IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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93 MM 2018

IN RE: RETURN OF SEIZED PROPERTY OF LACKAWANNA COUNTY

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

LACKAWANNA COUNTY,
Respondent

BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal from the June 20, 2018 Amended Opinion and Order of the Honorable John Braxton, Senior Judge, Sitting in the Lackawanna County Court of Common Pleas, Docket No. 17 CV 5927, Denying the Request of the Commonwealth to Transfer the Underlying Motion for Return of Property to the Supervising Judge of the Forty-First Statewide Investigating Grand Jury.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

MISCELLANEOUS AUTHORITIES

STATEMENT OF THE *AMICUS CURIAE* PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants. PACDL membership currently includes more than 950 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL has an interest in the fairness and workings of the criminal justice system in Pennsylvania and has filed *amicus* briefs in other cases before this Court. PACDL's mission is to ensure the fair administration of justice and to advocate for the rights of persons subject to grand jury investigations in addition to those charged with, and those convicted of and imprisoned for, crimes. PACDL's members have a direct interest in the outcome of this appeal because of

their concerns for ensuring that the privacy rights of all citizens are protected, that law enforcement respects the boundaries of the Constitution of the United States and the Constitution and statutes of the Commonwealth of Pennsylvania. PACDL's members have a continuing concern for clarity in the law as it relates to the scope of citizens' rights and the obligations of law enforcement in their interactions with the citizens of this Commonwealth.

Pursuant to Pa.R.A.P. 531(b)(2), PACDL states that no other person or entity, in whole or in part, has paid for the preparation of this brief or authored this brief.

SUMMARY OF ARGUMENT

The supervising judge of the 41st statewide investigating grand jury, an elected judge on the Court of Common Pleas of Chester County, had no authority to issue a search warrant for property located in Lackawanna County.

The core issue before this Court involves the scope of powers of an investigating grand jury as set forth in 42 Pa.C.S. §4548, as further defined at 42 Pa.C.S. §4542, and, more particularly, whether the power to issue search warrants is included therein. Absent from the general rule of §4548(a) and the definition of "investigative resources of the grand jury" at §4542 is any reference to the issuance of search warrants as being within the investigative resources and powers of an investigating grand jury.

Likewise, the rules of court pertaining to investigating grand juries omit any reference to the issuance of search warrants. The general Rules of Criminal Procedure at Pa.R.Crim.P. 200 do provide for authority to issue search warrants. Neither the text of Rule 200 nor the Comment refer to the authority of a supervising judge of a multicounty or statewide investigating grand jury. Notably, the Comment to Rule 200 states that the rule does not affect "the traditional power of appellate court judges and justices to issue search warrants anywhere in the state."

The research of *Amicus Curiae* has failed to disclose any published decision from the Pennsylvania appellate courts addressing this issue of statutory construction, i.e., whether supervising judges of statewide investigating grand juries have the authority to issue search warrants throughout the state. Neither has the research of *Amicus Curiae* disclosed any published decision from the Pennsylvania appellate courts holding that the common law powers of investigating grand juries include the authority to issue search warrants.

Contrary to the OAG's assertion, the Pennsylvania Supreme Court did not acknowledge the existence of such authority "by implication" in *In Re Investigating Grand Jury of Phila. (Petition of Miller)*, 593 A.2d 402 (Pa. 1991).

Pursuant to the interpretative canon *expressio unius est exclusio alterius*, it is reasonable to conclude that the legislature by including an express listing of certain powers (e.g. subpoenas for persons, documents, records and other evidence, civil and criminal contempt) intended to exclude the omitted power (search warrants). Excluding search warrant issuance from the powers of an investigating grand jury is a sensible statutory inference and will not lead to any unreasonable results.

ARGUMENT

THE SUPERVISING JUDGE OF THE 41ST STATEWIDE INVESTIGATING GRAND JURY, AN ELECTED JUDGE ON THE COURT OF COMMON PLEAS OF CHESTER COUNTY, HAD NO AUTHORITY TO ISSUE A SEARCH WARRANT FOR PROPERTY LOCATED IN LACKAWANNA COUNTY.

The issue before the Court is of substantial importance, as it involves a practice that has become pervasive throughout the Commonwealth, i.e., the use of an investigating grand jury and its process beyond the scope of its statutory powers. In 1978, Pennsylvania created a statutory framework for investigative grand juries, whether countywide, multicounty, or statewide. The current statute, "The Investigating Grand Jury Act," is codified at 42 Pa.C.S. §§4541–4553. It was enacted on October 5, 1980, effective in 60 days. It supplanted and repealed an earlier "Investigating Grand Jury Act," i.e., Act of November 22, 1978, No. 217, as amended, Act 50 of 1979. Prior to those statutory enactments, the requirements for convening an investigating grand jury were developed through decisions of the Pennsylvania Supreme Court. *See Robert Hawthorne, Inc. v. County Investigating Grand Jury*, 412 A.2d 556, 558-559 (Pa. 1980). Those restrictions became known as "the common law standards." *Id.* 558-559 n.7.

The instant matter involves the issuance of an extremely broad search warrant by the Supervising Judge of the 41st Statewide Investigating Grand Jury,

who is an elected judge on the Court of Common Pleas of Chester County. The search warrant was directed to property of various Lackawanna County governmental departments. The property was physically located in Lackawanna County.

Property belonging to Lackawanna County was searched and seized pursuant to that search warrant. In accordance with Pa.R.Crim.P. 588, Lackawanna County filed a motion for return of property with respect to the subject matters of the search warrant. The motion was filed in the Court of Common Pleas of Lackawanna County. After the Lackawanna County bench recused itself, Senior Judge John Braxton was appointed to hear the matter.

The gravamen of Lackawanna County's position is that: (a) the statutory powers of an investigating grand jury as set forth at 42 Pa.C.S. §4548 and further defined at 42 Pa.C.S. §4542 do not include the power to issue search warrants; (b) accordingly, the Supervising Judge's grant of authority under 42 Pa.C.S. 4544(b)(2) does not include the power to issue search warrants, thereby limiting his search warrant authority to his home county (Chester) under Pa.R.Crim.P. 200; and; (c) a judge of the Court of Common Pleas of Lackawanna County is the appropriate judicial officer to hear a motion for return of property under Pa.R.Crim.P. 588.

The Office of the Attorney General [OAG] contended that the Supervising Judge has authority to issue search warrants throughout the Commonwealth and moved for the motion for return of property to be transferred to the Supervising Judge. Judge Braxton denied that motion, ordering that the Court of Common Pleas of Lackawanna County had jurisdiction. Judge Braxton's ruling was based in part on the conclusion that the supervising judge of the 41st Statewide Investigating Grand Jury, an elected judge on the Court of Common Pleas of Chester County, had no authority to issue a search warrant for property located in Lackawanna County.

As set forth in the following sections of this brief, the core issue before this Court involves the scope of powers of an investigating grand jury as set forth in 42 Pa.C.S. §4548, as further defined at 42 Pa.C.S. §4542, and, more particularly, whether the power to issue search warrants is included therein. In short, the crux of the issue is one of statutory construction concerning these two related provisions. All other matters, i.e., coordinating Pa.R.Crim. 200 and Pa.R.Crim. 588 with the Investigating Grand Jury Act, are ancillary to that main issue.

Nevertheless, the OAG in its brief to this Court devotes the majority of its efforts to those ancillary issues. (OAG's Brief, pp. 18–40). Only in the last 5 pages of its brief – Pages 40-45 – does the OAG address the question of whether

the issuance of search warrants is a statutory power of investigating grand juries. It is important to note that that section of the OAG's brief contains a single citation, i.e., the definition of "Investigative Resources of the Grand Jury" set forth at 42 Pa.C.S.§4542.

In this brief, *Amicus Curiae* will focus solely on the statutory construction of 42 Pa.C.S. §4548 and 42 Pa.C.S. §4542 and whether the Act grants to a supervising judge of a statewide investigating grand jury the authority to issue a search warrant. As demonstrated below, the statutory powers of an investigating grand jury do not include the power to issue search warrants.

A. **The relevant statutes and rules of court.**

The powers of the investigating grand jury are set forth in the Act as follows:

> **(a) General rule. –** The investigating grand jury shall have the power to inquire into offenses against the criminal laws of the Commonwealth alleged to have been committed within the county or counties in which it is summoned. Such power shall include the investigative resources of the grand jury which shall include but not be limited to the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth. . . .

42 Pa.C.S. §4548(a).

A portion of that general rule – "investigative resources of the grand jury" – is one of the defined terms in 42 Pa.C.S. §4542:

> **"Investigative resources of the grand jury."** The power to compel the attendance of investigating witnesses; the power to compel the testimony of investigating witnesses under oath; the power to take investigating testimony from witnesses who have been granted immunity; the power to require the production of documents, records, and other evidence; the power to obtain the initiation of civil and criminal contempt proceedings; and every investigative power of any grand jury in the Commonwealth.

42 Pa.C.S. §4542.

Absent from the general rule of §4548(a) and the definition of "investigative resources of the grand jury" is any reference to the issuance of search warrants as being within the investigative resources and powers of an investigating grand jury.

Likewise, the rules of court pertaining to investigating grand juries omit any reference to the issuance of search warrants. Those rules are set forth at Pa.R.Crim.P. 220 through 244.

Although neither the Act nor the Rules of Court that pertain to investigating grand juries reference the issuance of search warrants, the general Rules of Criminal Procedure do. Pa.R.Crim.P. 200 is the rule of court which addresses the authority to issue search warrants: "A search warrant may be issued by any issuing

authority within the judicial district wherein is located either the person or place to be searched." The Comment to that rule states that the Rule does not affect "the traditional power of appellate court judges and justices to issue search warrants anywhere in the state." There is no reference in the Comment, however, to any authority of a supervising judge of a statewide investigating grand jury to issue search warrants throughout the state.

In addition to the above, the general rule set forth at §4548(a) concludes by stating that the powers of investigating grand juries shall include ". . . every investigative power of any grand jury of the Commonwealth." 42 Pa.C.S. §4548(a). The only other type of grand jury in the Commonwealth is the indicting grand jury. There are no current Pennsylvania statutes addressing the other type of grand jury, i.e., an indicting grand jury. In 1973, the Pennsylvania Constitution was amended to give counties the option of initiating criminal charges by information instead of indictment. *See* Pennsylvania Constitution, Article I, Section 10. All counties made that election, and the practice of grand jury indictments was *de facto* abolished. In 2012, however, the Supreme Court promulgated rules reviving the practice on a limited basis to address "cases in which witness intimidation has occurred, is occurring, or is likely to occur." Pa.R.Crim.P. 556(A). The rules pertaining to indicting grand juries are set forth at

Pa.R.Crim.P. 556 through 556.12. These rules omit any reference to the issuance of search warrants. Moreover, Pa.R.Crim.P. 556.11 addresses the types of "authority" possessed by an indicting grand jury. Although the rule provides for the authority to subpoena witnesses and documents, there is no reference to the authority to issue search warrants. Hence, no grand jury of this Commonwealth has been given the power to obtain and issue search warrants.

With respect to the authority of a supervising grand jury judge, the Act at 42 Pa.C.S. §4544 provides for the convening of a multicounty or statewide investigating grand jury. Applications for such juries are presented to the Supreme Court of Pennsylvania. If the application is approved, the Court designates a supervising judge as follows:

> **(b) Contents of order. –** An order issued under subsection (a) shall:
>
> * * *
>
> (2) designate a judge of a court of common pleas to be the supervising judge over such multicounty investigating grand jury and provide that such judge shall with respect to investigations, presentments, reports, and all other proper activities of said investigating multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty investigating grand jury.

42 Pa.C.S. §4544(b)(2).

Instantly, the Supreme Court designated a supervising judge for the 41st Statewide Investigative Grand Jury in conformity with that statutory language. Like all other provisions cited above, this provision omits any reference to the issuance of search warrants. By the terms of this provision, the supervising judge's multicounty jurisdiction extends to "all other proper activities of said multicounty investigating grand jury." If the issuance of a search warrant is not such a "proper activity," then the supervising judge in this matter does not have statewide jurisdiction with respect to search warrants. For purposes of Pa.R.Crim.P. 200, he or she would only be an "issuing authority" in his/her home county and would only have authority to issue search warrants for persons and property located in that county.

B. **The instant issue of statutory construction is a matter of first impression; *Petition of Miller*, 593 A.2d 402 (Pa. 1991) cannot be construed as addressing this matter "by implication" especially because that case did not even involve a multicounty or statewide investigating grand jury.**

The research of *Amicus Curiae* has failed to disclose any published decision from the Pennsylvania appellate courts addressing this issue of statutory construction, i.e., whether supervising judges of statewide investigating grand juries have the authority to issue search warrants throughout the state. Neither has the research of *Amicus Curiae* disclosed any published decision from the

Pennsylvania appellate courts holding that the common law powers of investigating grand juries include the authority to issue search warrants. The OAG in its brief (Page 11, footnote 3) suggests that this Court "by implication" acknowledged the existence of such authority in *In Re Investigating Grand Jury of Phila. (Petition of Miller)*, 593 A.2d 402 (Pa. 1991).

For two reasons, that characterization cannot withstand scrutiny. First, the issue on appeal in *Petition of Miller* concerned a person's assertion of attorney-client privilege, not an assertion that the judicial entity issuing the search warrant lacked jurisdiction to do so.

Second, the case did not involve a multicounty or statewide investigative grand jury. It involved a county investigating grand jury in Philadelphia. It was an investigation of corruption and encompassed various local governmental officials and banks. Some unspecified judicial officer issued a search warrant directed to the bank. It is unclear who issued the search warrant. The opinion merely recited that "the Commonwealth secured a search warrant." *Id.* at 404. Accordingly, the search warrant might have been issued by any of these three entities: (1) the supervising judge of the investigating grand jury; (2) another judge of the court of common pleas; or (3) a member of the minor judiciary.

Even if the supervising judge issued the search warrant, he or she would have been authorized to issue the warrant within the plain meaning of Pa.R.Crim.P. 200 due to his/her being a judge in Philadelphia County. There would have been no need to sanction the exercise of the search warrant authority under the relevant provisions of the Investigating Grand Jury Act.

In short, the Court's decision in *Petition of Miller* does not resolve the issue currently before this Court. Whether the supervising judge of a multicounty or statewide investigating grand jury has the authority to issue a search warrant outside of his/her "home" county is an issue of first impression whose resolution will depend on the statutory construction of 42 Pa.C.S. §4548 and 42 Pa.C.S. §4542.

C. **General principles of statutory construction.**

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. 1921(a). *Commonwealth v. Shiffler*, 879 A.2d 185, 189 (Pa. 2005).

In pursuing that end, the Pennsylvania Supreme Court has emphasized the following:

> . . . [W]e are mindful that the statute's plain language generally provides the best indication of legislative intent. See *[Commonwealth v.] Conklin*, [587 Pa. 140,] 897 A.2d [1168] at 1175 [(2006)]; *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 822 A.2d 676, 679 (2003). "When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). In reading the plain language, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage,"while any words or phrases that have acquired a "peculiar and appropriate meaning" must be construed according to that meaning. 1 Pa.C.S. § 1903(a); *[Commonwealth v.] Shiffler*, 879 A.2d at 189. Consistent with the Statutory Construction Act, this Court has repeatedly recognized that rules of construction, such as consideration of a statute's perceived "object" or "purpose," are to be resorted to only when there is an ambiguity in the meaning of the words. *Sternlicht v. Sternlicht*, 583 Pa. 149, 876 A.2d 904, 909 (2005); *Ramich v. WCAB (Schatz Elec., Inc.)*, 564 Pa.656, 770 A.2d 318, 322 (2001) ("Only when the language of the statute is ambiguous does statutory construction become necessary.") (citing 1 Pa.C.S. § 1921(c). Pursuant to

> Section 1921(c), when the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute.
>
> (2) The circumstances under which it was enacted.
>
> (3) The mischief to be remedied.
>
> (4) The object to be attained.
>
> (5) The former law, if any, including other statutes upon the same or similar subjects.
>
> (6) The consequences of a particular interpretation.
>
> (7) The contemporaneous legislative history.
>
> (8) Legislative and administrative interpretations of such statute. 1 Pa.C.S. § 1921(c).

Commonwealth v. McClintic, 909 A.2d 1241, 1245-1246 (Pa. 2006).

D. **There is no statutory, rule-based, or decisional basis for the conclusion that the powers of an investigating grand jury include the authority to issue search warrants.**

As stated above, the OAG only addresses the core issue of statutory construction in the last five pages of its brief. In those five pages, the OAG provides a single citation in support of its position, i.e., the definition of "investigative resources of the grand jury" set forth at 42 Pa.C.S. §4542; however, that definition omits any reference to the issuance of a search warrant as one of the

"investigative resources of the grand jury." Moreover, as mentioned above in Section B of *Amicus Curiae's* brief, the OAG made a footnote reference to *In Re Investigating Grand Jury of Phila. (Petition of Miller)*, 593 A.2d 402 (Pa. 1991) as supporting its position "by implication." For the reasons already set forth in Section B of *Amicus Curiae's* brief, *Petition of Miller* cannot be construed in that manner. The OAG has cited absolutely no other authority in support of its position; indeed, none exists. The OAG has provided no statute, rule, or court decision standing for the proposition that "investigative power of any grand jury" includes the power to issue search warrants.

Contrary to the OAG's position, none of the Pennsylvania rules of court pertaining to grand juries (either investigating or indicting) makes reference to the issuance of search warrants. Moreover, the general rule of court pertaining to the authority to issue search warrants (Pa.R.Crim.P. 200) makes no reference to the authority of supervising judges of investigating grand juries. It is significant that the Comment to that rule acknowledges the "traditional" power of appellate judges and justices to issue search warrants on a statewide basis, but makes no reference to a similar power for supervising judges of statewide investigating grand juries.

Despite the lack of any authority, the OAG makes a sweeping statement that an investigating grand jury, in addition to the unique powers of such an entity, has

all the arsenal of "techniques" possessed by police in investigating criminal activity:

> The investigative resources of the grand jury do not, however, circumscribe the investigative resources the Commonwealth may employ in pursuing a grand jury investigation, which include **any and all techniques law enforcement may otherwise employ in the course of a criminal investigation.**

(Brief of OAG, p.42) (emphasis added). Taken to its logical extreme, such a proposition would permit the prosecutor running the investigating grand jury to conduct interrogations in a locked room while using lies and deception – an acceptable police "technique."

In actuality, the institution of the investigative grand jury was invented to address situations in which the tools of conventional police investigations – including search warrants – are inadequate. *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, Criminal Procedure, West's Criminal Practice Series, §8.3, p.23 (Fourth Edition) [hereinafter "LaFave et al."]. The core power of the investigating grand jury is the power to issue subpoenas directed to the person (*ad testificandum*) and to tangible evidence (*duces tecum*):

> The basic investigative advantage of the grand jury stems from its ability to use the subpoena authority of the court that empaneled it. The grand jury may use the subpoena duces tecum to obtain tangible evidence and the subpoena

> ad testificandum to obtain testimony. Both subpoenas are supported by the court's authority to hold in contempt any person who willfully refuses, without legal justification, to comply with a subpoena's directive.

LaFave, et al., §8.3(a), p.24. The authors explain how the authority to issue a subpoena duces tecum is more efficacious than the use of a search warrant:

> The grand jury subpoena duces tecum offers several advantages over the primary device available to the police for obtaining records and physical evidence – the search pursuant to a warrant. Unlike the search warrant, the subpoena duces tecum can issue without a showing of probable cause.

LaFave, et al., §8.3(c), p.31.

The above quotes are from a lengthy chapter (430 pages) entitled "Grand Jury Investigations." LaFave et al., §§8.3–8.14, pp. 3–432. No where in those 430 pages is there any reference to the power of the investigating grand jury to seek, and the authority of a supervising judge of an investigating grand jury to issue, a search warrant.

E. **Pursuant to the interpretative canon *expressio unius est exclusio alterius*, it is reasonable to conclude that the legislature by including an express listing of certain powers (e.g. subpoenas for persons, documents, records and other evidence, civil and criminal contempt) intended to exclude the omitted power (search warrants).**

Read together, 42 Pa.C.S. §4548 and §4542 list these explicit powers of an investigating grand jury:

- the power to compel the attendance of investigative witnesses.
- the power to compel the attendance of investigative witnesses under oath.
- the power to take investigating testimony from witnesses who have been granted immunity.
- the power to require the production of documents.
- the power to require the production of records.
- the power to require the production of other evidence.
- the power to obtain the initiation of civil contempt proceedings.
- the power to obtain the initiation of criminal contempt proceedings.

It is acknowledged that §4548 contains general language that powers of the investigating grand jury "include but [are not] limited to" the explicitly listed powers. Both sections add this general language: "and every investigative power of any grand jury of the Commonwealth."

When the legislature enacts statutes containing such an explicit listing of an associated group of things, the law provides that such a listing gives rise to an inference that the legislature intended to exclude the things that were omitted. That canon of interpretation is known as *expressio unius est exclusio alterius* (the canon of express mention and implied exclusion). Black's Law Dictionary gives this

definition: "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (10th ed. 2014).

The Supreme Court of the United States defines this interpretative canon as: "expressing one item of [an] associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, 137 S.Ct. 929, 933 (2017) (citation omitted). The canon applies only when "circumstances support [] a sensible inference that the term left out must have been meant to be excluded." *Id.*

The courts of this Commonwealth have adopted and applied that interpretative canon. *See Humphreys v. DeRoss*, 790 A.2d 281, 284-285 (Pa. 2002); *Cali v. City of Philadelphia*, 177 A.2d 824, 832 (Pa. 1962); *Commonwealth v. Charles*, 411 A.2d 527, 530-531 (Pa.Super. 1979); *Samilo v. Commissioner, Insurance Department*, 510 A.2d 412, 413 (Pa.Cmwlth. 1986). Indeed, the Superior Court has observed that "[t]he maxim is one of longstanding application, and it is essentially the application of common sense and logic." *Commonwealth v. Charles, id.*, at 530.

This Court's decision in *Humphreys v. DeRoss* is instructive because the Court applied the canon even though the statute in question included additional language that might have been construed as a "catch-all" provision. In *Humphreys*,

the lower court concluded that a father's inheritance was "income" that should be factored into the formula for calculating his child support obligation. The case turned on the interpretation of the definition of "income" in the Domestic Relations Code. Specifically, the question was whether the term "income" included the lump sum principal of the father's inheritance.

The definition of "income" contained a long list of explicit types of income. Included in that list were two items relating to estates: "income in respect of a "decedent" and "income from an interest in an estate or trust."

There were also two phrases that might have been construed as a "catch-all": (1)"other entitlements to money or lump sum awards, without regard to source, including lottery winnings"; and "any form of payment due to and collectible by an individual regardless of source."

The lower court and the Superior Court ruled that the definition of "income" embraced the principal amount of a lump sum inheritance. The Supreme Court reversed. In reversing, the Court employed the express mention/implied exclusion maxim albeit not using the Latin name:

> The inheritance DeRoss received from his mother's estate does not meet the definition of "income in respect of a "decedent" or "income from an interest in an estate or trust." In light of the fact that the legislature specifically included "income from an interest in an estate or trust" but

> did not include the principal of an inheritance or trust, it is logical to assume that the legislature did not intend to include the principal. *Strunack v. Ecker,* 283 Pa.Super. 585, 424 A.2d 1355 (1981), *rev'd on other grounds,* 496 Pa. 290, 436 A.2d 1187 (1981) (where certain things are specified in a statute, omissions are exclusions); *Commonwealth v. Charles,* 270 Pa.Super. 280, 411 A.2d 527 (1979). Considering that inheritance is one of the most common means by which wealth is transferred, it defies logic that the legislature would not have clearly provided for inheritance within the statutory definition of income if that were its intent. It is for this reason that we reject the determination by the Superior Court that the inheritance DeRoss received falls within "other entitlements to money or lump sum awards, without regard to source, including lottery winnings," and the position espoused by the concurring opinion of the Superior Court, which stated that the monies at issue should be categorized as "any form of payment due to and collectible by an individual regardless of source."

Humphreys v. DeRoss, 790 A.2d 281, 284–85 (Pa. 2002). Accordingly, the Court was not convinced that the purported "catch-all" phrases should be accessed in gauging legislative intent when "it defies logic that the legislature would not have clearly provided" an explicit listing for the principal of an inheritance.

Similarly, in the instant matter, it defies logic that the legislature would not have clearly listed search warrants as a power of an investigating grand jury if that was its intent. That is especially the case because there is no authority predating the enactment of the Investigating Grand Jury Act identifying issuance of search

warrants as a power of the investigating grand jury. At the same time, the Investigating Grand Jury Act explicitly identifies all the traditional, common law powers of the investigating grand jury, e.g., subpoenaing witness, subpoenaing documents, records, and other evidence, civil contempt, and criminal contempt.

F. **Excluding search warrant issuance from the powers of an investigating grand jury is a sensible statutory inference and will not lead to any unreasonable results.**

The Supreme Court of the United States indicated that the express mention/implied exclusion maxim applies when "circumstances support [] a sensible inference that the term left out must have been meant to be excluded." *N.L.R.B. v. SW Gen., Inc.*, 137 S.Ct. 929, 933 (2017). Instantly, it is sensible to infer that the legislature intended to exclude from the powers of an investigating grand jury the issuance of search warrants.

As stated previously in Section D, the chief advantage and power-source of the investigating grand jury is the power to subpoena persons, documents, records, and other evidence. LaFave, et al., §8.3(a), p.24. Moreover, the investigating grand jury does not require probable cause to issue subpoenas duces tecum even for voluminous amounts of records.

Accordingly, the OAG in the instant case could have employed the broad subpoena duces tecum power to procure the records. It is unclear on the state of the current record why the OAG believed it was more advantageous to use search warrants. The fact remains, however, that the subpoena duces tecum mechanism can be utilized to procure the same information.

Even if there were legitimate reasons to seek a search warrant, it is not unreasonable to require the OAG to apply for a search of Lackawanna County's property before a judicial officer situated in Lackawanna County pursuant to Pa.R.Crim.P. 200. If secrecy is a legitimate concern, the OAG can request such judicial officer (who may himself/herself be specially appointed as in the instant matter) to seal the affidavit under the terms of Pa.R.Crim.P. 211. The sealing of the affidavit can be renewed through successive requests up until the actual filing of criminal charges. Pa.R.Crim.P. 211(G), (H).

If the supervising judge of the investigating grand jury controls the search warrant, then the affidavit is sealed (secret) by definition without any need for the OAG to show "good cause" for the sealing. However, if another judge issues the search warrant under Rule 200, that judge will need to make a finding under Rule 211(A) that the Commonwealth has shown "good cause" to seal the affidavit. The

crucial distinction between the two scenarios is that, in the latter scenario, the finding will be made by a truly neutral and detached magistrate.

CONCLUSION

WHEREFORE, the Pennsylvania Association of Criminal Defense Lawyers respectfully requests that Your Honorable Court affirm the ruling of the lower court, which was based in part on the conclusion that the supervising judge of the 41st Statewide Investigating Grand Jury, an elected judge on the Court of Common Pleas of Chester County, had no authority to issue a search warrant for property located in Lackawanna County.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE – CONFIDENTIAL INFORMATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 2, 2018

James J. Karl
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned counsel hereby certifies that the length of this brief does not exceed the 7,000 word limit for a brief submitted by an *amicus curiae* during merits briefing as set forth in Rule 531(b)(3) of the Pennsylvania Rules of Appellate Procedure.

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