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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 84 WM 2018

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

MERITS BRIEF IN OPPOSITION TO PREMATURE RELEASE OF UNREDACTED GRAND JURY REPORT NO. 1

Emergency Petition for Review of the June 5, 2018 and June 19, 2018 Orders of the Honorable Norman A. Krumenacker, Supervising Judge of the Fortieth Statewide Investigating Grand Jury Denying Petitioner's Petition for a Pre-Deprivation Evidentiary Hearing

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STATEMENT OF JURISDICTION

By Order dated July 6, 2018, this Court set an expedited schedule for the briefing of the merits of issues Petitioner the [redacted] ("Petitioner") raised in his Petition for Review. This Court has exclusive jurisdiction over grand jury matters originating from Courts of Common Pleas, such as the June 19, 2018 Order of the Supervising Judge, the Hon. Norman A. Krumenacker, III, and the prior June 5, 2018 Opinion and Order, upon which it is predicated. *See* 42 Pa. C.S. § 722(5).

Alternatively, the Court has jurisdiction under Pennsylvania Rule of Appellate Procedure 3331. Rule 3331 recognizes two kinds of orders pertaining to grand juries that are subject to this Court's review. First, the Court may review an order involving a grand jury that "contains a statement by the lower court pursuant to 42 Pa. C.S. § 702(b) (interlocutory appeals by permission)." Pa. R.A.P. 3331(a)(5). Second, the Court may review "[a]n order entered in connection with the supervision, administration or operation of an investigating grand jury or otherwise directly affecting an investigating grand jury or any investigation conducted by it." Pa. R.A.P. 3331(a)(3).

The Court has jurisdiction to review the June 19, 2018 Order and the June 19, 2018 Opinion and Order because they are interlocutory orders appealable by permission under Pa. R.A.P. 3331(a)(5). Indeed, the Supervising Judge included

the referenced language from 42 Pa. C.S. § 702(b) in the Opinion and Order, stating: "the Court is of the opinion this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Opinion and Order may materially advance the ultimate termination of this matter." *See* June 5, 2018 Opinion and Order, attached hereto as Exhibit A, at 11; June 19, 2018 Order, attached hereto as Exhibit B.

Alternatively, this Court also has jurisdiction to review the June 5 and 19 Orders because they are collateral orders under Pa. R.A.P. 313(b), which is subject to immediate appeal. *See In re Thirty-Third Statewide Investigating Grand Jury*, A.3d 204, 209 (Pa. 2014) (recognizing that within context of grand jury proceeding, otherwise interlocutory order may be reviewable if it satisfies requirements of collateral order doctrine).

ORDERS IN QUESTION

The Orders in Question are the Order of the Court dated July 6, 2018 (the "July 6th Order"), setting an expedited schedule for briefing on the merits of the issues raised in the Petitioner's Emergency Petition for Review in light of the OAG's indication that it had not fully developed the merits of its counter-argument to the Petitioner's claims.

The July 6th Order also references the Petitioner's challenges to the June 19, 2018 Order of the Supervising Judge, the Hon. Judge Norman A. Krumenacker, III, and preceding the June 5, 2018 Opinion and Order upon which it is predicated.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court's construction of the Investigating Grand Jury Act, 42 Pa. C.S. § 4541 *et seq.*, is plenary, with its initial focus directed to the plain language of the statute. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014).

The standard of review this Court applies to pure questions of law involving the Pennsylvania Constitution is *de novo* and its scope of review is plenary. *See Commonwealth v. Shabezz*, 166 A.3d 278, 285 (Pa. 2017).

QUESTIONS PRESENTED

The questions presented, as set forth by this Court in its July 6th Order, are as follows:

1. Whether the supervising judge's denial of a pre-deprivation hearing was improper where the characterization of Petitioner's decedent as an "offender" related to "child sexual abuse" in Report No. 1 is not supported by a preponderance of the evidence?

   Answer below: The Supervising Judge found the Report supported by a preponderance of the evidence.

2. Whether the supervising judge violated the fundamental rights of Petitioner's decedent to his good reputation and due process of law under Article I Sections 1, 9, and 11 of the Pennsylvania Constitution?

   Answer below: The Supervising Judge concluded that Petitioners were not entitled to a pre-deprivation evidentiary hearing.

STATEMENT OF THE CASE

A. Background of [redacted]

[redacted]

[redacted]

B. The 40th Statewide Investigating Grand Jury and Report No. 1

The OAG convened the Grand Jury to investigate alleged child abuse within six dioceses of the Catholic Church in Pennsylvania under the supervision of the Honorable Judge Norman A. Krumenacker III, of the Court of Common Pleas of Cambria County. The product of the Grand Jury investigation is the voluminous Report, which is at least one thousand pages long. *See* Exhibit D to Petitioners' Common Brief. From the few excerpts eventually provided to Petitioner, it is clear that the Grand Jury's purpose in issuing the Report was to identify clergy members and church administrators (*i.e.*, "name their names") who: (1) engaged in child sexual abuse; (2) enabled others to engage in child sexual abuse; (3) violated a duty to safeguard the welfare of children; or (4) engaged in some combination of this conduct. *See* Exhibit E to Petitioners' Common Brief. Petitioner did none of these things.

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1. As Petitioner has been denied its request for a Pre-Deprivation Hearing, no underlying record yet exists to which Petitioner can cite.

C. Petitioner Belatedly Learned of the Existence of the Report

After it issued its Report, the Grand Jury disbanded. But because Petitioner was wholly unaware of the Grand Jury's investigation or the Report's existence, Petitioner had no opportunity to challenge any of its references to him or characterizations of him before the Grand Jury's term ended. Most other individuals named in the Report learned of the investigation when they received a copy of a handful of excerpted pages of the Report with an order from the Honorable Judge Krumenacker in the mail. *See* Exhibit E to Petitioners' Common Brief. The May 2, 2018 Order stated that the Report was "critical of certain individuals" because it characterized them as child abusers, child abuse enablers, and persons who violated a duty to safeguard children's welfare. *Id.* It commanded the Attorney General to provide a copy of the Order to any living party named in the Report so the person named would have "sufficient notice" that his name appeared therein. *See id.* It also stated that each individual named in the Report had 30 days to file a sealed response to the Report. *See id.*

However, Petitioner only became aware of the Report by virtue of [redacted] who apparently was provided the section pertaining to [redacted] in response to Judge Krumenacker's May 22, 2018 Order that supplemental disclosures be made. *See* Exhibit C to Petitioners' Common Brief. To be sure,

however, any excerpts of the Report Petitioner has received do not allege that he engaged in child sexual abuse, nor do they assert that he enabled others to engage in such conduct, or failed to safeguard children.

The Report, as a whole, purports to summarize incidents related to sexual abuse of children, but in the case of Petitioner, absolutely no misconduct of this nature is even alleged. Instead, [redacted] Because Petitioner learned of these gross mischaracterizations and falsities only after the Report was completed, he had neither an opportunity to appear before the Grand Jury, nor respond at a meaningful time or in any meaningful way.

D. Petitioner's Motions Before Supervisory Judge Krumenacker Challenging the Report, and Judge Krumenacker's Acceptance of the Report

Because the Report would deprive Petitioner of his good reputation without due process if published, Petitioner filed motions under seal asking the Supervising Court: (1) to clarify that they were not child abusers, child abuse enablers, or persons who violated a duty to safeguard children's welfare; (2) to Stay the

issuance of the Report; and (3) for a Pre-Deprivation Hearing. *See* Exhibit D to Petitioners' Common Brief (May 20, 2018 Motions).

On May 21, 2018, numerous Petitioners raised similar due process concerns and others during a hearing before the Supervising Judge. During the hearing, counsel for these certain Petitioners, the Court, and the Attorney General were able to reach several compromises. First, the Court agreed to replace the May 2, 2018 Order with a new one "without any judicial finding relative to child predators, enablers, [or] things of that nature." Exhibit D to Petitioners' Common Brief (May 21, 2018 Hearing Tr. at 3:20-4:4). Second, the [redacted] and other Dioceses agreed to withdraw their Motions to Deny Acceptance and Public Filing of Grand Jury Report. Third, the OAG agreed to "supply individuals . . . with a larger sort of context of material" from the Report – within 48 hours – to enable them to better respond to the allegations against them. Exhibit D to Petitioners' Common Brief (May 21, 2018 Hearing Tr. at 4:5-13; 8:18-19; 23:19-20).

In light of the Court's promise to retract the Order of May 2, 2018, and the OAG's commitment to making more fulsome disclosure of portions of the Report relating to individual petitioners, certain Petitioners asked the Supervising Judge to hold their other motions in abeyance. The Supervising Judge agreed to do so. *See* Exhibit D to Petitioners' Common Brief (May 21, 2018 Hearing Tr. at 22:6-10; 26:12-14; 3014-19).

At the same time, however, the Supervising Judge made clear that he would deny any motions that sought to modify the Report – ***even if the modification sought to correct or eliminate clear errors*** in the Report: "I'm very hesitant to do anything that changes the face of [the report]," the Court said, "[b]ecause my jurors . . . they took these people to task." Exhibit D to Petitioners' Common Brief (May 21, 2018 Hearing Tr. at 18:16-18) (emphasis added). "I'm not going to change the report. . . I might do an order that says based on the evidence, ***the report is not accurate***. I'm not changing the report. There is no case law, no statute that allows this Court to tamper with an approved grand jury report." Exhibit D to Petitioners' Common Brief (May 21, 2018 Hearing Tr. at 37:7-12) (emphasis added).

Notwithstanding the significant due process concerns counsel expressed during the May 21 hearing, the Court accepted the Report in an order issued the next day. *See* Exhibit C to Petitioners' Common Brief (May 22, 2018 Order). In addition, the Court invited individuals identified or characterized by the Report to submit written responses to it within 30 days, and directed the OAG to disclose additional portions of it to those individuals. *See id.* Issuance of the May 22 Order, and the Court's permission for petitioners to submit a response to the Report within 30 days, established a deadline of June 22 for the submission of petitioners' responses to the Report.

E. The OAG's Supplemental Disclosures Reveal the Report Contains Clear Errors and Mischaracterizations of Petitioners

Upon learning that the Report contained inaccurate misrepresentations about them, certain other Petitioners filed Motions for Pre-deprivation Hearing. On June 5, 2018, the Supervising Judge issued the unsealed Order and Opinion denying the Motions for Pre-deprivation Hearing. Following the May 22 Order, certain Petitioners, [redacted] began receiving additional disclosures from the OAG. As the OAG provided other Petitioners their supplemental disclosures of the Report, they – like the certain Petitioners before them – also uncovered additional errors and mischaracterizations. Review of these supplemental materials revealed a section pertaining to [redacted] which had not previously been disclosed. This supplemental disclosure regarding [redacted] represents a gross mischaracterization of him as an offender related to child sexual abuse without alleging that he committed even a single offense of such nature. [redacted] filed a Motion for Pre-deprivation Hearing on June 13, 2018, which the lower Court denied on June 19, 2018 "for the reasons contained in the Court's Opinion concerning pre-deprivation hearings filed June 5, 2018." Exhibit B to Petitioners' Common Brief, June 19, 2018 Order.

SUMMARY OF ARGUMENT

Petitioner is indisputably factually innocent of any offense related to child sexual abuse, as he is alleged to have committed by virtue of his inclusion within Report No. 1 (the "Report") of the Fortieth Statewide Investigating Grand Jury. And yet the OAG – which is unwilling to correct, redact, or amend the Report in any way – has imbued the Report with the sanctity of holy writ.

In the typical criminal case, error of this magnitude and scope typically would not make it past the starting gate. That is because prosecutors – mindful of the risk of loss at trial, and endowed with broad discretion in making charging decisions – would be unwilling to seek an indictment where the elements of the charged crime so clearly could not be satisfied. But this is not a criminal case, much less a typical one, because the Report was issued, not by a grand jury performing the function of issuing a criminal presentment, but by an investigating grand jury. Consequently, the OAG has seen itself wholly unconstrained by the requirements of the Pennsylvania Constitution and due process of law. At least, until now.

The OAG has proceeded against the backdrop summarized above, unconcerned by the certain prospect of erroneously and irrevocably damaging the reputations of [redacted] and many other individuals identified in the Report. The OAG has ***insisted*** – in court, and in the press – on the Report's

immediate release, without correction or redaction. And more than that, the OAG has heaped public scorn upon those who have dared to invoke their constitutional rights. Furthermore, the OAG maintains that it is constitutionally sufficient for individuals to have the "opportunity" to file responses to the Report, even though such responses will be of mere academic value, as the Supervising Judge and the OAG have refused to alter the Report in any way, notwithstanding the errors regarding [redacted] and many others throughout. Those named may respond, in other words, but only to a *fait accompli*.

For the reasons discussed below, the OAG is wrong. The June 19, 2018 Order (incorporating the reasoning of the June 5, 2018 Order) was clearly erroneous because the Supervising Judge: (1) failed to exercise his statutory duty to examine the Report (and the grand jury record purportedly supporting the Report) in order to establish that the grand jury's findings were supported by a preponderance of the evidence; and (2) denied Petitioner the most basic requirements of due process – *i.e.*, notice, and an opportunity to be heard – before accepting the Report.

In sum, this Court should reverse the opinions and orders below and Order the Supervising Judge to: (1) undertake the statutorily required examination of the Report that is minimally necessary to establish that its findings are supported by a preponderance of the evidence with respect to Petitioner; and (2) prior to the

Supervisory Judge's final determination to accept or reject the Report, permit Petitioner a pre-deprivation evidentiary hearing as a procedural safeguard to avoid unnecessary harm to Petitioner's fundamental right to his good reputation.

Petitioner offers this Supplemental Brief to address facts specific to it, which support its arguments that the Supervising Judge failed to conduct the necessary examination of the Report and grand jury record in order to make a finding that the Report was supported by a preponderance of the evidence. Petitioner joins in, and incorporates by reference, the Merits Brief Setting Forth Common Legal Arguments of Clergy Petitioners ("Petitioners' Common Brief") that is being separately filed today, and all arguments set forth therein.[2]

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2. In addition to this Supplemental Brief, pursuant to Pa. R.A.P. 1513(d)(5), 2116(a) and 2137, the [redacted] has joined in and incorporates by reference the legal arguments in the Petitioners' Common Brief) submitted on behalf of itself and other Petitioners at Docket Nos. 75, 77 through 82, and 86 through 89 WM 2018, including that Brief's Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. The [redacted] also joins in any other Briefs filed by Petitioners who have filed appeals raising similar challenges to Report No. 1.

ARGUMENT

I. THE SUPERVISING JUDGE'S DENIAL OF THE PRE-DEPRIVATION HEARING WAS IMPROPER WHERE THE CHARACTERIZATION OF PETITIONER'S DECEDENT AS AN "OFFENDER" RELATED TO "CHILD SEXUAL ABUSE" IN REPORT NO. 1 IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

A. The Supervising Judge Failed To Conduct A Sufficiently Thorough Examination Of The Report And Record To Determine Whether The Grand Jury's Findings Were Supported By A "Preponderance Of The Evidence"

The Act requires the supervising judge to conduct a sufficiently thorough review of not only the investigating grand jury's report, but also of the record that purportedly supports the grand jury's findings. The relevant provision of the Act states as follows:

> **(b) Examination by court.** – The judge to whom such report is submitted ***shall examine it and the record*** of the investigating grand jury and, except as otherwise provided in this section, shall issue an order accepting and filing such report as a public record with the court of common pleas established for or embracing the county or counties which are the subject of such report ***only if the report*** is based upon facts received in the course of an investigation authorized by this subchapter and ***is supported by the preponderance of the evidence.***

42 Pa. C.S § 4542(b) (emphasis added).

A supervising judge's review of the grand jury ***record***, not just the ***report***, is essential, and, as noted above, required by statute. Indeed, a supervising judge cannot possibly conduct a sufficiently probative or meaningful review of the report's findings without thoroughly reviewing the record itself. Moreover, the

record produced in this case over the course of the grand jury's two-year term – much of which would have been required to be recorded, by statute, *see* 42 Pa. C.S § 4549(a) – is doubtless voluminous.

And yet the May 22, 2018 Order of the Supervising Judge accepting the Report refers only to the Supervising Judge's "finding that said report . . . is supported by the preponderance of the evidence," without explaining the basis for this conclusion, and without referring to any evidence the Supervising Judge reviewed from the record. The Order suggests, by its silence, that the Supervising Judge did not review the grand jury record. Furthermore, the Order leaves unclear what analysis the Supervising Judge undertook to determine that the Report in its entirely – which is reportedly approximately one thousand pages in length – was supported by a preponderance of the evidence.

Absent more fulsome reasoning and explanation, this Court cannot discern whether the Supervising Judge exercised his statutory obligation to "examine [the Report] ***and the record*** of the investigating grand jury." 42 Pa. C.S § 4542(b) (emphasis added). Furthermore, this Court cannot assess (because the Order is silent in this regard as well) any grounds for the Supervising Judge's inexplicable conclusion – notwithstanding the errors Petitioner identified and called to the Supervising Judge's attention – that the Report "is supported by the preponderance of the evidence." *See* May 22, 2018 Order at 1.

B. The Overarching Error with Respect to Petitioner Proves the Supervising Judge's Failure to "Examine" the Report and Record

[redacted] is factually innocent of child sexual abuse or the enabling of it. The Report does not allege otherwise. Instead, the OAG has irresponsibly included him in the Report, thereby branding him as a pedophile, by virtue of nothing more than his engagement in [redacted] during a time when such activity was equated with pedophilia. Had the Supervising Judge actually reviewed the section pertaining to [redacted], as he must in order to make the necessary "preponderance of the evidence" determination, this abuse would have been plain. As is, however, the continued inclusion of [redacted] section within the Report is an unmistakable indicator that the required analysis did not occur.

The gross errors confronting Petitioner not not unique to him; other named individuals have similar stories to tell. However, the severity of the error which resulted in [redacted] inclusion in the Report may be unique in that the section of the Report pertaining to him does not include even a single specific allegation that he engaged in inappropriate conduct with a minor. Such an error provides a stark illustration of the kind of inaccuracies and falsities the named individuals have found in the mere snippets the OAG has elected to share with them from the much lengthier Report they have not yet seen in its entirety. It is deeply disconcerting that such errors, discovered in just a sampling of the Report's

pages, may underrepresent the full scope of errors not yet known to those named since they have never received a copy of the entire Report.

In sum, the gross mischaracterizations, oversimplifications, and outright erroneous conclusions in the Report that violate Act and constitutional due process must be corrected before the Report is released to the public. Releasing the Report in its current flawed form would disserve the victims of abuse as much as it would disserve those wrongly accused and falsely implicated.

An end product that contains such errors will undoubtedly disappoint the victims who hoped for more. But in some sense this result, though disappointing, should not be surprising. That is because the adversarial system – not a cloistered grand jury – is a far better mechanism for accurate truth finding. *Com. v. Santiago*, 591 A.2d 1095, 1110 (Pa. Super. Ct. 1991) ("In our system, truth is determined through an essentially adversarial process in which, truth is best discovered by powerful statements on both sides of the question." (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quotations marks, alterations omitted))). "Thus, we have placed reliance in a system in which parties take an active, highly partisan role in unearthing and arguing the significance of relevant evidence from which the decision-maker may relatively passively determine truth." *Id.*

As discussed below, *see infra* Part II, the errors Petitioner discovered (and brought to the attention of both the Supervising Judge and the OAG, to no avail)

are the product of their denial of due process. His inability to persuade "the decision-maker" of the faulty determination of the "truth" bespeaks the failure of the Act to protect important constitutional rights that cannot be safeguarded by the OAG.

C. The Release Of Indisputably Incorrect, Misleading, And Unreliable Statements In The Report Is Contrary To The Plain Language, Purpose, And History Of The Act

1. The plain language of the Act conveys its limited purpose – and limited subject matter jurisdiction – of investigating organized crime and public corruption

The Investigating Grand Jury Act (the "IGJA," or the "Act") is codified at 42 Pa. C.S § 4541 *et seq*. As the plain language of the Act makes clear, a statewide or "multicounty" investigating grand jury has "jurisdiction to inquire into ***organized crime*** or ***public corruption*** or both under circumstances wherein more than one county is named in the order convening said investigating grand jury." *Id.* § 4542 (emphasis added); *see also id.* § 4544. "Organized crime" and "public corruption" are both defined in the Act. *Id.* § 4542. Neither definition applies here.

Given the limited subject matter jurisdiction of multicounty investigating grand juries, the OAG must specifically justify the need for such a grand jury to investigate either organized crime or public corruption. *Id.* § 4544(a) (noting "the Attorney General shall state that, in his judgment, the convening of a multicounty

investigating grand jury is necessary ***because of organized crime or public corruption or both***") (emphasis added).

Assuming this proper jurisdictional basis, the multicounty investigating grand jury may then issue an "investigating grand jury report." This is defined in the Act as "[a] report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings." *Id.* § 4542. Of course, the "proposing [of] recommendations for legislative, executive, or administrative action in the public interest ***based upon stated findings***," § 4542 (emphasis added), would logically seem to refer to findings from the investigation into organized crime and public corruption. Otherwise, the desire to make such recommendations would create much broader subject matter jurisdiction than the Act permits, in order to investigate a host of social issues having nothing to do with "organized crime" or "public corruption" as defined in the Act.[3]

Given the limited statutory grant of subject matter jurisdiction to multicounty grand juries, like the kind of investigating grand jury at issue here, the OAG is not permitted to use such grand juries as free-wheeling instruments for

3. Notably, the State of New York requires that a grand jury report submitted for this particular reason – *i.e.*, for "[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings" – may not be "critical of an identified or identifiable person." *See* N.Y. Crim. Proc. Law § 190.85(1)(c), (2)(b).

reform. That is what legislatures are for. Petitioner can only wonder – not having received or had any opportunity to review the OAG's application and order establishing the grand jury in this case – how and why the OAG expanded the scope of inquiry from organized crime or public corruption (as defined under the Act) into allegations of historic abuse in Catholic dioceses that name individual clergy members. What is clear, in any event, is that the Act does not contemplate the proper use of any investigating grand jury – whether for organized crime, public corruption, or otherwise – to defame innocent third parties or to publish erroneous, misleading, unreliable, and scandalous rumors. Such conduct, which violates Petitioner's fundamental constitutional interest in his good reputation, cannot possibly be "in the public interest" because it is illegal.

2. Legislative history reveals particular concern that grand jury investigative reports not give voice to unsupported defamatory statements

When debated in the Commonwealth's House of Representatives, the Act was considered "the center piece" of the legislature's efforts to combat "organized crime-official corruption." H.R. 162 – Pa. Legis. J. Vol. 1, No. 46, Sess. of 1978, Report of Comm. of Conf. on S.B. No. 1319, at 3739-40 (Pa. 1978) (Statement of Mr. Rhodes); *see also id.* at 3740 (Statement of Mr. Davies) ("I have got to agree . . . on the importance of the bill and the necessity of it in passing it this session to have an instrument by which they can do what they want to do with corruption and

the infiltration of crime and those aspects of it."). Of particular note, Representative Rhodes emphasized that the Act "is not a bill designed to discredit people." *Id.* (Statement of Mr. Rhodes).

Unsurprisingly, the legislature's purpose – in a bill clearly designed to address organized crime and public corruption – was plainly not to confer authority upon the OAG to undertake investigations beyond the scope of the authority the Act confers on the OAG. Still less did the legislature intend that this authority would be used to defame – or, in the words of Mr. Rhodes, "discredit" – individuals. However, that is precisely what is being attempted here. The irresponsible inclusion of [redacted] in the Report and its specific characterization of him as [redacted] would give public voice to baseless bigoted allegations which were solely intended by even their original publisher to discredit.

II. THE SUPERVISING JUDGE VIOLATED THE FUNDAMENTAL RIGHTS OF PETITIONER'S DECEDENT TO HIS GOOD REPUTATION AND DUE PROCESS OF LAW UNDER ARTICLE I SECTIONS 1, 9, AND 11 OF THE PENNSYLVANIA CONSTITUTION

A. Releasing The Report In Its Current Form Would Make Public Statements The OAG Does Not Dispute Are Erroneous And Misleading, And Would Therefore Harm Petitioner's Fundamental Reputational Interests

As discussed above, the section of the Report pertaining to Petitioner baselessly characterizes him as an "offender" related to "child sexual abuse" and [redacted]

[redacted] Such defamation violates Petitioner's fundamental constitutional interest in his good reputation. *See* Pa. Const. Art. I §§ 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.") and 11 ("[E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . . . Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."); *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 149 (Pa. 1994) (reputation is "an interest that is recognized and protected" by our Constitution). This Court has recognized that the interest in reputation extends to the deceased, noting that "[a] libel is a malicious publication . . . tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." *Sarkees v. Warner-W. Corp.*, 37 A.2d 544, 546 (Pa. 1944).

B. Releasing The Report Without A Pre-Deprivation Hearing Would Violate Petitioner's Fundamental Right To Due Process

While acknowledging that the right to reputation is fundamental and constitutionally protected in Pennsylvania, the Supervising Judge concluded that the only "process" due Petitioner was the *ex post* opportunity to respond to a *fait accompli*: (1) notice that language in the Report was critical of them; and (2) an

opportunity to file a response to the Report that would be included in some fashion in the report released to the public (but which would have no chance of successfully curing errors in the Report). *See* Exhibit A (June 5, 2018 Order and Opinion at 1). This token opportunity to respond in a way that has no possibility of changing the outcome is not due process worth the name.

Reputation is a fundamental interest that cannot be harmed without due process under Pennsylvania law. *See R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 149 (Pa. 1994) ("[I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to 'reputation,' providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection."); *see also D.C. v. Dep't of Human Servs.*, 150 A.3d 558, 566 (Pa. Commw. Ct. 2016) ("In Pennsylvania, therefore, reputational harm alone is an affront to one's constitutional rights."). Here, there is no dispute, as the Supervising Judge concluded, "that there is a fundamental interest affected by naming a nonindicted person in a grand jury report." Exhibit A (June 5, 2018 Order and Opinion at 2). The only open question, given this fundamental interest, is what process is due an individual named in such a report – a question the Supervising Court recognized as

"one of first impression in the Commonwealth." Exhibit A (June 5, 2018 Order and Opinion at 2).

A three-part test, adopted by this Court, requires "flexible" balancing of three factors:

1. the private interest affected by the governmental action;
2. the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and
3. the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state.

Bundy v. Wetzel, No. 2 WAP 2017, 2018 WL 2075562, at *4 (Pa. May 4, 2018) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Each of the factors this Court adopted in *Bundy* from the U.S. Supreme Court's *Matthews* decision strongly favor Petitioner's due process arguments.

1. The private interest Petitioner maintains in his reputation could not be weightier

The Supervising Judge acknowledged that the constitutional import of Petitioner's "fundamental" reputational interest *ipso facto* establishes the weightiness of this private interest. *See* Exhibit A (June 5, 2018 Order and Opinion at 5).

2. Petitioner has proven the risk of erroneous deprivation and the value of additional or substitute safeguards that would have averted the Report's errors

Petitioner has proved not only a "risk" of erroneous deprivation of due process, but that his fundamental right to his good reputation absolutely will be violated erroneously without additional safeguards. As discussed above (and in each of Petitioner's supplemental filings), Petitioner has proved that the grand jury unquestionably erred. These errors in the Report will harm Petitioner's reputational interests. These errors were not harmless, for they cut to the very core of the grand jury's project: accurately identifying abuse.

It is hard to imagine more serious mistakes in this context, or facts that so clearly call into question the validity of the grand jury's findings when the preponderance of the evidence clearly ***undermines*** rather than supports the grand jury's conclusions with respect to Petitioners. However, even after named individuals called such errors to the Supervising Judge's attention, the Supervising Judge reached an astoundingly circular conclusion: the grand jury's findings must be correct because they are supported by a preponderance of the evidence. *See* Exhibit A (June 5, 2018 Order and Opinion at 5). ("The nature of grand jury proceedings significantly minimizes the risk of erroneous depravations by requiring the findings of the grand jurors be supported by a preponderance of the evidence presented by the OAG through witnesses testifying under oath."). This

conclusion did not permit consideration of any grand jury error – even the definitive proof Petitioners presented to the Supervising Judge.

Bundy and *Matthew* also counsel that this Court consider not just the risk of error from a failure to provide sufficient due process protections, but whether the value of additional or substitute safeguards could have averted the error. This also weighs in favor of Petitioner. Indeed, if Petitioner had simply had an opportunity to review the Report before the grand jury completed its work in order to present a more accurate rendering of the diocesan source materials, he could have demonstrated the grand jury's error before the grand jury finalized its Report and before the Supervising Judge accepted it.[4]

The Commonwealth Court has required due process safeguards of the kind Petitioner seeks in matters concerning government reports and public registries. *J.P. v. Dep't of Human Servs.*, 170 A.3d 575, 581-84 (Pa. Commw. Ct. 2017) (placement of teacher's name on child abuse registry implicated protected reputational interest, and "failure to provide a hearing resulted in a violation of Petitioner's right to due process"); *see also G.V. v. Dep't of Pub. Welfare*, 91 A.3d

4. Such *ex ante* protective mechanisms – despite the OAG's protestations that they are unfeasible – are not impossible, as the experience of other jurisdictions reveals. *See, e.g.*, N.Y. Crim. Proc. Law § 190.85(2)(c) (requiring, for certain kinds of grand jury reports, that court ensure, when grand jury report is submitted to the court, "that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report"); *see also id.* § 190.85(5) (in the case of particular grand jury reports, and under certain circumstances, a court not satisfied that the report complies with the statute "may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report"); 18 U.S.C. § 3333(e) (same).

667, 676 (Pa. 2014) (Saylor, J., concurring) ("[T]he inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question.").

And while it is true that the statutorily required notice to Petitioner here differs from the lack of any pre-publication notice in the cases of *Simon v. Com.*, 659 A.2d 631 (Pa. Commw. Ct. 1995) and *Pennsylvania Bar Ass'n v. Com.*, 607 A.2d 850 (Pa. Commw. Ct. 1992), such notice establishes a constitutional floor that is necessary, although hardly sufficient, for due process protection. *See Pennsylvania Bar Ass'n*, 607 A.2d at 856 ("The Supreme Court of the United States has recognized that notice is the most basic requirement of due process."); *see also Bundy v. Wetzel*, No. 2 WAP 2017, 2018 WL 2075562, at *4 (Pa. May 4, 2018) ("The central demands of due process are notice and an 'opportunity to be heard ***at a meaningful time and in a meaningful manner.***'") (emphasis added). Such notice cannot possibly suffice without more, for the *ex post* right to reply to already established facts only ***after*** an irreversible decision has been rendered is no different from permitting rebuttal after release of a damaging report, which *Simon* held unconstitutional.

Here, where the fundamental interest in reputation is at stake, investigative function has yielded to adjudicatory opprobrium. Similarly, in *K.J. v. Pennsylvania Dep't of Pub. Welfare*, Judge Friedman, in dissent, noted that an investigator's unchallenged findings could assume the character of *de facto*

adjudication absent due process. *See* 767 A.2d 609, 616 (Pa. Commw. Ct. 2001) (Friedman, J., dissenting) ("It shocks my conscience that the Law would allow the investigating caseworker to render a *de facto* adjudication that is adverse to an individual's reputation *without* an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). The *de facto* adjudicatory imprimatur of the Grand Jury in this case is no different.[5]

In considering this matter of first impression, the Court may benefit from the considered views of federal courts under similar circumstances. *See J.P.*, 170 A.3d at 580 ("The due process standards of United States and Pennsylvania Constitutions are essentially the same."). For example, federal courts carefully

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5. The views of other jurisdictions are supportive. *See Wood v. Hughes*, 173 N.E.2d 21, 26 (N.Y. 1961) ("In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted."); *People v. McCabe*, 266 N.Y.S. 363, 367 (N.Y. Sup. Ct. 1933) ("A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."); *In re Presentment by Camden Cty. Grand Jury*, 169 A.2d 465, 471 (N.J. 1961) ("But there is a more fundamental reason for imposing restraint upon the privilege of a grand jury to hand up presentments reprobating a public official by name or inescapable imputation, where no evidence warranting indictment for crime has been submitted to it. When an indictment is returned, the official becomes entitled to a trial. He has an opportunity to face his accusers and to achieve public exoneration from a court or jury. Not so with a presentment. It castigates him, impugns his integrity, points him out as a public servant whose official acts merit loss of confidence by the people, and it subjects him to the odium of condemnation by an arm of the judicial branch of the government, without giving him the slightest opportunity to defend himself.").

treat the reputation interest of even unindicted coconspirators – *i.e.*, those, unlike Petitioner, with actual culpability. *See, e.g. United States v. Smith*, 776 F.2d 1104, 1115 (3d Cir. 1985) (affirming trial court's grant of protective order redacting names of unindicted coconspirators in grand jury indictment because "disclosure would almost certainly result in extremely serious, irreparable, and unfair prejudice to those" named but not charged); *United States v. Briggs*, 514 F.2d 794, 806 (5th Cir. 1975) (in naming unindicted coconspirators "grand jury acted beyond its historically authorized role, and we are shown no substantial interest served by its doing so"; "[t]he scope of due process afforded them was not sufficient"); *In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F. Supp. 875, 877 (N.D. Iowa 1990) ("The interest of the named individuals in not having their names published in a non-indicting Grand Jury report outweighs the public's interest in knowing the identity of the specific individuals. Therefore, the information contained in category one shall be redacted so that the individuals cannot be identified by name."). Whatever guidepost is employed, there clearly is value in additional procedural safeguards beyond an *ex post* response necessary to avoid the erroneous deprivation of Petitioner's fundamental reputational interest which would otherwise occur here.

3. Affording Petitioner constitutionally sufficient due process could have been achieved with minimal administrative burden and while still achieving relevant state interests

The linchpin of the Supervising Judge's rejection of the due process argument of other named individuals was the alleged "administrative burden" that affording minimally sufficient due process protections would visit upon the Commonwealth. This argument is flawed for several reasons.

First, the Supervising Judge fails to consider at all the clear error that Petitioner and other named individuals have highlighted. Given the *Bundy-Matthew* balancing test, it cannot be that no further due process is required when (a) a matter of the greatest constitutional import (b) is handled in a way that results in provable error merely because (c) correcting the error would be administratively burdensome. Even if minimally sufficient due process protections ***were*** burdensome (and they are not), this factor cannot outweigh the other two *Bundy-Matthew* factors. *See Simon*, 659 A.2d at 639 ("[W]hen the right of a citizen to preserve his/her constitutionally protected reputation is balanced against the interests of the Commonwealth in proceeding without the constitutional guarantee of procedural due process when conducting an investigation to discover the state of affairs in crime in the Commonwealth, the scale must be tipped in favor of the citizen.").

Contrary to the protests of the OAG, *see* App. To Lift Stay at 6 ¶¶ 14-15, when grand jury proceedings are conducted appropriately, and the supervising judge properly executes the duty to review the report to ensure its factual accuracy, the burden of conducting *ex ante* procedures is limited. In contrast, in instances like this case, where the proceedings were flawed and errors clearly exist, the Constitutional right to one's reputation and to due process trump the procedural burdens on the Supervising Judge. *See Simon*, 659 A.2d at 636-40. Further, the availability of such *ex ante* procedures will be a powerful check on grand jury abuses and will help prevent abuses such as those evidenced by the factually incorrect and improper content of the Report here. Plainly, in this instance the OAG (via the Report) has improperly used what the OAG calls the grand jury's "power to persuade." App. To Lift Stay at 5 ¶ 10.

Second, the OAG's administrative burden argument is neither coherent nor consistent, because while it claims that affording named individuals an opportunity to appear before the grand jury or to submit statements before the end of the grand jury's term would be burdensome, the Supervising Judge's opinion notes that "all current Bishops for the Dioceses were afforded an opportunity to testify before the Grand Jury with one, the bishop for the Diocese of Erie, testifying and five electing to submit written statements." Exhibit A (June 5, 2018 Order and Opinion at 5). Indeed, the practices of other jurisdictions reveal that affording minimally

sufficient opportunity to be heard before a grand jury is not as burdensome as the OAG suggests. *See supra* note 4.

Third, the Supervising Judge's analysis of administrative burden here was flawed because it failed to properly apply the "flexible concept" of due process. The Supervising Judge acknowledged that this Court has recently recognized the concept of due process to be "flexible" and context dependent. *See* Exhibit A (June 5, 2018 Order and Opinion at 2). Indeed, the Supervising Judge quoted this Court's recognition, in *Bundy*, that "[d]ue process is a flexible concept which 'varies with the particular situation.'" 2018 WL 2075562, at *4 (quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)). Consequently, the requirements of due process in some contexts may be less stringent in others. The Supervising Judge overlooked this distinction, however, assuming due process to be a zero-sum (*i.e.*, "all or nothing") requirement. The Supervising Judge therefore misunderstood the question before the court to be whether someone named in the Report is "entitled by virtue of due process to have a full pre-deprivation hearing, including the right to cross-examine Commonwealth witnesses, present witnesses of their own, and present evidence." Exhibit A (June 5, 2018 Order and Opinion at 1). The Supervising Judge elsewhere referred to this as "the full panoply of due process rights." Exhibit A (June 5, 2018 Order and Opinion at 7).

In fact, however, given the "particular situation," *see Bundy*, of a state investigative grand jury, something less than the "full panoply of due process rights" – but surely more than the sham "notice" provided here – could well have protected Petitioner from an unconstitutional deprivation of his fundamental reputational interest. The Supervising Judge could have required, for example – and nothing in the state statute would have barred such a procedure – that the person named in the Report be permitted to review and respond to the Report prior to the expiration of the grand jury's term. This would have permitted both the Supervising Judge, which is required to examine the Report prior to accepting it, and the grand jury, to consider whether the grand jury's findings were in fact supported by a preponderance of the evidence or – as was the case here – clearly refuted by the evidence. *See* 42 Pa. C.S. § 4552(a) ("Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, ***at any time during its term*** submit to the supervising judge an investigating grand jury report."); 42 Pa. C.S. § 4552(b) ("The judge to whom such report is submitted shall examine it and the record of the investigating grand jury").

Fourth, and finally, the two state interests alleged – (a) "having a[n] effective and efficient grand jury process" and (b) "the interest in protecting children from child sexual predators and those who enable them," Exhibit A (June 5, 2018 Order and Opinion at 7) – are not advanced or protected under the

circumstances described above. The effectiveness of the grand jury process might be persuasive if it ***was*** effective in reaching findings that were supported by a preponderance of the evidence. But the clear error identified here suggests otherwise. A procedure that leads a grand jury to conclude that engaging in an [redacted] equating to an "offense" related to "child sexual abuse" does not serve the state's interest in protecting children. If anything, the unreliability of this finding disserves and undermines the Report. In addition, because the Grand Jury's investigative mandate here was statutorily limited "to propos[ing] recommendations for legislative, executive, or administrative action in the public interest ***based on stated findings***," 42 Pa. C.S. § 4542, that purpose is not furthered by the release of a Report with "findings" that are clearly erroneous and a procedure that offers no avenue for correcting them.

C. Where A Fundamental Constitutional Right Is Violated, The *Ex Post* "Opportunity" To Respond To A Fait Accompli Really Is No Opportunity At All

The *ex post* opportunity to submit a response to the erroneous Report – but without hope of changing the errors in the Report – is no opportunity at all. Without *ex ante* notice and a meaningful opportunity to be heard – two well accepted requirements of elemental due process – the OAG's conception of due process is not more than the "opportunity" to vent, and to object to a *fait accompli*. *See Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) ("In terms of the right to be

heard at a meaningful time, the second *Mathews* element reflects that avoiding erroneous deprivations ***before*** they occur is an important concern under the Due Process Clause. There is thus a general preference that procedural safeguards apply in the ***pre-deprivation*** timeframe." (emphasis added)); *see also Simon v. Commonwealth*, 659 A.2d 631, 639 (Pa. Commw. Ct. 1995) ("Under this scheme, there is no forum for an individual who believes that his reputation has been adversely affected to seek a remedy until after the possible damage has been done. This is clearly an unconscionable abrogation of a state protected constitutional right without procedural due process. . . . Moreover, providing prior notice to an individual who is going to be named in a report published by the Commission would not be unduly burdensome to the process."). Evaluation of the *Matthews* factors here indicates that more is required to satisfy Petitioner's right to due process. This Court should remand for a pre-deprivation hearing.

CONCLUSION

In its current form, the Report characterizes Petitioner as [redacted] who committed an "offense" related to "child sexual abuse," without even specific unsubstantiated allegations to support such a portrayal. As such, this Court should order that the Supervising Judge conduct the "preponderance of the evidence" analysis of the Report which clearly was foregone in the first instance. Further, given the plainly erroneous deprivation of Petitioner's fundamental constitutional

right to his good reputation which this flawed Report would inflict, this Court should remand for additional process, including a pre-deprivation evidentiary hearing, to be administered prior to the Report's ultimate acceptance and publication.

Respectfully submitted,

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****FILED UNDER SEAL****

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	Supreme Court of Pennsylvania, Western District No. 84 WM 2018

ORDER

AND NOW, this _____ day of _____, 2018, it is hereby ORDERED that the Application to Lift Stay and Motion to Unseal, both dated July 2, 2018, are **DENIED.**

BY THE COURT:

_____
J.

****FILED UNDER SEAL****

CERTIFICATE OF SERVICE

I, Michael A. Comber, Esquire, hereby certify that a copy of the foregoing Merits Brief was served *via* electronic service through the PAC-file system and electronic mail on July 10, 2018 upon the following:

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CERTIFICATE OF COMPLIANCE

I, Michael A. Comber, 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.

In addition, I certify that this filing complies with the provisions of Pa. R.A.P. 2135. Though this filing exceeds 30 pages, the word count remains under 14,000 words.

Dated: July 10, 2018

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Exhibit A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

	*	
	*	Supreme Court of Pennsylvania
IN RE:	*	2 W.D. MISC. DKT. 2016
THE FORTIETH STATEWIDE	*	
INVESTIGATING GRAND JURY	*	Allegheny County Common Pleas
	*	No. 571 M.D. 2016
	*	
Motions for Pre-depravation Hearing	*	
	*	Notice Number 1
	*	

OPINION AND ORDER

Krumenacker, J: Currently before the Court are various Motions for Pre-depravation Hearings filed by persons named, but not indicted, in the Fortieth Statewide Investigating Grand Jury's Report Number 1 relative to Notice Number 1 (Report). The Motions seek to have evidentiary hearings prior to the release of the Report arguing that such hearings are required by due process as the reputation interest of the nonindicted named persons will be harmed by the release of the Report. The Office of Attorney General (OAG) responds that the Investigating Grand Jury Act (Grand Jury Act), 42 Pa. C.S. §§ 4541-4553, provides the requisite due process by: requiring that a named nonindicted person be informed of the existence of the critical language in the report; providing an opportunity to file a written response to the report; and providing for the inclusion of such response in the report that is released to the public. 42 Pa. C.S. § 4552 (e).

DISCUSSION

The specific constitutional question before the Court is whether a named nonindicted person in a grand jury report is, prior to the public release of the report, entitled by virtue of due process to have a full pre-depravation hearing, including the right to cross-examine Commonwealth witnesses, present witnesses of their own, and present evidence. "Courts examine procedural due process questions in two steps: the first asks whether there is a life,

liberty, or property interest with which the state has interfered, and the second examines whether the procedures attendant to that deprivation were constitutionally sufficient." J.P. v. Dep't of Human Servs., 170 A.3d 575, 580–81 (Pa. Cmwlth. 2017) (citing Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)). In Pennsylvania a person's reputation is recognized as a fundamental right in Sections 1 and 11 of Article I of the Pennsylvania Constitution. "In Pennsylvania, therefore, reputational harm alone is an affront to one's constitutional rights." D.C. v. Dep't of Human Serv., 150 A.3d 558, 566 (Pa. Cmwlth. 2016). Accordingly, our Courts have long recognized that this fundamental interest in reputation "cannot be abridged without compliance with constitutional standards of due process and equal protection." R. v. Com., Dep't of Pub. Welfare, 535 Pa. 440, 454, 636 A.2d 142, 149 (1994) (citing Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 193, 532 A.2d 346, 350 (1987)). Having answered the first question and determined that there is a fundamental interest affected by naming a nonindicted person in a grand jury report the second question, what level of due process is owed, must be addressed. This question is one of first impression in the Commonwealth.

The Pennsylvania Supreme Court has recently explained that

> "Due process is a flexible concept which "varies with the particular situation." Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). Ascertaining what process is due entails a balancing of three considerations: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The central demands of due process are notice and an "opportunity to be heard at a meaningful time and in a meaningful manner." Commonwealth v. Maldonado, 576 Pa. 101, 108, 838 A.2d 710, 714 (2003) (quoting Mathews, 424 U.S. at 333, 96 S.Ct. at 902); see also Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692 (1944) ("The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as

> are adequate to safeguard the right for which the constitutional protection is invoked.").

Bundy v. Wetzel, ___ Pa. ___, ___, ___ A.3d ___, ___, 2018 WL 2075562, at *4 (Pa. 2018).

In Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15, 4 L.Ed.2d 1307 (1960), the United States Supreme Court addressed the questions of: (1) whether the Commission on Civil Rights was authorized by Congress to adopt Rules of Procedure which provide that the identity of persons submitting complaints to the commission need not be disclosed and that those summoned to testify before the commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the commission; and (2) if so, whether those procedures violated the Due Process Clause of the Fifth Amendment. The Hannah court held that the Commission's procedural rules were authorized by the Civil Rights Act and did not, in view of the purely investigative nature of the commission's function, violate the due process clause of the Fifth Amendment.

The Court in Hannah was careful to distinguish the level of due process required differs based upon whether the action taken by the government is adjudicative or investigative in nature, with the former requiring a higher degree of due process than the latter. In this regard the Court opined that

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that

> proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.
>
> It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate it need not be bound by adjudicatory procedures.

Id. 363 U.S. at 442, 80 S.Ct. at 1514–15.

In Pennsylvania Bar Ass'n v. Commonwealth, 147 Pa. Cmwlth. 351, 607 A.2d 850 (1992), the Commonwealth Court concluded that before an attorney's name could be placed on a suspected fraud list because the attorney's client was suspected of fraud, the state was required to give the attorney notice and an opportunity to be heard. Later in Simon v. Commonwealth, 659 A.2d 631 (Pa. Cmwlth. 1995), our Commonwealth Court, relying on Hannah, concluded that due process required the Pennsylvania Crime Commission to give notice and the opportunity to respond to persons named in public reports. The Grand Jury Act in section 4552(e) already provides the due process protections required by Simon by requiring notice to named nonindicted persons and providing them a right to respond. 42 Pa. C.S. § 4552(e).

Similar to the Civil Rights Commission and the Crime Commission, a grand jury is an investigative not adjudicative body and so a lesser degree of due process is required than is afforded to those who appear before adjudicative governmental entities. Hannah, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15. Nonetheless as the Simon Court recognized, because the right to reputation is a fundamental one in the Commonwealth some amount of due process is required when a person is named in an investigative report. Simon, 659 A.2d 631, 639. Here application of the Mathews factors results in the same conclusion reached by the Simon Court, that given the investigative nature of a grand jury due process only requires notice and an opportunity to response to a report prior to the release of any report.

The first Mathews factor requires a determination of the nature of the private interest affected by the governmental action and whether such interest is entitled to due process protections. As discussed *supra* under Pennsylvania law there is no question that the right to reputation is a fundamental interest that cannot be abridged without some due process protections. The second Mathews factor requires a consideration of the risk of an erroneous deprivation with the value of additional or substitute safeguards. The Grand Jury Act provides a person named in a report notice of the report, an opportunity to review that portion of the report critical of them, and an opportunity to file response. See, 42 Pa. C.S. §4552(e). The issue then is whether the additional process sought would reduce the risk of erroneous deprivation. The nature of grand jury proceedings significantly minimizes the risk of erroneous depravations by requiring the findings of the grand jurors be supported by a preponderance of the evidence presented by the OAG through witnesses testifying under oath. Specifically with regards to the Report, the grand jury, in reaching its findings, heard from dozens of witnesses, examined numerous exhibits, and reviewed over half a million pages of internal diocesan documents from the archives of various Dioceses. Further, all current Bishops for the Dioceses were afforded an opportunity to testify before the Grand Jury with one, the Bishop for the Diocese of Erie, testifying and five electing to submit written statements. See, Gr. J., Notice 1 Exs. 472, 478, 479, 480, 481 501, 502, 513, 514, 515, 516.This level of protection is significantly higher than that afforded to the Simon plaintiffs who were named in Crime Commission report with no clear evidentiary basis for their inclusion.

The movants argue that due process requires the opportunity to present evidence to the grand jury to refute the evidence presented by the OAG that resulted in the language critical of them contained in the Report. The Court has found no support for this proposition in either the

laws of the Commonwealth, in Pennsylvania Supreme Court, or United States Supreme Court due process jurisprudence. In comparing the nature of the Civil Rights Commission to other traditional investigative bodies the Hannah Court commented on the nature of grand jury proceedings and explained

> we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

Hannah, 363 U.S. 420, 448–49, 80 S.Ct. 1502, 1518. The Hannah Court acknowledged that in the context on grand jury proceedings permitting cross-examination and presentation of evidence by potential targets would be unduly disruptive to the purely investigative function of the grand jury. Similarly, permitting those named in grand jury reports to present evidence would disrupt the investigative function while affording little additional safeguards. Further, permitting persons named in grand jury reports to present evidence, including potentially their own testimony subject to cross-examination, to the grand jury would turn an investigative proceeding into an adjudicative one which is not the purpose or function of an investigative grand jury. See, 42 Pa. C.S. § 4548 (providing that investigative grand juries have the power or inquiry and investigation not adjudication); Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (1986)(purpose of statute authorizing Supreme Court to convene multicounty, investigating grand juries is to enhance ability of Commonwealth to inquire into criminal activity or public corruption reaching into several counties). Adopting the position advanced by the movants

would fundamentally change the Grand Jury Act's procedures, change the historical function of grand juries, and effectively bring the grand jury process to a halt turning each investigation into a full adjudication.

The final Mathews factor requires consideration of the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. Here there are two identifiable state interests are implicated: the interest in having a effective and efficient grand jury process; and the interest in protecting children from child sexual predators and those who enable them. Relative to the first consideration concerning grand juries, the state interest is to have an entity that is capable of conducting inquiries into organized crime or public corruption or both involving more than one county of the Commonwealth. As noted above, never in the history of grand juries have persons under investigation been permitted to cross-examine witnesses or present evidence to an investigative grand jury. To permit persons named in a report the full panoply of due process rights would be a substantial burden to the Commonwealth who would be required to allow such persons access to the testimony of witnesses traditionally shielded in grand jury secrecy, permit them to recall and cross-examine those witnesses, and allow the presentation of new evidence.

Such requirements would disrupt the functions of the grand jury and distract it from its sole function as an investigative body and transform it into an adjudicative body. Investigative grand juries are, by their nature, not adjudicative in nature and the Grand Jury Act narrowly prescribes their authority to be investigative only. It would be a substantial overreach to transform a grand jury into an adjudicative body where the legislature has clearly intended to limit their authority to investigative functions only. Such a transformation would be contrary to the long standing historical role grand juries serve in our system of jurisprudence and would

require the creation of new procedures and safeguards that would burden all those involved with the process including the OAG, supervising judges, and most importantly the grand jurors themselves. Further, if persons named in a report were afforded the right to an evidentiary hearing it would require the hearing be held before the grand jury, whose function it is to weigh the evidence and make factual findings. This procedure would be extremely burdensome significantly increasing the time and expense required to complete each investigation. In some cases, such as the matter *sub judice*, permitting such hearings would be impossible as the grand jury's term has expired and so it cannot be reconvened to review this additional evidence or make or approve changes to the report it issued.

Movants suggest that this can be overcome by having the court conduct pre-depravations hearings and then making any necessary redactions or changes to the Report. There is no provision in the Grand Jury Act, other laws of the Commonwealth, or Pennsylvania Constitution that would authorize the Court to redact or rewrite a grand jury report once it has been submitted by the grand jury. Providing a court with such authority would effectively eviscerate the Grand Jury Act relative to grand jury reports by taking the power to make findings and recommendations away from the grand jury and placing it in the hands of the supervising judge. A grand jury report consists of factual findings by the grand jury supported by a preponderance of the evidence found credible by the jurors and in some cases, such as this one, recommendations for changes to the laws of the Commonwealth. Once a report is submitted to the supervising judge, the Grand Jury Act mandates the supervising judge review the report and if it is supported by a preponderance of the evidence accept the report and make it public. 42 Pa. C.S. § 4552. There exists only a narrow exception to this requirement for reports that are either not supported by a preponderance of the evidence or reports whose immediate release would

prejudice a pending criminal matter. Id. Authorizing a supervising judge to alter the report after its acceptance would fundamentally alter the Grand Jury Act and the power of the grand jury.

The second interest implicate is the Commonwealth's substantial interests to prevent child abuse, to provide justice to those abused children, and to protect abused children from further abuse by identifying abusers and those individuals and institutions that enable the abuses to continue abusing children. See *e.g.*, 23 Pa.C.S. § 6302 (finding and purpose of CPSL). Here the Report is the culmination of two years of investigation into the Dioceses related to allegations of child sexual abuse, failure to make a mandatory report, acts endangering the welfare of children, and obstruction of justice by individuals associated with the Roman Catholic Church, local public officials, and community leaders. This investigation followed the report issued by the Thirty-Seventh Statewide Investigating Grand Jury concerning child sexual abuse in the Altoona-Johnstown Diocese and the failure of Diocesan leaders to protect children from such abuse and to conceal that the abuse occurred. The Commonwealth's interest in protecting children from sexual predators and persons or institutions that enable them to continue their abuse is of the highest order.

Balancing these Mathews factors the Court reaches the same conclusion as did the Commonwealth Court in Pennsylvania Bar and Simon that where an individual is named in an investigative report due process requires only that they be afforded notice of the report and an opportunity to respond to the report in writing. Distinguishable are recent cases involving placing individuals on child abuse registries, such as ChildLine, without affording the affected person any or only limited due process rights. See, J.P. v. Dep't of Human Servs., 170 A.3d 575 (Pa. Cmwlth. 2017) (Department of Human Services violated teacher's due process rights in placing teacher's name on ChildLine and Abuse Registry of alleged child abuse perpetrators, pursuant to

the Child Protective Services Law, where Department did not provide any form of hearing despite teacher's clear request for one). See also, G.V. v. Dep't of Pub. Welfare, 625 Pa. 280, 295, 91 A.3d 667, 676 (2014) (Saylor, J. dissenting) ("I would only observe that the inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question."); D.C. v. Dep't of Human Servs., 150 A.3d 558 (Pa. Cmwlth. 2016) (person whose name is entered into the ChildLine Registry as a perpetrator of child abuse is entitled to a clear and unequivocal notice of the post-deprivation hearing as a matter of due process); K.J. v. DPW, 767 A.2d 609, 616 n. 9 (Pa.Cmwlth.2001) (Friedman, J., dissenting) ("It shocks my conscience that the Law would allow the investigating caseworker to render a *de facto* adjudication that is adverse to an individual's reputation *without* an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). In each of these cases the state, through one or more agencies, engaged in an adjudicative not investigative role in finding a person a perpetrator of child abuse and as such due process clearly required more process than was afforded to the individuals placed on the registry. Here, by its very nature as an investigating grand jury, the Grand Jury was involved in an investigative function not an adjudicative one and as such those named in its report are entitled to a lesser degree of due process. See, Hannah, 363 U.S. 420, 80 S.Ct. 1502; Simon, 659A.2d 631; Pennsylvania Bar, 147 Pa. Cmwlth. 351, 607 A.2d 850. This degree of due process is met by providing named persons notice of the report and an opportunity to respond to their inclusion in the report. Id.

For the foregoing reasons the following Order is entered:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

	*	Supreme Court of Pennsylvania
IN RE:	*	2 W.D. MISC. DKT. 2016
THE FORTIETH STATEWIDE	*	
INVESTIGATING GRAND JURY	*	Allegheny County Common Pleas
	*	No. 571 M.D. 2016
	*	
Motions for Pre-depravation Hearing	*	
	*	Notice Number 1

ORDER

AND NOW, this 5 day of June 2018, upon consideration of the Motions for Pre-depravation Hearing and for the reasons discussed in the foregoing Opinion, it is hereby **ORDERED, DIRECTED, AND DECREED** that the Motions for Pre-depravation Hearing are **DENIED**. It is **FURTHER ORDERED, DIRECTED, AND DECREED** that the Motions for Stay are **DENIED**.

The request to certify this matter for immediate appeal is **GRANTED** as the Court is of the opinion that this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Opinion and Order may materially advance the ultimate termination of this matter.

This Opinion and Order are not sealed.

BY THE COURT:

Norman A. Krumenacker, III
Supervising Judge
40th Statewide Investigating Grand Jury

cc: Daniel Dye, Esq., SDAG
Christopher D. Carusone, Esq.
John A. Marty, Esq.
Robert J. Donatoni, Esq.
Christopher M. Capozzi, Esq.
Glenn A. Parno, Esq.
Jessica Meller, Esq.

Exhibit B

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