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TESTIMONY OF MARK B SHEPPARD BEFORE THE PENNSYLVANIA SUPREME COURT INVESTIGATING GRAND JURY TASK FORCE

As the President of the Pennsylvania Association of Criminal Defense Lawyers ("PACDL"), I want to thank the Pennsylvania Supreme Court for convening this Task Force to review the practices of Pennsylvania's investigating grand juries. I also want to thank the members of this Task Force for agreeing to serve. The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is professional association of almost 900 private criminal defense attorneys and public defenders who have been admitted to practice before the Supreme Court of Pennsylvania. Founded in 1988, PACDL represents experienced criminal defense attorneys who aim to protect and ensure those individual rights guaranteed by the Pennsylvania and United States Constitutions by rule of law and work to achieve justice and dignity for criminal defendants.

I. Issues Addressed by My Fellow PACDL Members.

As criminal law practitioner primarily in the area of "white collar defense" for 30 years, I have represented entities and individuals in all manner of investigations and prosecutions, including representing targets, subjects and witnesses before federal as well as statewide and county grand juries. I have also engaged in motion and appellate practice regarding various legal issues arising in the grand jury context. Based upon those experiences as well as those recounted to me a number of PACDL members, it is apparent to us that meaningful reforms are necessary to return basic fairness and common sense to the state and county grand jury process. Other PACDL members have or will testify before this task force and have offered cogent comments relating to problem areas in need of reform. I will not repeat those comments here. Instead, I would respectfully refer the Task Force to the testimony of former PACDL President Michael

Engle and current PACDL members; Catherine Recker, Peter Vaira and Laurel Brandstetter whose testimony aptly reflects PACDL's position, which I briefly summarize below.

(1) The perception that supervising judges have on occasion abandoned the neutral role of independent arbiter of legal disputes and have become "vested" in the process, thus raising serious constitutional concerns. The Investigating Grand Jury Act (the "Act") vests a substantial amount of power and responsibility in the Supervising Judge to oversee the process and to protect the rights of all participants. Unfortunately, we have seen circumstances where a blurring of the lines between judicial and prosecutorial functions is the only explanation for decisions which have no basis in the language of the Act or the Supreme Court's grand jury jurisprudence.

For example, supervising judges have refused to allow disclosure of even the basic information necessary for a witness and her counsel to evaluate the witness's exposure despite longstanding Supreme Court precedents such as *Robert Hawthorne, Inc. v. County Investigating Grand Jury,* 488 Pa. 373, 412 A.2d 556 (1980), which recognized a witness' right to certain basic information necessary to challenge the exercise of grand jury power by adopting *Schofield* Affidavit standard as matter of state law, and *In Re Investigating Grand Jury of Philadelphia* (*Appeal of Washington)*, 490 Pa. 31; 415 A.2d 17(1980), which long ago recognized the importance of the "traditional role" of the judiciary as a check upon misuse of grand jury power. Any reform effort must start with an evaluation of the manner in which we educate and oversee those judges assigned to this essential role.

(2) The almost routine and constitutionally suspect practice of imposition of secrecy orders upon witnesses without a hearing or sufficient cause, despite the plain language of the Act that expressly provides that no witness shall be prohibited from discussing his testimony except

for cause shown in a hearing before the supervising judge. 42 Pa.C.S.A. §4549(d). In practice, "good cause" appears to be nothing more than the existence of the grand jury. Such an interpretation ignores the plain language of the Act and the important First Amendment rights this section was intended to vindicate. A rule of criminal procedure should be promulgated to clarify this procedure to ensure that swearing of witnesses is only done when good cause has been shown and further that the witness and his counsel are present and provided a meaningful opportunity to be heard.

(3) The lack of acceptance by both prosecutors and supervising judges of the jurisprudence supporting the proper invocation of the Fifth Amendment. Particularly troubling is the refusal to recognize long standing United States Supreme Court precedent that that the Fifth Amendment protects innocent persons. See *Ohio v. Reiner*, 532 U.S. 17, 21 (2001)) [O]ne of the Fifth Amendment's "basic functions… is to protect innocent men…'who might otherwise be ensnared by ambiguous circumstances.'"). Further, if the invocation is rejected and testimony is compelled over the invocation of the Fifth Amendment, is such compelled testimony rendered immunized under *Kastigar*?

(4) The related issue of what is the proper showing necessary for a stay pending appeal by a witness held in contempt. Case law is well settled that a "witness must take the contempt" for the order to be final. Less clear however is what showing must that witness make in order to stay the imposition of a the penalty while pursuing an appeal. See, e.g. *In re Investigating Grand Jury of Philadelphia County, Appeal of Drapczuk*, 495 Pa. 186, 433 A.2d 5 (1981). PACDL recommends a standard that is less onerous than likelihood of success, particularly given the difficulty surrounding the merits and procedures for determining whether a witness has a cognizable Fifth Amendment concern. The federal recalcitrant witness statute as set forth at 28

U.S.C. § 1826, appears to strike the right balance by providing for a stay unless the appeal is frivolous.

(6) Issues surrounding Grand Jury Reports. Section 4552 of the Act authorizes an investigating grand jury to submit to the supervising judge an investigating grand jury report. The supervising judge is then charged with the obligation to determine if the report is based upon facts received in the course of an investigation and is supported by the preponderance of the evidence. The Act also provides that if the supervising judge finds that the report is critical of an individual not indicted for a criminal offense, "the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report" which will be appended to the report 42 Pa.C.S.A. §4552(e).

Strong arguments have and will continue to be made that the report process has been an area ripe for abuse. Others have argued that reports historically serve an important public purpose and are available to address public problems where the evidence does not support the issuance of a presentment. PACDL believes the latter arguments are more persuasive and that on balance, grand reports should be preserved. However, the organization strongly urges that the procedures be strengthened so that any individual or entity is provided with the absolute right to respond to any negative reference in a report. Leaving such a right to the supervising judge's sole discretion is inconsistent with the Pennsylvania Constitution's recognition of the fundamental right to an individual's good reputation as set forth in Art. I §1 and recognized in cases such as *Simon v. Commonwealth*, 659 A.2d 631 (Pa. Cmwlth.1995).

I am pleased to expand on these comments in my oral testimony and welcome the opportunity to do so, particularly as many of these issues cross over to or impact those issues which I have addressed below.

II Issues That Directly Impugn Defense Counsel's Ability to Ethically and Effectively Represent His or Her Client

My remaining comments address those issues that directly impugn defense counsel's ability to ethically and effectively represent his or her clients in matters before the grand jury. In particular, I wish to address:

(1) The current practice of swearing defense counsel to secrecy despite the client's statutory right to counsel and counsel's fiduciary duty to ethically and effectively represent his or her client and to maintain a client's confidences;

(2) An unduly restrictive view of and inappropriate hostility toward the proper and ethical use of joint defense and common interest agreements among defense counsel, particularly where the clear aim is to limit counsel's ability to shadow the investigation and to coordinate on a common defense;

(3) The general acceptance by supervising judges of an overly expansive definition of matters occurring before the grand jury which similarly limits counsel's ability to fully evaluate his client's exposure and respond in a meaningful way with potentially exculpatory evidence in connection with any charging decision;

(4) The need for clarification of counsel's role in the grand jury room.

(5) Unreasonable limits upon defense counsel's access to grand jury transcripts and other discovery including *Brady* and *Giglio* material and in particular the current proposed amendments to Pa. R. Crim. P. 229 and 230. I have included my comments to proposed rule changes that were submitted earlier this year to the Criminal Rules Committee on behalf of PACDL.

The Practice of Swearing Defense Counsel to Secrecy

The most troubling issue effecting defense counsel is the ongoing practice of swearing counsel to secrecy as a prerequisite to representing the grand jury witness. Swearing defense lawyers is routinely done without a hearing and with no showing of necessity. This practice is not –as has been argued- required by the Act. Section 4549(b) cannot be read to apply to counsel for the witness. Indeed, those obligations and role of defense counsel are expressly discussed in the very next subsection. Instead, the reference "attorney" plainly means the counsel for the Commonwealth.

Moreover such a reading fails to recognize the proper role of counsel who is ethically bound to effectively represent his client, not only during the witness's testimony, but before and after the appearance of the client. The Act itself confers upon the witness the statutory right to the assistance of counsel, "including assistance during such time as the witness is questioned…" plainly recognizing that the duty to effectively represent the witness extends beyond the appearance itself and encompasses the obligation to conduct a thorough investigation so as to determine his or her client's potential exposure. To hold otherwise would impermissibly interfere with counsel's ethical obligation to adequately advise a potential witness as to his or options, including the exercise her right to remain silent. Lastly, assuming the Act did permit the gagging of counsel and assuming good cause were shown, the oaths routinely required are far broader than even the oath required of counsel for the Commonwealth, which excepted disclosures "for use in the performance of their duties." 42 Pa.C.S.A.§4549(b).

One recent example underscores the perniciousness of this practice. I represented a witness in a grand jury investigation and in response to the subpoena had filed a motions challenging the grand jury and seeking information regarding the empanelment and notice of

investigation. Before my client's challenge could be heard, I and every attorney and support staff person who was working on the case were summoned to chambers of the supervising judge. The purpose I was told was so that I and my colleagues would be sworn to secrecy. The oath we were required to take was to *promise not to reveal to anyone who has not been sworn to secrecy anything related to this investigation.* When I refused, I was summarily dismissed from the proceedings. More troubling, my client's motions were not heard. The gag order placed me and my firm in the untenable position of choosing between taking an improper oath that would infringe upon their (and their clients') constitutional rights and that, by its terms, would prevent my firm from providing full and effective assistance of counsel, or else being barred from the proceeding scheduled for the very purpose of addressing my client's own motions.

Joint Defense Agreements and the Offensive Use of Conflict Motions

This particular instance also shows the unduly restrictive view of toward the proper and ethical use of joint defense agreement among defense counsel particularly where the clear aim is to limit counsel's ability to coordinate on a common defense. The Supervising Judge attempted to justify the swearing of counsel because we had coordinated our motions with joint defense counsel. This was apparently a violation of grand jury secrecy.

Joint defense agreements are accepted and appropriate vehicles to coordinate a joint defense and to preserve applicable privileges. As Justice Frankfurter stated some seventy years ago, "a common defense often gives strength against a common attack." *Glasser v. United States,* 315 U.S. 60, 92, 62 S. Ct. 457, 475, 86 L. Ed. 680 (1942). This is particularly true in the corporate context where senior officers may share a common privilege or in the context of co-defendants and their attorney or attorneys. When multiple defendants and their counsel engage in a common defense, the privilege is not waived by the sharing of confidential information among

the parties for the benefit of the joint defense. See *Commonwealth v. Scarfo*, 611 A.2d 242 (Pa.Super.1992); see also Pa. R.P.C. 1.6(a). Neither prosecutors nor supervising judges get to decide whether a coordinated defense is in the best interest of a particular client, nor does the fact that a grand jury has been convened change that basic fact. Yet defense counsel has on numerous occasions been forced to choose between disclosing and/or forgoing a joint defense or facing removal from the case.

Our Supreme Court has also recognized the importance of a person's constitutional right to counsel of one's choice before an investigating grand jury. *Pirillo v. Takiff* , 462 Pa. 511, 341 A.2d 896 (1975. Counsel similarly enjoys a constitutional right to practice his profession. *Dent v. West Virginia,* 129 U.S. 114 (1889); *Moore v. Jamieson,* 451 Pa. 299, 306 A.2d 283 (1973). While these rights are not "absolute," before disqualification of one's chosen counsel may occur, the Commonwealth must set forth at the very least, the probability of a conflict sufficient to constitute violation of the witness' right to effective assistance of counsel. *Pirillo,* 462 Pa. at 529-530, 341 A.2d at 905. See also, *In re January 1974 Special Investigating Grand Jury; Petition of Walter M. Phillips, Jr.; In re Marvin Comisky, Esq. and Jerome Richter, Esq.,* 241 Pa.Super 246, 361 A.2d 325 (1976) (holding that *Pirillo* requires a showing of probability of conflict).

The above standard has been codified in the Investigative Grand Jury Act, 42 Pa.C.S. §4549(c), which states:

> An attorney, or attorneys who are associated in practice, shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client. If the supervising judge determines that the interest of an individual will or is likely to be adversely affected, he may order separate representation of witnesses, giving appropriate weight to the right of an individual to counsel of his own choosing (emphasis added).

Pennsylvania Rule of Professional Conduct 1.7 similarly sets forth the standard as follows:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Too often prosecutors and supervising judges rely upon a relaxed legal standard of "potential for conflict" impermissibly reducing the Commonwealth's burden of proof. Relying upon an erroneous reading of grand jury secrecy, attorneys have been disqualified for no other reason other than the fact that the representation is in the context of the grand jury. Indeed, it appears that often time the burden is shifted to counsel and his client to prove the lack of conflict particularly where counsel represents a group of witnesses.

The Need to Clarify What Constitutes Matters Occurring Before the Grand Jury

In the federal system, Rule 6(e) relating to grand juries secrecy applies only to the actual proceedings before the grand jury, to what actually happens in the grand jury room. In contrast, in state court proceedings, the gag order is often more sprawling, often applying to anything "relating to" the grand jury investigation. Given this expansive reading, prosecutors have often argued that grand jury secrecy apply to third party documents just because they were subject to subpoena. In so doing they attempted have ham strung defense counsel who must decide whether he or she can share a document with a witness merely because it was subpoenaed. Indeed, one

prosecutor recently took the position that a cell phone could not be produced in a civil case because it was subject to grand jury subpoena.

I would like to discuss one final example of how improper use of the grand jury secrecy can be used to interfere with counsel's ability to ethically and effectively represent his or her client. There, a former supervising judge had imposed such an extreme standard of secrecy that the prosecutors were concerned that they could not even discuss possible charges with counsel for the target without violating the Court's directive. This led to an absurd meeting where counsel attempted to engage in a declination discussion without knowing what charges were contemplated. Surely, this is not the type of meeting that should be discouraged. The Task force should recommend clarification of the standard and follow the federal rule that limits grand jury secrecy to those matters actually occurring before the grand jury

The Need to Clarify Counsel's Role in the Grand Jury Room.

42 Pa. C.S.A. § 4549(c) expressly provides that counsel may be present and shall be "allowed to advise the witness." Counsel may not however object, make argument or otherwise address the grand jury or the Commonwealth attorney. This language has been used by prosecutors and supervising judges to unduly limit counsel's ability to assist and advise her client as required by the Act. For example, in case I was admonished for initiating contact with my client concerning a particular question. The proceedings were stopped and I was told by the supervising judge that I was required to "wait until my client asked me for advice." I refused, explaining that I was the lawyer and that my client likely did not have the expertise to identify all areas where he may need counsel. In an even more extreme example, I was forced to raise an objection to even sit next to my client in the grand jury room and had to explain why I could not effectively represent him from the back of the room. While the statute is clear, because others

have faced similar restrictions, a rule should be considered so that counsel may fulfil his statutory and ethical obligation without having to wait for the client to decide how that should be accomplished.

I would like to again thank the Task Force for providing this opportunity to PACDL to testify concerning the Investigating Grand Jury.

Respectfully submitted,

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Criminal Defense Lawyers