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89 WM 2018

IN THE SUPREME COURT OF PENNSYLVANIA

No. 89 WM 2018

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

MERITS BRIEF OF PETITIONER, [redacted]

Patrick J. Egan, Esq. (No. 48080)
Maura L. Burke, Esq. (No. 308222)
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
215-299-2825 (voice)
215-299-2150 (fax)
pegan@foxrothschild.com
mburke@foxrothschild.com

Attorneys for Petitioner, [redacted]

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STATEMENT OF JURISDICTION[1]

By Order dated July 6, 2018, this Court set an expedited briefing schedule to address the merits of the issue that Petitioner, [redacted] ("Petitioner") raised in his *Emergency Petition For Review In The Nature Of An Appeal.* This Court has exclusive jurisdiction over grand jury matters originating from Courts of Common Pleas, including the June 5, 2018 Opinion and Order of the Supervising Judge, the Hon. Norman A. Krumenacker, III, and the June 13, 2018 Order of the Supervising Judge, the Hon. Norman A. Krumenacker, III. *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

[1] Petitioner, [redacted] incorporates by reference the "Merits Brief Setting Forth Common Legal Arguments of Clergy Petitioners in Opposition to Premature Release Of Unredacted Grand Jury Report No. 1" (hereinafter "Petitioners' Common Brief") filed in matter No. 75 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.

otherwise directly affecting an investigating grand jury or any investigation conducted by it." Pa. R.A.P. 3331(a)(3).

This Court has jurisdiction to review the June 5, 2018 Opinion, and Order and the June 13, 2018 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 June 5, 2018 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 at p. 11 (Exhibit A), which is incorporated by reference in the June 13, 2018 Order (Exhibit B).

Alternatively, this Court also has jurisdiction to review the June 5, 2018 Opinion and Order and June 13, 2018 Order because they are collateral orders under Pa. R.A.P. 313(b), which are subject to immediate appeal. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 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: (1) the June 5, 2018 Order and Opinion denying pre-deprivation hearings (Exhibit A); (2) the June 13, 2018 Order and Opinion denying pre-deprivation hearing of Petitioner (Exhibit B), which incorporates by reference the June 5, 2018 Order and Opinion.

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. *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).

QUESTION PRESENTED

1. Whether the Supervising Judge violated Petitioner's fundamental rights to his good reputation and due process of law under Article I Sections 1, 9, and 11 of the Pennsylvania Constitution by denying him a pre-deprivation hearing?

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

   Suggested Answer: Yes.

STATEMENT OF THE CASE

A. The Fortieth Statewide Investigating Grand Jury And Report

The Pennsylvania Office of Attorney General ("OAG") convened a 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 Report No. 1 (the "Report") of the Fortieth Statewide Investigating Grand Jury.

B. The Judge's Acceptance Of The Report, Petitioner's Belated Notice Of The Report, and Petitioner's Motion For Pre-Deprivation Hearing Before The Supervisory Judge

After it issued the Report, the grand jury disbanded. Because Petitioner was unaware of the grand jury's investigation, the Report's existence, or any references to him, Petitioner had no opportunity to challenge any references or characterizations before the grand jury's term ended.

Prior to Petitioner receiving notice of the Report, various petitioners (similarly situated to Petitioner) filed motions under seal on the basis that the Report, if published, would deprive them of their good reputations without due process. These included: (1) motions requesting that the Court clarify Petitioners are not child abusers, child abuse enablers, or persons who violated a duty to safeguard children's welfare; (2) Motions to Join the Diocese of Harrisburg's Motion to Deny Acceptance and Public Filing of Grand Jury Report; (3) Motions

to Stay the issuance of the Report; (4) Motions for a Pre-Deprivation Hearing; (5) a Motion for a Protective Order to redact the names of individuals referenced in the Report in a way that is prejudicial without probative value; and (6) Motions for Disclosure of additional pages from the Report so that each Petitioner might better respond to the Report.

On May 21, 2018, numerous petitioners raised these due process concerns during a hearing before the Supervising Judge. Notwithstanding the significant due process concerns counsel expressed during the hearing, the Court accepted the Report in an order issued the next day. *See* Motion for Pre-Deprivation Hearing, (Exhibit C).

On or about May 22, 2018, Petitioner received a letter from Senior Deputy Attorney General Daniel J. Dye regarding the Report, which advised in part: "[p]lease find enclosed the portions of a grand jury report which I have been authorized to release to you by the Supervising Judge of the 40th Statewide Investigating Grand Jury pursuant to 42 Pa. C.S. § 4552(e). The provision of this additional material provides you with thirty (30) days to respond from today's date." *See id.*

Also attached to the letter from Mr. Dye was an *Amended Order Accepting Investigating Grand Jury Report No. 1 and Directing Further Action Prior to the*

Report Being Made Part of the Public Record entered by the Supervising Judge on May 22, 2018, which provided:

> **AND NOW**, this 22 of May, 2018, upon examination of Investigating Grand Jury Report No. 1, and finding that said report, within the scope of the Grand Jury's authority, proposes recommendation for legislative, executive or administrative action in the public interest based upon stated findings, and further finding that said report is based upon facts received in the course of an. investigation authorized by the Investigating Grand Jury Act, 42 Pa.C.S. § 4541 *et seq.*, and is supported by the preponderance of the evidence, it is hereby **ORDERED** that:
>
> 1. Investigating Grand Jury Report No. 1 is accepted by the Court.
>
> 2. Pursuant to 42 Pa.C.S. § 4552(e), the Court finding that the report may be construed as critical of certain individuals that were not charged with any criminal offenses, the Court hereby permits any living individual so named or characterized within Investigating Grand Jury Report No. 1 to submit a response to the allegations in the report that may be construed as critical of them.
>
> 3. When disclosing portions of the report, the Attorney General, or his designee, is directed to disclose those portions that are specifically applicable to the particular individuals listed above. In that regard, the Attorney General, or his designee, is directed to disclose: 1) Section I ("Introduction") of the report; 2) That portion of Section II ("The Dioceses") of the report that pertains to the individual's diocese(s); 3) Those portions of Section V ("Appendix of Offenders") that pertain to the individual.
>
> 4. Those receiving disclosure of portions of the report are advised by this Court that the content shall not be publicly disclosed until further Order of Court. The fact that a report exists, however, may be publicly acknowledged.
>
> 5. Upon receipt of the applicable portions of the report, the individuals may file a response within 30 days of the date of this Order;

however, a response is not mandated. By Order of this Court, the responses shall be submitted to the Court under seal.

6. Upon receipt of any responses, the Court shall then consider whether the responses will be attached to the report before it is made part of the public record. *See* 42 Pa.C.S. § 4552(e).

See id.

The portions of the Report, that were received by the Petitioner, referenced Petitioner in connection with his investigation and reporting of a certain priest that the grand jury determined had engaged in child sexual abuse. Thus, the Report links Petitioner to individuals that have been determined to have engaged in child sexual abuse, enabled persons who engaged in child sexual abuse, and/or violated a duty to safeguard the welfare of children.

SUMMARY OF ARGUMENT[2]

The Supervising Judge's June 5, 2018 Opinion and Order and June 13, 2018 Order (which incorporates by reference the June 5, 2018 Opinion and Order) were clearly erroneous because the Supervising Judge: (1) improperly denied Petitioner's pre-deprivation hearing motion – without regard for harm to his reputation; and (2) denied Petitioner the most basic requirements of due process – *i.e.*, notice, and an opportunity to be heard – *before* accepting the Report.

This Court should reverse the June 5, 2018 Opinion and Order and June 13, 2018 Order, and require the Supervising Judge (or another lower court judge) to permit Petitioner sufficient opportunity to rebut (and/or change) the Report to avoid unnecessary reputational harm prior to the Supervisory Judge's final determination to accept or reject the Report.

[2] *See supra* fn 1. Petitioner incorporates by reference the Petitioners' Common Brief filed in matter No. 75 WM 2018, in its entirety, including that brief's Summary of Argument and Argument.

ARGUMENT

I. THE ORDERS BELOW DEPRIVED PETITIONER OF MINIMALLY SUFFICIENT DUE PROCESS SAFEGUARDS

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 him; 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. *See* Exhibit A at p. 1. This token opportunity to respond in a way that has no possibility of changing the outcome is not due process worth the name.

A. Applicable Law

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." *See* Exhibit A at p. 2. The only open question, given this fundamental interest, is what process is due an individual named in such a report – a question the Court recognized as "one of first impression in the Commonwealth." *Id.*

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, 184 A.3d 551, 557 (Pa. 2018) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

B. The "Process" Afforded Petitioner Was Constitutionally Deficient

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. Petitioner's private interests in his reputation could not be weightier

The private interest affected by the governmental action in this case is a fundamental right under the Pennsylvania Constitution – *i.e.*, the right to one's

good reputation. *See* Pa. Const. Art. I §§ 1, 11. This is a particularly strong interest here, where Petitioner is challenging inflammatory accusations that he was may have been connected to, or enabled or was indifferent to reports of child sexual abuse. The Supervising Judge acknowledged the constitutional import of Petitioner's "fundamental" reputational interest. *See* Exhibit A at p. 5. Furthermore, whether the government's branding of Petitioner is the result of an "investigative" or "adjudicative" process, as discussed by the Supervising Judge, is of no consequence. Either way, the damage to his reputation will be the same.

2. The risk of an erroneous deprivation of Petitioner's fundamental right to his good reputation under the procedures the Supervising Judge employed is significant.

The risk of an erroneous deprivation of Petitioner's fundamental right to his good reputation under the procedures the Supervising Judge employed is significant. *Bundy* and *Matthew* 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. Here, Petitioner had no opportunity to bring exculpatory evidence or clear errors to the attention of grand jurors. Thus, this factor weighs in favor of Petitioner.

In addition, the Supervising Judge's heavy reliance on *Hannah v. Larche*, 363 U.S. 420 (1960), is misplaced. In *Hannah*, the U.S. Supreme Court held, as a matter of federal constitutional law, that individuals summoned to appear before

the federal Civil Rights Commission were not entitled to learn the identity of persons who filed complaints against them, nor were they entitled to cross-examine witnesses called by the Commission, because the Commission's activities were "investigatory" rather than "adjudicative" in nature. However, the U.S. Supreme Court's decision in *Hannah* is distinguishable from this situation for several reasons.

First, and most obviously, *Hannah* is not binding on this Court's interpretation of the Pennsylvania Constitution. Indeed, it is black-letter law that this Court is free to interpret the Pennsylvania Constitution in a manner that provides greater rights to its citizens than those provided by the federal constitution. *See Commonwealth v. Edmunds*, 586 A.2d 887 (1991).

Second, a Pennsylvania citizen's fundamental right to his or her good reputation, as guaranteed by the Pennsylvania Constitution, was not at issue in *Hannah*. This is a critical distinction, because the federal constitution affords far less protection to reputational interests than does the Pennsylvania Constitution. *See Paul v. Davis*, 424 U.S. 693 (1976) (holding that reputation is not protected under the federal due process clause in the absence of a "more tangible" injury, creating the so-called "stigma-plus" line of federal cases concerning reputation).

Third, holding a pre-deprivation evidentiary hearing before a Supervising Judge would not cause the kind of disruptions in the investigative process that were

of concern in *Hannah*. Indeed, the investigation is over; the grand jury has been discharged.

Fourth, the Supervising Judge's decision to accept the Report as supported by a preponderance of the evidence is an adjudicative, not an investigative, act. This is a function of his judicial oversight role, which this Court has held is so critical in our grand jury system.

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.[3]

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[3] 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;

Finally, even though federal courts afford significantly less protection to reputation under the federal constitution than this Court does under the Pennsylvania Constitution, federal courts have respected the reputational rights of individuals identified in grand jury reports and indictments – even those, unlike Petitioner, who have criminal liability as unindicted coconspirators. In considering this matter of first impression, the Court may benefit from the considered views of these federal courts. *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

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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.").

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.").

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 Petitioner's due process argument was the alleged "administrative burden" that affording minimally sufficient due process protections would visit upon the Commonwealth. But pre-deprivation evidentiary hearings need not wreak havoc during grand jury proceedings, particularly because such hearings, as in this case, can follow the termination of the grand jury's investigation. Nor would such hearings impinge in any way upon grand jury proceedings leading to the issuance of a presentment, after which the full panoply of constitutional rights are afforded to the accused. Rather, Petitioner simply seeks a pre-deprivation evidentiary hearing before the Supervising Judge at which time the evidentiary sufficiency of the allegations in the Report can be determined by the Court prior to publication. Thus, the

argument of administrative burden is flawed. Moreover, 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 could be 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.").

C. Where A Fundamental Constitutional Right Is Violated, The *Ex Post* "Opportunity" To Respond To A *Fait Accompli* Is Really 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 offered conception of due process is not more than the "opportunity" to vent, and to object to a *fait accompli*. *See Bundy*, 184 A.3d at 557 ("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. Cmwlth. 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.").

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supervising Judge's June 5, 2018 Opinion and Order and June 13, 2018 Order be reversed, and that this matter be remanded with instructions that Petitioner be afforded notice, and an opportunity to be heard – ***before*** the Supervising Judge accepts the Report.

Respectfully submitted,

/s/ Maura L. Burke
Patrick J. Egan, Esq. (No. 48080)
Maura L. Burke, Esq. (No. 308222)
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
215-299-2825 (voice)
215-299-2150 (fax)
pegan@foxrothschild.com
mburke@foxrothschild.com

Attorneys for [redacted]

CERTIFICATE OF SERVICE

I, Maura L. Burke, Esquire, hereby certify that a copy of the foregoing Merits Brief of Petitioner, [redacted] on July 10, 2018 upon the following:

Via Email
Daniel Dye, Esq.
Senior Deputy Attorney General
Jennifer A. Buck, Esq.
Senior Deputy Attorney General
Julie Horst
Exec. Secretary for the Grand Jury
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
ddye@attorneygeneral.gov
jbuck@attorneygeneral.gov
jhorst@attorneygeneral.gov

Dated: July 10, 2018

By: ***/s/ Maura L. Burke***
Patrick J. Egan, Esq. (No. 48080)
Maura L. Burke, Esq. (No. 308222)
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
215-299-2825 (voice)
215-299-2150 (fax)
pegan@foxrothschild.com
mburke@foxrothschild.com

Attorneys for Petitioner, [redacted]

CERTIFICATE OF COMPLIANCE

I, Maura L. Burke, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania* 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. The word count is under 14,000 words.

Dated: July 10, 2018

By: ***/s/ Maura L. Burke***

Patrick J. Egan, Esq. (No. 48080)
Maura L. Burke, Esq. (No. 308222)
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
215-299-2825 (voice)
215-299-2150 (fax)
pegan@foxrothschild.com
mburke@foxrothschild.com

Attorneys for Petitioner, [redacted]

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

Filed Under Seal

Exhibit C

Filed Under Seal