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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

15 EM 2022

IN RE: THE THIRTIETH COUNTY
INVESTIGATING GRAND JURY

Filed Under Seal

BRIEF OF THE OFFICE OF ATTORNEY GENERAL

Exercise of extraordinary jurisdiction under 42 Pa.C.S. § 726 following grant of Pa.R.A.P. 1611 petition for specialized review of the March 4, 2022 Order of the Court of Common Pleas of Philadelphia County for the unsealing and public filing of the Report of County Investigating Grand Jury 30 at Misc. No. 0008094-2018.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

QUESTIONS PRESENTED

1. Is the report of the grand jury a "report" within the meaning of the Grand Jury Act?

2. Is the report of the grand jury supported by a preponderance of the evidence as required by the Grand Jury Act?

3(a). What type or degree of individual criticism in a grand jury report triggers due process protection?

3(b). Were all persons named in the instant report who were entitled to notice and opportunity to be heard so notified?

4. Would petitioner be denied due process or his constitutional right to reputation by publication of the report of the grand jury?

STATEMENT OF THE CASE

Petitioner challenges the redacted report of the thirtieth county investigating grand jury. The report, however, is consistent with the longstanding and vital function of grand juries in Pennsylvania, a system that affords oversight of important public functions that no other institution can provide. Here, while further redactions may be required before the report may be published, it does not deny petitioner's due process or reputation rights under Article I, § 1 of the state constitution.

Shortly after 8 p.m. on December 8, 2015, plainclothes officers [redacted] and [redacted] saw an illegal drug deal taking place at a [redacted] restaurant [redacted] in Philadelphia. The dealer, [redacted], was standing in the parking lot waiting to meet [redacted], who arrived in a 2003 Mercury Grand Marquis. [redacted] got in the passenger side. As the deal was taking place [redacted] walked up to [redacted] window and displayed his badge. [redacted] immediately raised his hands. [redacted] then went to the driver's side and tried to open [redacted] door. [redacted]n put the car in reverse and drove backwards across the parking lot, hitting a parked car. [redacted] drew his weapon and ordered [redacted] to stop and show his hands. Instead [redacted] drove rapidly toward [redacted], who dodged out of the way. [redacted]

kept going over the curb and onto Torresdale Avenue, emerging in front of two other officers who were patrolling in a marked police car.

[redacted] and [redacted] saw a car with unlit headlight exit over the curb from the [redacted] parking lot. [redacted] suspected it was fleeing following a robbery. A radio message said to stop the fleeing car. Other police cars joined the pursuit. [redacted] fled at high speed through various streets and over the grounds of a public park. [redacted] saw [redacted] car going "airborne" and "bottoming out" in crossing hills inside the park. [redacted] told [redacted] he didn't want to go to jail. [redacted] later said [redacted] was [redacted]

When [redacted] exited the park at high speed his car struck a curb, throwing both occupants forward. [redacted] hit the dashboard, and [redacted] hit the steering wheel and briefly lost control of the car [redacted]. After exiting the park, [redacted] hit one of the police cars. [redacted] said things were happening so fast he did not know if [redacted] did that on purpose. Afterward, when [redacted] slowed and opened his door as if preparing to stop, a police car came close and [redacted] repeatedly rammed it. [redacted] said he pleaded to be let out but instead [redacted]

[redacted] The entire pursuit was estimated to have occurred within the space of two minutes.

In the course of the chase [redacted] collided with at least four police cars and a number of parked cars. The resulting damage to his car included several flat tires. One tire came off the steel wheel rim, which threw sparks as he continued to drive. About a mile from the start of the pursuit, [redacted] stopped his car on the [redacted] Avenue. He exited the car and continued to flee on foot, but an officer tackled him in the gravel parking lot [redacted] remained in the car and cooperated in being taken into custody.

As many as 20 officers may have been in the immediate area, of which six ([redacted]) participated in the arrest. Four of these officers reported using some level of force, including control holds and punches to [redacted] head, arms, and upper back. [redacted] and [redacted] reported that [redacted] was kicking and punching the officers. [redacted] reported using "feet strikes" on [redacted] arms. In his statement of December 9, 2015, [redacted] stated that the arresting officers [redacted]. A civilian witness, 18-year-old

[redacted], said it was "really dark" but he could see that, after officers were able to handcuff [redacted], his face was "bloody." The witness heard [redacted] complain that an officer "punched me in my face" [redacted]

Fire Department Emergency Medical Services transported [redacted] directly to the [redacted] Hospital emergency room. He arrived at 9:28 p.m., complaining of pain in his left ribs, abdomen, head, left hand, and knees. Radiological tests showed facial orbital bone fractures, a broken hand, and several broken ribs. Doctors ruled out such conditions as intracranial hematoma, fracture of the cervical spine, and pulmonary contusion, and initially found [redacted] Further testing found a [redacted] causing [redacted] to be admitted to the hospital at 10:39 p.m.

Two days later, on December 10, 2015 at 6:56 p.m., the hospital discharged [redacted]. The officers who came to transport him noted that he was in pain from his rib injuries. He continued to complain of having been punched. The officers who handled [redacted] booking [redacted] asked if he wanted to return to the hospital, but he said no.

The next morning, December 11, 2015, [redacted] was transferred to the Curran Fromhold Correctional Facility (CFCF), a Philadelphia county prison. In

his intake assessment, [redacted] recorded that he was alert and in no acute distress, though he stated he had [redacted]. At 4:34 p.m. that day [redacted] filled out a "sick call request" citing medical problems [redacted] The CFCF medical staff (a City contractor, [redacted]) responded two days later, December 14, 2015, by printing out his [redacted] Hospital discharge instructions and giving them to him along with a note, written on the "sick call" form, stating that pain medicine had been ordered and that [redacted] had an upcoming appointment to have his staples or sutures removed.

The next day, Dec. 15, 2015, a "stretcher call" was issued for [redacted] at 2:27 p.m. He told the responding medical staff [redacted] He added that he was constipated and unable to take deep breaths. By way of treatment, he was given a pillow to help with breathing, was [redacted] and was told [redacted] He was also transferred from his one-person cell to a cell with two other inmates.

One of [redacted] cellmates, [redacted], concluded from [redacted] appearance and demeanor that he should be in a hospital. The other, [redacted], gave [redacted] some of his personal Motrin to help with his pain. He later believed he heard [redacted] vomiting. [redacted] told a guard that [redacted] needed medical treatment, but the guard said it would have to wait

until tomorrow. At 7:22 a.m. that next morning, December 16, 2015, a guard discovered [redacted] with eyes open, unresponsive and unmoving. Efforts to revive him with CPR, oxygen, an IV, and epinephrine, all failed. Fire Department paramedics pronounced [redacted] dead at 7:50 a.m.

An investigator for the Office of the Medical Examiner (OME), [redacted], arrived at 9:30 a.m. He took photographs, examined the body for lividity and injuries, and interviewed [redacted] cell mates and two guards. Police Officer [redacted] was dispatched to the prison, but did not go to [redacted] cell after corrections officials told him the body had already been removed.

At 8:30 a.m. the next day, December 17, 2015, Associate Medical Examiner [redacted] began an autopsy. She determined that laceration of [redacted] spleen, which occurred when his ribs were broken at his left torso on the date of his arrest on December 8, produced a hematoma (a collection of blood) from bleeding inside that organ. The hematoma continued to expand over several days, resulting in the spleen rupturing and causing death. [redacted] surmised that this fatal condition had not been detected at the hospital, even though a splenic laceration was noted on [redacted] hospital record, because multiple imaging tests are necessary to make certain there is no potential hematoma from such an injury. In this case only one such test was done [redacted].

[redacted]n believed the fatal injuries were sustained on the day of the arrest rather than through some subsequent trauma, and sought additional documentation in order to determine the proximate cause of those injuries. She contacted Northeast Detectives and was given photographs of the damage to [redacted] Grand Marquis. Though it was difficult to make out details, [redacted] considered it unlikely that McGovern had sustained the fatal injuries while in the car because [redacted]. She obtained police reports, but they did not state whether [redacted] was wearing a seat belt, whether his car's air bags deployed, or the speed of the vehicles during the multiple collisions. The police accounts of the arrest also did not specify how particular injuries were sustained.[1]

[redacted] later asked Northeast Detectives for additional information but was told the case had been transferred to IAD. [redacted] told her that no further information could be disclosed due to the ongoing investigation. He maintained that position notwithstanding [redacted] stated need

[1] The grand jury report concludes that [redacted] could not establish a cause of death because [redacted] in that the police documentation did not [redacted] Although higher speeds could arguably point to the collisions as a possible cause of death, however, that would not rule out police force as a matter of medical certainty [redacted].

for additional information to classify cause of death. [redacted] requested an in-person meeting at the OME offices. On or about March 1, 2016, [redacted] arrived with several other IAD personnel. [redacted] explained that she was considering classifying the death as a homicide. [redacted] appeared agitated by this news and was [redacted] in arguing against such a finding, but still declined to provide any general disclosure of IAD investigative materials. He did provide certain items, such as recorded police radio calls and copies of interviews conducted by Northeast Detectives.

Roughly a month after that meeting, [redacted] was contacted by IAD officers [redacted] and [redacted], who provided IAD documents and materials and the substance of the IAD investigation. [redacted] and [redacted] noted that the police Accident Investigation Division (AID) had not been contacted following the [redacted] pursuit, and that this was [redacted] [redacted] produced subsequently-taken photos of the Grand Marquis at the salvage yard, showing additional damage indicating that [redacted] had impacted the interior of the car. Although [redacted] believed this damage was not [redacted] she classified the cause of death as [redacted] because vehicular collision could not be excluded as a cause to a reasonable degree of medical certainty [redacted].

On the day [redacted] died in CFCF, December 17, 2015, a "use of force package" was forwarded to IAD. Since the December 8 arrest had occurred in the Northeast division, the matter was in the area of responsibility of [redacted]. He issued his final approval of the use of force package and did not order further investigation (exhibit 175, p. 37).

[redacted] testified in a 2017 deposition in a civil action that he had been monitoring the police radio broadcasts during the [redacted] pursuit.[2] Upon reviewing the use of force package, he concluded [redacted] was injured in his intentional crashes with police vehicles. [redacted] son, [redacted], was assigned to the [redacted] and was on duty that evening. [redacted] believed he had no conflict of interest, however, because [redacted] did not participate in the pursuit or arrest. However, [redacted] was responsible for investigating the conduct of his son's co-workers on the same shift.

On December 29, 2015, [redacted], the brother of the deceased, made an in-person report at the [redacted], alleging that his brother had died due to being physically abused by the police. A "complaint against police" (CAP) document was generated and forwarded to [redacted], but he did not see it

[2] [redacted] was not subpoenaed by the grand jury. He was invited by letter to testify, but declined (N.T. 6/3/21, 15).

until January 5, 2016 because he was on vacation. Until that time, [redacted] said, he had not known [redacted] had died while in custody.

IAD matters are typically assigned to the next available investigator by rotation (a/k/a "the wheel"), but can be specially assigned to a Force Investigation Team (FIT), a group of experienced officers. Some witnesses stated that a FIT assignment is standard when someone is hospitalized or dies following police use of force. In his 2017 deposition, [redacted] stated that his superior, [redacted], the commanding officer of IAD, directed him to assign the matter to "the next line squad that was up on the investigation wheel" [redacted]. [redacted] testified to the grand jury in 2021, but was not asked about [redacted] claim that he, [redacted], had given such an order. In his testimony [redacted] indicated (contrary to [redacted] deposition) that FIT assignments are never routine, but rather are discretionary with the investigating inspector (here [redacted]) and the FIT supervisor.

[redacted] direct subordinate, [redacted], assigned the investigation to [redacted] in early January 2016. On March 3, 2016, following [redacted] indication that [redacted] death might be classified as a homicide, [redacted] reassigned the investigation from [redacted] to a FIT team under [redacted]. On that same day, [redacted] contacted and briefed an assistant district attorney at the

Philadelphia District Attorney's Office (DAO), who began monitoring the investigation.

[redacted], who was assigned to the FIT team, was frustrated by the amount of time that had passed between [redacted] death and the assignment. [redacted] believed [redacted] had arranged to first assign the matter to [redacted] precisely because the task was beyond her abilities and resources, resulting in a loss of time-sensitive evidence, and that [redacted] was motivated by a conflict of interest because his son worked in the relevant district. [redacted] alleged that, when he complained about the [redacted] assignment to [redacted] told him that the plan was for [redacted] to fail so that she would be exposed to disciplinary action. As shown below, [redacted] later denied making such a statement.

[redacted] filed a memorandum on March 10, 2016 requesting an internal investigation of [redacted], claiming conflict of interest. [redacted] [redacted] disapproved the request and directed [redacted] to focus on the investigation. [redacted] testified that there was a preexisting personal conflict between [redacted] and [redacted] stemming from an incident in which [redacted] sustained IAD findings against an officer [redacted] knew.

The FIT investigators took additional photos of the damage to [redacted] car and of the area of the pursuit and arrest. They also learned that [redacted]

[redacted] and his partner were not involved in the pursuit or arrest, but subsequently went to the scene and assisted in controlling traffic. [redacted] should have noted this in the pair's patrol log, but did not. He later testified that the omission was inadvertent [redacted]. The investigators also found that Officer [redacted] had promptly reported [redacted] death to the police operations room, where it had been erroneously coded as [redacted] rather than [redacted] A [redacted] death would have been reported to the homicide unit.

The FIT investigation determined that certain evidence (including store surveillance videos, a recording of a 911 call, and "J band" radio transmissions) that could have been recovered early in the investigation had been lost due to the passage of time. Further, had the Accident Investigation Division been alerted it may have been able to use tire marks on the street to determine where vehicular collisions occurred during the pursuit. The IAD investigation ultimately identified no certain cause of death, although Inspector [redacted] believed the fatal injuries had been inflicted by the police.

Philadelphia District Attorney R. Seth Williams submitted the [redacted] matter to the 28th county investigating grand jury on May 11, 2016. That grand jury expired without issuing a report. Covid restrictions and lack of resources hindered further proceedings until the 30th grand jury obtained additional evidence.

The 30th grand jury submitted a report on or about June 3, 2021. On that date, counsel for the Commonwealth argued that only individuals accused of criminal conduct were constitutionally entitled to notice [redacted]. However, the supervising judge, the Honorable Kai N. Scott, decided to issue more expansive notice and opportunity for response to a total of nine persons: [redacted] All those notified, with the exception of [redacted] filed responses and moved, *inter alia*, to permanently seal the report.

The ensuing proceedings culminated in Judge Scott's extensive redaction of the report, which removed certain names and organizational designations. Appended to the redacted report is a statement by petitioner, [redacted], providing a detailed rebuttal of allegations made against him and contending that the report is agenda-driven and an abuse of the grand jury process. The report was submitted for publication on March 4, 2022. [redacted] then filed a petition for specialized review, which this Court granted on February 10, 2023, exercising extraordinary jurisdiction and inviting the Office of the Attorney General to file the instant brief.

SUMMARY OF ARGUMENT

Petitioner's main objection to the grand jury report relies on his constitutional right to reputation. That right, he argues, entitles him to anonymity and immunity to criticism. But this was never how the constitutional right to reputation was understood in Pennsylvania. Instead, as shown below, the constitution protects against the equivalent of libel and slander. Fact-based criticism designed to address general welfare concerns, especially of a public official's performance of public duties, has never been discouraged in Pennsylvania's constitutional scheme. To the contrary, such transparency, and the grand jury system that facilitates it, has long been constitutionally recognized as vital to good government.

Here, the grand jury report criticizes petitioner, but taken as a whole it does not deny the constitutional right to reputation. His right to due process was generally afforded by the fact that he testified before the grand jury, litigated the validity of criticisms against him, and appended to the report a statement in which he challenged its assertions. The report is therefore broadly consistent with the due process framework outlined by Justice Dougherty's 2018 concurrence in *In re Fortieth Statewide Investigating Grand Jury*. Nevertheless, it is not without flaws; additional notice to certain persons, as well as additional redactions of the report, appear to be required.

ARGUMENT

1. The report recommends legislative, executive or administrative action in the public interest.

Petitioner contends that the grand jury report fails to meet the statutory definition of a "report" under 42 Pa.C.S. § 4542. That provision of the Grand Jury Act defines a report as a document that, *inter alia*, "propos[es] recommendations for legislative, executive, or administrative action in the public interest based upon stated findings."

The report, however, meets that statutory definition. It is unlike the report in *In re Grand Jury Investigation No. 18*, 224 A.3d 326, 332 (Pa. 2020). As this Court explained there, the report in that case only "arguably" proposed executive or administrative actions. In reality, its recommendations were not "in the public interest" because they were not genuinely "directed at broad-based legislative, executive, or administrative action," but rather overtly sought to punish individuals who could not be criminally charged or prosecuted. 224 A.3d at 332.

Here the report addresses significant matters of general welfare. Its focus and conclusions may certainly be debated; but the same might be expected of any account of matters of general welfare. While the report criticizes the actions of certain individuals, it addresses not their private lives but their performance in public or governmental roles. The criticisms are not ends in themselves, as in *Grand Jury Investigation No. 18*, but form the basis for proposals that address

arguable shortcomings in the [redacted] investigation. The report recommends, for example, that reasons for an IAD decision not to investigate a police use of force should be documented. It further suggests that an Assistant District Attorney should participate in investigations of non-natural deaths that occur in law enforcement custody, and calls for police use-of-force statistics to be kept, made public, and be subject to audit by an agency independent of local government. There are perhaps many ways in which similar investigations might be improved, and the recommendations made here may or may not be the optimal way to achieve the goal. But they are plausible measures that the public may wish to consider, and are therefore within the statutory purpose.

Petitioner deems the recommendations an "afterthought" because the bulk of the report comprises a detailed factual analysis of the circumstances of Mr. [redacted] death and the ensuing investigation (petitioner's brief, 22-25). To the contrary, such detailed analysis is entirely consistent with the statutory definition and purpose of a report, since the validity of the recommendations depends on the supporting facts. The statutory definition provides not just that the report shall "propos[e] recommendations for legislative, executive, or administrative action in the public interest," but that such recommendations shall be "based upon stated findings." 42 Pa. C.S. § 4542.

Indeed, petitioner himself states that the report provides "long-awaited answers for the family of [redacted]" (petitioner's brief, 28). But providing such answers was the job of the investigation to begin with. The very fact that long-awaited answers came from the grand jury report suggests that the initial investigation may have been flawed, and that the public concerns the report identifies are not merely an afterthought.

Here, evidence established a basis to believe that Mr. [redacted] death resulted from excessive use of force by police officers, and that the subsequent investigation was mismanaged. Others may look at the same facts and argue for different conclusions, such as that the vehicular collisions or poor medical treatment were the more proximate cause of death, or that the flaws in the investigation were insignificant. But the possibility of such debate is inherent in the statutory definition. Potential errors by the police department in investigating what may have been a deadly use of force by the police are of undeniable public concern. *See, e.g.*, *Commonwealth v. Pownall*, 278 A.3d 885, 908 (Pa. 2022) ("We recognize the DAO's fervent desire to put the troubling and recurring issue of police [excessive force] in the spotlight. We agree the issue warrants serious examination, by every facet of government as well as those outside of it"). Such police errors clearly warrant executive, legislative or administrative attention.

The report presents recommendations to that end. It thus meets the statutory definition.

2. The general conclusions and recommendations of the report are supported by a preponderance of the evidence.

Under 42 Pa.C.S. § 4552(b), the report must be "supported by the preponderance of the evidence." This is "the least burdensome standard of proof known to the law." *Commonwealth v. Ehredt*, 401 A.2d 358, 360 (Pa. 1979). The evidence need only be "something a reasonable person would accept as sufficient to support a decision." *In re Vencil*, 152 A.3d 235, 246 (Pa. 2017) (citation omitted). Here, in reviewing the report under the preponderance standard, the supervising judge relied on a version that was annotated with 984 footnotes, each citing specific evidence considered by the grand jury.

The preponderance question comprises two categories. While the general conclusions and recommendations of the report must be supported, the same is true of criticism directed at individuals. Because the latter may implicate the constitutional right to reputation, individualized criticism must be considered separately. *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 727 (Pa. 2018) (Dougherty, J., concurring); *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 575 (Pa. 2018) (preponderance review on a "report-wide basis" distinct from determining whether individual criticism is supported). Individual criticism issues will therefore be discussed in later sections of this brief.

As for the broad, policy-focused conclusions of the report, they may well be debatable – but that does not mean they are unsupported under the preponderance standard. Petitioner's arguments to the contrary raise contentions about which reasonable people can disagree. He contends, for example, that the report finds that "high ranking police officials conspired to obstruct the investigation" (petitioner's brief, 32-33). But the report does not directly allege a conspiracy, and never uses any form of that word. In assigning blame for shortcomings in the investigation the report largely singles out one individual, [redacted], in combination with lesser mistakes by other individuals, exacerbated by a theory of cultural or institutional avoidance of responsibility on the part of the police department that the report calls [redacted].

Petitioner similarly disagrees with the report's conclusion that Mr. [redacted] death was not [redacted] investigated. He deems this characterization "demonstrably false," asserting to the contrary that an investigation "began promptly" when an officer reported to the CFCF when the death became known to the police (petitioner's brief, 33-34). Nevertheless, the report's assertion of the lack of a [redacted] investigation is not without basis. It is accurate, for example, that perishable sources of evidence, such as security video footage and J band police transmissions, were lost because investigators did not act promptly to obtain them. The Northeast Detectives file went missing and was

never found. The death was inappropriately classified as [redacted] when reported to the police operations room. And the IAD investigation was initially assigned to one inexperienced officer, and only later to a FIT team. These events objectively render the [redacted] of the investigation a matter subject to reasonable dispute.

Petitioner also contests the report's compliance with the preponderance standard in that it supposedly concludes [redacted] signed off on the December 17, 2015 "use of force" package and [redacted] about his son's "involvement in [redacted] arrest and death" (petitioner's brief, 37). But the report is consistent with the known facts in this regard. In approving the use of force reports, [redacted] disregarded [redacted] including that [redacted] had internal injuries; and [redacted] relied on his own, arguable assumption that any use of force was justified by [redacted] conduct in the vehicle pursuit [redacted]. Further, contrary to petitioner's reading, the report expressly states the finding of the grand jury that [redacted], was not involved in the arrest or use of force and that he [redacted]. To the contrary, he [redacted].

To be sure, the report references [redacted] in that he was [redacted] to the use of force and was [redacted] about it [redacted]. However, [redacted] arrived only after the arrest was over and could not have witnessed use of force in the arrest. The report further states that [redacted] omitted his presence at the scene from his patrol log [redacted], finding it [redacted] that he did so on instructions from [redacted] to [redacted]. Neither [redacted], however, is a petitioner here. To the extent these statements implicate petitioner, they should perhaps be subject to revision, but they do not invalidate the report as a whole.

Otherwise, the report's broader conclusions appear to be factually supported under the preponderance standard. Petitioner can find arguments against those conclusions, but that is not the test. While he contends that a higher standard is constitutionally required (this claim is discussed below), the legislative judgment is that preponderance – subject to the careful review of the supervising judge – provides the appropriate balance. The purpose of a report is not to state obvious facts that no one would disagree with; if a topic is the subject of a grand jury report, it is likely one that could be a matter of some degree of controversy. That different conclusions might have been drawn from the same facts does not defeat

the preponderance standard. The report, on the whole, is supported under that standard.

3. The due process threshold of Article I, § 1 protection of reputation is informed by the law of defamation—which permits a degree of criticism to further important societal interests.

This Court has posed the question of what type or degree of individual criticism in a grand jury report triggers due process protection, and whether all persons named in the instant report who were entitled to notice and opportunity to be heard were so notified.

A. The right to reputation is implicated by statements capable of defamatory meaning.

Not every negative remark necessarily compromises the right of reputation. Because the law of defamation provides the historical basis for that right, it should also establish the threshold for due process protections in this context.

The substance of the reputation right derives from common law principles of defamation. The "charter of liberties" of William Penn's May 5, 1682 *Frame of Government of Pennsylvania* called for "all scandalous and malicious reporters, backbiters, defamers, and spreaders of false news" to be "severely punished, as enemies to the peace and concord of this Province" (Laws Agreed Upon In England, 1, 30). In *Respublica v. Oswald*, 1 Dall. 319, 1788 WL 179 (1788), this Court noted that the state constitution "give[s] to every citizen a right of

investigating the conduct of those who are entrusted with the public business," but concluded that it could not "be presumed that … slanderous words" had "become sacred by the authority of the constitution." In *Barr v. Moore*, 87 Pa. 385, 393 (1878), this Court explained that the reputation right recognized in the Declaration of Rights "naturally flows from the doctrine of the common law." *Accord Sprague v. Walter*, 543 A.2d 1078, 1084 (Pa. 1988) ("Under Article I, section 1 of the Constitution of this Commonwealth, a person's interest in his or her reputation has been placed in the same category with life, liberty and property. … The redress provided under our body of substantive law is an action in tort for defamation").[3] The boundaries established by the common law of defamation thus inform and help to define the contours of the constitutional right to reputation.

As a result, due process protections are properly triggered by statements that meet the standard for libel or slander, *i.e.*, are capable of defamatory meaning. A statement is defamatory, and so implicates the right of reputation, where its impact is to "lower" the subject "in the estimation of the community" or "deter third

[3] *See Senna v. Florimont*, 958 A.2d 427, 433-434 (N.J. 2008) (explaining state constitutional reputation right recognized that reputation was "valued so highly at common law that a speaker or writer was held liable for the publication of a false and defamatory statement regardless of fault" and "implicitly acknowledged the common law of defamation") (citation, brackets and internal quotation marks omitted); *see also King v. Hopkins*, 57 N.H. 334 (1876) ("The authorities are numerous that construe common law terms in a constitution according to their common law signification. Our constitution is to be construed in the light of the common law").

persons from associating or dealing with him," *Baird v. Dun & Bradstreet*, 285 A.2d 166, 169 (Pa. 1971), or show that he "lack[s] honor and integrity." *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751, 753 (Pa. 1962). Such defamatory statements include language that holds its subjects "out for ridicule in the world," *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 126 (2004), or constitutes a charge of misconduct in office, *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1054 (1996). Defamation provides a well-developed body of law for distinguishing between actionable and inactionable criticism.

B. Reputation is balanced by other constitutional values, and is protected where due process is provided.

The constitutional right to reputation recognized in Article I, § 1, is "on the same level as those pertaining to life, liberty, and property." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d at 573 (citations omitted); *see Driscoll v. Corbett*, 69 A.3d 197, 210 (Pa. 2013) (reputation is among the "foundational freedoms"); *R. v. Commonwealth Department of Public Welfare*, 636 A.2d 142, 152 (Pa. 1994) (reputation "in the same class with life, liberty and property"); *see also Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (Rights in Article I, § 1 "are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution"). That the right to reputation is of highest constitutional importance, however, does not mean that all individual public criticism is constitutionally prohibited.

Rather, the reputation right exists alongside other constitutional rights and values and must be weighed together with them. Article I, § 7 states that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." The principle "that debate on public issues should be uninhibited, robust, and wide-open" also has "special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the 'crime' of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury." *Commonwealth v. Tate*, 432 A.2d 1382, 1388 (Pa. 1981) (citation omitted).

In *Norton v. Glenn*, 860 A.2d 48, 58 (Pa. 2004), this Court explained that its decision in *Sprague* (concerning the scope of the reputation interest under Article I) recognizes "the seesawing balance between the constitutional rights of freedom of expression and of safeguarding one's reputation." The constitutional interest in open debate is limited by the principle that it is not a license to defame. "Rather, a balance must be struck between these two constitutional rights." *Id.*

A third value, the investigative function of the grand jury, must also be weighed. The grand jury exists to "guard the right and liberties of the people," and it "is a particularly suitable body to investigate misconduct of public officials and

public evils." *Petition of McNair*, 187 A. 498, 503 (Pa. 1936).[4] This Court has thus recognized, consistent with other states, that investigating grand juries serve "a need that is not met by any other procedure" as "[t]here are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest." *In re Presentment by Camden County Grand Jury*, 89 A.2d 416, 443-444 (N.J.1952). "No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest." Grand jury reports can be "a great deterrent to official wrongdoing" and "inspire public confidence in the capacity of the body politic to purge itself of untoward conditions." *Id*.[5]

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[4] Indeed, the Court has treated the grand jury function as having constitutional dimension, stating that it is "preserved" in "the first article" of the Pennsylvania Constitution (Article I, the Declaration of Rights), and that the power "to investigate by means of the grand jury" is "fully recognized in the constitution." *In re Investigation by Dauphin County Grand Jury, Sept., 1938*, 2 A.2d 804, 807-808 (Pa. 1938). *See* Pa. Const. Art. I, § 10 (providing that no person may be "be proceeded against criminally by information" for "any indictable offense"); *In re Investigation of Jan. 1974 Philadelphia County Grand Jury*, 328 A.2d 485, 491 (Pa. 1974) (concluding that Article I, § 10 preserves "the institution of the grand jury as an investigative arm of the court").

[5] "The argument in favor of the reporting function is strongest when the grand jury uncovers a violation of the public trust that is not regulated by the criminal law[.]" Such exposure "furthers the public interest since it publicizes the official's misconduct and thereby holds the official accountable under a stricter standard of conduct than that required by the criminal law," and is "consistent with the historical role of the grand jury as a citizen watchdog over both noncriminal and criminal misconduct in government." Stern, *Revealing Misconduct by Public*

This Court has continued to recognize the value of grand jury reports "designed to address general welfare concerns" notwithstanding that they "may have a collateral impact on reputational rights," even while disapproving reports whose "primary objective" is "to publicly censure the conduct of specific individuals." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 574 (Pa. 2018). This balanced assessment reflects the foundational understanding, noted above, of the right to reputation in light of the law of defamation.

In the private sphere, that balance – between the need to protect individual reputation and the need for free expression and societal self-examination – is effectuated through the "actual malice" standard, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964). In the public sphere, the balance is kept by the application of due process principles and the oversight of the supervising grand jury judge. Evidence received by a grand jury may be false or mistaken; and conclusions in a report may be without factual basis. Due process therefore

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Officials Through Grand Jury Reports, 136 U. Pa. L. Rev. 73, 125-126 (1987). "Grand juries appear better suited than either legislative or executive committees or private bodies to police the conduct of public officials," especially because "the grand jury is not an autonomous group, completely the master of its own investigation. Its action is subject to immediate control by the court of which the jury is but an arm." Because grand jury reports encourage "public employees to regard their office as a public trust" they are clearly in the general interest; "there is no greater deterrent to evil, incompetent and corrupt government than publicity[.]" Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 Colum. L. Rev. 1103, 1119, 1122 (1955) (footnotes omitted).

requires that an individual who is criticized by a grand jury report be given prepublication notice and an opportunity to appear before the grand jury, to dispute the factual basis of the criticisms, and to publish his own response as part of the report. These are the core protections outlined by Justice Dougherty's concurrence in *In re Fortieth*, 197 A.3d at 725 *et seq.* As a result of this Court's guidance, petitioner received those protections. He testified before the grand jury, he litigated challenges before the supervising judge, and his written refutation of certain parts of the report is appended thereto.

Petitioner nevertheless asks this Court to declare Pennsylvania's Investigating Grand Jury Act *facially* unconstitutional. He claims that the process provided him was "inadequate" (petitioner's brief, 9). But even if that were so (and this brief notes that further proceedings may be necessary), the alleged inadequacy of due process measures in general cannot be a basis for a finding of facial unconstitutionality. Due process is "a flexible concept" that "varies with the particular situation," and its "central demands … are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (citations and internal quotation marks omitted); *see In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d at 717 (2018) (applying *Bundy*). Here, citing *Commonwealth v. Pownall*, 278 A.3d 885 (Pa. 2022), petitioner argues that the Grand Jury Act may be abused by particular actors in

particular cases (petitioner's brief, 9). That is unfortunately true, as it is true that any legal power may be abused. But as *Pownall* itself concludes, that a law might in some cases be misapplied does not make it facially unconstitutional. *Pownall*, 278 A.3d at 904-905 ("A statute is facially unconstitutional only where no set of circumstances exist[s] under which the statute would be valid") (citation omitted); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018) (statute invalid only if it "clearly, palpably, and plainly violates the Constitution") (citations omitted).

A finding of unconstitutionality is not a proper remedy for the possibility of abuse of power; rather, the proper approach here, as with other rights and other powers, is to provide proper process and proper oversight.[6]

C. Additional notice and revisions may be required.

In addressing the second part of the issue raised by the Court, it appears that pre-publication notice and opportunity to be heard was required but not issued for several individuals.

[6] Moreover, because the grand jury is an arm of the court, egregious misconduct is subject to discipline by this Court pursuant to its exclusive constitutional authority. *See Beyers v. Richmond*, 937 A.2d 1082, 1091 (Pa. 2007) (Article V, § 10 grants Supreme Court the power of "the continuous monitoring of the practice of law" and the "inherent and exclusive power to supervise the conduct of attorneys who are its officers").

As previously noted, the report finds that [redacted] and [redacted]. However, it also cites his [redacted] because he was [redacted] and was [redacted] to the use of force but was [redacted] about it [redacted]. The report further states that [redacted] omitted his presence at the scene from his patrol log [redacted], deeming it [redacted] that he did so on instructions from [redacted]. These assertions appear to accuse [redacted] of misconduct, which entitled him to notice and opportunity to be heard on these specific issues.

[redacted] is described in the report as inexperienced, but also as [redacted] in IAD, [redacted] a [redacted] having [redacted] and having been repeatedly cited for [redacted]. While these pejorative descriptors are based on testimony, they nevertheless indicate that [redacted] lacks honor or integrity, and they could deter others from wanting to associate with her. *See Baird v. Dun & Bradstreet*, 285 A.2d at 169; *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d at 753. [redacted] should have been provided with notice.

[redacted], [redacted] supervisor in IAD, is claimed in the report to have [redacted] while allegedly doing nothing to assist or oversee her work in the [redacted] investigation [redacted]. The report concludes that [redacted] was [redacted] by (*inter alia*) [redacted] to undermine the investigation and build an internal discipline case against Johnson [redacted]. Because obstructing an investigation could amount to misconduct in office or even a criminal offense, notice to [redacted] would have been warranted.

[redacted], was a nurse at the CFCF prison and helped to process Mr. [redacted]. After noting that the prison [redacted] the report states that [redacted] recorded him answering [redacted] when asked if he had any police related injury or life-threatening medical problem. The report deems it [redacted] that [redacted] really gave those answers [redacted], implying that [redacted] fabricated them. That would have contributed to the prison's failure to provide [redacted] with timely medical care, resulting in his death. Thus, notice to [redacted] may well have been proper.

[redacted], the police operations room supervisor, received the report from the OME investigator that Mr. [redacted] had died in the prison, and he coded the death as [redacted] As noted in the report, he admitted this was an

error. But the report goes beyond that fact, equating [redacted] admitted mistake with [redacted] allegedly deliberate patrol log omission, implying that [redacted] action was deliberate and calculated. Given the characterization, notice would have been appropriate.

[redacted] supervised [redacted] at Northeast Detectives. [redacted] wrote an email to [redacted] stating that [redacted] had ordered him ([redacted]) not to provide information. The report characterizes this incident as a refusal to cooperate with the IAD investigation on the part of [redacted] and [redacted], ignoring [redacted] explanation that he was not providing the information because [redacted] was supplying hard copies of the relevant documents. This called for notice to [redacted] and [redacted].

The report notes that the OME investigator notified [redacted] of the death, but the call was not recorded in the log [redacted]. That implies [redacted] committed malfeasance. He was entitled to notice.

Lastly, the report finds that caregivers at [redacted] Hospital provided inadequate medical care. That conclusion is supported by the testimony of [redacted] that additional tests should have been performed and would have prevented [redacted] death. But if the report identified individuals who were alleged to have provided fatally deficient medical services, those individuals should have received notice.

Since the grand jury is no longer in session, the jurors themselves can no longer consider or incorporate any new information that might be offered by non-noticed parties. Revisions to the report by the supervising judge may therefore be required. *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d at 723-724.

4. With appropriate further proceedings, publication of the report would not deny petitioner's rights to due process or reputation.

The remaining question is whether publication of the grand jury report would deny petitioner's constitutional rights to due process or reputation. Given proper additional process, it would not.

To reiterate, the right to reputation does not exist in constitutional isolation, but is balanced by Article I, § 7, which holds that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man[,]" and by the role of the grand jury in furthering societal self-correction, which this Court has historically recognized. The Constitution ensures "that debate on public issues should be uninhibited, robust, and wide-open." *Commonwealth v. Tate*, 432 A.2d at 1388. These constitutional standards that define the contours of the reputation right also inform the due process question, which involves a balance of interests.

With regard to due process, this Court has recognized a distinction "between a grand jury report that is designed to address general welfare concerns, but may have a collateral impact on reputational rights," and one "in which a primary objective is to publicly censure the conduct of specific individuals." *In re Fortieth*

Statewide Investigating Grand Jury, 190 A.3d at 574. The "difficult question" is to determine exactly "what process is due." *In re F.C. III*, 2 A.3d 1201, 1215 (Pa. 2010). As Justice Dougherty outlined in *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d at 726-28 (Pa. 2018) (Dougherty, J, concurring), the best practice, where possible, is to provide persons subject to criticism with relevant portions of a draft report before they testify. Such persons could be given the option to return and testify again after a report has been prepared. They should also have the opportunity to file objections with the supervising judge, who by statute must determine if the report's findings are supported by the record. See 42 Pa.C.S. § 4552(b). The grand jury, if still in session, may also have the chance to reconsider its report in light of any new testimony, written objections, or concerns of the supervising judge. Finally, in addition to such procedures, criticized individuals should have the opportunity to lodge a written public response to be filed together with the report. Where these procedures should have been applied but were not, and where, as here, the grand jury has been dissolved, revision may be necessary before publication can be permitted. *In re Fortieth*, 197 A.3d at 723-724 (redaction of names and identifying information required where grand jury had been dissolved).

Petitioner argues that such procedures did not properly protect him, and that the report therefore cannot be published. He observes, for example, that, although

his identity is redacted from the grand jury report, he remains identifiable, and he complains that he had to acknowledge his identity in order to effectively dispute the report (petitioner's brief, 44-45, 57). That is correct, as far as it goes—petitioner's command of IAD at the time in question is known to thousands of police employees, and is readily ascertainable by internet search. But that in itself is not a denial of his constitutional reputation right, if appropriate process is provided. Criticism of an IAD investigation that does not imply criticism of its commander is as impossible as considering the sinking of the Titanic without implicating its captain. As the one in charge, petitioner is not entitled to anonymity any more than any other official with public responsibilities. The constitutional right to reputation is not a right to anonymity, nor is it a right to immunity from criticism. Petitioner was entitled to testify before the grand jury, which he did, to contest findings before the supervising judge, which he did, and to contradict the report in writing, as he did in his written addendum in accordance with the Act.

Petitioner also contends that the report cannot be published because aspects of it will cause him to be "condemned in the court of public opinion" (petitioner's brief, 46). It should be noted, however, that, while the report severely criticizes [redacted], its review of petitioner's conduct is more muted. For example, while the report maintains that a FIT team should have been assigned immediately upon Mr. [redacted] death, on balance it assigns this failure to [redacted].

The report cites [redacted] assertion that it was petitioner who ordered him to follow the wheel assignment procedure, but that account is prefaced by [redacted] labeling it as [redacted] assertion rather than established fact [redacted]. The report also acknowledges petitioner's assertion that not all cases involving hospitalization or death necessarily go to a FIT team [redacted], and it appends petitioner's rebuttal, contradicting as [redacted] assertions in the report based on allegations by, *inter alia*, [redacted], that such cases are always FIT cases [redacted]. The report acknowledges that [redacted] was [redacted] but that when the Medical Examiner raised the possibility that the death was a homicide, it was petitioner who immediately assigned a FIT team and notified the District Attorney's Office [redacted].

The report repeats [redacted] assertion that petitioner told him [redacted] was originally assigned [redacted]. But it also makes clear that this is [redacted] version of events. Petitioner's addendum states that he [redacted] and that [redacted] version is [redacted]. The report conveys petitioner's perspective of [redacted] objection to [redacted]s participation in the investigation, and [redacted] clash with petitioner over [redacted] demand for a separate investigation of [redacted]

[redacted]. The report also reflects that [redacted] harbored personal animosity toward [redacted], because [redacted] had sustained an IAD complaint against an officer [redacted] knew (report, 60-62). The facts in the report indicate that [redacted] harbored a similar grudge against petitioner because he failed to comply with [redacted] demands.

The report adds that, following his dispute with petitioner and others, [redacted] considered his position in IAD [redacted] leading to what he himself described as [redacted] on his part [redacted]. It also acknowledges that while [redacted] expected negative consequences for his mutiny, there were none—petitioner did not retaliate. Instead [redacted]. The report also refers to [redacted] conflict of interest and states that petitioner [redacted]. But the report also appends petitioner's response, stating that, since [redacted] was not involved in the use of force and was never under investigation, [redacted] participation was entirely proper under the Office of Professional Responsibility's conflict of interest policy [redacted].[7]

[7] The report finds petitioner's reasons for disapproving [redacted] demand for a separate investigation of [redacted] However, the question of whether [redacted] should have been personally investigated is unrelated to the investigation of Mr. [redacted] death. Similarly, the report deems it [redacted] that [redacted]

Perhaps most significantly, petitioner and the report agree that mistakes were made by officers, including officers under his command, during and after the arrest and in the subsequent investigation (addendum, 19). It follows, then, that some level of criticism is not unreasonable.

Finally, petitioner seeks to block publication of the report on the basis of the standard of review. Citing *Commonwealth v. Maldonado*, 838 A.2d 710 (Pa. 2003), he assails the statutory preponderance standard, contending that a more difficult bar such as clear and convincing evidence should be imposed whenever the constitutional right to reputation is at risk (petitioner's brief, 58-60). As *Maldonado* recognizes, however, multiple and disparate interests must be considered in assigning the standard of proof. *E.g*., 838 A.2d at 718 ("the harm to the public associated with any underinclusion that could result from imposition of the reasonable-doubt requirement cannot be overlooked … such harm may be grave"). Here, moreover, the standard has been set by the legislature. Because due process is flexible, *Bundy v. Wetzel*, 184 A.3d at 557, requiring the procedural protections outlined by Justice Dougherty in *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d at 726-28, rather than contravening the standard set by statute, allows this Court to fulfill its "duty to avoid constitutional difficulties, if

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[redacted], but it does not link this conclusion to petitioner's conduct.

possible, by construing statutes in a constitutional manner." *Commonwealth v. Ludwig*, 874 A.2d 623, 628 (Pa. 2005).

Further, the "difficult question" of "what process is due," *In re F.C. III*, 2 A.3d at 1215, should include consideration of the fact that petitioner is not a private actor, but a public officer whose performance of his public duties is subject to public scrutiny. Article I, § 7 protects the principle "that debate on public issues should be uninhibited, robust, and wide-open," *Commonwealth v. Tate*, 432 A.2d at 1388, and the law provides for a grand jury to "investigate misconduct of public officials and public evils." *Petition of McNair*, 187 A. at 503. In *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d at 574, this Court noted the importance of "a grand jury report that is designed to address general welfare concerns." While some individuals might understandably wish to limit public scrutiny of public conduct, such a desire would be in tension with Pennsylvania's constitutional design, in which debate on public issues should be "wide-open," *Commonwealth v. Tate*, 432 A.2d at 1388. The statutory standard, in concert with due process protections, properly balances the interests at stake.

CONCLUSION

Additional notice and opportunity to be heard for other named actors, as well as additional revisions, appear to be needed prior to publication. Petitioner is not entitled to suppress the report as a whole.

Respectfully submitted,

/s/ *Hugh Burns*

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with Pa. R. App. P. 2135(a) (word limit) and (d) (certificate of compliance), as it contains fewer than 14,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*, which require that confidential information and documents be filed differently than non-confidential information and documents.

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