The Legal Intelligencer

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Grand Juries on Witness Intimidation Are Challenged

More than seven months after the Pennsylvania Supreme Court restored use of indicting grand juries for cases involving witness intimidation, the First Judicial District has been addressing a series of concerns about Philadelphia's application of the charging tool.

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2013-08-14 12:00:04 PM

More than seven months after the Pennsylvania Supreme Court restored use of indicting grand juries for cases involving witness intimidation, the First Judicial District has been addressing a series of concerns about Philadelphia's application of the charging tool.

Among the issues that have cropped up with use of the indicting grand jury have been defendants' access to the material presented to the grand jury and protecting the constitutional rights of witnesses who give incriminating testimony.

Another issue is whether defendants will be held in jail for long periods of time while their cases go through the indicting grand jury process.

A fourth issue is setting up a procedure for cases involving the ability, particularly of younger juveniles who prosecutors want to try as adults, to raise challenges aimed at returning their cases to juvenile court as soon as possible.

The First Judicial District has empaneled three indicting grand juries so far since the rule allowing for such grand juries went into effect at the end of December. None of the cases have gone to trial so far.

As of early July, 400 cases had been presented to the indicting grand jury and over 90 percent have resulted in indictments, said Laurie Malone, the deputy district attorney in charge of the pretrial division in the Philadelphia District Attorney's Office. A minority of those cases arise out of the same nucleus of facts and reflect separate, multiple victims, Malone said.

Court leaders are trying to ensure there is proper judicial oversight and to develop the local indicting grand jury procedures and protocols in a fair way, including having meetings with the criminal defense bar and the District Attorney's Office, Philadelphia Court of Common Pleas Judge Charles A. Ehrlich said in a joint interview along with the other judges involved in supervising the indicting grand jury.

Those judges include Judge Jeffrey P. Minehart, the chief supervising judge, Judge Glenn B. Bronson and Senior Judge Benjamin Lerner.

"The grand jury process has been used many other places," Ehrlich said. "We want to make sure it is fairly and properly implemented. People may agree or disagree about it whether it should be there. It's being used in a way we hope, with our oversight, to be done properly."

The restoration of indicting grand juries was recommended by a criminal reform task force chaired by Pennsylvania Supreme Court Justice Seamus P. McCaffery, and the task force's work included a trip to New York to meet with the Manhattan District Attorney's Office and court officials to discuss the use of indicting grand juries in their court system, Minehart and Ehrlich said.

The indicting grand juries are used post-arrest.

Kirsten Heine, chief of the district attorney's charging unit and one of the prosecutors working with the indicting grand jury, said that the office's training for assistant district attorneys presenting their cases to the grand jury has emphasized "you have to be the judge, the defense attorney and the prosecution in the grand jury room."

The indicting grand jury is a new procedure and everything prosecutors do is going to be challenged, so assistant district attorneys need to "go above and beyond to make sure we present competent, reliable evidence and we protect the defendant's rights to the extent they need to be protected because the defense attorney is not there," Heine said.

Once Malone, Heine and the third supervising grand jury prosecutor, Jacqueline Coelho, identify the cases as appropriate for the indicting grand jury, the office identifies the ADA specially assigned the case by his or her supervisor, and that ADA can present the case to the indicting grand jury as long as he or she has gone through the office's grand jury training, Malone said.

In almost all of the cases, Malone, Heine or Coelho are in the room with the prosecutor presenting the case, Malone said.

GRAND JURY OVERUSE?

Some defense attorneys argue that the indicting grand jury is being overused in cases where there may have been difficulties in getting complainants or other witnesses to show and those cases would otherwise result in dismissal at preliminary hearings.

"While there is witness intimidation and it does occur, it doesn't happen to the extent the commonwealth is making it out to be or that the judges are even buying into," said Michael J. Engle, of Greenblatt, Pierce, Engle, Funt & Flores, in an interview. "It's not as rampant as they are making it sound."

"This crosses the line into fundamental unfairness," said Engle's law partner, Ronald Greenblatt.

Engle and other defense attorneys are challenging the validity of the Supreme Court's authorization of indicting grand juries. They argue that the substantive rights of criminal defendants are affected and the change was not a matter that the court could enact in a procedural rule.

Minehart said it would be outside the indicting grand jury's jurisdiction for it to address cases that may be discharged because of a complainant's unwillingness to appear.

Lerner added there is always a "danger when you're moving into a new area ... that you're relying on that professionals are going to do what they're supposed to do. On the other hand, this is all under ultimate judicial control. If a defense lawyer has reason to believe that some evidence that he or she has a right to have ... and it's been withheld because it was being presented to a grand jury you have a right to go to a judge and ask for early disclosure of that or any other information."

Defense attorneys have raised the issue of how witnesses who give incriminating testimony before the grand jury will have their constitutional rights protected, including if they say something inconsistent with what they told police detectives.

Any evidence of that sort must be turned over to defense lawyers, Heine said.

While witnesses are not given any specific warnings about their constitutional rights, the grand jury rules are very clear that witnesses facing constitutional issues have to be advised by the supervising judge, Heine said.

When Lerner asked what would happen if a witness started to wander into the territory of self-incrimination and there was no defense attorney present to assert that the witness had a right to counsel, Ehrlich said that prosecutors, as officers of the court, have to be on the lookout for those issues and seek the attention of one of the supervising judges.

speed of disclosure

Another issue Greenblatt and Engle raised is how soon grand jury material is being turned over.

In New York, grand jury material does not need to be turned over until the day of trial, Minehart said. In federal court, under the Jencks Act, inculpatory statements, including in the grand jury, from government witnesses and other material relied upon the witnesses must be turned over after the witnesses have testified, Bronson said, but the material is "typically turned over well before."

The FJD has set up a protocol that grand jury material must be turned over 60 days before those cases go to trial, including those witnesses who testified before the grand jury, Minehart said.

While the homicide program has made a lot of progress in addressing a backlog and getting earlier dispositions in cases,

Lerner said, "There's a real danger that you'll cut down on getting those early dispositions if the defense doesn't have sufficiently early access to the key information in the case: the key information about what the evidence is against the defendant."

Defense attorneys can file motions to quash after they have received all of the discovery 60 days before trial, Minehart said.

Another issue Greenblatt and Engle raised was that defense counsel can never obtain the ex parte affidavit submitted by prosecutors to judges alleging that there was probable cause that witness intimidation was likely to occur or had occurred. That means the issue of the grand jury jurisdiction can never be meaningfully litigated and that "makes the motion to dismiss essentially a nullity," Engle said.

"In other indictment processes around the country, secrecy gives way to transparency at the time the indictment comes down," Engle said. "In our system, secrecy doesn't give way to total transparency. ... The defendant is never told what creates this witness intimidation that might happen in the future."

Motions can be filed at any time for bail, Ehrlich said, but Greenblatt said that bail is rarely going to be granted because a judge has already found that there is, was or likely to be witness intimidation.

Clients are likely to be sitting in jail for several months because there will be no meaningful plea bargain discussions until discovery is provided 60 days out before trial, Greenblatt said.

In contrast, New Jersey does provide discovery for bail motions, there are preindictment conferences to try to resolve cases, and there also are cutoffs after all the discovery has been given and no more pleas will be offered, Greenblatt said.

Further, more cases are going to be pushed to jury trial in indicted cases because defense attorneys won't advise their clients to opt for bench trials when it's known that another judge already sanctioned the case as a witness intimidation case, Greenblatt said.

Indicted defendants will see judges two times before trial, including at a formal arraignment after indictment in which defendants are informed of the grand jury process and their rights and the 60 days before trial when discovery is turned over, Ehrlich said.

Because witness intimidation can occur 60 days before trial, Engle argues that the new system "creates a system that does nothing more than give a tactical advantage to the prosecution. This is about seeking higher levels of convictions. It's not about justice. It's not about worrying about the constitutional rights of the accused."

In contrast, Heine said that she is not concerned with what happens with cases beyond getting them to trial.

"What I'm concerned about is getting the cases to trial," Heine said. "We all spent years in Municipal Court withdrawing case after case after case because our witnesses didn't come back or because our witnesses were intimidated. I'm more than happy to take my chances at trial and prove somebody guilty beyond a reasonable doubt. I just don't want my case to die on the vine because of systemic issues or because of witness intimidation."

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