[J-56A-J & L-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	:	Nos. 75, 77-82, 84, 86-89 WM 2018
	:	ARGUED: September 26, 2018

DISSENTING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: DECEMBER 3, 2018**

As the majority relates, the remedy initially requested by Petitioners was a remand for a *de novo* evidentiary hearing before a supervising judge to determine whether Report 1 of the 40th Statewide Investigating Grand Jury was supported by a preponderance of the evidence relative to each of the petitioners. In this regard, Petitioners made what was perhaps a strategic decision not to lodge a facial challenge to the constitutionality of the Investigating Grand Jury Act or to oppose the release of the bulk of the grand jury's report.[1] For my part, I have favored -- and I continue to favor -- the affordance of the comparatively modest relief that had been requested at the outset.

I respectfully differ with any suggestion that such relief would constitute a rewriting of the Investigating Grand Jury Act. Rather, I believe that a hearing before a

[1] To the degree this was a strategic choice, it seems to me to have been a reasonable one in the context of the subject matter and scale of the report in issue.

judicial officer serves as a conventional pre-deprivation remedy. Moreover, this Court has often portrayed its authority to regulate procedures in the judiciary as being exclusive, *see, e.g.*, *Commonwealth v. McMullen*, 599 Pa. 435, 444, 961 A.2d 842, 847 (2008), and accordingly, it seems to me to be unsurprising that the General Assembly would refrain from attempting to engraft a detailed procedural code upon an investigating grand jury scheme encompassing supervision by a member of the judiciary. Furthermore, the enactment is subordinate to the Constitution, *see, e.g.*, *In re Subpoena on Judicial Inquiry and Review Bd.,* 512 Pa. 496, 507, 517 A.2d 949, 955 (1986), and its provisions can and should be interpreted to allow for the conferral of supplemental procedures and protections when necessary, under the Constitution, to vindicate individual rights. *See* 1 Pa.C.S. § 1922(3) (embodying the presumption "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth").

Although I would grant the *de novo* hearings that Petitioners had requested, I would not require discovery on the scale that they envision or the cross-examination of witnesses that testified before the grand jury. Rather, since due process is a flexible concept to be assessed against the particular circumstances, I would authorize the supervising judge to make reasonable judgments concerning whether, and to what extent, Petitioners would be permitted to review and test the evidence upon which the grand jurors relied. The judicial officer's assessment might be informed by (among other considerations) residual secrecy concerns, to the extent that they still pertain, as well as the burden upon victim-witnesses, should their own interests be at stake.[2]

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[2] In our July 27th opinion, we explained that "the historical acceptance of the institution of the grand jury can go only so far in justifying the relaxation of procedural requirements for the protection of [fundamental] rights." *In re 40th Statewide Investigating Grand Jury*, ___ Pa. ___, ___, 190 A.3d 560, 573 (2018). Accordingly, we (…continued)

At a minimum, however, it is my position that Petitioners should be provided the opportunity to advocate that the grand jury's particularized findings of criminal and/or morally reprehensible conduct are not supported by a preponderance of the evidence. In addition, for those of the petitioners who were never afforded the opportunity to testify before the grand jury's term expired, I conclude that due process requires that they be permitted to do so before a supervising judge. I would also direct that, after the judge entertains the testimony and arguments, he should make a determination whether the grand jury's challenged criticisms of each individual petitioner are supported by a preponderance of the evidence and prepare an opinion explaining why this is or is not so. Finally, I would require these opinions to be filed under seal, at least until the claims involving Petitioners' reputational rights are finally resolved.

I recognize that it would be "far more difficult to incorporate other procedural safeguards, such as [a mandated] opportunity to confront and cross-examine adverse witnesses, without fundamentally altering the grand jury's traditional inquisitorial role." 1 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE §2.4 (1986).

(continued…)
rejected the proposition that a person criticized in a grand jury report -- at least where the criticisms are of the nature and scale of Report 1 -- has no right to any pre-deprivation process beyond the submission of a written response. *See id.* at 575. Nevertheless, I find that the institutional grounding of the grand jury regime should serve a significant role in assessing the nature of the process that is due to Petitioners at the present stage.

Along these lines, the investment of discretion in a supervising judge to shape the proceedings would ameliorate, to a degree, the concerns expressed by Judge Krumenacker about burdening investigating grand jury proceedings with trial-like requirements and otherwise fundamentally altering grand jury review. *See id.* at 567 (citing *In re 40th Statewide Investigating Grand Jury,* No. 571 M.D. 2016, *slip op.* at 7-8 (C.P. Allegheny June 5, 2018)). But, again, the Court has ruled that the critical character of the grand jury report in issue calls for *some* additional process. *Accord id.* at 575.

This is why I would leave these matters to the discerning judgment of a supervising judge, in the first instance, for circumstance-dependent consideration according to the governing litmus of fundamental fairness and with due consideration of the historical and institutional grounding of the grand jury.