

**IN THE SUPREME COURT OF PENNSYLVANIA**

\_\_\_\_\_  
[REDACTED]  
\_\_\_\_\_

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

\_\_\_\_\_  
**PETITION [REDACTED] BRIEF IN SUPPORT OF HIS  
EMERGENCY PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**  
\_\_\_\_\_

Efrem M. Grail (No. 81570)  
Brian C. Bevan (No. 307488)  
**THE GRAIL LAW FIRM**  
436 Seventh Avenue  
Koppers Building, 30th Floor  
Pittsburgh, PA 15219  
(412) 227-2969  
[egrail@grailaw.com](mailto:egrail@grailaw.com)  
[bbevan@grailaw.com](mailto:bbevan@grailaw.com)

Counsel to Petitioner in:

*In re: Petition of* [REDACTED]

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>TABLE OF CITATIONS</b>	<b>iv</b>
<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. STATEMENT OF JURISDICTION</b>	<b>3</b>
<b>III. ORDER OR OTHER DETERMINATION IN QUESTION</b>	<b>3</b>
<b>IV. STATEMENT OF SCOPE AND STANDARD OF REVIEW</b>	<b>4</b>
<b>V. STATEMENT OF QUESTIONS INVOLVED</b>	<b>4</b>
<b>VI. STATEMENT OF THE CASE</b>	<b>5</b>
<b>VII. SUMMARY OF THE ARGUMENT</b>	<b>10</b>
<b>VIII. ARGUMENT FOR PETITIONER</b>	<b>12</b>
<b>A. THE SUPERVISING JUDGE COMMITTED AN ERROR OF LAW WHEN HE DETERMINED THAT THE PUBLICATION OF THE REPORT WITHOUT REDACTION OF PETITIONER’S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS WOULD NOT VIOLATE MULTIPLE STATUTORY AND CONSTITUTIONAL PROHIBITIONS</b>	<b>12</b>
<b>B. BY INCLUDING PETITIONER’S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS IN THE REPORT THE OFFICE OF ATTORNEY GENERAL VIOLATED ITS CLEAR AND SELF-EXECUTING DUTY TO MAINTAIN THE CONFIDENTIALITY OF SUCH RECORDS, THUS CONSTITUTING A SIGNIFICANT ETHICAL BREACH</b>	<b>18</b>

**C. THE SUPERVISING JUDGE HAS A DUTY TO PROTECT THE CONFIDENTIALITY OF PETITIONER’S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS, EVEN WHERE THE OFFICE OF ATTORNEY GENERAL HAS OBTAINED THEM LAWFULLY AND THE COURT FINDS THERE IS A VALID WAIVER** 21

**1. The Authority Which the Court Below Cites Does Not Support The Proposition That the Waiver at Issue Here was General and Broad, Rather Than Specific and Limited** 23

**2. Petitioner’s Waiver at Issue is a Limited and Specific One, and Not General or Broad Enough to Lose the Expansive Statutory and Constitutional Protections Pennsylvania Affords His Confidential, Privileged Medical/Psychotherapist Evaluation and Treatment Communications and Descriptions, Protections the Supervising Judge Failed to Protect** 28

**D. ISSUE OF FIRST IMPRESSION** 34

**IX. STATEMENT OF THE RELIEF SOUGHT** 35

**X. CONCLUSION** 36

**APPENDIX**

**Exhibit A – June 14, 2018 Supervising Judge Order**

**Exhibit B – July 2, 2018 Supervising Judge Opinion**

**Exhibit C – June 8, 2018 Petitioner Motion to Redact Statutory and Constitutionally Protected Information from the GJ Report**

**Exhibit D – June 14, 2018 Petitioner Motion Hearing Transcript with Exhibits**

**Exhibit E – June 13, 2018 Petitioner Executed Affidavit**

**Exhibit F – Petitioner’s Post-Hearing Brief in Support of His Motion to Redact Statutory and Constitutionally Protected Information from GJ Report**

**Exhibit G – Unredacted and Proposed Redacted Appendix of GJ Report, p. 370-373**

**TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<u>Bagwell v. Pa. Dep't. of Education</u> , 103 A.3d 409, 420 (Pa. Cmwlth. 2014)	22, 28, 29
<u>Carbis Walker, LLP v. Hill, Barth &amp; King, LLC</u> , 930 A.2d 573, 577 n.2 (Pa. Super. 2007)	20
<u>Commonwealth v. Blystone</u> , 549 A.2d 81, 87 (Pa. 1988)	24, 25
<u>Commonwealth v. Chmiel</u> , 738 A.2d 406, 414 (Pa. 1999)	29
<u>Commonwealth v. Crouse</u> , 729 A.2d 588, 595 (Pa. Super. 1999)	27
<u>Commonwealth v. Gonzalez</u> , 109 A.3d 711 (Pa. Super. 2015)	13
<u>Commonwealth v. Eck</u> , 605 A.2d 1248 (Pa. Super. 1992)	13
<u>Commonwealth v. Enimpah</u> , 106 A.3d 695, 699 (Pa. 2014)	27
<u>Commonwealth v. Sandusky</u> , 70 A.3d 886, 898 (Pa. Super. 2013)	28
<u>Doe v. Ensey</u> , 220 F.R.D. 422, 428 (M.D. Pa. 2004)	32, 33
<u>Gormly v. Edgar</u> , 995 A.2d 1197, 1204 (Pa. Super. 2010)	13
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965)	16
<u>Herman Goldner Co., Inc. v. Cimco Lewis Indus.</u> , 2002 WL 1880733, *1 (Pa. Com. Pl. July 19, 2002)	19
<u>Hoffa v. United States</u> , 385 U.S. 293, 302 (1966)	24, 25
<u>In re The 1979 Allegheny County Investigating Grand Jury</u> , 490 Pa. 143 (1980)	14
<u>In re "B".</u> , 394 A.2d 419, 426 (Pa. 1978)	12, 34

<u>In re Thirty-Third Statewide Investigating Grand Jury</u> , 86 A.3d 204, 215 (Pa. 2014)	4
<u>Johnsonbaugh v. Dep’t of Public Welfare</u> , 665 A.2d 20, 28 (Pa. Cmwlth. 1995) aff’d, 701 A.2d 1357 (Pa. 1997)	25, 28
<u>Kopko v. Miller</u> , 892 A.2d 766, 770 (Pa. 2006)	4
<u>Levy v. Senate of Pennsylvania</u> , 65 A.3d 361, 367 (Pa. 2013)	4
<u>Lopez v. United States</u> , 373 U.S. 427, 438 (1963)	24, 25
<u>M. v. State Bd. of Med.</u> , 725 A.2d 1266 (Pa. Cmwlth. 1999)	26, 27
<u>Octave ex. rel. Octave v. Walker</u> , 103 A.3d 1255 (Pa. 2014)	32
<u>Roe v. Wade</u> , 410 U.S. 113 (1973)	16
<u>Rost v. State Bd. of Psychology</u> , 659 A.2d 626, 629 (Pa. Cmwlth. 1995)	26
<u>Sprague v. Walter</u> , 656 A.2d 890 (Pa. Super. 1995)	26
<u>Stanley v. Georgia</u> , 394 U.S. 557 (1969)	16
<u>Turk v. Oiler</u> , No. 09-CV-381 (N.D. Ohio Feb. 1, 2010)	17
<u>Whalen v. Roe</u> , 429 U.S. 589, 599-600 (1976)	16
<u>Zane v. Friends Hospital</u> , 836 A.2d 25, 31-32 (Pa. 2003)	15
 <b><u>Ethics Opinions</u></b>	
ABA Formal Ethics Opinion 06-440	20
 <b><u>Regulations</u></b>	
45 CFR Part 164, Sub. E, 45 C.F.R. §§ 164.500 – 164.534 (“Privacy of Individually Identifiable Health Information”)	17

**Rules of Professional Conduct**

Pa. Rule of Professional Conduct 4.4 19

**Statutes**

42 Pa. C.S. § 702(b) 3, 8

42 Pa. C.S. § 722(5) 3

42 Pa. C.S. § 5929 1, 14, 34

42 Pa. C.S. § 5944 2, 13, 19, 20, 29

50 P.S. §§ 7101-7503 14, 34

I. **INTRODUCTION**

This emergency appeal is different from all others arising out of the Fortieth Statewide Investigating Grand Jury Report No. 1 (“the Grand Jury Report,” or, “the Report”). It seeks this Court’s critical protection of an individual’s confidential, privileged medical/psychotherapist evaluation and treatment records, which are safeguarded by two privileges, a state and a federal statute, and both the Pennsylvania and the U.S. Constitutions. Without this Court’s intervention, individual privacy rights long-recognized and protected by the Commonwealth and the United States will be lost on a wide scale resulting in serious consequences for all. In the face of the Pennsylvania Office of Attorney General’s (“OAG”) lack of any basis to violate privilege and confidentiality protections, and the Supervising Judge’s unwillingness to act, Petitioner, [REDACTED] seeks this Court’s emergency and last resort intervention.

The OAG, in its effort to publish [REDACTED] investigative files of [REDACTED] complaints made decades ago about alleged actions occurring even decades before that, obtained private medical communications and other information protected by the physician-patient privilege,<sup>1</sup> the psychotherapist-

---

<sup>1</sup> 42 Pa. C.S. § 5929.

patient privilege,<sup>2</sup> confidentiality provisions of the Pennsylvania Mental Health Procedures Act (“MHPA”)<sup>3</sup>, state and federal constitutional protections of private information and reputation, and even the federal HIPAA privacy rule<sup>4</sup>. Despite such entrenched confidentiality protections, the OAG is preparing to wholly ignore his own self-executing duty to protect obviously-privileged confidences unless this Court acts to redact the Grand Jury’s Report. Even were a waiver, limited or otherwise, to be found, these multiple duties to maintain confidentiality against public release apply, as this Court has itself recognized. The Grand Jury Supervising Judge, in adopting a legally inconsistent and erroneous view of the nature of waiver here, refused to carry out his duty to protect the rights to the confidentiality of personal, medical and psychotherapist diagnostic and treatment information of Petitioner (and those of others whose confidences the OAG will violate upon publication of the Report). The Judge has failed to accord the information at issue the heightened status of protection it is afforded under law, and in failing to do so, has violated Petitioner’s statutory and constitutional privacy and due process protections. Petitioner thus seeks this Court’s Review and order in the nature of mandamus relief to compel the redaction of all of his confidential, privileged

---

<sup>2</sup> 42 Pa. C.S. § 5944.

<sup>3</sup> 50 P.S. § 7111.

<sup>4</sup> 45 C.F.R. § 164.500-534 (“Privacy of Individually Identifiable Health Information”).

medical/psychotherapist evaluation and treatment communications and descriptions, and information stemming from them, from any public release of the Fortieth Statewide Investigating Grand Jury's Report No. 1.

**II. STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction pursuant to 42 Pa. C.S. § 722(5) and Pa.R.A.P. 3331(a)(3), (a)(5), or alternatively, as a collateral order under Pa. R.A.P. 313. The Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury, has certified his June 14, 2018 Order for immediate appeal pursuant to 42 Pa. C.S. § 702(b) and Pa. R.A.P. 312 and 341.

**III. ORDER OR OTHER DETERMINATION IN QUESTION**

The Order to be reviewed is the Order entered on June 14, 2018, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury<sup>5</sup>, which states as follows:

██████████, this 14<sup>th</sup> day of June, 2018, the MOTION by ██████████  
██████████ (sic) to Redact Staturorily (sic) and Constit  
n from the Grand Jury Report is **DENIED**.

The Request to Certify this matter for immediate appeal is **GRANTED** as the Court is of the opinion under 42 Pa. C.S. § 702(b)) (sic) that this ORDER denying the Motion to Redact Grand Jury Report No. 1 or for Evidentiary Hearing involves controlling questions of law, specifically the legal issues

---

<sup>5</sup> June 14, 2018 Order attached as Exhibit "A".

raised in the Motion, as to which there is substantial ground for differences of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this matter.

The Court will be issuing an opinion in the near future.

The Opinion to be reviewed is the Opinion issued by the Supervising Judge on July 2, 2018<sup>6</sup>, affirming his June 14, 2018 Order.

**IV. STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The Court identified three questions for Petitioner to address on appeal (see Statement of Questions Involved, immediately below). Each of the Questions Involved are questions of law. The Supreme Court's standard of review over questions of law is *de novo*, and the scope of review is plenary. In re Thirty-Third Statewide Investigating Grand Jury, 86 A.3d 204, 215 (Pa. 2014) (citing Levy v. Senate of Pennsylvania, 65 A.3d 361, 367 (Pa. 2013); Kopko v. Miller, 892 A.2d 766, 770 (Pa. 2006)).

**V. STATEMENT OF THE QUESTIONS INVOLVED**

1. Whether publication of the Report without redaction of Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions violates no less than five statutory and constitutional prohibitions?

*Answered by the Supervising Judge's July 2, 2018 Opinion in the negative. Petitioner suggests Supervising Judge's Answer should have been in the affirmative.*

---

<sup>6</sup> July 2, 2018 Opinion attached as Exhibit "B".

2. Whether the Office of Attorney General's duty to maintain the confidentiality of such sensitive, privileged records is clear and self-executing, and its violation suggests a significant ethical breach?

*Not addressed by the Supervising Judge's July 2, 2018 Opinion. Petitioner's suggested answer is in the affirmative.*

3. Whether the supervising judge has a duty to protect the confidentiality of privileged medical records, even where the Office of Attorney General has obtained them lawfully and the court finds that there is a valid waiver?

*Not addressed by the Supervising Judge's July 2, 2018 Opinion. Petitioner's suggested answer in the affirmative.*

## VI. STATEMENT OF THE CASE

[REDACTED] On or about

May 4, 2018, Petitioner received the following letter from Senior Deputy Attorney General Daniel J. Dye regarding Grand Jury Report:

You have been named in a grand jury report. Please find enclosed the portion of the report which I have been authorized to release to you by the Supervising Judge of the 40th Statewide Investigating Grand Jury pursuant to 42 Pa. C.S. § 4552(e). You will also find the Court's order providing thirty (30) days to respond from today's date. Please be advised any response may be made public. This matter may be discussed with your attorney. However, any additional disclosure may be subject to criminal penalties enumerated within the Grand Jury Act or applicable Pennsylvania law.

Attached to the letter from Mr. Dye was the following Order and Notice entered by Judge Krumenacker:

**AND NOW**, this 2nd day of May 2018, pursuant to 42 Pa. C.S. § 4552(e), the Court finds that Report 1 of the 40th Statewide Investigating Grand Jury [REDACTED]

**IT IS ORDERED** that the Attorney for the Commonwealth shall provide a copy of this order to any living party so named. The provision of this order shall constitute sufficient notice.

**IT IS FURTHER ORDERED** that individuals so named shall have 30 days to file a sealed response with the Court, and provide a copy to the Attorney for the Commonwealth.

Attached to the Order and Notice was a four (4) page summary contained in the Appendix of the Report, at pp. 370-373, taken from [REDACTED] records the OAG obtained by Grand Jury Subpoena about a 1994-95 complaint about past conduct against Petitioner, his only one in over forty-five (45) years as a minister.<sup>7</sup> At the time, the [REDACTED] dispatched Petitioner to [REDACTED] for medical and psychological “evaluation and treatment.” Report, App. at 371. [REDACTED] provides integrated psychological, spiritual and physical treatment [REDACTED]

[REDACTED]<sup>8</sup>

---

<sup>7</sup> Petitioner in no way concedes that there is any truth in the decades-old complaint which the Report reiterates about him.

Starting towards the bottom of pg. 371 of the Report (Appendix) and continuing through to the bottom of pg. 373, the Report contains Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions from while he was an inpatient at [REDACTED]. The information in these pages stems from Petitioner's communications to [REDACTED] providers, and also tends to expose his communications about his innermost thoughts about himself and his mental health.

On June 8, Petitioner through counsel petitioned Judge Krumenacker for an order redacting the aforementioned confidential and privileged material from the four-page Appendix<sup>9</sup>, and on June 12, Judge Krumenacker, recognizing the unique nature of Petitioner's objections and the potential for significant but avoidable prejudice to Petitioner upon the release of the Report in its current form, scheduled a hearing on the matter for June 14 in the Pittsburgh Grand Jury headquarters. At the hearing, the Commonwealth presented a witness, one of its investigators, Special Agent ("SA") Kelly Roberts, who testified that the [REDACTED] files which the Grand Jury subpoenaed contained some kind of waiver executed by some (but not all) of the persons named in the Grand Jury Report<sup>10</sup>. SA Roberts had no knowledge of

---

<sup>9</sup> Petitioner's June 8, 2018 Motion to Redact Statutorily and Constitutionally Protected Information from the Grand Jury Report is attached as Exhibit "C."

<sup>10</sup> Transcript of the June 14<sup>th</sup> Hearing on Petitioner's Motion is attached as Exhibit "D."

Petitioner executing any waiver or having seen a waiver executed by him, or of the limitations of any of the waivers she testified she had seen in the [REDACTED] files, and the Commonwealth offered no waiver into evidence from Petitioner or anyone else at that time. Admitted as Exhibit 1 for the hearing, however, was Petitioner's Affidavit<sup>11</sup> stating that he had not waived any confidentiality in his inpatient mental health evaluation and treatment records by physicians and psychotherapists at [REDACTED], [REDACTED], excerpted and discussed in the Grand Jury Report<sup>12</sup>.

Following testimony and argument, Judge Krumenacker commissioned a hearing transcript, requested that the OAG review its Grand Jury records to identify if it received any type of waiver as to Petitioner, and allowed the parties to submit supplemental briefs, as he indicated he would be issuing an opinion. In order to maintain his commitment to at that point to release the Report by June 23<sup>rd</sup>, Judge Krumenacker at the conclusion of the Hearing denied Petitioner's Motion to Redact Statutorily and Constitutionally Protected Information from the Grand Jury Report from the bench, certified the question for interlocutory appeal

---

<sup>11</sup> Counsel informed the Court that Petitioner had executed the Affidavit from his bedside at [REDACTED] Hospital, where the previous week he had been admitted (and where he remained throughout the Hearing and after) from the Emergency Room.

<sup>12</sup> Petitioner's June 13, 2018 Executed Affidavit attached as Exhibit "E." (Affidavit is Ex. 1 to June 14, 2018 Hearing Transcript; and Exhibit "C" in Petitioner's Supplemental Appendix to Emergency Petition for Review in the Nature of An Appeal, filed via PACFile at the request of this Court on June 22, 2018).

pursuant to 42 Pa. C.S. § 702(b), consistent with his practice with respect to other Petitioners' motion regarding the Grand Jury Report, and denied Petitioner's further motion for a stay in which to seek appellate review.

In an expedited basis, Petitioner filed an Emergency Petition for Review in the Nature of an Appeal on June 18, 2018. On June 22, 2018, the Supervising Judge provided Petitioner with a document the OAG had provided to him after the Hearing regarding Petitioner's treatment at [REDACTED]<sup>13</sup> (without providing any other of the materials related to Petitioner [REDACTED] that Counsel at the Hearing had moved the Court to order the OAG to produce.). The document purported to be a January 4, 1994, limited waiver executed by Petitioner – twenty-four years ago -- wherein *he authorized the release of confidential information obtained during his evaluation and treatment a* [REDACTED]

[REDACTED] On June 27, 2018, Petitioner filed a Post-Hearing Brief in Support of His Motion to Redact Statutorily and Constitutionally Protected Information from the Grand Jury Report with the Supervising Judge, wherein he argued, *inter alia*, the irrelevancy of the limited waiver<sup>14</sup>. On July 2, the Supervising Judge issued an opinion affirming his June 14 Order.

---

<sup>13</sup> See Exhibits 4-8 to Ex. D.

<sup>14</sup> Petitioner's Post-Hearing Brief in Support of His Motion to Redact Statutory and Constitutionally Protected Information is attached as Exhibit F.

**VII. SUMMARY OF THE ARGUMENT**

In its current form, the Fortieth Statewide Investigating Grand Jury Report No. 1 contains Petitioner's (and very likely others similarly situated) confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions. This information is of such a sensitive and personal nature that Pennsylvania, through its legislature and its courts, and the United States, through Congress and its courts, saw fit, minus a few exceptions, to protect such information from public disclosure via statute and by Constitution. The Supervising Judge determined that one of the exceptions, waiver of confidentiality, applied based upon the Petitioner executing a limited waiver over twenty (20) years ago in a context completely different from the circumstances surrounding his information today.

The Supervising Judge was in error. Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions at issue remain protected by statute and constitution from disclosure.

To permit the aforementioned information to remain in the Report would constitute a violation of numerous strictly construed statutes and sections of the state and federal constitution that provide broad protections to an individual's confidential, personal, sensitive medical/mental health treatment information. The Supervising Judge's unsound conclusion that Petitioner waived his confidentiality protections is

not supported by the record or the inapposite case law the lower court relied on in its opinion.

The Supervising Judge had an ongoing duty to protect Petitioner's confidential medical/mental health treatment information from public disclosure. He breached that duty by not properly evaluating the waiver at issue. In order for Petitioner to waive his confidentiality in the records at issue, the type of records which have long been afforded expansive protection, he necessarily had to have executed an explicit, comprehensive, global waiver. Such a waiver does not exist here, and the Supervising Judge failed to treat such confidential information with the special, heightened status of protection it has always been given. This Court must act to ensure Petitioner's broadly protected privacy rights are vindicated.

Along with the lower court, the OAG had a clear and self-executing duty to maintain the confidentiality of Petitioner's sensitive, personal medical treatment information. Its inclusion of this material in the Report constituted a breach of this duty of a significant ethical nature.

Additionally, Petitioner submits that this matter presents unique issues of first impression which have significant ramifications far beyond these Grand Jury proceedings and which are of substantial public importance, specifically as to the

nature under Pennsylvania law of the effect of the written waiver, its scope and its limitations, for materials covered by Pennsylvania and United States statutes and provisions of the Pennsylvania and United States Constitutions.

## VIII. ARGUMENT FOR PETITIONER

### A. THE SUPERVISING JUDGE COMMITTED AN ERROR OF LAW WHEN HE DETERMINED THAT THE PUBLICATION OF THE REPORT WITHOUT REDACTION OF PETITIONER'S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS WOULD NOT VIOLATE MULTIPLE STATUTORY AND CONSTITUTIONAL PROHIBITIONS

Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions are protected from public disclosure by an array of statutory and constitutional protections. The Pennsylvania Assembly and Pennsylvania courts have *always* placed such information in a heightened protected status rarely to be publicly disclosed, and only in the most limited of circumstances. The courts, including this Court, have held firm to this approach, even in the most difficult of circumstances.<sup>15</sup>

---

<sup>15</sup> See In re "B", 394 A.2d 419, 426 (Pa. 1978) (In a child custody case, this Court held that a lower court judge did not have the authority to order the mental health provider of the child's mother to disclose her mental health treatment records despite their significance to the court's decision regarding custody. ("We recognize that our holding may, in some cases, make it more difficult for the court to obtain all the information it might desire regarding members of the juvenile's family, or about the juvenile's friends, neighbors, and associates. The individual's right of privacy, however, must prevail in this situation.")); see also, Commonwealth v. Gonzalez,

Under applicable Pennsylvania state law:

No psychiatrist or [licensed psychologist] shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 Pa. C.S. § 5944. The Superior Court holds this privilege in the highest regard, recognizing that such confidential statements are the key to the deepest, most intimate thoughts of an individual seeking solace and treatment. Gormly v. Edgar, 995 A.2d 1197, 1204 (Pa. Super. 2010). The privilege applies not only to testimony of a psychotherapist, but also to records created in the course of the confidential relationships. See also Commonwealth v. Eck, 605 A.2d 1248 (Pa. Super. 1992). The communications between Petitioner and the [REDACTED] [REDACTED] providers are protected under this privilege from disclosure here. They are equally protected by the physician-patient communications' privilege in civil cases, which also protects the confidentiality of the records at issue here, 42 Pa. C.S. § 5929.<sup>16</sup>

---

109 A.3d 711 (Pa. Super. 2015) (Court held in rape case that under the MHPA, the victim's mental health treatment records, without her consent, were privileged and not subject to release).

<sup>16</sup> See also, In re The 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 150 (Pa. 1980) (citing to 42 Pa. C.S. § 5929) ("No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of

The Pennsylvania Mental Health Procedures Act (“MHPA”), 50 P.S. §§ 7101-7503, provides equal if not greater protection for confidential, privileged, medical and psychological diagnosis and treatment records. The MHPA establishes rights and procedures for all voluntary inpatient treatment of mentally ill persons, including the requirement that no records may be disclosed except upon written consent of the patient.<sup>17</sup> This Court has strictly construed the broad scope and protections of the MHPA:

The unambiguous terms contained in the [MHPA] provision regarding the confidentiality of medical records leaves little room for doubt as to the intent of the Legislature regarding this section . . . "[a]ll documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed to anyone." 50 P.S. § 7111(a). The provision applies to all documents regarding one's treatment, not just medical records. Furthermore, the verbiage that the documents " shall be kept confidential" is plainly not discretionary but mandatory in this context-

---

said patient, except in civil matters brought by such patient, for damages on account of personal injuries.”).

<sup>17</sup> Section 111(a) (“Confidentiality of Records.”):

(a) All documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed to anyone except:

- (1) those engaged in providing treatment for the person;
- (2) the county administrator, pursuant to section 110;
- (3) a court in the course of legal proceedings authorized by this act; and
- (4) pursuant to Federal rules, statutes and regulations governing disclosure of patient information where treatment is undertaken in a Federal agency.

In no event, however, shall privileged communications, whether written or oral, be disclosed to anyone without such written consent.

-it is a requirement. The release of the documents is contingent upon the person's written consent and the documents may not be released "*to anyone*" without such consent. The terms of the provision are eminently clear and unmistakable and the core meaning of this confidentiality section of the Mental Health Procedures Act is without doubt--there shall be no disclosure of the treatment documents to anyone.

Zane v. Friends Hospital, 836 A. 2d 25, 31-32 (Pa. 2003) (emphasis in original).

This Court has, further, resoundingly found the MHPA to be a clear and unequivocal statement of the sacrosanct value Pennsylvania places on an individual's private, confidential, sensitive mental health treatment records:

The confidentiality of mental health records is the *sine qua non* of effective treatment. Its purpose is to enable effective treatment of those with mental illnesses by encouraging patients to offer information about themselves freely and without suffering from fear of disclosure of one's most intimate expressions to others and the mistrust that the possibility of disclosures would engender. The importance of confidentiality cannot be overemphasized. ... The purpose of the [MHPA] of seeking 'to assure the availability of adequate treatment to persons who are mentally ill,' 50 P.S. § 7102, would be severely crippled if a patient's records could be the subject of discovery in a panoply of possible legal proceedings.

Id., at 33 – 34 (internal citations omitted.).

In compelling broad disclosure of Petitioners confidential, privileged, medical/psychotherapist evaluation and treatment communications and descriptions, the Supervising Judge was to have considered his right to privacy, which stems from both the state and federal constitutions. This Court established this requisite analytical step when faced with a similar circumstance involving an Investigating Grand Jury:

Clearly, the privacy interest of the patients which is implicated under [the disclosure of their confidential medical records] is the interest in avoiding disclosure of personal matters. This privacy interest finds explicit protection in the Pennsylvania Constitution, Art. 1, § 1, which provides, in pertinent part: ‘All men ... have certain inherent and inalienable rights, among which are those ... of acquiring, possessing, and protecting property and reputation’.

In re The June 1979 Allegheny County Investigating Grand Jury, Id. at 151.

Although Pennsylvania’s privacy protections are stronger, this Court has further recognized that the United States Constitution provides similar protections of privacy against the Government revealing our information and private thoughts and feelings as conveyed to our physicians and psychotherapists.<sup>18</sup>

Confidential medical information enjoys an amplified level of protection under federal statute as well. Under HIPAA, a medical provider and its business associates generally may not use or disclose an individual’s protected health information without a written authorization or without providing the individual the opportunity to agree or object. 45 CFR Part 164, Sub. E (“Privacy of Individually Identifiable Health Information.”). While a grand jury subpoena is an exception to medical record written waiver requirement of the HIPAA privacy rule, more

---

<sup>18</sup> See In re The June 1979 Allegheny County Investigating Grand Jury, Id., at 150-51. (“There can be no doubt that the United States Constitution guarantees a right to privacy. See Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). Cases concerned with the constitutional protection of privacy ‘have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters ... .’ Whalen v. Roe, 429 U.S. 589, 599-600 (1976).”).

stringent state laws and especially constitutional protections that prohibit disclosures of confidential medical information supersede the state's subpoena power and require additional procedural protections not afforded to Petitioner here. See Turk v. Oiler, No. 09-CV-381 (N.D. Ohio Feb. 1, 2010) (Patient's claim for invasion of privacy following the Cleveland Clinic's disclosure of medical records in response to a grand jury subpoena upheld; court found the state's patient-physician privilege *more* protective than HIPAA).

Significantly, the traditional protection in place for subpoenaed information resulting from the secrecy of grand jury proceedings is inapplicable here. The Supervising Judge has already announced his intention to publicly disclose the Report.<sup>19</sup>

The Supervising Judge found that Petitioner waived these statutory and constitutional protections to the confidentiality of his privileged medical/psychotherapist evaluation and treatment communication and descriptions.<sup>20</sup> He was in error. The waiver, as explained more fully below, was limited in nature, only and explicitly permitting [REDACTED] to disclose Petitioner's confidential mental health treatment information to three [REDACTED]

---

<sup>19</sup> Given the nature of the Report, the records would not just be used in discovery in a legal dispute between private parties, or even be restricted to use at trial to which the Commonwealth is a party, but rather would be released for indiscriminate *publication* in a matter of intense public and media interest to date.

<sup>20</sup> Ex. B, at 3-6.

officials. The waiver did not abrogate the statutory and constitutional protections from public disclosure of Petitioner's sensitive, privileged diagnostic and treatment records. It would be a clear violation of Petitioner's statutory physician-patient and psychotherapist-patient privileges, his protections under the MHPA, HIPAA, and both the state and federal constitution to permit his confidential, privileged, medical/psychotherapist evaluation and treatment communications and descriptions to remain in the soon to be publicly disclosed Report. Accordingly, the Supervising Judge committed an error of law in deciding that the publication of the Report without redaction of the information at issue would not violate multiple constitutional and statutory protections afforded Petitioner under the circumstances.

**B. BY INCLUDING PETITIONER'S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS IN THE REPORT THE OFFICE OF ATTORNEY GENERAL VIOLATED ITS CLEAR AND SELF-EXECUTING DUTY TO MAINTAIN THE CONFIDENTIALITY OF SUCH RECORDS, THUS CONSTITUTING A SIGNIFICANT ETHICAL BREACH<sup>21</sup>**

Pennsylvania courts have recognized that "an attorney receiving confidential documents has ethical obligations that may surpass the limitations implicated by the attorney-client privilege and that apply regardless of whether the documents in question retain their privileged status." See Herman Goldner Co., Inc. v. Cimco Lewis Indus., 2002 WL 1880733, \*1 (Pa. Comm. Pl. Jul. 19, 2002). It is these

---

<sup>21</sup> The Supervising Judge did not address this issue in his July 2, 2018 Opinion.

principles that underlie the oft-cited protocol directing counsel, upon discovering the confidential nature of documents, to cease review, notify the owner, and abide by the owner's instructions regarding the documents' disposition. See id., at \*1. The rules concerning documents covered by other privileges and confidentiality protections should be the same; indeed, under the psychotherapist– patient privilege, they must be. (“The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.” 42 Pa. C.S. § 5944).

The OAG had a self-executing duty to take steps to notify each of the holders of the confidentiality privileges upon learning that the files which the ██████████ produced contained confidential documents to which the OAG was not entitled. See, e.g., Pa. Rule of Professional Conduct 4.4(b):

A lawyer who receives a document, including electronically stored information, relating to the representation of the lawyer's client and knows or reasonably should know that the document, including electronically stored information, was inadvertently sent shall promptly notify the sender.<sup>22</sup>

---

<sup>22</sup> Again, the confidential communications between a psychologist or psychiatrist and his client must receive the same protections as those “provided or prescribed by law between an attorney and client.” 42 Pa. C.S. § 5944.

See also, Carbis Walker, LLP v. Hill, Barth & King, LLC, 930 A.2d 573, 577 n.2 (Pa. Super. 2007) (citing with approval ABA's "Formal Opinions" regarding Model Rule 4.4(b)). Indeed, the ABA's "Formal Opinion" on the subject is even stronger, implying ethical breach when an Officer of the Court takes no action upon finding confidential, privileged documents, let alone threaten to publish them ("[T]he Rules do not exhaust the moral and ethical considerations that should inform a lawyer's [conduct]" in such a situation. ABA Formal Ethics Opinion 06-440 (May 13, 2006)).

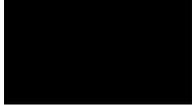
The OAG Special Agent's June 14 hearing testimony raised concerns that during its investigation obtaining and presenting of evidence to the Investigating Grand Jury the OAG did not take its ethical obligations seriously. SA Roberts testified that she did not ask the [REDACTED] for Petitioner's waiver for his treatment at [REDACTED]<sup>3</sup>. She also admitted that she was not instructed by the OAG attorneys to look for Petitioner's waiver, nor did she, other investigators, or the OAG attorneys create a list or otherwise take note of received waivers<sup>24</sup>. And, regardless of how the OAG intended to use the information, at the outset, or later, during its (presumed) presentation to the Court and the Grand Jury, the ethical obligations concerning

---

<sup>23</sup> Ex. D, at 32.

<sup>24</sup> Id., at 32, 35, 36-37.

confidential, privileged treatment information surely attached at the first moment when the OAG determined to release the records wholesale to the public in their unredacted form.

The existence of Petitioner's executed limited waiver as to his treatment at  does not vitiate the OAG's omnipresent self-executing duty under the Pennsylvania Rules of Professional Responsibility and applicable case law to maintain the confidentiality of Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions. As argued below, the limited waiver did not represent a waiver of the dissemination of such sensitive information beyond certain Diocesan employees to the whole world. To include such records in the Report constituted a significant ethical breach of OAG's important and constant duty regarding the confidentiality of these types of information.

**C. THE SUPERVISING JUDGE HAS A DUTY TO PROTECT THE CONFIDENTIALITY OF PETITIONER'S CONFIDENTIAL, PRIVILEGED MEDICAL/PSYCHOTHERAPIST EVALUATION AND TREATMENT COMMUNICATIONS AND DESCRIPTIONS, EVEN WHERE THE OFFICE OF ATTORNEY GENERAL HAS OBTAINED THEM LAWFULLY AND THE COURT FINDS THERE IS A VALID WAIVER<sup>25</sup>**

On January 4, 1994, Petitioner apparently executed the document entitled "Authorization for Release of Confidential Information," wherein Petitioner did:

---

<sup>25</sup> The Supervising Judge did not address this issue in his July 2, 2018 Opinion.

[H]ereby authorize the release of confidential information obtained during my



The Judge had an affirmative obligation to consider the waiver as for whom, as to when, what, and for its limits, as Pennsylvania recognizes the doctrine of limited/selective waiver. See, e.g., Bagwell v. Pa. Dep't. of Education, 103 A.3d 409, 420 (Pa. Cmwlth. 2014) (In the work product context, Court reaffirmed that Pennsylvania courts have recognized selective/limited waiver in circumstances where the parties provided limited disclosures to certain law enforcement authorities, as is at issue in the instant case). The Supervising Judge found the above to constitute a general release.<sup>26</sup> His erroneous determination ignores the content of the waiver, to who and what it applies, and his ongoing duties to protect the confidentiality of such information. This limited waiver, which *does not* explicitly state that it applies to mental health treatment records, *does not* invalidate the statutory and constitutional prohibitions that protect the public disclosure of Petitioner's confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions. The limited waiver *only* applied to disclosing Petitioner's confidential treatment records to 

---

<sup>26</sup> Ex. B., at 3.

and not to the public at large. It was a waiver to a select few, but not to any other and definitely not to the whole world.<sup>27</sup>

**1. The Authority Which the Court Below Cites Does Not Support The Proposition That The Waiver at Issue Here was General and Broad, Rather Than Specific and Limited**

The Supervising Judge does not cite to any cases or statutes that underpin his determination that Petitioner’s waiver was general and broad, rather than specific and limited. In fact, almost all of the authority the lower court cites in support of its reasoning are inapposite to the specific circumstance here: the presence of a specific and limited waiver, but the disclosure of confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions to the public at large without restriction, and not to a typical grand jury or in a litigation setting where confidentiality protections and due process concerning such protections are in effect and honored.

The lower court initially claimed that because Petitioner was sent to [REDACTED] by [REDACTED], he waived any expectation of confidentiality and privacy in his treatment records. The Judge’s argument is negated by Secs. 7103 and 7111 of the MHPA (“Scope of the Act”). Sec. 7103 states:

---

<sup>27</sup> At the very least, before going beyond the scope of the limited waiver by including Petitioner’s sensitive confidential treatment information in the Report, pursuant to its professional and ethical duties, the OAG should have contacted Petitioner to attempt to obtain his consent, or otherwise put him on notice.

This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons.

Sec. 7111 (“Confidentiality of Records.”) provides absolute protection from disclosure, save for a few limited exceptions not relevant here, of all “documents concerning persons in treatment,” making no distinction between involuntary and voluntary inpatient treatment. Therefore, whether or not Petitioner sought of his own accord or was compelled to obtain evaluation and treatment at [REDACTED] by the [REDACTED] has no bearing on the protection of such confidential information.

Courts should approach waiver arguments with caution, particularly those that too greatly diminish the protection of the applicable statutory and constitutional protections in this matter. As evidenced above and below, the Supervising Judge did not apply caution in his waiver analysis, which was rife with errors. He initially relied on Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988), Hoffa v. United States, 385 U.S. 293, 302 (1966), and Lopez v. United States, 373 U.S. 427, 438 (1963), to support his contention that once Petitioner chose to share his “secrets with [Diocesan officials]” he could no longer assume that they would remain secret and that the officials would not share the “secrets” with others.<sup>28</sup> Blystone, Lopez, and Hoffa all involve attempts by defendants to suppress both the testimony of police informants regarding defendants’ inculpatory comments and wiretapped

---

<sup>28</sup> Ex. B, at 5.

conversations recorded by the informants. None of these cases arose in a context remotely similar to the one at issue here, nor does either case address both waivers and the disclosure of sensitive medical/mental health treatment information.

In Johnsonbaugh v. Dep't of Public Welfare ("DPW"), 665 A.2d 20, 28 (Pa. Cmwlth. 1995), aff'd, 701 A.2d 1357 (Pa. 1997), also cited by the court below, a mental health professional contested his dismissal from his position at a state hospital, claiming his due process rights were infringed because the DPW was able to view the mental health records of complaining hospital patients and he was not, despite their providing written consent to release portions of their records to DPW. The court found the complaining patients had waived the confidentiality in the disclosed records. Id. However, this dispute involved a limited waiver of mental health records in the context of civil dispute, and not a circumstance where the court found that the complaining patients were, by consenting to the release of some of their mental health records, consenting to their release to the public at large, or where the complaining patients faced, by consenting to the release of some of their mental health treatment records, the risk of public dissemination of them. If anything, this case supports Petitioner's claim as to the existence of limited waivers for the disclosure of mental health records, as the court found that the mental health

professional was only entitled to view the portions of records that the complaining patients consented to their release, and was not entitled to see all of their mental health treatment records.

The one case Judge Krumenacker cites, Sprague v. Walter, 656 A.2d 890 (Pa. Super. 1995), exemplifies the breadth of his erroneous analysis of the waiver issue. Sprague involved the admissibility of an individual's psychiatric care records, where the court found the individual had waived confidentiality in his records in part because he admitted in an interview with the media that he had received psychiatric care. There, the individual attempting to prevent release of his confidential records willingly informed the public at large about his mental health treatment, a circumstance vastly different from Petitioner's.

The Supervising Judge here, further cited to Rost v. State Bd. of Psychology, 659 A.2d 626, 629 (Pa. Cmwlth. 1995), and M. v. State Bd. of Med., 725 A.2d 1266 (Pa. Cmwlth. 1999), for the proposition that the psychotherapist-client privilege can be waived, especially when an individual makes confidential mental health treatment information known to third persons or were aware that it would not be kept confidential. Rost pertained to the confidentiality obligations of the treating psychologist, and did not address the circumstances of a limited waiver by the client/patient. M. v. State Bd. addressed whether a psychotherapist-patient privilege

existed under the circumstances, unique to that case, as a basis to prevent the disclosure of treatment records. Again, the case did not address the scope of the waiver at issue in the instant matter.

The Judge also claimed that [REDACTED] documents which th [REDACTED] produced regarding Petitioner's treatment are proof he waived his constitutional rights to privacy.<sup>29</sup> In discussing this issue, the lower court cites to cases that stand for general propositions regarding an individual's constitutional privacy rights: Commonwealth v. Enimpah, 106 A.3d 695, 699 (Pa. 2014) (Only where an expectation of privacy is reasonable is it afforded constitutional protection); Commonwealth v. Crouse, 729 A.2d 588, 595 (Pa. Super. 1999) (“[T]he right to privacy under Pennsylvania law, although extensive, it not unlimited). In fact, both of the above cases involved searches of property and implicated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, which both protect individuals from unreasonable searches and seizures. Neither case addresses the section of the Pennsylvania Constitution most relevant to the analysis of the instant dispute, Article I, Section 1.

---

<sup>29</sup> Id., at 8-9.

Review of the lower court's cited case law demonstrates its reliance on opinions that provide no justification for the court's finding that the Petitioner's waiver here was general and broad. If anything, the one opinion, Johnsonbaugh, is evidence of a Pennsylvania appellate court recognizing the concept of limited waiver when it comes to the release of mental health records. In referencing cases mostly for general propositions and not factual similarity, the Supervising Judge reinforced the uniqueness of the issue before this Court in this matter.

**2. Petitioner's Waiver at Issue is a Limited and Specific One, and Not General or Broad Enough to Lose the Expansive Statutory and Constitutional Protections Pennsylvania Affords His Confidential, Privileged Medical/Psychotherapist Evaluation and Treatment Communications and Descriptions, Protections the Supervising Judge Failed to Protect**

As noted above, Pennsylvania recognizes the doctrine of limited waiver, and has done so in circumstances similar to those involved in the instant case. In Bagwell, the Court discussed the existence of limited waiver in the work product privilege context, citing to Commonwealth v. Sandusky, 70 A.3d 886, 898 (Pa. Super. 2013), where the Superior Court held that the work product privilege was not entirely waived by a limited disclosure pursuant to a court order to the Supervising Judge of the Grand Jury. The work product privilege and the related attorney-client

privilege, one of the most court-respected of the privileges<sup>30</sup>, are treated on a similar level to the confidentiality privilege established by Pennsylvania statute and Pennsylvania and federal constitution regarding private, medical/psychotherapist treatment records. See 42 Pa. C.S. § 5944 (“The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client”).

The Supervising Judge points to the other [REDACTED] documents provided by the OAG regarding Petitioner’s ongoing treatment as proof of Petitioner’s intent “that his medical and psychological records be shared with the [REDACTED] among others, and that he placed no limitations on how those entities could utilize those records.”<sup>31</sup> However, not just the content of the documents are dispositive of waiver, as the court noted in Bagwell, but also the context in which the documents were disclosed. See Id., at 420 (“[T]he context and content of disclosure are material”). Taken as a whole, [REDACTED] treatment documents only indicate that Petitioner only intended that his [REDACTED] treatment records be disclosed to

---

<sup>30</sup> It is well-established that the attorney-client privilege and the protection it provides to confidential communications are entrenched in Pennsylvania jurisprudence. See Commonwealth v. Chmiel, 738 A.2d 406, 414 (Pa. 1999) (citations omitted) (acknowledging that “[a]lthough now embodied in statute, the attorney-client privilege is deeply rooted in the common law. Indeed, it is the most revered of the common law privileges”). This Court has been reluctant to carve exceptions to the attorney-client privilege, as codified in 42 Pa. C.S. § 5916.

<sup>31</sup> Id., at 4.



confidentiality may have been selectively waived, the Court is duty bound to ensure that the release of such privileged and confidential communications and other documents are disclosed no further than absolutely necessary.

There, this Court observed that “...the supervising judge plays a pivotal role in protecting individual rights in a manner consistent with a proper grand jury investigation.” *Id.*, at 151-52, and especially where disclosure of such confidential communications would “pose such a serious threat to a patient's right not to have personal matters revealed” as to be constitutionally impermissible. *Id.*, at 151. Such a threat exists here, as the widespread public dissemination of the Report would cause the severest violation of patient’s constitutionally protected privacy rights. Surely, the Court should not and cannot countenance their publication to the world, especially in the Investigating Grand Jury context, where standard confidentiality and due process protections are simply inapplicable.

The records at issue reveal the most personal and sensitive of information about an individual, and if disclosed, will immediately and permanently shape how that individual is viewed and treated. To allow their widespread dissemination would violate privacy interests which are not only explicitly protected in statute, but specifically in the Pennsylvania Constitution under Article I, Sec. 1, entitled “Inherent rights of mankind.” This section provides a cherished, broad array of rights granted to all Pennsylvania citizens; they should not be easily ordered null and void.

Indeed, Pennsylvania and federal courts interpreting Pennsylvania law have imposed significant privacy protections on *any* disclosure and/or public release (let alone publication) of confidential, medical and psychological diagnosis and treatment records, including those of [REDACTED]. In Octave ex. rel. Octave v. Walker, 103 A.3d 1255 (Pa. 2014), the trial court found that the plaintiff, in asserting mental health injuries in a personal injury suit, had impliedly waived protections under the MHPA, and therefore had to produce personal mental health treatment records. The Supreme Court noted that the Commonwealth Court, in affirming the trial court, emphasized that the compelled records were subject only to an *in camera* review by the court to determine which produced records were relevant to the specific mental health conditions at issue in the suit, and only permit their disclosure to the defendant, in order that, “the intrusion upon [the plaintiff’s] privacy will be minimal and limited to the extent necessary to promote the interests of justice.” Octave, 103 A.3d at 1264.

In Doe v. Ensey, 220 F.R.D. 422, 428 (M.D. Pa. 2004), in addressing the waiver of similar types of records as at issue here, the United States District Court reaffirms his position, as supported by statute, constitutions, and case law, that confidential, privileged, medical/psychotherapist diagnosis and treatment records are strongly protected from disclosure, and when their release is allowed, it is only on a very limited and restricted basis. In Ensey, the Court, after finding an

effective waiver of confidentiality as to an opposing party in litigation, nevertheless held that the private records should be protected from unwarranted public release, and as such, imposed the following broad restrictions on their use:

- ii. The said reports will be kept strictly confidential and revealed *only* to the parties to this action and their respective counsel.
- iii. To the extent the contents of the subject reports are referenced in any way in the record proceedings in this case, including during depositions, the resulting document or transcript will be *filed under seal*.
- iv. Violation of this confidentiality mandate as set forth herein by any party or their counsel will result in the imposition of appropriate and if necessary *severe contempt sanctions* by this Court.” *Id.*, at 429 (emphasis added).

In summary, Pennsylvania has consistently afforded confidential, privileged medical/psychotherapist diagnosis and treatment records strong, broad protection from disclosure. Even in the circumstances where a court has compelled the release of such information, whether due to an implied or explicit waiver, it has been with an extremely limited scope and created safeguards to prevent wider, unwarranted, and damaging dissemination. The existence of a limited waiver did not abrogate the Supervising Judge’s authority to always ensure against the violation of well-established, entrenched, and almost inviolable privacy rights, even in the most trying of situations<sup>34</sup>. Under that authority, he should have stricken Petitioner’s confidential, privileged, medical/psychotherapist evaluation

---

<sup>34</sup> See n. 14 (*In re “B”*., *supra*, where in holding that mother’s constitutional right of privacy must prevail in a juvenile delinquency hearing, the Court indicated that Article I, Section 1 of the Pennsylvania Constitution provides even “more rigorous and explicit protection for a person’s right to privacy.” *Id.* at 425.)

and treatment communications and descriptions from the soon to be publicly disclosed Report. In light of his error of law, this Court must act to compel him to take the action consistent with protecting Petitioner's established statutory and constitutional rights.

**D. ISSUE OF FIRST IMPRESSION**

Petitioner submits that the Supervising Judge's July 2<sup>nd</sup> Opinion, ruling on Petitioner's Motion to Redact Statutorily and Constitutionally Protected Information from the Grand Jury Report, presents unique issues of first impression which have significant ramifications far beyond these Grand Jury proceedings and which are of substantial public importance, specifically as to the nature under Pennsylvania law of the effect of the written waiver, its scope and its limitations, for materials covered by: the medical and psychological evidentiary privileges, 42 Pa. C.S. §§ 5929 & 5944, respectively; the Pennsylvania Mental Health Procedures Act ("MHPA"), 50 P.S. §§ 7101-7503; and privacy rights protected under both the state and federal constitutions, per In re June 1979 Allegheny County Investigating Grand Jury, *supra*, at 150-152, and the Pennsylvania Constitution, Article I, § 1, as to require prompt and definitive resolution by this Court.

**IX. STATEMENT OF THE RELIEF SOUGHT**

For all the foregoing reasons, Petitioner, [REDACTED] respectfully requests that Supervising Judge's Order of June 14, 2018, denying his Motion for Redaction of all of his confidential, privileged medical/psychotherapist evaluation and treatment communications and descriptions contained in the Grand Jury Report No. 1 be reversed, and that this matter be remanded to the Supervising Judge with the instructions that any of the above-referenced information pertaining to Petitioner [REDACTED] determined to be so covered by such lawful protection against disclosure must be redacted and removed from the Grand Jury Report No. 1.<sup>35</sup>

---

<sup>35</sup> Petitioner's Supplemental Appendix to Emergency Petition for Review in the Nature of an Appeal, Exhibit A, the Appendix to Grand Jury Report No. 1, p. 370-373, and Exhibit B, PROPOSED REDACTED Appendix to Grand Jury Report No. 1, p. 370-373, are attached here as Exhibit "G" for ease of reference. The PROPOSED REDACTED Appendix represents Petitioner's conclusion of what information in the Report is protected from disclosure.

x. CONCLUSION

Accordingly, for the reasons set forth above, Petitioner, [REDACTED] respectfully requests that the Court grants his Emergency Petition for Review in the Nature of an Appeal.

Respectfully submitted this 10<sup>th</sup> day of July 2018.

By: /s/ Efrem M. Grail  
Efrem M. Grail, Esquire  
PA ID No. 81570  
Brian C. Bevan  
PA ID No. 307488  
THE GRAIL LAW FIRM  
436 Seventh Ave.  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
egrail@grailaw.com  
bbevan@grailaw.com

*Attorneys for Petitioner,*  
[REDACTED]

*\*\*\*FILED UNDER SEAL\*\*\**

**CERTIFICATE OF COMPLIANCE**

I, Efrem M. Grail, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

By: /s/ Efrem M. Grail

Efrem M. Grail, Esquire  
PA ID No. 81570  
THE GRAIL LAW FIRM  
436 Seventh Avenue  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
egrail@grailaw.com



Date: July 10, 2018

*\*\*\*FILED UNDER SEAL\*\*\**

**CERTIFICATE OF COMPLIANCE**

I, Efrem M. Grail, Esquire, certify that this filing, while longer than 30 pages, does not exceed 14,000 words.

By: /s/ Efrem M. Grail

Efrem M. Grail, Esquire  
PA ID No. 81570  
THE GRAIL LAW FIRM  
436 Seventh Avenue  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
egrail@graillaw.com



Date: July 10, 2018

*\*\*\*FILED UNDER SEAL\*\*\**

**IN THE SUPREME COURT OF PENNSYLVANIA**

\_\_\_\_\_  
[REDACTED]  
\_\_\_\_\_

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

**PETITIONER [REDACTED] BRIEF IN SUPPORT OF HIS  
EMERGENCY PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**

**CERTIFICATE OF SERVICE**

I, Efrem M. Grail, hereby certify this 10<sup>th</sup> day of July, 2018, that a copy of the foregoing:

**PETITIONER [REDACTED]'S BRIEF IN SUPPORT OF HIS  
EMERGENCY PETITION FOR REVIEW IN THE NATURE OF AN APPEAL**

is hereby served upon the following:

Pittsburgh (Western District) Supreme Court Prothonotary:  
Via PACFile

Via U.S. Mail:  
The Honorable Norman A. Krumenacker, III  
Supervising Judge, 40<sup>th</sup> Statewide Investigating Grand Jury  
Cambria County Court of Common Pleas Courthouse  
200 South Center Street  
Ebensburg, PA 15931

*\*\*\*FILED UNDER SEAL\*\*\**

With a Courtesy Copy via electronic mail to:  
Karen A. Hogue, Executive Assistant  
[nakbench@co.cambria.pa.us](mailto:nakbench@co.cambria.pa.us)

And by Electronic Mail (per agreement) to:  
Jennifer A. Buck, Esq.  
Daniel J. Dye, Esq.  
Carson Blythe Morris, Esq.  
Leigh Ann Snyder (SDAG Buck's Assistant)  
Criminal Law Division  
1600 Strawberry Square  
[jbuck@attorneygeneral.gov](mailto:jbuck@attorneygeneral.gov)  
[ddye@attorneygeneral.gov](mailto:ddye@attorneygeneral.gov)  
[cbmorris@attorneygeneral.gov](mailto:cbmorris@attorneygeneral.gov)  
[lsnyder@attorneygeneral.gov](mailto:lsnyder@attorneygeneral.gov)

And to:  
Julie L. Horst  
Grand Jury Secretary  
Criminal Law Division  
1600 Strawberry Square  
Harrisburg, PA 17120  
[jhorst@attorneygeneral.gov](mailto:jhorst@attorneygeneral.gov)

By: /s/ Efreem M. Grail  
PA ID No. 81570  
THE GRAIL LAW FIRM  
436 Seventh Ave.  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
[egrail@graillaw.com](mailto:egrail@graillaw.com)

