



PACDL

Pennsylvania Association of
Criminal Defense Lawyers

115 State Street
Harrisburg, PA 17101

717-234-7403
717-234-7462 (Fax)

pacdl@pacdl.org
www.pacdl.org

February 18, 2018

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635

Re: Proposed Pennsylvania Rule of Criminal Procedure 556.11

Dear Attorney Wasileski:

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As such, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and work to achieve justice and dignity for defendants. PACDL's membership includes more than 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

The proposed changes include an amendment to Pennsylvania Rule of Criminal Procedure 556.11 and various changes to provide guidance on implementing the amendment to Rule 556.1. Specifically, the Committee proposes to add the following language to Rule 556.11:

(A) A grand jury has the authority to:

...

(3) based upon evidence it has received, including hearsay evidence as permitted by law, or upon a presentment issued by an investigating grand jury, if the grand jury finds the evidence establishes a prima facie case that (1) an offense has been committed and (2) the person other than the defendant in the matter originally presented to the indicting grand jury has committed it, indict the individual for an offense under the criminal laws of the Commonwealth of Pennsylvania . . .

PACDL opposes this proposed amendment. First, by failing to require some showing of witness intimidation, the proposed revision represents an unwarranted departure from the intellectual and jurisprudential underpinnings of indicting grand juries. The expansion of possible defendants subject to indictment thus threatens the constitutional statutory and procedural rights of individuals without any concomitant reason for doing so. Further, given the very unusual circumstances that led to the proposal of this change, the alleged benefits are, at best, minimal and can be easily addressed in a manner that does not run afoul of procedural protections. As such, the proposed rule should not be adopted.

The Proposed Change Ignores the Original Justification for Proceeding by way of Indicting Grand Jury

As noted in the comment on this proposed rule, the original purpose to allowing the Commonwealth to charge by way of criminal proceeding and bypass a preliminary hearing was that the specific case was a matter “in which witness intimidation has occurred, is occurring, or is likely to occur.” See Pa. R. Crim. P. 556(A). This at least requires a minimal threshold determination by the prosecutor, and approval by a judicial authority that the individual arrested may engage in witness intimidation.

By allowing the indictment of a not yet charged person whose identity may not even be known, the proposed rule change vitiates the even minimal threshold requirement that the prosecuting authority make a good faith claim that the person indicted be likely to engage in witness intimidation. Simply put, the prosecutor cannot in good faith claim that a certain individual is likely to engage in witness intimidation if the prosecutor cannot even say who the person specifically

The Proposed Change Invites the Proliferation of “John Doe” Indictments

As the rule places no requirement that the previously-uncharged-but-newly-indicted be identified in any manner, the rule raises the specter of “John Doe” indictments that would raise significant constitutional concerns.

“John Doe” indictments are a shorthand term for a practice of indicting a specific person even though they may not be in custody or their identity might not be known. The alleged benefit of these indictments is that it allows the prosecuting authority to bring charges within the statute of limitations. As a practical matter, the current practice of John Doe indictments involves crimes where there is specific forensic evidence (often DNA), where the unknown individual associate with a unique genetic profile is indicted.

By allowing an individual who has not been charged (and thus possibly not identified in any specific manner), the rule permits indictment of an unknown individual without any threshold requirement of identification. This would allow indictments of unknown individuals with the descriptions running the gamut from the merely vague (“male 24 years of age with a face tattoo”) to the absurd (“other person present”).

The Proposed Change Prevents the Uncharged Charged Individual from Raising Legitimate Objections to the Presentation of Grand Jury Testimony

Allowing an individual not yet charged to be indicted removes the ability of that individual to object to either the composition of the grand jury or the presentation of evidence that is inappropriate or prejudicial. In the case of a defendant who has been arrested, counsel for that individual would be able to file motions as it relates to the identification process in front of a grand jury. The uncharged individual, as they may not even be aware that a grand jury is taking testimony, has no means by which to challenge the composition of the grand jury or the introduction of an identification that is unduly suggestive.

The Proposed Change Prevents Fair and Early Resolution of Criminal Matter

When an individual is arrested and charged, and the prosecuting authority proceeds by way of indicting grand jury, that defendant through counsel is able to begin negotiations with the prosecutor and either (1) provide

February 18, 2018

Page 3

information that may inform the prosecutor's decision to charge or what offenses to charge or (2) provide information regarding potential cooperation involving other individuals suspected in a criminal incident.

In the case of a not yet charged individual, the proposed rule would prevent prompt discussions between the prosecuting authority and defense counsel and, as such, would jeopardize a prompt and fair resolution of criminal matters.

The Proposed Change Does Not Provide a Meaningful Benefit

The Committee's report does not identify any specific meaningful benefit to allowing the practice of allowing the grand jury to indict someone who has not yet been arrested. Our understanding is that the reason for this proposed rule change comes from a single incident that occurred in Allegheny County and this is what prompted this proposed change. Given the apparent rarity of this situation, the problems created by the rule change far outweigh the minimal benefit. The only apparent benefit would be avoiding a duplication of resources so that the prosecuting authority would not have to present the same evidence twice in separate grand jury proceedings. Even this benefit is minimal at best. In experience the prosecuting authority does not need to call in witnesses twice. Rather, the prosecuting authority could call all witnesses to testify in the first grand jury proceeding and then, once a second individual is identified and arrested, the prosecuting authority could simply read the transcript from the previous grand jury.

In conclusion, PACDL objects to the proposed rule. The proposal threatens the constitutional rights of individuals called before the indicting grand jury, prevents defense counsel from being able to represent individuals charged with crimes via the grand jury, and invites confusion for both defense counsel and prosecutors in handling individuals not yet arrested. The alleged benefits are, at best, minimal and can be easily provided in a manner that does not run afoul of constitutional protections.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark B. Sheppard', with a stylized flourish at the end.

Mark B. Sheppard
President