[J-171-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, BAER, BALDWIN, JJ.

IN RE: THE TWENTY-FOURTH STATEWIDE INVESTIGATING GRAND JURY PETITION OF: COMMONWEALTH OF PENNSYLVANIA	:	No. 120 MM 2006
IN RE: THE TWENTY-FOURTH STATEWIDE INVESTIGATING GRAND JURY PETITION OF: LANCASTER NEWSPAPERS, INC. AND P.J. REILLY	:	No. 121 MM 2006 SUBMITTED: August 29, 2006

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: October 6, 2006**

I join parts I and II of the Majority Opinion, with the exception of the *dicta* comprising the sentence that includes footnote 4 concerning the alleged potential for grand jury abuses. Maj. slip op. at 11. I concur in the result of Part IV, as I would defer to the supervising judge's exercise of discretion as to the propriety of disclosing the contents of the notice.[1] However, with respect to Part III and the Majority's concomitant vacatur of the supervising judge's orders of August 17 and 24, 2006, I respectfully dissent.

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[1] I agree with the Majority that the disclosure order was appealable by the Attorney General as of right, but I specifically note my disagreement with the Majority's characterization of Commonwealth v. Cosnek, 836 A.2d 871 (Pa. 2003) and, in particular, any overt or implied suggestion that Cosnek should inform the general approach to questions of appealability
(continued…)

The Majority apparently finds that Subpoena 686 is unconstitutional as a matter of law because there were other, more limited means by which the grand jury could obtain the information it sought. The Majority also finds that the safeguards adopted by the supervising judge were insufficient, as a matter of law, to survive a constitutional challenge. In my view, this Court should defer to the supervising judge's assessment of this issue as well, which was not an abuse of the substantial discretion necessarily vested in his control over the grand jury proceedings. See Impounded, 241 F.3d 308, 312 (3d. Cir. 2001) (appropriate standard of review in matters involving lower court's grant or quash of a grand jury subpoena is whether court abused its discretion); United States v. Doe, 429 F.3d 450, 452 (3d. Cir. 2005) (abuse of discretion standard governs review of issues involving application of law in grand jury proceedings).

In overturning the supervising judge's order, the Majority does not specifically identify whether it bases its decision on a particular ground raised by Lancaster Newspapers (the "newspapers"), all of their constitutional and statutory arguments, or some combination thereof. The fact that the Majority's ultimate dispositive analysis adverts to a potential chilling effect and overbreadth, however, suggests that the decision is powered by First Amendment concerns. As actual authority for overturning the trial court's order, the Majority cites only to a single-judge opinion from the Southern District of New York, which of course is not binding on this Court. In re Grand Jury Subpoena *Duces Tecum*, 846 F.Supp. 11 (S.D.N.Y. 1993). Moreover, it does not appear that that decision involved constitutional concerns, much less was it powered by constitutional authority which would bind this Court. Particularly given the truncated nature of the proceedings and pleadings

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under Pa.R.A.P. 311. I believe the language of the Rule controls; that Cosnek decided only the narrow question there presented; and that, to the extent *dicta* in Cosnek may be read as suggesting some broader approach to appealability, that *dicta* should be disapproved.

before the Court in the case *sub judice*, which has been treated as an emergency, I am not inclined to elevate the view of a single federal trial judge in a different Circuit to the status of constitutional command by which we must measure the discretionary decisions of Pennsylvania judges supervising grand jury proceedings.

The Majority seems to extrapolate from the New York federal trial judge's opinion a controlling rule that, to survive constitutional scrutiny, a grand jury subpoena in an instance such as this must promise to utilize "a neutral, court-appointed expert" to examine the newspapers' hard drives. Although that might be a **different** way to address the newspapers' concerns, I am not convinced that it is the **only** reasonable way, much less the only constitutional way to do so.

The supervising judge limited the Attorney General's search of the hard drives to Internet history and cached content of the hard drives. Neither of these types of information is protected by any of the privileges claimed by the newspapers -- a point the newspapers conceded below (see N.T. 2/23/06 at 20). The newspapers' objection instead related to information on the computers that is not being sought by the Commonwealth. The newspapers professed a fear that the Commonwealth would abuse the subpoena and seek to access other information that might be subject to some constitutional or statutory protection.

The supervising judge did not dismiss the newspapers' professed concern out of hand, but instead adopted safeguards, safeguards which were perfectly reasonable given the record produced below. The Commonwealth presented expert testimony regarding the nature and extent of the measures it would take to comply with the court's restrictions. The expert explained that the Attorney General was looking for Internet history, which consists of specific Internet addresses and cached web pages. N.T. 2/23/06 at 11. He further explained that this information could be found in two places: active files where computers automatically save such information for 26 days, and the unused space on the hard drive,

where the information is saved after it is deleted from the active files. Id. The expert testified that that the active Internet history files are easily identifiable and able to be copied. He informed the Court that a certain tool is used to extract the Internet history from the saved hard drive files and that, to use this tool properly, the Commonwealth must have access to the entire hard drive. Id. at 11-12. This process of extracting the Internet history from the saved hard drive, the expert explained, can take anywhere from six hours to two days and, therefore, it is only practical to perform it in the Office of the Attorney General. Id. at 12.

The newspapers did not provide a countering expert to suggest other, less intrusive means to provide the Attorney General with the Internet history which unquestionably was the proper subject of the subpoena, or to suggest why that which was proposed was unworkable. The supervising judge ultimately found that the Attorney General's proposed method of searching the hard drives was reasonable and adequately protected against improper seizure or disclosure of protected information. The judge's order also provided that the court would review the information produced by the Internet technology department of the Attorney General's Office before such information would be provided to the Attorney General proper.[2]

I see no abuse of discretion in the safeguards adopted by the supervising judge in response to the newspapers' professed concerns. The court was not obliged to assume that the Attorney General's representatives -- officers of the Court -- would ignore the limitations of the subpoena and the judge's expressed concerns and nefariously rummage about in the hard drives for information which was not the subject of the investigation. Nor

[2] As a further protection and indication of its good faith, the Attorney General agreed to provide the newspapers with a copy of each hard drive obtained so as not to interfere with the newspapers' daily functioning.

do I believe that the court was obliged to assume that the Attorney General's information technology professionals would seek to subvert the court's imposed restrictions and plan of action. I also do not believe that the Constitution obliged the court to appoint some outside, "neutral" expert to perform an investigative function which is one of the core duties of the Attorney General's Office. Finally, in my mind, the fact that the subpoena could be narrower and more to the liking of the newspapers does not render it unconstitutional. Because I would find that the newspapers failed to prove that the subpoena, as narrowed and framed by the supervising judge, was unreasonable or constitutionally improper, I would not interfere with the court's exercise of discretion and seek to micromanage this grand jury. Hence, I respectfully dissent from the Court's vacatur order.