IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 86 WM 2018

In re: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

BRIEF FOR RESPONDENT, COMMONWEALTH OF PENNSYLVANIA

Brief on petitions for review of orders of the grand jury supervising judge, Common Pleas Court of Allegheny County, at CP-02-MD-571-2016.

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1) Does the Grand Jury Act permit the supervising judge to conduct adversarial evidentiary hearings and substitute his own findings and conclusions for those made by the jurors in a grand jury report?

2) Does the Grand Jury Act violate due process by providing objectors to a grand jury report with an opportunity to be heard through the pre-publication right of response?

3) Does the Grand Jury Act or the constitution authorize the supervising judge to "redact" and rewrite grand jury reports to alter passages that the judge believes are "false" or "misleading?"

STATEMENT OF THE CASE

The Fortieth Statewide Investigating Grand Jury convened in Pittsburgh in May 2016. By now, the prime focus of the jury is widely known: clergy sex abuse of children, over a period of decades, throughout six of the eight dioceses of the Catholic Church in the Commonwealth of Pennsylvania.

Over the course of its two-year lifespan, the grand jury heard from dozens of witnesses and reviewed over half a million pages of internal documents subpoenaed from diocesan archives. Bishops of all six dioceses were provided the opportunity to appear before the grand jury; five chose to submit written statements, and one testified in person.

At the close of this comprehensive investigation, the jurors, carrying out their duty under § 4552(a) of the Investigating Grand Jury Act, voted to submit a report detailing their findings and making a series of recommendations. The supervising judge – the Honorable Norman A. Krumenacker III – in turn exercised his duty to review the report under § 4552(b). Judge Krumenacker determined that the report was based upon facts received in the course of an investigation authorized by the statute, and that the report was supported by the preponderance of the evidence. Accordingly, he determined to accept the report for filing as a public document in the court of common pleas.

First, however, the supervising judge invoked the procedure established by § 4552(e) of the act: the right of response. The judge determined that the report could be construed as critical of some unindicted individuals. He therefore granted them all the opportunity to file responses to be made public as part of, and at the same time as, the report itself. The supervising judge placed no restrictions of any type on the content of this response right.

At that point a group of these individuals began a concerted effort to prevent the public from ever seeing the report as written. They contend that, because the grand jury could not charge them with any offenses, "all agree [they] have committed no crime," and they are mere "innocent bystanders." Petitioners' Common Brief at 51. Rather than state their case publicly through the statutory right of response, however, members of the group chose instead to file a series of sealed challenges to the release of the report.

The petitioners argued that, because the supervising judge had a statutory obligation to determine whether the report was supported by a preponderance of the evidence, he was obligated to conduct an adversary evidentiary hearing, to overrule the grand jurors, and to make his own findings of fact about the subjects of the report. They asserted that the report is "erroneous," and that the judge therefore must not have done his job correctly. The group members argued further that "due process" requires such an adversary hearing whenever any public entity or official does

something that may harm a person's reputation, and if the Grand Jury Act does not provide a full trial-like procedure to prevent that harm, then the Act must be unconstitutional. Finally, the petitioners demanded that the supervising judge rewrite the report to correct its "false" and "misleading" comments about them.

While the supervising judge did not accept these arguments, he liberally granted certifications to appeal his rulings directly to this Court. Numerous filings ensued. On July 6, 2018, the Court entered orders in 14 of these cases requiring immediate briefing.

Although the petitioners' filings all use somewhat different wording to describe their arguments, they generally coalesce into a set of cognate issues, as illustrated by the "common brief" that the petitioners chose to file in addition to the briefing that had been authorized by this Court. For purposes of clarity and the Court's convenience, therefore, the Commonwealth files a single brief that responds to these common questions as well as to the specific complaints of all of the 14 petitioners.[1]

[1] One of the 14 petitioners, [redacted], raises a different set of issues, which are addressed in Argument IV (G).

SUMMARY OF ARGUMENT

I. There is a reason the grand jury exists: to involve the people of Pennsylvania directly in the investigative process. The supervising judge oversees that process to assure adherence to the statutory framework. But he is not a participant in the jurors' decision-making. That is why the grand jury act requires the judge to determine if the report is "supported by" a preponderance of the evidence. "Supported by" the evidence is a term of art equivalent to "sufficiency" of the evidence. It is a *review* function, not a fact-finding function. The supervising judge's job is not to render his own opinion about whether statements in a grand jury report are true or "false," "misleading" or not. The petitioners' accusation that the judge here failed to make his own findings of fact rests on a fundamental misunderstanding of the statute, and of the grand jury process itself.

II. The Grand Jury Act provides protection against allegedly unfair statements in a report not by suppressing them, as petitioners demand, but by allowing both sides to speak. Before a report can ever be published, unindicted persons are allowed to file responses that become part of the report itself and are filed with it. If the responses persuade the supervising judge that, in fact, the report is not supported by a preponderance of the evidence, he must reject the report; if not, the responses will nonetheless be published along with the report, so that the real decision-maker – the public at large – can draw its own conclusions.

Petitioners complain that this is not enough process. They would prefer a one-size-fits-all approach to due process, with the size being extra-large: a full-blown (yet secret), adversary, evidentiary hearing before the supervising judge. The purpose of the proposed proceeding is to permit the judge to decide whether, in his own view, the grand jury's assessment of the facts is right, or wrong.

But that is not how due process requirements work. The process that is due depends on the nature of the inquiry. Grand jury reports do not initiate legal proceedings or deprive individuals of life, liberty, or property; instead they raise issues that the jurors, as representatives of their community, believe the public needs to consider. Sometimes, there is simply no way to do that without saying things that may affect the reputations of certain individuals. The statutory framework accounts for that concern through the pre-publication right of response. Petitioners have all received the process that is due.

III. If, however, a supervising judge did conclude, applying the proper standard of review, that a grand jury report was not supported by the evidence, he would not then have the power to "fix" the report by making his own changes to it. That is the remedy that petitioners seek, but neither the statute nor due process entitles them to it. The supervising judge has two options: accept the report, or reject it. If the report is rejected, a sitting grand jury could attempt to rewrite and resubmit the report; but that is their decision, no one else's.

The reason is that the report must be the words approved by the jurors themselves. Words matter. Redaction, deletion, rewriting all involve matters of judgment that can change the meaning of the report. Defining that meaning is the job of the jurors, not the courts. Judicial intervention in this function would not only interfere with the jury's decision-making role; it would also require the courts to depart from their own role. The job of the judge is to supervise, not to advocate.

IV. Petitioners charge that the report portrays them falsely. Like many appellants, they reach this conclusion by systematically reading the evidence in the light most favorable to themselves, and ignoring the evidence that does not fit the picture they wish to paint. In reality there was ample evidence in the grand jury record to support the report's statements and rebut the exculpatory assertions that petitioners present as if they were facts. Of course, that does not mean they can't try: they can present their versions to the public through the right of response. What petitioners cannot properly do is block publication of the report. It is time.

Finally, one petitioner tries a different tactic to undermine the integrity of the report: he claims that it illegally and unfairly used his own private health care information against him. He submitted an affidavit swearing that he had never waived those privacy protections. But the affidavit was false. The grand jury record contains his waivers, which were received along with the "health" records from his diocese. The grand jury did not seek to pry into this petitioner's private medical

care; instead it reviewed only the records created when his employer required him to attend a church "treatment" facility to address reports he was sexually abusing a child. The dioceses frequently employed such strategies in response to clergy sex abuse, and were careful to secure waivers; otherwise there would have been little value in setting up and paying for such "treatment."

The report stands. The public should see it and decide for itself.

ARGUMENT

I. The supervising judge has already properly determined that the grand jury's report is supported by a preponderance of the evidence; under the Act, the judge performs a *review* function, not a fact-finding function.

The petitioners insist the grand jury statute required the supervising judge to find that statements about them in the grand jury report have been proven by a preponderance of the evidence. They propose that the judge must conduct a proceeding at which he determines whether statements are "false" or "misleading," and they complain that he has not done that yet. Their argument confuses the roles of jury and judge. As this Court has made clear, there is a categorical difference between making findings of fact and determining whether findings are "supported by" evidence. The statute assigns the former task only to the grand jurors, and the latter to the supervising judge. Petitioners' displeasure with the grand jury's understanding of the evidence it heard provides no statutory basis for attacking the grand jury's report.

The Investigating Grand Jury Act plainly sets forth the supervising judge's functions in relation to grand jury reports. The judge must examine the report and the record of the grand jury, and "shall" issue an order accepting the report "if the report is based upon facts received in the course of an investigation authorized by this subchapter and is *supported by* the preponderance of the evidence." 42 Pa. C.S.

§ 4552(b) (emphasis supplied). This language belies the petitioners' notion that the judge may hear evidence on his own and make his own findings about it. Rather, the judge conducts a *review* process. The scope of that review is limited to the existing record; and the inquiry is whether that record provides a basis for the jury's conclusions, whether or not the reviewing court would have reached the same conclusions itself.

This Court has recently explored the nature of such review at length. In *In re Vencil*, 152 A.3d 235 (Pa. 2017), the Court considered a provision of the Uniform Firearms Act addressing individuals with a prior history of involuntary civil commitment. The statute at issue permits these individuals to petition for judicial review of the prior commitment. The Superior Court ruled that the statute required a *de novo* hearing. This Court reversed, holding that the statute instead permitted judges only to review "the sufficiency of the evidence." Equating "sufficiency" with "supported by," the Court held that the judge's task is "to determine whether [the] findings are supported by a preponderance of the evidence," "in the light most favorable to the … original decision-maker," and "limited to the information available to the [decision-maker] at the time." *Id.* at 237.

This Court explained that "[t]his has been the definition of a court's review of the sufficiency of the evidence for more than a century," and that the phrase is "a term of art that has a precise meaning." *Id.* at 242-43. Stated another way, the Court

continued, such review requires "[d]eference to the facts as found by the original factfinder." *Id.* at 243. The Court observed that this standard of review is applied in a wide variety of contexts, from delinquency adjudications, to civil actions, to attorney discipline matters. *Id.*

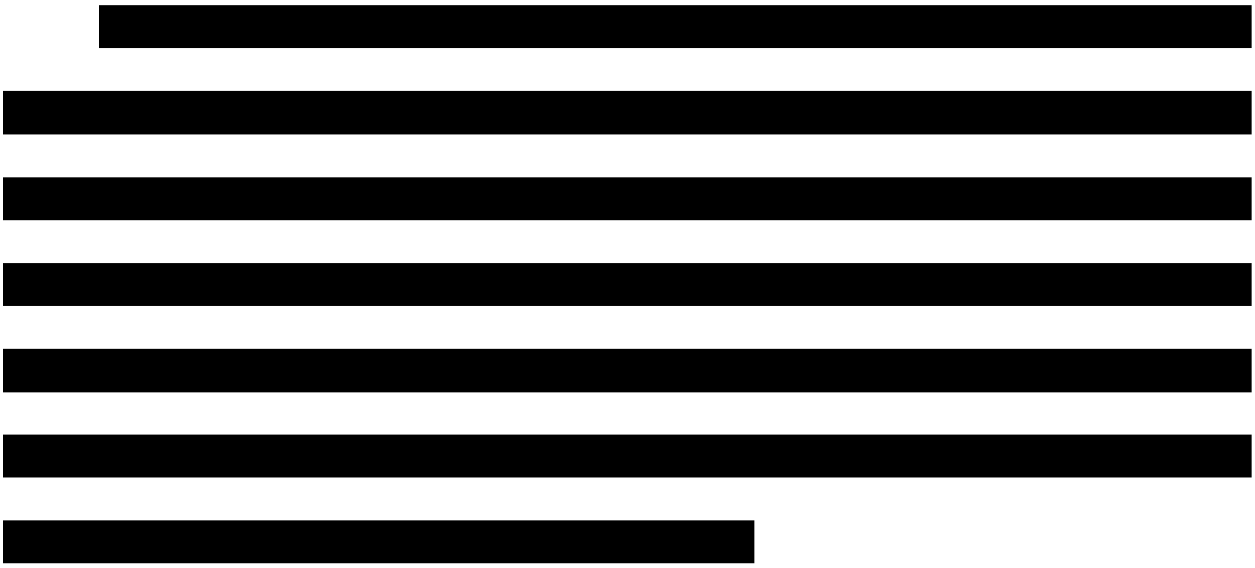
Indeed the same is true in many additional areas. *See, e.g., Allison v. Pennsylvania Human Relations Commission*, 716 A.2d 689, 691 (Pa. Cmwlth. 1998) (commission's findings of discrimination are sufficient "if supported by a preponderance of the evidence"); *Thompson v. Thompson*, 963 A.2d 474, 477 (Pa. Super. 2008) (protection from abuse order was supported by a preponderance of the evidence, reviewing that evidence "in the light most favorable to the petitioner and granting her the benefit of all reasonable inference"); *Strand v. Chester Police Dept.*, 687 A.2d 872, 876 (Pa. Cmwlth. 1997) (forfeiture order "was supported by a preponderance of the evidence").

These well-established judicial doctrines dictate the proper interpretation of the Grand Jury Act. As this Court also noted in *Vencil*, where the legislature borrows terms of art from legal tradition and lengthy practice, the words of the statute must be given the same meaning long attributed to them by case law. 152 A.3d at 242-43. Here the Legislature directed the supervising judge to review "the record," and to determine if the report "is supported by" a preponderance of the evidence. That

command cannot reasonably be construed to allow the judge to take his own evidence or make his own findings about what is "false," let alone "misleading."

The General Assembly's division of responsibility between grand jury and supervising judge, as established by the language it chose in § 4552(b), is a reflection of an even older legal tradition. The grand jury, like the petit jury, has since long before the Founding served as a means of direct participation by the citizenry in its own governance. The grand jury is one way in which the law gives an unfiltered voice to the people. Plainly the Legislature of this Commonwealth, as the people's representative, did not intend to relegate the grand jury's fact-finding function to a judge, however wise and well-meaning. Instead it allocated to the supervising judge a typically judicial function: deferential review.

Even a cursory look at the petitioners' various complaints about the report reveals their refusal to recognize the nature of that review.



[redacted]

These and the other petitioners' complaints are addressed more fully below in Argument IV. On the whole, however, they provide no basis for invasion of the grand jury's fact-finding function. To the contrary – they are matters of

interpretation that the statute entrusts to the lay persons who are selected from their communities to serve as grand jurors. That is the meaning of the review provided under § 4552(b) and performed with the required deference by the supervising judge.

II. The Grand Jury Act already affords due process protection against loss of reputational interest; the right of response addresses disputes not by suppressing speech, but with more speech.

Petitioners contend that, regardless of the statute, they are constitutionally entitled to a "pre-deprivation hearing" before the publication of any grand jury report that might negatively affect their "reputations." They say that all who might feel aggrieved by an upcoming report should get to go before the supervising judge, *in camera*, under the cloak of grand jury secrecy, to persuade the judge to censor the report to the extent they feel it is unfair to them. Their proposal would have the effect, if not the intention, of sabotaging this Commonwealth's historical grand jury reporting process.

Existing grand jury practice provides a better way to achieve fairness. The whole purpose of the grand jury report is to initiate, through a supervised process, public discussion of matters of public importance. As a consequence, the Grand Jury Act creates the right of response. The grand jury reports its findings by issuing its report; objectors tell their side by attaching responses to the document. Both are published simultaneously; the public is then free to decide.

Petitioners insist, ironically, that due process prohibits such open discussion. In support of their claim they rely on cases like *Mathews v. Eldridge*, 424 U.S. 319 (1976), which considers some of the factors used to determine the process that is due in particular situations. But "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). "The fundamental requirement" remains "an opportunity to be heard," *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (citation omitted) – not necessarily the right to a specific result.

As this Court has said, safeguards against grand jury abuses of power "are reflected in the statutory scheme of regulation, which recognizes the essential role of the judiciary in supervising grand jury functions … adherence to the statutory framework is adequate to assure regularity in the proceedings." *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006) (citation omitted). In addition to § 4552(b)'s "supported by" review, discussed above, the Grand Jury Act offers an additional protection to assure regularity – *i.e.*, fairness – to unindicted subjects: the supervising judge can permit individuals criticized in a report the right to file a response that will "be attached to the report before the report is made part of the public record." 42 Pa. C.S. § 4552(e).

While the statute calls upon the judge to exercise "discretion" in applying this provision, he of course cannot refuse to publish responses merely because he

disagrees with their content – any more than he could properly refuse to publish a grand jury's report merely because he disagreed with its content. Instead, the judge must reasonably determine whether the report is indeed "critical" of individuals so as to implicate the right to reputation. If so, he must then invite responses. If individuals choose to submit them, the judge then reviews the responses (just as he reviews the report).

That review can ensure that the responses do not contain obviously unacceptable material (such as names and addresses of grand jurors) – but it might also serve to convince the judge that there are problems with the report that would prevent its acceptance under the standard established by § 4552(b). Because the response process must occur *before* publication of the report, it provides another opportunity for the judge to assess whether the report is in fact supported by a preponderance of the evidence in the record. If the judge remains satisfied that the statutory standard has been met, then the report will be published – along with the responses, which, as the statute specifies, become part of the public report.[2]

[2] In this case the judge put the petitioners on advance notice both that he intended to publish the report and that he intended to publish all the responses. But that was not a final order, and in any case a supervising judge remains free to modify his ruling up until the point of publication. The statute, moreover, gives the judge discretion to proceed in whatever order he thinks best. He may conduct subsection (b)'s "supported by" review either before or after he determines whether the report is critical of individuals and calls for responses. The subsections of 4552 are not placed in chronological order; subsection (d), for example, concerns appeal, which would be the final step in the process.

This statutory scheme affords exactly the process that is due. It accords with the precedent cited by petitioners themselves. In *Simon v. Commonwealth,* 659 A.2d 631, 639 (Pa. Cmwlth. 1995), for example, an individual criticized by the Pennsylvania Crime Commission *could not be heard* prior to publication of the Commission's report: the sole recourse "was a right of rebuttal after the report became public information." Similarly, in *D.C. v. Department of Human Services*, 150 A.3d 558, 566 (Pa. Cmwlth. 2016), the Department was placing the names of alleged child abusers in a public registry "on the basis of the investigation alone," with no prior review or means of challenging the report. *See also J.P. v. Department of Human Services*, 170 A.3d 575 (Pa. Cmwlth. 2017) (same).

Here, in contrast, the petitioners' objections are instead subject to consideration *before* publication (including, as this case demonstrates, the possibility of discretionary appellate consideration), and that consideration may in some cases result in denial of publication. More importantly, the right of response means that there will never be a time when the public is exposed to only one side of the argument. From the outset of any public discussion, the responders' version of events will be equally available if they so choose.

Petitioners here presume that due process can be satisfied only if negative information is *never heard*. That is not the case. "The fundamental requirement,"

as this Court said in *Bundy*, is the "opportunity *to be heard*," – not the ability to keep one's critics from being heard.

The statutory scheme provides that opportunity to be heard. *See Pelullo v. State of New Jersey, Commission of Investigation,* 683 A.2d 558, 563-567 (N.J. App. Div. 1996) (explicitly distinguishing *Simon*; where state recognizes "a protectible interest in reputation without requiring any other tangible loss," due process was afforded where reporting Commission was serving an investigatory rather than an adjudicative function, plaintiff was allowed to preview parts of the report that applied to him, and was allowed to file a response that would be published with the report).

As the statutory process therefore illustrates, a person criticized in a grand jury report cannot, for that reason alone, be deemed to have been "finally" deprived of a protected right. *Mathews*, 424 U.S. at 333. The report is not a judicial adjudication of wrongdoing, but rather the opinion of lay jurors. The public at large presumably understands that opinions may be wrong, just as accusations in a civil complaint (which is filed in court, and may be disseminated by news media) are understood to be partisan averments that are potentially false. Yet a civil complaint – no matter how much publicity it may receive – is not subject to any kind of pre-publication review, unlike the report of the grand jury. That a grand jury report is

not a "final" determination of wrongdoing is also plain from the fact that (again in contrast to a civil complaint) it may be published, as here, with individual rebuttals.

But it is not only the petitioners' legal theory that is lacking; they also fail to make any real assessment of the costs and benefits of their demands. Petitioners insist on importing into the grand jury process a full-blown (yet non-public) bench trial, including live testimony, cross-examination, exculpatory and mitigating evidence, and fact-finding by the supervising judge. Under existing procedures, however, evidence is presented only to the *jurors*, not the judge, who does not sit in the grand jury room. The jurors alone may draw conclusions from that evidence. The evidence is later reviewed by the supervising judge only from the record, in the usual manner of judicial review of jury fact-findings. Consequently, the trial-like thing that petitioners seek would require all testimony and evidence already presented to be introduced all over again, this time with the supervising judge in effect sitting as the grand jury.

Necessitating such a proceeding in every instance in which objections arise would obviously impose indefinite delay (as this case threatens to illustrate), and would also carry bizarre procedural ramifications. It is not clear, for example, how factual findings by the supervising judge would affect later proceedings. Petitioners appear to assume that the judge must inevitably make findings in their favor; they do not remark on how they would fare if the opposite occurred. They do not address

whether such credibility findings would be admissible in subsequent legal proceedings.

Notably, the fact-finding process that petitioners demand has no parallel even in the early stages of a criminal case. Even *after* charges have been filed, a preliminary hearing judge does not make credibility determinations, consider defenses or mitigation, or find ultimate facts, but decides only if the evidence is *facially* sufficient. *See Liciaga v. Court of Common Pleas of Lehigh County*, 566 A.2d 246, 248 (Pa. 1989) ("The committing magistrate is precluded from considering the credibility of a witness"); *Commonwealth v. Jackson*, 809 A.2d 411, 419 (Pa. Super. 2002) ("Neither the credibility of the witnesses presented nor the validity of any claimed defenses is of any concern when determining if a *prima facie* case is present"); *see also North Dakota Commission on Medical Competency v. Racek*, 527 N.W.2d 262, 266-267 (N.D. 1995) (while state constitution protects reputation, it also protects liberty; yet it would be absurd to argue that a full due process hearing is required before charging a citizen with murder or other grave felonies and taking them into custody on such charges). Where, as here, there is no criminal proceeding at all, there is no justification for overriding the statutory procedure in favor of the peculiar creature that petitioners propose.[3]

[3] Petitioners contend that an "adversarial" process is "a far better mechanism for accurate truth finding" (Petitioners' Common Brief at 23), as if a grand jury were supposed to be the same thing as a trial. But criticizing the grand jury system for not being the "best" mechanism for deciding

Petitioners presume that the "inaccuracies" they assert demonstrate the need for blowing up and replacing the existing process. But those claimed inaccuracies in the report prove, if anything, just the opposite [redacted] As discussed below in Argument IV, the report presents the more accurate account of these events; had there been a "trial" before the supervising judge, he would not likely have prevailed. Under either

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factual disputes is like denouncing an apple for not being an orange. Not every public contest of fact is or should be resolved only by a full adversarial trial, and attempting to provide such process in all instances would produce only paralysis. The grand jury is an investigative body. Precisely because it does *not* purport to adjudicate ultimate truth, its conclusions are inherently less harmful to reputation than the result of a fact-finding hearing. A grand jury report *begins* the public discussion; it does not *end* the discussion.

version, moreover, the upshot is just the same: [redacted]

So, compared to the secret hearing petitioners seek, the right of response presents an effective – in some ways more effective – process for those who wish to challenge a grand jury report. And it does so without undermining the entire point of the grand jury: to bring the voice of citizens directly into the investigative process. Grand jury investigations concern criminal activity "that the ordinary process of the law is inadequate to cope with or discover[.]" They deal with "criminal acts which

seriously affect or injure the public generally," and "if permitted to continue, would endanger public safety[.]" *Petition of McNair*, 187 A. 498, 504 (Pa. 1936) (citations omitted); *see Commonwealth ex rel. Camelot Detective Agency, Inc. v. Specter,* 303 A.2d 203, 205 (Pa. 1973) (refusing to enjoin grand jury investigation into "systematic criminal activity [that] has injuriously affected the public health, safety, morals and welfare of citizens"). Where, as here, the existing statutory scheme already affords pre-publication review of personal objections, there is no due process basis for expanding upon or invalidating that scheme if doing so would obstruct the important task of investigating grand juries.

This case presents a classic example of criminal activity "that the ordinary process of the law [has been] inadequate to cope with or discover." 408 U.S. at 481. The activity was covered up for so long that statutes of limitation mostly bar prosecution – which, of course, is exactly why the product of the investigation is a report rather than a presentment. Petitioners would gladly impose obstructions on such reports, but to no legitimate purpose.

Petitioners' procedural demands would displace citizen-made findings with judge-made findings. The Legislature understood that this is not the proper role of the supervising judge. His power is to review the report, to quash it in its entirety if it is unsupported by evidence, or to publish it with responses attached. This is the only process that can protect reputational interest without destroying the very

essence of the institution, which reserves to citizen jurors the power make conclusions about the meaning of the evidence and make decisions about the content of the report.

The Act therefore preserves the historic role of the grand jury while also allowing pre-publication review and response. What this Court stated in *In re Twenty-Fourth Statewide Investigating Grand Jury* continues to hold true: "adherence to the statutory framework is adequate to assure regularity in the proceedings." 907 A.2d at 512. Petitioners can identify no deficiency in the existing statutory framework that would warrant a full pre-publication trial in addition to the public response right already afforded.

III. Neither the statute nor the constitution entitles objectors to piecemeal redaction of grand jury reports; judicial editing would inject the courts into the grand jury's role.

Petitioners are in error not only about their alleged rights under the act and the constitution, but about the remedy for a violation of any such rights. Petitioners assume that, if the statute or the constitution did empower the supervising judge to make his own findings of "error," he would then be empowered to "correct" the "errors" by changing the report. Such an action would be contrary to the Investigating Grand Jury Act and to the due process principles on which petitioners rely.

Citing § 4552(b), many of the petitioners incorrectly assert that the supervising judge may "accept some, all, or none of the information in the Report." The statute says no such thing.

A reading of the plain language of § 4552 reflects a straightforward process for issuance of a grand jury report. A report is accepted by the grand jury by majority vote and then is submitted to the supervising judge. If the report is authorized by the Investigating Grand Jury Act and supported by a preponderance of the evidence, the supervising judge issues an order accepting the report as a whole and directing its public filing in the relevant county court. If the supervising judge decides that the report is critical of any individual named in the report, the judge first allows the named person to submit a response to the report. The supervising judge then attaches the response to the full report before it is filed publicly.

Nothing in the statute, therefore, permits a supervising judge to redact language from or otherwise edit a report submitted by an investigating grand jury. To the contrary, the supervising judge must either allow, or not allow, the full report to be filed. The judge has no statutory authority to rewrite the report, edit the report, or omit parts of the report. If the judge declines to allow the report to be filed, the entire report is barred. If the grand jury remains in session and wishes to modify the report to meet the judge's objections, it may exercise its discretion to do so. If the

judge still refuses to let the report see the light of day, the Commonwealth has an explicit statutory right of appeal. That is what the statute provides.

Petitioners also seem to assert their entitlement to redaction as a due process matter, but there is nothing even in their own constitutional arguments that justifies such judicial rewriting. Again, as this Court emphasized in *Bundy*, "[t]he fundamental requirement of due process is an opportunity to be heard." 184 A.3d at 557. Consistent with that command, all the petitioners received pre-publication notice and an opportunity to be heard. If the judge chooses to rescind his acceptance of the report as a result of the responses, petitioners will have received due process; if the judge chooses not to rescind and instead to publish the responses, petitioners will similarly have received due process. Due process can provide no basis for redacting the report rather than accepting or rejecting it, as the statute provides.

Nor *should* a supervising judge have such redaction power, either for the court's sake or the grand jury's. The grand jury report is designed to allow the jurors, as the voice of their community, to make recommendations for executive, legislative, or administrative action in the public interest based on the grand jury's own findings. The jurors must hear or read every word of a report and vote as a body to adopt it. Until they are satisfied, the report goes nowhere. It belongs to them.[4]

[4] Some critics of the grand jury process are fond of commenting that grand jury reports only reflect prosecutors' views, not grand jurors'. Those critics have not spent enough time (if any) in grand jury rooms – certainly not in this grand jury's room. The secrecy of grand jury proceedings

No one but grand jurors, therefore, should have the ability to alter a report. The power to redact is the power to edit; the power to edit is the power to write. A supervising judge empowered to remove "false" or "misleading" facts or conclusions from a grand jury report, as petitioners request, will necessarily be making judgments about the content of that report. Even a redaction as "simple" as removing a name and substituting initials is often not so simple. As this Court is well aware, individuals may complain that initials are insufficient to hide their true names. Complete identity "cleansing" might require quite significant deletions – especially when prominent individuals are a subject of the report.

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prevents the Commonwealth from discussing details of such interactions in this brief. This Court, however, is invited to consult the transcripts for April 17 and April 27, 2018, for examples of the jurors' close involvement in the reporting process.

footnote cont.

Escalating such aspersions even further, petitioners declare in their "common brief" that the publicity generated by this case is actually the product of a nefarious media campaign orchestrated by the Office of Attorney General. On the basis of three brief press releases, issued over the last two months, petitioners allege that news articles about the case – and even editorials! – are attributable to the Commonwealth. Such a charge reflects a dim view of the independence and abilities of the Fourth Estate.

But petitioners' argument also shows an unrealistic view about the nature of this investigation. There has never been a reasonable likelihood that the case would not attract attention of its own accord. First, as practitioners are well aware, witnesses before the grand jury are not bound by any secrecy as to their testimony, 42 Pa. C.S. § 4549(d), and are free to speak to the press. Indeed, this Court is presently considering the degree to which witnesses' lawyers should also be exempt from grand jury secrecy. *See In re: Fortieth Statewide Investigating Grand Jury, Petition of Diocese of Harrisburg and Diocese of Greensburg*, No. 45 WM 2017 (appeal pending).

Furthermore, the subject of this investigation, clergy sex abuse, is a matter of intense scrutiny, literally worldwide. This investigation is hardly the first of its kind; the public is well aware of the significance of the questions involved. Combine that with the unprecedented issues raised by petitioners before this Court, which they themselves characterize as of the highest importance. This is a highly unusual case, generating highly unusual litigation. That is why it is in the news.

Faced with such a prospect, the grand jury, were it in charge of the "editing" process, might exercise its discretion in a variety of ways that no supervising judge could accurately predict. If it is the judge doing the editing, then it is the judge who is making those judgment calls; it is the judge, ultimately, who is deciding how to present the report's content to the public. Substitution of the court's judgments for the jurors' would undermine the grand jury's ability to act on behalf of the citizens of the Commonwealth to address the government in an official manner and in a collective voice. At the same time, a judicial patina on the reporting process would leave the public to wonder how much it reflected the jury's views, and how much the judge's. "Redaction" therefore jeopardizes the independence and neutrality of the judiciary.

The grand jury voted to approve Report No. 1 in its current form. It was accepted by the supervising judge in its current form. It should be filed publicly in its current form.

IV. The petitioners' claims about inaccurate or privileged information are meritless.

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CONCLUSION

For these reasons, the Commonwealth respectfully requests this Court to deny the petitions for review, to lift the stay, and to finally permit the citizens of Pennsylvania to read the grand jury's report – along with all the responses to it – and draw their own conclusions.

Respectfully submitted,

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July 13, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 2135

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

CERTIFICATE OF COMPLIANCE WITH RULE 127

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

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July 13, 2018

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	:	**NO. 86 WM 2018**
	:	
	:	**Supreme Court of Pennsylvania**
	:	**2 W.D. Misc. Dkt. 2016**
[redacted]	:	
	:	**Allegheny County Court of Common Pleas**
	:	**CP-02-MD-571-2016**

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing brief upon the person below by electronic mail via the PAC-file system:

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