

## GRAND JURY SUBCOMMITTEE REPORT

### A. Introduction

The recent *Philadelphia Inquirer* series on the Philadelphia court system vividly exposed the problem of witness intimidation in the city's criminal justice system. The *Inquirer* wrote: "Witness intimidation pervades the Philadelphia criminal courts, increasingly extracting a heavy toll in no-show witnesses, recanted testimony – and collapsed cases . . . Prosecutors, detectives, and even some defense lawyers say witness fear has become an unspoken factor in virtually every court case involving violent crime in Philadelphia. Reluctant or terrified witnesses routinely fail to appear in court, and when they do, they often recant their earlier testimony or statements to police."<sup>1</sup>

In 2007, the Pennsylvania Commission on Crime and Delinquency ("PCCD") held a series of forums to study the phenomenon of witness non-cooperation. PCCD found that while quantitatively the extent to which witness reluctance affects the outcome of criminal prosecutions is not well known, qualitatively there is consensus among prosecutors in Pennsylvania that witness reluctance is a major problem. Witness reluctance takes many forms: "Witnesses who do not come forward with relevant information at all; witnesses who deny having any information when interviewed at a crime scene; witnesses who initially cooperate and later stop, by either refusing to cooperate further or by feigning lack of memory."<sup>2</sup> PCCD found that witness reluctance can be caused by a fear of retaliation, fear of social rejection, alienation from the legal system, individual apathy, individual exposure to legal and other negative consequences, and the burdens of involvement in the legal process.<sup>3</sup>

One of the root causes in Philadelphia of witness reluctance to testify, either as a victim or as merely an eyewitness, can be found in how charges are processed from arrest, arraignment, preliminary hearing and finally to the filing of an information by the District

Attorney. It is at the preliminary hearing stage that victims and witnesses first encounter the adversarial criminal justice system. This is where the Commonwealth must present sufficient evidence to make out a prima facie case for the case to proceed to the next stage, and it is at the preliminary hearing that the victim, in crimes of violence, must testify.

Under Philadelphia's current system, witnesses and victims of a crime often have to appear multiple times at preliminary hearings, because it is not uncommon for hearings to be postponed several times. Each time, they must go to police districts or the Criminal Justice Center, where most preliminary hearings are held, and where they find themselves in close quarters with the defendants against whom they are to testify as well as the defendant's friends and family. Then, when the hearing does take place, they are subjected to harsh cross-examination by hostile defense counsel.

If the District Attorney had the option of proceeding directly from arraignment to an indicting grand jury, rather than having to go through a preliminary hearing, it would eliminate these problems. There is no constitutional impediment to proceeding in this fashion, since courts, both state and federal, have universally held that denying a defendant a preliminary hearing does not violate the Sixth Amendment right of confrontation.<sup>4</sup> That right does not arise until trial.

Proceeding directly to a grand jury indictment rather than going through a preliminary hearing followed by an information: (1) allows victims and even the identity of witnesses to be protected until well along in the process; (2) enables the prosecutor to lock in the witness' testimony for future use if there is a chance the victim or a witness may "go south" in their testimony; (3) since the law allows the prosecutor to use hearsay testimony before the grand jury, it obviates the need for the victim to appear in person; (4) it lessens the chance the victim will have any interaction with the defendant before trial; and (5) it would reduce the number of times that victims and witnesses must appear since, unlike preliminary hearings,

grand jury proceedings are rarely postponed. Just as importantly, such a system would go a long way to reducing the general skepticism and negative attitude that the public has toward the current criminal justice system, and which has resulted in many crimes never being reported in the first place. Moreover, it would result in cost savings, since police overtime paid to officers who have to appear at several scheduled preliminary hearings would be reduced.

The subcommittee also believes that District Attorneys should not be mandated to proceed exclusively to an indicting grand jury, but should have the option of proceeding either directly to a grand jury or with a preliminary hearing followed by the filing of an information should the case be held for court. The reason for making it optional is that there may be cases where justice would be better served by a preliminary hearing. For example, the District Attorney might prefer to proceed to a preliminary hearing: where the key witness might be shaky and the District Attorney wants to see how they hold up under cross-examination; or there is a likelihood that the witness may not be available at trial and his or her testimony is only admissible if it has been subjected to cross-examination at the preliminary hearing.

This report will detail how we got to where we are today, and the legal changes that would be needed in order to reinstitute the indicting grand jury. The report also discusses how other grand jury systems work so as to offer suggestions as to what Philadelphia could borrow from them.

**B. Legal Changes Needed**

In order to reinstitute the indicting grand jury system, there are several steps that need to be taken that are legal in nature, but we do not believe it would require enabling legislation. The Pennsylvania Supreme Court has, in our view, the authority to establish the

procedure for initiating criminal charges, which authority is derived from the state constitution and the Court's inherent rule-making power.

### **Background**

Indicting grand juries were in effect in Pennsylvania until the mid-1970's<sup>5</sup> when an amendment to the Pennsylvania Constitution permitted individual judicial districts to provide for the initiation of criminal proceedings by information rather than indictment, as long as the county obtained the Pennsylvania Supreme Court's approval. Specifically, Article 1, Section 10 of the Pennsylvania Constitution was amended to provide that "[e]ach 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."<sup>6</sup>

Thereafter, on October 10, 1974, Governor Milton Shapp signed an Act of the General Assembly implementing the above provision. The Act provided that "[t]he 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 information 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."<sup>7</sup>

Philadelphia County petitioned the Supreme Court to begin initiating prosecutions by information rather than indictment, but it was forced to postpone the effective date of the change because the Supreme Court had not yet promulgated rules of procedure to govern prosecutions by information. Also, it had to await the outcome of a challenge to the constitutionality of prosecuting defendants in some counties by information and in some counties by indictment.<sup>8</sup> In February 1975, the Supreme Court promulgated rules for prosecuting by information and they are incorporated in Pennsylvania Rules of Criminal Procedure, Rule 560, *et seq.* In May 1975, the Court rebuffed the challenge to the new

system with its decision in *Commonwealth v. Webster*, finding that the new information system presented no constitutional problems.<sup>9</sup>

On December 23, 1975, the Court cleared up the status of informations in Philadelphia County by issuing an order stating: “Effective January 1, 1976, no grand jury shall be empaneled for the purpose of considering bills of indictment, and no grand jury shall be held over from a prior term as an indicting grand jury. In lieu thereof, proceedings against criminal defendants shall be by information.”<sup>10</sup>

Philadelphia officially switched to an information system from an indictment system on January 1, 1976. By 1978, sixty-one of the sixty-seven counties in Pennsylvania had all switched, and the rest soon followed suit.<sup>11</sup>

Meanwhile, the legislature got into the act in July 1976 by passing 42 Pa. C. S. § 8931(f), which provided that “[n]o grand jury shall be empaneled in any judicial district where this section is applicable for the purpose of considering bills of indictment.”<sup>12</sup> This meant that where a county opted to proceed by information, it could not also have an indicting grand jury system. In other words, it had to have one or the other, but not both. The legislation added that counties which adopted the information system could still have investigating grand juries, which, of course, only have the power to issue presentments and cannot indict.

### **The Pennsylvania Supreme Court’s Exclusive Authority re Procedure**

The Pennsylvania Supreme Court has “the power to prescribe general rules governing practice, procedure, and the conduct of all courts...if such rules are consistent with [the Pennsylvania] 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, nor suspend nor alter any statute of limitation or repose.”<sup>13</sup> It is the function of the Pennsylvania Supreme Court, and not the Pennsylvania General Assembly, to

prescribe rules of procedure for the state courts.<sup>14</sup> The Pennsylvania General Assembly may not limit this power.<sup>15</sup>

The Court's authority does not preclude the legislature from enacting "substantive law," which creates, defines, and regulates rights, as opposed to the Court's exclusive jurisdiction over "procedural law," which addresses the method by which rights are enforced.<sup>16</sup> If a procedural ruling by the Supreme Court involves substantive rights of litigants, or has a collateral effect on a substantive right, it does not follow that the Supreme Court has inappropriately exceeded its constitutional rule-making authority.<sup>17</sup> This is because, "[m]ost rules of procedure will eventually reverberate to the substantive rights and duties of those involved."<sup>18</sup>

Thus, the Pennsylvania Supreme Court has exclusive rule-making authority to the extent that its orders and rulings involve "procedural law" and not "substantive law," although a procedural rule that affects substantive rights, directly or collaterally, is not outside the scope of the Court's authority.

The language of the state constitution regarding the initiation of criminal proceedings is not mandatory, since it specifically says that the courts of Common Pleas "may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings . . ."<sup>19</sup> It does not mandate that counties proceed by information, only that if they do decide to use that method they first need to obtain the approval of the Pennsylvania Supreme Court. This is because, as discussed above, the state constitution gives the Supreme Court "the power to prescribe general rules governing practice, procedure and the conduct of all courts..."<sup>20</sup>

Similarly, because the Pennsylvania Supreme Court has the exclusive authority to establish rules of criminal procedure, it is the subcommittee's view that the Court could issue an order that would repudiate 42 Pa. C.S. § 8931(f) and allow for the District Attorney to elect between proceeding to a preliminary hearing followed by the filing of an information or

directly from arraignment to an indicting grand jury.<sup>21</sup> The Supreme Court's power to suspend acts of the legislature where those acts conflict with the exclusive authority of the Court is not new. In *Commonwealth v. McMullen*,<sup>22</sup> 599 Pa. 435, 961 A.2d 842, 208 Pa. LEXIS 2270 (Pa. Super. Ct. 2008), the Court suspended a statute that granted a jury trial in an indirect criminal contempt case for violating a court order where the possible penalty was under the constitutional threshold for a right to a jury trial. Simply put, where the matter is purely procedural, the legislature has no authority to encroach on the Court's jurisdiction. Of course, it would make sense for the legislature to rescind 42 Pa. C.S. § 8931(f), but waiting for that to happen should not delay making the procedural change discussed above, given the Pennsylvania Supreme Court's exclusive authority over procedural rules.

### **C. Federal and Other State Grand Jury Rules**

#### **Federal Rules**

Under the Fifth Amendment to the United States Constitution, certain federal crimes cannot be prosecuted unless there is a grand jury indictment.<sup>23</sup> An indicting grand jury empowers laymen to decide whether there is enough information for the prosecutor to initiate criminal proceedings against an individual suspected of committing a crime, for the purpose of protecting the accused from unjust prosecution.<sup>24</sup> The grand jury can subpoena witnesses and documents in order to determine whether to indict, and has broad latitude in what information it may request.<sup>25</sup>

The federal rules regulating grand juries are simple and quite straightforward. Rule 6 of the Federal Rules of Criminal Procedure lays out the process for impaneling grand juries, the various challenges that may be made to the grand jury, the recording of matters before the grand jury, grand jury secrecy, the number of jurors necessary to conduct business and to vote an indictment, etc. A substantial body of law has grown up over the years interpreting these rules,<sup>26</sup> but the rules themselves have changed little. There is also a statute, Title 18,

United States Code, Section 3331, *et seq.*, that succinctly lays out the powers and duties of a special grand jury, distinguishing it from an indicting grand jury in that, in addition to the power to indict, it can also issue a report concerning misconduct in public office or organized crime conditions in the community in which it sits.

If Philadelphia, and the rest of the state for that matter, were to reinstitute the indicting grand jury system, some thought should probably be given to eliminating the distinction between an investigating grand jury and an indicting grand jury. The law now is that an investigating grand jury may only issue a presentment, it may not indict. This makes little sense since there is nothing that distinguishes the selection or composition of the two grand juries. Moreover, since the filing of an information is virtually automatic after an investigating grand jury in Pennsylvania has issued a presentment, it would change very little to invest investigating grand juries with the power to indict.

### **State Grand Juries**

Only Pennsylvania and Connecticut<sup>27</sup> have completely abolished the use of grand juries to issue indictments. The other forty-eight states and the District of Columbia use an indicting grand jury in some capacity. Twenty-three states and the District of Columbia require an indictment from a grand jury to prosecute certain offenses,<sup>28</sup> such as, for example, only capital offenses, or only felonies. Twenty-five states give the prosecutor the option to either indict or proceed by information and preliminary hearing.<sup>29</sup>

### **New York and New Jersey**

In addition to the federal grand jury rules, the subcommittee examined New York's and New Jersey's rules governing the operation of grand juries. Both states have rules much like the federal rules with respect to how grand juries are selected, and how they are to function; but they also differ from the federal rules in certain respects.



In New York, for example, a grand jury, in addition to having the power to indict, may direct the District Attorney to file a prosecutor's information with the local criminal court, may direct the District Attorney to remove the case to family court, may dismiss the charge or charges, and may issue a report.<sup>30</sup>

The New York system also offers increased protections for testifying witnesses. Thus, unlike federal law, attorneys for grand jury witnesses are allowed to accompany their clients into the grand jury room and be present during the testimony.<sup>31</sup> However, the attorney can do no more than advise his or her client and may not otherwise participate.<sup>32</sup> Another rather unusual feature in New York is that a grand jury witness automatically receives immunity if he or she appears before the grand jury unless they waive immunity prior to entering the grand jury room.<sup>33</sup> New York may be the only state with this feature, and it is not clear the purpose behind it.

New Jersey has both local and statewide grand juries that act as investigating and indicting grand juries. New Jersey offers its own unique protections to witnesses and targets. When the grand jury investigates a person but decides not to indict, New Jersey law allows that person to request through the court that the grand jury issue a statement indicating that they had been investigated but were not indicted.<sup>34</sup> There is a similar provision for witnesses who testify before the grand jury but are not indicted.<sup>35</sup>

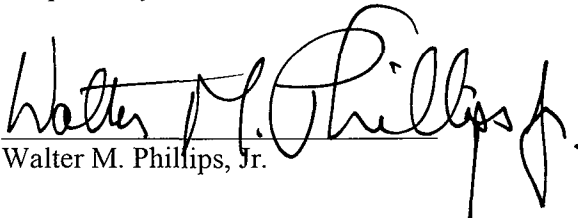
As to which is the most workable grand jury model to follow in Pennsylvania, that would best be left to the Pennsylvania Supreme Court Rules Committee.

### **CONCLUSION**

The Grand Jury Subcommittee is strongly in agreement that having a grand jury system available to the District Attorney as the method for filing formal charges would go a long way in protecting witnesses from intimidation, which is unquestionably a serious problem in Philadelphia and elsewhere. We also believe that an indicting grand jury system

would reduce the level of skepticism and general fear of the criminal justice system on the part of the public in Philadelphia. For these reasons, we urge the Pennsylvania Supreme Court, in the exercise of its rule-making authority, to issue rules that would effect the change to an indicting grand jury as an option for the District Attorney to formally charge. It should be a straightforward exercise of the Court's exclusive authority to regulate the process for instituting criminal process in Pennsylvania. We also believe that it makes sense for the District Attorney to have the option of proceeding either directly to the grand jury or to a preliminary hearing followed by the filing of an information, particularly in Philadelphia where the sheer volume of cases would overwhelm the system if they all had to be presented to a grand jury. In making these recommendations, we are mindful of a defendant's right of confrontation under the Sixth Amendment, but our research shows that the changes we are advocating would not abrogate this right. We are mindful that this tool potentially can be abused by overzealous prosecutors who overuse it, but we believe that the benefits of giving this option to District Attorneys far outweigh the negatives.<sup>36</sup>

Respectfully submitted,

  
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## Endnotes

- <sup>1</sup> Nancy Phillips, et al., Witnesses fear reprisals, and cases crumble – Intimidation on the streets is changing the way trials are run. “People are frightened to death,” the D.A. says., PHILA. INQUIRER, Dec. 14, 2009, at A-01.
- <sup>2</sup> PENN. COMM. ON CRIME AND DELINQUENCY, FORUM ON WITNESS RELUCTANCE, REPORT TO THE COMMISSION, December 11, 2007.
- <sup>3</sup> *Id.* at 4-8.
- <sup>4</sup> See *Commonwealth v. Ruza*, 511 A.2d 808, 810 (1986) (no constitutional right to a preliminary hearing). See also *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982) (no right to preliminary hearing once indictment is filed). *Nichols v. Estelle*, 556 F.2d 1330, 1331 (5<sup>th</sup> Cir, 1977) (U.S. Constitution does not require a state preliminary hearing), *cert. denied*, 434 U.S. 1020 (1978).
- <sup>5</sup> For the original Pennsylvania Rules of Criminal Procedure governing indicting grand juries with commentary of amendments to these rules abolishing the indicting grand jury, see 22 Pa.B 3826-38.
- <sup>6</sup> PA. CONST. Art. I § 10.
- <sup>7</sup> 1974 Pa. Law 713, 238 §1.
- <sup>8</sup> 337 A.2d 914 (Pa.1975).
- <sup>9</sup> *Id.* At 917-19.
- <sup>10</sup> See *Com v. Brown*, 372 A.2d 887, 889 (Pa. Sup. Ct.1977).
- <sup>11</sup> See 204 Pa. Code §201.3(1978). All Pennsylvania counties had abolished the indicting grand jury system by September, 1992.22 Pa.B 3826.
- <sup>12</sup> 42 Pa. C.S. § 8931(f); 204 Pa. Code §201.3.
- <sup>13</sup> PA. CONST. Art. V § 10(c).
- <sup>14</sup> *Adelphia Cabelvision Associaties of Radnor, L.P. v. Univ. City Housing Co.*, 755 A.2d 703 (Pa. Super Ct. 2000).
- <sup>15</sup> *Bergdoll v. Kane*, 694 A.2d 1155 (Pa. Commw. Ct. 1997).
- <sup>16</sup> *Comm v. McMullen*, 961 A,2d 1155 (Pa. Commw. Ct. 1997).
- <sup>17</sup> *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 (Pa. 1981). The Court also quoted the New Jersey Supreme Court’s conclusion that “an absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution.” *Id.* (quoting *State v. Leonardis*, 375 A.2d 607, 614 (N.J. 1977)).
- <sup>18</sup> *Id.*
- <sup>19</sup> PA. CONST. ART. I § 10.
- <sup>20</sup> PA. CONST. ART V, §10 (c).
- <sup>21</sup> The Pennsylvania Supreme Court rescinded the Pennsylvania Rules of Criminal Procedure pertaining to the indicting power of the grand jury on August 12, 1993.23 Pa. B 4204.
- <sup>22</sup> 961 A.2d 842 (Pa. Super. Ct. 2008).
- <sup>23</sup> U.S. CONST. AMEND V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”). Whether a crime is infamous depends on the punishment imposed. *Ex parte Wilson*, 114 U.S. 417 (1885). Federal misdemeanor crimes do not require an indictment. *Duke v. U.S.*, 301 U.S. 492 (1937).
- <sup>24</sup> *Costello v. U.S.*, 350 U.S. 359 (1956).
- <sup>25</sup> *U.S. v. R.. Enterprises, Inc.*, 498 U.S. 292 (1991).
- <sup>26</sup> *E.g., U.S. v. R.. Enterprises, Inc.*, 498 U.S. 292 (1991)(subpoena powers of grand jury unrestrained by procedural or evidentiary rules); *U.S. v. Calandra*, 414 U.S. 338 (1974)(exclusionary rules does not apply in grand jury hearing); *Costello v. U.S.*, 350 U.S. 359(1956) (hearsay admissible in grand jury hearing); *Hurtado v. California*, 110 U.S. 516 (1884) (requirement of grand jury indictment not incorporated to the states).
- <sup>27</sup> CONN. CONST. Art. 1. § 8. See also C.G.S.A. § 54-46 (providing that for all crimes charged after May 26, 1983 the prosecution may be by complaint or information).
- <sup>28</sup> Alabama: Ala. R. Crim. P. 2.1, Alaska: Alaska R. Crim. P. 7(a), Delaware: Del. R. Crim. P. 7(a)(1), Florida: Fla. R. Crim. P. 3.140, Kentucky: Kent. Const. § 12, Louisiana: LSA - C. Crim. P. Art. 382, Maine: Maine R. Crim. P. 7(a), Massachusetts: Mass. R. Crim. P. 3, Minnesota: Minn. R. Crim. P. 17.01, Mississippi: Miss. Code Ann. § 99-7-1, Missouri: Missouri R. Crim. P. 23, New Hampshire: N.H. R. Crim. P. 7(a), New Jersey: N.J. Crim. P. 3:7-2, New York: N.Y. Code Crim. Proc. § 200.10, North Carolina: N.C.G.S.A. § 15-140 *et. seq.*, North Dakota: N.D. R. Crim. P. 7(a)(1), Ohio: Ohio R. Crim. P. 7(a), Rhode Island: Gen. Laws 1956, § 12-12-1.1, South Carolina: S.C. R. Crim. P. 3(c), Tennessee: Tenn. Const. Art. 1 § 14, Texas: Tex. Code of Crim. Proc. Chap. 21, Virginia: Va. Code Ann. § 19.2-217; West Virginia: W.V. R. Crim. P. 7(a).

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<sup>29</sup> Arizona: Ariz. R. Crim. P. 2.2, Arkansas: Ark. R. Crim. P. 8.6, California: Cal. R. Crim. P: 4.405(9), Colorado: Col. R. Crim. P. 5(a)(1), Georgia: Ga. R. Crim. P. Chap. 11, Hawaii: Haw. R. Penal P. 7, Idaho: I.C.R. 7, Illinois: 725 ILCS 5/111-1, Indiana: IC 35-34-1-1, Iowa: Iowa Const. Art. I. Sec. 11, Kansas: K.S.A. 22-2303, Maryland: Md. R. Crim. P. 4-211, Michigan: Mich. R. Crim. P. 6.112, Montana: MT ST. 46-11-101, Neb. Rev. St. § 29-110, Nevada: Nev. Rev. Stat. § 172.015, New Mexico: N.M.S.A. 1978, § 31-6-5, Oklahoma: 22 OK ST § 222, Oregon: OR Const. Art. VII § 5, South Dakota: SDCL § 23A-6-1, Utah: Utah R. Crim. P. 5, Vermont: Vt. R. Crim. P. 7, Washington: RCW 10.37.015, Wisconsin: W.S.A. § 967.05; Wyoming: Wyo. R. Crim. P. 3.

<sup>30</sup> N.Y. CODE CRIM. PROC. § 190.60.

<sup>31</sup> *Id.* at §190.52.

<sup>32</sup> If the witness cannot afford an attorney the state provides one. *Id.*

<sup>33</sup> *Id.* at § 190.40.

<sup>34</sup> N.J. STAT. ANN. § 2B:21-9(a).

<sup>35</sup> *Id.* at § 2B:21-9 (b).

<sup>36</sup> The subcommittee is especially grateful to Temple University Law student Doug Moak for his excellent legal research that is the basis for much of the analysis in the report.