

IN THE COURT OF COMMON PLEAS  
DAUPHIN COUNTY, PENNSYLVANIA

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IN RE: : SUPREME COURT OF PENNSYLVANIA  
: 6 M.D. MISC. DKT. 2008  
THE TWENTY-EIGHTH STATEWIDE :  
: DAUPHIN COUNTY COMMON PLEAS  
INVESTIGATING GRAND JURY : NO. 10 M.D. 2008  
:  
: NOTICE NO. 4

FINAL ORDER OF COURT AUTHORIZING THE RELEASE  
AND PUBLIC DISEMINATION OF GRAND JURY REPORT NUMBER 1  
INVOLVING RECOMMENDATIONS TO THE GENERAL ASSEMBLY WITH  
FOOTNOTE EXPLANATION

AND now this 24<sup>th</sup> day of May, 2010, pursuant to 42 Pa.C.S.A. § 4552<sup>1</sup> and having

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<sup>1</sup> § 4552. Investigating grand jury reports

- (a) **General rule.**- Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report.
- (b) **Examination by court.**- The judge to whom such report is submitted shall examine it and the record of the investigating grand jury and, except as otherwise provided in this section, shall issue an order accepting and filing such report as a public record with the court of common pleas established for or embracing the county or counties which are the subject of such report only if the report is based upon facts received in the course of an investigation authorized by this subchapter and is supported by the preponderance of the evidence.
- (c) **Sealed report.**-Upon the submission of a report pursuant to subsection (a), if the supervising judge finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, he shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter except upon order of court.
- (d) **Appeal from refusal to file.**- Failure of the supervising judge to accept and file as a public record a report submitted under this section may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rules.
- (e) **Authorization of response by nonindicted subject.**- If the supervising judge finds that the report is critical of an individual not indicted for a criminal offense the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report. The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).

examined Report No. 1 of the Twenty-Eighth Statewide Investigating Grand Jury which has made multiple recommendations which it believes will improve the structure and operation of the Pennsylvania General Assembly; the Court finds that the release of the report at this time will not prejudice the fair consideration of any pending criminal matters. The Court also finds that the report is based upon facts received in the course of an investigation authorized by the Investigating Grand Jury Act and is supported by a preponderance of the evidence. The Court further finds that pursuant to its interim order dated April 23, 2010, (which Order is attached hereto) the one individual that the report was critical of chose to file a response; and such was received on May 19, 2010. A copy of the response will, as requested by Ms. Runk, be attached to this report and made part of the public record.<sup>2</sup>

In consideration of the foregoing, the Court finds the contents of this extraordinary report, prepared at the direction of a unique body of citizens, should not lay fallow beyond the time which the Court deemed appropriate; and that its immediate release is clearly in the public interest.

**It is hereby ORDERED and DIRECTED that:**

1. Both of the Orders of Court dated April 23, 2010 and May 20, 2010, along with the 34 page Report Number 1 of the 28<sup>th</sup> Statewide Investigating Grand Jury, attachments and response should be docketed in the Dauphin County Clerk of Courts Office. The Clerk of Court is authorized to provide copies of all of the aforesaid documents to anyone who

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<sup>2</sup> With the exception of the aforementioned individual, this report does not criticize, expressly reference or impliedly inculcate any individual who was presented (indicted) by this or any prior Grand Jury. However out of an overabundance of caution, this Court decided to not release the report until after the conclusion of the trial pending before Honorable Richard Lewis. Similarly, this Court chose to not release the report until after the one specific person criticized had the opportunity to respond, and the Court intentionally set the date for release subsequent to the primary election. A careful reading of the report reveals that its content and specific recommendations are “systemic” and not critical of or favoring any political party. Rather its recommendations are directed to the structure and operation of the entire General Assembly.

requests such, after payment of any lawful fee for copying.

2. A copy of this report shall be expeditiously forwarded to the Honorable Ronald Castille, Chief Justice, who approved the empanelment of the Grand Jury. It is further ORDERED AND DIRECTED, in accordance with the implied request of the Grand Jurors who made their recommendations for legislative, executive or administrative actions; that the aforesaid Orders and Report shall also be provided to:

- a. The Honorable Edward G. Rendell, Governor of Pennsylvania;
- b. The leadership of the Pennsylvania Senate and House of Representatives. Specifically in the Senate, Joseph B. Scarnatti, Dominic Pileggi, Robert J. Mellow and in the House Keith R. McCall, Todd A. Eachus and Samuel H. Smith. The Court respectfully requests the aforesaid leadership to facilitate the provision of a copy of the Grand Jury report to all of the elected members of the Senate and House.
- c. Gretchen A. Mundorff, Esquire, President of the Pennsylvania Bar Association and the Honorable James Gardner Collins, Chairman of the Pennsylvania Bar Associations Internal State Constitutional Review Commission.<sup>3</sup>

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<sup>3</sup> In my order I characterize the contents of grand jury report number 1 as extraordinary. Actually, one of my first thoughts when I read the report was the line uttered by the broadcaster in the satirical movie Network – “I’m mad as hell and I’m not going to take this anymore.” However, I found this jury to be an astute and reflective group of men and women and saw this report “if not its substantive content,” coming early on. I believe the circumstances surrounding the issuance of this report should be developed to enhance its credibility and weight.

On the day of their empanelment, March 24, 2008, the jury of 23 plus 10 alternates hopefully having overcome their shock at having to serve a minimum of one week a month for eighteen months, were sworn as the 28<sup>th</sup> Statewide Investigative Grand Jury. At that time, I charged the jury on the law that was to guide them in their deliberations. After explaining the importance of secrecy, I told them their primary role is to listen to evidence and determine if there is probable cause (sufficient evidence) to charge (issue a presentment) or not charge someone with a crime. I explained that it is not their duty to decide whether someone is guilty, or not guilty, and noted that the much higher burden as to guilt (beyond a reasonable doubt) is to be decided by a Petit Jury. In addition, at the conclusion of my charge, I added

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that the grand jury at any time, by a majority vote, may submit to me a report concerning part or all of the matters under inquiry.

I have been a grand jury judge approximately seven years and it is my observation that generally such reports are the rare exception. Yet, this is the third report I have authorized for release. The first recommended that the method of selection of grand jurors be modified. Prior thereto, six of our 67 counties were selected at random to sit in Harrisburg or Pittsburgh. Such random selection resulted in the need to house and transport jurors across the state. Besides costing the taxpayers a large sum of money, jurors were reluctant to be away from their homes for a full week at a time. I sent the report (which was endorsed by Attorney General Corbett) recommending regional selection with the grand jury sitting at three different locations (Harrisburg, Pittsburgh and Norristown) to Chief Justice Cappy. He appointed, now Chief Justice Castille, to chair a committee to review the recommendation. To my amazement and pleasure, within a few months we had a new rule. Such has not only made the responsibility of a grand jury judge in selecting a fair and representative cross section of the community easier, (most jurors now can go home each night) but it saves our taxpayers approximately \$500,000 a year in lodging, transportation, and meal expenses.

The second report recommended that grand jurors (if they so choose) can opt out of future jury service. Presently, the current law only allows current jurors to be excused for three years if they have served three or more days on any jury (petit or grand). 42 Pa.C.S. § 4503(a)(2). Needless to say, most jurors when they are summoned, are shocked when they learn they must serve a minimum of one week for eighteen months and possibly up to 24 months. This time, Chief Justice Castille sent the report to Senator Greenleaf and Representative Caltagirone (chairs of the Senate and House Judiciary Committee). Again, to my pleasant surprise, within a short time a bill allowing discretionary exemption was introduced by Representative Will Gabig. I am told the likelihood of passage is good.

It would be easy to be glib and suggest my belief that Chief Justice Castille will not be able to so easily facilitate the recommendations in this report. In fact, I suspect he and his peers on the Supreme Court (who may have to rule on any potential constitutional changes) will do little beyond reading the report. However, I write further in the hope of persuading the Legislature that this grand jury's recommendations are theirs alone, are both sincere and serious, and have an early and solid foundation in fact.

I am bound by 42 Pa.C.S. § 4552 as to the release of this report, and am satisfied the statutory criteria have been met. However, I am so impressed with the work of these men and women, that within the confines of secrecy (which I decide but of course am answerable to a higher body) I am going to be specific in explaining the genesis of this report:

1. This jury was extraordinary in its inception by nature of the fact that (unlike other grand juries hearing testimony from witnesses on what usually entails 60-70 different cases involving organized crime or public corruption), their focus was primarily limited to one notice. In effect they only heard from witnesses about what has been characterized as "BonusGate," and other relevant issues that arose out of such, that arguably implicated both malfeasance and misfeasance in the Pennsylvania General Assembly.
2. Grand Jurors, unlike petit jurors, have the right to ask questions. While most of the questions were related to the particular person or caucus being investigated, many seemed focused on about what was going on in the legislature, especially as it impacted their pocketbooks.
3. Such, I submit, was the genesis of this report.

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4. Also, many subpoenaed witnesses, both immunized and not, had a lot to say in response to jurors' inquiries about the internal operation of the legislature.
  5. I received notes from the grand jury foreman requesting information that was collateral but relevant to the criminal investigation extant. For example, I was asked to explain or asked to have someone explain:
    - a. The constitutional convention process
    - b. The difference between a voter referendum and constitutional convention
    - c. A breakdown of the state budget – total dollars, mandated versus discretionary, WAM, and salaries. Clearly, the use/misuse of public monies was a recurring theme.
    - d. Explain the grant request process
  6. Based on the foregoing, and similar inquiries, the Office of Attorney General arranged for the testimony of Professor Allan Rosenthal. Professor Rosenthal at his testimony on July 23, 2009, in response to the question by Deputy Attorney General James Reeder "Professor tell these folks who you are" indicated the following. "I'm a political scientist by training. I teach at Rutgers University, the State University of New Jersey. My career has been as a student of state legislatures. I've studied legislatures for 40 years, written about them, taught about them and consulted with legislatures around the country. As a disclaimer, I kind of like legislatures and the legislatures I've met I kind of have had great respect for. This doesn't mean that I have met every legislator, or I like every legislator, but I think these institutions around the country have done a pretty good job in representative democracy. It's not easy. I think for the most part legislators take the job seriously and try to do it right as they see right. That's not to comment on the situation you're looking into in Pennsylvania, but it's just to give you an idea of where I'm coming from. Currently, I'm serving as the chairman of the Joint Legislative Committee on Ethical Standards. I have written a lot of books on state legislators. I have received awards for my work and I received an award from the National Conference of State Legislators."
  7. Towards the end of our session, the grand jury requested time, separate from the ongoing criminal investigation, to discuss "their report." Their request was granted.
  8. Near the expiration of their 18 month term, the grand jury was asked to extend six more months. Such required the acquiesce of a majority of the 23 permanent grand jurors. Such requests are often denied by Grand Juries weary from their extended service. Grand jury votes are secret. However, in my discretion (and given the limited nature of the revelation, and the rationale for revealing such) I note the vote was 23-0 to extend. In my experience, that was both extraordinary and unprecedented. From the foregoing, I infer these fine citizens wanted to be heard, and also wanted to be involved in a matter they deemed important to the public good.

In consideration of the foregoing, I would respectfully submit that this grand jury is a serious minded group of citizens. In my view the grand jury will not be satisfied with non substantive window dressing and/or sound byte utterances; regarding the concerns set forth in their report.

Finally, while I arguably may have gone on much longer than necessary to justify the release of this report, there is one area where I am going to tender my own recommendations. While such may be presumptuous, however, akin to the grand jury report and recommendations, I am hopeful they may facilitate the public interest and welfare as well as the ongoing investigation.

The very first grand jury recommendation on page 31 of the report is "that tax payer funded political caucuses be eliminated." I concur with that recommendation. For what it's worth (admittedly

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little) I, like professor Rosenthal, do not agree with some of the recommendations, including the recommendation for term limits.

However, the political caucus recommendation directly impacts one of my roles as a grand jury judge and has been a significant legal issue in this case. I previously authored and published a redacted opinion involving the inapplicability of what was characterized as legislative privilege. That privilege was not asserted by any individual legislator, but rather by a political caucus in opposition to my authorizing the seizure of boxes of evidence which were reportedly being destroyed in anticipation of the newly initiated "BonusGate" investigation. I found that assertion of privilege to be without merit. One of the primary responsibilities of the Supervising Judge of the Grand Jury is to decide all legal questions arising out of the grand jury inquiry. I note, the legislation creating the grand jury is relatively new and there is little case law interpreting the act or decisions of the grand jury judges. The individual grand jury judge is often charting new ground. I have authored several opinions in this and other cases in support of, and in opposition to, the interest of both the Office of Attorney General and the respective person being investigated. However, I could find no case law on how to deal with a caucus corporate entity. That entity, and the nuances of such, came in conflict with another important responsibility of the grand jury judge. That responsibility is to ensure that the work of the grand jury not be improperly impeded or delayed by dilatory tactics. Finally, it is always the responsibility of the Judge to ensure orders of court, which include subpoenas, are complied with. Such implicates the question of contempt as well as collaterally the expenditure of taxpayer monies when there is unjustified noncompliance or delay regarding such orders. Admittedly, the depth and breadth of the subpoenas and documents sought, reviewed by opposing counsel, and ultimately, if in some cases belatedly, was overwhelming to both Office of Attorney General and counsel for the caucus, as well as other counsel for various parties.

In my view, this investigation has been delayed by the ill defined and arguably unaccountable caucus system. It is my observation that the caucus system has been used as both a sword and shield by both parties.

Both the Democratic and Republican caucus are aware of my views on this. Such has been often stated on and off the record. As I have bluntly stated, "who the hell is the caucus." If requests for documents pursuant to a subpoena *duces tecum* (i.e. emails, letters, invoices, etc) are not forthcoming, and there is no valid reason for such, the court is stymied by who should be held in contempt and/or what sanctions should be utilized.

By way of illustration, the most dramatic moment of my 23 years as a judge, arose out of an alleged subpoena non-compliance proceeding. Frank Fina, the Chief Deputy Attorney General in charge of the Public Corruption/"BonusGate" investigation, did an extensive *in camera* (as authorized by law) proffer in support of the contempt proceeding. Thereafter, in open court, in the presence of opposing counsel, Mr. Fina summarized such with his request I enter a contempt citation against leaders of the caucus. The proceeding became so loud and adversarial that I had to recess because the court reporter could not keep up with the rapid fire exchanges.

While that matter was ultimately resolved, I make the following specific recommendations to the General Assembly:

1. If the caucus system is not amended, then it should be statutorily explicit that if it is determined the caucus is the holder of documents that are improperly being withheld, the court has the authority to impose any fine it deems appropriate on any member(s) of the leadership of the caucus. Such would not be paid out of taxpayer subsidized caucus monies, but out of the individual funds of the caucus, House or Senate member(s), or employee(s) who the court found responsible for non compliance. Otherwise, in effect, the taxpayers would be subsidizing non compliance and thereby frustrate the grand jury investigation and search for the truth. Because of separation of powers concerns, the Grand Jury Judge's order

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should be stayed pending expedited review (as is already the case with the review) by the Pennsylvania Supreme Court. Such does not mean to suggest the Court does not have the inherent authority to impose an appropriate contempt sanction including incarceration on an individual leader of the caucus. In fact, as to the matter referenced above, if the dispute had not been “amicably” resolved, the court was considering the imposition of a substantial fine on the caucus until there was full compliance. Where I was “stymied” was on how such could be paid without the cost in effect being borne by the taxpayers.

2. The obstruction of justice statute should be amended to provide a separate section or statute that focuses on interference with a grand jury inquiry. Also, such should be classified as a more serious felony. The current obstruction of justice statute, 18 Pa.C.S. § 5102, is only a misdemeanor of the second degree with a maximum penalty of two years. A review of our, and many other state obstruction of justice statutes and case law, seems to suggest such are more focused on interfering with the trial portion of the justice system. However, even in those cases, in many states, the penalty is much higher than in Pennsylvania.
3. During my review of other state statutes, I also noted several had a separate official misconduct and/or obstructing governmental operations statute. By way of example, both Illinois and Indiana have official misconduct statutes that are felonies. As a courtesy, I have enclosed a copy of an overview of those state statutes.
4. Finally, despite the aforementioned comments/recommendations, I acknowledge the need for deference and sensitivity to the separation of powers doctrine. Additionally, unlike many, I do not consider the appellation politician a pejorative term. In my view it is akin to the misuse of the quote by Shakespeare in Henry the VI (“let’s kill all the lawyers”). Like Professor Rosenthal, I concur most politicians (and lawyers) are honorable hard working public servants. I share the sentiments of Professor Rosenthal who at the very beginning of his testimony (here again I exercise my discretion as to concerns about revealing testimony before a grand jury) in noting his non prejudicial comments as a preface to his testimony. Professor Rosenthal stated:
  - a. I’ve been an advocate of legislatures as institutions and I’ve worked with them for such a long career. I am one of the few people in the United States that is not a legislator, on the legislative staff, or maybe a lobbyist who actually likes legislatures. I understand and I recognize that most people are fairly cynical about them and critical of them. I disagree with that position but I understand that most people take it and I understand why they take it.

At the beginning of this explanation for the release of a report, I noted my first reaction was the citizen grand jury was “mad as hell and not going to take it anymore.” Having reread the report and recommendations numerous times, I have come to the conclusion a different aphorism may be more reflective of the recommendations tendered in the report. Whether biblical or based on the admonition to physicians, the grand jury’s admonition to the legislature may be “Heal Thy Self.” While aspirational, and perhaps not likely to occur, I believe the effort (perhaps armed with a copy of the report and the book Profiles in Courage) is a worthy endeavor. Failing such, I trust the matters of concern outlined by the grand jury in report number 1 will be addressed by the special bar association committee, the next Governor and/or ultimately, as it should, by the fellow citizens of the Commonwealth of Pennsylvania.

With the exception of the foreman (who signed the report) I conclude by only identifying the additional grand jurors by their occupation which reflects their diverse and broad-based background. I would note several of the grand jurors wondered whether, when, and under what circumstances, I would authorize the release of this report. Such has now occurred and I am proud to have served with these fine group of citizens. They are:

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<u>Juror Number</u>	<u>Job Description</u>
1	Office Clerk
3	Used Car Salesperson
4	Information Technology Technician
5	Jerry W. Sterner-Retired Plant Mgr/Senior Mgt Consultant
6	Group Coordinator
7	Research Technician
8	Retired Supervisor
9	Chemical Engineer
10	Teacher
11	Retired
12	Tax Collector
13	IT Logistics Analyst
14	Retired
15	Sheet Metal Mechanic
16	Machine Operator
17	School District Paraprofessional
18	Retired
20	Highway Department
21	Grand Jury Secretary-Business Analyst
23	Data Management
Alt 1	Food Service Worker
Alt 2	Wastewater Operator
Alt 3	Clerk
Alt 4	Production Worker
Alt 6	Coach Driver
Alt 7	Shipping Supervisor
Alt 8	Department Manager
Alt 9	Material Clerk
Alt 10	Retired Auditor

BY THE COURT:

Barry J. Feudale S.J.  
Presiding Judge of the 28<sup>th</sup> Statewide  
Investigating Grand Jury