



November 10, 2011

Via Facsimile and Electronic Mail

President
Barbara A. Zemlock

President-Elect
James A. Swetz

Vice President
Eastern District
Christopher M. Patterson

Middle District
Philip Gelso

Western District
John A. Knorr

Secretary
David R. Crowley

Treasurer
Mark B. Sheppard

Immediate Past President
Michael J. Engle

Past Presidents
Arthur T. Donato, Jr.
Stanton D. Levenson
Joshua D. Lock
J. Richard Gray
Charles P. Gelso*
Joel P. Trigiani
Sara M. Webster
Robert J. Donatoni
Caroline M. Roberto
David R. Eshelman
Frank W. Nocito
John J. Kerrigan, Jr.
Gary Neil Asteak
Joseph M. Cosgrove
Bernard L. Siegel
Royce L. Morris

Executive Director
Debra H. McGovern

*Deceased

Anne T. Panfil, Chief Staff Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
Pennsylvania Judicial Center, Suite 6200
601 Commonwealth Avenue
P.O. Box 62635
Harrisburg, PA 17106-2635

**Re: Proposed New Pa.Rs.Crim.P. 556 Through 556.12
And Proposed Correlative Changes to Pa.Rs.Crim.P. 103, 540,
542, 544, 547, 560, 573, 578, 582, 646, 648, 1003 and 1101**

Dear Ms. Panfil:

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a statewide professional organization representing the interests of the criminal defense bar throughout the Commonwealth of Pennsylvania, consisting of over 800 members. We are in receipt of the Proposed New Rules of Criminal Procedure which pertain to Indicting Grand Juries, with the Proposed Correlative Changes, as referenced above. On behalf of our members, we write to advise of PACDL's strong opposition to the Proposed New Rules and the Proposed Correlative Changes.

In short, proposed Rules 556 through 556.12 permit a court of common pleas to impanel an Indicting Grand Jury in cases in which the Commonwealth submits an *ex parte* motion to the president judge averring that witness intimidation has occurred, is occurring, or is likely to occur. *See*, Proposed Rules 556 and 556.1. Where the Commonwealth moves to present the matter to an Indicting Grand Jury, no preliminary hearing will be held. *See*, Proposed Rule 556.2(A). The Proposed Rules also address the composition of the Indicting Grand Jury; challenges to the Indicting Grand Jury and Grand Jurors; the duration of the Indicting Grand Jury; the recording of testimony before the Indicting Grand Jury; those who may be present during the session of the Indicting Grand Jury; the "secrecy" of the Indicting Grand Jury proceedings; proceedings when the case is presented to the Grand Jury; and the waiver of an Indicting Grand Jury action.

These Proposed Rules generate significant issues. First, the Proposed Rules are beyond the rule-making authority of the Supreme Court, as they implicate substantive rights. Second, the Proposed Rules are unnecessary, as the criminal justice system already has processes in place to remedy the issues which the Proposed Rules purportedly seek to address. Third, the Proposed Rules contain numerous procedural infirmities which directly impact a citizen's right to the effective representation of counsel. Each of these issues will be addressed *seriatim*.

The Proposed Rules infringe upon the substantive rights of an accused to be free from a prosecution commenced via an Indicting Grand Jury and, hence, are beyond the scope of the Supreme Court's rulemaking authority authorized by Article V, Section 10(c) of the Constitution of the Commonwealth of Pennsylvania. As this Committee is likely aware, prior to 1973, an individual who was accused of a crime was entitled to a preliminary hearing and, if a *prima facie* case were established, the matter would be bound over to an Indicting Grand Jury. Thereafter, the Indicting Grand Jury would determine whether a Bill of Indictment should issue.

In 1973, the Constitution of the Commonwealth was amended so as to authorize the court of common pleas to provide for the initiation of criminal proceedings by information "filed . . . in the manner provided by law." A copy of Joint Resolution No. 2 reflecting this amendment to the Constitution is attached hereto as Appendix "A." To implement the foregoing amendment, the Legislature passed Act No. 238 of 1974. A copy of Act No. 238 of 1974 is attached hereto as Appendix "B." Addressing the jurisdiction of the courts of common pleas, Act No. 238 provided:

The several courts of common pleas which have obtained the approval of the Supreme Court of Pennsylvania to provide for the initiation of criminal proceedings by informations instead of by grand jury indictments, shall possess and exercise the same power and jurisdiction as they heretofore possessed in cases of prosecutions upon indictments. . . .

See, Act No. 238 of 1974, § 1. Act No. 238 also provided that "[n]o information shall be filed by the district attorney or the special attorney appointed by the Attorney General in the manner provided by law concerning alleged criminal violations where a preliminary hearing has not been held or properly waived except as provided in the rules of criminal procedure. *Id.* at § 3.(b). Importantly, Act 238 abolished Indicting Grand Juries and provided the substantive right to an accused to not have a case proceed via an Indicting Grand Jury. Specifically, § 5 of Act No. 238 provides:

No grand jury shall be impaneled in any judicial district where this act is applicable for the purpose of considering bills of indictment: Provided, however, That nothing in this act shall prohibit the impaneling

as heretofore of, or affect the functioning of, a grand jury for the purpose of investigating offenses against the criminal laws of the Commonwealth or for any other purpose as provided by law.

Id. at § 5.

Clearly, the Legislature divested courts of common pleas of the jurisdiction to provide for the initiation of criminal proceedings via an Indicting Grand Jury once a determination was made to initiate criminal proceedings via an information, thus effectively providing a substantive, positive right to an accused to be free from indictment by an Indicting Grand Jury.

In 1978, as part of the Judiciary Repealer Act, Act 238 was replaced and amended by 42 Pa.C.S. § 8931. Significantly, the Legislature, through 42 Pa.C.S. § 8931, continued the explicit abolition of an Indicting Grand Jury and, again, expressly provided that “[n]o grand jury shall be impaneled in any judicial district where this section is applicable for the purpose of considering bills of indictment . . .” 42 Pa.C.S. § 8931(f). Through § 8931, the Legislature provided to the courts of common pleas the same power and jurisdiction over proceedings initiated via criminal information as they possessed in cases of prosecution upon indictments. 42 Pa.C.S. § 8931(c). Importantly, the Legislature expressly provided that “[n]o information shall be filed by the district attorney concerning alleged criminal violations where a preliminary hearing has not been held or properly waived except as prescribed by general rules.” 42 Pa.C.S. § 8931(d).

Hence, it is patent that the Legislature abolished the Indicting Grand Jury, consistent with Article I, Section 10 of the Commonwealth’s Constitution. Courts of common pleas no longer have the authority to impanel, or jurisdiction over, any Indicting Grand Jury, and individuals have a positive right to be free from prosecution via an Indicting Grand Jury. Pursuant to Article V, § 10(c) of the Commonwealth’s Constitution, the Supreme Court has no authority to, among other things, “. . . 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 . . .” Pennsylvania Const., Art. V, § 10(c). The reinstatement of an Indicting Grand Jury requires an act of the Legislature. Insofar as the Proposed Rules seek to reinstitute an indicting entity that has been abolished via, arguably, Article I, Section 10 of the Constitution of the Commonwealth and, definitively, via 42 Pa.C.S. § 8931, the Supreme Court does not have the authority under Article V, Section 10(c) to promulgate the Proposed Rules.

Not only does the Supreme Court lack the authority to promulgate the Proposed Rules, but, regardless, the Proposed Rules are unnecessary. The Report on Indicting Grand Juries that was submitted with the Proposed Rules reflects that the impetus for the Proposed Rules is a Philadelphia Inquirer series of articles that reported on a purported problem “. . . within the criminal justice system of the First Judicial District.” *See*, Report, Section I. The Report reflects that one of the problems identified in the newspaper article concerned intimidation by threats of violence to witnesses and/or witnesses’ family members. The Report does not reflect that if some issue does exist, it extends beyond the boundaries of the First Judicial District.

Neither this Committee nor the Supreme Court should propose rules which substantively alter the rights of an accused and abolish a proceeding which has been integral to the criminal justice system based solely on newspaper articles and an issue which, if it exists, is isolated to a single Judicial District. Indeed, the Proposed Rules threaten to effectively abolish preliminary hearings throughout the Commonwealth of Pennsylvania, despite the fact that only Philadelphia has been identified as a potential source of problems. Quite frankly, it is incomprehensible that the Supreme Court would so radically alter the Rules of Criminal Procedure based on some specific issue in a single county. No reason exists to foist upon the Commonwealth, as a whole, a radical change to the Rules of Criminal Procedure based on what may be occurring in Philadelphia. When the Indicting Grand Jury did exist decades ago, the presentation of the case to the Indicting Grand Jury was preceded by a preliminary hearing. The procedure that the Committee currently is proposing is unlike any that Pennsylvania has known.

Additionally, the Committee cannot ignore the fact that, if an issue with witness intimidation does exist, a remedy for the same is already in place. The Legislature specifically retained Investigating Grand Juries. *See*, 42 Pa.C.S. § 8931(f). If the Commonwealth has a concern that witness intimidation has or may occur, no reason exists as to why the Commonwealth cannot present its case to an Investigating Grand Jury.

Moreover, if witness intimidation has occurred, or if there is an attempt to intimidate a witness, the Crimes Code provides an offense for victim and witness intimidation. Specifically, pursuant to 18 Pa.C.S. § 4952, a person can be charged with offenses that can be graded as high as a felony of the first degree for engaging in specified conduct which seeks to intimidate a witness or a victim. Furthermore, pursuant to 18 Pa.C.S. § 4953, an individual can be charged with an offense for retaliating against a witness, victim or party. Given the remedies available to the Commonwealth to address the evils associated with witness or victim intimidation, no legitimate reason exists to abolish preliminary hearings and proceed via an Indicting Grand Jury based on a purported problem in one Judicial District.

In addition to the foregoing, the procedural infirmities with the Proposed Rules cannot be ignored. The Proposed Rules essentially permit the Commonwealth to forego a critical proceeding (to wit, a preliminary hearing) simply by filing an *ex parte* motion with the president judge, averring that witness intimidation has occurred, is occurring or is likely to occur. *See* Proposed Rule 556.2(A)(1)-(2). The Rule does not provide for any burden of proof; it does not require the Commonwealth to present facts establishing by a preponderance of the evidence or clear and convincing evidence that witness intimidation has occurred, is occurring or is likely to occur. It cannot be disputed in good faith that the end result is, effectively, no judicial scrutiny concerning an *ex parte* Motion which will deprive an accused of the opportunity to hear what evidence may exist against him or her, and to challenge the same before proceeding to trial.

It is acknowledged that Rule 556.4(B) provides for a Motion to Dismiss and indicates that a defendant may move to dismiss an information filed following a grand jury's vote to indict based on, *inter alia*, the failure to establish probable cause that the defendant committed the crime or crimes charged, or that the statute of limitations has expired. *See*, Proposed Rule 556.4(B).

Pursuant to Subsection (C), a motion to dismiss “shall be made as part of the omnibus pretrial motion.” *See*, Proposed Rule 556.4(C).

Noteworthy is the fact that Indicting Grand Jury proceedings are to be secret (Proposed Rules 556.9(C) and 556.10(A)). Defense counsel is not permitted to be present. Pursuant to the Proposed Rules, however, the Commonwealth is not required to disclose transcripts of the testimony of any witnesses who have testified before the Indicting Grand Jury until thirty (30) days before the commencement of trial. Rule 579 requires omnibus pretrial motions to be filed and served within 30 days after arraignment. *See*, Pa.R.Crim.P. 579. In most counties, it is likely that the Commonwealth would have not yet disclosed the Grand Jury testimony to defense counsel within the time parameters of Rule 579. Although it is acknowledged that Rule 579 does permit the filing of an omnibus pre-trial motion where an opportunity to file the same did not exist within 30 days after arraignment, it cannot be disputed that, during the 30 day period prior to trial, defense counsel is gearing up for trial. Depending on the nature of the case, substantial sums of money may have already been spent preparing for the same. Defense counsel should not be put in a position, 30 days prior to trial, of needing to assess whether a *prima facie* case was even established in the first instance, or whether a statute of limitations defense may exist. Frankly, the Court should not be burdened with assessing, at this late date in the proceeding, whether a *prima facie* case existed. The proposed Rule is patently unfair to defendants and is equally unfair to the Court.

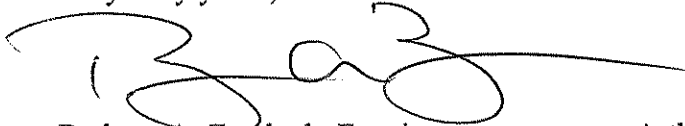
In addition to the foregoing, Proposed Rule 556.11(B) provides that the Indicting Grand Jury has the authority to, “based upon evidence it has received, including hearsay evidence as permitted by law,” indict a defendant for an offense under the criminal laws of the Commonwealth of Pennsylvania. *See*, Proposed Rule 556.11(B). With respect to the presentation of hearsay evidence to an Indicting Grand Jury, the Comment to Rule 556.11 cites Commonwealth v. Dessus, 423 Pa. 177, 224 A.2d 188 (1966). In relevant part, Dessus states that “[t]he law is well settled in Pennsylvania that an indictment can be found by a Grand Jury based upon hearsay testimony or upon evidence which was incompetent or inadequate to make out a *prima facie* case.” Dessus, 423 Pa. at 181, 224 A.2d at 191 (citations omitted). Hence, the Proposed Rules apparently permit an individual to be indicted and forced to trial based on unchallenged testimony, hearsay testimony, and evidence which may be incompetent to establish a *prima facie* case that the accused was involved in some wrongdoing.

One cannot ignore the fact that, even under our current criminal justice system, wrongful convictions occur. It is no longer uncommon to read about the fact that, through forensic evidence, a determination has been made that some individual has been wrongfully convicted of a crime. Many wrongful convictions have been attributed to mistaken eye witness identification and/or the ineffective assistance of counsel. The Proposed Rules seek to abolish a critical proceeding which provides not only an opportunity to test eye witness testimony and the strength of the Commonwealth’s case, but also to assist defense counsel in beginning to prepare an effective defense. The proposed Indicting Grand Jury Rules do not move Pennsylvania’s criminal justice system forward; instead, they shove the system backward.

Anne T. Panfil, Chief Staff Counsel
November 10, 2011
Page 6

PACDL believes that the Proposed Rules wholly undermine the rights of an accused, while failing to advance any real need of the Commonwealth. We sincerely thank the Committee for providing PACDL with this opportunity to comment on these very significant proposed changes. If any member of the Committee has any questions or concerns regarding the information herein, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Barbara A. Zemlock', with a long horizontal flourish extending to the right.

Barbara A. Zemlock, Esquire
President, PACDL

Arthur T. Donato, Jr., Esquire
Past President, PACDL;
Member Pennsylvania Criminal Procedural Rules
Committee 1992-1998

Michael J. Engle
Past President, PACDL

David B. Chontos, Esquire
Chair, PACDL Criminal Rules Committee

APPENDIX A

(This Joint Resolution No.2 was passed for the first time at the Legislative Session of 1971 as Joint Resolution No.7 and for the second time at the Legislative Session of 1973 and was approved by the electorate on November 6, 1973.)

No. 2

A JOINT RESOLUTION

SB 117

Proposing an amendment to article one, section ten of the Constitution of the Commonwealth of Pennsylvania authorizing courts of common pleas to provide for the initiation of criminal charges by information.

The General Assembly of the Commonwealth of Pennsylvania hereby resolves as follows:

Section 1. The following amendment to the Constitution of the Commonwealth of Pennsylvania is proposed in accordance with the provisions of the eleventh article thereof:

That section ten, article one of the Constitution of the Commonwealth of Pennsylvania be amended to read:

Section 10. **[Criminal Information] *Initiation of Criminal Proceedings***; Twice in Jeopardy; Eminent Domain.—**[No] *Except as hereinafter provided no*** person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. ***Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law.*** No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Section 2. The proposed amendment shall be submitted by the Secretary of the Commonwealth to the qualified electors of the State, at the election next held after the advertising requirements of article eleven, section one of the Constitution of the Commonwealth of Pennsylvania have been satisfied.

APPENDIX B

No. 238

AN ACT

SB 1546

Implementing the amendment to Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania, authorizing courts of common pleas with the approval of the Supreme Court to provide for the initiation of criminal proceedings by information instead of by grand jury indictment; providing for the manner of filing such information; placing duties on the courts, district attorneys, special attorneys appointed by the Attorney General and officers of the court.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Jurisdiction; Clerk.—The several courts of common pleas which have obtained the approval of the Supreme Court of Pennsylvania to provide for the initiation of criminal proceedings by informations instead of by grand jury indictments, shall possess and exercise the same power and jurisdiction as they heretofore possessed in cases of prosecutions upon indictments. The clerk of the court or the officer of the court designated by it, shall file the transcript of proceedings, complaint and all related papers received by it, receive and file informations presented by the district attorney or the special attorney appointed by the Attorney General in the manner provided by law, and record all business of the court relative to criminal prosecutions.

Section 2. Scope of the Act.—This act shall not affect criminal proceedings held before the Municipal Court of Philadelphia, district justices of the peace and magistrates, as now provided by law and rules of criminal procedure, nor, except as herein provided, shall it affect criminal proceedings subsequent to the filing of the information by a district attorney or a special attorney appointed by the Attorney General in the manner provided by law. Except as otherwise provided in this act or to the extent that they are specifically inconsistent with prosecutions initiated by information, existing statutory law applicable to criminal prosecutions initiated by indictment shall be applicable to the information filed by a district attorney or a special attorney appointed by the Attorney General in the manner provided by law hereunder.

Section 3. Duty of District Attorney or Special Attorney to Examine Each Transcript Returned; Necessity of Preliminary Hearing.—(a) Whenever a transcript of proceedings, complaint and all related papers in a criminal proceeding where the defendant has been held for court have been transmitted to the clerk of the common pleas court or the court's designated officer, he, after recording same, shall immediately transmit the documents or a copy thereof to the district attorney or the special attorney appointed by the Attorney General in

the manner provided by law. The district attorney or the special attorney appointed by the Attorney General in the manner provided by law, or their designees, shall have the duty to inquire into and make full examination of all the facts and circumstances connected with each such case to determine if the facts and circumstances warrant the filing of an information or informations premised upon the transcript.

(b) No information shall be filed by the district attorney or the special attorney appointed by the Attorney General in the manner provided by law concerning alleged criminal violations where a preliminary hearing has not been held or properly waived except as provided in the rules of criminal procedure.

Section 4. Disposition of Cases.—The district attorney or the special attorney appointed by the Attorney General in the manner provided by law shall sign all informations. The information shall be filed in such form as the rules of criminal procedure provide. After the filing of the information, he shall not enter a nolle prosequi or dispose of any criminal cases or discharge a prisoner from custody by means of a proceeding in lieu of plea or trial without having obtained the approval of the court.

Section 5. Investigating Grand Juries Not Affected.—No grand jury shall be impaneled in any judicial district where this act is applicable for the purpose of considering bills of indictment: Provided, however, That nothing in this act shall prohibit the impaneling as heretofore of, or affect the functioning of, a grand jury for the purpose of investigating offenses against the criminal laws of the Commonwealth or for any other purpose as provided by law.

Section 6. Effective Date; Repealer.—This act shall take effect immediately but shall be applicable only in those judicial districts which have obtained the approval of the Pennsylvania Supreme Court to substitute informations for grand jury indictments as the method for initiating criminal prosecutions. Thereafter, all acts and parts of acts inconsistent herewith shall not apply in said judicial districts.

APPROVED—The 10th day of October, A. D. 1974.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 238.



Secretary of the Commonwealth.