[J-56A-2018] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	:	Nos. 75, 77-82, 84, 86-87, 89 WM 2018
	:	ARGUED: September 26, 2018

CONCURRING OPINION

JUSTICE DOUGHERTY **DECIDED: DECEMBER 3, 2018**

The majority's conclusion there is no due process remedy presently available to secure petitioners' constitutional rights to reputation is compelling and unavoidable. As the majority points out, neither party has directed us to any authority that would permit the Court to fashion any of the suggested judicial remedies, each of which would require "wholly recraft[ing] a purely statutory process and compel[ling] the parties to reopen and participate anew in an extra-statutory proceeding." Majority Opinion, slip op. at 17. Unfortunately, the parties' exhaustive search for a legally supportable remedy capable of protecting petitioners' due process rights at this late stage has been fruitless. Therefore, I am constrained to join the majority's opinion adopting as permanent the temporary redactions of petitioners' names and other identifying information.

However, while the majority's well-reasoned opinion reaches the correct result in this particular case, it does little to illuminate a path forward. The majority recognizes the remedies suggested by the parties, as well as the procedures authorized by statute in certain other states, are not without merit. *Id*. at 17, n.15. Nevertheless, it concludes that

"making such procedures a part of the grand jury process is a task committed to the sound discretion of the legislature, which is in the best position to evaluate them and determine if, as a matter of policy, any of these procedures should be adopted and utilized in future grand jury proceedings." *Id*. I take no issue with this conclusion. In my respectful view, however, the issue that brought the parties here is of constitutional dimension, and I believe this Court's further guidance on that legal question would be beneficial to the legislature, should it ultimately endeavor to revisit the procedures set forth in the Investigating Grand Jury Act ("Act"), 42 Pa.C.S. §§4541-4553. Moreover, investigating grand juries will surely persist even after today's decision, and, presumably, even in the absence of legislative correction. Indeed, as we previously recognized, nothing in the Act precludes the Commonwealth from continuing this practice, so long as it can satisfy the constitutional standard on its own initiative. *See In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 574 (Pa. 2018) (*Grand Jury I*) ("[T]he Investigating Grand Jury Act does not restrain the attorney for the Commonwealth from implementing additional procedural protections[.]"). Thus, while I fully agree with the majority that it is beyond our authority to recraft the Act by judicial fiat, I write separately to elucidate how, in my view, the dissatisfying result of this case can and should be avoided in the future.

Initially, I recognize that, because due process is an "elusive concept" with "exact boundaries [that] are undefinable," *Hannah v. Larche*, 363 U.S. 420, 442 (1960), the procedures I recommend below are not etched in stone. For that reason, my proposed formulation should not be interpreted as the only method of affording the necessary protections, nor as foreclosing the imposition of additional statutory safeguards, as some other states have deemed appropriate. *See*, *e.g.*, N.Y. CRIM. PROC. LAW §190.85. The proposals below are, quite simply, the minimum procedures I believe are required to assure due process to nonindicted individuals criticized in an investigating grand jury

report. *See In re Grand Jury of Hennepin Cty. Impaneled on Nov. 24, 1975*, 271 N.W.2d 817, 820-21 (Minn. 1978) ("A procedure may be devised which allows the release of the much needed information contained in grand jury reports and at the same time protects the individuals involved from unjust accusation."). With that understanding, my proposed procedures, which I believe are supported by the Act's current statutory scheme, follow.

First, in line with the Court's prior pronouncement that it would be "ideal" for named individuals to be afforded the opportunity to appear before the grand jury, *see Grand Jury I*, 190 A.3d at 578, I would hold this requirement essential to due process. *See* SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW & PRACTICE §2.4 ("At a minimum, due process is likely to require that the individual have an opportunity to refute the charges against him in an appearance before the grand jury[.]"). As we previously noted, and as the Commonwealth now seems to agree, *see* Commonwealth's Supplemental Brief at 9, the government should wish to present such testimony "for the benefit of lay grand jurors who have plainly set out to find the truth and reveal it to the public." *Grand Jury I*, 190 A.3d at 574. *See also* BEALE, *ET AL.*, GRAND JURY L. & PRAC. §2.4 ("[A]llowing the subject of the investigation to appear and testify before the report is filed would not seriously disrupt the grand jury's investigation, and it would greatly enhance the fairness of the proceedings (and perhaps their accuracy as well)."). Moreover, a "meaningful" opportunity to be heard demands more than the bare occasion to testify before the grand jury. For the named individual's testimony to be meaningful, it must be made with full knowledge of the allegations against him, which, in some cases, might require the disclosure of certain underlying evidence supporting those allegations. *See generally In re Second Report of Nov., 1968 Grand Jury of Erie Cty.*, 257 N.E.2d 859, 861 (N.Y. 1970) (Fuld, C.J.) ("To limit the accused official or employee to a bare unsupported and unsubstantiated list of charges and allegations against him would serve to deprive him of

that opportunity to be heard[.]"). After hearing the individual's testimony, if any, the grand jury will be better suited to decide whether it needs to consider additional evidence, or whether it is prepared to finalize its report and submit it to the supervising judge.[1]

Second, after the named individual has been afforded a meaningful opportunity to testify, the grand jury, by an affirmative majority vote, may submit its report to the supervising judge. *See* 42 Pa.C.S. §4552(a). If the submitted report still includes references critical of a named but nonindicted individual, it should be supported by citation to all specific exhibits or transcript pages pertinent to that individual. As discussed below, this process will facilitate the discrete review in which the supervising judge must subsequently engage.

Third, if the supervising judge concludes there are critical references in the report, such that it would implicate the right to reputation, he should provide the appropriate sections to the criticized individuals. *See* 42 Pa.C.S. §4552(e). This will put those named individuals on notice of the proposed criticisms, and allow them an opportunity to file any written objections and appear before the supervising judge to argue against their inclusion in the report.

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[1] There are several facets to this particular procedure on which I take no position at this time. For example, although the Commonwealth now agrees individuals criticized in a report should be given an opportunity to testify before the grand jury, it argues they "would have the same rights as other witnesses under the Act." Commonwealth's Supplemental Brief at 9, *citing* 42 Pa.C.S. §4549(c). Whether Section 4549(c) should apply with full force to individuals who choose to invoke their due process right to be heard by the grand jury is questionable; indeed, a blanket application of Section 4549(c) to these "witnesses" would raise serious questions about their counsel's role in the proceeding — not to mention the Commonwealth's attorney's role. Similarly, I take no position on petitioners' observation that some jurisdictions also afford an individual named in a grand jury report the opportunity to present witnesses on his behalf. *See* Petitioners' Supplemental Brief at 26, *citing* Utah Code Ann. §77-10a-17(1), (2)(b) (affording any person named in a report "and any reasonable number of witnesses on his behalf" an opportunity to testify before the grand jury). For now, I simply reiterate that what is at issue is the **named individual's** right to be heard.

Fourth, pursuant to 42 Pa.C.S. §4552(b), the supervising judge "to whom such report is submitted shall examine it and the record of the investigating grand jury" to determine whether the report — including each individual criticism contained therein — is "based upon facts received in the course of an investigation authorized by [the Act] and is supported by the preponderance of the evidence." *Id*. In other words, the judge must review criticism of any individual on its own merit. *See Grand Jury I*, 190 A.3d at 575 (preponderance-of-the-evidence review pursuant to Section 4552(b) requires discrete determination of whether each specific criticism is supported by a preponderance of the evidence, rather than on a "report-wide basis"). This review should be limited to the existing record; and the inquiry would merely be whether the record provides a basis for the grand jury's conclusion, akin to a sufficiency analysis, whether or not the reviewing judge would have reached the same conclusion himself. *See generally In re Vencil*, 152 A.3d 235, 237, 242-43 (Pa. 2017), *cert*. *denied*, 137 S.Ct. 2298 (2017) (equating "sufficiency" with "supported by" and holding, in the context of judicial review of an involuntary civil commitment under the Uniform Firearms Act, that a reviewing judge's task is not to conduct a *de novo* review but to "determine whether [the] findings are supported by a preponderance of the evidence," "limited to the information available to the [decision-maker] at the time"). In this respect, I emphasize the majority's conclusion that the judge's role under this statutory provision is "strictly circumscribed to conducting a judicial review of the report and the record as developed before the grand jury . . . [and] plainly does not authorize a supervising judge to conduct his own *de novo* review, let alone receive additional evidence." Majority Opinion, slip op. at 14.[2]

[2] Beyond agreeing with the majority as to what the plain language of Section 4552(b) does and does not allow of a supervising judge, I reject outright petitioners' wide-sweeping claim that due process demands the opportunity to participate in a *de novo* evidentiary hearing, let alone that such hearing must require, *inter alia*, "an opportunity to cross-examine witnesses[.]" Petitioners' Supplemental Brief at 38. Neither law nor

Fifth, if the supervising judge concludes the record supports the criticism of each and every identified individual, the report should be approved. *See* 42 Pa.C.S. §4552(b). If there is any individual for whom criticism is not supported by a preponderance of the evidence, the report should be sent back to the grand jury, if it is still in session, along with the bases for the supervising judge's remand. The grand jury may then decide whether the deficiencies can be remedied, whether the relevant criticisms should be deleted, or whether the report as a whole should be withdrawn. *See Grand Jury I*, 190 A.3d at 576 ("it would be preferable for [a] grand jury to have an opportunity to correct mistakes that it may have made"). If, on the other hand, the grand jury's term has expired, any unsupported criticism must be excised by the supervising judge. *See id*. ("[T]his Court has determined that the remedy of excision is available with respect to a grand jury report that offends due process, or otherwise unconstitutionally impairs reputational rights, relative to a particular individual or individuals.").

Sixth, once the court approves publication of the report, any criticized individuals should be given the opportunity to file a public response. *See* 42 Pa.C.S. §4552(e). While I acknowledge this Court's concern that Section 4552(e) calls upon the supervising judge to exercise "discretion" in applying this provision, *see Grand Jury I*, 190 A.3d at 566 n.4, I would simply conclude that a judge's refusal to publish relevant, appropriate material — by which I mean material that is not obviously prohibited, privileged, or protected (such as names and addresses of grand jurors) — would constitute an abuse of discretion.

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reason supports this assertion. *See*, *e.g.*, *Hannah*, 363 U.S. at 449 (rights of apprisal, confrontation, and cross-examination "have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings"); BEALE, *ET AL.*, GRAND JURY L. & PRAC. §2.4 ("It would, however, be far more difficult to incorporate other procedural safeguards, such as the opportunity to confront and cross-examine adverse witnesses, without fundamentally altering the grand jury's traditional inquisitorial structure.").

Hence, in all but the rarest of cases, the judge must permit the criticized individual to publish a response to the grand jury report.

In my view, application in future cases of the procedures outlined above would be sufficient to remedy the problems that now preclude the full release of the report in this case. Moreover, these proposals are entirely consistent with the Act as currently written and require no judicial rewriting, which I agree with the majority would be improper. In the event the legislature may choose to revisit the Act, I stress again that these suggested procedures are not the only means of protecting reputational interests while also preserving the historic watchdog function of the citizen grand jury; rather, these procedures, taken together, merely establish a constitutional floor that I believe would satisfy due process. In a similar vein, should the legislature choose not to act, I see no impediment to the Commonwealth unilaterally employing these or more extensive due process procedures to safeguard the reputational rights of named but nonindicted individuals, which in turn will ensure the integrity of future investigating grand jury reports and allow for their full release.