Professor Bruce Antkowiak, J.D.
Executive Summary of Expected Testimony

I was asked by the Committee to address the propriety of the use of the Grand Jury process by the District Attorney's office regarding the prosecution of Ryan Pownall with reference to the Special Concurrence by Justice Kevin Dougherty in the Pennsylvania Supreme Court case on that matter. I was also asked to address generally the policies and practices of the District Attorney's office in the context of the proper scope of prosecutorial discretion as the law of Pennsylvania understands that concept.

With respect to the first issue, Justice Dougherty's major concern was the indication that the Investigating Grand Jury was never given an instruction on the law, particularly with respect to the impact of Section 508 of the Crimes Code. That Section discusses the lawful parameters of the use of deadly force by a police officer in connection with the arrest of a suspect. In the Special Concurrence, Justice Dougherty indicates that it appears that no instruction was given to the Grand Jury on this point and that little or no instructions were given regarding any of the degrees of homicide that could possibly have been charged in this case. See, Special Concurrence, footnote 4.

My full report details the conclusion that it is both a legal and an ethical duty of a prosecutor assisting a Grand Jury to give the Grand Jurors accurate and proper advice on the law they are to apply. A Grand Jury is an ex parte proceeding at which no judge or defense attorney is present to raise or contest issues that otherwise might need to be presented for the proper exercise of the Grand Jury's function. Even though an Investigatory Grand Jury in Pennsylvania is not empowered to return an indictment, Pennsylvania law nonetheless requires it to make a specific recommendation that an individual has violated a criminal law of the Commonwealth.

Given this, it is critical that the Grand Jury understand the meaning of those laws and how the facts that they find apply to those standards.

Moreover, the ethical demands on prosecutors and lawyers generally is to insure that law that is applicable to the resolution of a matter but adverse to the parties' position is nonetheless brought forward to a tribunal that has to make a determination in which the application of the law is required. To the extent that this Grand Jury was not advised of the potential impact of Section 508 or other aspects of the law which would be applicable to the recommendation made in the presentment, a potentially serious problem does arise.

That problem could only be resolved by a complete review of the entire Grand Jury transcript in this matter. It may have been that at some point during the Grand Jury's process, Grand Jurors asked questions about whether a police officer is guided under a different set of rules than another individual in the use of deadly force. If that question, in some form, was asked, its answer could provide important insight as to the Grand Jury's deliberations.

Overall, the standard for a finding of Grand Jury abuse requires a Court to find that not only has the prosecutor committed error but that the defendant suffered prejudice as a result. Prejudice in this context means that the legitimacy of the Grand Jury's finding would be called into serious question given the error which occurred. That assessment can only be made upon a full review of the entire Grand Jury process.

To be sure, a prosecutor's office may take a position that a statute is unconstitutional or that it is otherwise inapplicable under the facts of a given case. A prosecutor is free to take such a position if their good faith analysis of an issue leads them to believe that a law of the Commonwealth cannot be applied in a case without violating a Constitutional principle. But until either the Legislature changes the law or a Court of competent jurisdiction strikes down the

statute, the law remains applicable and if it is relevant to a Grand Jury's inquiry, the jury must be so advised.

In the present case, the DAO espoused the position that sections of Section 508 were unconstitutional under Federal Constitutional standards. Ultimately, two Justices of the Pennsylvania Supreme Court agreed with the DAO that its pretrial appeal of this matter was proper and that parts of Section 508 did not pass Constitutional muster. The four-member majority of the Supreme Court refused to support the legitimacy of the pretrial appeal and dismissed it. The fact that 1/3 of the justices who heard the case agreed with the DAO's position, however, makes it impossible to call its efforts to prosecute a pretrial appeal and its substantive position in the matter frivolous or in bad faith.

With respect to the second major issue the Committee asked me to address, Pennsylvania gives a very broad discretionary power to a prosecutor in terms of the decision to file charges in a given case. It is a fundamental application of the Separation of Powers Doctrine that prosecutors are given considerable leeway here. Recent decisions by the Pennsylvania Supreme Court have reaffirmed the position that the prosecutors' authority with respect to the filing of charges is extremely broad and their discretion is largely unchecked. In certain other contexts, and as a case proceeds, the discretion is more curtailed since the ultimate decision-making function in a case passes in certain respects to the jury and the courts but, in the initial decision to prosecute, Pennsylvania is one of a number of states that affords great deference to the judgment of the local prosecutor.

Other states seek to curtail this by Constitutional provisions or by vesting additional authority in a state-wide officer such as the Attorney General. While the Attorney General has some limited ability in Pennsylvania to take over a given case, the day-to-day judgments about

what is to be prosecuted and how it is to be prosecuted are largely left within the discretion of the elected District Attorney. In that context, it appears that the judgement of Pennsylvania has been to allow the electorate to have the final word on whether the policies of a given District Attorney are in accord with their liking and should continue for another term in office.

REPORT TO SELECT COMMITTEE ON RESTORING LAW & ORDER, PENNSYLVANIA HOUSE OF REPRESENTATIVES, PURSUANT TO H R 216

This report is presented in response to a request from counsel to the Select Committee of the Pennsylvania House of Representatives organized pursuant House Resolution Number 216. The report is to address the following issues:

1. The propriety of the use of the Grand Jury process of Philadelphia's District Attorney's office in the prosecution of Ryan Pownall, as that matter is referenced in the concurring opinion of Justice Kevin M. Dougherty in the case of Commonwealth v. Pownall, 278 A3d 885 (Pa. 2022).
2. The policies and practices of the District Attorney's Office of Philadelphia County as within or outside the bounds of permissible prosecutorial discretion in the enforcement of the criminal laws promulgated by the Pennsylvania Legislature.

The findings of this report are set forth in detail and are summarized in the Executive Summary set forth below.

I. EXECUTIVE SUMMARY

At the conclusion of Justice Dougherty's special concurring opinion, he details six concerns regarding the actions of the District Attorney in the prosecution of this case. Within the body of his special concurrence, Justice Dougherty collapses

those into three broad considerations, specifically, the legal instructions given to the Grand Jury before the return of its presentment, the bypassing of the preliminary hearing urged by the District Attorney's office, and the filing of a Motion In Limine to preclude a jury instruction pursuant to Title 18, PACS Section 508 and the subsequent attempt by the District Attorney's office to take a collateral appeal of the denial of that motion.

Regarding the six specific matters listed by Justice Dougherty in the special concurrence, Id. at *72 to *73, the following summary conclusions can be drawn:

1. The Justice's most significant concern was that the Grand Jury presentment became a slanted presentation of the facts, in substantial part because the Grand Jury was not instructed on the applicability of Section 508 and the impact it could have had on the determination as to whether an officer-involved shooting was justified. Both ethically and legally, a prosecutor is obligated, in dealing with a Grand Jury, to ensure that the grand jurors are presented with an accurate statement of the law from which they can assess the facts presented and reach the conclusion the Grand Jury has been empowered to reach by the Pennsylvania Legislature. The failure to properly instruct the Grand Jury on the law is a serious concern that could undermine the integrity of the presentment if a finding of specific prejudice to the Defendant was reached.
2. The unsealing and dissemination to the press of a Grand Jury presentment is part of the normal process that occurs in the issuance of many such presentments and, by itself, does not suggest any impropriety by a

prosecutor. Pursuant to Rule 3.8 of the Pennsylvania Rules of Professional Conduct, prosecutors are admonished to refrain from making public comments about a case:

> "**(e)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."[1]

If a more surreptitious motive existed for that release in dissemination, or it was accompanied by inflammatory comments in violation of these Rules, an additional conclusion regarding its propriety could be reached. However, the mere releasing of the presentment, particularly in a high-profile case such as this, does not appear to be outside the norm for prosecutorial actions.

3. With regard to the bypassing of the right of the Defendant to a preliminary hearing, Justice Dougherty is certainly correct that the Legislature, in its enactment of Section 4551(e) of Title 42 PACS, has dictated that a person against whom a presentment has been filed "shall" have the right to a preliminary hearing.[2] This supersedes the general provisions of Rule 565

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[1] Rule 3.6 limits all attorneys from making public comments about cases which "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

[2] "**(e)** ***Procedure following presentment.*** — When the attorney for the Commonwealth proceeds on the basis of a presentment, a complaint shall be filed and the defendant **shall** be entitled to a preliminary hearing as in other criminal proceedings." [emphasis added]

of Pennsylvania Rules of Criminal Procedure which, in very limited circumstances, permits a prosecutor to have a Court order that the preliminary hearing be bypassed.[3] The prosecutor's office should have been aware of the provisions of Section 4551(e), and it is not clear whether or not they brought that provision to the attention of the Trial Court. However, to the extent that defense counsel did bring that section to the attention of the Court, the difficulty in bypassing the preliminary hearing lies equally upon the Trial Court, which ordered the bypass despite the mandatory language of that section of the statute.

A preliminary hearing in a grand jury presentment case such as the *Pownall* matter is to proceed to a preliminary hearing except if the case was then to be presented to an indicting grand jury pursuant to Pa. Rule of Criminal Procedure 556.2.[4] Rule 556.2 requires a showing by the prosecutor of probable cause to believe that witness intimidation has or is occurring. It does not appear from the record that such a showing was made.

4. The prosecutor's opposition to the change of venue is not an uncommon posture for a prosecutors' office to take. "A change in venue becomes necessary when the trial court concludes that a fair and impartial jury

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[3] "Rule 565**(A)** When the attorney for the Commonwealth certifies to the Court of common pleas that a preliminary hearing cannot be held for a defendant for good cause, the Court may grant leave to the attorney for the Commonwealth to file an information with the Court without a preliminary hearing." The Official Commentary to that Rule states: "It is intended that use of the bypass procedure as set forth in paragraph (A) will be limited to exceptional circumstances only.

[4] See, Pa. Rule Criminal Procedure 540 (F)(2).

cannot be selected in the county in which the crime occurred." *Commonwealth v. Robinson,* 864 A.460, 484 (Pa. 2004). Courts presume to try a case with a local jury unless evidence demonstrates that a fair jury cannot be drawn from that locale. Here, Justice Dougherty's opinion indicates that the trial Court made a careful effort to determine whether a jury could be selected from Philadelphia County without the need to change venue or veneer.[5] There is no superficial impropriety in a prosecutor opposing such a change of venue and the Court's ruling on it was a matter the defense could have later challenged on appeal. Indeed, since the effort to select a trial jury awaits, it still may prove to be impossible to draw a fair and impartial jury from the local population. Unless further evidence develops of some surreptitious motive on the part of the District Attorney to oppose of change of venue, there is simply nothing unusual about a prosecutor's office seeking to have the prosecution remain within the local jurisdiction.

5-6. Points 5 and 6 of Justice Dougherty's summary involves the action of the District Attorney in waiting until the trial neared before filing a Motion in Limine to bar the use of Section 508 via application by the Pennsylvania Suggested Standard Jury Instructions in the case. Upon the filing of the Motion in Limine, the trial Court did what many trial Courts would do in such a circumstance, that is, indicate that it would withhold ruling on that motion until the evidence was developed at trial. It is a fundamental principle of trial management that jury instructions can only be given where a factual

[5] The trial Court conducted two mock jury selections over the course of several months and concluded that a fair jury could be drawn from the Philadelphia area. Id, at *3-4.

basis exists in the record to support them, and the trial judge properly indicated that until the evidence was developed, the applicability of any part of Section 508 would have to await that factual basis. Nonetheless, the District Attorney pressed the matter, arguing that Section 508 (in most of its particulars) violated the Federal and Commonwealth Constitutions and asked for a pre-trial ruling on matter. When an adverse ruling was obtained, the District Attorney sought a collateral appeal.

Again, while additional evidence may indicate an improper motive for this appeal, it must be pointed out that while the Superior Court agreed with the trial Court that the matter was not an appealable order, two Justices of the Pennsylvania Supreme Court disagreed. Though a majority of four justices (Justice Saylor did not participate in the decision in the Pownall case), decided that the issue did not fit any established rubric for an immediate pre-trial appeal by the Commonwealth, Justices Wecht and Donahue disagreed. Id. at *86-87. They concluded that the matter was properly before the Court and agreed with the Commonwealth that Section 508 is unconstitutional in part. Id. at *100-108. An intriguing aspect of that dissenting opinion, however, is that the two Justices observed that even if Section 508 was declared unconstitutional in part, the impact of that ruling would not be felt by the Defendant in this case. Assuming the facts supported it, Pownall could still have used Section 508 as a trial defense, as a change in the law at this point would constitute an Ex Post Facto application in violation of the Defendant's constitutional rights. Id. at *110 *and following.*

Thus, given the support of one third of the deciding members of the Supreme Court that the decision to seek a pre-trial appeal was viable and that the grounds for the appeal were not frivolous, the decision to seek a pre-trial

appeal does not, by itself, demonstrate any impropriety on the part of the District Attorney's office.

Overall, there are certainly grounds for concern regarding the actions of the District Attorney in this case, most particularly with respect to the advice to the Grand Jury on the applicable law. Other actions were, on the surface, far more mainstream in terms of prosecutorial conduct, and a further development of facts would be necessary to draw conclusions with more ominous tones.

As to the second question posed by the Committee, Pennsylvania embraces a broad scope of discretion for District Attorneys. While individual decisions in certain matters are constrained by Legislative enactments, the major check of the exercise of discretion is the electoral process. Short of that, resorting to the exhaustive process of impeachment is available. And in specific cases, the Attorney General may seek to intervene and supersede the District Attorney in a given prosecution. Beyond that, little is available as a legal avenue to check a prosecutor's executive power.

II. ANALYSIS: COMMITTEE'S QUESTION #1

Before delving into the two particulars of the concerns raised by Justice Dougherty concerning this entire prosecution, a synopsis of the Pownall opinion is appropriate to place these issues into proper context.

A. The Pownall Opinion

The majority opinion in Pownall, written by Justice Dougherty, addresses the fundamental procedural issue of whether the appeal perfected by the Commonwealth was properly before the Court.

The majority outlined the salient facts leading up to the present posture of the case as follows:

The Defendant, a Philadelphia police officer, was charged with shooting a suspect after a Philadelphia County Investigating Grand Jury filed a presentment recommending the filing of homicide charges. The District Attorney's office preferred a criminal information charging third degree murder and other offenses.

The District Attorney then sought to bypass the preliminary hearing and the lower Court agreed, seemingly disregarding the express language of Title 42 Section 4551(e), which states that when a charge arises out of a Grand Jury presentment, a defendant "shall" be entitled to a preliminary hearing. Id. at *3 to *4. The Court appears to have proceeded on the general application of Rule 565 of the Criminal

Rules[6], which permits a preliminary hearing bypass for "good cause." In cases involving a Grand Jury presentment, Section 4551(e) must be seen to supersede that Rule and itself only admits of an exception under Rule 556.2, which permits a prosecutor to seek a bypass of a preliminary hearing where a probable cause showing is made to the Court that witness intimidation has or is occurring.[7] No attempt was

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[6] Rule 565: "**(A)** When the attorney for the Commonwealth certifies to the court of common pleas that a preliminary hearing cannot be held for a defendant for good cause, the court may grant leave to the attorney for the Commonwealth to file an information with the court without a preliminary hearing."

[7] **Rule 556.2. Proceeding by Indicting Grand Jury Without Preliminary Hearing.**

(A) After a person is arrested or otherwise proceeded against with a criminal complaint, the attorney for the Commonwealth may move to present the matter to an indicting grand jury instead of proceeding to a preliminary hearing.

(1) The motion shall allege facts asserting that witness intimidation has occurred, is occurring, or is likely to occur.

(2) The motion shall be presented *ex parte* to the president judge, or the president judge's designee.

(3) Upon receipt of the motion, the president judge, or the president judge's designee, shall review the motion. If the judge determines the allegations establish probable cause that witness intimidation has occurred, is occurring, or is likely to occur, the judge shall grant the motion, and shall notify the proper issuing authority.

(a) Upon receipt of the notice from the judge that the case will be presented to the indicting grand jury, the issuing authority shall cancel the preliminary hearing, close out the case before the issuing authority, and forward the case to the court of common pleas as provided in Rule 547 for all further proceedings.

made to make that showing here; rather, the District Attorney relied upon a showing that a plethora of witnesses would be needed for a preliminary hearing and that this would unduly slow the process. Id. at *61-65.

The District Attorney further opposed a change of venue in the case. The trial Court conducted two mock jury selections over the course of months and, as a result, concluded that a fair and impartial jury could be drawn from the Philadelphia Jury pool. Thus, the change of venue motion filed by the Defendant was denied, at least pending the attempt to actually empanel a jury prior to the start of trial. Id. at *4 to *5.

The circumstances leading to the appeal began approximately a month before trial when the District Attorney's office filed a motion to bar the Trial Court from using a Pennsylvania Suggested Standard Jury Instruction based upon Section 508 of the Crimes Code. That section set forth the circumstances under which a police officer is justified in using deadly force during the arrest of a suspect. The District Attorney essentially contended that pursuant to Tennessee v. Gardner, 471 U.S. 1 (1985), two of the subsections of §508 were unconstitutional. Specifically, the District Attorney's office contended that the section which permitted deadly force to be used when necessary to prevent the defeat of an arrest by a defendant who had committed "a forcible felony" or when the defendant was in possession of "deadly weapon" exceeded the authorization of the Gardner decision. Id. at *7-14.

In response to the motion, the Trial Court indicated that it would hold the matter under advisement, as it presented an evidentiary issue that required the Court to assess the factual basis for the giving of any instruction in this matter and that the ultimate decision on the Commonwealth's Motion in Limine would be reached after that factual basis was assessed at trial.

The District Attorney's office, unsatisfied with that resolution, evidently appeared at the Trial Court's chambers on December 23, 2019, and asked the Court to rule immediately on the matter. The District Attorney asserted that if the motion was denied, an immediate appeal would be taken under either rule of Rule 311(d) or 313 of the Pennsylvania Rules of Appellate Procedure. Rule 311 allows the Commonwealth to appeal wherein an issue is decided pre-trial adversely to it which would either terminate the prosecution or substantially handicap the prosecution's case.[8] The Trial Court denied the application of Rule 311. It also held that the order it was entering was not collateral order. According to §313:

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[8] Rule 311 states: "d) *Commonwealth appeals in criminal cases* -In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution."
By making that assertion with respect to the application of Section 508, it must be concluded that the Commonwealth was aware that the trial jury's awareness of §508 might have a very severe impact on whether or not a conviction could properly be obtained in the case. This is a significant matter when again considering the impact

> **(b)***Definition* -A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

*22. The Trial Court's consideration of this matter was primarily based upon its continued assertion that the application of any subsection of Section 508 would be dependent upon the facts that were ultimately developed at trial. At the conclusion of these proceedings, the Trial Court also denied an application by the Commonwealth to certify the issue for an immediate appeal. *24.

Nonetheless, the Commonwealth filed a Notice of Appeal.

The Superior Court dismissed the appeal as one improperly brought. 240 A. 3d. 905 (Pa. Super Unpub. 2020).

The Supreme Court, per Justice Dougherty and three other Justices, affirmed that dismissal. The Court held that Rule 311 was not applicable in a circumstance such as here, where the issue was the admissibility of defense evidence or argument as opposed to where Commonwealth evidence has been suppressed. Id. at *31. In essence, the majority held that the Commonwealth could not rely on Section 311 to speculate on what impact on Commonwealth's case something that the defense might be able to argue, depending upon whether the facts would support that

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of the Commonwealth's failure to advise the Grand Jury of the possible application of that section prior to the Grand Jury's deliberation on the presentment it returned.

argument. Id. at *34. In this connection, the majority reminded that a defendant is only able to rely upon a justification defense if the facts support it. Id. at *36, *citing authority*. See also, Commonwealth v. Browdie, 671 A. 2d 668 (Pa. 1998) (A trial court can only instruct on matters upon which a verdict could reasonably be based given the evidence).

As to Rule 313, the majority held that the issue raised was not separable from the main cause of action (whether the Defendant was guilty or not) and that, since Section 508 was not unconstitutional on its face, the only attack that could properly be mounted was an "as-applied" argument which, of course, would rely upon the development of a trial record. Accordingly, the appeal of the Commonwealth was quashed. Id at *48-50.

Justices Wecht and Donahue dissented from this majority ruling. Those Justices concluded that the issue raised was a collateral order which should properly be considered immediately by the Supreme Court. The dissenters argued that these were legal issues capable of a decision without a trial record and that, in fact, sub-sections of Section 508 were unconstitutional for the reasons suggested by the Commonwealth. Id. at *86 to *87, *100 to *108. The dissenters reasoned, however, that even if the full Court found parts of Section 508 unconstitutional at this point, the Defendant would nonetheless be able to invoke those provisions; to do otherwise would be to impose an Ex Post Facto provision upon him in violation of his

fundamental Constitutional rights. Overall, the dissenters did support the position of the Commonwealth that the matter was ripe for immediate appeal and that the Commonwealth was correct that portions of Section 508 do not pass Constitutional muster. Id. at *110.[9]

A special concurrence by a member of the Supreme Court is, in fact, unusual. Justice Dougherty indicated that he was moved by certain unique and troubling aspects of this case to take this generally untraveled path. Overall, he concluded that the District Attorney had not treated the Defendant fairly and equally in the

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[9] An oddity of the dissenting opinion is that it would have permitted a determination by the Supreme Court of Pennsylvania on an issue which would not have affected the substantive rights of the parties before them. It could be argued that such a decision is an advisory opinion and not one that should be properly rendered by the Court.

One of the central problems in this case articulated in a number of the opinions is how the Commonwealth could possibly raise the issue of the constitutionality of this statute other than pressing of a collateral order appeal. Certainly, an appeal would have properly been pressed if the trial Court had certified the issue for an appeal. See, Tile 42 Pa.C.S. 702 (b). Moreover, if the trial Court had overseen this case and decided that Section 508 was inapplicable based upon the facts, and the Defendant had been convicted, a Defendant's appeal would have raised the question of the applicability of Rule 508. Under accepted appellate practice, the Court could have considered any lawful grounds to uphold the conviction, including the fact that Section 508 was unconstitutional in its application in any event. This is an application of the so-called "right for any reason" doctrine. See, In re AJR, 188 A. 3d 1157 Pa. 2018); Commonwealth v. Tighe, 224 A.3d 1268 (Pa. 2020).

Moreover, the District Attorney's office was always free to seek a legislative remedy by amendment of Section 508, arguing that under constitutional authority, Sections of that statute do not accord with constitutional principles.

To be sure, none of these options have the efficacy of a direct, interlocutory appeal but they are paths available when the direct option fails.

prosecution of the case and identified three circumstances which particularly caused him concern. Id. at *52.

First, he identified the failure of the prosecutor to give the Grand Jury all relevant legal definitions before its deliberations on whether a presentment should be returned. Second, he noted the successful "attempt" by the District Attorney to deny the defendant a preliminary hearing. And third, he was disturbed by the "relentless but unsuccessful" attempt to change the law of Pennsylvania in the form of Section 508 by an appeal prior to the trial of the matter. Id. at *52-53.

With respect to the Grand Jury, Justice Dougherty noted that the Trial Court had ordered the release of the Grand Jury instructions to the Defendant, who then alleged that no definition of any of the degrees of homicide nor any indication of the content of Section 508 were presented to the Grand Jury. Id. at *55. In footnote 4 of his concurrence, Justice Dougherty noted that the allegation was evidently true. He thus decried the fact that the Commonwealth had obtained a presentment without giving the Grand Jury a definition of the crime and, thereby, wholly undermining the factual determination the Grand Jury had made. Id. at *56. This was underscored by the fact that the presentment itself, which was prepared by the prosecutor, contained no discussion of the law whatsoever, resulting in a deeply troubling

circumstance, given the complexity of the law regarding officer-involved shootings. Id. *60. [10]

With respect to the preliminary hearing bypass, Justice Dougherty pointed out that Section 4551(e) of Title 42 PACS definitively states that once a presentment is utilized, a defendant "shall be entitled" to a preliminary hearing. Rule 565(A) of the Pennsylvania Rules of Criminal Procedure is thus bypassed in Justice Dougherty's view, particularly upon consideration of Commonwealth v. Bestwick, 414 A.2d 1373 (Pa. 1980), a case heavily relied upon by the Commonwealth. There, a preliminary hearing bypass was permitted in a case involving a Grand Jury presentment, but in footnote 2 of that same opinion, the Court pointed out that the issue of whether a bypass in such a case was possible "has been settled by the legislature" by enacting Section 4551(e). That section was not applicable in the Bestwick case but going forward it would supersede any general notation permitting a bypass that other rules might present. Justice Dougherty found it "inexplicable" that the District Attorney did not realize and cite to this important distinction. *63.[11]

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[10] An independent review of the published presentment confirms this. Over 13 pages, it summarizes the various testimonies presented. No discussion of Section 508 or any legal principles is set forth. At the very end, citations to the statutes involving Criminal Homicide, Possession of an Instrument of Crime, and Recklessly Endangering Another Person are set forth without any discussion.

[11] Rule 556.2 would still permit the Commonwealth in a presentment case to petition the Court to bypass the preliminary hearing via the submission of the case to an *indicting* Grand Jury which would understand that it was not only

With respect to the Commonwealth's Motion in Limine to preclude a jury instruction on Section 508, Justice Dougherty chided the Commonwealth for a lack of candor in their underlying Constitutional claim, the questionable timing of their motion, and their insistence on a pre-trial appeal. As to the first point, he indicated that the Commonwealth neglected a key paragraph of Tennessee v. Garner that appeared to affirm the validity of Section 508. Id. at 67.[12] Also, Garner did not hold that the statute before it was unconstitutional on its face but only as applied, a concept that the trial Court was repeatedly seeking to assert with respect to its belief that the only way the Commonwealth's motion could properly be assessed is when a factual development occurred at trial. Id.

With respect to the timing, Justice Dougherty noted that the Commonwealth had waited 14 months to file the motion and that it did so two weeks before the trial at a time when it would have been called upon to file an answer to the motion to quash the presentment filed by the Defendant. Overall, Justice Dougherty said the maneuvering by the Commonwealth denied the Defendant a speedy and fair trial. Id. at *70 to *71.

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recommending a charge but actually, by its vote, bringing one about. That rule is only available where witness intimidation is afoot and, in the present case, there was no showing of that here.

[12] The dissenting Justices did not share the view that the omitted paragraph had such an impact.

Concluding his special concurrence, Justice Dougherty listed the six points referenced previously, which he felt, in sum, demonstrated that the Commonwealth had adopted a "win at all cost" attitude with respect to this case and that this Defendant had been treated markedly differently than others similarly situated.

The following analysis explores the three major areas Justice Dougherty identified as well as the six sub-points therein.

B. CONDUCT OF THE PROSECUTOR REGARDING THE GRAND JURY

No discussion of the potential of prosecutorial abuse with respect to the Grand Jury would be complete without recalling the comment made by a former Judge of the New York Court of Appeals, the Honorable Sol Wachtler, that if a prosecutor wanted to, he could get a Grand Jury to indict a "ham sandwich."[13]

To be sure, a significant possible restraint on Grand Jury conduct was removed by the U.S. Supreme Court in United States v. Williams, 504 U.S. 36 (1992), where the Court held that a prosecutor is under no obligation to present exculpatory information into a Grand Jury since the Grand Jury is an accusatory and not an adjudicatory body. Id. at 1742 to 1744. The Grand Jury, the Court held, does not have an obligation to hear all of the evidence, but it is supposed to operate as a

[13] An excellent review of the history of Grand Jury can be found in Christopher Winkler, The Grand Jury Under Fire, 58 Duquesne Law Review 301 (2020).

buffer between the government and the people as an independent body, part of neither the legislative, judicial, or executive branch. Id.

The Court's pronouncement in Williams occasioned Justice Stevens to lament in dissent that the Court had done little there to deal with the "Hydra" of prosecutorial misconduct he perceived by prosecutors, one head of which was the misconduct with respect to the presentation of evidence in the Grand Jury. Id., at 1749 to 1750. Citing numerous cases in which prosecutors presented perjured testimony, failed to inform the Grand Jury about exculpatory information, failed to inform them of their power to subpoena witnesses, and operated under a conflict of interest, Justice Stevens noted that the *ex parte* character of a Grand Jury makes even more poignant the famous admonition of Justice Sutherland in Berger v. United States, 295 U.S. 78, 88 (1935), who stated that "the interest of the United States in a criminal prosecution is not that it shall win the case but that justice be done." Id.

As a general matter, Courts in the system are well aware that the prosecutors must keep their ethical and legal obligations firmly in mind when they appear in a Grand Jury, outside the supervision of a judge and outside the probing and objecting eye of defense counsel. As the authors of the passage in Section 126 of Corpus Juris Secundum *Grand Juries* have said:

> "The prosecutor should not unduly influence, invade the province of, exercise dominion over, or impinge on the autonomy of the grand jury. He

> or she must insure that the grand jury retains its independent role. A grand jury's independent judgment is compromised when the prosecutor's misconduct invades the grand jury's independent deliberative process and substantially affects its decision to indict. Even unintentional behavior can cause improper influence and usurpation of the grand jury's role. However, it has been said that the prosecutor need not limit his or her participation to an innocuous presentation.
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> High ethical standards are required of prosecutors, and there is a need for the court to exercise some control over the prosecutor's conduct before the grand jury. The court may intervene to ensure that the purpose of the grand jury is not imperiled by prosecutorial misconduct."

Indeed, a number of cases have held that a supervising judge maintains a considerable degree of supervisory of the Grand Jury, assuming, of course, that the judge is made aware of potential improprieties occurring there. See, 1979 Allegheny County Investigating Grand Jury, 415 PA 73 (Pa. 1980), In Re 24th Statewide Grand Jury, 907 A2d 205 (PA 2006); In Re 35th Statewide Grand Jury, 112 A3d 624 (Pa. 2015); Investigative Grand Jury of Chester County, 544 A2d 924 (Pa. 1988). The Legislature has even empowered a supervising judge to discharge a Grand Jury if it is not conducting itself in line with its proper investigative authority. Title 42, PACS Section 4546(c). The obligation to toe that line is shared by the government official who works with the Grand Jury in the exercise of each of its duties, the prosecutor.

A clear direction to counsel operating within the Grand Jury is contained in the United States Department of Justice United States Attorney Manual. In section 9-11.010, Federal prosecutors are admonished as follows:

> "In dealing with the Grand Jury, the prosecutor must always conduct himself or herself as an officer of the Court whose function is to ensure that justice is done, and that guilt shall not escape, nor innocence suffer. The prosecutor must recognize that the Grand Jury is an independent body, whose functions include not only investigation of crime and the initiation of criminal prosecution, but also the protection of citizenry from unfounded criminal charges. **The prosecutor's responsibility is to advise the Grand Jury of the law** and to present evidence for its consideration. In discharging these responsibilities, the prosecutor scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the Grand Jurors." [emphasis added]

Given the *ex parte* nature of Grand Jury proceedings and the fact that Grand Jurors are presumably lay people unskilled in the intricacies of the law, a particular obligation placed on the prosecutors is to make certain that the Grand Jury is properly advised of the applicable law. The Grand Jury's function is not simply to return a factual summary. It is to make a presentment recommending the filing of a criminal charge. That determination cannot be made blind of the applicable laws under which the recommendation is made. If, in fact, a prosecutor has not given the Grand Jury a basic understanding of the law that is charged against a defendant, a serious question about the efficacy of the Grand Jury process arises. To the extent such a deficiency of process operates to prejudice an individual, that is, to create a circumstance in which it is likely that the Grand Jury's decision would have been other than what it was had the prejudicial act not occurred, relief in the form of judicial intervention with the Grand Jury process may well be required. Generally, see Bank of Nova Scotia v. United States, 487 U.S. 50 (1988).

The duty of a prosecutor to fairly advise the Grand Jury of the law derives from both ethical demands placed by the profession upon prosecutors and by the very law which establishes Grand Jury in the first place.

The Pennsylvania Investigating Grand Jury is a creature of the Legislature. Various Pennsylvania statutes enacted to bring the Grand Jury system about also indicate the importance the Grand Jurors receiving accurate information regarding the law they are to consider in their deliberations.

Title 42 PACS Section 4543 discusses how County Grand Juries are to be convened. Normally, the attorney for the Commonwealth is to make application to the President Judge for an order that directs an investigative Grand Jury to be constituted and, in that application, the attorney must state that the convening of such a Grand Jury is necessary because of the existence of "criminal activity" in the County, which can best be fully investigated using the investigative resources of the Grand Jury. Section 4543(b). The focus of Grand Jury from the outset, therefore, is regarding specific *criminal activity*, and the Grand Jury convened must get an accurate rendering of the meaning of the criminal activity which is to be investigated.[14]

[14] Section 4550 of Title 42 PACS further indicates that before any investigation is submitted to the Grand Jury, the attorney for the Commonwealth "shall submit a notice to the supervising judge," which alleges that the matter in question should be

A key section in understanding the importance of defining the crimes under investigation is Section 4548 of Title 42 PACS, entitled "Powers of Investigating Grand Jury." The section is direct and compelling.

> "***(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 alleged **offenses** may be brought to the attention of such grand jury by the court or by the attorney for the Commonwealth, but in no case shall the investigating grand jury inquire into alleged **offenses** on its own motion." [emphasis added].

The powers of the Grand Jury relate solely to the investigation of violations of **criminal laws** of the Commonwealth, laws which the ordinary lay person in the Grand Jury does not know in the detail necessary to sustain a proper assessment of whether facts exist to support the occurrence of such **offenses**. Instruction on the meaning of those offenses must come from the prosecutor, and a prosecutor's obligation, therefore, to be accurate in such a description becomes paramount.

That obligation is reinforced by the following sub-section of Section 4548.

> "(b) **Presentments** - the investigating grand jury shall have the power to issue a presentment with regard to any person who appears to have committed within the county or counties in which such investigating

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brought before the Grand Jury so that the investigated resources of that body can be utilized for a proper investigation. Again, the orientation of that investigation is on *criminal activity* as defined by the Crimes Code of Pennsylvania, and a necessary adjunct of that process is that the Grand Jury have some particular idea as to what the Legislature has defined to be a crime in the particular case.

Grand Jury is summoned an **offense against the criminal laws** of the Commonwealth." [emphasis added]

A Grand Jury presentment alleges a violation of the criminal laws of the Commonwealth and, to properly exercise the powers the Legislature has given it, the Grand Jury has to have a fundamentally proper understanding of what those criminal laws mean in the context of the case before it. As Section 4548(a) states, the Grand Jury is not permitted to go on its own to inquire into whatever offenses it wishes to investigate. This is a quite sensible provision since, once again, Grand Jurors cannot be presumed to have an independent and proper understanding of the criminal laws around which their investigation is focused. That focus comes from the laws passed by the Legislature, and the entity in the position to advise the Grand Jury of the impact and meaning of those laws on the facts the Grand Jury will hear is most clearly the attorney for the Commonwealth.

Section 4551 of Title 42 PACS speaks of the presentments to be made by an Investigating Grand Jury. That section states that where the Grand Jury determines that a presentment "should be returned against an individual," the Grand Jury is to direct the attorney for the Commonwealth to prepare a presentment to be submitted to them for a vote. A majority vote approving that presentment is then to be placed before the supervising judge to determine it was in the authority of the Grand Jury and was otherwise accomplished in accordance with the provisions of the statute. If

it was, the presentment will be accepted and can ultimately be unsealed. Section 4551(a).

Once again, for a Grand Jury to properly determine if a presentment should be returned against an individual, the Grand Jury can only fulfill its obligation by having a proper understanding of the laws in question. The attorney for the Commonwealth prepares the draft presentment report in order to properly focus the evidence on the applicable law in preparation for the Grand Jury vote. In the present case, if the Grand Jury did not receive any instructions on Section 508 of the Crimes Code or other definitions of the intricacies of the various forms of homicide under the law, it is difficult to see how this Grand Jury could have properly exercised the powers it was given in rendering presentment which was made.[15] As noted earlier, the presentment itself contains no reference to the application of the facts to the relevant law.

One final note about the applicable rules and statutes that concern the obligation of a prosecutor to give a Grand Jury a proper understanding of the applicable law may be gleaned from consideration of the oath each Grand Juror is required to take before serving as a member of that body. Pursuant to Rule 225 of

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[15] It is unclear from the Special Concurrence whether the supervising judge of this Grand Jury was aware that the Grand Jury was not advised of the underlying criminal statutes or whether there was any further inquiry by the supervising judge before the Grand Jury presentment was accepted.

Pennsylvania Rules of Criminal Procedure, Grand Jurors are asked to take an oath in which they solemnly swear as follows:

> "You, as grand jurors, do solemnly swear that you will make diligent inquiry with regard to all matters brought before you as well as such things as may come to your knowledge in the course of your duties; that you will keep secret all that transpires in the jury room, except as authorized by law; that you will not present any person for hatred, envy, or malice, or refuse to present any person for love, fear, favor, or any reward or hope thereof; and that you will present all things truly to the court as they come to your knowledge and understanding." Rule 225(B).

For a Grand Jury to carry out its oath, its presentation must represent a proper reflection of their knowledge and understanding of all aspects of their duty. Certainly, scrupulous attention to the facts gathered are an integral part of that duty but so is their appreciation of the applicable law. Theirs is not simply a factual report to be then absorbed by some future determining body for the purpose of drawing an ultimate legal conclusion as to the propriety of the filing of a criminal charge. Rather, it is a holistic statement that, based upon the facts as found and the applicable law, it is proper for this important body to publicly recommend the prosecution of a fellow citizen for a serious violation of the Pennsylvania Crimes Code. Without a proper understanding of that law, it is difficult but not impossible for the average Grand Juror to properly exercise the duties of their oath.

Case law regarding this area is sparse, as it has seldom been brought to the attention of the Court that a prosecutor may have improperly advised the Grand

Jury regarding the applicable law they are to consider. Nonetheless, such issues have been dealt with consistent with the general Grand Jury jurisprudence that any time prosecutorial misconduct occurs which may prejudice a defendant, the Grand Jury action may be superseded by a Court.

As the Second Circuit observed in United States v. Ciambrone, 601 F2d 616, 622 (2nd Cir. 1979), the Grand Jury possesses broad and investigatory functions and powers. Nonetheless, "[a]s a practical matter, however, it must lean heavily upon the United States Attorney as its investigator and legal advisor to present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles." No relief was warranted in Ciambrone as the prosecutor was found not to have misled the Grand Jury. Id.

In United States v. Stevens, 771 F. Supp 2d. 556 (Dist. of Maryland, 2007), the Court held that when erroneous advice is given to a Grand Jury which prejudices a defendant, dismissal of the indictment is minimally required. Prejudice is defined as the creation of grave doubts about whether the indictment would have been returned had the advice been proper. While the Court in Stevens found no specific evidence of such prejudice there, it further observed that if the erroneous instructions were rendered as part of a willful act on the prosecutor's part, the remedy might well transcend mere dismissal of the indictment and require a dismissal of the case with prejudice. Id. at 567-568.

Furthermore, in United States v. Mix, 213 U.S. District LEXIS 79679 (Eastern Dist. Louisiana, 2013), the District Court conducted an *in camera* review to determine if the Grand Jury had been improperly instructed on the law. Id. at *10. The Court observed that a prosecutor's obligation to the Grand Jury with respect to the law does necessarily require the prosecutor to give a full and detailed law-school-type explanation of the law, and that reading the relevant statutes was arguably sufficient in that regard. Id. at *15 to *16. But if a failure to give adequate instructions prejudices the defendant, that is, substantially influences Grand Jury decision, relief may well be needed. Id. at *16 (citing cases).

Beyond the clear legal framework, which requires a prosecutor to properly advise the Grand Jury of the applicable law, the ethical demands of the legal profession provide an additional basis for an attorney for the Commonwealth to fulfill this duty.

The Pennsylvania Supreme Court has often embraced the principles of the American Bar Association Criminal Justice Standards for the Prosecution Function (2017) as applicable when considering whether prosecutors have properly exercised their ethical function in a variety of circumstances. See Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018); Commonwealth v. Cullins, 341 A.2d 492 (Pa. 1975); Commonwealth v. Revty, 295 A.2d 300 (Pa. 1972). Those standards make it clear that a prosecutor is "an administrator of justice, a zealous advocate, and an officer

of the Court" whose primary duty is to seek "justice within the bounds of the law, not merely to convict." Standard 3-1.2(a-b). Prosecutors must be aware of ethical standards applicable in his or her jurisdiction and they have, given the broad authority and discretion invested in their office, "a heightened duty of candor" in fulfilling their professional obligations. Standard 3-1.4 (a).

In this regard, the prosecutor should not make any statement of fact or law that the prosecutor "does not reasonably believe to be true" and should disclose any legal authority in the controlling jurisdiction "known to the prosecutor to be directly averse to the prosecution's position and not disclosed by others." Standard 3-1.4 (b-c). While a District Attorney may hold a sincere and honest belief that any given statute does not meet a proper Constitutional standard, the obligation remains to ensure that those who must adjudicate or make a determination on a matter by necessarily applying an applicable legal standard, know what that standard is so that their assessment of the facts may be properly considered in conjunction with the applicable law.

The ABA standard speaks specifically to a prosecutor's relationship with the Grand Jury, noting that, "in light of its *ex parte* character, the prosecutor should respect the independence of the Grand Jury and should not preempt the function of the Grand Jury, **mislead the Grand Jury**, or abuse the processes of the Grand Jury." Standard 3.4-5. This particular section also states plainly as follows:

> (b) "Where the prosecutor is authorized to act as a legal advisor to the Grand Jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on legal significance of the evidence, but should give due deference to the Grand Jury as an independent legal body."

Moreover, at no point is a prosecutor to make statements or arguments to the Grand Jury in a way that would be an impermissible effort at trial. Section 3-4.5(c). In the present case, it is clear that the prosecutors were deeply concerned about the application of Section 508 to this case, but they would certainly never have been able to argue at trial that the jury should disregard that section in their deliberations if the Court had determined otherwise. A prosecutor's invalid assertion about the applicability about the law at trial may result in a reversal of a conviction. See, Caldwell v. Mississippi, 472 U.S. 320, 336 (1985).

The ABA standards with respect to the Grand Jury function also admonish that the prosecutor "should be familiar with the law of the jurisdiction regarding Grand Juries and "ensure that the Grand Jurors are properly instructed consistent with the law of the jurisdiction on the Grand Jury's right and ability to seek evidence, ask questions, and hear directly any available witnesses, including eye-witnesses." Standard 3-4.6 (c-d).

Overall, these standards would not countenance a prosecutor's decision to withhold from the Grand Jury the law that is applicable or even arguably applicable

to their consideration of a critical factual matter. Grand Jurors are not presumed to be conversant in the intricacies of the law and if they not hear a proper explanation of law from the prosecutors, they will hear it from no one.

The Pennsylvania Rules of Professional Conduct also speak to these issues. To be sure, a prosecutor, like any advocate, shall not "assert or controvert an issue… unless there is a basis of law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.1 (1) Pa. R. P. C. There is thus nothing improper about a prosecutor setting forth a concern that a given statute may be unconstitutional, but that statute continues to be applicable in the case before the Grand Jury, that statute simply has to be brought to the attention of the Grand Jury considering the case.

As the comment to Pennsylvania Rules of Professional Conduct Rule 3.1 indicates, a lawyer has "a duty to not to abuse legal procedure," and the law "establishes the limits within which an advocate may proceed." Rule 3.3 of the Rules of Professional Conduct also clearly demands that lawyers not knowingly make false statements of material fact or law to any tribunal or fail to correct the false statement that may have previously been made. The lawyer must also not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse" to their position and not disclosed by opposing counsel. Rule 3.3(2) Pa. R.P.C.

In a Grand Jury setting, the defense has no voice and thus the only law the Grand Jury will hear will come from the prosecutor. While the prosecutor may disagree with the law, if it is controlling at that time of the presentation, there is simply no basis to avoid informing the Grand Jury of it. Rule 3.3 makes this even more explicit by stating that in "an ex parte proceeding,"[16] a lawyer "shall inform the tribunal[17] of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." 3.3(4). This also implies a duty of concern for the accurate presentation of the law, given that a fact must have legal significance to be "material." Thus, the failure to identify the legal standards by which facts are to be assessed may itself be a circumstance in which the prosecutor has failed to perform their proper duty in presenting a position in an ex parte setting like the Grand Jury.[18]

While a lawyer is not required "to make a disinterested exposition of the law," they must "recognize the existence of pertinent legal authority." Rule 3-3, P.R.P.C., Comment 4. Moreover, an advocate "has a duty to disclose directly adverse authority

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[16] Section 3.3(14) notes that, in an ex parte proceeding, the object "is nevertheless to yield a substantially just result."

[17] The Pennsylvania Rules of Professional Conduct define "tribunal" in a broad way. See, Rule 1.0(m). Rule 3.1 admonishes prosecutors about to limit the issuance of a subpoena to a lawyer in connection with a "Grand Jury or other tribunal investing criminal activity."

[18] The Comment to this section also states clearly that lawyers must not allow a tribunal "to be misled by false statements of law or fact." Comment 2.

controlling jurisdiction that has not been disclosed by the opposing party." 3.3(4). That requirement mandates that the lawyer who has the only legal voice in the room be scrupulously fair in presenting material that permits the conclusion that the result reached by the determining body was fundamentally fair.

Rule 3.8 of the Pennsylvania Rules of Professional Conduct also speaks to the special responsibility of a prosecutor. Comment One to that section reiterates the position taken throughout the federal system that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Such responsibility "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Taken in conjunction with the other rules, the obligation to give complete legal advice to a Grand Jury is obvious.

Reflecting on all relevant authority, there is simply no basis to justify a prosecutor's failure to give the Grand Jury a proper rendering of the applicable law. The Grand Jury process, particularly given its *ex parte* quality, puts upon the prosecutor a special obligation to ensure that a fair rendering of the law was given so that the important work of the Grand Jury can be done effectively as the statutes establishing the Grand Jury and empowering it anticipate.

If that did not occur here, a potentially serious violation of the Grand Jury process has indeed occurred.

C. UNSEALING THE PRESENTMENT

The other criticisms of Justice Dougherty regarding the actions of the District Attorney's Office in this case will be touched upon briefly. Insofar as the Grand Jury presentment was unsealed, Section 4551 of Title 42 PACS permits the supervising judge to seal the presentment until the time the defendant is in custody or has been released pending trial. Section 4551(b). Unsealing the presentment itself does not give any indication of bad faith on the prosecutor's office. A presentment in the high-profile matter is a going to be intimately scrutinized by the local media.

Of course, prosecutors do operate under a special restriction regarding statements to the media. Rule 3-8(e) of the Pennsylvania Rules of Professional Conduct states:

> **(e)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Statements made in connection with the release of a presentment could violate this Rule but the Special Concurrence does not cite specific examples in this regard.

D. THE PRELIMINARY HEARING BYPASS

With respect to the bypass of the preliminary hearing, it is clear that Section 4551(e) of Title 42 directs that a preliminary hearing be afforded to a defendant who has been charged by way of presentment.

The Bestwick case makes it clear that this Legislative enactment alters prior law, which, per Rule 565 of the Pennsylvania Rules of Criminal Procedure, would allow a Court generally to permit a bypass of a preliminary hearing where exceptional circumstances were presented even in a presentment case. See Commonwealth v. Bestwick, 414 A2d 1373, n. 2 (Pa. 1980). To the extent that the District Attorney's office did not cite that section of the statute in effort to have the preliminary hearing bypassed, a potential ethical issue is raised pursuant to Pennsylvania Rule of Professional Conduct 3.3(a)(2), which states that a lawyer shall not knowingly "fail[ed] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." To the extent that the Defendant's lawyer cited Section 4551(e), the District Attorney is technically excused from a failure to bring this matter to the attention to the Court.

In any event, it was the Trial Court that ruled that the preliminary hearing could be bypassed, and the error in disregarding Section 4551(e) is primarily focused on that order.

E. OPPOSITION TO THE CHANGE OF VENUE

As noted previously, a District Attorney's opposition to a change in venue is certainly not unusual. The law has a reasonably heavy presumption of wanting trials to take place in the district in which the offense allegedly occurred. Common Pleas Courts are uniquely aware of the expense incurred in either trying the case in another County or even in drawing another jury from a remote location to sit in judgment of the matter. The Supreme Court has most commonly rejected claims that a trial judge has failed to properly assess the capacity to empanel a fair jury. See, Commonwealth v. Flor, 259 A.3d 891, 936 (Pa. 2021); Commonwealth v.Clemons 200 A.3d 141 (Pa. 2019).

It is simply not unusual that the Commonwealth would have opposed a change of venue and it must be noted that the trial judge evidently made a careful effort to determine whether a change of venue was necessary by conducting two mock jury selections and determining if it was possible to attempt to draw a jury from Philadelphia. Commonwealth v. Pownall, Supra. at *4 to *5. It is difficult to infer bad faith from the District Attorney's office insofar as their opposition to a change of venue is concerned.

F. THE MOTION IN LIMINE AND APPEAL

Finally, Justice Dougherty criticizes the District Attorney for waiting until the last minute to file their challenge to the use of jury instruction based on Section 508 of the Crimes Code. As noted previously, however, at least two Justices of the Pennsylvania Supreme Court have agreed with the Commonwealth that a pre-trial appeal of this matter was permissible and that the Commonwealth's legal analysis of the constitutionality of Section 508 was valid. While the Commonwealth's position did not prevail, the opinions of those Justices make it very difficult to deem the actions of the District Attorney's office frivolous in seeking an appeal and in challenging the validity of that statue.

Clearly, other means could have been used to try to challenge the applicability of the statute, particularly in light of the sound rulings of the trial Court, which reflected that any instructions based on Section 508, including any jury instruction particularly in a homicide case that bears upon possible offenses, must wait until the evidence at trial is developed since no such instruction is warranted where evidence it not offered that would support its impact on a verdict. See Commonwealth v. Pierce, 786 A.2d 203, 218 (PA 2001); Commonwealth v. DeMarco, 809 A.2d 256, 260, note 6 (PA 2002); Commonwealth v. Browdie, 671 A.2d 668 (Pa 1996); and Hooper v. Evans, 456 US 605 (1982).

But finding bad faith in the effort to appeal and in the Commonwealth's analysis of the statute is difficult to support.

II. ANALYSIS: COMMITTEE'S QUESTION #2

The second question posed by the Committee is the permissible scope of prosecutorial discretion.

Perhaps in a respectful acknowledgement to the foundational principle of separation of powers, the law has always been given significant deference to the ability of prosecutors to decide how to deploy the resources of their office in the decision on what sorts of crime should be prosecuted and to what extent.

The Superior Court explored the importance of the separation of powers doctrine in Commonwealth v. Hill, 239 A.3d. 175 (Pa. Super. 2020). There, a Huntingdon County Common Pleas Court *sua sponte* dismissed charges of possession of marijuana filed against a prisoner serving a life sentence, frustrated that the Court system would be used for the litigation of a case which would add a meaningless additional term of years to the existing sentence. Id. at 176. The Superior Court reversed, finding that the lower court failed to respect the doctrine of separation of powers, the "roots" of which, the Court said, "run deep" in the Commonwealth. Id. at 179. While the lower Court's actions effectively usurped the power of the Legislature, Department of Corrections, defense counsel and the jury,

a particularly egregious failure occurred with respect to the failure to recognize the role of the prosecutor:

> The trial court ignored the well-settled principle that the Commonwealth retains discretion regarding the prosecution of criminal matters. ***See Commonwealth v. Brown***, 550 Pa. 580, 708 A.2d 81, 84 (Pa. 1998) ("[a] District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case.").

Id. at 180.

This discretion affords prosecutors tremendous power.

As former US Supreme Court Justice and Nuremburg Prosecutor Robert H. Jackson once wrote, the power to charge is "the most dangerous power of the prosecutor;" that is, it is a power virtually un-reviewable and one existing in multiple dimensions. *Robert Jackson,* quoted in Prosecutorial Decision Making and Discretion in the Charging Function 62 Hastings Law Journal 1259 (2011). While prosecutors may never consider invidious factors such as the politics of the individuals being prosecuted, their race or other such factors, beyond that basic due process level, the system affords them tremendous leeway in the decision on whom to prosecute and for what offenses. Id. at 1276.

To be sure, some states have embedded in their Constitutions principles that seek to limit the ability of a local District Attorney to decline to prosecute certain

statutes otherwise placed in the Crimes Code by the Legislatures. The North Carolina Constitution, for example, states that "[a]ll powers of suspending laws or the execution of laws by any authority, without the consent of representatives of the people, is injurious to their rights and shall not be exercised." Constitution of North Carolina, Article 1, Section 7. The Commonwealth of Massachusetts has a similar provision: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Constitution of the Commonwealth of Massachusetts Article XX.

The California Constitution grants broad powers to the Attorney General to supersede a local District Attorney. Article V, Section 13 of the California Constitution states:

> It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.

This is a significant override authority the Constitution of Pennsylvania does not afford its Attorney General. Rather, as the Pennsylvania Supreme Court held recently, the discretion of prosecutors in Pennsylvania is extremely wide.

In Commonwealth v. Cosby, 253 A.3d 1092 (Pa. 2021), the Court dismissed a prosecution against a defendant who had been promised by a former District Attorney that no charges would be filed against him on condition that he gave a deposition in a civil case. In discussing the authority afforded to a District Attorney to make such a decision, the Court discussed at length the powers normally afforded to a local prosecutor in this Commonwealth. A prosecutor:

> "has the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate, and ultimately, to prosecute or dismiss charges at trial. [citations omitted] The extent of the powers enjoyed by the prosecutor was discussed most elegantly by the United States Attorney General (and later Supreme Court Justice) Robert H. Jackson. In his historic address to the nation's Unites States Attorneys, gathered in 1940 at the Department of Justice in Washington DC, Jackson observed that in 'the prosecutor has more control over life, liberty and reputation then any other person in America. His discretion is tremendous. In fact, the prosecutor is afforded such deference that this Court and Supreme Court of United States seldom interfere with the prosecutor's charging decision." Id. at 1131.

Later in the Cosby opinion, the Pennsylvania Supreme Court held that a charging decision is "generally beyond the reach of judicial interference" as long as the discretion is not patently abused." Id. at 1134. The limits on the discretion

exercised by a prosecutor, according to the Cosby Court, arise from the "basic principles of fundamental fairness" and discretion certainly cannot be exercised in a manner that violates a defendant's fundamental Constitutional rights. Id. But, the Court cautioned, not every exercise of prosecutorial discretion "invites a due process challenge". Id. The Court reiterated that:

> "the charging decisions inhere within the vast discretion afforded the prosecutor and are generally subject to review only for arbitrary abuse. A prosecutor can choose to prosecute or not. The prosecutor can select the charges to pursue and omit from a complaint or bill of information those charges that he or she does not believe is warranted or viable on the facts of the case. The prosecutor can also condition his or her decision not to prosecute a defendant... [and] generally, no due process violation arises from these species of discretionary decision making and a defendant is without recourse to seek the enforcement of any assurances under such circumstances." Id. at 1135. See also Commonwealth v. Slick, 639 A2d 482 (PA Super. 1994).

In certain kinds of situations, various forms of limits seem to exist with respect to prosecutorial discretion, but none of those limits are inherently significant.

In Commonwealth v. Buck, 109 A.2d (Pa. 1998), the question posed to the Supreme Court was whether a trial Court could make a pre-trial determination of whether the filing of an aggravating circumstance to elevate a homicide case to one involving the death penalty was justifiable. The Court noted that, under the statute, it is the jury that must weigh the aggravating circumstance (assuming they have found it to exist), and the Court is not empowered to do a similar weighing process. Id. at 895. Older cases held that a trial Court did not have the capacity to interfere

with the Commonwealth's determination to seek the death penalty, and "the prosecutor possesses the initial discretion regarding whether to seek the death penalty... that discretion, however, is not unfettered." Id. To overcome the deference given to a prosecutor who has chosen to seek the death penalty in a given case, however, a defendant must make a showing "purposeful abuse." Id. at 896. The filing of a notice of aggravated circumstances requires the Trial Court to presume that evidence supports it, and unless the Court has reason to believe that the Commonwealth is seeking the death penalty for some improper reason, that filing alone is generally sufficient to permit the case to go forward as a capital prosecution. Prior to trial, a defendant seeking to challenge the filing of an aggravating circumstance has the burden of proof to show that no evidence supports such a circumstance. If and only if the defendant is able to make that initial showing, may the Commonwealth be required to make a minimal disclosure to permit the Court to rule that indeed the case can go forward with the death qualification process of the jury and a trial anticipated to involve both a guilt and penalty phase. Id.

A most unusual death penalty case which occasioned considerable discussion of prosecutorial discretion was Commonwealth v. Brown, 196 A. 3d. 130 (Pa. 2018). In this appeal to the Pennsylvania Supreme Court, the District Attorney of Philadelphia joined with the defense in arguing that the death sentence should be reversed and insisted that the discretion of the prosecutor required the Court to

overturn the death verdict. The Pennsylvania Attorney General, asked to file an amicus brief, disagreed and provided the Court with an analysis of how a prosecutor's discretion evolves during the course of a case:

> As cogently explained by the Attorney General, the scope of prosecutorial discretion changes as a criminal case proceeds, narrowing as the case nears completion. At the outset, a prosecutor has almost unfettered power to charge, or not charge, as he or she sees fit. Once charges are filed, the prosecutor may withdraw them by nolle prosequi, subject to judicial oversight. Pa.R.Crim.P. 585. A prosecutor may also choose to enter into a plea agreement, again subject to appropriate judicial oversight. Pa.R.Crim.P. 590. The decision whether the Commonwealth will seek the death penalty is also left to the prosecutor, though this decision, which is made at the time of arraignment, is also potentially subject to some pre-trial judicial review. *See* Commonwealth v. Buck, 551 Pa. 184, 709 A.2d 892, 896 (Pa. 1998) ("If no evidence is presented in support of any aggravating circumstance, the trial court may rule that the case shall proceed non-capital."). After trial and the entry of a capital verdict, however, a district attorney's prosecutorial discretion narrows significantly. There is an automatic appeal to this Court from a death sentence, 42 Pa.C.S. § 9711(h), over which the prosecutor has no statutory power to interfere. A representative cross section of the community has issued its decision, and the prosecutor, having sought and obtained the death sentence, may not thereafter unilaterally alter that decision. The community now has an interest in the verdict, which may thereafter be disrupted only if a court finds legal error. Contrary to the Commonwealth's representation that a district attorney remains free at "all stages of capital criminal litigation" to make a "reasoned fact and policy-based decision" as to what he or she believes the appropriate sentence should be, after seeking and obtaining a death sentence, the prosecutor's discretion at this point is limited to attempts, through the exercise of effective advocacy, to persuade the courts to agree that error occurred as a matter of law. Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review.

Id. at 146. Beginning at a point of largely unfettered discretion, a District Attorney seeking to have an appellate court overturn a lawful judgment becomes an advocate,

lacking the authority heretofore enjoyed to dictate the course of a case without oversight by a coordinate branch of government.

With respect to a diversion of a case into the Accelerated Rehabilitative Disposition (ARD) program, again the Pennsylvania Supreme Court has held that the District Attorney has the initial discretion to refer a case for possible inclusion into the ARD program. As the Court held in Commonwealth v. Lutz 495 A.2d 928 (Pa. 1985), "the decision rests in the sound discretion of the district attorney. Such discretion, of course, is not without limitation." Id. at 934. But:

> [a]bsent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is most beneficial for society and the offender. Id. at 935.

While the trial court must ultimately admit a person into the ARD program and can arguably refuse to do so, the decision to move the admission of that person must be initiated by the District Attorney. See, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure* 52 University of Pittsburgh Law Review 269 (1990).

A recent and fascinating case concerning both the relative powers of a District Attorney and capacity of a frustrated Court to deal with the District Attorney's exercise of discretion is Commonwealth v. Mayfield, 247 A.3d 1002 (Pa. 2021). In Mayfield, a judge of the Court of Common Pleas of Philadelphia County had

sentenced an individual to a period of county probation. When the individual was rearrested, the Court called in the parties and directed that a detainer be filed in anticipation of a violation of probation hearing. The District Attorney's office advised the Court that under their office policy, no such detainers were to be issued prior to the conviction on the new charge except by expressed direction of a higher official within their office. When the Court directed that matter be further explored with the prosecutor's office and was later advised that the office would decline to file a violation of probation in the case before it, the Court ordered that the next defense attorney on the list to be Court-appointed for a defense case be designated a special prosecutor in the Mayfield case and authorized to file the motion to violate the Defendant's probation forthwith. Id. 1003 to 1004.

This occasioned the Pennsylvania Superior Court to examine the Commonwealth's Attorneys Act, 71 PS 732-101 et. seq. as to whether this method of replacing a District Attorney with someone else to prosecute the case was authorized. The Court held that the Attorney General can petition the Court to enter and supersede the District Attorney in any given case, or the President Judge of the District may request the Attorney General to do so. Alternatively, the District Attorney can refer a case for prosecution to the Attorney General, indicating a lack of resources or a conflict of interest in their own proceeding with it. Id. at 1006. But

as this case did not fit any one of those scenarios, the actions of the Trial Court here were deemed *ultra vires*.[19]

Insofar as who has the discretion to file a petition to violate parole, the Court held that whether the District Attorney held that discretion or whether it lies in the Trial Court was not clear. Id. at 107.[20] The Court indicated that it has always preferred waiting for a violation of probation/parole to be prosecuted after adjudication on the new charge has occurred, but whether or not the ultimate decision about the filing lies with District Attorney or the Court is not a matter that was precisely addressed in this opinion. What the Court did note parenthetically was that in a case where the District Attorney had been ordered to proceed in a given matter by the Court and declined to do so, the District Attorney may be held in contempt, ripening the issue for an appeal to the Superior or Supreme Court to determine whether the refusal is properly within the discretion of the prosecution. Id. at note 23.

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[19] The Court specifically noted that a supervising judge of a Grand Jury can, however, act to a point an independent counsel if there is a question as to whether the Attorney for Commonwealth has violated Grand Jury secrecy. This is a power stemming from the Grand Jury and it is not applicable anytime a trial judge wishes to replace a District Attorney. See In re: 35th Statewide Grand Jury, 112 A.3d 624 (Pa. 2015).

[20] To be sure, any court has an interest in seeing that Its orders are properly carried out and could, at least in theory, avail itself of the device of a rule to show cause why a person who violated a probationary order should not be violated.

And where a Humane Society Officer sought a writ of mandamus to compel the District Attorney of Berks County to act on citations she filed against a Sportsmen's Club for holding a pigeon shoot, the Commonwealth Court upheld the lower court's refusal to issue the writ, holding that mandamus may issue to compel ministerial acts but not ones which results from the exercise of discretion by a public official. Setton v. Adams, 50 A.3d. 268, 273 (Pa. Cmwlth. 2010). The Court explained the breadth of discretion afforded a prosecutor in this circumstance:

> District attorneys are responsible for "all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which [they are] elected ..." Section 1402 of the County Code, Act of August 9, 1955, P.L. 323, *as amended*, 16 P.S. §1402. It has been observed that a "'prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous....'" 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §9:1, at 216 (2d ed. 1979) (quoting Justice Robert H. Jackson of the United States Supreme Court). Davis explains that a prosecutor's duty to enforce a statute is usually presented in the strongest terms, but the legislature assumes that, nevertheless, there is a power not to enforce. Further, a prosecutor's decision *not* to enforce a law is beyond judicial review. Davis explained these precepts as follows:
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> > An outstanding fact of major importance about the American system of law and government is that nearly all statutes which provide in absolute terms for enforcement are nullified in some degree by an assumed discretionary power not to enforce. The usual discretionary power [**21] not to enforce is almost never delegated by the legislative body. It is not subject to a statutory standard. It is not checked by an independent reviewer. It is not insulated from ulterior influence the way that judicial action is customarily insulated.... *And discretionary power not to enforce is almost always immune to judicial review, even for abuse of discretion.*
> >
> > *Id.* §9:1 at 217-18 (emphasis added).

> The Supreme Court of the United States will not interfere with a prosecutor's discretion. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Neither will the Pennsylvania Supreme Court. *See, e.g.,* Commonwealth v. Stipetich, 539 Pa. 428, 430, 652 A.2d 1294, 1295 (1995) ("discretion to file criminal charges lies in district attorney.").

Id. at 275 -276. Putting it bluntly, the Court observed: "In short, the district attorney has the final word on a decision to prosecute or not to prosecute." Id. at 277.

There are a very few and discrete ways in which a District Attorney may be displaced from handling a prosecution on behalf of the Commonwealth. One way which the Court has struck down was litigated in Birdeye v. Driscoll, 534 A.2d 548 (PA Commonwealth 1987). In that case, under an obscure provision of the Pennsylvania Wiretap Act, an individual who had been subject of a wire interception brought an action which invoked a provision of the Act, which on its face indicated that if a District Attorney had violated the Act in authorizing or administering a wiretap he or she could be removed from office. The Commonwealth Court struck this position down saying that under the Pennsylvania Constitution, Article VI, Section 7, a District Attorney can only be removed by conviction of misbehavior or

infamous crime or by the governor after the statement of reasonable cause and consent of two-thirds of the Senate.[21]

Under Section 71 PS Section 732-205, the Attorney General of Pennsylvania is permitted to petition a Court to permit the Attorney General's office to supersede a District Attorney in the prosecution on the initiation of a prosecution if by a preponderance of evidence, the Attorney General can show that the District Attorney has failed or refused to prosecute in a matter that constitutes an abuse of discretion. This power of supersession can also be invoked where a Judge of the Court of Common Pleas requests the Attorney General to enter the case and seek to displace the District Attorney. [22]

An overall view of Pennsylvania law demonstrates that broad discretion is given to a District Attorney in the exercise of his or her powers to enforce the law and allocate the resources of his or her office with respect to the spectrum of offenses and defendants who will be prosecuted in their jurisdiction. Unlike some other jurisdictions, which have, by Constitutional enactment, placed limits and potential

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[21] Section 16 PS Section 1405 of the Pennsylvania Code states that if the District Attorney is guilty of willful and negligence in the execution of his or her duties, a criminal offense could be charged with a consequence being the office would become vacant.

[22] Generally, the Attorney General of Pennsylvania has such jurisdiction as the statute establishing that office permits. See Commonwealth v. Carsia 517 A.2d 956 (Pa. 1956).

limits on the discretionary authority of a District Attorney, Pennsylvania remains a jurisdiction in which a broad discretion is afforded to a local prosecutor.

This certainly creates the potential for the administration of justice in a checkerboard fashion in the Commonwealth where cases of a similar nature will receive very disparate treatment depending on whether they occur in one county or a few miles away in another. But until and unless structural change is effectuated at a basic level in how the system operates, the instinct of the entities set in conflict by our adherence to the importance of separation of powers principles will cause the Legislature, Courts, and the Executive to jealously guard their distinct realms of authority from incursion by the other branches.

The checks and balances system the framers of our government chose was believed to be effective to limit arbitrary abuse by any individual branch. In such a scheme, the primary check on the discretionary authority of a District Attorney lies with the same authority upon which the system relies to be the ultimate corrective authority for abuses in the other branches. That ultimate authority is the people who, with respect to local prosecutors, exercise that authority most directly and effectively by the electoral process every four years when a District Attorney stands before the public to account for his or her discretionary judgments.

Respectfully Submitted,

s/s/ Bruce A. Antkowiak

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