion. It is unlikely that the Pennsylvania Supreme Court will follow the *Mimms* Court lead.

In different contexts, the Pennsylvania Supreme Court has indicated that Pennsylvania law will neither consider an expansion of *Terry*'s precepts nor permit any seizures by individual officers without reasonable suspicion.[300] The Pennsylvania Supreme

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[297] 392 U.S. 1 (1968). The Court recently held that having felt an object during a frisk, an additional probing by an officer was constitutionally invalid because the incriminating nature of the object was not immediately apparent without the additional feel. Minnesota v. Dickerson, 113 S. Ct. 2130 (1993). Previously, the Court had held that police (lawfully on a premises executing a valid search warrant for other evidence) conducted an unconstitutional additional search, without probable cause, when they moved stereo equipment a few inches to be able to read the serial numbers because they suspected that the equipment was stolen. Arizona v. Hicks, 480 U.S. 321 (1987). The Court held that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325. Its sensitivity to very minor property intrusions, reflected by a refusal to dismiss them as de minimis searches, has not extended to seizures of the person. Unlike searches where "[a] search is a search," a seizure is not always a seizure when it comes to constitutional protections.

[298] *Terry*, 392 U.S. at 30-31.

[299] *See* Commonwealth v. Lovette, 450 A.2d 975 (Pa. 1982), *cert. denied*, 459 U.S. 1178 (1983).

[300] *E.g.*, Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992) (holding that reasonable suspicion is the minimum requirement to detain a person found outside an apartment building that police are entering to lawfully search); Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (finding reasonable suspicion required for canine sniff of storage lockers for drugs). The court has permitted a seizure without reasonable suspicion in only one limited context, where all individual police discretion has been eliminated by a specific standardized procedure. *See* Commonwealth v. Blouse, 611 A.2d 1177 (Pa. 1992) (holding roadblocks constitutional under some circumstances).

Court has reached beyond minimum, federal constitutional requirements and held that such intrusions are unconstitutional without reasonable suspicion because the constitution mandates that "an individual's interest in being free from police harassment, annoyance, inconvenience and humiliation"[301] should be protected.

In *Commonwealth v. Martin*,[302] the Pennsylvania Supreme Court found that a canine sniff of a satchel was impermissible absent probable cause when a person was stopped because of a reasonable suspicion of a drug-related transaction.[303] Relying on the Pennsylvania Constitution, the court held that probable cause, not reasonable suspicion, was required because the search in *Martin* involved one's person and not merely one's property.[304] The Pennsylvania Supreme Court has also not been inclined to hold additional seizures de minimis when individuals are stopped in their cars for traffic offenses. For example, in *Commonwealth v. Kelly*,[305] the court held that taking a vial from an automobile, to look at it during a lawful car stop, was an additional seizure requiring probable cause.[306]

As Justice Stevens noted in his forceful dissent in *Mimms*, the statistics did not support the majority's conclusion of a safety imperative for police ordering drivers out of cars.[307] Without strong support for a fear that any more than a minuscule number of those stopped for traffic offenses are dangerous, there is an insufficient basis for dispensing with the personal security rights of those who are stopped. Justice Stevens emphasized that the consequence of *Mimms* is that many innocent people could be

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[301] *Johnston*, 530 A.2d at 80.

[302] 626 A.2d 556 (Pa. 1993).

[303] *Id.* at 560.

[304] *Id.*

[305] 409 A.2d 21 (Pa. 1979) (decided on Fourth Amendment grounds).

[306] *Id.* at 23.

[307] Pennsylvania v. Mimms, 434 U.S. 106, 117 (1977) (Stevens, J., dissenting). One commentator criticized the Court's use of social science evidence in *Mimms*. "It should . . . seek out the best scientific evidence available, and not be satisfied with one inadequate study." Lawrence W. Sherman, *Traffic Stops and Police Officers' Authority: A Comment on* Pennsylvania v. Mimms, 14 CRIM. L. BULL. 343, 346 (1978).

subjected to an intrusion that they would view as anything but de minimis.[308] Permitting an individual to remain in the relative privacy of one's car is by far more preferable for most people than being exposed to the public attention and embarrassment that results from being detained outside by police. With no constitutional check on such officer discretion to order someone out of the car, the determinative factor could be that "those with more expensive cars, or different bumper stickers, or different-colored skin—may escape [being called out] entirely."[309] An individual's interest in personal security requires constitutional safeguards that will prevent arbitrary decisions by the police.

An ordinary traffic violation obviously provides no basis for a belief that a driver or an occupant is dangerous. Based upon its related cases, it is unlikely that the Pennsylvania Supreme Court will allow the unfettered discretion of police to decide when to add the additional indignity of being ordered out of a car to the routine process of issuing a traffic ticket.[310]

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[308] *Mimms*, 434 U.S. at 118 (Stevens, J., dissenting).

[309] *Id.* at 122.

[310] The Hawaii Supreme Court is apparently the only court that has ruled pursuant to its state constitution that it is unconstitutional to order a driver to get out of the car without reasonable suspicion. State v. Kim, 711 P.2d 1291 (Haw. 1985). The situation is different with respect to passengers, even on Fourth Amendment grounds. In Commonwealth v. Pollard, 299 A.2d 233 (Pa. 1973), a pre-*Mimms* decision, the Pennsylvania Supreme Court held that ordering a passenger out after a stop for a traffic offense violated the Fourth Amendment. The superior court held that, on Fourth Amendment grounds, *Pollard* was no longer good law after *Mimms*. Commonwealth v. Elliott, 546 A.2d 654 (Pa. Super. Ct. 1988). However, some courts have not agreed that the *Mimms* Fourth Amendment holding extends to passengers who have a greater privacy interest than the driver. These courts have held that without reasonable suspicion a police order to get out of the car violates the passenger's Fourth Amendment rights. *E.g.*, State v. Becker, 458 N.W.2d 604 (Iowa 1990); Johnson v. State, 601 S.W.2d 326 (Tenn. Crim. App. 1980); Bethea v. Commonwealth, 404 S.E.2d 65 (Va. Ct. App. 1991). The courts do not agree whether *Mimms* extends to passengers on Fourth Amendment grounds. LAFAVE, *supra* note 179, § 2.6(b), at 469.

I. Admission of Evidence Obtained in Violation of Search and Seizure Rights at Probation and Parole Revocation Proceedings

The United States Supreme Court has never decided whether unconstitutionally obtained evidence may be admitted against a defendant at probation and parole revocation proceedings. A majority of the courts that have considered the issue, including the Pennsylvania Supreme Court in *Commonwealth v. Kates*,[311] have concluded that the admission of such evidence does not violate the United States Constitution.[312]

In *Kates* the court recognized that applying the exclusionary rule in revocation proceedings would serve a deterrence purpose.[313] Nonetheless, the rationale advanced was that the deterrent effect of the exclusionary rule should be limited to the criminal prosecution because of societal and rehabilitative needs.[314]

Although it is not entirely clear that the United States Supreme Court would reach the same conclusion, it is the likely result for two reasons. First, the Court's view is that "the *sole purpose* for the exclusionary rule under the 4th Amendment was to 'deter police misconduct.'"[315] Second, the Supreme Court has had a pronounced tendency not to extend the exclusionary rule beyond

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[311] 305 A.2d 701 (Pa. 1973). On the authority of *Kates*, unconstitutionally obtained evidence has been considered at revocation proceedings in Pennsylvania, but the issue has never been decided under the Pennsylvania Constitution. *See, e.g.*, Commonwealth v. Homoki, 621 A.2d 136 (Pa. Super. Ct. 1993); Commonwealth v. Donato, 508 A.2d 1256 (Pa. Super. Ct. 1986); Nickens v. Commonwealth, Pa. Bd. of Probation and Parole, 502 A.2d 277 (Pa. Commw. Ct. 1985).

[312] *See* Brian L. Crowe, *The Exclusionary Rule in Probation Revocation Proceedings*, 13 LOY. U. CHI. L.J. 373, 390-91 & n.71 (1982).

[313] *Kates*, 305 A.2d at 710.

[314] *Id.* at 710-11; *see* Crowe, *supra* note 312, at 390-91 & n.72.

[315] Commonwealth v. Edmunds, 586 A.2d 887, 893 (Pa. 1991) (quoting United States v. Leon, 468 U.S. 897, 916 (1984)).

criminal proceedings[316] or, for that matter, to even apply it there.[317]

The opposite result is likely to occur, however, when the Pennsylvania Supreme Court considers the issue under its own constitution. As the Pennsylvania Supreme Court recently stated in *Commonwealth v. Edmunds*,[318] when it rejected the good faith exception to the exclusionary rule, "the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the [Fourth] Amendment."[319] Whether the officer exercised good faith was deemed irrelevant by the *Edmunds* court. The court reasoned that the purpose of the exclusionary rule in Pennsylvania is not to deter police misconduct but to protect the right of privacy guaranteed by Article I, Section 8.

> We similarly conclude that, given the strong right of privacy which inheres in Article I, § 8, as well as the

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[316] The Court has refused to apply the exclusionary rule in a variety of contexts, contending that extending the rule to other proceedings imposes an additional, unwarranted societal cost without sufficient deterrent effect. *E.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (deportation proceedings); United States v. Janis, 428 U.S. 433 (1976) (civil tax proceedings); United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings).

[317] It is possible that the United States Supreme Court would reach a different result in revocation proceedings. Unlike the cases in the previous footnote, the result of the adjudication is often imprisonment and the deterrent effect of an exclusionary rule would be far more important. Police have easy access to the criminal histories of individuals, and finding that a person is on probation or parole could serve as an incentive to conduct an illegal search or seizure, secure in knowing that if the defendant "beats" any criminal charges on a "technicality" (a violation of his search and seizure rights), the desired "just" punishment of imprisonment could still result at revocation proceedings. If the exclusionary rule were recognized, it would be subject to at least the same limitations as applied in criminal prosecutions. *See, e.g.*, Illinois v. Krull, 480 U.S. 340 (1987) (holding that there is no suppression in a criminal prosecution where evidence is obtained in good faith reliance on unconstitutional statute); United States v. Leon, 468 U.S. 897 (1984) (holding that the exclusionary rule is not applicable in criminal prosecution if police seized evidence pursuant to constitutionally invalid warrant obtained in good faith).

[318] 586 A.2d 887 (Pa. 1991).

[319] *Id.* at 897.

> clear prohibition against the issuance of warrants without probable cause, or based upon defective warrants, the good faith exception to the exclusionary rule would directly clash with those rights of citizens as developed in our Commonwealth over the past 200 years. To allow the judicial branch to participate, directly or indirectly, in the use of the fruits of illegal searches would only serve to undermine the integrity of the judiciary in this Commonwealth. From the perspective of the citizen whose rights are at stake, an invasion of privacy, in good faith or bad, is equally as intrusive. This is true whether it occurs through the actions of the legislative, executive or the judicial branch of government.[320]

Although the court's strong language in *Edmunds* may not ultimately be taken to its absolute limit in barring unconstitutionally obtained evidence from all proceedings, the court would likely agree with this observation by another jurist:

> Probation involves direct and active participation by the judiciary in a judgment resulting in imprisonment of an individual. The judiciary, indeed, plays an 'ignoble part' when it accepts unconstitutionally seized evidence against a probationer, the victim of the search, in an adjudicatory hearing that results in imprisonment. Admission during a probation revocation hearing of tainted evidence, seized in violation of constitutional rights, clearly makes a mockery of judicial integrity.[321]

The Oregon Supreme Court, like the Pennsylvania Supreme Court, has also interpreted its state constitution's exclusionary rule to be based on the protection of personal rights rather than on

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[320] *Id.* at 901 (citation omitted).

[321] Crowe, *supra* note 312, at 399 (footnotes omitted). Although the Pennsylvania Supreme Court has consistently applied the exclusionary rule to evidence unconstitutionally obtained in violation of its criminal procedure rules regarding search and seizure, only such evidence that implicates constitutional interests is generally excluded. *Compare, e.g.*, Commonwealth v. Mason, 490 A.2d 421 (Pa. 1985) (finding no suppression for violation of rule requiring service of warrant by law enforcement official) *with* Commonwealth v. Chambers, 598 A.2d 539 (Pa. 1991) (holding that suppression is a remedy for violation of knock and announce rule).

deterrence.[322] The court held that its exclusionary rule applied to revocation proceedings because of the purpose served by the exclusionary rule and because of the fact that the defendant's "liberty interest is sufficiently analogous to the liberty interest at stake in traditional criminal prosecutions."[323]

Unless the Pennsylvania Supreme Court takes a sharp turn away from the core value of a right to privacy in Article I, Section 8, as expressed in *Edmunds,* I end this analysis of Article I, Section 8 as I began: I predict that the court will go further than the United States Supreme Court to protect the liberty interests of defendants in criminal proceedings when it considers these related issues under the Pennsylvania Constitution.[324]

IV. THE RIGHT AGAINST SELF-INCRIMINATION

Pennsylvania's provision protecting against self-incrimination, Article I, Section 9,[325] has been interpreted in some contexts to provide greater protection to the accused than that afforded by the Federal Constitution.[326] One such area has been with respect to

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[322] *E.g.*, State v. Swartzendruber, 853 P.2d 842 (Or. Ct. App. 1993); State *ex rel.* Juvenile Dep't v. Rogers, 836 P.2d 127 (Or. Ct. App. 1992).

[323] *Juvenile Dep't*, 836 P.2d at 130.

[324] Whether the Pennsylvania Supreme Court would permit the use of unconstitutionally obtained evidence not in violation of Article I, Section 8, for example, a statement obtained without *Miranda* warnings where constitutionally required, presents a separate question. Given that the principal reason for the exclusion articulated in *Edmunds* is the protection of the underlying constitutional right, rather than deterrence, such evidence may also be inadmissible at revocation proceedings. In another context, the court has held that it violated the Pennsylvania Constitution to use an unconstitutionally obtained statement against a defendant. Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975); *see supra* note 61 (discussing the *Triplett* decision).

[325] Pennsylvania's Article I, Section 9 provides in pertinent part that "[i]n all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself." PA. CONST. art. I, § 9.

[326] The present discussion will focus on those areas where more rights are currently granted under the Pennsylvania Constitution. What is not discussed are the former holdings of the court that a juvenile is entitled to more protection than that provided by the Federal Constitution when questioned by police. *See, e.g.*, Commonwealth v. Henderson, 437 A.2d 387 (Pa. 1981). The Pennsylvania

police questioning. In *Commonwealth v. Bussey*,[327] the court held, unlike the United States Supreme Court,[328] that when an individual is constitutionally entitled to *Miranda* warnings, only an explicit waiver of those rights may constitute a valid waiver.[329] The Pennsylvania Supreme Court also has indicated, as a matter of state law, that *Miranda* warnings are constitutionally required in more circumstances than the United States Supreme Court has required. The court has not adopted the same restrictive definition of "custody," a prerequisite for *Miranda* warnings.[330] However, the contours of the more expansive Pennsylvania requirement have not been fully explored, and that issue is discussed below.

The Pennsylvania Supreme Court has also exceeded federal constitutional requirements by holding that any post-arrest silence may not be used to impeach a testifying defendant at trial.[331] Discussed here is the natural extension of that decision under the Pennsylvania Constitution; a prohibition against using pre-arrest silence for impeachment purposes.

Finally, there is the important unresolved question of whether the Pennsylvania Constitution permits compelling a defendant to incriminate himself without being offered transactional immunity—complete protection from prosecution for the

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Supreme Court's test does not now differ from the federal standard. *See* Fare v. Michael C., 442 U.S. 707 (1979); Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984). Another decision that granted more rights than those required under the Pennsylvania Constitution is Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975), which is no longer controlling authority. *See supra* note 61.

[327] 404 A.2d 1309 (Pa. 1979).

[328] *See* North Carolina v. Butler, 441 U.S. 369 (1979).

[329] *Bussey*, 404 A.2d at 1314.

[330] *See infra* notes 334-59 and accompanying text.

[331] Commonwealth v. Turner, 454 A.2d 537 (Pa. 1982). The United States Supreme Court has held that a defendant may be impeached with post-arrest silence so long as that silence does not follow *Miranda* warnings. Fletcher v. Weir, 455 U.S. 603 (1982). For a discussion of the use of silence to impeach, see *infra* text accompanying notes 360-83. The Pennsylvania Supreme Court has also held, under Article I, Section 9, that the failure of the judge to give a no-adverse-inference charge to the jury when the defendant has not testified at trial constitutes automatic reversible error. Commonwealth v. Lewis, 598 A.2d 975 (Pa. 1991). This issue has not been decided by the United States Supreme Court as a federal constitutional question. *Lewis*, 598 A.2d at 980 n.11.

underlying offenses discussed in his testimony. Although a statute provides "use" immunity protection and a prohibition against the use of the compelled statements,[332] there is an exceedingly strong argument that the statute's failure to provide transactional immunity is unconstitutional under the Pennsylvania Constitution.[333]

A. When Miranda *Warnings Are Required in Pennsylvania: The Custody Requirement*

As is known by just about everyone, lawyer and nonlawyer alike, *Miranda v. Arizona*[334] provides an individual with the right to warnings before police questioning, in order to protect the individual against possible self-incrimination. However, the warnings are only constitutionally required some of the time because *Miranda* held that warnings were required only when there is custodial interrogation.[335]

In *Miranda*, the Court explained that "[b]y custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[336] The Court also stated that it did not intend to interfere with traditional police investigations, and "[s]uch investigation may include inquiry of persons not under restraint."[337] An earlier decision of the Court suggested that even without custody, *Miranda* warnings may be required whenever an individual is the focus of an investigation.[338] United States Supreme Court decisions after *Miranda* clarified that neither focus without custody nor every restraint would trigger *Miranda* warnings.[339] *Miranda*'s definition of custody, "[when one is] deprived of . . . freedom of

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[332] 42 PA. CONS. STAT. § 5947 (1990).

[333] *See infra* text accompanying notes 386-417.

[334] 384 U.S. 436 (1966).

[335] *Id.* at 477-79.

[336] *Id.* at 444.

[337] *Id.* at 477.

[338] Escobedo v. Illinois, 378 U.S. 478 (1964).

[339] *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976).

action in any significant way,"[340] has been further interpreted by the United States Supreme Court as presenting the question of "'whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"[341]

In *Berkemer v. McCarty*,[342] the United States Supreme Court held that an individual questioned during a traffic stop was not entitled to *Miranda* warnings.[343] The Court, however, acknowledged that McCarty was not free to leave and "that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers."[344] The Court stated that such stops, like *Terry* stops, generally do not require *Miranda* warnings before police questioning unless the restraints are like those of an arrest.[345]

Pennsylvania has a more expansive view of when an individual is to be considered "in custody," triggering the requirement of *Miranda* warnings. Since the 1970s, the Pennsylvania Supreme Court, relying exclusively on Pennsylvania cases, has employed the following definition of custody:

> The test for determining whether or not a person is in custody for *Miranda* purposes is whether he "is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation . . . ."[346]

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[340] *Miranda*, 384 U.S. at 444.

[341] *E.g.*, New York v. Quarles, 467 U.S. 649, 655 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam))).

[342] 468 U.S. 420 (1984).

[343] *Id.* at 440.

[344] *Id.* at 436.

[345] *Id.* at 439-41; *see* Terry v. Ohio, 392 U.S. 1 (1968) (holding that police could stop a person if they had a reasonable suspicion of criminal activity, and that police could frisk if there was a reasonable suspicion that the person stopped was armed).

[346] Commonwealth v. Medley, 612 A.2d 430, 433 (Pa. 1992) (quoting Commonwealth v. O'Shea, 318 A.2d 713, 715, *cert. denied*, 419 U.S. 1092 (1974)); *see, e.g.*, Commonwealth v. McGrath, 495 A.2d 517 (Pa. 1985); Commonwealth v. Chacko, 459 A.2d 311 (Pa. 1983); Commonwealth v.

The second part of that definition, in the alternative, is significant because it adds another layer of protection for individuals in Pennsylvania; a protection not recognized under the federal standard. This added layer of protection was explained by the Pennsylvania Supreme Court in *Commonwealth v. Meyer*.[347]

> [T]he Commonwealth's exposition of what it views to be the guiding rule of law seriously understates the circumstances in which *Miranda* warnings must be given in Pennsylvania. The Commonwealth now, in supposed harmony with *Beckwith*, would have it that police must give warnings only if they interrogate one in actual custody or otherwise significantly deprived of freedom. But this jurisdiction's test of "custodial interrogation" examines more than actual deprivation of freedom.[348]

Under the Pennsylvania standard, when a person reasonably believes that his freedom of movement has been restricted, then *Miranda* warnings are required. The common thread throughout

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Horner, 442 A.2d 682 (Pa. 1982); Commonwealth v. Meyer, 412 A.2d 517 (Pa. 1980); Commonwealth v. Brown, 375 A.2d 1260 (Pa. 1977). At one time, Pennsylvania required *Miranda* warnings even if a defendant was not in custody, so long as he was the focus of investigation. *See, e.g.*, Commonwealth v. Feldman, 248 A.2d 1, 3 (Pa. 1968). Individual justices have sometimes raised the issue whether in Pennsylvania the "focus test" is still an alternative to the custody test for *Miranda* purposes. *See, e.g.*, Commonwealth v. Holcomb, 498 A.2d 833 (Pa. 1985). However, given the many majority decisions of the court employing the custody test to determine whether *Miranda* warnings are required, the focus test is no longer applicable in Pennsylvania. Although focus is sometimes a relevant factor, it is neither sufficient in itself nor a prerequisite for a finding of custody. *See, e.g.*, *Brown*, 375 A.2d at 1266 (finding custody for *Miranda* purposes, even though defendant was not the focus of investigation).

[347] 412 A.2d 517 (Pa. 1980).

[348] *Id.* at 521. The language of the Pennsylvania alternative tests for custody, *see supra* text accompanying note 346, is not entirely consistent. It is doubtful that the court meant to require an actual deprivation of freedom of action *in a significant way* for a finding of custody while also finding custody to be present when there is a reasonable belief *of any* deprivation of freedom of movement. Although explicit clarification would be helpful, it appears from what the court said in *Myers*, and as explained from an overview of the cases as a whole, that the court intends that any actual deprivation of freedom of action would constitute custody.

Pennsylvania's cases is that *Miranda* warnings are required whenever there is "present a degree of 'deprivation of liberty.'"[349]

The Pennsylvania Supreme Court has never explicitly stated whether the basis for granting greater rights is its supervisory power[350] or an application of the Pennsylvania constitutional provision protecting against self-incrimination. Likewise, except for *Meyer*, the court has simply applied the Pennsylvania standard, relying on Pennsylvania cases, without explicitly stating that it was doing so as a matter of state law. The superior court has often ignored the Pennsylvania Supreme Court's definition of custody for *Miranda* purposes. The court has instead applied the federal test, which requires restraint equivalent to an arrest, and has held that there is no right to warnings during questioning pursuant to a *Terry* stop.[351] However, this seems incorrect as a matter of Pennsylvania law because the well-established definition of seizure, first adopted in Pennsylvania in *Commonwealth v. Jones*,[352] is

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[349] Commonwealth v. McLaughlin, 379 A.2d 1056, 1058 (Pa. 1977). In *McLaughlin*, Justice Nix analyzed the facts of past cases in which *Miranda* warnings were required in Pennsylvania, suggesting that perhaps they could be harmonized with the United States Supreme Court standard. *See* Commonwealth v. D'Nicuola, 292 A.2d 333 (Pa. 1972); Commonwealth v. Simala, 252 A.2d 575 (Pa. 1969); Commonwealth v. Jefferson, 226 A.2d 765 (Pa. 1967). He observed that even if Pennsylvania did grant broader protections pursuant to the Pennsylvania Constitution, the defendant failed to establish that he was entitled to *Miranda* warnings when questioned as part of a noncriminal investigation. *McLaughlin*, 379 A.2d at 1058.

[350] *See supra* notes 4-25 and accompanying text.

[351] *See, e.g.*, Commonwealth v. Haupt, 567 A.2d 1074 (Pa. Super. Ct. 1989); Commonwealth v. Ellis, 549 A.2d 1323 (Pa. Super. Ct.), *appeal denied*, 562 A.2d 824 (Pa. 1989); Commonwealth v. Douglass, 539 A.2d 412 (Pa. Super. Ct.), *appeal denied*, 552 A.2d 250 (Pa. 1988). The Pennsylvania Supreme Court only decided one case, Commonwealth v. Meyer, 412 A.2d 517 (Pa. 1980), that involved a *Terry* stop. In *Meyer*, the defendant was detained at the scene of an auto accident for thirty minutes and sat in a patrol car before being questioned. The court held that the defendant's rights were violated by the failure to give *Miranda* warnings before questioning. "We conclude that the court correctly suppressed appellee's *pre-arrest* statement." *Id.* at 518 (emphasis added).

[352] 378 A.2d 835 (Pa. 1977), *cert. denied*, 435 U.S. 947 (1978). For a

whether a reasonable man would believe that his freedom of movement is restricted.[353] Thus, the Article I, Section 8 definition of seizure for the purpose of a *Terry* stop is practically the same as one of the alternative definitions of custody for *Miranda* purposes.[354]

The Pennsylvania rule does not significantly hamper legitimate law enforcement efforts. The rule treats the realities of a street encounter with police more realistically than does the federal rule, and it provides a bright-line rule for law enforcement officers to determine when *Miranda* warnings are required.

Police are still free to conduct investigations and to ask any questions they want of any individual, so long as they do not seize the person. Once a person reasonably believes his freedom of movement is restrained, police officers should give the *Miranda* warnings. At this point a different set of psychological conditions comes into play that justify Pennsylvania's application of a different constitutional rule.

In *Berkemer v. McCarthy*, the United States Supreme Court held that *Miranda* warnings were not required during traffic stops.[355] Traffic stops are in public view and the motorist has an expectation of quick release after the checking of his license and registration and the possible issuance of a traffic ticket.[356] The Court neglected to discuss, however, the expectations of the stopped person when it analogized the traffic stop to *Terry* pedestrian stops on the street.[357] The Court observed that such

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discussion of *Jones* and the definition of seizure for search and seizure purposes, see *supra* notes 198-201 and accompanying text.

[353] *Jones*, 378 A.2d at 840 & n.7.

[354] It was no accident that the Pennsylvania Supreme Court's definition of seizure was virtually the same as its custody definition for *Miranda* purposes. *See id.* at 840 n.8.

[355] 468 U.S. 420, 440 (1984).

[356] *Id.* at 437-38.

[357] Even though traffic stops now come within the purview of Pennsylvania's definition of custody for *Miranda* purposes, the lack of coercive atmosphere associated with a routine stop for a motor vehicle violation may cause Pennsylvania to carve out an exception for *Miranda* warnings in this context. *Cf.* Commonwealth v. Dussell, 266 A.2d 659 (Pa. 1970) (neither occupants nor car may be searched pursuant to arrest for motor vehicle violation unlike rule for

Terry stops are usually brief with a few questions to which "the detainee is not obliged to respond."[358] Yet, in actuality, the reasonable expectation of the detainee, in the coercive circumstances of a *Terry* stop, is that he is expected and is required to respond. It is considered a seizure, rather than a mere police approach, precisely because it is accompanied by a sufficient show of authority, whether accompanied by only forceful words or by an additional display of authority such as a drawn gun. Very often the *Terry* stop will be accompanied by the additional serious intrusion of a frisk,[359] which is not experienced by the motorist stopped for a traffic offense. When a person is stopped by police as a suspect in criminal activity and is asked questions, the expectation is, "I had better respond, otherwise I might be taken in." From the individual's perspective, she does not know that she is only going to be asked a few questions or that she may be released a short time later unless probable cause develops. She believes she must tell the police what they want to know or be transported to a police station to be held for hours, or even placed under arrest.

Miranda warnings are a reasonable requirement to offset these coercive factors that make a reasonable person feel compelled to speak and possibly incriminate oneself. If police do not want to take the brief time required to give *Miranda* warnings during *Terry*-type stops, then they should confine their investigation to one that does not include interrogation. The Pennsylvania Supreme Court should clearly communicate that under Pennsylvania law, *Miranda* warnings are required for interrogations during *Terry* stops and thus maintain the position it has promoted in its definitions of seizure and custody for *Miranda* purposes.

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other offenses).

[358] *Berkemer*, 468 U.S. at 439.

[359] *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Commonwealth v. Medley, 612 A.2d 430, 434 (Pa. 1992).

B. Impeachment of a Defendant With Pre-Arrest Silence

In *Doyle v. Ohio*,[360] the United States Supreme Court held that it was a violation of due process for the government to impeach a defendant at trial with the fact that he was silent after receiving *Miranda* warnings.[361] However, in *Jenkins v. Anderson*,[362] the Court subsequently held that there was no constitutional violation if a defendant was impeached for his pre-arrest silence.[363] The Court reached the same result with post-arrest silence in *Fletcher v. Weir*.[364] *Doyle* was distinguished on the basis that the government induced the silence with *Miranda* reassurances and then sought to unfairly use the silence against the defendant at trial.[365]

The Pennsylvania Supreme Court has already reached a different result regarding post-arrest silence. In *Commonwealth v. Turner*,[366] the court refused to follow *Fletcher v. Weir*, and held that impeachment based upon post-arrest silence violated Article I, Section 9 of the Pennsylvania Constitution,[367] which provides a state-granted privilege against self-incrimination. The Pennsylvania Supreme Court has reversed convictions involving even a single question of the defendant that could be interpreted to refer to post-arrest silence.[368] The issue of pre-arrest silence that arose in *Jenkins v. Anderson* has yet to present itself to the court.

It is unlikely that the Pennsylvania Supreme Court, given its analysis and result in *Turner*, will permit impeachment based on pre-arrest silence. A single, constitutionally prohibited question was involved in *Turner*: "'Did you ever tell the police that somebody was shooting at you?'"[369] The court found this inquiry

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[360] 426 U.S. 610 (1976).
[361] *Id.* at 618-19.
[362] 447 U.S. 231 (1980).
[363] *Id.* at 238.
[364] 455 U.S. 603 (1982).
[365] *Id.* at 606; *Jenkins*, 447 U.S. at 239-40.
[366] 454 A.2d 537 (Pa. 1982).
[367] *Id.* at 540.
[368] *E.g.*, Commonwealth v. Clark, 626 A.2d 154 (Pa. 1993).
[369] *Turner*, 454 A.2d at 538.

to be a violation of the Pennsylvania Constitution. The court viewed such a reference as being prejudicial because "there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt."[370] This substantial prejudice was balanced against what the court called the not very probative "'insolubly ambiguous' nature of silence on the part of the accused."[371] The Pennsylvania Supreme Court concluded, unlike the United States Supreme Court, that constitutional protection from impeachment should be given not only to those who were governmentally induced into silence, but also to those who are self-motivated to exercise that constitutional right.[372]

Turner's reasoning applies with equal force whether the prosecutor's question of—why didn't you tell the police what happened?—refers to pre-arrest or post-arrest silence.[373] The right not to incriminate oneself does not arise at the moment of arrest. Individuals have a constitutional right not to speak to police during a *Terry* stop[374] or at any other time in our accusatorial system. Further, a person with potentially self-incriminating information does not have to seek out authorities. As Justice Marshall observed in his dissenting opinion in *Jenkins v.*

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[370] *Id.* at 539.

[371] *Id.* The same result could be reached on nonconstitutional grounds. Evidence commentators have argued for the exclusion of such evidence of silence, both pre-arrest and post-arrest, on the ground that it is prejudicial to the defendant and only minimally probative. *See, e.g.*, EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 160, at 429 (3d ed. 1984); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.3 (2d ed. 1987). The majority in *Jenkins v. Anderson* disavowed that it was making any finding that pre-arrest silence was particularly probative of credibility. It found this consideration to be a matter of state evidentiary law irrelevant to the constitutional analysis. Jenkins v. Anderson, 447 U.S. 231, 239 n.5, 240 (1980).

[372] *Turner*, 454 A.2d at 540.

[373] The Pennsylvania Supreme Court has already ruled that pre-arrest silence in the face of a third-person's accusation in the presence of police, is inadmissible as substantive evidence. The court abolished the tacit-admission rule in a case in which the defendant was voluntarily at the police station when the accusation was made. Commonwealth v. Dravecz, 227 A.2d 904 (Pa. 1967).

[374] *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

Anderson, "[t]he privilege prohibits the government from imposing upon citizens any duty to present themselves to the authorities and report their own wrongdoing."[375] The "insolubly ambiguous nature of [such] silence," recognized by *Turner*, is present in any pre-arrest situation. As in the post-arrest situation before *Miranda* warnings, the person may not come forward to talk to police because he may be aware of his right to remain silent, may be acting on the advice of an attorney, or he may choose to remain silent for some other innocent reason.[376] The very slight probative value of silence is offset by the same substantial prejudice recognized in *Turner*, because the jury is likely to equate silence with guilt in both situations, whether it was pre-arrest or post-arrest.[377]

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[375] *Jenkins*, 447 U.S. at 250 (Marshall, J., dissenting). "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[376] *See, e.g.*, *Jenkins*, 447 U.S. at 247-48 (Marshall, J., dissenting); State v. Brown, 488 N.W.2d 848, 852 (Minn. Ct. App. 1992) (holding that it violates state constitution to impeach defendant with pre-arrest silence on the advice of counsel); People v. Conyers, 420 N.E.2d 933 (N.Y. 1981) (holding that it violates state evidentiary rule to impeach defendant with minimally probative pre-arrest silence for which there are many innocent reasons); Anne B. Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 222-23 (1984); Debra M. Williamson, Note, *What You Do Not Say Can and Will Be Used Against You: Prearrest Silence Used to Impeach a Defendant's Testimony*, 16 VAL. U. L. REV. 537, 551-52 (1982).

[377] In finding impeachment with pre-arrest silence prejudicial and violative of its state constitution, the Oregon Court of Appeals noted that custody was not the issue because the defendant had the same right to remain silent pre-custody. State v. Marple, 780 P.2d 772, 774 n.2 (Or. Ct. App. 1989). The Pennsylvania Supreme Court has, in the past, noted that it viewed "[t]he difference between prosecutorial use of an accused's silence at *trial* and the use of an accused's silence at the time of *arrest* [as] . . . 'infinitesimal.'" Commonwealth v. Haideman, 296 A.2d 765, 767 (Pa. 1972). Given its rationale in *Turner* and previous post-arrest silence cases like Commonwealth v. Dulaney, 295 A.2d 328, 331 (Pa. 1972), in which the court condemned an exercise of the right to remain silent being used against a defendant, the court will likely view the

A Pennsylvania Superior Court panel stepped into the pre-arrest, post-arrest (*Turner*) arena by holding that impeachment by pre-arrest silence is constitutional in Pennsylvania.[378] The only reasoning offered in support of this conclusion was that *Turner* involved only post-arrest silence.[379] The result of such a holding is that the issue becomes an inquiry into whether ambiguous questions by counsel referred to pre-arrest or post-arrest silence and an analysis and application of the law of arrest to determine whether impeachment was proper.[380] For example, a defendant was held to be properly impeached with his silence at a state police barracks after the court concluded that he was not yet under arrest.[381] Yet, the fact that the defendant was not yet under arrest should be quite beside the point, because, like the defendant in *Turner*, maybe the defendant was silent because he knew he had a constitutional right to keep his mouth shut even though the state police had not advised him of his rights.

Impeachment by pre-arrest silence impermissibly burdens the right to remain silent and the right to testify.[382] The implication of such impeachment is that a defendant, who does not seek out the police to give them information that may help to convict him may later suffer a penalty if he chooses to testify.[383]

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difference between pre-arrest and post-arrest silence as also being infinitesimal.

[378] Commonwealth v. Hassine, 490 A.2d 438, 450 (Pa. Super. Ct. 1985).

[379] *Id.*

[380] *See* Commonwealth v. Freeman, 562 A.2d 375 (Pa. Super. Ct. 1989); Commonwealth v. Monahan, 549 A.2d 231 (Pa. Super. Ct. 1988).

[381] *Monahan*, 549 A.2d 231 (Pa. Super. Ct. 1988).

[382] Many commentators have reached this conclusion. *E.g.*, Sylvia L. Hackl, *Silence Is No Longer Golden: Destruction of the Right to Remain Silent*, 19 LAND AND WATER L. REV. 629 (1984); Poulin, *supra* note 376; Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 203-05 (1980); Williamson, *supra* note 376; Larry Breman, Comment, Jenkins v. Anderson*:* *The Fifth Amendment Fails to Protect Prearrest Silence*, 59 DENV. L.J. 145 (1981).

[383] In another "right to remain silent" context, the choice not to testify at trial, the Pennsylvania Supreme Court has held that it violates the Pennsylvania Constitution if the court fails to give a requested "'no-adverse-inference'" charge to the jury. Commonwealth v. Lewis, 598 A.2d 975, 979-80 (Pa. 1991). The court emphasized that this "is the only bulwark to ensure that the exercise of a

Fletcher v. Weir, which permitted the use of post-arrest silence for impeachment purposes, relied on *Jenkins v. Anderson*. The Pennsylvania Supreme Court has rejected *Fletcher*.[384] Therefore, it would be surprising if the court decides to follow *Jenkins'* pre-arrest rationale and finds the burden on the exercise of constitutional rights to be constitutionally insignificant.

C. Transactional Immunity Requirement for Compelled Testimony

The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protect against self-incrimination. One question arising out of each of these constitutional provisions is whether the government can ever compel self-incriminating testimony of an individual, and, if so, what kind of immunity is constitutionally required in return. Transactional immunity provides complete protection against prosecution for any acts to which the witness is compelled to testify. Use and derivative use immunity offer no such protection, only prohibiting the government from using the testimony, or the fruits of that testimony, in a criminal case.[385]

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fundamental right does not turn into an act of constitutional suicide." *Id.* at 980.

Permitting impeachment with pre-trial silence poses an unfair pre-trial dilemma that even an attorney is hard-pressed to successfully navigate.

> Assume you are a criminal lawyer and a client comes to you and tells you facts that might indicate possible criminal activity, what do you advise? If you tell your client to tell the police everything she knows, you are a more effective agent for the government than the police can be under *Miranda*. If you tell your client to do nothing, *Jenkins* suggests that your client may suffer as a result.

STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 528 (4th ed. 1992); *see* State v. Fencl, 325 N.W.2d 703, 711 (Wis. 1982) ("If both a person's prearrest speech and silence may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable 'Catch-22.'").

[384] *See* Commonwealth v. Turner, 454 A.2d 537, 540 (Pa. 1982).

[385] *See generally* Kastigar v. United States, 406 U.S. 441 (1972) (explaining these two types of immunity).

The United States Supreme Court originally held in *Counselman v. Hitchcock*, in 1892, that the Fifth Amendment required transactional immunity.[386] However, the states were free to provide less protection. It was not until 1964 that the Fifth Amendment protection against self-incrimination was held to be binding on the states through the operation of the Fourteenth Amendment.[387] In 1972, in *Kastigar v. United States*,[388] the United States Supreme Court overruled *Counselman* and decided that the Fifth Amendment required only use and derivative use immunity in return for compelled testimony.[389] Thus, only for the period of 1964-1972 were states required by the Federal Constitution to provide transactional immunity, and after 1972 the issue once again became only a matter of state constitutional concern.

In 1989, in *D'Elia v. Pennsylvania Crime Commission*,[390] the Pennsylvania Supreme Court held that Article I, Section 9 of the Pennsylvania Constitution was violated by the Pennsylvania Crime Commission when it compelled self-incriminating testimony in return for use and derivative use immunity.[391] Much of the reasoning of Justice Zappala's opinion in *D'Elia* suggests that Article I, Section 9 would be violated by any governmentally compelled testimony without a grant of transactional immunity.[392] Nonetheless, four members of the court concurred in finding no violation, because they interpreted the "holding to apply only to situations arising before the Pennsylvania Crime Commission which has neither legislative, executive, nor judicial powers."[393] The question is therefore open with respect to the

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[386] 142 U.S. 547, 585-86 (1892).

[387] Malloy v. Hogan, 378 U.S. 1 (1964); *see, e.g.*, Commonwealth v. Haines, 90 A.2d 842, 845 (Pa. Super. Ct. 1952) (stating that the Federal Constitution is not binding on state constitutional question concerning self-incrimination and immunity).

[388] 406 U.S. 441 (1972).

[389] *Id.* at 453.

[390] 555 A.2d 864 (Pa. 1989).

[391] *Id.* at 870-72.

[392] *Id.* at 867-68.

[393] *Id.* at 872 (Papadakos, J., concurring).

constitutionality of Pennsylvania's general immunity statute,[394] which permits prosecutors to obtain immunity orders for grand jury and judicial proceedings when the prosecutor determines that "the testimony . . . may be necessary to the public interest."[395] The statute does not provide transactional immunity; it provides protection only against the use of the compelled testimony or any information derived from that testimony against the individual in a criminal case.[396]

Unless the Pennsylvania Supreme Court now decides to grant fewer rights under the Pennsylvania Constitution than it has in the past, then the apparently open question is really a closed one. Pennsylvania decided long ago that use immunity was not sufficient under Article I, Section 9. It is past decisions of Pennsylvania's appellate courts,[397] as well as related provisions of the Pennsylvania Constitution that lead to this conclusion. Pennsylvania's first constitution in 1776 provided that a person could not "be compelled to give evidence against himself,"[398] a prohibition that has been continued in almost identical language through later Pennsylvania constitutions up to the present time.[399] As Justice Zappala noted in *D'Elia*, the constitution's privilege against self-incrimination has, "[f]rom the earliest foundations . . . been construed . . . broadly, in favor of the right it was intended to secure."[400] In fact, early nineteenth-century

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[394] 42 PA. CONS. STAT. ANN. § 5947 (1986).

[395] *Id.* § 5947(b)(1).

[396] *Id.* § 5947(d).

[397] *See, e.g.*, Commonwealth v. Lenart, 242 A.2d 259, 261-62 (Pa. 1968); Commonwealth v. Katz, 198 A.2d 570, 572 (Pa. 1964); Commonwealth v. Kilgallen, 108 A.2d 780, 786 n.4 (Pa. 1954) (dictum); *In re* Kelly, 50 A. 248, 249 (Pa. 1901) (dictum); Commonwealth v. Frank, 48 A.2d 10 (Pa. Super. Ct. 1946); *In re* Contempt of Myers, 83 Pa. Super. 383, 391-92 (1924). Commentators have also concluded that Article I, Section 9 does not permit compelled self-incriminating testimony in return for any kind of use immunity. *See, e.g.*, 2 GEORGE M. HENRY, PENNSYLVANIA EVIDENCE § 822, at 299-300 (4th ed. 1953); NATHAN KESSLER, 1 THE LAW OF CRIMINAL PROCEDURE IN PENNSYLVANIA 327 (1961); WHITE, *supra* note 33, at 104-06.

[398] PA. CONST. of 1776, ch. I (Decl. of Rights), § 9.

[399] *See* PA. CONST. art. I, § 9.

[400] D'Elia v. Pennsylvania Crime Comm'n, 555 A.2d 864, 867 (Pa. 1989).

decisions of the Pennsylvania Supreme Court, discussed in *D'Elia*, suggested that the privilege may even go beyond the protection against potential criminal prosecution, and protect against compelled responses that would expose the individual to shame or reproach.[401]

In 1874, Pennsylvania added two provisions to its constitution with respect to self-incrimination that have no analogue in the United States Constitution. Article III, Section 32 provided, in pertinent part, that a person may be compelled to testify in proceedings involving "bribery or corrupt solicitation" and "shall not be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding."[402] Article VIII, Section 10 was very similar regarding contested elections and provided as follows:

> Section 10. In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding except for perjury in giving such testimony.[403]

What is apparent is that if the Framers intended that the general prohibition against self-incrimination contained in Article I, Section 9 meant that testimony could be compelled if use immunity was provided in return, then the addition of Article III, Section 32 and Article VIII, Section 10 in the constitution of 1874 would have been entirely superfluous. There would be no necessity for special constitutional provisions concerning compelled testimony and use immunity with respect to proceedings involving bribery or contested elections because the same result would

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[401] *Id.* at 868. Twentieth-century decisions have indicated that the privilege against self-incrimination protects only against possible incrimination and not possible disgrace. *See, e.g.*, Marshall v. Carr, 114 A. 500, 502 (Pa. 1921).

[402] PA. CONST. of 1874, art. III, § 32. This provision was repealed when the present constitution was adopted in 1968.

[403] PA. CONST. of 1874, art. VIII, § 10. This provision appears as Article VII, Section 8 in the present constitution.

already be provided for by Article I, Section 9 with respect to all proceedings in Pennsylvania.

Pennsylvania's appellate courts have properly treated these two provisions as special exceptions to the general constitutional protection provided by Article I, Section 9. The question in each case where testimony has been compelled has been whether the proceedings and questions involved bribery, corrupt solicitation, or contested elections. If not, a violation of Article I, Section 9 was found; if so, then there was no constitutional violation because Article III, Section 32 or Article VIII, Section 10 permitted the compelled testimony in return for use immunity.[404]

Thus, for example, in *Commonwealth v. Katz*[405] and *Commonwealth v. Lenhart*,[406] the Pennsylvania Supreme Court held that the claim of a privilege not to testify under Article I, Section 9 should have been honored with respect to those questions not relating to bribery or corrupt solicitation, which were therefore not covered by the compelled testimony use immunity provision of Article III, Section 32.[407] Likewise, when the legislature enacted a statute that provided for compelled testimony and use immunity in cases unrelated to bribery, corrupt solicitation, or contested elections, the Pennsylvania Superior Court held that the statute was unconstitutional under Article I, Section 9 because of its failure to provide transactional immunity.[408]

The Pennsylvania Supreme Court is, of course, free to abandon prior interpretations of Article I, Section 9 and provide less protection than it has in the past and follow the United States Supreme Court in *Kastigar*. However, in light of Pennsylvania's unique constitutional framework and history, and the Pennsylvania Supreme Court's probable unwillingness to accept use and derivative use immunity as adequate protections against self-incrimination, the Pennsylvania court will most likely stay its

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[404] *See, e.g.*, *In re* Kelly, 50 A. 248 (Pa. 1901); Rosenberg Appeal, 142 A.2d 449 (Pa. Super. Ct. 1958); Commonwealth v. Haines, 90 A.2d 842 (Pa. Super. Ct. 1952).

[405] 198 A.2d 570 (Pa. 1964).

[406] 242 A.2d 259 (Pa. 1968).

[407] *Lenhart*, 242 A.2d at 261; *Katz*, 198 A.2d at 572.

[408] Commonwealth v. Frank, 48 A.2d 10 (Pa. Super. Ct. 1946).

course. In *Kastigar*, the United States Supreme Court recognized that "a grant of immunity must afford protection commensurate with that afforded by the privilege."[409] Its conclusion, however, that use and derivative use immunity provides that protection has been subject to much criticism.[410]

As Justice Zappala emphasized in *D'Elia*, "[i]f one is compelled to testify," the security of knowing that the government is left on its own to gather evidence and prosecute "vanishes entirely and the individual cannot help but wonder if he is now caught in an untraceable web of effects that might lead to the ordeal of a trial."[411] It is this "untraceable web of effects" that was the focus of the Justices' dissent in *Kastigar*.[412] This "web" is also the reason that several state courts have held on state constitutional grounds that transactional immunity is required before testimony may be compelled.[413]

Consciously or unconsciously, it is difficult to ignore what often amounts to a confession. The prosecution is provided with

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[409] Kastigar v. United States, 406 U.S. 441, 453 (1972).

[410] "The extensive law review commentary was generally critical" concerning *Kastigar*. State v. Soriano, 684 P.2d 1220, 1230 (Or. Ct. App.), *aff'd*, 693 P.2d 26 (Or. 1984); *see, e.g.*, Jeffrey M. Feldman & Stuart A. Illanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229, 249-54 (1986); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 807-10 (1978).

[411] D'Elia v. Pennsylvania Crime Comm'n, 555 A.2d 864, 871 (Pa. 1989).

[412] *Kastigar*, 406 U.S. at 466-67 (Douglas, J., dissenting); *id.* at 468-69 (Marshall, J., dissenting). Justice Brennan did not participate in the *Kastigar* decision, but he had earlier expressed the view that the Fifth Amendment required transactional immunity in order to adequately protect the witness. Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting from dismissal of certiorari).

[413] State v. Gonzalez, 853 P.2d 526 (Alaska 1993); State v. Miyasaki, 614 P.2d 915 (Haw. 1980); Attorney Gen. v. Colleton, 444 N.E.2d 915, 917 (Mass. 1982); Wright v. McAdory, 536 So. 2d 897, 903-04 (Miss. 1988); State v. Soriano, 684 P.2d 1220 (Or. Ct. App.), *aff'd*, 693 P.2d 26 (Or. 1984). The states that have considered the issue on state constitutional grounds are about evenly split on the question of whether transactional immunity is constitutionally required. *See* State v. Gonzalez, 825 P.2d 920, 933 (Alaska Ct. App. 1992), *aff'd*, 853 P.2d 526 (Alaska 1993).

what is, in effect, a pre-trial deposition to which it is not entitled that may influence how it proceeds with its case. Discretionary decisions as to whether to prosecute or negotiate a guilty plea, as well as how to cross-examine the defendant if there is a trial and he testifies, are all likely to be subtly influenced by the compelled testimony. It may appear that there has been no use or derivative use of the compelled testimony as evidence in a future criminal prosecution, but it ignores reality to believe that the individual is in the same position as if the government had not had "access to otherwise unavailable information by nullifying a constitutional privilege."[414] As the Oregon Court of Appeals concluded, "there is a wide range of situations in which use and derivative use immunity simply cannot adequately protect the witness."[415]

Curiously, Pennsylvania's present use and derivative use immunity statute, which was enacted fifteen years ago,[416] has never been squarely challenged on state constitutional grounds. When it is, the statute should not survive such a challenge. On one side of the constitutional ledger is the defendant's right against self-incrimination; on the other side is the great benefit to law enforcement that is provided by compelled self-incriminating testimony. That latter benefit has proven unpersuasive to the Pennsylvania Supreme Court as a balance to dilute constitutional protections in the search and seizure area pursuant to Article I, Section 8,[417] and it should have no greater success as an argument against providing full constitutional protection against the dangers of self-incrimination. Those compelled to testify will most likely be granted transactional immunity under state law.

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[414] *Miyasaki*, 614 P.2d at 923. *Kastigar* has been interpreted as providing no protection against nonevidentiary uses of immunized testimony. *E.g.*, United States v. Serrano, 870 F.2d 1 (1st Cir. 1989); United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

[415] *Soriano*, 684 P.2d at 1234.

[416] The present version of the statute, title 42, section 5947 of the Pennsylvania Consolidated Statutes Annotated, except for subsequent amendments not pertinent to the issue now discussed, has been in existence since 1978. 42 PA. CONS. STAT. ANN. § 5947 (1986) (Historical Note following statute).

[417] *See generally supra* notes 71-101 and accompanying text.

V. THE RIGHT TO COUNSEL

A. When the Right Attaches

The Pennsylvania Supreme Court has been sensitive to the vital role counsel plays in representing individuals who are accused of crime. It is not surprising, therefore, that the court extends protections beyond the minimum provided by the United States Constitution. For example, although the United States Supreme Court has not held that there is a constitutional right to appointed counsel for the indigent facing parole or probation revocation proceedings,[418] the Pennsylvania Supreme Court has held that there is such a right in Pennsylvania[419] and that right extends to appeals from revocation proceedings.[420]

The Pennsylvania Supreme Court has also demonstrated concern for the right to counsel of choice for those who can afford counsel. The court invalidated a rule that limited the number of cases that very busy defense lawyers, who were constantly forced to continue cases, could accept.[421] In addition, unlike the United States Supreme Court, which found no federal constitutional violation,[422] the Pennsylvania Supreme Court recently held that the Pennsylvania Constitution was violated by a forfeiture statute that did not exclude the payment of attorney's fees for criminal representation from pre-trial forfeiture.[423]

The United States Supreme Court has held that there is a right to counsel at all critical proceedings in criminal prosecutions,[424] but that right to counsel attaches only after formal adversarial

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[418] *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

[419] Commonwealth *ex rel.* Rambeau v. Rundle, 314 A.2d 842 (Pa. 1973); Commonwealth v. Tinson, 249 A.2d 549 (Pa. 1969). In a noncriminal context, where the legislature provided for a right to counsel, the Pennsylvania Supreme Court held that the right included the effective assistance of counsel. *In re* Hutchinson, 454 A.2d 1008 (Pa. 1982) (involuntary mental health commitment proceedings).

[420] Bronson v. Commonwealth, Bd. of Probation and Parole, 421 A.2d 1021 (Pa. 1980), *cert. denied*, 450 U.S. 1050 (1981).

[421] Moore v. Jamieson, 306 A.2d 283 (Pa. 1973).

[422] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

[423] Commonwealth v. Hess, 617 A.2d 307 (Pa. 1992).

[424] *E.g.*, Coleman v. Alabama, 399 U.S. 1 (1970).

proceedings have been initiated by an indictment, other charging document, or arraignment.[425] Pennsylvania, on the other hand, has recognized the critical role that counsel plays even before formal proceedings have commenced, and it has held that the right to counsel attaches at arrest.[426] That rule of law has resulted in greater rights at identification procedures. In addition, there are important implications for the interrogation process that have yet to be fully explored by Pennsylvania's appellate courts.

B. Identification Procedures and Interrogations

The United States Supreme Court held that an individual does not have a constitutional right to counsel until formally charged.[427] The point in the process at which the right to counsel attaches obviously has a tremendous impact on various phases of the criminal justice system. Without such a triggering event, the Sixth Amendment right to counsel is irrelevant.[428] However, the Pennsylvania Supreme Court has concluded, as a matter of state law, that the right to counsel attaches at the point of arrest.[429]

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[425] *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972).

[426] *See infra* note 429.

[427] *E.g.*, United States v. Gouveia, 467 U.S. 180 (1984); *see supra* note 425 and accompanying text. Although the Court interpreted the language of the Sixth Amendment, "[i]n all criminal prosecutions," to provide a right to counsel only after formally charged, it has interpreted the same Sixth Amendment language to provide a right to a speedy trial that attaches at arrest. United States v. Marion, 404 U.S. 307 (1971).

[428] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 428-30 (1986).

[429] *See, e.g.*, Commonwealth v. Karash, 518 A.2d 537, 541 (Pa. 1986); Commonwealth v. DeHart, 516 A.2d 656, 665-66 (Pa. 1986), *cert. denied*, 483 U.S. 1010 (1987); Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974); Commonwealth v. Waggoner, 540 A.2d 280 (Pa. Super. Ct. 1988), *cert. denied*, 490 U.S. 1031 (1989). Some decisions, such as *Commonwealth v. DeHart*, have referred to the right as a Sixth Amendment right, while at the same time recognizing that the Pennsylvania standard of recognizing a right to counsel at arrest "is more favorable to the accused than the federal standard." *DeHart*, 516 A.2d at 665. For the sake of clarity, it would be useful for the court to refer exclusively to a state right to counsel rather than Pennsylvania's Sixth Amendment right to counsel.

Thus, in the post-arrest, pre-charge stage of proceedings, Pennsylvania law provides greater protection than its federal counterpart.

Once the right to counsel attaches, the defendant has the right to the assistance of counsel at any critical stage of the proceedings unless waived.[430] The United States Supreme Court recognized that the identification process—where the suspect, either alone or with others, is shown to a potential identification witness—is a critical stage. In *United States v. Wade*, the Court emphasized the pitfalls of such an identification process without the presence of counsel.[431] The Court held that a post-indictment lineup without counsel violated the defendant's right to counsel.[432] The decision gave no indication that its holding was limited to post-indictment settings.[433] Based on the reasoning of *Wade*, the Pennsylvania Supreme Court in *Commonwealth v. Whiting*,[434] held that the right to counsel was violated by a post-arrest, pre-charge photo display in which the defendant was identified without counsel present.[435] The Pennsylvania Supreme Court correctly observed that the necessity for counsel was just as great with a photo identification, and that "*Wade* cannot be undercut simply by substituting pictures for people."[436]

In decisions after *Wade*, which were inconsistent with its rationale, the Court limited the right to counsel. In *Kirby v. Illinois*,[437] the Court held that the right to counsel at in-person showups did not attach until a defendant was formally

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[430] *See, e.g.*, Commonwealth *ex rel.* Wright v. Cavell, 220 A.2d 611, 613-14 (Pa. 1966). Conversely, there is no right to counsel at any point in the proceedings if what occurs is not held to be a critical stage requiring the assistance of counsel. *See, e.g.*, Commonwealth v. West, 536 A.2d 447 (Pa. Super. Ct. 1988), *appeal denied*, 544 A.2d 1342 (Pa. 1988) (holding that because a post-arrest breathalyzer test is not a critical stage of the prosecution, there is no right to counsel before deciding whether to take the test).

[431] 388 U.S. 218, 227-36 (1967).

[432] *Id.* at 236-37.

[433] *Id.* at 226.

[434] 266 A.2d 738 (Pa.), *cert. denied*, 400 U.S. 919 (1970).

[435] *Id.* at 739-40.

[436] *Id.* at 740.

[437] 406 U.S. 682 (1972).

charged.[438] In *United States v. Ash*,[439] the Court held that a display of photos was not a critical stage that required counsel. These decisions have received much criticism.[440] Pennsylvania has rejected both of these decisions, and held firm to its opinion that there is a right to counsel at virtually all post-arrest identification procedures.[441]

Relying on its decision in *Commonwealth v. Whiting*, the Pennsylvania Supreme Court unanimously rejected *Kirby v. Illinois* in *Commonwealth v. Richman*,[442] a case that involved a post-arrest, pre-formal charge lineup. The court stated, "[W]e hold that *Commonwealth v. Whiting* appropriately draws the line for determining the initiation of judicial proceedings in Pennsylvania at the arrest."[443] A majority of the court joined the opinion authored by Chief Justice Nix that rested on the court's supervisory powers to grant greater protections than those provided by the Federal Constitution.[444] Additionally, a majority also joined opinions that reached the same result as a matter of state constitutional law.

The importance of the unanimous decision in *Richman* is that Pennsylvania provided, as a matter of state law, greater protections for the accused in the area of identification.[445] More generally, the decision, amplified in subsequent decisions, established that

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[438] *Id.* at 689-90.

[439] 413 U.S. 300 (1973).

[440] *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 8.2(k), at 217-18 (2d ed. 1992); LATZER, *supra* note 3, at 114; Joseph D. Grano, Kirby, Biggers *and* Ash*: Do Any Constitutional Safeguards Remain Against Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974). A few states have declined to follow *Kirby* or *Ash* as a matter of state law. *See, e.g.*, Blue v. State, 558 P.2d 636 (Alaska 1977); People v. Bustamonte, 634 P.2d 927 (Cal. 1981).

[441] The only exception is for prompt, on-the-scene identification procedures. *See, e.g.*, Commonwealth v. Minnis, 458 A.2d 231 (Pa. Super. Ct. 1983).

[442] 320 A.2d 351 (Pa. 1974).

[443] *Id.* at 353 (citation omitted).

[444] *Id.*

[445] *See* Commonwealth v. Sanders, 551 A.2d 239, 246 (Pa. Super. Ct. 1988) (dictum), *appeal denied*, 559 A.2d 36 (Pa. 1989); Commonwealth v. Ferguson, 475 A.2d 810 (Pa. Super. Ct. 1984); Commonwealth v. Riley, 425 A.2d 813, 818 n.7 (Pa. Super. Ct. 1981) (dictum); Commonwealth v. Jackson, 323 A.2d 799, 805 (Pa. Super. Ct. 1974) (Spaeth, J., concurring opinion).

there is a single standard to determine when the right to counsel attaches for all criminal process contexts.[446] That Pennsylvania standard, attaching the right to counsel at arrest,[447] is important in defining a defendant's rights during the interrogation process, because the right to counsel attaches significantly earlier than under the federal standard. Once the right to counsel attaches, undercover officers or confidential informants can no longer elicit statements from the accused, whether in custody or not.[448] Therefore, no such questioning can occur in Pennsylvania after arrest. Likewise, once a defendant with a right to counsel asserts that right, even if not during an interrogation process or pursuant to *Miranda* warnings, police cannot administer *Miranda* warnings or otherwise attempt to obtain a statement.[449] An alleged waiver of the right to counsel in response to police interrogation is invalid.[450] These rights attach at arrest in Pennsylvania, whereas the federal constitutional protections are triggered only after a formal charge or at arraignment.[451]

In *Patterson v. Illinois*,[452] the United States Supreme Court held that once the right to counsel has attached, a defendant may still waive that right if given *Miranda* warnings.[453] Pennsylvania has reached the same conclusion under the Pennsylvania Constitution.[454] However, the *Patterson* Court also recognized that once the right to counsel has attached, that right is

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[446] *See supra* note 429.

[447] *See* Commonwealth v. Karash, 518 A.2d 537 (Pa. 1986) (stating that the right to counsel attaches at arrest, but that right was not violated by interrogation that occurred because arrest had not yet occurred); Commonwealth v. Waggoner, 540 A.2d 280 (Pa. Super. Ct. 1988) (holding that the right to counsel was violated by post-arrest questioning without waiver of right to counsel), *cert. denied*, 490 U.S. 1031 (1989).

[448] *E.g.*, Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, 474 U.S. 159 (1985); Commonwealth v. Moose, 602 A.2d 1265 (Pa. 1992).

[449] Michigan v. Jackson, 475 U.S. 625 (1986).

[450] *Id.* at 636.

[451] *Id.*

[452] 487 U.S. 285 (1988).

[453] *Id.* at 296.

[454] *See* Commonwealth v. Young, 572 A.2d 1217, 1223-24 (Pa. 1990).

determinative in other interrogation contexts.[455] In *Moran v. Burbine*,[456] the United States Supreme Court held that there was no violation of the Fifth Amendment if a defendant, who police wished to interrogate, was not told that a lawyer was trying to reach him, and the lawyer, who called on his behalf, was told by police that they would not question him.[457] The Court held that Burbine had no right to counsel because he had not yet been formally charged, and noted that "we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a '"medium" between [the suspect] and the State' during the interrogation."[458]

In *Patterson*, the Court stated that the result in *Moran v. Burbine* would have been different if the accused had a right to counsel when interrogated. "[W]e have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid."[459] Whether or not

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[455] *Patterson*, 487 U.S. at 291.

[456] 475 U.S. 412 (1986).

[457] *Id.* at 422-27.

[458] *Id.* at 428 (citations omitted).

[459] *Patterson*, 487 U.S. at 296 n.9; *see* Brewer v. Williams, 430 U.S. 387, 404-05 (1977) (finding that where the right to counsel has attached, police must honor any agreement they make with counsel not to question the accused, and that assertion of the right to counsel may be made by counsel acting as agent for the accused); *cf.* Commonwealth v. Lark, 477 A.2d 857 (Pa. 1984).

The Pennsylvania Supreme Court considered counsel's participation in the interrogation process under Article I, Section 9 of the Pennsylvania Constitution in *Lark*. A plurality of the court held that the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution were violated by the interrogation of a defendant after he was turned over to authorities pursuant to an agreement with counsel that he would not be interrogated. *Lark*, 477 A.2d at 1113 (plurality opinion); *see also* Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977) (plurality opinion) (finding the rights of the accused violated by denying counsel access to him during interrogation process). Subsequent cases, without considering the issue of whether the right to counsel had attached, have stated in dictum that police failure to honor a request by counsel to be present during interrogation, in itself, does not constitute a violation of the defendant's rights. Commonwealth v. Yarris, 549 A.2d 513, 524 (Pa. 1988), *cert. denied*, 491 U.S. 910 (1989); Commonwealth v. Rigler, 412 A.2d 846, 850 n.3 (Pa.

Pennsylvania chooses to follow *Moran v. Burbine* when the right to counsel has not yet attached,[460] the Pennsylvania rule that the defendant has the right to counsel at the time of arrest should prohibit police from concealing from the accused information that counsel is seeking to contact him or from interfering with efforts by counsel to meet with him in all post-arrest situations.

Unless the Pennsylvania Supreme Court would later decide that the right to counsel no longer attaches at arrest, individuals will receive more constitutional protection at identification procedures and during the interrogation process under

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1980), *cert. denied*, 451 U.S. 1016 (1981).

[460] A number of states have rejected *Moran*. *See, e.g.*, State v. Reed, 627 A.2d 630 (N.J. 1993). "*Moran* has not been well received." LATZER, *supra* note 3, at 92. Justice Stevens authored a forceful dissent in *Moran*, on behalf of three members of the Court, emphasizing the inconsistency between the values underlying the requirement of *Miranda* warnings and the result in *Moran*.

> The Court's holding focuses on the period after a suspect has been taken into custody and before he has been charged with an offense. The core of the Court's holding is that police interference with an attorney's access to her client during that period is not unconstitutional. The Court reasons that a State has a compelling interest, not simply in custodial interrogation, but in lawyer-free, incommunicado custodial interrogation. Such incommunicado interrogation is so important that a lawyer may be given false information that prevents her presence and representation; it is so important that police may refuse to inform a suspect of his attorney's communications and immediate availability. This conclusion flies in the face of this Court's repeated expressions of deep concern about incommunicado questioning. Until today, incommunicado questioning has been viewed with the strictest scrutiny by this Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind.

Moran, 475 U.S. at 437-39 (Stevens, J., dissenting) (footnotes omitted).

The Pennsylvania Supreme Court considers the right to *Miranda* warnings to be guaranteed under the right to counsel provision, Article I, Section 9 of Pennsylvania's Constitution, unlike the United States Supreme Court, which considers the requirement of *Miranda* warnings merely a prophylactic rule to aid the right against self-incrimination. *Compare* Commonwealth v. Romberger, 347 A.2d 460 (Pa. 1975) *with* Moran v. Burbine, 475 U.S. 412 (1986). Whether this becomes a factor in the analysis of Pennsylvania's appellate courts, when presented with a *Moran*-type issue, is unclear.

Pennsylvania law than is presently provided under the Federal Constitution.

VI. PRELIMINARY ARRAIGNMENT WITHOUT UNNECESSARY DELAY

The United States Supreme Court has never held that there is a constitutional right to be brought before a judicial authority without unnecessary delay after arrest. The Court has only given constitutional attention to the speed of the post-arrest process for those individuals arrested without a warrant, generally requiring that there be a probable cause determination within forty-eight hours of arrest.[461]

The Pennsylvania Supreme Court, however, for a long time, has had Rules of Criminal Procedure barring unnecessary delay in arraignment.[462] The court has explained that the only delay that is considered acceptable is that "justified by administrative processing—fingerprinting, photographing, and the like."[463] To implement this right and to protect the accused against the "coercive influence of custodial interrogation,"[464] the Pennsylvania Supreme Court, pursuant to its supervisory powers, now requires the suppression of those statements obtained more than six hours after arrest, if arraignment is unnecessarily delayed beyond that time.[465]

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[461] County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991); *see* Baker v. McCollan, 443 U.S. 137 (1979); Gerstein v. Pugh, 420 U.S. 103 (1975).

[462] PA. R. CRIM. P. 122-123, 130. At the preliminary arraignment, the defendant is entitled to notice of the charges and his right to counsel, as well as the setting of bail and scheduling of a preliminary hearing. PA. R. CRIM. P. 140.

[463] Commonwealth v. Williams, 319 A.2d 419, 421 (Pa. 1974). Delays for further post-arrest investigation, such as lineups, interrogation, and the execution of a search warrant are not considered necessary delays. *See, e.g.*, Commonwealth v. Davenport, 370 A.2d 301, 305 (Pa. 1977).

[464] *Davenport*, 370 A.2d at 305.

[465] Commonwealth v. Duncan, 525 A.2d 1177 (Pa. 1987). Justifiable, necessary delay in arraignment excuses compliance with this supervisory rule. *See, e.g.*, Commonwealth v. Keasley, 462 A.2d 216 (Pa. 1983). *Duncan* modified the supervisory rule of *Davenport*, which had required that if

Whatever the Pennsylvania Supreme Court ultimately decides, pursuant to its supervisory powers, concerning the suppression of statements and the six-hour rule, it seems clear that the general prohibition against an unnecessary delay in arraignment is firmly established with "roots in the Pennsylvania state constitution."[466] Twenty years ago, the Pennsylvania Supreme Court explained that "[t]he fundamental purpose of the preliminary arraignment is . . . to guarantee a citizen substantially the same rights to which he is entitled under the Pennsylvania Constitution"[467]—such as notice of the charges and bail. "The danger of any . . . unconstitutional restriction of liberty diminishes significantly when a citizen is brought swiftly before a neutral judicial authority . . . ."[468] In 1987, the Pennsylvania Supreme Court again emphasized the constitutional underpinnings of the rules barring unnecessary delay in arraignment.

> Enforcement of these rules has long been of concern to this Court. In *Davenport*, we stated that the purpose of the prompt arraignment requirement is to insure that the accused is promptly afforded the full panoply of rights and protections guaranteed by our Constitution as embodied in Pa.R.Crim.P. 140.[469]

An arraignment without unnecessary delay has helped implement another constitutional right where Pennsylvania has

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arraignment was unnecessarily delayed beyond six hours, all post-arrest statements, even those made during the first six hours, would be subject to suppression.

[466] Galie, *supra* note 3, at 306. "[T]he Commonwealth cannot successfully assert that the underpinnings of the six-hour arraignment rule are not constitutional in scope." Commonwealth v. Goldsmith, 619 A.2d 311, 315 (Pa. Super. Ct.), *appeal denied*, 625 A.2d 1191 (Pa. 1993).

[467] Commonwealth v. Dixon, 311 A.2d 613, 614 (Pa. 1973).

[468] *Id.* At arraignment, bail is set and the defendant is given a copy of the complaint which provides formal written notice of the charges. PA. R. CRIM. P. 132, 140. A defective complaint, prejudicial to the rights of the defendant, may be dismissed at that time. *See* PA. R. CRIM. P. 150. However, the determination whether there is probable cause to support the charges is made later at a preliminary hearing. *See supra* note 233 and accompanying text.

[469] *Duncan*, 525 A.2d at 1180-81 (footnote omitted).

gone further in protecting its citizens than the United States: the right to bail.

VII. THE RIGHT TO BAIL

The United States Supreme Court held that, under some circumstances, there is no violation of an individual's constitutional rights when pre-trial bail is denied on the basis of a defendant's perceived danger to the community if released. A majority of the Court concluded in *United States v. Salerno*,[470] which sustained the constitutionality of a congressional preventive detention act, that neither due process rights nor the Eighth Amendment ban against excessive bail were violated.[471] The Court interpreted the constitutional ban against excessive bail to provide only a check on the amount of bail whenever bail was set, but "[t]his Clause . . . says nothing about whether bail shall be available at all."[472] The Pennsylvania Constitution has not been interpreted in this manner.

Such pre-trial detention is clearly prohibited by Pennsylvania's Constitution. Since 1776, Pennsylvania's Constitution has not only had a ban against excessive bail,[473] but has also had a separate clause providing a right to bail for all defendants except for some who possibly face the death penalty.[474] Article I, Section 14 of the current Pennsylvania Constitution provides, in pertinent part, that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great."[475]

The Pennsylvania Superior Court has interpreted Article I, Section 14, to provide, except in some potential capital cases, a "Pennsylvania Constitutional mandate that all persons have a right

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[470] 481 U.S. 739 (1987).

[471] *Id.* at 755.

[472] *Id.* at 752.

[473] PA. CONST. art. I, § 13.

[474] Commonwealth v. Truesdale, 296 A.2d 829, 831 n.2 (Pa. 1972).

[475] PA. CONST. art. I, § 14. To deny bail altogether, the case must be one in which the death penalty may be imposed and the Commonwealth presents evidence at a hearing that would be sufficient to sustain a guilty verdict. *See* Commonwealth *ex rel.* Alberti v. Boyle, 195 A.2d 97 (Pa. 1963).

to be free prior to trial if their appearance is assured."[476] In *Commonwealth v. Truesdale*,[477] the Pennsylvania Supreme Court rejected the notion that the Pennsylvania Constitution permitted pre-trial incarceration as preventive detention because of "anticipated criminal activity."[478] The court held that bail should be granted "in the absence of evidence the accused will flee,"[479] and this right is firmly established in Pennsylvania.[480]

VIII. DOUBLE JEOPARDY PROTECTIONS

Double jeopardy protections are a unique area in Pennsylvania constitutional law because the Pennsylvania Supreme Court, although very narrowly construing the rights provided by the state constitutional provision,[481] has provided significant rights pursuant to its supervisory powers. Many years ago, the Pennsylvania Supreme Court exercised its supervisory powers and exceeded federal constitutional protections by requiring that all offenses arising from the same conduct or criminal episode be tried in a single prosecution.[482] The court also held, pursuant to its supervisory powers, that prosecution in Pennsylvania was generally barred for the same conduct if the defendant was previously prosecuted and convicted in another jurisdiction.[483] This provided

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[476] Ruckinger v. Weicht, 514 A.2d 948, 950 (Pa. Super. Ct. 1986).

[477] 296 A.2d 829 (Pa. 1972).

[478] *Id.* at 836.

[479] *Id.* at 834.

[480] Although there is no constitutional right to bail after a guilty verdict, the Pennsylvania Rules of Criminal Procedure provide for a right to bail in some post-trial and post-sentencing circumstances. PA. R. CRIM. P. 4010.

[481] Article I, Section 10 of the Pennsylvania Constitution provides, in pertinent part, that "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb." PA. CONST. art. I, § 10.

[482] Commonwealth v. Campana, 314 A.2d 854 (Pa. 1974) (*Compana II*) (per curiam). The protections of *Campana II* are codified at title 18, section 110 of Pennsylvania Consolidated Statutes Annotated. The Double Jeopardy Clause of the United States Constitution has been interpreted not to have such a requirement. *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849 (1993); Ashe v. Swenson, 397 U.S. 436 (1970).

[483] Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971). The protections of *Mills* are now codified and apply when there has been a prior prosecution in

double jeopardy protections not available under the Federal Constitution.

It was not, however, until 1992, in *Commonwealth v. Smith*,[484] that the Pennsylvania Supreme Court held that an accused had greater double jeopardy protections under the Pennsylvania Constitution than those provided by the United States Constitution.[485] For many years, the court held that the double jeopardy provision of the Pennsylvania Constitution only applied to capital cases.[486] In recent years, the court has held that the double jeopardy provision applies to all cases, but up until a few months before the *Smith* decision, it continued to hold that its protections were coextensive with those of the Double Jeopardy Clause of the United States Constitution.[487] The rationale was that "[t]he double jeopardy provision of the Pennsylvania Constitution (Article 1, Section 10) involves the same meaning, purpose and end"[488] as its federal counterpart.

In *Commonwealth v. Simons*,[489] the Pennsylvania Supreme Court held that it would use the same test under the Pennsylvania Constitution to determine whether prosecutorial misconduct would

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another jurisdiction even if it did not result in a conviction. *See* 18 PA. CONS. STAT. § 111 (1972). The Double Jeopardy Clause of the United States Constitution has been interpreted to include a "dual sovereignty" doctrine that permits successive prosecutions for the same conduct and charges by different jurisdictions. Heath v. Alabama, 474 U.S. 82 (1985); *see* Bartkus v. Illinois, 359 U.S. 121 (1959).

[484] 615 A.2d 321 (Pa. 1992).

[485] *Smith*, 615 A.2d at 325. Pennsylvania's choice to follow the United States Supreme Court in the double jeopardy area was common among many state supreme courts. Charles A. Ercole, *Developments in State Constitutional Law: 1991*, 23 RUTGERS L.J. 789, 909-10 (1992).

[486] *E.g.*, Commonwealth v. Sparrow, 370 A.2d 712, 718 n.7 (Pa. 1977); Commonwealth v. Baker, 196 A.2d 382 (Pa. 1964); *see* WHITE, *supra* note 33, at 107.

[487] *E.g.*, Commonwealth v. Lively, 610 A.2d 7, 8 (Pa. 1992); Commonwealth v. Kunish, 602 A.2d 849 (Pa. 1992); Commonwealth v. Jones, 554 A.2d 50, 52 (Pa. 1989); Commonwealth v. Sojourner, 518 A.2d 1145, 1149 n.10 (Pa. 1986); Commonwealth v. Bostic, 456 A.2d 1320, 1322 n.4 (Pa. 1983).

[488] Commonwealth v. McCane, 539 A.2d 340, 346 n.5 (Pa. 1988).

[489] 522 A.2d 537 (Pa. 1987).

bar a second trial on double jeopardy grounds, as that set forth by the United States Supreme Court in *Oregon v. Kennedy*.[490] In *Kennedy*, the United States Supreme Court held that the Double Jeopardy Clause prohibited a retrial following prosecutorial misconduct at the first trial only if the misconduct was intended to force a mistrial.[491] Five years later, *Simons* was effectively overruled by a unanimous court in *Commonwealth v. Smith*, which independently analyzed the double jeopardy test of *Oregon v. Kennedy*. The court found *Kennedy* to be unrealistic and to inadequately provide the necessary protections for those accused of crimes and subjected to prosecutorial excesses.[492]

In *Smith,* the prosecutors intended to, and did, win the first trial by unfairly suppressing critical evidence.[493] There was, however, no intent to provoke a mistrial.[494] Thus, there was no double jeopardy protection under the *Oregon v. Kennedy* test.[495] The Pennsylvania Supreme Court stated that the suppression of evidence was "prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause."[496] The court then set forth a double jeopardy test with more expansive and more reasonable double jeopardy protections than that provided by *Oregon v. Kennedy*.

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally

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[490] 456 U.S. 667 (1982).

[491] *Id.* at 679.

[492] *See* Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992); *see also* Commonwealth v. Moose, 623 A.2d 831, 836 (Pa. Super. Ct. 1993); Commonwealth v. Rightley, 617 A.2d 1289, 1293 (Pa. Super. Ct. 1992).

[493] *See Smith*, 615 A.2d at 323-24.

[494] *See id.* at 322.

[495] *See id.* at 325.

[496] *Id.* at 324.

undertaken to prejudice the defendant to the point of the denial of a fair trial.[497]

Smith is important not only for its holding, but also because it may signal the beginning of a new, independent approach to analyzing protections under Pennsylvania's double jeopardy clause. This may result in the willingness of the Pennsylvania Supreme Court to evaluate other double jeopardy issues differently than the United States Supreme Court.

IX. THE RIGHT TO A JURY TRIAL

Like the United States Constitution, the Pennsylvania Constitution has been construed to provide a right to a jury trial for all crimes except petty offenses, defined as those with a potential penalty not exceeding six months in prison.[498] Where a defendant has the right to a jury trial,[499] the United States Supreme Court has held that there is no constitutional right to a jury of twelve persons[500] or that its decision be a unanimous

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[497] *Id.* at 325.

[498] *See* Baldwin v. New York, 399 U.S. 66 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Commonwealth v. Mayberry, 327 A.2d 86 (Pa. 1974); Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985). Article I, Section 6 of the Pennsylvania Constitution provides that "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate." PA. CONST. art. I, § 6. This section has been interpreted to provide a right to a jury trial in those cases where there was a right to a jury trial when the Pennsylvania Constitution was adopted. *E.g.*, Commonwealth v. One (1) 1984 Z-28 Camaro Coupe, 610 A.2d 36, 41 (Pa. 1992) (right to jury trial for "[i]n rem forfeiture actions involving questions of whether the goods seized are contraband"). At the time the Pennsylvania Constitution was adopted, there was no right to a jury trial for summary criminal offenses, therefore, there is no right. *E.g.*, Byers v. Commonwealth, 42 Pa. 89 (1862); City of Scranton v. Hollenberg, 31 A.2d 437, 440 (Pa. Super. Ct. 1943); Bacik v. Commonwealth, 434 A.2d 860 (Pa. Commw. Ct. 1981), *appeal dismissed*, Bacik v. Pennsylvania, 456 U.S. 967 (1982).

[499] In Pennsylvania, there is no government right to a jury trial. Commonwealth v. Sorrell, 456 A.2d 1326, 1329 (Pa. 1982). Pursuant to rule 1101 of the Pennsylvania Rules of Criminal Procedure, a defendant may waive his right to a jury trial with the approval of the court. *Id.*

[500] Williams v. Florida, 399 U.S. 78 (1970). The Federal Constitution

verdict.[501] In Pennsylvania, however, the state constitution guarantees a twelve-person jury and the right to a unanimous verdict.[502]

X. CONFRONTATION RIGHTS

In recent years, a few confrontation clause issues have been addressed by the Pennsylvania Supreme Court under the Pennsylvania Constitution. One issue involved whether the prosecution is required to disclose to the defense, for purposes of cross-examination at trial, allegedly confidential records concerning a witness or complainant. In a series of decisions, including one based on the Sixth Amendment that was reversed by the United States Supreme Court,[503] the Pennsylvania Supreme Court recently clarified the extent of a defendant's rights under the Pennsylvania Constitution. If the records are not privileged, or are protected by only a common-law privilege, then the defendant has a right to examine them pursuant to the compulsory process and confrontation clause provisions of Article I, Section 9 of the Pennsylvania Constitution.[504] However, when there is a statutory

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requires that the jury consist of at least six persons. Ballew v. Georgia, 435 U.S. 223 (1978).

[501] Apodaca v. Oregon, 406 U.S. 404 (1972).

[502] *E.g.*, Commonwealth v. Collins, 110 A. 738 (Pa. 1920); *see* Blum v. Merrell Dow Pharmaceuticals, 626 A.2d 537 (Pa. 1993).

[503] Commonwealth v. Ritchie, 502 A.2d 148 (Pa. 1985), *rev'd*, Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

[504] *See* Commonwealth v. French, 611 A.2d 175 (Pa. 1992) (concluding that police internal affairs division records must be disclosed); Commonwealth v. Lloyd, 567 A.2d 1357, 1358-59 (Pa. 1989) (holding that psychiatric treatment records must be disclosed). The Pennsylvania Constitution provides:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgement of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted

privilege that provides absolute confidentiality for communications and records, the Pennsylvania Supreme Court has held that it does not violate either the Pennsylvania Constitution or United States Constitution to completely bar the defense from access.[505]

Another issue recently addressed by the Pennsylvania Supreme Court was the question of whether a child witness, under some circumstances, could testify via closed-circuit television rather than in the presence of the defendant.[506] The United States Supreme Court held that such a procedure did not violate the Confrontation Clause if, in a particular case, the government could make a showing that the child witness would suffer severe emotional trauma from testifying in the defendant's presence.[507] In *Commonwealth v. Ludwig*,[508] the Pennsylvania Supreme Court declined to follow the United States Supreme Court and held that the Pennsylvania Constitution required that there be in-court testimony in the presence of the defendant, even if there was a

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and shall not be construed as compelling a person to give evidence against himself.

PA. CONST. art. I, § 9.

[505] Commonwealth v. Wilson, 602 A.2d 1290 (Pa.), *cert. denied*, 112 S. Ct. 2952 (1992) (holding communications to sexual assault counselor are absolutely privileged under statute); *see* Commonwealth v. Kyle, 533 A.2d 120 (Pa. 1987), *appeal denied*, 541 A.2d 744 (Pa. 1988) (holding that communications to licensed psychologist are absolutely privileged under statute). The United States Supreme Court has not resolved these issues addressed by the Pennsylvania Supreme Court. With respect to the one issue decided by the United States Supreme Court, disclosure rights with respect to records that are statutorily privileged but do not provide for complete confidentiality, the Pennsylvania Supreme Court has not decided whether the Pennsylvania Constitution provides the defendant with any additional protections. In the context of Pennsylvania Child Youth Services records, in Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987), the Court held that there is no federal constitutional right to defense examination of the records, but there is a right to *in camera* judicial review and disclosure of "information material to the fairness of the trial." *Id.* The Pennsylvania Superior Court has held that the Pennsylvania Constitution confers no greater rights in this situation. Commonwealth v. Nissly, 549 A.2d 918 (Pa. Super. Ct. 1988), *appeal denied*, 562 A.2d 319 (Pa. 1989).

[506] Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991).

[507] Maryland v. Craig, 497 U.S. 836 (1990); *see* Coy v. Iowa, 487 U.S. 1012 (1988).

[508] 594 A.2d 281 (Pa. 1991).

showing that the child witness would be traumatized by this procedure.[509]

As the Pennsylvania Supreme Court explained in a companion case to *Ludwig*, "[a]lthough the result may be harsh, we cannot permit such a result to cause us to ignore the plain meaning of Article I, Section 9 of our State Constitution."[510] The court emphasized that, although the Federal Confrontation Clause guaranteed the defendant the right "to be confronted with the witnesses against him,"[511] Article I, Section 9 of the Pennsylvania Constitution provided a right to meet the witnesses face to face.[512] Pennsylvania's first constitution in 1776[513] had language virtually identical to the language now contained in the Federal Constitution. In 1790, however, the Pennsylvania Constitution was amended to provide the current language of a right to a "face to face" meeting with the witness.[514] The difference in the two constitutions demonstrates Pennsylvania's respect for a defendant's right to confront adverse witnesses.

In *Ludwig*, the Pennsylvania Supreme Court went beyond the differences in language between the two confrontation clauses. The *Ludwig* decision severely criticized the approach of the United States Supreme Court, which expressed a preference for face to face confrontation, but excused it in some circumstances even though the declarant was available.[515] The court stated, "The confrontation clause does not guarantee reliable evidence but rather it guarantees specific trial procedures that were thought to assure reliable evidence."[516]

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[509] *See id.* at 284-85.

[510] Commonwealth v. Lohman, 594 A.2d 291, 292 (Pa. 1991).

[511] U.S. CONST. amend. VI.

[512] *Lohman*, 594 A.2d at 292.

[513] The Pennsylvania Constitution of 1776, Declaration of Rights, provided, in pertinent parts: "That in all prosecutions for criminal offenses a man hath a right to . . . be confronted with the witnesses." PA. CONST. of 1776, ch. I (Decl. of Rights), § 9.

[514] The Constitution of 1790 provided, in pertinent part: "That in all criminal prosecutions the accused hath a right . . . to meet the witnesses face to face . . . ." PA. CONST. of 1790, art. IX, § 9.

[515] Commonwealth v. Ludwig, 594 A.2d 281, 283 (Pa. 1991).

[516] *Id.*

Given *Ludwig*'s holding and rationale, as well as prior decisions of the Pennsylvania Supreme Court, it seems clear that Pennsylvania will not follow the lead of the United States Supreme Court in another confrontation area. In 1980, the United States Supreme Court held, in a decision that suggested that this might be a general constitutional requirement, that the Confrontation Clause prohibited the introduction of prior testimony against a defendant unless there was a showing of unavailability.[517] However, in 1986, in *United States v. Inadi*,[518] the Court held that no showing of unavailability was required to admit hearsay testimony that fit under the coconspirator exception to the hearsay rule.[519] Also, in 1992, in *White v. Illinois*,[520] the Court reached the same conclusion with respect to statements that came within the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule.[521] The latter decision left no doubt that the Court would not find unavailability to be a constitutional requirement for the admission of statements fitting under most, if not all, of the well-established exceptions to the hearsay rule.[522]

In *White*, the United States Supreme Court reached its desired result in an opinion that demonstrated a surprising disdain for the importance of the right of cross-examination. The Court viewed an out-of-court statement that came within a firmly rooted hearsay exception as being "so trustworthy that adversarial testing can be expected to add little to its reliability."[523]

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[517] Ohio v. Roberts, 448 U.S. 56 (1980).

[518] 475 U.S. 387 (1986).

[519] *Id.* at 400.

[520] 112 S. Ct. 736 (1992).

[521] *Id.* at 743.

[522] The Court indicated that the result would be the same for all firmly rooted exceptions to the hearsay rule. *Id.* What constitutes a firmly rooted exception has never been fully explained, but apparently one that has been in existence for a long time or is accepted by most jurisdictions, will be considered firmly rooted. *Id.* at 742 n.8.; *see* Idaho v. Wright, 497 U.S. 805 (1990) (concluding that the residual exception to hearsay rule is not firmly rooted).

[523] *White*, 112 S. Ct. at 743. *Inadi* and *White* have been the subject of some scholarly criticism. *See, e.g.*, SALTZBURG & CAPRA, *supra* note 383, at 1009; Nancy H. Baughan, White v. Illinois: *The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements*, 46 VAND. L. REV.

The importance of cross-examination and face to face confrontation plays a more important role in the Pennsylvania constitutional framework. In *Commonwealth v. McCloud*,[524] the Pennsylvania Supreme Court held that Pennsylvania's confrontation clause prohibited the introduction of critical hearsay in an autopsy report, which qualified as a business record exception to the hearsay rule, unless there was a showing that the doctor declarant who prepared the autopsy report was unavailable.[525] The Court emphasized that, although "production of a critical witness may be inconvenient,"[526] only a showing of unavailability would excuse the confrontation clause requirements. *Ludwig* and other decisions[527] are entirely consistent with *McCloud*'s holding and

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235 (1993); David E. Seidelson, *The Confrontation Clause and the Supreme Court: From "Faded Parchment" to Slough*, 3 WIDENER J. PUB. L. 477 (1993); Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in* White v. Illinois *Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145 (1993); Marilyn Feuchs-Marker, Note, United States v. Inadi*: Co-Conspirators Lose the Battle Between the Confrontation Clause and Hearsay*, 21 LOY. L.A. L. REV. 543 (1988). Some state courts have ruled that their state constitutions require a showing of unavailability for confrontation clause purposes before hearsay statements, which are important to the government's case and qualify under an exception to the hearsay rule, may be admitted. State v. Ortiz, 845 P.2d 547, 556 (Haw. 1993) ("A showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants."); People v. Persico, 556 N.Y.S.2d 262, 269 (N.Y. App. Div.) ("Undoubtedly, there will be situations in which the prosecution will, as a strategic matter prefer not to produce the declarant. But the confrontation clause does not accommodate such gamesmanship."), *appeal denied*, 562 N.E.2d (N.Y. 1990).

[524] 322 A.2d 653 (Pa. 1974).

[525] *Id.* at 656-57; *see* Commonwealth v. McNaughton, 381 A.2d 929, 932 (Pa. Super. Ct. 1977).

[526] *Id.* at 657.

[527] Statements of declarants involving important evidence that have been admitted pursuant to an exception to the hearsay rule, without a finding of a confrontation clause violation, have involved unavailable declarants. *See, e.g.*, Commonwealth v. Coccioletti, 425 A.2d 387 (Pa. 1981); Commonwealth v. Stasko, 370 A.2d 350 (Pa. 1977); Commonwealth v. Hanawalt, 615 A.2d 432 (Pa. Super. Ct. 1992). *But see* Commonwealth v. Xiong, 630 A.2d 446, 453-54 (Pa. Super. Ct. 1993). The Pennsylvania right of face to face confrontation has always been viewed as guaranteeing the right to cross-examination of a declarant

Pennsylvania's constitutional mandate that a defendant is entitled to meet the witnesses against him in a courtroom "face to face," rather than being forced to fend off secondhand statements related by others.

XI. CONSTITUTIONAL RIGHT TO APPEAL

There is no constitutional right to appeal a criminal case under the Federal Constitution.[528] In Pennsylvania, before the adoption of the present Pennsylvania Constitution in 1968, there was no constitutional right of appeal except in homicide cases.[529] Appellate rights generally depended on the legislature providing a right to appeal. If the legislature specified that there would be no right to appeal, then the courts were constitutionally limited to review only whether the lower court had jurisdiction, and they could not consider the merits.[530]

In cases involving summary convictions there was a separate constitutional provision and rule which provided that a "party may appeal . . . as may be prescribed by law, upon allowance of the appellate court or judge thereof upon cause shown."[531] This provision had been inserted into the constitution of 1874 to attain uniformity. Prior practice had been that for some summary

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in person at trial. *See* Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957); WHITE, *supra* note 33, at 102.

The Pennsylvania constitutional right to confrontation and cross-examination may even extend to critical witnesses at preliminary hearings. Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) (plurality opinion) ("This [face to face] right necessarily includes the right to confront witnesses and explore fully their testimony through cross-examination."), *cert. denied sub nom.* Stevens v. Buchanan, 111 S. Ct. 1108 (1991); *see* PA. R. CRIM. P. 141(c)2 (right to cross-examine witnesses at preliminary hearing).

[528] *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 393 (1985); Abney v. United States, 431 U.S. 651, 656 (1977).

[529] *See* PA. CONST. of 1874, art. V, § 24; *see, e.g.*, Commonwealth v. Washington, 236 A.2d 772, 774 (Pa. 1968); Sayres v. Commonwealth, 88 Pa. 291 (1879).

[530] *E.g.*, Commonwealth v. Green, 128 A.2d 577 (Pa. 1957) (per curiam); *In re* Twenty-First Senatorial Dist. Nomination, 126 A. 566, 568 (Pa. 1924).

[531] PA. CONST. of 1874, art. V, § 14.

convictions for violations of penal statutes and ordinances, an appeal of right was provided, whereas for others there was no review permitted.[532] In a case involving a summary conviction after the passage of the constitutional provision in 1874, in which there previously had been a right to appeal, the Pennsylvania Supreme Court held there no longer was such a right because the constitutional provision required "cause shown" for all summary conviction appeals.[533] The Pennsylvania Supreme Court observed that "[w]e do not feel at liberty to do violence in this manner to a very plain provision of the constitution."[534] Likewise, the Pennsylvania Superior Court held that a statute, which purported to confer a right to appeal from summary convictions, was unconstitutional because it was inconsistent with the plain language of the constitutional provision.[535] The court explained the significance of the constitutional choice that had been made.

> The convention, subject to the approval of the people, might have granted the appeal as a matter of right, and designated the court to which it should be taken, or it might have provided that neither party should have the right to appeal in such cases; but it did neither of these things. What it did do was to provide that either party may appeal, subject to certain express regulations and restrictions. The section expressly gave to the legislative branch of the government the power to designate the courts to which appeals might be taken by either party in this class of cases, and inferentially it imposed upon that branch of the government the duty to so designate the courts; but it at the same time vested the power to allow the appeal in the court, and upon the judiciary it imposed the duty of inquiring into the sufficiency of the cause shown. The constitution in express terms makes the question whether an appeal shall be allowed, from the judgment of a court not of record, in any particular case of summary conviction, or action for a penalty, a judicial

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[532] Commonwealth v. McCann, 34 A. 299, 299-300 (Pa. 1896).

[533] *Id.*

[534] *Id.*

[535] Commonwealth v. Luckey, 31 Pa. Super. 441 (1906).

one to be determined by the court to which the appeal lies.[536]

This historical background is critical to an understanding of the import of what occurred in 1968 when Pennsylvania radically changed its constitutional structure with respect to appeals by repealing the summary conviction provision and enacting Article V, Section 9. Section 9 provides:

> 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, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.[537]

This language on its face is plain and unambiguous.[538] Every litigant dissatisfied with the merits of a decision by an administrative agency, court of record, or a court not of record, has a constitutional right to appeal.[539] The Pennsylvania Supreme Court has properly construed this constitutional provision to mandate a right to appeal,[540] which is absolute and exists even in the absence of the legislature creating such a right.[541]

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[536] *Id.* at 444.

[537] PA. CONST. art. V, § 9.

[538] The Pennsylvania Supreme Court has held that plain and unambiguous constitutional language must be followed. Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991) ("face to face" language in Pennsylvania's confrontation clause provision). For a discussion of *Ludwig*, see *supra* text accompanying notes 508-16 and accompanying text.

[539] It is equally clear that the language creates an absolute constitutional right to only one appeal. *See* WOODSIDE, *supra* note 6, at 423-25.

[540] *E.g.*, Bronson v. Commonwealth, Bd. of Probation and Parole, 421 A.2d 1021, 1024 (Pa. 1980), *cert. denied*, 450 U.S. 1050 (1981); Commonwealth v. Wilkerson, 416 A.2d 477, 479 (Pa. 1980); Conestoga Nat'l Bank v. Patterson, 275 A.2d 6, 10 & n.5 (Pa. 1971).

[541] *In re* Thomas, 626 A.2d 150 (Pa. 1993) (legislature did not choose to provide a right to appeal to juveniles adjudicated to be delinquent, but Article V, Section 9 affords a right to appeal that was waived here by flight during pendency of appeal).

It is clear from the plain language of the provision, the related historical background, and the debates at the Constitutional Convention of 1968[542] that the Framers intended to provide a fundamental right of review on the merits to every litigant in Pennsylvania. This right could not be limited or interfered with by the legislature or the courts, requiring a prerequisite demonstration such as "cause shown" that would have the effect of providing appellate review on the merits only to some litigants. The constitutional provision was submitted in 1968 by a legislator who was unhappy with the judicial decision to deny an appeal in a particular summary conviction case involving one of his clients.[543] There was general dissatisfaction with the constitutional provision that required "cause shown" for an appeal on the merits from summary convictions, as well as the denial of a right to appeal in zoning cases and various administrative actions.[544]

At the Constitutional Convention of 1968, there were delegates who complained that the proposed new constitutional provision would result in seriously clogged appellate courts, and an amendment was proposed that would have resumed the constitutional status quo. The provision would have provided generally that appeals would be allowed by law as determined by the legislature.[545] The proponents of change responded that they were not concerned with potential problems of clogging the courts, because they viewed a right to appeal as an important fundamental right.[546] The proposed amendment was defeated and,

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[542] Although not controlling, the remarks of individual delegates are important in shedding light on the history of Article V, Section 9. *See, e.g.*, Commonwealth v. Wilson, 602 A.2d 1290, 1294 n.4 (Pa.), *cert. denied*, 112 S. Ct. 2952 (1992).

[543] *See* WOODSIDE, *supra* note 6, at 423.

[544] *Id.*

[545] 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1968, at 870 (Feb. 15, 1968), 957-58 (Feb. 19, 1968). Some members of the Pennsylvania Supreme Court also opposed this provision. *Id.* at 448 (Feb. 5, 1968).

[546] *Id.* at 871-72 (Feb. 15, 1968), 1000-01 (Feb. 20, 1968); *see* Commonwealth v. McFarlin, 607 A.2d 730, 732-33 (Pa. 1992) (Papadakos, J., dissenting).

immediately after these remarks, Article V, Section 9 was overwhelmingly adopted by the delegates.[547]

Two issues are now discussed in the criminal procedure area that should be affected by the adoption of Article V, Section 9. The first is a statute that seems to clearly violate both the letter and the spirit of that provision; the second is an important constitutional sentencing issue, now unresolved by the Pennsylvania Supreme Court, for which Article V, Section 9 should have a major impact.

A. Statute Requiring Appellate Court to Find "Substantial Question" Presented Before Deciding a Sentencing Appeal on the Merits

The Rules of Criminal Procedure, statutes, and the Sentencing Guidelines govern the sentencing process.[548] The sentencing judge is accorded discretion in this process,[549] but it is not unlimited. It is well established in Pennsylvania that a sentence may be reversed on appeal if there has been an abuse of discretion.[550] An abuse of discretion is defined as follows:

> [I]n exercising its discretion the sentencing court must not overlook pertinent facts, disregard the force of evidence or commit an error of law. Nor may it impose a sentence exceeding that prescribed by statute. In addition, the trial court must examine the circumstances of the crime and the individual background of the defendant.[551]

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[547] In the form ultimately approved by the electorate, Article V, Section 9 was adopted by a vote of 128 to 2 (33 not voting). 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1968, at 1001 (Feb. 20, 1968).

[548] *See* PA. R. CRIM. P. 1405; 42 PA. CONS. STAT. §§ 9701-9781 (1990).

[549] 42 PA. CONS. STAT. § 9721 (1990 & Supp. 1992). The only exception is where the legislature has provided for a mandatory sentence or a mandatory minimum sentence. *See, e.g.*, 18 PA. CONS. STAT. § 1102 (1990).

[550] *See, e.g.*, Commonwealth v. Jones, 565 A.2d 732, 733-34 (Pa. 1989); Commonwealth v. Plank, 445 A.2d 491 (Pa. 1982); Commonwealth v. Townsend, 443 A.2d 1139 (Pa. 1982); Commonwealth v. Martin, 351 A.2d 650 (Pa. 1976); Commonwealth v. Felix, 539 A.2d 371 (Pa. Super. Ct. 1988), *appeal denied*, 581 A.2d 568 (Pa. 1990).

[551] Commonwealth v. Edrington, 416 A.2d 455, 457 (Pa. 1980).

Neither defendants nor the Commonwealth are now accorded a right to review on the merits of the discretionary aspects of a sentence because of title 42, section 9781(b), which requires that an allowance of appeal be granted first.[552] In pertinent part, the section provides: "Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter."[553]

This statute does exactly what Article V, Section 9 was designed to prohibit. Instead of requiring "cause shown" to be found by the appellate court before there is review on the merits, as in the pre-Article V, Section 9 procedure for appeals from summary convictions, this statute requires the appellate court to conclude that there is a "substantial question." The difference between "cause shown" and "substantial question" is slight and without legal significance. The entire purpose of Article V, Section 9 was to assure an appeal of right on the merits in every case, without the legislature and the courts having any power to limit or grant review to only some litigants. Under title 42, section 9781(b), the superior court may exercise its discretion in choosing which cases to review on the merits.[554] As the court has stated,

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[552] 42 PA. CONS. STAT. § 9781(b) (1990). There is a right to appeal the legality of the sentence. *Id.* § 9781(a). This appeal of right has been narrowly construed to include only claims that the sentence exceeded statutory limits and some constitutional claims. *See, e.g.*, Commonwealth v. Chilcote, 578 A.2d 429, 437 (Pa. Super. Ct. 1990), *appeal denied*, 590 A.2d 756 (Pa. 1991). Most claims, including those that the judge acted inconsistently with a particular provision of the Sentencing Code or erroneously applied the Sentencing Guidelines, will be considered discretionary aspects of the sentence with no right to review. *See, e.g.*, Commonwealth v. Morgan, 625 A.2d 80, 83 (Pa. Super. Ct. 1993); Commonwealth v. Losch, 535 A.2d 115, 119 n.7 (Pa. Super. Ct. 1987).

[553] PA. R. APP. P. 2116, 2119. Without passing on the constitutionality of this legislative scheme, the Pennsylvania Supreme Court enacted appellate rules that set forth the briefing procedure for implementing the statute. *See* Commonwealth v. Tuladziecki, 522 A.2d 17, 18-19 (Pa. 1987). The defendant is not entitled to have his brief read on the merits as part of the superior court preliminary review to determine whether a substantial question is presented that would entitle the defendant to an appeal on the merits under the statute. Commonwealth v. Gambal, 561 A.2d 710 (Pa. 1989).

[554] The Pennsylvania Superior Court has the final appellate word, because

"The determination of whether a particular issue constitutes a substantial question must be evaluated on a case by case basis."[555] This is a correct application of an unconstitutional statute.

A divided Pennsylvania Superior Court, sitting en banc, has upheld the constitutionality of the statute.[556] In *Commonwealth v. McFarlin*,[557] the majority gave two reasons for holding that the statute did not violate Article V, Section 9. First, the superior court stated that it is constitutional to enact reasonable regulations on the absolute right to appeal, and concluded that the statutory petition for allowance of appeal was one such regulation.[558] It is clear, however, that this is not so by examining the one 1879 case cited in support of its holding, *Sayres v. Commonwealth*,[559] which the superior court relied on without discussing the issue.[560]

In *Sayres*, the Pennsylvania Supreme Court upheld a legislative time limitation period in which to file the constitutionally guaranteed appeal from felonious homicide cases, because it was a reasonable procedural regulation.[561] Clearly, the constitutional right to appeal does not carry with it the right to appeal anytime. However, the key difference between *Sayres* and the present statute is that under the statutory scheme reviewed in *Sayres*, every person constitutionally entitled to an appeal would receive review on the merits, so long as he complied with

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the statute precludes Pennsylvania Supreme Court review of the discretionary aspects of the sentence. 42 PA. CONS. STAT. § 9781(f) (1990); Commonwealth v. Jones, 565 A.2d 732 (Pa. 1989).

[555] Commonwealth v. Morgan, 625 A.2d 80, 83 (Pa. Super. Ct. 1993).

[556] Panel decisions of the superior court had previously reached the same conclusion. Commonwealth v. Chilcote, 578 A.2d 429 (Pa. Super. Ct. 1990), *appeal denied*, 590 A.2d 756 (Pa. 1991); Commonwealth v. Smith, 575 A.2d 150 (Pa. Super. Ct. 1990).

[557] 587 A.2d 732 (Pa. Super. Ct. 1991), *aff'd*, 607 A.2d 730 (Pa. 1992) (per curiam).

[558] *Id.* at 735.

[559] 88 Pa. 291 (1879).

[560] *McFarlin*, 587 A.2d at 735.

[561] *Sayres*, 88 Pa. at 308-09.

reasonable statutory regulations for the processing of his appeal.[562]

The *Sayres* rationale has been consistently applied to modern cases when there is a constitutional right to appeal. The Pennsylvania Supreme Court has repeatedly held that Article V, Section 9 provides an absolute right to appeal, which entitles a defendant to review on the merits, unless he knowingly, intelligently, and voluntarily surrenders that right, or waives it by failing to comply with reasonable procedural requirements, or through flight or other obstruction of the appellate process.[563] The constitutional problem with title 42, section 9781(b) is that it permits the denial of review on the merits even though the defendant has complied with all procedural requirements and has not waived his right to appeal. The superior court in *McFarlin* failed to discuss this distinction.

The second reason given for the *McFarlin* holding is that the "[a]doption of McFarlin's contention would inundate the appellate courts."[564] This fear may be groundless, but even if not, that is the same argument that was made by those who opposed Article V, Section 9 before it was adopted. It cannot now provide support for ignoring the clear constitutional command that courts must provide a right to appeal despite any administrative difficulties they may experience as a result.

When considering the plain language of the "face to face" provision of Pennsylvania's confrontation clause, the Pennsylvania Supreme Court held that it was required to enforce the unambiguous provision even if the results seem harsh.[565] The explicit constitutional provision adopted in 1968 is entirely compromised by a statute that conditions the right to appeal on a court first deciding whether to grant an allowance of appeal. The

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[562] *Id.*

[563] *E.g.*, *In re* Thomas, 626 A.2d 150 (Pa. 1993); Commonwealth v. Passaro, 476 A.2d 346, 348 (Pa. 1984); Commonwealth v. Wilkerson, 416 A.2d 477, 479 (Pa. 1980); *see* Ryan v. Johnson, 564 A.2d 1237, 1239 (Pa. 1989); WOODSIDE, *supra* note 6, at 425-26.

[564] *McFarlin*, 587 A.2d at 736.

[565] Commonwealth v. Lohman, 594 A.2d 291, 292 (Pa. 1991); Commonwealth v. Ludwig, 594 A.2d 281, 283 (Pa. 1991).

order in *McFarlin* was affirmed by the Pennsylvania Supreme Court per curiam.[566] It is unclear whether this represents a ruling on the merits.[567] In any event, it is important that the Pennsylvania Supreme Court review the constitutionality of title 42, section 9781(b), not only because the rights of criminal defendants are violated, but also because it represents an impermissible, legislative incursion abridging the constitutional right to appeal that may be repeated in other areas.

B. Increase in Sentence Following an Appeal by the Defendant

In *North Carolina v. Pearce*,[568] the United States Supreme Court noted that there was no constitutional right to appeal, but that due process of law protects a defendant against possible vindictiveness after a successful appeal.[569] The Court observed that the fear of such vindictiveness could deter a defendant from appealing and that "increased sentences on reconviction are far from rare."[570] The Court stated that due process required "that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."[571] Therefore, the Court held that whenever a defendant received a more severe

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[566] Commonwealth v. McFarlin, 607 A.2d 730 (Pa. 1992) (per curiam).

[567] In *McFarlin*, the superior court denied the petition for allowance of appeal and, therefore, affirmed the judgment of sentence. *McFarlin*, 587 A.2d at 736. It is well settled that the Pennsylvania Supreme Court can affirm the order of an intermediate appellate court for any reason, even one not considered by that court or raised by the parties. *E.g.*, McAdoo Borough v. Commonwealth, Pa. Labor Relations Bd., 485 A.2d 761, 764 n.5 (Pa. 1984); Gwinn v. Kane, 348 A.2d 900, 905 n.12 (Pa. 1975). Thus, the Pennsylvania Supreme Court has held that an unexplained per curiam order, such as the one it issued in *McFarlin*, "constitutes no precedent of this Court." *In re* Jones, 476 A.2d 1287, 1294 n.12 (Pa. 1984). However, the legal effect of per curiam Pennsylvania Supreme Court orders is now in a confused state because of the per curiam order in Commonwealth v. Gretz, 554 A.2d 19 (Pa. 1989) (per curiam), which held, without discussing relevant prior precedent, that a prior per curiam order of that court constituted binding precedent.

[568] 395 U.S. 711 (1969).

[569] *Id.* at 724-25.

[570] *Id.* at 725 n.20.

[571] *Id.* at 725 (footnote omitted).

sentence upon retrial, there would be a presumption of vindictiveness that would not be overcome unless the new sentence was based on information concerning the conduct of the defendant after the initial sentencing.[572]

Subsequent decisions of the Court, emphasizing that the essence of the *Pearce* due process right was the fear of vindictiveness, have held that there is no bar to an increased sentence when the sentencer is different the second time around. This is so because there could be no presumption of possible vindictiveness when the sentence is not imposed by the original judge who was reversed by an appellate court. Thus, no reasons for exceeding the first sentence need be given if the increased sentence after retrial occurs when a jury decides one or both of the sentences.[573] This is also true if a different judge is involved, as in a two-tiered system, which provides an automatic right to appeal and a trial de novo after trial before an inferior court.[574]

As any practicing lawyer knows, there is a risk of vindictiveness even with a different judge on retrial because of potential institutional resentment toward the defendant for having made the system try him again.[575] More fundamentally, the major problem is not with vindictiveness, but with the fact that exercising the right to appeal presents a substantial gamble that could result in putting the defendant in a much worse position after a "successful" appeal than he had been before the appeal. That is why lawyers frequently try to persuade clients to forego meritorious appeals; the cure might be far worse than the illness of an unfair trial.

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[572] *Id.* at 725-26.

[573] Texas v. McCullough, 475 U.S. 134 (1986) (jury sentenced after first trial; judge who was not reversed by appellate court sentenced after second trial); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (different juries decided sentence after first and second trials).

[574] Colten v. Kentucky, 407 U.S. 104 (1972); *see* Rock v. Zimmerman, 959 F.2d 1237, 1257-58 (3d Cir.), *cert. denied*, 112 S. Ct. 3036 (1992). *North Carolina v. Pearce* involved different judges sentencing at the first and second trials, a fact not mentioned in that opinion and later discounted in reaching an opposite constitutional conclusion. *See McCullough*, 475 U.S. at 140 n.3.

[575] *See Colten*, 407 U.S. at 126-27 (Marshall, J., dissenting).

It is difficult to see what legitimate, societal interest is served by having the possibility of a higher sentence hang over a defendant's head, even though he has committed no misconduct since the first sentencing.[576] If the defendant has been denied a fair trial at the first proceeding, he deserves an unimpeded right to appeal without fearing additional punishment. Likewise, with a two-tiered system, such as the municipal court system in Philadelphia,[577] a defendant should not be deterred from appealing and getting a trial de novo, where, for the first time, he will receive his constitutionally guaranteed right to a jury trial.[578]

With respect to these issues, the Pennsylvania appellate courts have followed the lead of the United States Supreme Court on federal due process grounds, but have never considered state constitutional law claims.[579] Several state courts have chosen to

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[576] *See, e.g.*, Michael D. Beck, Note, *Preventing Vindictiveness In Retrials—Is The Distinction Between Prosecutor, Judge and Jury Really Justified?*, 6 CRIM. JUS. J. 235, 258 (1983); Allan S. Brilliant, Note, *Fifth Amendment—Sentence Enhancement: Rethinking the* Pearce *Prophylactic Rule*, 75 J. CRIM. L. & CRIM. 716, 725-27 (1984). Even when *Pearce* due process concerns do apply because the same sentencer is involved in both proceedings, the Court has held that the sentence may be increased without any antisocial, post-first sentencing conduct by the defendant, if there are other intervening events or new evidence concerning the defendant's conduct. *McCullough*, 475 U.S. at 134; Wasman v. United States, 468 U.S. 559 (1984); *see* Commonwealth v. Maly, 558 A.2d 877 (Pa. Super. Ct. 1989) (new psychological report is not new evidence of identifiable conduct that justifies increase).

[577] *See* PA. R. CRIM. P. 6001-6013.

[578] Municipal court proceedings in Philadelphia apply to misdemeanors with a penalty no greater than five years. *Id.* The defendant has a constitutional right to a jury trial whenever the maximum penalty for the offense is greater than six months. *See supra* notes 498-502 and accompanying text. For almost every municipal court trial the defendant has a constitutional right to a jury trial because misdemeanors in Pennsylvania generally carry a maximum possible penalty of at least one year. *See* 18 PA. CONS. STAT. § 106(b) (1990).

[579] *E.g.*, Commonwealth v. Martorano, J-136-1993 (E.D. Pa. Nov. 8, 1993); Commonwealth v. Mikesell, 537 A.2d 1372 (Pa. Super. Ct.), *appeal denied*, 551 A.2d 214 (Pa. 1988); Commonwealth v. DeCaro, 444 A.2d 160 (Pa. Super. Ct. 1982); Commonwealth v. Visconto, 448 A.2d 41 (Pa. Super. Ct. 1982). In *Mikesell*, Judge Beck, in dissent in a case raising only federal claims, noted that the state constitutional issue was an open one. *Mikesell*, 537

rule on state law grounds that regardless of who the sentencer is at the second proceeding, a sentence may not be increased after a defendant's appeal unless warranted by intervening conduct of the defendant. These courts have done so because they found that otherwise there was a serious chilling effect on a defendant's right to appeal.[580] Significantly, almost all of these states did so even in the absence of a state constitutional right to appeal.[581]

The argument is much stronger in Pennsylvania where there is such a right and not merely a statutory right. Article V, Section 9 guarantees a right of appeal to all litigants. To ensure that right is a reality for criminal defendants, it is likely that the Pennsylvania Supreme Court, as a matter of state constitutional law, will hold that defendants may appeal without worrying that a successful appeal may lead to a longer sentence simply because a different judge presides at a retrial.

XII. CONCLUSION

In many areas the Pennsylvania Supreme Court has extended greater procedural protections to the accused under the Pennsylvania Constitution than are provided by counterpart provisions in the United States Constitution. This trend should accelerate in the coming years because a body of decisional law interpreting many provisions of the Pennsylvania Constitution has sufficiently developed to provide a set of core values that will provide guidance for deciding new issues that will arise. Given the Pennsylvania Supreme Court's willingness to independently analyze claims under the Pennsylvania Constitution, those issues

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A.2d at 1382 n.1 (Beck, J., dissenting).

[580] *E.g.*, Commonwealth v. Martorano, No. J-136-1993 (E.D. Pa. Nov. 8, 1993) (per curiam); State v. Violette, 576 A.2d 1359, 1361 (Me. 1990); State v. Holmes, 161 N.W.2d 650, 653, 656 (Minn. 1968); People v. Van Pelt, 556 N.E.2d 423 (N.Y. 1990); State v. Turner, 429 P.2d 565, 571 (Or. 1967); State v. Sorensen, 639 P.2d 179, 180 (Utah 1981); State v. Eden, 256 S.E.2d 868, 875 (W. Va. 1979); *see* State v. Washington, 380 So. 2d 64, 66 (La. 1980) (per curiam) (holding that an increase to death sentence after second trial would violate state constitution; constitutional issue not decided for other contexts).

[581] Of the decisions listed in *supra* note 580, only *Sorensen* and *Washington* rested in whole or in part on a violation of a state constitutional right to appeal.

are being raised with increasing frequency in the courts. Therefore, lower courts, which have only rarely exercised the power and responsibility to independently analyze the Pennsylvania Constitution, may begin to fulfill that duty more often, given clear signals by the Pennsylvania Supreme Court on closely related issues.

The predictions in this Article are based, in part, on the past conduct exemplified by the Pennsylvania Supreme Court, and in part, on the history and text of constitutional provisions the court has not yet fully analyzed. Only time will tell whether the trend to grant more rights than the minimum granted by the Federal Constitution is one that will continue, and, whether it will proceed in the direction suggested here.