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88 WM 2018

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: THE FORTIETH STATEWIDE INVESTIGATING GRAND JURY

PETITION OF: [redacted]

Supreme Court Docket Number: 88 WM 2018
Supreme Court Docket Number: 2 W.D. Misc. Dkt. 2016
Trial Court: Allegheny County Court of Common Pleas
Trial Court Docket Number: CP-02-MD-571-2016

BRIEF OF PETITIONER [redacted]

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BRIEF OF PETITIONER [redacted][1]

Introduction

Petitioner [redacted] possesses fundamental, Constitutional rights to both his good reputation and due process of law. *See* Article I Sections 1, 9, and 11 of the Pennsylvania Constitution. Those rights have been improperly infringed and this appeal seeks to vindicate and protect them.

Grand Jury Report No. 1. (the "Report") contains a graphic description of historical allegations of child sexual abuse in six dioceses of the Roman Catholic Church in Pennsylvania.[2] Given the subject matter of the Report and the respect owed to victims of abuse, Petitioner

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[1] In addition to this Brief, pursuant to Pa.R.A.P. 1513(d)(5), 2116(a) and 2137, [redacted] has joined in and adopts by refence the legal arguments in the Merits Brief Setting Forth Common Legal Arguments of Clergy Petitioners ("Petitioners' Common Brief") submitted on behalf of himself along with the Petitioners at Docket Nos. 75, 77 through 82, 84, and 86 through 89 WM 2018, including that Brief's Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. However, he does not join in any portion of Petitioners' Common Brief concerning not having the ability to testify before the grand jury. He also joins in any other Briefs filed by fellow Petitioners that have filed appeals raising similar challenges to Report No. 1.

[2] It is our understanding that, at another docket number, the Court has asked the Office of Attorney General (OAG) to supply it with a complete copy of the Report. [redacted] has not been provided a complete copy of the report, only the excerpts found at Exhibit E to his Petition.

submits that the ultimate goal of all parties here should be to ensure that any Report released to the public is one-hundred percent factually accurate. The current Report, unfortunately, is not. Accordingly, this appeal challenges – and seeks relief regarding – false, inaccurate and defamatory information and conclusions in the Report as they pertain to [redacted].

To be clear, if appropriate statutory and Constitutional processes are implemented and followed, [redacted] is not seeking to prevent ultimate public disclosure of the Report in some form or even the majority of its content. Rather, he seeks to be provided meaningful process to demonstrate that portions of the Report are inaccurate and should be changed or excised. Such meaningful process will help ensure that the Report that is ultimately made public is complete and factually accurate.

The Supervising Judge below denied meaningful process to [redacted] in, at least, two central ways. First, he failed to appropriately execute his duties under 42 Pa.C.S. §4552(b). The Supervising Judge did not conduct a detailed examination of the grand jury record to determine that the factual allegations and conclusions challenged in this appeal

were supported by the preponderance of the evidence, which – [redacted] – they were not. Second, after [redacted] received notice of the false, inaccurate and defamatory information and conclusions in the Report, the Supervising Judge denied him the opportunity to remedy this false information by denying Petitioner a pre-deprivation hearing aimed at correcting the errors in the Report. *See Simon v. Commonwealth*, 659 A.2d 631 (Pa. Commw. Ct. 1995).

As discussed herein, Pennsylvania statutory and Constitutional law provide for, at least, two checks and balances on the grand jury's power: (1) a meaningful, detailed review under 42 Pa.C.S. §4552(b) and (2) a pre-deprivation hearing. If properly used, these checks and balances can prevent a Report from wrongly disparaging an individual's Constitutionally protected reputation. Unfortunately, [redacted] did not receive the protections and benefits of either of these checks and balances.

Therefore, [redacted] respectfully requests that the Supervising Judge (or another lower court judge) be ordered to conduct a

detailed review of the grand jury record to determine if the information in the Report that is challenged in this appeal is supported by a preponderance of the evidence (or, in the alternative, that this Court under a *de novo* review conduct such an examination). He also requests that the Supervising Judge's Order denying his Motion For Pre-Deprivation Hearing and Stay ("Motion") be reversed with instructions that a hearing be held by the Supervising Judge (or another lower court judge) and that any information deemed to be inaccurate, misleading or unsupported by a preponderance of the evidence be removed from the Report prior to publication.[3]

Statement of Jurisdiction

This Court has appellate jurisdiction over this matter pursuant to 42 Pa.C.S. §722(5) and/or §702(b) and Pa.R.A.P. 3331(a)(3) and/or (5) and/or 313(b) and/or 341(b)(1).

Order(s) in Question

The Order to be reviewed is the Order (attached as Exhibit B to the Petition) dated [redacted] issued by the Honorable Norman A.

[3] An alternative form of relief could be a stipulation between the OAG and [redacted] and/or a covering court order, that would come before the Report and indicate that the portions challenged herein are not intended to apply to and do not apply to [redacted].

Krumenacker, III, Supervising Judge of the 40th Statewide Investigating Grand Jury denying [redacted] request for a pre-deprivation hearing, which incorporated a prior Order and Opinion from the Supervising Judge dated June 5, 2018 (attached as Exhibit A to the Petition). The Supervising Judge's [redacted] Order accepting the Report and purporting to make the preponderance of the evidence determination required by 42 Pa.C.S. §4552(b) (attached as Exhibit D to the Petition) is also implicated by this appeal. The [redacted] Order provides:

[redacted]

[redacted]

Statement of Scope and Standard of Review

Both questions at issue in this appeal are questions of law, namely (1) what level of review is required by the Supervising Judge under 42 Pa.C.S. §4552(b) and (2) whether a pre-deprivation hearing was required in this case to satisfy due process and protect [redacted] reputational rights under the Pennsylvania Constitution. This Court's standard of review over questions of law is *de novo,* and the scope of review is plenary. *E.g., Kopko v. Miller,* 892 A.2d 766, 770 (Pa. 2006); *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014).

Statement of the Questions Involved

Per the Court's July 6, 2018 Order:

1. Whether the Report's conclusions about Petitioner are not supported by a preponderance of the evidence [in light of the

requirements of 42 Pa.C.S. §4552(b)]?[4]

Answer below: This precise question was not addressed below; rather, only a general, global statement apparently regarding the Report in its entirety was made by the Supervising Judge.

2. 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 held that no pre-deprivation hearing was required.

Statement of the Case

[redacted]

[4] This Question should be deemed to include all versions of related questions raised by other Petitioners who are challenging the Report via appeal to this Court. *See* Pa.R.A.P. 1513(d)(5) and 2116(a).

[redacted]

On May 29, 2018, [redacted] received the following letter dated May 22, 2018 from Senior Deputy Attorney General Daniel J. Dye regarding the 40th Statewide Investigating Grand Jury, Report No. 1:

> Please find enclosed the portions of the 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. The information is being provided to better inform you as to the scope and nature of the report.
>
> Please also note the enclosure of an order rescinding the Judge's May 2, 2018 order. The Court has accepted the grand jury's report in which you are named as provided by law. However, no judicial finding has been made beyond that judicial determination.
>
> This matter may be discussed with your attorney. You are not obligated to respond. Please be advised that any response may be made public.

See Petition, Exhibit C. Attached to the letter from Mr. Dye was an Amended Order [redacted]. *See* Petition, Exhibit D. Attached to the Order and Notice were excerpts of the report relating to [redacted]. *See* Petition, Exhibit E.[5]

As discussed herein, [redacted] denies the Report's portrayal of him and believes it is factually inaccurate. The [redacted] Order from the Supervising Judge does not make a preponderance of the evidence finding as to each (or any) of the assertions and conclusions concerning [redacted] challenged by this appeal. *See* Petition, Exhibit D. No other order from the Supervising Judge making a preponderance of the evidence finding as to each (or any) of the assertions and conclusions concerning [redacted] challenged by this appeal has been provided to [redacted]. [redacted] has not been afforded any type of hearing in order to challenge the findings against him despite his Motion requesting such a hearing. *See* Petition, Exhibit

[5] Exhibit E submitted with the Petition had copying errors. A corrected Exhibit E was filed on June 27, 2018.

B. He has, however, been invited to submit a sealed response to the Report pursuant to 42 Pa.C.S. §4552(e) ("The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b)."). *See* Petition, Exhibit D.

The incorrect information challenged by this appeal includes the following inaccurate and false assertions[6]:

[redacted]

6 [redacted]

[redacted]

By their very nature, these inaccurate assertions and conclusions are *per se* defamatory and portray [redacted] in a false light.

In addition, the rendition of facts in the Appendix sections of the Report are incomplete and artfully drafted in such a way as to falsely portray [redacted] conduct and actions. [redacted]

[redacted] Additional specific examples would be raised at any hearing.

Likewise, [redacted] Additional specific examples would be raised at any hearing.[7]

Additionally, as to the issue of portraying his conduct and reputation falsely, [redacted]

[7] Documents are also often cited out of context in a manner that creates a false impression.

[redacted]

Had he been granted a pre-deprivation hearing, among other things and contrary to the portrayal of him in the Report, [redacted] would have submitted evidence establishing:

- [redacted]
- [redacted]

[redacted]

[redacted]

[redacted][8]

[redacted]

[redacted]

8 [redacted]

[redacted]

See Motion ¶8. The Report makes no mention of any of the above.

Summary of Argument

On the first question: The Supervising Judge's obligations under 42 Pa.C.S. §4552(b) are intended to serve as a check and balance on the investigating grand jury. The dutiful exercise of the Supervising Judge's obligations under Section 4552(b) are vital and necessary to protect individuals mentioned in a grand jury report. They serve as an initial process to help guard against violations of the Constitutionally recognized reputational rights of such individuals. Here, nothing in the record demonstrates that the Supervising Judge properly performed his requisite obligations as to each portion of the Report objected to by [redacted] Further, nothing demonstrates that the Supervising Judge made the requisite preponderance of the evidence finding as to any portion of the Report challenged in this appeal, let alone as to all of them. This is erroneous, violates [redacted] Constitutionally protected due process and reputational rights, and should invalidate the

challenged portions of the Report (if not the Report in its entirety).

On the second question: The Supervising Judge's denial of a pre-deprivation hearing deprived [redacted] of a "meaningful opportunity" at a "meaningful time" to protect his Constitutionally recognized reputational rights before they are impugned by the public issuance of the Report. As this Court recently indicated, if "the state is in a position to provide for pre-deprivation process" – as is the case here via a pre-deprivation hearing – due process requires that such process be provided. *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) ("In terms of the right to be heard at a meaningful time, the second *Mathews* element reflects that avoiding erroneous deprivations ***before*** they occur is an important concern under the Due Process Clause. There is thus a general preference that procedural safeguards apply in the ***pre-deprivation*** timeframe.") (emphasis added). The failure to provide [redacted] with a pre-deprivation hearing is erroneous, violates [redacted] Constitutionally protected due process and reputational rights and should invalidate the portions of the Report challenged herein.

Argument

Neither of the two checks and balances on the grand jury (and the OAG) [9] that could help protect [redacted] fundamental constitutional rights to his good reputation and due process of law – a proper review under 42 Pa.C.S. §4552(b) and a pre-deprivation hearing – were provided to him. [redacted] fundamental constitutional right to his good reputation and due process of law are not satisfied by allowing him to submit an *ex post* "response," which is to be attached to the back of what is, at least, an 884-page Report. It is hard to conceive of a more Constitutionally-meaningless process, particularly when compared to the power and prestige of a Grand Jury Report that the Supervising Judge previously touted in his unsealed Opinion as unlikely to be erroneous. *See* Petition, Exhibit A at 5. What little due process this avenue of objection may have had has been further undermined and eroded by the OAG's repeated press statements about the Report. This Court should not endorse issuing a blank check to future grand juries to carelessly slander people however they see fit with no judicial recourse,

[9] While the Grand Jury adopted and issued the Report, under typical grand jury practices, the language of the Report was drafted by the OAG not the Grand Jury.

nor should the Court allow this grand jury (via the OAG) to do so via the Report in is current, erroneous form.[10]

1. The Challenged Portions of the Report About [redacted] Are Not Supported by a Preponderance of The Evidence, Nor was the Required Finding That They Are Supported by a Preponderance of The Evidence Made Below.

The Investigating Grand Jury Act pertaining to the issuance of Grand Jury reports, in relevant part, provides:

> **b) Examination by court.**–The judge to whom such report is submitted shall examine it ***and*** the record of the investigating grand jury and . . . shall issue an order accepting and filing such report as a public record . . . only if the report is based upon facts received in the course of an investigation

10 [redacted]

> authorized by this subchapter ***and is supported by the preponderance of the evidence.***

42 Pa.C.S. §4552(b) (emphasis added). We are not aware of any legislative history or case law detailing the scope and extent of the Supervising Judge's review obligations and preponderance of the evidence findings that are required by Section 4552(b). What is clear, however, is that the process is intended to serve as a check and balance on the grand jury (and the OAG) by ensuring accuracy of the information in a Report, since, unlike a presentment, a report will not be subject to further challenges in court. *Compare* 42 Pa.C.S. §4551(a) (no preponderance of the evidence finding requirement for Presentments) and §4552(b) (requiring preponderance of the evidence findings for Reports). By helping to ensure such accuracy, the procedure set forth in Section 4552(b) is one means of helping to ensure that individuals' reputational rights are not improperly trampled upon by the grand jury (guided by an overzealous OAG).

It is unlikely that, in drafting Section 4552(b), the legislature envisioned a report like the present one that spans, at least, [redacted]. But, the breadth of the Report is all the more reason why the Supervising Judge's obligations under

Section 4552(b) must be zealously exercised and enforced – that is because inaccuracies and false conclusions can be easily buried amongst legitimate facts in a report of such size. While it certainly could be a cumbersome task, in order for Section 4552(b) and the rights in helps protect to be ***meaningful*** – which is the touchstone of Constitutionally required due process, *e.g. Bundy*, *supra* – the statute should be read to require the Supervising Judge to make a preponderance of the evidence finding as to all factual assertions and conclusion in a report, particularly when those assertions and conclusions have a detrimental impact on the Constitutionally protected reputation of individuals named in the report. Whether the factual inaccuracies are in a report that is 1,000-pages long, as compared to a report that is 10-pages long, may increase the workload of the Supervising Judge, but it should not impact the requirements under Section 4552(b) that are needed to make the statutory section, and the rights it helps protect, meaningful.

Simply documenting the length of time that the grand jury met or the number of witnesses it heard from or the volume of documents made available to it – which it appears is all that was done here (*see* [redacted] Order and June 5, 2018 Order and Opinion at 5) – is not sufficient.

In order to serve as a meaningful check and balance, the Supervising Judge should be required to steadfastly compare the grand jury record to the specific factual assertions and conclusion in a report and determine if the preponderance standard has been met for each assertion and conclusion. Absent such a review, the procedural protections embodied in Section 4552(b) are rendered meaningless and we risk the Supervising Judge becoming little more than a rubber stamp for whatever the grand jury (as a mouthpiece for the OAG) has elected to say.

It is not clear from the record exactly what the Supervising Judge did in his required review here. What is clear, however, is that there is no record establishing that he undertook the type of review discussed above and no record that he made preponderance of the evidence findings as to each of the portions of the Report challenged by [redacted] With the record lacking evidence of the above, the Report is infirm and violates [redacted] Constitutionally protected due process and reputational rights. Accordingly, the challenged portions of the Report (if not the Report in its entirety) should be invalidated.[11]

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[11] When offending conduct – like the Supervisory Judge's apparent failure to conduct a sufficiently probative examination under Section 4552(b) – violates a

This is particularly true here since the Report's conclusions about [redacted] are sharply contradicted by other evidence, [redacted].

2. The Supervising Judge Violated [redacted] 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.

a. Applicable Law

"[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." *R. v. Com., Dept. of Public Welfare*, 636 A.2d at 149. As this Court recently observed:

"statutory mandate," an irreparable injury is established per se. *See SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 508 (Pa. 2014). In such cases of per se irreparable injury – like those here – injunctive relief is appropriate. *See Com. v. Burns*, 663 A.2d 308, 312 (Pa. Commw. Ct. 1995) (granting injunctive relief to prevent a statutory violation) (citing *Pa. Pub. Utility Comm. v. Israel*, 52 A.2d 317 (Pa. 1947)). Of course, the violation of a constitutional right can be no less important. *See R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 149 (Pa. 1994).

> 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, 184 A.3d at 557 (emphasis added). As the *Bundy* Court further indicated "[i]n 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." *Id.* (emphasis added).

The Commonwealth Court has been particularly rigorous in its application of these constitutional principles to government reports and

public registries. *See J.P. v. Dept. of Human Servs.*, 170 A.3d 575, 584 (Pa. Commw. Ct. 2017) (holding placement of teacher's name on child abuse registry without a hearing violated due process); *Simon,* 659 A.2d at 639 (holding inclusion of person's name in a Pennsylvania Crime Commission report about organized crime without notice or an opportunity to be heard violated due process); *Pa. Bar Assn. v. Com.*, 607 A.2d 850, 857 (Pa. Commw. Ct. 1992) (holding that statute requiring placement of attorneys' names on motor vehicle fraud index without notice or hearing violated due process). At least one member of this Court has also begun to express misgivings about the informal manner in which Pennsylvania labels people as child abusers under the Child Protective Services Law. *See G.V. v. Dept. of Public Welfare*, 91 A.3d 667, 676, 674 n.1 (Pa. 2014) (Saylor, J., concurring) ("[T]he inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question" and "is in tension with the constitutional preference for pre-deprivation process."). While the instant case involves a Grand Jury report rather than inclusion in a child abuse registry, the former is much more public, while the latter includes at least some due process protections. *See* 23 Pa.C.S. §6341(c.2). By contrast, under the

Investigating Grand Jury Act, a person criticized in a Grand Jury report is not guaranteed any form of due process at all. *See* 42 Pa.C.S. §4552(e) ("The supervising judge ***may*** then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).") (emphasis added).

b. The *Ex Post* Right of Response Under 42 Pa.C.S. §4552(e) is Not Sufficient Due Process in This Case

The Supervising Judge held that the right to respond to the Report under 42 Pa.C.S. §4552(e) provides [redacted] with Constitutionally sufficient due process. This conclusion is wrong as a matter of law.

As an initial matter, the fact that 42 Pa.C.S. §4552 does not expressly discuss a pre-deprivation hearing is of no moment. The issue is not what process is provided for by Section 4552. Rather, the issue is what process is Constitutionally required before Petitioner's Constitutionally protected reputational rights are trampled upon via the publication of inaccurate and false information in the Report. *See Simon*, 659 A.2d at 636-40. That is the core nature of a procedural due process challenge or an "as applied" challenge. Here, the need for the requested pre-deprivation hearing to protect Petitioner's Constitutional right in his

reputation derives from the Constitutional protections mandated by due process, which require not just notice but also "an opportunity to be heard" at a "***meaningful*** time and in a ***meaningful*** manner." *Bundy, supra* (emphasis added). Those ***Constitutional*** protections cannot be swept aside because Section 4552's ***statutory*** provisions do not expressly call for a pre-deprivation hearing. *See e.g., Simon*, 659 A.2d at 636-40.[12]

The holding in *Simon*, *supra*, is instructive. The ***statutory*** scheme at issue in *Simon* did not provide for a pre-deprivation hearing, but that obviously did not impact the ***Constitutionally***-based holding of the *Simon* court that a meaningful pre-deprivation opportunity to be heard was mandated by due process prior to publication of the report at issue.

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[12] Additionally, nothing in the Investigating Grand Jury Act prevents the Supervising Judge from conducting a pre-deprivation evidentiary hearing requested by a person adversely affected by a Grand Jury Report in order to determine whether the challenged information is false, misleading or not supported by a preponderance of the evidence. Even a casual review of the Act's reporting statute makes it clear that the Supervising Judge's discretion to accept a response from a non-indicted individual under Section 4552(e) is not phrased as an exclusive remedy. *See* 42 Pa.C.S. §4552(e). Moreover, this Court has judicially empowered the Supervising Judge to conduct an evidentiary hearing (not expressly codified in the Act) when the Grand Jury begins to exercise its power over an individual. *See In re Investigating Grand Jury of Phila. Cnty. (Appeal of Washington)*, 415 A.2d 17, 21-22 (Pa. 1980) (authorizing the Supervising Judge to "hear evidence from the challenger which is relevant to the validity of the statements or allegations" in the application to empanel the Grand Jury or the notice of submission of investigation). In addition, arguments that the finding(s) of the Grand Jury are not supported by a preponderance of the evidence fit comfortably within the Supervising Judge's power to accept or reject some or all of the Report. *See* 42 Pa.C.S. §4552(b).

The same should hold here: ***prior to publication of the Report***, Petitioner should be afforded a meaningful hearing to assure that the Report is factually accurate. This is needed to ensure that his Constitutionally protected right to his reputation is not infringed upon without due process. After such due process, if the Report is not accurate, then the Report should either be made accurate or publication enjoined. *Simon, supra* (enjoining publication of report because right to a rebuttal after report was issued was insufficient to meet due process).

The constitutionally insufficient rebuttal right in *Simon* can be directly analogized to the response right found in 42 Pa.C.S. §4552(e), even though the latter would have a response made public in conjunction with the Report. Colloquially, what *Simon* stands for is that, once the toothpaste is out of the tube via the Report, a procedure permitting an effort to put the toothpaste back into the tube (*i.e.*, a response right) is not sufficient constitutional due process. That is because reputational damage is caused by the publication of inaccurate information, regardless of an ability to rebut it. *See e.g., Simon*, 659 A.2d at 639. The fact of that reputational damage does not change even if, under Section 4552, the right to respond is simultaneous with publication as opposed to

a few days later (as in *Simon*). This is particularly true in the instant scenario where any Response will be buried under a Report that is, at least, [redacted]

As this Court recently indicated in *Bundy*, if "the state is in a position to provide for pre-deprivation process" (i.e., an opportunity to prevent the toothpaste from coming out in the first place) – as is the case here via a pre-deprivation hearing – due process requires that such process be provided. *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).

As *Bundy* dictates, rather than permit a scenario where [redacted] reputation is slandered by inaccurate statements, conclusions and innuendo in the Report which he then must try and rebut via a Response, he should be afforded a meaningful opportunity to have the inaccuracies in the Report corrected before it is published and causes damage to his Constitutionally protected reputational rights.

The *ex post* opportunity to submit a response to the erroneous Report – but without hope of changing the errors in the Report – is not Constitutionally meaningful or sufficient due process. Without *ex ante* notice and an opportunity to be heard – two well accepted requirements of elemental due process – Section 4552(e) provides nothing more than the "opportunity" to object to a *fait accompli*. *Bundy*, *supra*. Additionally, in the instant matter, the OAG has so deeply poisoned the well of public sentiment through its serial press statements about the Report and this appeal, that the supposed "opportunity" to submit a response to a *fait accompli* – *i.e.*, an erroneous grand jury Report that neither the Supervising Judge nor the OAG will permit to be corrected or even redacted – is now of even less value to Petitioners.[13] This "opportunity" to respond was previously incorrectly thought (by the Supervising Judge and the OAG) to offer sufficient due process to Petitioners. This incorrectness is even more clear now that the OAG's use of his office's power and authority to galvanize public opinion against Petitioners – and

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[13] The OAG's series of prejudicial press releases and press statements, which can be read to violate Rules of Professional Conduct 3.6(a) and 3.8(e), is catalogued at pages [redacted] For purposes of judicial economy, that discussion is not repeated herein but is incorporated by reference.

against this Court [14] – has further eroded the already woefully insufficient modicum of redress provided by Section 4552(e).

As not-too-distant Pennsylvania history teaches us, the ability of official bodies to make unilateral public reports defaming citizens, with no opportunity to defend themselves before being forever tarred by the accusations, is not embraced in our Commonwealth. That concern, in fact, was expressed in several decisions of this Court leading up to the eventual elimination of the Crime Commission. *See e.g.*, *D'Elia v. Pa. Crime Comm'n*, 555 A.2d 864, 872 (Pa. 1989); *In re Petition for Enf't of Subpoenas to John Doe Corps. A, B, C, D & E*, 489 A.2d 182, 186 (Pa. 1985) (holding that the Crime Commission must afford due process, despite the fact that it exercises only investigative, rather than

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[14] *See* The Inquirer Editorial Board, *Our View: Pa. Supreme Court enables toxic secrets in priest sex scandal – Editorial*, (June 22, 2018 5:25am), http://www.philly.com/philly/opinion/editorials/pa-supreme-court-grand-jury-report-catholic-church-priests-sex-scandal-editorial-20180622.html ("For decades, the alleged abusers were able to hide behind a cloak of secrecy to commit sickening crimes. ***Now the state's highest court is prolonging the victims' suffering by suppressing the report.***" (emphasis added)); The Editorial Board, *Release the report: No reason to hold back grand jury report on abuse*, Pittsburgh Post-Gazette, (June 22, 2018 12:00am), http://www.post-gazette.com/opinion/editorials/2018/ 06/22/-Release-the-report-No-reason-to-hold-back-grand-jury-report-on-abuse/ stories/201806220019 ("***If it delays releasing a report that sheds light on decades of scandal in the church, the Supreme Court can consider itself part of the problem, too.***" (emphasis added)).

prosecutorial power); *see also Simon, supra*. While the discrete question in *D'Elia* pertained to a matter not presently implicated (*i.e.* transactional immunity), its rationale is particularly instructive, as the Court's holding was partly grounded on the right to reputation under the Pennsylvania Constitution. *D'Elia*, 555 A.2d at 872. Relying on Article I, Section 1, the Court concluded that without adequate process, that right would be in great peril:

> There is, in some respects, *a greater danger than potential prosecution* attaching to the compelling of potentially self-incriminatory testimony to a body such as the Commission. Were a prosecution to occur, the defendant would have the opportunity to explain and exonerate himself by the judgment of his peers on the assessment of properly submitted, legal evidence. *No such opportunity would attend the filing of a report by the Commission, yet the extent of the exposure and the magnitude of the infamy that might follow on the mere assemblage of information untested by the fires of due process is enormous.*

Id. (emphasis added).

Here, the value of the additional safeguards of a pre-deprivation hearing are necessary to provide Constitutionally sufficient, meaningful due process and to safeguard [redacted] Constitutionally recognized reputational rights. A pre-deprivation proceeding is needed to ensure that any Report that is made public is factually accurate and

complete – the toothpaste should remain in the tube. The *ex post* ability to respond under Section 4552(e), by its very nature, cannot accomplish this objective, rendering it Constitutionally insufficient due process in this case.

c. Under *Mathews* and this Court's Precedent, [redacted] Should be Afforded a Pre-Deprivation Hearing

Given the discussion above, in the instant case, application of the three-pronged *Mathews* test requires that an evidentiary hearing be afforded prior to deprivation of [redacted] fundamental right to his good reputation through the issuance of the Report. First, the private interest affected by the governmental action is a fundamental right under the Pennsylvania Constitution, that being the right to one's good reputation. *See* Pa. Const. art. I, §§ 1, 11. This is a particularly strong interest here, given that [redacted] is fighting against, *inter alia*, [redacted]

Second, the risk of an erroneous deprivation of [redacted] fundamental right to his good reputation under the procedures employed below is great. Below, there was a total absence of any sort of neutral, fact-finding process to challenge inaccurate assertions and conclusions in

the Report, which are the product of secret process controlled by the OAG. Likewise, the value in protecting the reputational rights at stake via a pre-deprivation hearing is obvious and clearly important.

Third, while the Commonwealth certainly has an interest in uncovering child sexual abuse wherever and whenever it occurs, the administrative burden of affording those criticized in the Grand Jury Report with the right to an evidentiary hearing is minimal. [redacted] is not seeking to wreak havoc during Grand Jury proceedings. Nor do his arguments impact Grand Jury proceedings leading up to the issuance of a Presentment, after which the full panoply of constitutional rights is afforded to the accused. Rather, [redacted] is simply seeking an evidentiary hearing before the Supervising Judge at which time the truth of the allegations in the Report can be tested prior to publication.[15] In form and substance, the pre-deprivation hearing would not be much different than contested hearings that occur every day in courtrooms across the Commonwealth. This also should prove to be of

[15] In his June 5, 2018 Opinion (at pages 5-7), the Supervising Judge appears to have incorrectly viewed the requests for pre-deprivation hearing as seeking a hearing in front of the grand jurors. What is requested by [redacted] is a hearing before the Judge to serve as a Constitutional check and balance on the grand jury (and the OAG).

minimal burden to the Commonwealth, which – to the extent it exists – should have already assembled the evidence regarding the questioned portions of the Report and presented it to the Grand Jury.

Additionally, such a procedure would not be inconsistent with the Investigating Grand Jury Act, which vests the Supervising Judge with the power to accept some, all, or none of the information in the Report. *See* 42 Pa.C.S. §4552(b). Moreover, if the General Assembly intended the Supervising Judge to be powerless to stop the publication of a Grand Jury report known to contain false information, it would be inconsistent with the Pennsylvania Constitution and this Court's description of the important role of the Supervising Judge. *See In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011) ("The very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings."). Finally, given the historical nature of the allegations in the Report, there is no temporal urgency that warrants leaving unremedied the permanent reputational harm that [redacted] faces.[16]

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[16] As for the victims who justifiably seek the Report's disclosure, there will be cold comfort in a Report that unfairly implicates the innocent along with those

From a public policy standpoint, affording pre-deprivation hearings will add a check and balance to protect individuals' Constitutional rights to their good reputation and, in instances where grand jury proceedings are conducted appropriately (unlike the present case) and the supervising judge properly executes the duty to review the report to ensure its complete factual accuracy (unlike what appears to have been done in the present case), the need for and burden of conducting *ex ante* proceedings should be limited. In contrast, in instances like this case, where the grand jury proceedings were flawed and errors clearly exist, the Constitutional right to one's reputation and to due process must trump the procedural burdens on the Supervising Judge. *See Simon*, 659 A.2d at 636-40.

Further, the availability of such *ex ante* procedures will be a powerful check on grand jury abuses and will help prevent abuses such as those evidenced by the factually incorrect and improper content of the Report here. Knowing that a report will be subject to a pre-release

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properly accused. Indeed, premature release of a deeply flawed Report, containing clear and demonstrable factual errors, would dishonor the victims and disserve justice. Furthermore, [redacted] which further demonstrates the lack of an urgent need for immediate release of the Report.

challenge will help ensure that grand juries (via the OAG) have placed only truthful, properly supported facts and conclusions in a report. This provides a strong incentive for accuracy and fairness – a stark contrast to the present process where the grand jury (via the OAG) is free to write whatever broad conclusory attacks it sees fit, to do so unhinged to any actual, concrete facts and then to publish the report with the force of the bully pulpit of the OAG, leaving those injured by a report with no redress but a hollow ability to respond under Section 4552(e).

Lastly, the Supervising Judge's heavy reliance on *Hannah v. Larche*, 363 U.S. 420 (1960), is misplaced. In *Hannah*, the United States 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 the instant situation for numerous reasons.

First, and most obviously, the Court's decision in *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 that provided by the federal constitution. *See Com. v. Edmunds*, 586 A.2d 887, 894 (1991). Second, a Pennsylvania citizen's fundamental right to his/her good reputation, guaranteed by the Pennsylvania Constitution, was not at issue in *Hannah*. This is a critical distinction, because the federal constitution affords far less protection of one's reputational interest than the Pennsylvania Constitution. *See Paul v. Davis*, 424 U.S. 693, 702 (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). Lastly, the Supervising Judge's decision to accept the Report as being supported by a preponderance of the evidence is an adjudicative, not an investigative, action. This is a function of his judicial oversight role, which this Court has held is so critical in our Grand Jury system (and which, based on the record, appears to have been neglected here). *See In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d at 503. For all of these reasons, the U.S. Supreme Court's decision

in *Hannah* simply has no application here.

Conclusion

For all of the foregoing reasons, [redacted] respectfully requests that the Court reject the Report as improper since the record does not establish that the Supervising Judge fully complied with his duties under 42 Pa.C.S. §4552(b). In the alternative, the Supervising Judge (or another lower court judge) should be ordered to examine the grand jury record in detail (or on *de novo* review this Court could elect to do so itself) and, for each of the sections of the Report challenged herein, make a written finding with supporting evidence that each allegation or conclusion is or is not supported by a preponderance of the evidence. Following such written findings, the Supervising Judge (or another lower court judge) should be ordered to conduct a Pre-Deprivation Hearing so that [redacted] has a meaningful opportunity to protect his reputation and challenge the written findings with his own evidence. And, following such hearing, any information determined to be false,

misleading or not supported by a preponderance of the evidence should be deleted from the Report.[17]

Granting this relief would help fulfill what should be the ultimate goal of all parties here and what also is fair for the victims of abuse: ensuring that any Report released to the public is one-hundred percent factually accurate.

Respectfully submitted,

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Date: July 10, 2018

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[17] An alternative form of relief could be a stipulation between the Office of Attorney General (OAG) and [redacted], and/or a covering court order, that would come before the Report and indicate that the portions challenged herein are not intended to apply to and do not apply to [redacted]

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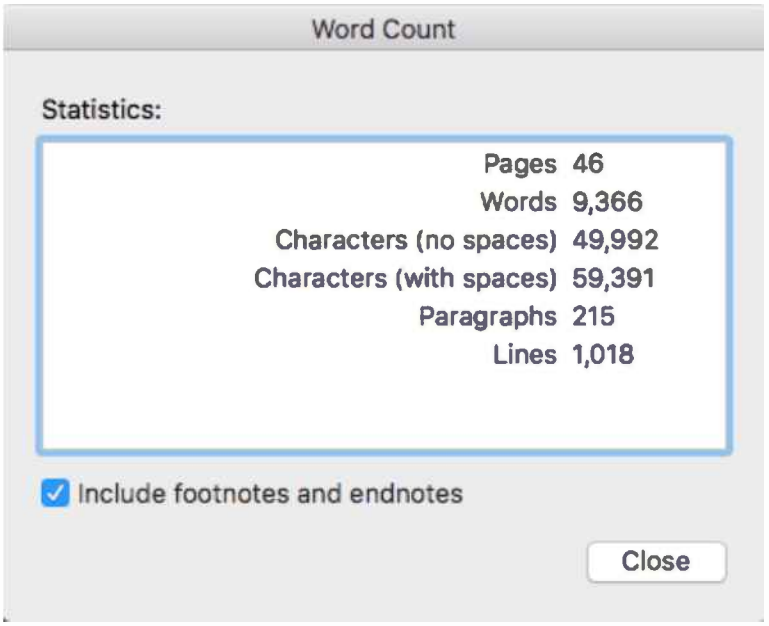
CERTIFICATE OF COMPLINACE WITH WORD LIMITS SET FORTH IN PA.R.APP.PROC. 2135

I, David J. Berardinelli, Esquire, hereby certify that the foregoing Brief complies with Rule 2135. The word limit, per Rule 2135, for this Principal Brief is 14,000 words. By the count of the word processing system used to produce this Brief, the total word count for all parts of the brief, including covers, tables, etc. is 9,366 words. A copy of the word count from the word processor is pasted in below:



DeFOREST KOSCELNIK YOKITIS & BERARDINELLI

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CERTIFICATE OF SERVICE

I, David J. Berardinelli, Esquire, hereby certify that I am this day serving a copy of the foregoing document upon the person(s) below by electronic service via the PAC-file system:

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Exhibit A

EXHIBIT REDACTED