Proposed New Pa.Rs.Crim.P. 556 through 556.12, and Proposed Correlative Changes to Pa.Rs.Crim.P. 103, 540, 542, 544, 547, 560, 573, 578, 582, 646, 648, 1003, and 1101

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules of Criminal Procedure 556 through 556.12, amend Rules of Criminal Procedure 103, 540, 544, 547, 560, 646, 1003, and 1101, and revise the Comments to Rules of Criminal Procedure 542, 573, 578, 582, and 648. The proposed new rules and correlative rule changes have been developed at the request of the Court and provide, inter alia, for the resumption of the use of indicting grand juries, but only as a local option in the narrowly defined circumstance of cases in which witness intimidation has occurred, is occurring, or is likely to occur. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed new rules and amendments to the rules precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Anne T. Panfil, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 6200, P.O. Box 62635
Harrisburg, PA 17106-2635
fax: (717) 231-9521 or e-mail: criminal.rules@pacourts.us

no later than Thursday, November 10, 2011.

September 30, 2011 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

_____
Risa Vetri Ferman, Chair

_____
Anne T. Panfil, Counsel

_____
Jeffrey M. Wasileski,Counsel

CHAPTER 5

[This is a new Part.]

PART E. INDICTING GRAND JURY

[This is an entirely new rule.]

RULE 556. INDICTING GRAND JURY

Each of the several courts of common pleas may proceed with an indicting grand jury pursuant to these rules only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

COMMENT: This rule was adopted in 2011 to permit the use of an indicting grand jury as an alternative to the preliminary hearing but only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

NOTE: New Rule 556 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.1 SUMMONING PANELS OF GRAND JURORS.

(A) When the court of common pleas elects to proceed with an indicting grand jury, the president judge, or president judge's designee, shall order one or more grand juries to be summoned for the purpose of issuing indictments or shall order that the sitting investigating grand jury shall sit as the indicting grand jury.

(B) The judge shall order the officials designated by law to summon prospective jurors to summon such number of jurors who are eligible by law as the judge deems necessary to serve as a panel for grand jury service.

(C) The summons shall be made returnable on such date as is ordered by the court.

COMMENT: Pursuant to paragraph (A), the president judge, or president judge's designee, may order that an investigating grand jury that is sitting will also serve in the capacity of the indicting grand jury. To the extent that 42 Pa.C.S. § 4548(c) is inconsistent with this rule, the statute is suspended by Rule 1101 (Suspension of Acts of Assembly).

The number of persons who may be summoned is left to the discretion of the president judge or the president judge's designee to accommodate the needs of the judicial district.

The qualification, selection, and summoning of prospective jurors, as well as related matters, are generally dealt with in 42 Pa.C.S. §§ 4501-4503, 4521-4527, 4531-4532.

NOTE: New Rule 556.1 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

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 a 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 are sufficient, the judge shall grant the motion, and shall notify the proper issuing authority.

(4) The order granting the motion and the motion shall be sealed.

(5) The attorney for the Commonwealth shall file the sealed order and the sealed motion with the clerk of courts.

(B) If not already assigned, the president judge shall assign one of the judges in the judicial district to serve as the supervising judge for the indicting grand jury.

(C) If the motion is granted, the case shall be presented to the grand jury within 21 days of the date of the order, unless the grand jury proceedings are waived by the defendant with the consent of the attorney for the Commonwealth.

(D) If the district attorney elects not to present the case to a grand jury, the defendant is entitled to a preliminary hearing before the proper issuing authority.

COMMENT: An accused in Pennsylvania ordinarily has the right to a preliminary hearing before he or she may be indicted by the grand jury. *See Commonwealth v. Hoffman*, 396 Pa. 491, 152 A.2d 726 (1959). However, the 2011 amendments to the rules permit the attorney for the Commonwealth to proceed to the indicting grand jury without first presenting the matter to an issuing authority for a preliminary hearing but only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

Pursuant to paragraph (A)(2), the president judge may designate another judge to receive motions from the attorney for the Commonwealth. It is anticipated that this designee will be the judge designated to be the supervising judge of the grand jury.

See Rule 556.11 for the procedures when a case is presented to the grand jury.

See Rule 556.12 for the procedures for the defendant to waive the grand jury proceedings.

If, after a motion to proceed to a grand jury is granted, the attorney for the Commonwealth elects not to present the case to the grand jury, the case will proceed as any other criminal case following the preliminary arraignment. *See* Rules 541-547.

NOTE: New Rule 556.2 adopted , effective .

***** ***** ***** ***** ***** *****

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.3. COMPOSITION AND ORGANIZATION OF THE INDICTING GRAND JURY.

(A) There initially shall be impaneled to serve on an indicting grand jury 23 legally qualified jurors and a minimum of 7 and not more than 15 legally qualified alternates. During its term, the indicting grand jury shall consist, as provided hereinafter, of not less than 15 nor more than 23 legally qualified jurors, and the remaining alternates.

(B) When an indicting grand jury is to be impaneled, the supervising judge in charge of the grand jury shall examine prospective jurors to determine which prospective jurors to excuse for cause. After prospective grand jurors have been excused for cause, the reduction to the minimum of 30 or maximum of 38 shall take place by random drawing in the following manner: 30 to 38 jurors shall be selected by random drawing, of which the first 23 jurors so selected shall be designated permanent grand jurors and the next 7 to 15 jurors shall be designated alternate jurors. Alternate jurors shall replace permanent jurors in the sequence in which the alternate jurors are selected.

(C) Alternate jurors shall attend and participate in sessions of the grand jury but they may not attend or participate in the deliberations and voting until such time as they may be appointed as permanent grand jurors as provided in paragraph (D).

(D) The court shall have the power to permanently excuse a permanent or alternate grand juror for cause at any time during the term of the indicting grand jury. For each such excused permanent grand juror, the court shall appoint a new permanent grand juror from among the available alternates.

(E) Fifteen permanent members of the grand jury shall constitute a quorum, but an affirmative vote of 12 permanent members of the grand jury shall be required to indict.

(F) Whenever the number of permanent grand jurors, including alternates who have been appointed to replace permanent grand jurors, becomes less than 15, the term of the indicting grand jury shall be considered at an end.

(G) The supervising judge shall appoint one of the grand jurors as foreperson and another juror as the deputy foreperson, who will act in the foreperson's absence. The grand jury shall select one of its members as a secretary to assist the foreperson in keeping a record of the action of the grand jury.

COMMENT: To accommodate the possibility that a grand jury would serve the dual function of both an investigating and indicting grand jury, see Rule 556.2(A), the procedures in this rule comport to the procedures in Rule 222 (Composition and Organization of the Investigating Grand

Jury).

The term "permanent grand juror" is used to distinguish grand jurors with the power to vote from alternate grand jurors. The purpose of providing a built-in system of alternates is to ensure the smooth functioning of the grand jury throughout its term and to provide that alternates, when made permanent grand jurors, will be fully cognizant of all the proceedings before the grand jury.

It is intended that no alternate may be appointed as a temporary substitute for a permanent grand juror, and that the court will excuse permanent grand jurors only when necessary and in the interests of justice. However, whenever a permanent juror is excused for cause and an alternate is available to become a permanent grand juror, the court must substitute an alternate for the excused permanent grand juror. It is intended that such substitution be made in the order of the alternate jurors' numerical designation.

NOTE: New Rule 556.3 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.4. CHALLENGES TO GRAND JURY AND GRAND JURORS.

(A) Challenges

The attorney for the Commonwealth or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(1) The challenge shall be in the form of a written motion and shall allege the ground upon which the challenge is made.

(2) If a challenge to an individual grand juror is sustained, the juror shall be discharged and replaced with an alternate juror.

(B) Motion to Dismiss

(1) The attorney for the Commonwealth or a defendant may move to dismiss the information filed following the grand jury's vote to indict the defendant based on the following grounds:

(a) an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under paragraph (A);

(b) the evidence did not establish probable cause that the defendant committed the crime or crimes charged;

(c) lack of jurisdiction of the grand jury; or

(d) expiration of the Statute of Limitations.

(2) The judge shall not dismiss the information on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(C) Any motion under paragraph (A) or paragraph (B) shall be made as part of the omnibus pretrial motion.

COMMENT: Concerning the right to challenge the array of the grand jury, see, *Commonwealth v. Dessus*, 423 Pa. 177, 224 A.2d 188 (1966), in which the Court held, *inter alia,* that "the law must not deprive an accused of any of his legal or Constitutional rights in this case the right to promptly (a)

challenge the array of the grand jury and (b) prove by legally competent evidence that one or more of the grand jurors should be disqualified for cause."

Nothing in this rule is intended to limit the availability of *habeas corpus* review as provided by law.

Nothing in this rule is intended to require notice to the defendant of the time and place of the impaneling of a grand jury, or to give the defendant the right to be present for the selection of the grand jury.

NOTE: New Rule 556.4 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.5. DURATION OF INDICTING GRAND JURY.

(A) The length of the grand jury term shall be determined by the president judge, or the president judge's designee, but shall not exceed 18 months, unless an order for discharge is entered earlier by the supervising judge upon determination by the grand jury, by majority vote, that its business has been completed, or an extension is granted pursuant to paragraph (B).

(B) At the end of its original term or any extension thereof, if the grand jury determines by majority vote that it has not completed its business, it may request the supervising judge to extend its term for an additional period of 6 months. No grand jury term shall exceed 24 months from the time the grand jury was originally summoned.

(1) The supervising judge shall grant a request for extension unless the judge determines that such request clearly is without basis.

(2) Failure to grant an extension of term under this rule may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rule.

(3) If an appeal is taken, the grand jury shall continue to exercise its powers pending the disposition of the appeal.

(C) At any time within the original term of a grand jury, or any extension thereof, if the supervising judge determines that the grand jury is not conducting proper indicting activity, the judge may order that the grand jury be discharged.

(1) An order of discharge under this rule shall not become effective less than 10 days after the date on which the order is issued and actual notice given to the attorney for the Commonwealth and the foreperson of the grand jury.

(2) The order may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rule.

(3) If an appeal is taken, the grand jury shall continue to exercise its powers pending the disposition of the appeal.

COMMENT: The procedures governing the duration of the indicting grand jury are consistent with the procedures for investigating grand juries as set forth in 42 Pa.C.S. § 4546.

NOTE: New Rule 556.5 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.6. ADMINISTERING OATH TO GRAND JURY AND FOREPERSON.

(A) After the selection of the members of the grand jury, the supervising judge shall administer the oath separately to the foreperson and deputy foreperson and then to the other grand jurors. The supervising judge shall then charge the grand jury concerning its duties.

(B) The supervising judge shall administer the oath to the grand jury in substantially the following form:

> "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 neither approve any indictment or present any person for hatred, envy or malice, or refuse to approve any indictment or 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."

(C) The supervising judge shall administer the oath to the foreperson and deputy foreperson in substantially the following form:

> "You, as foreperson, do solemnly swear that you will make diligent inquiry with regard to all matters as shall be given you in charge; that you will keep secret all that transpires in the jury room, except as authorized by law; that you will neither approve any indictment or present any person for hatred, envy or malice, or refuse to approve any indictment or 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."

COMMENT: It is intended that all grand jurors, including alternate grand jurors, will be sworn at this time.

NOTE: New Rule 556.6 adopted , effective .

***** ***** ***** ***** ***** *****

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.7. ADMINISTRATION OF OATH TO WITNESSES; COURT PERSONNEL.

(A) Each witness to be heard by the indicting grand jury shall be sworn by the foreperson before testifying.

(B) All court personnel who are to be present during any portion of the grand jury proceedings, and all others who assist in the proceedings, shall be sworn to secrecy by the supervising judge prior to their participation.

COMMENT: When it is necessary to give constitutional warnings to a witness, the warnings and the oath must be administered by the supervising judge. As to warnings that the court may have to give to the witness when the witness is sworn, see, *e.g.*, *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (1971).

NOTE: New Rule 556.7 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.8. RECORDING OF TESTIMONY BEFORE INDICTING GRAND JURY.

(A) Proceedings before an indicting grand jury, other than the deliberations and voting of the grand jury, shall be recorded by a court reporter or by a suitable recording device, and a transcript made.

(B) The supervising judge shall retain control of the recording device and the original and all copies of the transcript, and shall maintain their secrecy.

(C) When physical evidence is presented before the indicting grand jury, the supervising judge shall establish procedures for supervising custody.

(D) In cases in which an indictment is not returned, the notes or transcriptions shall be destroyed unless ordered by the supervising judge to be preserved for good cause shown, including but not limited to the prosecution of a witness for perjury.

COMMENT: This rule requires that the supervising judge retain control over the transcript of the indicting grand jury proceedings and all copies thereof, as the record is transcribed, until such time as the transcript is released as provided in these rules.

NOTE: New Rule 556.8 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.9. WHO MAY BE PRESENT DURING SESSIONS OF INDICTING GRAND JURY.

(A) The attorney for the Commonwealth, the alternate grand jurors, the witness under examination, and a stenographer may be present while the indicting grand jury is in session. Counsel for the witness under examination may be present as provided by law.

(B) The supervising judge, upon the request of the attorney for the Commonwealth or the grand jury, may order that an interpreter, security officers, and such other persons as the judge may determine are necessary to the presentation of the evidence may be present while the indicting grand jury is in session.

(C) All persons who are to be present while the indicting grand jury is in session shall be identified in the record, shall be sworn to secrecy as provided in these rules, and shall not disclose any information pertaining to the grand jury except as provided by law.

(D) No person other than the permanent grand jurors may be present during the deliberations or voting of the grand jury.

COMMENT: It is intended in paragraph (B) that when the supervising judge authorizes a certain individual to be present during a session of the indicting grand jury, the person may remain in the grand jury room only as long as is necessary for that person to assist the grand jurors.

Paragraph (C) prohibits the disclosure of any information related to testimony before the indicting grand jury. This prohibition differs from the disclosure provisions in 42 Pa.C.S. § 4549 for investigating grand juries that provides some exceptions for witnesses to disclose their testimony.

See also Rule 556.10 concerning secrecy and disclosure of indicting grand jury proceedings.

Nothing in these rules precludes the supervising judge from permitting a witness to testify using two-way simultaneous audio-visual communication.

NOTE: New Rule 556.9 adopted , effective .

***** ***** ***** ***** ***** *****

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.10. SECRECY; DISCLOSURE.

(A) Secrecy

(1) All evidence, including exhibits and all testimony presented to the grand jury, is subject to grand jury secrecy, and no person may disclose any matter occurring before the grand jury.

(2) A violation of grand jury secrecy rules may be punished as a contempt of court.

(B) Disclosure

(1) Attorney for the Commonwealth:

Upon receipt of the certified transcript of the proceedings before the indicting grand jury, the supervising judge shall furnish a copy of the transcript to the attorney for the Commonwealth for use in the performance of official duties.

(2) Defendant in a Criminal Case:

(a) If a defendant in a criminal case has testified before the indicting grand jury concerning the subject matter of the charges against him or her, upon application of such defendant, the supervising judge shall order that the defendant be furnished with a copy of the transcript of such testimony.

(b) Pretrial discovery in cases indicted by a grand jury is subject to Rule 573, except that discovery shall not be ordered until 30 days before the commencement of trial. Pretrial discovery includes the transcripts of the testimony of any witnesses in a criminal case who have testified before the indicting grand jury concerning the subject matter of the charges against the defendant and, when ordered by the supervising judge, the grand jury material that is subject to the secrecy provisions in paragraph (A).

(c) The attorney for the Commonwealth may request that the supervising judge delay the disclosure of a grand jury witness' testimony, but such delay in disclosure shall not be later than the conclusion of direct testimony of that witness at trial.

(3) Other Disclosures:

Disclosure of grand jury material or matters, other than the grand jury's deliberations and the vote of individual jurors, may be made to any law enforcement personnel that an attorney for the Commonwealth considers necessary to assist in the enforcement of the criminal law.

(C) The supervising judge shall close to the public any hearing relating to grand jury proceedings to the extent necessary to prevent disclosure of a matter occurring before a grand jury. Records, orders, and subpoenas relating to grand jury proceedings shall be kept under seal to prevent the unauthorized disclosure of a matter occurring before a grand jury.

COMMENT: The attorney for the Commonwealth has an affirmative duty to provide the defendant with any testimony before the indicting grand jury and any physical evidence presented to the grand jury that is exculpatory to the defendant consistent with the line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions.

Paragraph (B) establishes the limitations on pretrial discovery in cases in which a defendant has been indicted by a grand jury information. Although the Criminal Rules generally recognize the defendant's right to have pretrial discovery to be able to prepare his or her case, given the nature of the cases presented to the grand jury, see Rule 556, this rule provides for the limited delay in providing pretrial discovery of grand jury testimony until 30 days before the commencement of trial. For purposes of this rule, a trial commences when the trial judge determines that the parties are present and directs them to proceed to *voir dire* or to opening argument, or to the hearing of any motions that had been reserved for the time of trial, or to the taking of testimony, or to some other such first step in the trial. It is not intended that preliminary calendar calls should constitute commencement of a trial.

Paragraph (B)(2)(b)(ii) permits the supervising judge to extend the time for the disclosure of a grand jury witness' testimony upon the request of the attorney for the Commonwealth. Under no circumstances may the extension be later than the completion of the witness' direct testimony

at trial.

The supervising judge may grant a continuance to enable the defendant to review the grand jury testimony as the interests of justice require.

NOTE: New Rule 556.10 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.11. PROCEEDINGS WHEN CASE PRESENTED TO GRAND JURY.

(A) When a case is presented to an indicting grand jury, the case shall remain open in the office of the issuing authority in which the complaint was filed until conclusion of the proceedings before the grand jury, and the issuing authority shall cancel the preliminary hearing and schedule a hearing to review the status of the case.

(1) The status hearing shall be held 30 days from the date when the issuing authority received notice that the case will be presented to the grand jury. If the case still is before the grand jury at the time of the status hearing, the issuing authority shall schedule additional status hearings every 30 days until such time as the grand jury indicts the defendant or declines to indict the defendant.

(2) The defendant, the defendant's attorney, if any, and the attorney for the Commonwealth shall be present at the status hearings.

(3) In the discretion of the issuing authority, the status hearing may be conducted by using two-way simultaneous audio-visual communication. When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the status hearing.

(B) A grand jury has the authority to:

(1) inquire into violations of criminal law through subpoenaing witnesses and documents; and

(2) based upon evidence it has received, including hearsay evidence as permitted by law, or upon a presentment issued by an investigating grand jury, indict defendant for an offense under the criminal laws of the Commonwealth of Pennsylvania; or

(3) decline to indict.

(B) After a grand jury has considered the evidence presented, the grand jury shall vote whether to indict the defendant. The affirmative vote of at least 12 grand jurors is required to indict.

(C) In cases in which the grand jury votes to indict, an indictment shall be prepared setting forth the offenses on which the grand jury has voted to indict. The indictment shall be signed by the grand jury foreperson, or deputy foreperson if the foreperson is unavailable, and returned to the supervising judge.

(D) Upon receipt of the indictment, the supervising judge shall:

(1) provide a copy of the indictment to the Commonwealth authorizing the attorney to prepare an information pursuant to Rule 560; and

(2) forward the indictment to the issuing authority, or issue an arrest warrant, if the subject of the indictment has not been arrested on the charges contained in the indictment.

(E) At the request of the attorney for the Commonwealth, the supervising judge shall order the indictment to be sealed.

(F) In cases in which the grand jury does not vote to indict, the foreperson promptly and in writing shall so report to the supervising judge who immediately shall dismiss the complaint and shall notify the issuing authority of the dismissal.

COMMENT: As provided in paragraph (A), the case will remain open in the magisterial district office in which the complaint was filed and the issuing authority must conduct a hearing into the status of the case every 30 days until the grand jury takes action on the case. At the status hearing, issues related to the case, such as bail, may be addressed.

When the grand jury votes to indict the defendant, the vote to indict is the functional equivalent of holding the defendant for court following a preliminary hearing. In these cases, the matter will proceed in the same manner as when the defendant is held for court following a preliminary hearing. *See, e.g.,* Rules 547 and 560.

The indictment required by paragraph (C) no longer serves the traditional function of an indictment, but rather serves as an instrument authorizing the attorney for the Commonwealth to file an information. *See* Rule 103.

Concerning hearsay evidence before the indicting grand jury, see *Commonwealth v.Dessus,* 423 Pa. 177, 224 A.2d 188 (1966).

If the grand jury declines to indict, the attorney for the Commonwealth may reinstitute the charges as provided in Rule 544.

NOTE: New Rule 556.11 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

[This is an entirely new rule.]

RULE 556.12. WAIVER OF GRAND JURY ACTION.

A defendant, with the consent of the attorney for the Commonwealth and the approval of the supervising judge, may waive action by the grand jury and consent to be bound over to court. The waiver shall be in writing and signed by the defendant and defense attorney, if any, and shall certify that the defendant voluntarily waives the grand jury action and consents to be bound over to court.

NOTE: New Rule 556.12 adopted , effective .

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 41 Pa.B. (, 2011).

RULE 103. DEFINITIONS.

The following words and phrases, when used in any Rule of Criminal Procedure, shall have the following meanings:

ADVANCED COMMUNICATION TECHNOLOGY is any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.

ADVANCED COMMUNICATION TECHNOLOGY SITE is any approved location within Pennsylvania designated by the president judge, or the president judge's designee, with advanced communication technology equipment that is available for parties in a criminal matter to communicate with others in physically separate locations as provided in these rules.

AFFIANT is any responsible person capable of taking an oath who signs, swears to, affirms, or, when permitted by these rules, verifies a complaint and appreciates the nature and quality of that person's act.

ARRAIGNMENT is the pretrial proceeding in the court of common pleas conducted pursuant to Rule 571.

BAIL is the security or other guarantee required and given for the release of a person, conditioned upon a written undertaking, in the form of a bail bond, that the person will appear when required and comply with all conditions set forth in the bail bond.

BAIL AUTHORITY is the magisterial district judge, magistrate, Philadelphia arraignment court magistrate, or the judge with jurisdiction over the case who is authorized by law to set, modify, revoke, or deny bail.

CAPITAL CASE or **CRIME** is one in or for which the death penalty may be imposed.

CARRIER SERVICE includes, but is not limited to, delivery by companies such as Federal Express or United Parcel Service, or a local courier service, and courthouse interoffice mail. The courthouse interoffice mail is a method of delivery used in some judicial districts for transmittal of documents between offices in the courthouse, and between the courthouse and other county facilities, including the county jail facility.

CLERK OF COURTS is that official, without regard to that person's title, in each judicial district who, pursuant to 42 Pa.C.S. §§ 2756 and 2757, has the responsibility and function to maintain the official criminal case file and list of docket entries, and to perform such other duties as required by rule or law.

COLLATERAL is cash or a cash equivalent deposited in summary cases.

COPY is an exact duplicate of an original document, including any required signatures, produced through mechanical or electronic means, and includes, but is not limited to: carbon copies; copies reproduced by using a photocopy machine, by transmission using facsimile equipment, or by scanning into and printing out of a computer.

COURT is a court of record.

COURT ADMINISTRATOR is that official in each judicial district who has the responsibility for case management and such other responsibilities as provided by the court.

COURT CASE is a case in which one or more of the offenses charged is a misdemeanor, felony, or murder of the first, second, or third degree.

CRIMINAL PROCEEDINGS include all actions for the enforcement of the Penal Laws.

INDICTMENT is **[a bill of indictment which has been approved by a grand jury and properly returned to court, or which has been endorsed with a waiver as provided in former Rule 215]** **the instrument holding the defendant for court after a grand jury votes to indict and authorizing the attorney for the Commonwealth to prepare an information.**

INFORMATION is a formal written **[accusation]** **statement charging the commission** of an offense **[made]** **signed and presented to the court** by the attorney for the Commonwealth **after a defendant is held for court or waives the preliminary hearing or a grand jury proceeding.** **[, upon which a defendant may be tried, which replaces the indictment in all counties since the use of the indicting grand jury has been abolished.]**

ISSUING AUTHORITY is any public official having the power and authority of a magistrate, a Philadelphia arraignment court magistrate, or a magisterial district judge.

LAW ENFORCEMENT OFFICER is any person who is by law given the power to enforce the law when acting within the scope of that person's employment.

MOTION includes any challenge, petition, application, or other form of request for

an order or relief.

ORDINANCE is a legislative enactment of a political subdivision.

PENAL LAWS include all statutes and embodiments of the common law which establish, create, or define crimes or offenses, including any ordinances which may provide for imprisonment upon conviction or upon failure to pay a fine or penalty.

POLICE OFFICER is any person who is by law given the power to arrest when acting within the scope of the person's employment.

POLITICAL SUBDIVISION shall mean county, city, township, borough, or incorporated town or village having legislative authority.

PRELIMINARY ARRAIGNMENT is the proceeding following an arrest conducted before an issuing authority pursuant to Rule 540 or Rule 1003(D).

SEALED VERDICT is a verdict unanimously agreed upon by the jury, completed, dated, and signed by the foreman of the jury, and closed to open view.

SECURITY shall include cash, certified check, money order, personal check, or guaranteed arrest bond or bail bond certificate.

SIGNATURE, when used in reference to documents generated by the minor judiciary or court of common pleas, includes a handwritten signature, a copy of a handwritten signature, a computer generated signature, or a signature created, transmitted, received, or stored by electronic means, by the signer or by someone with the signer’s authorization, unless otherwise provided in these rules.

SUMMARY CASE is a case in which the only offense or offenses charged are summary offenses.

VOIR DIRE is the examination and interrogation of prospective jurors.

> COMMENT: The definitions of arraignment and preliminary arraignment were added in 2004 to clarify the distinction between the two proceedings. Although both are administrative proceedings at which the defendant is advised of the charges and the right to counsel, the preliminary arraignment occurs shortly after an arrest before a member of the minor judiciary, while an arraignment occurs in the court of common pleas after a case is held for court and an information is filed.

The definition of indictment was amended in 2011 consistent with the adoption of the new indicting grand jury rules in Chapter 5 Part E. Under the new rules, the indictment is the functional equivalent of an issuing authority's order holding the defendant for court and that forms the basis for the information that is prepared by the attorney for the Commonwealth. Formerly, an indictment was defined as a bill of indictment that has been approved by a grand jury and properly returned to court, or which has been endorsed with a waiver as provided in former Rule 215.

The definition of information was added to the rules as part of the implementation of the 1973 amendment to PA. CONST. art. I, § 10, permitting the substitution of informations for indictments. The term "information" as used here should not be confused with prior use of the term in Pennsylvania practice as an instrument which served the function now fulfilled by the complaint.

The definition of bill of indictment was deleted in 1993 as no longer necessary because all courts of common pleas have abolished the indicting grand jury and now provide for the initiation of criminal proceedings by information. *See* PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931. Some pending cases, however, may have been instituted prior to the abolition of the indicting grand jury. For this reason, the definition of indictment has been retained in this rule.

The definitions of bail authority and issuing authority were amended in 2005 to reflect the provisions of Act 207 of 2004 that changed the phrase "district justice" to "magisterial district judge," effective January 29, 2005. *See also* the Court's January 6, 2005 Order providing that any reference to "district justice" in a court rule shall be deemed a reference to a "magisterial district judge."

The definitions of "bail authority" and "issuing authority" were amended in 2009 to reflect the provisions of Act 98 of 2008 that changed the phrase "bail commissioner" to "arraignment court magistrate," effective December 8, 2008. See also the Court's January 21, 2009 Order providing that any reference to "bail commissioner" in a court rule shall be deemed a reference to an "arraignment court magistrate."

Neither the definition of law enforcement officer nor the definition of police officer gives the power of arrest to any person who is not otherwise given that power by law.

The definition of signature was added in 2004 to make it clear when a rule requires a document generated by the minor judiciary or court of common pleas to include a signature or to be signed, that the signature may be in any of the forms provided in the definition. In addition, documents that institute proceedings or require the inclusion of an oath ordinarily are not documents generated by the minor courts or courts of common pleas and therefore any signature required on the document would not be included in this definition of signature; however, in the event such a document is generated by the minor courts or the courts of common pleas, the form of "signature" on this document is limited to handwritten, and the other forms of signature provided in the definition are not permitted.

Included in Chapter 5 Part C of the rules are additional definitions of words and phrases that apply specifically to bail in criminal cases. *See, e.g.*, Rule 524, which defines the types of release on bail.

NOTE: Previous Rules 3 and 212 adopted June 30, 1964, effective January 1, 1965, suspended January 31, 1970, effective May 1, 1970; present Rule 3 adopted January 31, 1970, effective May 1, 1970; amended June 8, 1973, effective July 1, 1973; amended February 15, 1974, effective immediately; amended June 30, 1977, effective September 1, 1977; amended January 4, 1979, effective January 9, 1979; amended July 12, 1985, effective January 1, 1986; January 1, 1986 effective date extended to July 1, 1986; amended August 12, 1993, effective September 1, 1993; amended February 27, 1995, effective July 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; renumbered Rule 103 and *Comment* revised March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended March 2, 2004, effective July 1, 2004; amended April 30, 2004, effective July 1, 2004; amended August 23, 2004, effective August 1, 2005; amended February 4, 2005, effective immediately; amended May 6, 2009, effective immediately **[.] ; amended**

. 2011, effective , 2011.

*** * * * * ***

COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the February 27, 1995 amendments published with the Court's Order at 25 Pa.B. 935 (March 18, 1995).

Final Report explaining the September 13, 1995 amendments published with Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 Pa.B. 2591 (May 25, 2002).

Final Report explaining the March 2, 2004 amendments defining carrier service, clerk of courts, court administrator, and motion published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the April 30, 2004 amendments defining "signature" published with the Court's Order at 34 Pa.B. 2542 (May 15, 2004).

Final Report explaining the August 23, 2004 amendments adding definitions of arraignment and preliminary arraignment published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the February 4, 2005 amendments modifying the definitions of bail authority and issuing authority published with the Court's Order at 35 Pa.B. 1333 (February 19, 2005).

Final Report explaining the May 6, 2009 amendments modifying the definitions of bail authority and issuing authority published with the Court's Order at 39 Pa.B. (, 2009).

Report explaining the proposed amendments modifying the definitions of indictment and information published for comment at 41 Pa.B. (, 2011).

RULE 540. PRELIMINARY ARRAIGNMENT.

(A) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

(B) At the preliminary arraignment, a copy of the complaint accepted for filing pursuant to Rule 508 shall be given to the defendant.

(C) If the defendant was arrested with a warrant, the issuing authority shall provide the defendant with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant shall be given copies no later than the first business day after the preliminary arraignment.

(D) If the defendant was arrested without a warrant pursuant to Rule 519, unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

(E) The issuing authority shall not question the defendant about the offense(s) charged but shall read the complaint to the defendant. The issuing authority shall also inform the defendant:

(1) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(2) of the right to have a preliminary hearing; and

(3) if the offense is bailable, the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

(F) Unless the preliminary hearing is waived by a defendant who is represented by counsel**, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2**, the issuing authority shall:

(1) fix a day and hour for a preliminary hearing which shall not be **later than 14 days after the preliminary arraignment if the defendant is in custody and no later than 21 days if not in custody [less than 3 nor more than 10 days after the preliminary arraignment,]** unless:

(a) extended for cause shown; or

(b) the issuing authority fixes an earlier date upon request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and

(2) give the defendant notice, orally and in writing,

(a) of the date, time, and place of the preliminary hearing, and

(b) that failure to appear without good cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and will result in the case proceeding in the defendant's absence and in the issuance of a warrant of arrest.

(G) After the preliminary arraignment, if the defendant is detained, the defendant shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail as provided by law.

(H) If a monetary condition of bail is set, the issuing authority shall accept payment of the monetary condition, as provided in Rule 528, at any time prior to the return of the docket transcript to the court of common pleas.

COMMENT: A preliminary arraignment as provided in this rule bears no relationship to arraignment in criminal courts of record. *See* Rule 571.

Within the meaning of Rule 540, counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (A), the issuing authority has discretion to order that a defendant appear in person for the arraignment.

Under paragraph (A), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning *venue* when proceedings are conducted using advanced communication technology.

Paragraph (C) requires that the defendant receive copies of the arrest warrant and the supporting affidavit(s) at the time of the preliminary arraignment. *See also* Rules 513(A), 208(A), and 1003.

Paragraph (C) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the

preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, **515 Pa. 501,** 530 A.2d 414 (**[Pa.]** 1987).

When a defendant has not been promptly released from custody after a warrantless arrest, the defendant must be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. *See* Rule 519(A).

Under paragraph (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before a defendant may be detained. *See Riverside v. McLaughlin*, 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Pursuant to the 2004 amendment to paragraph (F)(2), at the time of the preliminary arraignment, the defendant must be given notice, both orally and in writing, of the date, time, and place of the preliminary hearing. The notice must also explain that, if the defendant fails to appear without good cause for the preliminary hearing, the defendant's absence will constitute a waiver of the right to be present, the case will proceed in the defendant's absence, and a warrant for the defendant's arrest will be issued.

The 2011 amendment to paragraph (F) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

See Rule 1003(D) for the procedures governing preliminary arraignments in the Municipal Court.

NOTE: Original Rule 119 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 119 adopted January 31, 1970,

effective May 1, 1970; renumbered Rule 140 September 18, 1973, effective January 1, 1974; amended April 26, 1979, effective July 1, 1979; amended January 28, 1983, effective July 1, 1983; rescinded August 9, 1994, effective January 1, 1995. New Rule 140 adopted August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; renumbered Rule 540 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended August 24, 2004, effective August 1, 2005 **[.] ; amended , effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the provisions of the new Rule 140 published at 22 Pa.B. 6 (January 4, 1992). Final Report published with the Court's Order at 24 Pa.B. 4342 (August 27, 1994).

Final Report explaining the September 13, 1995 amendments published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 Pa. B. 2591 (May 25, 2002).

Final Report explaining the August 24, 2004 amendments concerning notice that the case will proceed in defendant's absence published with the Court's Order at 34 Pa.B. 5016 (September 11, 2004).

Report explaining the proposed amendments concerning indicting grand juries published for comment at 41 Pa.B. (, 2011).

RULE 542. PRELIMINARY HEARING; CONTINUANCES.

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

(1) assume charge of the prosecution; and

(2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it.

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(F) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(G) CONTINUANCES

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date and time for the preliminary hearing, and the reasons that the particular date was chosen.

(2) The issuing authority shall give notice of the new date and time for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

COMMENT: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the language of the rule interpreted by the Court in *Commonwealth v. Mullen*, 460 Pa. 336, 333 A.2d 755 (1975). This amendment was made to preserve the limited function of a preliminary hearing.

Paragraph (E) was added to the rule in 2011 to clarify that

traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements enumerated in paragraph (E). That enumeration is not comprehensive, and hearsay is admissible to establish other matters as well. The presence of witnesses to establish these elements is not required at the preliminary hearing. *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

If the case is held for court, the normal rules of evidence will apply at trial.

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F)**,** during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, including the taking of evidence on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

See Chapter 5 Part E for the procedures governing indicting grand juries. Under these rules, a case may be presented to the grand jury instead of proceeding to a preliminary hearing. _See_ Rule 556.2.

NOTE: Former Rule 141, previously Rule 120, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 141 and amended September 18, 1973, effective January 1, 1974; amended June 30, 1975, effective July 30, 1975; amended October 21, 1977, effective January 1, 1978; paragraph (D) amended April 26, 1979, effective July 1, 1979; amended February 13, 1998, effective July 1, 1998; rescinded October 8, 1999, effective January 1, 2000. Former Rule 142, previously Rule 124, adopted June 30, 1964, effective

January 1, 1965, suspended effective May 1, 1970; present rule adopted January 31, 1970, effective May 1, 1970; renumbered Rule 142 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; effective date extended to July 1, 1982; amended July 12, 1985, effective January 1, 1986, effective date extended to July 1, 1986; rescinded October 8, 1999, effective January 1, 2000. New Rule 141, combining former Rules 141 and 142, adopted October 8, 1999, effective January 1, 2000; renumbered Rule 542 and *Comment* revised March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended January 27, 2011, effective in 30 days **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the February 13, 1998 amendments concerning questioning of witnesses published with the Court's Order at 28 Pa.B. 1127 (February 28, 1998).

Final Report explaining new Rule 141 published with the Court's Order at 29 Pa.B. 5509 (October 23, 1999).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the August 24, 2004 amendments concerning notice published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the March 9, 2006 amendments to paragraph (D) published with the Court's Order at 36 Pa.B. 1392 (March 25, 2006).

Final Report explaining the May 1, 2007 amendments deleting the certified mail service requirement from paragraph [(D)] (E)(2)(b) published with the Court's Order at 37 Pa.B. 2503 (June 2, 2007).

Report explaining the proposed revision of the Comment concerning indicting grand juries published for comment at 41 Pa.B. (, 2011).

RULE 544. REINSTITUTING CHARGES FOLLOWING WITHDRAWAL OR DISMISSAL.

(A) When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, **or when a grand jury declines to indict,** the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the re-filing of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

(B) Following the re-filing of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

COMMENT: This rule provides the procedures for reinstituting criminal charges following their withdrawal or dismissal at, or prior to, the preliminary hearing**, or after a grand jury declines to indict**.

The authority of the attorney for the Commonwealth to reinstitute charges that have been dismissed at the preliminary hearing is well established by case law. *See, e.g., McNair's Petition*, **324 Pa. 48,** 187 A. 498 (**[Pa.]** 1936); *Commonwealth v. Thorpe*, **549 Pa. 343,** 701 A.2d 488 (**[Pa.]** 1997). This authority, however, is not unlimited. First, the charges must be reinstituted prior to the expiration of the applicable statute(s) of limitations. *See Commonwealth v. Thorpe*, **549 Pa. 343,** 701 A.2d 488 (**[Pa.]** 1997). In addition, the courts have held that the reinstitution may be barred in a case in which the Commonwealth has repeatedly rearrested the defendant in order to harass him or her, or if the rearrest results in prejudice. *See Commonwealth v. Thorpe*, **549 Pa. 343,** 701 A.2d 488 (**[Pa.]** 1997); *Commonwealth v. Shoop*, **420 Pa. Super. 606,** 617 A.2d 351 (**[Pa. Super.]** 1992).

The decision to reinstitute charges must be made by the attorney for the Commonwealth. Therefore, in cases in which no attorney for the Commonwealth was present at the preliminary hearing, the police officer may not re-file the complaint without the written authorization of the attorney for the Commonwealth. *See* Rule 507 (Approval of Police Complaints and Arrest Warrant Affidavits by Attorney for the Commonwealth -- Local Option) for procedures for prior approval of complaints.

Pursuant to paragraph (A), in the usual case, charges will be reinstituted by filing a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges. However, there may be cases in which the attorney for the Commonwealth determines that a different issuing authority should conduct the preliminary hearing, such as when an error of law is made by the issuing authority in finding that the Commonwealth did not sustain its burden to establish a *prima facie* case. Paragraph (B) requires that, in these cases, the attorney for the Commonwealth must file a petition with the court of common pleas requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. For the procedure for requesting assignment of a different issuing authority, see Rule 132.

***See* Chapter 5 Part E for the procedures governing indicting grand juries. If the attorney for the Commonwealth is reinstituting the charges after a grand jury has declined to indict, the complaint should be re-filed with the issuing authority with whom the original complaint was filed.**

See Chapter 5 Part F(1) for the procedures governing motions.

NOTE: Original Rule 123, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 123 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 143 September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; renumbered Rule 142 October 8, 1999, effective January 1, 2000. New Rule 143 adopted October 8, 1999, effective January 1, 2000; renumbered Rule 544 and amended March 1, 2000, effective April 1, 2001 **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Final Report explaining new Rule 143 published with the Court's Order at 29 Pa.B. 5509 (October 23, 1999).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed amendments to paragraph (A) concerning indicting grand juries published for comment at 41 Pa.B. (_____, 2011).

RULE 547. RETURN OF TRANSCRIPT AND ORIGINAL PAPERS.

(A) When a defendant is held for court, **either following a preliminary hearing or an indictment by a grand jury,** the issuing authority shall prepare a transcript of the proceedings. The transcript shall contain all the information required by these rules to be recorded on the transcript. It shall be signed by the issuing authority, and have affixed to it the issuing authority's seal of office.

(B) The issuing authority shall transmit the transcript to the clerk of the proper court within 5 days after holding the defendant for court.

(C) In addition to this transcript the issuing authority shall also transmit the following items:

(1) the original complaint;

(2) the summons or the warrant of arrest and its return;

(3) all affidavits filed in the proceeding;

(4) the appearance or bail bond for the defendant, if any, or a copy of the order committing the defendant to custody;

(5) a request for the court of common pleas to issue a bench warrant as required in Rule 543(D)(3)(b); **[and]**

(6) notice informing the court of common pleas that the defendant has failed to comply with the fingerprint order as required in Rule 543(D)(3)(b)(ii) **[.] ; and**

(7) when the defendant is indicted by the grand jury, the copy of the indictment.

COMMENT: *See* Rule 135 for the general contents of the transcript. There are a number of other rules that require certain things to be recorded on the transcript to make a record of the proceedings before the issuing authority. *See, e.g.*, Rules 542 and 543.

When the case is held for court pursuant to Rule 543(D)(3), the issuing authority must include with the transcript transmittal a request for the court of common pleas to issue a bench warrant.

When the case is held for court pursuant to Rule

543(D)(3)(b)(ii), the issuing authority must include with the transcript transmittal a notice to the court of common pleas that the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2). *See* Rule 543(D)(3)(b)(ii). The court of common pleas must take whatever actions deemed appropriate to address this non-compliance.

***See* Chapter 5 Part E for the procedures governing indicting grand juries. Pursuant to Rule 556.11, the supervising judge will forward a copy of the indictment to the issuing authority for inclusion with documents forwarded with the transcript under this rule. When the case is transmitted to the court of common pleas, the clerk of courts should associate the transcript and other documents transmitted by the issuing authority with the original indictment filed by the supervising judge.**

NOTE: Formerly Rule 126, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 146 and amended September 18, 1973, effective January 1, 1974; amended October 22, 1982, effective January 1, 1982; amended July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986; renumbered Rule 547 and amended March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended July 10, 2008, effective February 1 , 2009 **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the August 24, 2004 changes published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the May 1, 2007 amendments concerning the request for a bench warrant published with the Court's Order at 37 Pa.B. 2496 (June 2, 2007).

Final Report explaining the July 10, 2008 amendments to paragraph (C)(6) concerning the fingerprint order published at 38 Pa.B. 3971 (July 26, 2008).

Report explaining proposed amendments to paragraph (A) and adding paragraph (C)(7) concerning indicting grand juries published for comment at 41 Pa.B. (, 2011).

RULE 560. INFORMATION: FILING, CONTENTS, FUNCTION.

(A) After the defendant has been held for court **following a preliminary hearing or an indictment**, the attorney for the Commonwealth shall proceed by preparing an information and filing it with the court of common pleas.

(B) The information shall be signed by the attorney for the Commonwealth and shall be valid and sufficient in law if it contains:

(1) a caption showing that the prosecution is carried on in the name of and by the authority of the Commonwealth of Pennsylvania;

(2) the name of the defendant, or if the defendant is unknown, a description of the defendant as nearly as may be;

(3) the date when the offense is alleged to have been committed if the precise date is known, and the day of the week if it is an essential element of the offense charged, provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient;

(4) the county where the offense is alleged to have been committed;

(5) a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint; and

(6) a concluding statement that "all of which is against the Act of Assembly and the peace and dignity of the Commonwealth."

(C) The information shall contain the official or customary citation of the statute and section thereof, or other provision of law that the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the information.

(D) In all court cases tried on an information, the issues at trial shall be defined by such information.

COMMENT: The attorney for the Commonwealth may electronically prepare, sign, and transmit the information for filing.

Before an information is filed, the attorney for the Commonwealth may withdraw one or more of the charges by filing a notice of withdrawal with the clerk of courts. *See* Rule 561(A). Upon the filing of an information, any

charge not listed on the information will be deemed withdrawn by the attorney for the Commonwealth. *See* Rule 561(B). After the information is filed, court approval is required before a *nolle prosequi* may be entered on a charge listed therein. *See* Rule 585.

In any case in which there are summary offenses joined with the misdemeanor, felony, or murder charges that are held for court, the attorney for the Commonwealth must include the summary offenses in the information. *See Commonwealth v. Hoffman*, 406 Pa. Super. 583, 594 A.2d 772 (1991).

When there is an omission or error of the type referred to in paragraph (C), the information should be amended pursuant to Rule 564.

See Rule 543(D) for the procedures when a defendant fails to appear for the preliminary hearing. When the preliminary hearing is held in the defendant's absence and the case is held for court, the attorney for the Commonwealth should proceed as provided in this rule.

See Chapter 5 Part E for the procedures governing indicting grand juries. As explained in the _Comment_ to Rule 556.11, when the grand jury indicts the defendant, this is the functional equivalent to holding the defendant for court following a preliminary hearing.

NOTE: Rule 225 adopted February 15, 1974, effective immediately; *Comment* revised January 28, 1983, effective July 1, 1983; amended August 14, 1995, effective January 1, 1996; renumbered Rule 560 and amended March 1, 2000, effective April 1, 2001; *Comment* revised April 23, 2004, effective immediately; *Comment* revised August 24, 2004, effective August 1, 2005; *Comment* revised March 9, 2006, effective September 1, 2006 **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 14, 1995 amendments published with the Court's Order at 25 Pa.B. 3468 (August 26, 1995).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the April 23, 2004 Comment revision published with the Court's Order at 34 Pa.B. 2543 (May 15, 2004).

Final Report explaining the August 24, 2004 Comment revision concerning failure to appear for preliminary hearing published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the March 9, 2006 Comment revision concerning joinder of summary offenses with misdemeanor, felony, or murder charges published with the Court's Order at 36 Pa.B. 1385 (March 25, 2006).

Report explaining the proposed amendments to paragraph (A) concerning indicting grand juries published for comment at 41 Pa.B. (, 2011).

RULE 573. PRETRIAL DISCOVERY AND INSPECTION.

(A) INFORMAL

Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion. Such motion shall be made within 14 days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.

(B) DISCLOSURE BY THE COMMONWEALTH

(1) MANDATORY:

In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints,

or other tangible evidence; and

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

(2) DISCRETIONARY WITH THE COURT:

(a) In all court cases, except as otherwise provided in Rule**s** 230 (Disclosure of Testimony Before Investigating Grand Jury) **and 556.10 (Secrecy; Disclosure)**, if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(i) the names and addresses of eyewitnesses;

(ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and

(iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

(b) If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

(C) DISCLOSURE BY THE DEFENDANT

(1) In all court cases, if the Commonwealth files a motion for pretrial discovery, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items:

(a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, that the defendant intends to introduce as evidence in chief, or were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph (B)(1)(e); and

(b) the names and addresses of eyewitnesses whom the defendant intends to call in its case - in - chief, provided that the defendant has previously requested and received discovery under paragraph (B)(2)(a)(i).

(2) If an expert whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the defendant disclose a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

(D) CONTINUING DUTY TO DISCLOSE

If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material, or witness.

(E) REMEDY

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

(F) PROTECTIVE ORDERS

Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

(G) WORK PRODUCT

Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

COMMENT: This rule is intended to apply only to court cases. However, the constitutional guarantees mandated in *Brady v. Maryland*, 373 U.S. 83 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions, apply to all cases, including court cases and summary cases, and nothing to the contrary is intended. For definitions of "court case" and "summary case," see Rule 103.

See Rule 556.10(B)(2)(b) for discovery in cases indicted by a grand jury. In these cases, discovery is not to be ordered until 30 days before the commencement of trial.

The attorney for the Commonwealth should not charge the defendant for the costs of copying pretrial discovery materials. However, nothing in this rule is intended to preclude the attorney for the Commonwealth, on a case-by-case basis, from requesting an order for the defendant to pay the copying costs. In these cases, the trial judge has discretion to determine the amount of costs, if any, to be paid by the defendant.

Any motion under this rule must comply with the provisions of Rule 575 (Motions and Answers) and Rule 576 (Filing and Service by Parties).

See Rule 576(B)(4) and *Comment* for the contents and form of the certificate of service.

See Rule 569 (Examination of Defendant by Mental Health Expert) for the procedures for the examination of the defendant by the mental health expert when the defendant has given notice of an intention to assert a defense of insanity or mental infirmity or notice of the intention to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant.

Included within the scope of paragraph (B)(2)(a)(iv) is any

information concerning any prosecutor, investigator, or police officer involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the prosecutor or investigator in connection with his or her involvement in the case.

Pursuant to paragraphs (B)(2)(b) and (C)(2), the trial judge has discretion, upon motion, to order an expert who is expected to testify at trial to prepare a report. However, these provisions are not intended to require a prepared report in every case. The judge should determine, on a case-by-case basis, whether a report should be prepared. For example, a prepared report ordinarily would not be necessary when the expert is known to the parties and testifies about the same subject on a regular basis. On the other hand, a report might be necessary if the expert is not known to the parties or is going to testify about a new or controversial technique.

Whenever the rule makes reference to the term "identification," or "in-person identification," it is understood that such terms are intended to refer to all forms of identifying a defendant by means of the defendant's person being in some way exhibited to a witness for the purpose of an identification: *e.g.*, a line-up, stand-up, show-up, one-on-one confrontation, one-way mirror, *etc*. The purpose of this provision is to make possible the assertion of a rational basis for a claim of improper identification based upon *Stovall v. Denno*, 388 U.S. 293 (1967), and *United States v. Wade*, 388 U.S. 218 (1967).

This rule is not intended to affect the admissibility of evidence that is discoverable under this rule or evidence that is the fruits of discovery, nor the standing of the defendant to seek suppression of such evidence. *See* Rule 211 for the procedures for disclosure of a search warrant affidavit(s) that has been sealed.

Paragraph (C)(1), which provided the requirements for notice of the defenses of alibi, insanity, and mental infirmity, was deleted in 2006 and moved to Rules 567 (Notice of Alibi Defense) and 568 (Notice of Defense of Insanity or Mental Infirmity).

It is intended that the remedies provided in paragraph (E) apply equally to the Commonwealth and the defendant as the interests of justice require.

The provision for a protective order, paragraph (F), does not confer upon the Commonwealth any right of appeal not presently afforded by law.

It should also be noted that as to material which is discretionary with the court, or which is not enumerated in the rule, if such information contains exculpatory evidence as would come under the *Brady* rule, it *must* be disclosed. Nothing in this rule is intended to limit in any way disclosure of evidence constitutionally required to be disclosed.

The limited suspension of Section 5720 of the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5720, see Rule 1101(E), is intended to insure that the statutory provision and Rule 573(B)(1)(g) are read in harmony. A defendant may seek discovery under paragraph (B)(1)(g) pursuant to the time frame of the rule, while the disclosure provisions of Section 5720 would operate within the time frame set forth in Section 5720 as to materials specified in Section 5720 and not previously discovered.

NOTE: Present Rule 305 replaces former Rules 310 and 312 in their entirety. Former Rules 310 and 312 adopted June 30, 1964, effective January 1, 1965. Former Rule 312 suspended June 29, 1973, effective immediately. Present Rule 305 adopted June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; *Comment* revised April 24, 1981, effective June 1, 1981; amended October 22, 1981, effective January 1, 1982; amended September 3, 1993, effective January 1, 1994; amended May 13, 1996, effective July 1, 1996; *Comment* revised July 28, 1997, effective immediately; *Comment* revised August 28, 1998, effective January 1, 1999; renumbered Rule 573 and amended March 1, 2000, effective April 1, 2001; amended March 3, 2004, effective July 1, 2004; *Comment* revised March 26, 2004, effective July 1, 2004; amended January 27, 2006, effective August 1, 2006 **[.] ; *Comment* revised , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 3, 1993 amendments published at 21 Pa.B. 3681 (August 17, 1991).

Final Report explaining the May 13, 1996 amendments published with the Court's Order at 26 Pa.B. 2488 (June 1, 1996).

Final Report explaining the July 28, 1997 Comment revision deleting the references to the ABA Standards published with the Court's Order at 27 Pa.B. 3997 (August 9, 1997).

Final Report explaining the August 28, 1998 Comment revision concerning disclosure of remuneration published with the Court's Order at 28 Pa.B. 4883 (October 3, 1998).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the March 3, 2004 amendments to paragraphs (A), (C)(1)(a), and (C)(1)(b), and the revision to the Comment adding the reference to Rules 575 and 576 published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning costs of copying discovery materials published with the Court's Order at 34 Pa.B. 1933 (April 10, 2004).

Final Report explaining the January 27, 2006 changes to paragraph (C) deleting the notice of defenses of alibi, insanity, and mental infirmity published with the Court's Order at 36 Pa.B. 694 (February 11, 2006).

Report explaining the proposed revision of the Comment concerning discovery when case is indicted by grand jury published for comment at 41 Pa.B. (, 2011).

RULE 578. OMNIBUS PRETRIAL MOTION FOR RELIEF.

Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion.

COMMENT: Types of relief appropriate for the omnibus pretrial motions include the following requests:

(1) for continuance;
(2) for severance and joinder or consolidation;
(3) for suppression of evidence;
(4) for psychiatric examination;
(5) to quash **or dismiss** an information;
(6) for change of venue or venire;
(7) to disqualify a judge;
(8) for appointment of investigator; **[and]**
(9) for pretrial conference **[.] ; and**
(10) challenging the array of an indicting grand jury.

The omnibus pretrial motion rule is not intended to limit other types of motions, oral or written, made pretrial or during trial, including those traditionally called motions *in limine*, which may affect the admissibility of evidence or the resolution of other matters. The earliest feasible submissions and rulings on such motions are encouraged.

***See* Rule 556.4 for challenges to the array of an indicting grand jury and for motions to dismiss an information filed after a grand jury indicts a defendant.**

NOTE: Formerly Rule 304, adopted June 30, 1964, effective January 1, 1965; amended and renumbered Rule 306 June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; amended October 21, 1983, effective January 1, 1984; *Comment* revised October 25, 1990, effective January 1, 1991; *Comment* revised August 12, 1993, effective September 1, 1993; renumbered Rule 578 and *Comment* revised March 1, 2000, effective April 1, 2001 **[.] ; *Comment* revised , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the October 25, 1990 Rule 306 Comment revision published at 12 Pa.B. 1696 (March 24, 1990).

Report explaining the August 12, 1993 Comment revision published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed revision of the Comment referencing indicting grand jury rules published for comment at 41 Pa.B. (, 2011).

RULE 582. JOINDER -- TRIAL OF SEPARATE INDICTMENTS OR INFORMATIONS.

(A) STANDARDS

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

(B) PROCEDURE

(1) Notice that offenses or defendants charged in separate indictments or informations will be tried together shall be in writing and filed with the clerk of courts. A copy of the notice shall be served on the defendant at or before arraignment.

(2) When notice has not been given under paragraph (B)(1), any party may move to consolidate for trial separate indictments or informations, which motion must ordinarily be included in the omnibus pretrial motion.

COMMENT: Ordinarily offenses or defendants charged in separate indictments or informations will be tried separately. Under the scheme set forth in this rule, it can be assumed that offenses charged in the same indictment or information will be tried together. *See* Rule 563. Similarly, offenses or defendants will be tried together if written notice is served pursuant to paragraph (B)(1) of this rule. In these situations, the court may order separate trials either when the standards in paragraph (A) are not met or pursuant to Rule 583. Absent joinder in the same indictment or information or absent written notice pursuant to paragraph (B)(1), a motion for consolidation is required under paragraph (B)(2). A party may oppose such a motion either on the ground that the standards in paragraph (A) are not met, or pursuant to Rule 583.

Paragraph (A)(1)(a) is based upon *Commonwealth v. Morris*,

493 Pa. 164, 425 A.2d 715 (**[Pa.]** 1981). Paragraph (A)(1)(b) is based upon statutory and case law that, ordinarily, if all offenses arising from the same criminal episode or transaction are not tried together, subsequent prosecution on any such offense not already tried may be barred. *See* the Crimes Code, 18 Pa.C.S. §§ 109-110; *Commonwealth v. Campana*, **452 Pa. 233,** 304 A.2d 432 **(1973)**, vacated and remanded, 414 U.S. 808 (1973), addendum opinion on remand, **455 Pa. 622,** 314 A.2d 854 (**[Pa.]** 1974); *Commonwealth v. Tarver*, **467 Pa. 401,** 357 A.2d 539 (**[Pa.]** 1976). The court has also held that a defendant's failure to move for consolidation does not ordinarily constitute a waiver of an objection to a subsequent, separate trial of any such offense. *See*, *e.g.*, *Commonwealth v. Stewart*, **493 Pa. 24,** 425 A.2d 346 (**[Pa.]** 1981).

See Rule 571 concerning arraignment procedures.

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 since the indicting grand jury was abolished in all counties (see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b)), the reference was retained in **paragraphs (A) and (B) of** this rule because there may be some cases still pending that were instituted **under the former indicting grand jury rules** prior to the abolition of the indicting grand jury **in 1993**. **These references to "indictment" do not apply in the context of an indicting grand jury convened pursuant to the new indicting grand jury procedures adopted in 2011 in which an information would be filed after a grand jury indicts a defendant. *See* Rules 103 and 556.11.**

NOTE: Rule 1127 adopted December 11, 1981, effective July 1, 1982; amended August 12, 1993, effective September 1, 1993; amended August 14, 1995, effective January 1, 1996; renumbered Rule 582 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002 **[.] ; *Comment* revised , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the August 14, 1995 changes published with the Court's Order at 25 Pa.B. 3471 (August 26, 1995).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments to paragraph (B) published with the Court's Order at 32 Pa. B. 2582 (May 25, 2002).

Report explaining the proposed rescission of the last paragraph of the Comment concerning the abolition of the indicting grand jury published for comment at 41 Pa. B. (, 2011).

RULE 646. MATERIAL PERMITTED IN POSSESSION OF THE JURY.

(A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).

(B) The trial judge may permit the members of the jury to have for use during deliberations written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed.

(1) If the judge permits the jury to have written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed, the judge shall provide that portion of the charge in its entirety.

(2) The judge shall instruct the jury about the use of the written charge. At a minimum, the judge shall instruct the jurors that

(a) the entire charge, written and oral, shall be given equal weight; and

(b) the jury may submit questions regarding any portion of the charge.

(C) During deliberations, the jury shall not be permitted to have:

(1) a transcript of any trial testimony;

(2) a copy of any written or otherwise recorded confession by the defendant;

(3) a copy of the information **or indictment**; and

(4) except as provided in paragraph (B), written jury instructions.

(D) The jurors shall be permitted to have their notes for use during deliberations.

COMMENT: This rule prohibits the jury from receiving a copy of the indictment or information during its deliberations. The rule also prohibits the jury from taking into the jury room any written or otherwise recorded confession of the defendant. In *Commonwealth v. Pitts*, 450 Pa. 359, 301 A.2d 646, 650 n. 1 (1973), the Court noted that "it would be a better procedure not to allow exhibits into the jury room which would require expert interpretation."

The 2009 amendment to paragraph (B) changes the procedures in Pennsylvania concerning the jury's access

during deliberations to written copies of the judge's charge by permitting the judge to provide each member of the jury with written copies of the portion of the judge's charge on the elements of offenses, the lesser included offenses, and the elements of any potential defenses upon which the jury was charged for the jurors to use during their deliberations. This amendment supersedes the line of cases from *Commonwealth v. Baker*, 466 Pa. 382, 353 A.2d 406 (1976) (plurality opinion) and *Commonwealth v. Oleynik*, 524 Pa. 41, 568 A.2d 1238 (1990), through *Commonwealth v. Karaffa*, 551 Pa. 173, 709 A.2d 887 (1998), in which the Court held it was reversible error to submit written jury instructions to the jury to the extent these cases would preclude that portion of the charge containing the elements of the offense charged, lesser included offenses, and defenses raised at trial from going to the jury.

It is within the discretion of the trial judge to permit the use of the written copies of the portions of the charge on the elements by the jury during deliberations. However, once the judge permits the use of the written elements, the elements of all of the offenses, lesser included offenses, and defenses upon which the jury was charged must be provided to the jury in writing.

The method of preparing the written instructions to be provided to the jury is within the discretion of the trial judge. For example, the instructions do not have to be contemporaneously transcribed but can be a copy of previously prepared instructions that the judge has read as part of the charge that are then provided to the jury for use during deliberations.

The judge must instruct the jurors concerning the use of written instructions during deliberations. Paragraph (B)(2) sets forth the minimum information the judge must explain to the jurors.

It is strongly recommended the judge instruct the jurors along the lines of the following:

Members of the jury, I will now instruct you on the law that applies to this case including the elements of each offense as well as the elements of the lesser included offenses and defenses upon which evidence has been provided during this trial. To assist you in your deliberations I will give you a

written list of the elements of these offenses, lesser included offenses, and defenses to use in the jury room.

If any matter is repeated or stated in different ways in my instructions, no emphasis is intended. Do not draw any inference because of a repetition. Do not single out any individual rule or instruction and ignore the others. Do not place greater emphasis on the elements of the offenses, lesser included offenses and defenses simply because I have provided them to you in writing and other instructions are not provided in writing. Consider all the instructions as a whole and each in the light of the others.

If, during your deliberations, you have a question or feel that you need further assistance or instructions from me, write your question on a sheet of paper and give it to the court officer who will be standing at the jury room door, and who, in turn, will give it to me. You may ask questions about any of the instructions that I have given to you whether they were given to you orally or in writing.

See Rule 647(A) (Request for Instructions, Charge to the Jury, and Preliminary Instructions) concerning the content of the charge and written requests for instructions to the jury.

The 1996 amendment adding "or otherwise recorded" in paragraph (C)(2) is not intended to enlarge or modify what constitutes a confession under this rule. Rather, the amendment is only intended to recognize that a confession can be recorded in a variety of ways. *See Commonwealth v. Foster*, 425 Pa.Super. 61, 624 A.2d 144 (1993).

Nothing in this rule is intended to preclude jurors from taking notes during testimony related to a defendant's confession and such notes may be in the jurors' possession during deliberations.

Paragraph (D) was added in 2005 to make it clear that the notes the jurors take pursuant to Rule 644 may be used during deliberations.

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 because the indicting grand jury was abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b),), the reference was retained in **paragraph (C)(3)**

this rule because there may be some cases still pending that were instituted **under the former indicting grand jury rules** prior to the abolition of the indicting grand jury **in 1993**. **The reference to "indictment" does not apply in the context of an indicting grand jury convened pursuant to the new indicting grand jury procedures adopted in 2011 in which an information would be filed after a grand jury indicts a defendant. *See* Rules 103 and 556.11.**

NOTE: Rule 1114 adopted January 24, 1968, effective August 1, 1968; amended June 28, 1974, effective September 1, 1974; *Comment* revised August 12, 1993, effective September 1, 1993; amended January 16, 1996, effective July 1, 1996; amended November 18, 1999, effective January 1, 2000; renumbered Rule 646 March 1, 2000, effective April 1, 2001; amended June 30, 2005, effective August 1, 2005; amended August 7, 2008, effective immediately **[.] ; amended October 16, 2009, effective February 1, 2010.**

***** ***** ***** ***** ***** ***** *****

COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 Comment revision published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the January 16, 1996 amendments published with the Court's Order at 26 Pa.B. 439 (February 3, 1996).

Final Report explaining the changes to paragraph (B) and the Comment prohibiting written jury instructions going to the jury published with the Court's Order at 29 Pa.B. 6102 (December 4, 1999).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the June 30, 2005 amendment concerning jurors' notes published with the Court's Order at 35 Pa.B. 3917 July 16, 2005).

Final Report explaining the August 7, 2008 revision of the Comment concerning jurors' notes related to a defendant's confession published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).

Final Report explaining the October 16, 2009 amendment concerning providing jurors with the elements of the charged offenses in writing published with the Court's Order at 39 Pa.B. 6331 (October 31, 2009).

Report explaining the proposed amendment to paragraph (C)(3) and the revision of the Comment concerning the former abolition of the indicting grand jury published for comment at 41 Pa.B. (, 2011).

RULE 648. VERDICTS.

(A) Upon retiring to deliberate, the jury shall select one of its members as foreman.

(B) The verdict shall be unanimous, and shall be announced by the foreman in open court in the presence of a judge, the attorney for the Commonwealth, the defendant and defendant's attorney, except as provided in Rule 602.

(C) If there are two or more defendants, the jury may report a verdict or verdicts with respect to those defendants, upon which it has agreed, and the judge shall receive all such verdicts. If the jury cannot agree upon a verdict with respect to all of the defendants, the verdicts which have been received shall be recorded.

(D) If there are two or more counts in the information or indictment, the jury may report a verdict or verdicts with respect to those counts upon which it has agreed, and the judge shall receive and record all such verdicts. If the jury cannot agree with respect to all the counts in the information or indictment if those counts to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter counts shall be dismissed. When the counts in the information or indictment upon which the jury cannot agree are not included offenses of the counts in the information or indictment upon which it has agreed, the defendant or defendants may be retried on those counts in the information or indictment.

(E) If there are two or more informations or indictments, the jury may report a verdict or verdicts with respect to those informations or indictments upon which it has agreed, and the judge shall receive and record all such verdicts. If the jury cannot agree with respect to all the informations or indictments, if those informations or indictments to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter informations or indictments shall be dismissed. When the informations or indictments upon which the jury cannot agree are not included in the offenses of the information or indictment upon which it has agreed, the defendant or defendants may be retried on those informations or indictments.

(F) If there is a summary offense joined with the misdemeanor, felony, or murder charge that was tried before the jury, the trial judge shall not remand the summary offense to the issuing authority. The summary offense shall be disposed of in the court of common pleas, and the verdict with respect to the summary offense shall be recorded in the same manner as the verdict with respect to the other charges.

(G) Before a verdict, whether oral or sealed, is recorded, the jury shall be polled at the request of any party. Except where the verdict is sealed, if upon such poll there is no concurrence, the jury shall be directed to retire for further deliberations.

COMMENT: Paragraph (A) of the rule replaces the practice of automatically appointing the first juror chosen

as foreman of the jury. Paragraphs (C), (D), and (E) serve only to codify the procedure where conviction or acquittal of one offense operates as a bar to a later trial on a necessarily included offense. Similarly, the rule applies to situations of merger and *autrefois* convict or acquit. No attempt is made to change the substantive law **[which] that** would operate to determine when merger or any of the other situations arise. *See*, *e.g.*, *Commonwealth v. Comber*, 374 Pa. 570, 97 A.2d 343 (1953).

Paragraph (F) provides for the disposition in the court of common pleas of any summary offense that is joined with the misdemeanor, felony, or murder charges that were tried before the jury. Under no circumstances may the trial judge remand the summary offense to the issuing authority, even in cases in which the defendant is found not guilty by the jury. *See also* Rule 543 (Disposition of Case at Preliminary Hearing).

Paragraph (G) provides for the polling of the jury and requires the judge to send the jury back for deliberations in accordance with *Commonwealth v. Martin*, 379 Pa. 587, 109 A.2d 325 (1954). With respect to the procedure upon non-concurrence with a sealed verdict, see Rule 649(C).

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 because the indicting grand jury was abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in **paragraphs (D) and (E) of** this rule because there may be some cases still pending that were instituted **under the former indicting grand jury rules** prior to the abolition of the indicting grand jury **in 1993**. **These references to "indictment" do not apply in the context of an indicting grand jury convened pursuant to the new indicting grand jury procedures adopted in 2011 in which an information would be filed after a grand jury indicts a defendant. *See* Rules 103 and 556.11.**

NOTE: Rule 1120 adopted January 24, 1968, effective August 1, 1968; amended February 13, 1974, effective immediately; paragraph (E) amended to correct printing error June 28, 1976, effective immediately; paragraph (F) amended April 26, 1979, effective July 1, 1979; amended

August 12, 1993, effective September 1, 1993; renumbered Rule 648 and amended March 1, 2000, effective April 1, 2001; amended March 9, 2006, effective September 1, 2006 **[.] ; *Comment* revised , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the March 9, 2006 amendments concerning joinder of summary offenses with misdemeanor, felony, or murder charges published with the Court's Order at 36 Pa.B. 1325(March 25, 2006).

Report explaining the proposed revision of the Comment concerning the former abolition of the indicting grand jury published for comment at 41 Pa.B. (, 2011).

RULE 1003. PROCEDURE IN NON-SUMMARY MUNICIPAL COURT CASES.

(A) INITIATION OF CRIMINAL PROCEEDINGS

(1) Criminal proceedings in court cases shall be instituted by filing a written complaint, except that proceedings may be also instituted by:

(a) an arrest without a warrant when a felony or misdemeanor is committed in the presence of the police officer making the arrest; or

(b) an arrest without a warrant upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when the arrest without a warrant is specifically authorized by law; or

(c) an arrest without a warrant upon probable cause when the offense is a felony.

(2) Private Complaints

(a) When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.

(b) If the attorney for the Commonwealth:

(i) approves the complaint, the attorney shall indicate this decision on the complaint form and transmit it to the issuing authority;

(ii) disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the President Judge of Municipal Court, or the President Judge's designee, for review of the decision. Appeal of the decision of the Municipal Court shall be to the Court of Common Pleas.

(B) CERTIFICATION OF COMPLAINT

Before an issuing authority may issue process or order further proceedings in a Municipal Court case, the issuing authority shall ascertain and certify on the complaint that:

(1) the complaint has been properly completed and executed; and

(2) when prior submission to an attorney for the Commonwealth is required, an

attorney has approved the complaint.

The issuing authority shall then accept the complaint for filing, and the case shall proceed as provided in these rules.

(C) SUMMONS AND ARREST WARRANT PROCEDURES

When an issuing authority finds grounds to issue process based on a complaint, the issuing authority shall:

(1) issue a summons and not a warrant of arrest when the offense charged is punishable by imprisonment for a term of not more than 1 year, except as set forth in paragraph (C)(2);

(2) issue a warrant of arrest when:

(a) the offense charged is punishable by imprisonment for a term of more than 5 years;

(b) the issuing authority has reasonable grounds for believing that the defendant will not obey a summons;

(c) the summons has been returned undelivered;

(d) a summons has been served and disobeyed by a defendant;

(e) the identity of the defendant is unknown;

(f) a defendant is charged with more than one offense, and one of the offenses is punishable by imprisonment for a term of more than 5 years; or

(3) when the offense charged does not fall within the categories specified in paragraph (C)(1) or (2), the issuing authority may, in his or her discretion, issue a summons or a warrant of arrest.

(D) PRELIMINARY ARRAIGNMENT

(1) When a defendant has been arrested within Philadelphia County in a Municipal Court case, with or without a warrant, the defendant shall be afforded a preliminary arraignment by an issuing authority without unnecessary delay. If the defendant was arrested without a warrant pursuant to paragraph (A)(1)(a) or (b), unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

(2) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-

visual communication. When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

(3) At the preliminary arraignment, the issuing authority:

(a) shall not question the defendant about the offense(s) charged;

(b) shall give the defendant's attorney, or if unrepresented the defendant, a copy of the certified complaint;

(c) if the defendant was arrested with a warrant, the issuing authority shall provide the defendant's attorney, or if unrepresented the defendant, with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant's attorney, or if unrepresented the defendant, shall be given copies no later than the first business day after the preliminary arraignment; and

(d) **also** shall **[also]** inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(ii) of the day, date, hour, and place for the trial, which shall not be less than 20 days after the preliminary arraignment, unless the issuing authority fixes an earlier date for the trial or the preliminary hearing upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth;

(iii) in a case charging a felony, **unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.1,** of the date, time, and place of the preliminary hearing, which shall not be less than 14 nor more than 21 days after the preliminary arraignment unless extended for cause or the issuing authority fixes an earlier date upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and that failure to appear without good cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and that the case

shall proceed in the defendant's absence, and a warrant of arrest shall be issued;

(iv) of the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

(4) After the preliminary arraignment, if the defendant is detained, he or she shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail, as provided by law.

(E) PRELIMINARY HEARING IN CASES CHARGING A FELONY

(1) Except as provided in paragraphs (E)(2) and (E)(3), in cases charging a felony, the preliminary hearing in Municipal Court shall be conducted as provided in Rule 542 (Preliminary Hearing; Continuances) and Rule 543 (Disposition of Case at Preliminary Hearing).

(2) At the preliminary hearing, the issuing authority shall determine whether there is a *prima facie* case that an offense has been committed and that the defendant has committed it.

(a) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.

(b) Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(3) If a *prima facie* case is not established on any felony charges, but is established on any misdemeanor or summary charges, the judge shall remand the case to Municipal Court for trial.

(F) ACCEPTANCE OF BAIL PRIOR TO TRIAL

The Clerk of Courts shall accept bail at any time prior to the Municipal Court trial.

COMMENT: The 2004 amendments make it clear that Rule 1003 covers the preliminary procedures for all non-summary Municipal Court cases, see Rule 1001(A), and cases charging felonies, including the institution of proceedings, the preliminary arraignment, and the preliminary hearing.

See Chapter 5 (Procedure in Court Cases), Parts I (Instituting Proceedings), II (Complaint Procedures), III(A)

(Summons Procedures), III(B) (Arrest Procedures in Court Cases), and IV (Proceedings in Court Cases Before Issuing Authorities) for the statewide rules governing the preliminary procedures in court cases, including non-summary Municipal Court cases, not otherwise covered by this rule.

The 2004 amendments to paragraph (A)(1) align the procedures for instituting cases in Municipal Court with the statewide procedures in Rule 502 (Means of Instituting Proceedings in Court Cases).

The 1996 amendments to paragraph (A)(2) align the procedures for private complaints in non-summary cases in Municipal Court with the statewide procedures for private complaints in Rule 506 (Approval of Private Complaints). In all cases in which the affiant is not a law enforcement officer, the complaint must be submitted to the attorney for the Commonwealth for approval or disapproval.

As used in this rule, "Municipal Court judge" includes a bail commissioner acting within the scope of the bail commissioner's authority under 42 Pa.C.S. § 1123(A)(5).

The procedure set forth in paragraph (C)(3) allows the issuing authority to exercise discretion in whether to issue a summons or an arrest warrant depending on the circumstances of the particular case. Appropriate factors for issuing a summons rather than an arrest warrant will, of course, vary. Among the factors that may be taken into consideration are the severity of the offense, the continued danger to the victim, the relationship between the defendant and the victim, the known prior criminal history of the defendant, *etc*.

If the attorney for the Commonwealth exercises the options provided by Rule 202, Rule 507, or both, the attorney must file the certifications required by paragraphs (B) of Rules 202 and 507 with the Court of Common Pleas of Philadelphia County and with the Philadelphia Municipal Court.

For the contents of the complaint, see Rule 504.

Under paragraphs (A) and (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before

the defendant may be detained. *See Riverside v. McLaughlin*, 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Within the meaning of paragraph (D)(2), counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (D)(2), the issuing authority has discretion to order that a defendant appear in person for the preliminary arraignment.

Under paragraph (D)(2), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning *venue* when proceedings are conducted pursuant to this rule using advanced communication technology.

Paragraph (D)(3)(c) requires that the defendant's attorney, or if unrepresented the defendant, receive copies of the arrest warrant and the supporting affidavits at the preliminary arraignment. This amendment parallels Rule 540(B). *See also* Rules 208(A) and 513(A).

Paragraph (D)(3)(c) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (1987).

The 2011 amendment to paragraph (D)(3)(d)(iii) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness

intimidation has occurred, is occurring, or is likely to occur. *See* Rule 556.2.

Under paragraph (D)(4), after the preliminary arraignment, if the defendant is detained, the defendant must be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she must be committed to jail as provided by law.

Paragraphs (D)(3)(d)(iii) and (E) make it clear that, with some exceptions, the procedures in Municipal Court for both preliminary hearings and cases in which the defendant fails to appear for the preliminary hearing are the same as the procedures in the other judicial districts.

Paragraph (E)(2)(a) permits the use of hearsay at the preliminary hearing to establish certain elements of specific crimes. *But compare Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a *prima facie* case). Nothing in this rule is intended to prohibit the use of hearsay at the preliminary hearing as otherwise permitted by case law or other authority. *See, e.g.,* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII.

Paragraph (E)(2)(b) provides that hearsay, whether written or oral, may establish the elements enumerated in paragraph (E)(2). That enumeration is not comprehensive, and hearsay is admissible to establish other matters as well. The presence of witnesses to establish these elements is not required at the preliminary hearing.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

NOTE: Original Rule 6003 adopted June 28, 1974, effective July 1, 1974; amended January 26, 1977, effective April 1, 1977; amended December 14, 1979, effective April 1, 1980; amended July 1, 1980, effective August 1, 1980; amended October 22, 1981, effective January 1, 1982; *Comment* revised December 11, 1981, effective July 1, 1982; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; rescinded August 9, 1994,

effective January 1, 1995. New Rule 6003 adopted August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; amended March 22, 1996, effective July 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; amended August 28, 1998, effective immediately; renumbered Rule 1003 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended August 24, 2004, effective August 1, 2005; amended August 15, 2005, effective February 1, 2006; amended April 5, 2010, effective April 7, 2010; amended January 27, 2011, effective in 30 days **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the provisions of the new rule published at 22 Pa.B. 6 (January 4, 1992). Final Report published with the Court's Order at 24 Pa.B. 4342 (August 27, 1994).

Final Report explaining the September 13, 1995 amendments published with Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the March 22, 1996 amendments published with the Court's Order at 26 Pa.B. 1690 (April 13, 1996).

Final Report explaining the August 28, 1998 amendments published with the Court's Order at 28 Pa.B. 4627 (September 12, 1998).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 Pa. B. 2591 (May 25, 2002).

Final Report explaining the August 24, 2004 changes clarifying preliminary arraignment and preliminary hearing procedures in

Municipal Court cases published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the August 15, 2005 amendments to paragraphs (A)(2)(b)(ii) and (D)(3)(d)(ii) published with the Court's Order at 35 Pa. B. 4918 (September 3, 2005).

Court's Order adopting the April 5, 2010 amendments to paragraph (D)(3)(d) published at 40 Pa.B. 2012 (April 17, 2010).

Report explaining the proposed amendments to paragraph (D)(3)(d)(iii)concerning indicting grand juries published for comment at 41 Pa. B. (, 2011).

RULE 1101. SUSPENSION OF ACTS OF ASSEMBLY.

This rule provides for the suspension of the following Acts of Assembly:

(1) The Act of June 15, 1994, P.L. 273, No. 45, § 1, 42 Pa.C.S. §§ 4137, 4138, and 4139, which provides, *inter alia*, that any punishment imposed for contempt will be "automatically stayed for a period of 10 days from the date of the imposition of the punishment during which time an appeal of the action" of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge "may be filed with the court of common pleas of the judicial district," and which is implemented by Rules 140, 141, and 142, is suspended *only* insofar as the Act is inconsistent with the 30-day appeal period and 30-day automatic stay period set forth in Rule 141.

(2) The Act of April 29, 1959, P.L. 58, § 1209, 75 P.S. § 1209, repealed by Act of June 17, 1976, P.L. 162, No. 81, § 7 and replaced by Sections 6322, 6323, 6324, and 6325 of the Vehicle Code (75 Pa.C.S. §§ 6322-6325), are suspended insofar as these sections are inconsistent with Rule 470.

(3) The Act of July 1, 1987, P.L. 180, No. 21, § 2, 42 Pa.C.S. § 1520, is suspended insofar as the Act is inconsistent with Rules 300, 301, 302, and Rules 310 through 320.

(4) The Public Defender Act, Act of December 2, 1968, P.L. 1144, No. 358, § 1 *et seq.* as amended through Act of December 10, 1974, P.L. 830, No. 277, § 1, 16 P.S. § 9960.1 *et seq.*, is suspended *only* insofar as the Act is inconsistent with Rule 122.

(5) Section 5720 of the Wiretapping and Electronic Surveillance Control Act, Act of October 4, 1978, P.L. 831, No. 164, 18 Pa.C.S. § 5720, is suspended as inconsistent with Rule 573 only insofar as the section may delay disclosure to a defendant seeking discovery under Rule 573(B)(1)(g); and Section 5721(b) of the Act, 18 Pa.C.S. § 5721(b), is suspended *only* insofar as the time frame for making a motion to suppress is concerned, as inconsistent with Rules 579 and 581.

(6) Sections 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 of the Sentencing Code, 42 Pa.C.S. §§ 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 are suspended as being inconsistent with the rules of Chapter 7.

(7) The Act of November 21, 1990, P.L. 588, No. 138, § 1, 42 Pa.C.S. § 8934, which authorizes the sealing of search warrant affidavits, and which is implemented by Rule 211, is suspended only insofar as the Act is inconsistent with Rules 205, 206, and 211.

(8) The Act of October 5, 1980, P.L. 693, No. 142, § 216(a)(2), 42 Pa.C.S. § 4548, that provides that "except for the power to indict," the investigating grand jury has all the same powers as any other grand jury, is suspended only insofar as the Act is inconsistent with Rule 556.1(A).

COMMENT: This rule is derived from former Rules 39, 159, 340, 1415, and 2020, the rules previously providing for the suspension of legislation.

NOTE: Former Rule 39 adopted October 1, 1997, effective October 1, 1998; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 159 adopted September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; amended April 10, 1989, effective July 1, 1989; amended January 31, 1991, effective July 1, 1991; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 340 combined previous Rules 321 and 322, which were the prior suspension rules, and was adopted June 29, 1977, effective September 1, 1977; amended April 24, 1981, effective June 1, 1981; amended January 28, 1983, effective July 1, 1983; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 1415 adopted July 23, 1973, effective 90 days hence; paragraph (g) added March 21, 1975, effective March 31, 1975; amended August 14, 1995, effective January 1, 1996; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 2020 adopted September 3, 1993, effective January 1, 1994; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. New Rule 1101 adopted March 1, 2000, effective April 1, 2001 **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

FORMER RULE 39:

Final Report explaining the provisions of new Rule 39 published with

the Court's Order at 27 Pa.B. 5401 (October 18, 1997).

FORMER RULE 159:

Report explaining the January 31, 1991 amendments to former Rule 159 published at 20 Pa.B. 4788 (September 15, 1990); Supplemental Report published at 21 Pa.B. 621 (February 16, 1991).

FORMER RULE 1415:

Final Report explaining the August 14, 1995 amendments to former Rule 1415 published with the Court's Order at 25 Pa.B. 3472 (August 26, 1995).

FORMER RULE 2020:

Report explaining the provisions of former Rule 2020 published at 21 Pa.B. 3681 (August 17, 1991).

NEW RULE 1101:

Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 1101 published at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed amendments adding paragraph (8)suspending 42 Pa.C.S. § 4548 published for comment at 41 Pa. B. (, 2011).

REPORT

Proposed New Pa.Rs.Crim.P. 556 through 556.12, and
Proposed Correlative Changes to Pa.Rs.Crim.P. 103, 540, 542, 544, 547, 560, 573, 578, 582, 646, 648, 1003, and 1101

INDICTING GRAND JURIES

I. BACKGROUND

In January 2010, the Philadelphia Inquirer published a series of articles reporting on what was seen as systemic problems within the criminal justice system of the First Judicial District. In response to these articles, the Court appointed a Commission to study the issues raised by the Philadelphia Inquirer.

One of the problems identified in the Inquirer articles concerned intimidation by threats of violence to witnesses and/or witnesses' family members. "Witness intimidation pervades the Philadelphia criminal courts, increasingly extracting a heavy toll in no-show witnesses, recanted testimony – and collapsed cases . . . Prosecutors, detectives, and even some defense lawyers say witness fear has become an unspoken factor in virtually every court case involving violent crime in Philadelphia. Reluctant or terrified witnesses routinely fail to appear in court, and when they do, they often recant their earlier testimony or statements to police."[1]

The recommendations of the Court's Commission included, as a way to address the problem of witness intimidation, a proposal that the Court adopt rules providing for the use of the indicting grand jury similar to the indicting grand jury procedures in a number of other jurisdictions, including the federal courts. The Commission's Report explained that the indicting grand jury would be utilized in lieu of proceeding by preliminary hearing on an as-needed basis in cases in which witness intimidation has occurred or is a distinct possibility. The Court referred the matter to the Committee to consider the Commission's proposal and to develop a set of rules that would reinstitute

[1] Nancy Phillips, et al., "Witnesses Fear Reprisals, and Cases Crumble – Intimidation On The Streets Is Changing the Way Trials Are Run." PHILA. INQUIRER, Dec. 14, 2009.

the indicting grand jury in Pennsylvania as suggested by the Commission.

The Committee reviewed the history of the indicting grand jury and its evolution in Pennsylvania, examining the constitutional, statutory, and rule provisions, and the case law governing indicting grand juries in Pennsylvania and in other jurisdictions. An initial question raised by the Court was whether the process for reinstituting the indicting grand jury could be accomplished by rule or would have to be by statute. After thoroughly reviewing the history of the indicting grand jury and its evolution in Pennsylvania, and the materials prepared by the Commission, the Committee unanimously agreed that the Court, pursuant to its constitutional and statutory authority to prescribe general rules governing practice, procedure, and conduct of all courts, has the power to reinstitute the indicting grand jury by rule. The Committee therefore proceeded with development of procedural rules to accomplish this as requested by the Court, and is proposing that the Court adopt new Rules of Criminal Procedure 556 through 556.12 that establish the procedures for the judicial districts to resume using the indicting grand jury and that establish the procedures necessary to convene the indicting grand jury, to conduct the grand jury, and to proceed following the grand jury's action. The Committee also is proposing correlative and conforming amendments Rules of Criminal Procedure 103, 540, 544, 547, 560, 646, 1003, and 1101 and revisions of the *Comments* to Rules of Criminal Procedure 542, 573, 578, 582, and 648. The proposed new procedures, as much as possible, incorporate the procedures recommended by the Commission, the procedures from the current investigating grand jury rules, Rules 220-231, and the former indicting grand jury rules, former Rules 200-224.

II. DISCUSSION OF RULE CHANGES

Placement of New Rules

When initially considering the placement of the new indicting grand jury rules, it was thought that the rules just would be re-inserted into the same chapter of the rules where the indicting grand jury rules were prior to being rescinded – then-Chapter 200 (Grand Jury, Indictment, and Information). However, since the time when the indicting grand jury rules were rescinded, the Criminal Rules have been reorganized and

renumbered, and there no longer is a chapter comparable to former Chapter 200.[2] In the current rules, Chapter 200 deals only with investigations and includes the search warrant and investigating grand jury rules. The rules governing preliminary hearings are in Chapter 5, Part D (Proceedings in Court Cases Before Issuing Authorities) and the rules governing informations, formerly in Chapter 2, are now in Chapter 5 Part E (Procedures Following a Case Held for Court). Sequentially, the indicting grand jury procedures come after the rules governing preliminary hearings and before the procedures for when a case is held for court. In view of this, the Committee is proposing that a separate Part be added to Chapter 5 that would be dedicated to the indicting grand jury procedures. This separate Part would be new Part E (Indicting Grand Jury) and begin with Rule 556.[3] Because of the dearth of available numbers in this chapter, although not a preferred method for numbering the Criminal Rules but a less confusing option than renumbering all the rules in Chapter 5, all the new rules in Part E will fall under Rule 556, and the next rules in the sequence would be Rule 556.1 *etc.*

Resumption of Using Indicting Grand Jury

In 1973, Article I § 10 of the Pennsylvania Constitution (Initiation of criminal proceedings; twice in jeopardy; eminent domain) was amended to provide "each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law." The implementing statute, Act 238 of 1974,[4] and the Criminal Rules establishing the procedures for the use of informations in judicial districts that had received approval from the Court to proceed by information instead of indicting grand

---

[2] *See* 30 *Pa.B.* 1478 (March 18, 2000).

[3] This will necessitate re-naming current Parts E and F.

[4] The Act 238, which initially was in Title 17, sections 271-276, was repealed in 1978 as part of the Judiciary Act Repealer Act and replaced and amended by 42 Pa.C.S. § 8931.

jury were adopted in 1974.

In 1991, the Supreme Court approved the request of the last court of common pleas to abolish the indicting grand jury,[5] and directed the Committee to develop rules providing for the rescission of the indicting grand jury rules. On August 12, 1993, effective September 1, 1993, the Court adopted the Committee's proposal for the rescission of the indicting grand jury and indictment rules as no longer necessary, and for correlative changes to other rules necessitated by the rescission.[6]

The Committee believes that, because the Supreme Court was constitutionally required to approve the judicial districts' request to proceed by information instead of indictment, which effectively rescinded the indicting grand jury, before a judicial district may resume using the indicting grand jury, the judicial district would have to receive the approval of the Supreme Court.

The Committee initially considered requiring the individual judicial districts to petition the Court for permission to reinstitute the indicting grand jury, similar to the petition procedure used when the judicial districts requested permission to proceed by information. Procedurally, however, such a procedure seemed to be overly complex, time consuming, and potentially confusing. Alternatively, the Committee agreed that the best way to accomplish the reinstitution of the indicting grand jury would be for the Supreme Court, correlatively with adopting procedural rules governing indicting grand jury rules, to issue an administrative order permitting any judicial district to resume using the indicting grand jury subject to the provisions of the indicting grand jury rules. Accordingly, the Committee plans on proposing this to the Court when it submits the proposal for the new indicting grand jury rules. If the Court adopts the rules and issues such an administrative order, the administrative order would be referenced in the *Comment* to proposed new Rule 556.

---

[5] Bedford County Court of Common Pleas.

[6] *See* 22 *Pa.B.* 3826 (July 25, 1992).

Scope of Indicting Grand Jury Authority: Proposed New Rule 556

The Committee discussed how broad the jurisdiction of the indicting grand juries should be and whether the scope should be expanded beyond the cases in which witness intimidation is at issue. There were a number of different opinions expressed by the Committee about whether and in what manner the use of the indicting grand jury should be limited. After considering various approaches, the Committee ultimately agreed that, as a first step for bringing back the indicting grand jury the new procedures should be narrowly drafted. Adding to this determination was the fact that indicting grand juries had not been used in Pennsylvania for more than eighteen years and the new proposals would not provide for a preliminary hearing procedure following indictment as was the case in the previous practice.

Accordingly, proposed new Rule 556 (Indicting Grand Jury) permits the judicial districts to proceed by indicting grand jury as provided by the rules but only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

Proposed Rule 556.1 (Summoning Panels of Grand Jurors)

Rule 556.1 sets forth the procedures for summoning an indicting grand jury. When a judicial district elects to proceed with the indicting grand jury, the president judge, or the president judge's designee, must order that one or more panels be summoned. The Committee noted that the judicial districts that choose to use the indicting grand jury may want to have a standing grand jury for that purpose, and agreed that should be permitted in the rule.

In addition, the Committee discussed whether judicial districts with sitting investigating grand juries could order the investigating grand jury to sit as an indicting grand jury reasoning that permitting this dual function would promote judicial economy. From research into this question, we learned that several other jurisdictions provide for this by rule or statute, and agreed that the rules should permit this in Pennsylvania. To accommodate a sitting investigating grand jury sitting as an indicting grand jury, to the extent possible, the proposed new procedures for the indicting grand jury, including the procedures for summoning, are the same as the procedures for the investigating grand

jury.[7]

By permitting the investigating grand jury to sit as an indicting grand jury, the rules create an inconsistency with the provision of Section 4548(c) of the Investigating Grand Jury Act, 42 Pa.C.S. § 4548(c) (Other Powers), that provides, *inter alia,* "[e]xcept for the power to indict, the investigating grand jury shall have every power available to any other grand jury in the Commonwealth," and, unless addressed, may cause confusion for the bench and bar. Because of the benefits of permitting the investigating grand jury to sit as an indicting grand jury, the proposal includes the recommendation that 42 Pa.C.S. § 4548(c) be suspended **but only insofar** as it is inconsistent with Rule 556.1(A). To accomplish this, the Rule 556.1 *Comment* includes a paragraph explaining the suspension and referring to Rule 1101. Rule 1101 would be amended to provide for the suspension.

When an investigating grand jury sits as an indicting grand jury, there should not be an overlap of functions. However, there may be situations in which there has been a crime but the Commonwealth does not know who did it and submits the case to the investigating grand jury. The investigating grand jury gathers information during its investigation of the crime and learns the identity of the perpetrator. The attorney for the Commonwealth then determines the crime is one in which there is intimidation and submits the case to the indicting grand jury, which, in this case, is the same body as the investigating grand jury. In this situation, it makes sense to permit the incorporation of the evidence presented to the grand jury during the investigation for the grand jury's consideration when it is sitting as the indicting grand jury. The *Comment* explains that the rule does not prevent the investigating grand jury when sitting as an indicting grand jury from considering the evidence already presented to it.

[7] This reasoning also applies to the inclusion of the procedures from the investigating grand jury rules in proposed new Rules 556.3, 556.5, 556.6, 556.7, 556.8, 556.9, and 556.10.

Proposed Rule 556.2 (Proceeding by Indicting Grand Jury without Preliminary Hearing)

Rule 556.2 sets forth the new procedures for either proceeding to an indicting grand jury or proceeding to a preliminary hearing. To proceed to an indicting grand jury, the attorney for the Commonwealth must file a motion setting forth facts that show that witness intimidation has occurred, is occurring, or is likely to occur. This fact-based motion procedure provides the judge with an opportunity to decline to grant the motion but only if the attorney for the Commonwealth does not make out sufficient facts about the witness intimidation. However, if the judge finds the motion is sufficient, he or she must grant the motion.

The motion is made *ex parte* to the president judge, or the president judge's designee. In most cases, the Committee anticipates that the judge designated to receive these motions also will be the judge designated to supervise the grand jury. If the judge grants the motion, the judge shall seal the motion and order granting the motion, and the attorney for the Commonwealth shall file both with the clerk of courts. In addition, concurrently with granting the motion, the judge must notify the proper issuing authority that the attorney for the Commonwealth's motion has been granted thereby providing notice that the preliminary hearing must be stayed.

Procedurally, all court cases will continue to be instituted by the filing of a complaint or an arrest without a warrant, the preliminary arraignments will be conducted by the proper issuing authority, and the preliminary hearing initially will be scheduled by the issuing authority. When the attorney for the Commonwealth is proceeding to an indicting grand jury instead of to a preliminary hearing, because the case has not been held for court, and because, until the grand jury proceeding actually is held, the possibility that a preliminary hearing will have to be held remains, the Committee is proposing that the case remain open in the proper issuing authority's office. Proposed new Rule 556.11, explained in more detail below, sets forth the procedures for maintaining the case before the magisterial district judge when the case is submitted to the grand jury.

The proposal also permits the defendant to waive the grand jury proceedings in

the same manner that he or she may waive the preliminary hearing, but only with the consent of the Commonwealth. The consent of the Commonwealth requirement was added because there may be situations in which the Commonwealth will want to memorialize a witness's testimony on the record particularly when there is witness intimidation. Paragraph (C) of this rule and new Rule 556.12 provide for the waiver.

Proposed Rule 556.3 (Composition and Organization of the Indicting Grand Jury)

Rule 556.3 incorporates most of the procedures for the composition and organization of the indicting grand jury as are set forth in Rule 222 for the investigating grand jury because the investigating grand jury also may be sitting as the indicting grand jury. The Committee is proposing some organizational changes to paragraph (B) to make the rule clearer with regard to the manner of selection.

Proposed Rule 556.4 (Objections to Grand Jury and Grand Jurors; Motion to Dismiss)

Rule 556.4 is taken from former Criminal Rule 203. During discussions of these procedures, questions arose about the procedures for challenging the array of the grand jury and whether such challenges have a constitutional basis. Research revealed that the right to challenge the array is a common law right and that some of the challenges, such as thosed based on race or gender, are constitutional challenges. *Commonwealth v. Dessus,* 423 Pa. 177, 224 A.2d 188 (1966), cited in the former indicting grand jury rules, and other early Pennsylvania cases that recognize the right to challenge the array appear to still be good law. In view of this research, proposed new Rule 556.4 incorporates procedures for challenging the array. The rule also sets forth the procedures for filing a motion to dismiss the indictment.

The former rules provided that the motion to dismiss an indictment should be made as part of the omnibus pretrial motion. This provision was deleted from the rules when the indicting grand jury rules were rescinded. With the reinstitution of the indicting grand jury, the new procedures incorporate this previous procedure. In addition, the challenge to the array also would be made as part of the omnibus pretrial motion. Rule 556.4(C) spells out these requirements and the *Comment* to Rule 578 would be revised

to add challenges to the array and motions to dismiss to the list of matters that should be included in the omnibus pretrial motion.

One concern raised throughout the Committee's discussions was the importance of protecting a defendant's right to *habeas corpus* proceedings when there has been an indicting grand jury proceeding. To ensure that the procedures in Rule 556.4 are not read as limiting this right, the Rule 556.4 *Comment* includes a cautionary provision explaining that "nothing in the rule limits the availability of *habeas corpus* proceedings as provided by law."

A last point with reference to challenges to the array and motions to dismiss relates to the defendant's access to information concerning the indicting grand jury prior to the grand jury proceedings. Providing for these challenges and motions in the rules does not give the defendant a right to participate in the process prior to an indictment, see, *e.g., Commonwealth v. Dessus*, *supra.* In recognition of the special nature of these indicting grand juries because of witness intimidation and the fact that indicting grand juries have not been in existence in Pennsylvania for over 18 years, the *Comment* provides clarification by explaining "nothing in this rule is intended to require notice to defendant of the time and place of the impaneling of a grand jury, or to give the defendant the right to be present for the selection of the grand jury."

Proposed Rule 556.5 (Duration of Indicting Grand Jury)

Rule 556.5 is consistent with 42 Pa.C.S. § 4546 (Term of Investigating Grand Jury) but leaves the duration to the discretion of the judge with the outside limit of 18 months. Although the Committee believes the indicting grand jury proceedings under these new rules ordinarily will be relatively brief, and therefore it might not be necessary to provide for an extension mechanism, because the goal is to have the new procedures for the indicting grand jury be the same as the procedures for the investigating grand jury, Rule 556.5 includes, as much as possible, the same detailed procedures for the extension of and early termination of the grand jury that are applicable in investigating grand jury proceedings.

Proposed Rules 556.6 (Administering Oath to Grand Jury and Foreperson) and 556.7 (Administration of Oath to Witnesses; Court Personnel)

The provisions in Rules 556.6 and 556.7 are taken from former Criminal Rules 206 and 207 and Criminal Rules 223, 223, and 225. The supervising judge would be required to administer the oath to the foreperson, the deputy foreperson, and the other grand jurors. This provision is taken from the rescinded rules and includes the text of the oaths that is required to be administered. The oaths to the witnesses and court personnel would be administered by the foreperson, or deputy foreperson, and the text of the oaths are taken from the investigating grand jury rules.

Proposed Rule 556.8 (Recording of Testimony Before Indicting Grand Jury)

Rule 556.8 provides for the recording of the grand jury proceedings other than deliberations and voting and is taken from Criminal Rules 228 and 229. The rescinded indicting grand jury rules prohibited the recording of the proceedings. The Committee agreed to follow the procedure in the investigating grand jury rules, as well as a number of states, to ensure there is a record should there be a need to review the grand jury proceedings. The supervising judge would maintain control of the recordings and the transcript, as well as, of any physical evidence introduced during the proceedings. In addition, the rule provides for the destruction of the transcript if no indictment is returned, except for good cause. "Good cause" would include, for example, the prosecution of a witness for perjury.

Proposed Rule 556.9 (Who May be Present During Sessions of Indicting Grand Jury)

Rule 556.9 is taken from Criminal Rule 231. In considering the provisions of Rule 231, whether a witness may disclose his or her testimony was discussed in view of the provisions of 42 Pa.C.S. § 4549(d) that provides for a witness to disclose his or her grand jury testimony. Because any case before the indicting grand jury under these new rules involves witness intimidation and permitting a witness to disclose his or her testimony could be dangerous, there are different

considerations for these witnesses than for witnesses before the investigating grand jury. In view of this, Rule 556.9 provides that the indicting grand jury witness may not disclose his or her testimony unless the witness has received the supervising judge's permission to do so. This variation between the investigating grand jury procedures and the indicting grand jury procedures is explained in the *Comment.*

The Committee also considered the procedures in other jurisdictions for permitting witnesses to testify using two-way simultaneous audio-visual communication. Although the Committee does not believe the rules should mandate this procedure, it agreed there would be no reason not to permit such testimony with the approval of the supervising judge. A paragraph explaining this is included in the *Comment.*

Proposed Rule 556.10 (Secrecy; Disclosure)

Rule 556.10 is taken from Criminal Rule 230 and provides the procedures for maintaining the secrecy of the grand jury proceedings, paragraph (A), and for the disclosure, paragraph (B).

Paragraph (A) requires that all evidence is subject to grand jury secrecy and any violation may be subject to contempt.

Paragraph (B)(1) provides that the supervising judge must provide the attorney for the Commonwealth with a copy of the transcript of the grand jury proceeding for the attorney's official duties.

Paragraph (B)(2) provides that the transcript of a witness's testimony be furnished to the defendant but only after the direct testimony of the witness at trial. This limitation on disclosure was a concern for the Committee. We explored various options for the time for pretrial discovery taking into consideration the concerns about witness intimidation as well as the defendant's need to have adequate time to review the discovery to prepare for the trial. The proposal is that rule would provide that the pretrial discovery would be 30 days before the commencement of trial with a provision for the attorney for the Commonwealth to request a delay in discovery when the need arises. The *Comment* explains that the court should grant a continuance to the defendant when he or she needs more time to review the materials. The *Comment* also

includes an explanation of what constitutes the “commencement of trial” using the provisions from Rule 600.

Another issue discussed concerned whether a defendant may testify before the indicting grand jury, noting that Rule 230(B)(1) suggests that the defendant may testify before the investigating grand jury, and that other jurisdictions provide for the defendant's testimony. The Committee agreed the rules should not address this issue, but reasoned that leaving the rule silent did not prevent a defendant from asking to testify. However, the Committee decided to include language comparable to Rule 230(B)(1) in Rule 556.10 to ensure that any defendant who is permitted to testify before the indicting grand jury would be entitled to a copy of the transcript of his or her testimony. They were concerned that if the language was omitted from Rule 556.10 then it might be construed as prohibiting the defendant's right to the transcript and that would create due process issues.

Proposed Rule 556.11 (Grand Jury Authority and Action)

Although Rule 556.11 is taken from former Criminal Rule 210, the new rule sets forth a completely new concept for the proceedings related to the indicting grand jury’s actions and for how the case is handled while remaining with the issuing authority. Under the former indicting grand jury procedures, after a defendant was held for court following a preliminary hearing, the attorney for the Commonwealth would prepare a bill of indictment and submit that to the indicting grand jury. If the indicting grand jury, after considering the bill of indictment, voted to indict, the attorney for the Commonwealth would prepare the indictment and file it in the court of common pleas and the case would proceed to an arraignment. Under the proposed new procedures:

> (1) The case would remain open in the magisterial district court until the grand jury acts to either indict the defendant (holds the case for court), or declines to indict. The issuing authority would forward the case to the clerk of courts pursuant to Rule 547 after the grand jury indicts in the same way he or she forwards a case after a case is held for court following a preliminary hearing.
>
> (2) When the issuing authority receives notice from the president judge that the case is being presented to an indicting grand jury, the issuing authority is required to cancel the preliminary hearing. To provide a means to monitor the case while the proceedings are before the indicting grand jury, the rule would

require the issuing authority to conduct status hearings every 30 days until the grand jury acts.

(3) To simplify the post-indictment procedures and to keep them more in line with the post-preliminary hearing procedures, the function of the grand jury's indictment would be changed from the charging document that was comparable to an information to a notice-type document that sets forth the charges held for court by the grand jury and authorizes the attorney for the Commonwealth to file an information. Thereafter, the attorney for the Commonwealth would proceed in the same manner as he or she would proceed after a case is held for court following a preliminary hearing.

(4) If the grand jury declines to indict, the supervising judge must dismiss the complaint and the attorney for the Commonwealth may re-file pursuant to Rule 544.

Proposed Rule 556.12. (Waiver of Grand Jury Action)

Rule 556.12 sets forth the procedures for the waiver of the grand jury proceedings. The procedures are comparable to the procedures for waiving the preliminary hearing but, as explained above, require the consent of the attorney for the Commonwealth. In addition, the supervising judge has to approve the waiver.

Conforming Changes to Rules 103, 540, 542, 544, 547, 560, 573, 578, 582, 646, 648, and 1003

The Committee also is proposing conforming changes to Rules 103, 540, 542, 544, 547, 560, 573, 578, 582, 646, 648, and 1003. Except for the changes described below, the conforming changes merely add references to the new indicting grand jury procedures.

Rule 103 would be amended to change the definition of "indictment" from "a bill of indictment which has been approved by a grand jury and properly returned to court, or which has been endorsed with a waiver as provided in former Rule 215" to "the instrument holding the defendant for court after a grand jury votes to indict and authorizing the attorney for the Commonwealth to prepare an information" to conform with the proposal that when an indicting grand jury votes to indict the defendant, the attorney for the Commonwealth proceeds by filing an information as set forth in the rules. The definition of "information" also would be amended to make it clear that an

information is presented to the court by the attorney for the Commonwealth when the defendant is held for court or waives the preliminary hearing or a grand jury proceeding. The Rule 103 *Comment* further clarifies the new function of the "indictment" under the indicting grand jury rules.

Rule 540(F) includes, as an exception to when an issuing authority would set the date for the preliminary hearing, the situation when the attorney for the Commonwealth is presenting the case to an indicting grand jury. Paragraph (F)(3) would be amended to extend the time for conducting the preliminary hearing from 3 to 10 days after the preliminary arraignment to 14 to 21 days after the preliminary arraignment to accommodate the timing for proceeding to an indicting grand jury depending on whether or not the defendant is in custody.

Rule 544(A) would be amended to add when the indicting grand jury declines to indict a defendant as a situation when the attorney for the Commonwealth may re-file the charges.

Rule 547(A) would be amended by adding "either following a preliminary hearing or an indictment by a grand jury" after "When a defendant is held for court" to include the action by the grand jury into the rule requirement for when an issuing authority must prepare a transcript of the proceedings to send to the court of common pleas. Similarly, paragraph (C) would be amended by the addition of a new paragraph (7) that requires a copy of the indictment to be forwarded with the transcript.

Rule 560(A) would be amended by adding the issuance of an indictment to when an information is to be prepared by the attorney for the Commonwealth.

The Rule 578 *Comment* would be amended to add "or dismiss" in paragraph (5) to make it clear that a motion to dismiss an information is to be included in the omnibus pretrial motion and to add a new paragraph (10) providing that a challenge to the array of an indicting grand jury ordinarily would be made as part of the omnibus pretrial motion.

The amendment to Rule 646(C)(3) adding "indictment" is a corrective amendment referring to indictments under the former indicting grand jury rules that were rescinded in 1993 as explained further in the *Comment.*

Rule 1003(D)(3)(d)(iii) would be amended by adding an "unless" clause

comparable to the "unless" clause in Rule 540(F), and explains that the Municipal Court judge must inform the defendant of the preliminary hearing unless the preliminary hearing is waived or the case is being presented to an indicting grand jury.

As explained more fully in the discussion of proposed new Rule 556.1, Rule 1101 would be amended to include the suspension of 42 Pa.C.S. § 4548(c) **but only insofar as** the statute is inconsistent with the provisions of Rule 556.1 that permit an investigating grand jury to also sit as an indicting grand jury.