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GRAND JURY—IRREGULARITIES IN FUNCTION—SUBSTITUTION OF GRAND JURORS—The Pennsylvania Supreme Court has held that the unprecedented substitution of six grand jurors one year after the original panel had been sworn and begun its work was prejudicial to the defendant and necessitated the invalidation of the investigating grand jury's presentment and the subsequent indictment based on that presentment.

Commonwealth v. Levinson, 389 A.2d 1062 (Pa. 1978).

In early January, 1974, an investigating grand jury¹ was sworn and later charged to conduct an investigation of alleged corruption in the City of Philadelphia's local government. Between May, 1974, and January, 1975, one grand juror died and five others were excused from service. These grand jurors were replaced by six additional individuals and the reconstituted grand jury was again specially charged.

Thereafter, the reconstituted grand jury continued its investigation and proceedings which resulted in a presentment favoring the indictment of Hillel Levinson² for perjury, false swearing, extortion, and illegal political activities.³ Levinson was indicted accordingly, and unsuccessfully moved to quash the indictment. He then moved for certification⁴ of three questions⁵ to the Superior Court of Pennsylvania.

1. The 1974 Investigating Grand Jury was convened to conduct a special investigation and was selected according to the normal calendar of court business. A special grand jury is one that is specially selected at a time other than that designated by the court's calendar. See *Smith v. Gallagher*, 408 Pa. 568, 185 A.2d 143 (1962) (distinguishing the two types of investigating grand juries).

2. Hillel Levinson was the Managing Director of the City of Philadelphia. *Commonwealth v. Levinson*, 389 A.2d 1063 (Pa. 1978).

3. These charges arose out of Levinson's alleged solicitation of certain architects doing business with the City of Philadelphia to buy tickets to a Democratic fund raising dinner during the 1972 presidential campaign, and his allegedly inconsistent testimony before the 1972 and 1974 investigating grand juries. *Id.* at 1064.

4. See 42 PA. CONS. STAT. ANN. § 702 (Purdon Supp. 1978), which gives the trial judge the authority to certify certain issues to the superior court.

5. Levinson claimed that (1) he was denied due process of the law by the refusal to allow him to examine the grand jury minutes which denied him a preliminary hearing; (2) the substitution of six jurors who were sworn January 15, 1975, was unauthorized under the laws of Pennsylvania; and (3) a former grand juror who was present when the 1974 Investigating Grand Jury voted on the Fourteenth Presentments was an unauthorized person in the grand jury room, and therefore the indictment should have been dismissed. 389 A.2d at 1064.

After granting the motion for certification and allowing the appeal, the superior court reversed the trial court's order and quashed the indictment on the ground that the substitution of the grand jurors was unauthorized under the laws of Pennsylvania.⁶ The Supreme Court of Pennsylvania granted the Commonwealth's petition for leave to appeal,⁷ and affirmed the decision of the superior court, holding that the substitution of the six grand jurors was prejudicial to the defendant and unprecedented in Pennsylvania law.

Writing for the majority, Justice Manderino first noted the arguments raised by the prosecution. The prosecution initially contended that the substitution of the jurors was statutorily authorized, or in the absence of statutory authority, that the supervising judge had inherent discretionary power to add members to the grand jury.⁸ Next, the prosecution contended that if the substitutions were illegal, the new grand jurors should be afforded *de facto* legitimacy.⁹ Alternatively, the prosecution argued that even if the addition of the new jurors was unlawful, the presentment was not defective since the defendant failed to show prejudice, and even if the presentment was defective, this defect was cured by the subsequent indictment of the regular grand jury.¹⁰

In considering the prosecution's first contention, the court construed the Act of March 31, 1860,¹¹ which authorized the substitution of grand or petit jurors. The majority concluded that such

6. *Commonwealth v. Levinson*, 239 Pa. Super. Ct. 387, 362 A.2d 1080, *aff'd*, 389 A.2d 1062 (Pa. 1978). The superior court reached this conclusion because Rule 201 of the Pennsylvania Rules of Criminal Procedure provides that a grand jury shall consist of not less than fifteen nor more than twenty-three members. The 1974 Investigating Grand Jury originally impaneled twenty-three jurors. Therefore, even without the six jurors excused in January of 1975 and two other original jurors who were subsequently excused, the panel would have met the minimum standard of required members set forth by the rules.

7. 389 A.2d at 1064.

8. *Id.*

9. *Id.* at 1064-65.

10. *Id.*

11. The Act of March 31, 1860, Pub. L. No. 427, reads as follows:

All courts of criminal jurisdiction of this commonwealth shall be and are hereby authorized and required, when occasion shall render the same necessary, to order a tales de circumstantibus, either for the grand or petit jury, and all talesmen shall be liable to the same challenges, fines and penalties as the principal jurors: Provided, that nothing herein contained shall repeal or alter the provisions of . . . "An act establishing a mode of drawing and selecting jurors in and for the city and county of Philadelphia."

PA. STAT. ANN. tit. 17, §§ 1152, 1153 (Purdon 1962) (partially repealed by Pennsylvania Rules of Criminal Procedure 1109 and 1125(3)).

substitutions are authorized only when the panel from which the jury is to be selected falls below the number that is necessary to form a legal jury, but that no substitutions can occur after the original jury has been sworn and begun its work.¹² To illustrate the absurdity of permitting substitutions after the original panel has been sworn, Justice Manderino hypothesized that if the statute permits the substitution of grand jurors, it also permits the substitution of petit jurors after they have begun to hear the evidence. Justice Manderino summarily stated that such a proposition was so at odds with our concept of trial by jury that it required no further comment.¹³ To further support his conclusion, Justice Manderino acknowledged the common law rule which required that the jury be dismissed if a juror failed to appear after being sworn.¹⁴ To temper the harshness of this common law rule, he noted that the legislature enacted Rule 1108, which provides for alternate petit jurors.¹⁵ Manderino maintained, however, that grand juries have eight built-in alternatives since twenty-three may be chosen but only fifteen are required for a legal quorum.¹⁶ Thus, he reasoned, a statutory enactment similar to Rule 1108 for grand juries is unnecessary.

Justice Manderino then dismissed the Commonwealth's contention that the supervising judge had the inherent authority to substitute the jurors by distinguishing *In re January 1974 Philadelphia County Grand Jury Investigation*.¹⁷ He maintained that

12. 389 A.2d at 1066.

13. *Id.* at 1065.

14. For a discussion of the common law rule regarding the dismissal of the entire jury if one of the jurors does not complete his service, see *Lillie v. American Can & Foundry*, 209 Pa. 161, 58 A. 272 (1904); *Pennell v. Percival*, 13 Pa. 196 (1850).

15. PA. R. CRIM. P. 1108.

16. In essence, the majority derived this line of reasoning from the decision of the superior court. See *Commonwealth v. Levinson*, 239 Pa. Super. Ct. 387, 401, 362 A.2d 1080, 1088 (1976), *aff'd*, 389 A.2d 1062 (Pa. 1978). The superior court compared the statute with PA. R. CRIM. P. 201 and 210, and concluded that the grand jury can consist of fifteen to twenty-three members, although only twelve are required to vote in favor of returning an indictment. With this latitude built into the operation of the grand jury, the superior court believed that any addition to the original panel would not have been necessary even if there had been statutory authority for doing so. See note 6 *supra*.

17. 458 Pa. 586, 328 A.2d 485 (1974). In *Philadelphia County*, the authority of the 1974 Investigating Grand Jury was questioned by nine subpoenaed witnesses because the trial judge ordered its formation and delineated its course of investigation. Normally, an investigating grand jury is created on the request of the executive branch (usually the attorney general's office), but the trial judge ordered the investigation in *Philadelphia County* on his own motion.

Philadelphia County held only that a supervising judge could, on his own motion, initiate a grand jury investigation, and thus that case had no bearing on whether a judge has authority to add to a jury's complement after it has been sworn. Manderino likewise distinguished *State Dental Council and Examining Board v. Pollack*,¹⁸ contending that under *Pollack* the acts of *de facto* officials are given effect only when the officials act from the inception of the proceeding which is being challenged. Justice Manderino concluded, therefore, that the *de facto* rule should not be applied where, as in *Levinson*, such persons act as public officials for only part of the relevant proceeding.¹⁹ The majority then proceeded to illustrate the manner in which the defendant was prejudiced by the presence of the six substituted grand jurors. First, the court reasoned, since no common law authority could be found for the substitution of jurors, these jurors represented unauthorized persons in the jury room and thereby prejudiced the defendant by participating in the voting for the presentment.²⁰ Second, the court acknowledged the holding of *United States ex rel. McCann v. Thompson*,²¹ in which the United States Court of Appeals for the Second Circuit stated that every grand juror need not be in attendance for the presentation of each piece of evidence considered by the jury. However, the majority distinguished *Thompson*, concluding that in the instant case a substantial percentage of the jury was absent from a significant portion of the presentation of the evidence, thus causing prejudice to the defendant.

Finally, the majority was not persuaded that the defect in the presentment was cured by the subsequent indictment. To accept such a contention would, according to the court, result in elevating

18. 457 Pa. 264, 318 A.2d 910 (1974) (defendant questioned the authority of some of the board members).

19. The reason for treating *de facto* officials as *de jure* officials is to insulate *de facto* officials from repetitious suits for official acts while in office, when it is later discovered that the official was not authorized to hold that office as a *de jure* official. *Id.*

20. Compare *Commonwealth v. Columbia Inv. Corp.*, 457 Pa. 353, 325 A.2d 289 (1974) (permitting a court stenographer to be present during the hearing of evidence), and *Commonwealth v. Hegedus*, 44 Pa. Super. Ct., 157, 165 (1910) (warning against the impropriety of a stenographer's presence during grand jury deliberations and voting) with *Levinson*. Rule 209 of the Pennsylvania Rules of Criminal Procedure permits only the jury to be present during deliberations or voting. The majority admitted that this rule specifically applies to indicting grand juries, but asserted that it was equally applicable to investigating grand juries. 389 A.2d at 1069.

21. 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944).

investigating grand juries above the law.²² Nor was the majority persuaded that *United States v. Calandra*,²³ in which the United States Supreme Court held that a grand jury can hear evidence seized in violation of a defendant's constitutional rights, compelled a contrary result. Rather, Justice Manderino reasoned that the *Calandra* Court's interest in the orderly progress of grand jury investigations would be furthered if the Levinson indictment were quashed, since it would assure regularity in the formulation and proceeding of the investigating grand jury.²⁴

Justice Roberts in his dissent²⁵ stated that the indictment should not have been quashed on the basis of the substitution of the six grand jurors since the ramifications of that holding would be to delay the administration of justice and to create remedies for rights that have not been injured.²⁶ His argument for sustaining the indictment was based on the observation that federal courts have not quashed indictments for the substitution of grand jurors,²⁷ for the failure of all grand jurors to hear all of the evidence against a defendant,²⁸ or for the prosecution's summation of the evidence for the jurors.²⁹ Finally, Roberts agreed with the prosecution that *Calandra* gives a grand jury greater latitude since a grand jury proceeding is

22. *But see* Commonwealth v. Evans, 190 Pa. Super. Ct. 179, 154 A.2d 57 (1959) (defendant not prejudiced by remarks made by the governor on television the night before grand jury was to convene); Commonwealth v. Gross, 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952) (defendant not prejudiced before indicting grand jury because of contempt citation he received for refusing to testify before the investigating grand jury).

23. 414 U.S. 338 (1974). In *Calandra*, the Supreme Court held that evidence which was seized in violation of the defendant's fourth amendment rights should not be excluded from a grand jury proceeding.

24. 389 A.2d at 1070.

25. *Id.* (Roberts, J., dissenting). (Justice O'Brien joined in Justice Roberts' dissent).

26. *Id.* at 1072. *See* *In re Meckley*, 50 F. Supp. 274 (M.D. Pa. 1943). In *Meckley*, the substitution of grand jurors was based on a federal statute, 28 U.S.C. §§ 419, 421 (1940) (current version at 18 U.S.C. § 3321 (1970)). A close reading of the federal statute reveals that it closely resembles Pennsylvania's statute, which authorized the calling of talesmen. But the important statute in *Meckley* was that which specifically allowed the replacement of a grand juror at any time during the proceeding. *See* 28 U.S.C. § 421 (1940) (current version at FED. R. CRIM. P. 6(g)). Pennsylvania has no analogous statute or rule at this time.

27. *United States ex rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944) (no prejudice to the defendant when seven jurors missed various portions of the testimony since the collective mind of the jury was intact).

28. *United States v. Mitchell*, 397 F. Supp. 166 (D.D.C. 1974) (court held it permissible for the prosecuting attorney to summarize the parts of the testimony for grand jurors even though they had all heard the testimony when it was originally given and had entire record available for consultation).

29. *See* note 23 *supra*.

an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted, not an adversary proceeding in which guilt or innocence is adjudicated.³⁰

In his dissent,³¹ Justice Pomeroy stated that the indictment should be sustained because the addition of the six jurors was clearly harmless error. Pomeroy maintained that the investigating grand jury in *Levinson* had, at all times, maintained a legal quorum, and that the indicting grand jury had other evidence on which to base its indictment aside from the allegedly invalid presentment. The majority, he stated, had overlooked the difference between investigating grand juries and indicting grand juries, and relied to a certain extent on precedent applicable solely to indicting grand juries.³²

The full impact of *Commonwealth v. Levinson* can be understood only in light of the functioning of grand juries in Pennsylvania. Called at the request of the attorney general³³ or at the discretion of the supervising judge,³⁴ a grand jury investigation probes specific areas of criminal conduct that are not easily examined by regular investigative processes.³⁵ In order to accomplish this end, the investigating grand juries are given the power to subpoena witnesses and documents, and to compel compliance with the threat of contempt.

Since investigating grand juries possess these broad powers enabling them to perform extensive research about the subject of their investigations, their presentments³⁶ are generally accepted by in-

30. Justice Roberts further maintained that the supervising judge must have the authority to take reasonably necessary steps to permit an extended grand jury to complete its work. In this respect, Justice Roberts considered criminal activity, particularly governmental corruption, to be too extensive and too involved to require all grand jurors to sit for the entire period of time. 389 A.2d at 1072 (Roberts, J., dissenting).

31. *Id.* (Pomeroy, J., dissenting). (Justice O'Brien also joined in Justice Pomeroy's dissent).

32. *Id.* at 1073.

33. See Segal, Spivak & Costello, *Obtaining a Grand Jury Investigation in Pennsylvania*, 35 TEMP. L.Q. 73 (1963) [hereinafter cited as Segal], for a discussion of the formation of an investigating grand jury.

34. See note 17 and accompanying text *supra*.

35. See Segal, *supra* note 32, at 79.

36. Presentments are reports or conclusions of a grand jury investigation. A presentment is similar to an indictment in that it contains specific charges of crimes and accuses an individual of those crimes, but unlike an indictment, it lacks the legal sufficiency to initiate criminal proceedings. For a discussion of grand jury investigations, see Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932).

dicting grand juries as instructions for a true bill of indictment. In fact, in *Commonwealth v. Webster*³⁷ the Pennsylvania Supreme Court recognized that in many instances where an indicting grand jury receives a presentment from an investigating grand jury, the indicting grand jury will merely "rubber stamp" the presentment into an indictment.³⁸ Moreover, in *Commonwealth v. McCloskey*,³⁹ the Pennsylvania Supreme Court stated that an indicting grand jury can accept an investigating grand jury's presentment in lieu of a complaint and preliminary hearing without violating the due process requirements of the Constitution.⁴⁰ Thus, as a result of the force and effect given to the presentments of investigating grand juries, courts are faced with the problem of determining whether irregularities in the functioning of investigating grand juries require an invalidation of the presentment and quashing of the subsequent indictment. Specifically, the *Levinson* court was confronted with the problem of whether the substitution of six grand jurors one year after the investigation began was such an irregularity that it required the invalidation of the presentment and corresponding indictment. The *Levinson* court concluded that the irregularity was of such magnitude that it did require invalidation of the presentment and subsequent indictment.

In the past, Pennsylvania courts have carefully scrutinized cases involving an alleged pre-indictment irregularity and, where possible, have found a basis for sustaining the indictment. For example, in *Commonwealth v. Gross*,⁴¹ the superior court held that an investigating grand jury's violation of the defendant's fifth amendment rights was a harmless pre-indictment irregularity. The superior court reasoned that other evidence existed upon which the indicting grand jury could have based its decision, and therefore it should be presumed that the tainted presentment did not provide the main

37. 462 Pa. 125, 337 A.2d 914 (1975) (court sustained information as a valid way to begin criminal proceedings and added that indictments are little more than investigating grand jury presentments which are "rubber-stamped" into legal indictments by indicting grand juries).

38. *Id.* at 132, 337 A.2d at 917.

39. 443 Pa. 117, 277 A.2d 764 (1974) (trial court's acceptance of investigating grand jury's presentment in lieu of a complaint and preliminary hearing was not a violation of due process).

40. *Id.* at 140, 277 A.2d at 776.

41. 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952) (court held defendant was not prejudiced because the indictment against him was based on a presentment which stated that he refused to testify before the indicting grand jury).

basis for the indictments.⁴² This ruling was somewhat clarified in *Commonwealth v. Evans*,⁴³ where the superior court stated that preindictment irregularities should not result in the quashing of an indictment unless the irregularities were clearly prejudicial to the defendant.⁴⁴ Moreover, several defendants have unsuccessfully attempted to quash indictments based upon insufficient warnings against self-incrimination prior to testifying before a grand jury.⁴⁵ The Supreme Court of Pennsylvania has maintained that since a grand jury proceeding is an *ex parte*, non adversary proceeding, the warnings which were given to the defendants were sufficient safeguards against self-incrimination, and were not required to be as extensive as those afforded to defendants in custodial interrogations⁴⁶ or adversarial proceedings.⁴⁷ Although these decisions illustrate the trend in Pennsylvania to uphold indictments, they also reveal that Pennsylvania courts recognize the possibility that prejudicial pre-indictment irregularities may be grounds for quashing an indictment. *Levinson* represents a justifiable departure from the trend to uphold indictments, since in *Levinson* the pre-indictment irregularities were distinguishable from those irregularities involved in prior decisions and, more importantly, were prejudicial to the defendant.

In prior decisions, the action or inaction of a legally constituted grand jury was attacked as being without the bounds of the grand jury's authority. In *Levinson*, however, the focus of attack was not upon the action of a legally constituted grand jury, but rather upon the legality of the constitution of the jury itself: it is in this distinction that the prejudice present in *Levinson* emanates. Six grand jurors who had neither seen nor heard the defendant testify in 1974 were asked to return a presentment for perjury. Since only twelve jurors are required to vote in favor of returning a presentment, the votes of these six substituted jurors played a crucial role in the

42. *Id.* at 92, 92 A.2d at 254.

43. 190 Pa. Super. Ct. 179, 154 A.2d 57 (1959) (court held that there was no prejudice to the defendant because the governor made inflammatory remarks about the defendant on television the night before the grand jury convened).

44. *Id.* at 201, 154 A.2d at 69.

45. See notes 20 & 27 *supra*.

46. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required prior to custodial interrogation).

47. See *Commonwealth v. Columbia Inv. Corp.*, 457 Pa. 353, 325 A.2d 289 (1974), for a discussion of warnings required prior to testifying before a grand jury.

decision to indict. As Justice Manderino pointed out, investigating grand juries investigate areas of suspected criminal activity, and evidence concerning any one individual may contain much that is exculpatory as well as that which is inculpatory.⁴⁸ Thus, as a result of the inability of these six jurors to hear possible exculpatory evidence as well as their lack of opportunity to fully observe the defendant's demeanor and ability to answer questions, the probability of prejudice was sufficiently great to warrant the quashing of the presentment and subsequent indictment.

Although federal courts have permitted grand jurors to be substituted after some evidence has been heard,⁴⁹ and have permitted the summation of evidence to the grand jury to a prosecuting attorney,⁵⁰ reasoning in these federal decisions are inapplicable to the *Levinson* situation. First, unlike any Pennsylvania statute, the Federal Rules of Criminal Procedure specifically provide for the substitution of grand jurors at any time.⁵¹ Moreover, *United States v. Mitchell*,⁵² the decision cited by the dissent as permitting a summation of the evidence, permitted the summation only for jurors who had heard the entire testimony throughout the course of the proceeding, and the summation was used solely to refresh their memories. In *Thompson*,⁵³ the court of appeals held that not all grand jurors must hear all of the evidence; but the *Thompson* court, speaking through Judge Learned Hand, did acknowledge that in limited instances it might be possible that the absence of some of the grand jurors could

48. 389 A.2d at 1068.

49. *In re Meckley*, 50 F. Supp. 274 (M.D. Pa. 1943). Because federal law required a minimum of sixteen grand jurors, the *Meckley* court selected two additional jurors after two of the original seventeen grand jurors were excused, even though the jury had begun to hear testimony.

50. *United States v. Mitchell*, 397 F. Supp. 166 (D.D.C. 1974) (court held it permissible for the prosecuting attorney to summarize parts of the testimony for grand jurors even though they had all heard the testimony when it was originally given and had the entire record available for consultation).

51. FED. R. CRIM. P. 6(g) (1972) which reads as follows:

A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning of expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

52. See note 50 *supra*.

53. *United States ex rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944) (no prejudice to the defendant when seven jurors missed various portions of the testimony since the collective mind of the jury was intact).

prejudice the defendant if the evidence missed by those jurors was exculpatory in nature.⁵⁴ The majority in *Levinson* reasoned that the *Thompson* holding was applied to indicting grand juries rather than investigating grand juries, and further, that the exception acknowledged by Judge Hand was more applicable to investigating grand juries, since investigating grand juries hear evidence which is exculpatory as well as that which is inculpatory.⁵⁵ Therefore, even if *Thompson* were to be controlling in *Levinson*, Hand's exception would apply since *Levinson* involved an investigating rather than an indicting grand jury.

Finally, *United States v. Calandra*⁵⁶ and its progeny support the invalidation of the presentment and the subsequent indictment in *Levinson*. Although the *Calandra* court upheld an indictment despite the presence of illegally seized evidence, the Court added a caveat that grand juries themselves may not violate a valid privilege established by the Constitution, statute or the common law.⁵⁷ This caveat was relied upon in *United States v. Hinton*⁵⁸ and *Commonwealth v. Field*,⁵⁹ and in each of these cases indictments were quashed since the grand juries *themselves* obtained evidence by violating the defendants' fifth amendment privilege against self-incrimination.⁶⁰ Apparently, it was the illegal action of the grand juries in obtaining the evidence which induced the *Hinton* and *Field* courts to invalidate the presentment and indictments.⁶¹ In *Levinson*, since the judge lacked both the statutory and inherent authority to add six grand jurors,⁶² at no time was the 1974 Investigating Grand Jury acting legally. This is distinguishable from the

54. *Id.* at 607.

55. 389 A.2d at 1068.

56. 414 U.S. 338.

57. *Id.* at 346.

58. 543 F.2d 1002 (2d Cir. 1976) (indicting grand jury compelled defendant to testify in violation of her fifth amendment rights).

59. 231 Pa. Super. Ct. 53, 331 A.2d 744 (1974). In *Field*, the investigating grand jury compelled the defendant to testify without even minimal warnings against self-incrimination. The superior court held this to be a violation of Field's fifth amendment rights; therefore, the presentment and indictment based on that presentment were quashed.

60. Each court distinguished *Hinton* and *Field* from *Calandra* because the grand jury in *Calandra* only viewed the evidence which was illegally obtained by other sources, while the grand juries in *Hinton* and *Field* themselves illegally obtained the evidence.

61. The court in *Field* invalidated both a presentment and an indictment. 231 Pa. Super. Ct. 53, 331 A.3d 744 (1974). On the other hand, the court in *Hinton* was only concerned with an indictment. 543 F.2d at 1002.

62. 389 A.2d at 1065.

situation in *Calandra* where the grand jury was not considered to have acted illegally by merely viewing evidence which was illegally seized in violation of the defendants' fourth amendment right. However, in *Hinton* and *Field*, the grand juries *themselves* violated the defendants' fifth amendment rights against self-incrimination by compelling them to testify at the grand jury proceeding. Since in *Levinson* the grand jury was not a legally constituted one, therefore, all of its actions were illegal. Thus, as *Hinton* and *Field* point out, where a grand jury acts illegally, the presentment handed down by it must be invalidated.

Commonwealth v. Levinson clearly demonstrates that there is no authority in Pennsylvania to substitute grand jurors after the panel has been sworn and begun its work. Pennsylvania courts must now accept the rationale of *Levinson* and closely scrutinize any juror substitutions to insure that the defendant is not thereby prejudiced. Although the *Levinson* principle may hamper the functions of grand juries which cannot maintain a quorum for their entire term, the Pennsylvania Supreme Court has determined that the protection afforded to criminal defendants during the grand jury process is of the utmost importance; as a result, *Levinson* will endure in the absence of legislative response.

Richard J. Schubert

