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~~**[UNDER SEAL]**~~

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 15 EM 2022

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IN RE: THE THIRTIETH COUNTY
INVESTIGATING GRAND JURY

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# COMMONWEALTH'S BRIEF FOR APPELLEE

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On Petition for Specialized Review of orders entered March 4, 2022, by the Honorable Kai N. Scott, Supervising Judge, Thirtieth County Investigating Grand Jury, Court of Common Pleas of Philadelphia County, at Misc. No. 0008094-2018.

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## CITATION ABBREVIATIONS

Citations of the form "SA__" refer to pages in the Sealed Appendix to the Commonwealth's Response in Opposition to Petition for Specialized Review, filed March 24, 2022.

Citations of the form "ICA__" refer to pages in the In-Camera Sealed Appendix to the Commonwealth's Response in Opposition to Petition for Specialized Review, filed March 24, 2022.

## SCOPE AND STANDARD OF REVIEW

Because this Court has exercised its extraordinary jurisdiction, this Court's scope of review is plenary with respect to all questions presented in this appeal. *See* 42 Pa. C.S. § 726 (providing that, in a judicial proceeding "involving an issue of immediate public importance, [this Court may] assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done").

For the legal question whether the Report qualifies as a "grand jury report" as defined by statute, this Court's standard of review is *de novo*. *In re Grand Jury Inv. No. 18*, 224 A.3d 326, 332 (Pa. 2020).

This Court's standard of review is abuse of discretion for the question whether the supervising judge erred in finding that the [redacted] Report is supported by the preponderance of the evidence. *See* 42 Pa. C.S. § 4552(b) (vesting the supervising judge with authority to determine whether the report findings are supported by the preponderance of evidence).

This Court reviews *de novo* the question whether High-Ranking Official #1 received constitutionally adequate due process prior to the potential deprivation of [redacted] reputation through the publication of the Report. *Cf. In re N.C.*, 105 A.3d 1199, 1210 (Pa. 2014) (holding that, although evidentiary rulings are reviewed for abuse

of discretion, appellate courts review *de novo* the legal question whether that ruling violates a defendant's Confrontation Clause rights).

This Court reviews for abuse of discretion the question whether certain individuals, but not others, should be given notice and a right to respond to the Report. 42 Pa. C.S. § 4552(e); *In re Fortieth Statewide Inv. Grand Jury (Fortieth I)*, 190 A.3d 560, 511, 566 n.4 (Pa. 2018). The standard of review is *de novo*, however, "[t]o the degree the issue [on appeal is] whether the [governing] law has been misapplied." *Brady v. Urbas*, 111 A.3d 1155, 1161 (Pa. 2015); *see also In re N.C.*, 105 A.3d at 1210.

## QUESTIONS PRESENTED

1. Did the supervising judge err by ordering the public release of the investigating grand jury report of the Thirtieth County Investigating Grand Jury because the Report does not meet the statutory definition of an investigating grand jury report as that term is defined pursuant to 42 Pa. C.S. § 4542?

*(Answered in the negative by the court below.)*

2. Did the supervising judge err in concluding that the findings in the Report were supported by a preponderance of the evidence . . . ?

*(Answered in the negative by the court below.)*

3. Does the publication of the Report violate [High-Ranking Official #1]'s constitutional right to protection of [redacted] reputation . . . ?

*(Answered in the negative by the court below.)*

4. What type or degree of criticism of a named but nonindicted individual in a grand jury report warrants notice and an opportunity to be heard under 42 Pa. C.S. § 4552(e), and did the supervising judge's discretionary decision to provide notice and an opportunity to be heard to some, though not all, named but nonindicted individuals in the grand jury's report comport with the principles of due process and the fundamental right to reputation under Article I, Section 1 of the Pennsylvania Constitution, as interpreted by *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560 (Pa. 2018)?

*(Answered in the affirmative by the court below, with respect to whether the court's decision comported with due process and the fundamental right to reputation.)*

## STATEMENT OF THE CASE

### A. The Grand Jury's Investigation, Findings, and Recommendations.

In April 2021, the Thirtieth County Investigating Grand Jury (Grand Jury 30) adopted a Report on [redacted] (the "Report"). The supervising judge (Kai N. Scott, J.) received a copy of the Report containing more than 900 footnote citations to the record (ICA1-139) and a copy of the underlying record. On June 3, 2021, at a hearing held *in camera*, the court stated that it had "examine[d] the [R]eport itself" and had "reviewed countless pages of notes of testimony from countless witnesses," witness statements, and other materials in the Grand Jury 30 record. (ICA3224-26.) Based on the court's review of that "voluminous" record, the supervising judge found "that the facts in this Report [are] supported by the preponderance of evidence" and accepted the Report. (ICA3226, SA137.)

As relevant to this appeal, the Grand Jury's findings and recommendations, and the evidence on which they were based, can be summarized as follows:

#### 1. [redacted]

[redacted]

### 2. [redacted] should have conducted an urgent investigation into [redacted], but that investigation was undermined by the mismanagement of [redacted]

The Grand Jury found that the standard procedure of the [redacted] called for urgent investigation of the [redacted], but that [redacted]—a senior [redacted] supervisor—departed from that procedure and thereby undermined the investigation. (SA11, SA104-05.) That finding and the bases for it are described in detail below.

**a. [redacted] had routine practices and procedures for investigating [redacted]**

[redacted]

[redacted]

**b. [redacted] deviated from standard practices in material respects, while operating under a known conflict of interest—[redacted]**

The record established that, in handling the [redacted] incident, [redacted] undermined the investigation by deviating from [redacted] standard practices, while acting under a known conflict of interest—specifically, [redacted] As the Grand Jury (and several testifying [redacted]) concluded, [redacted] conduct was not accidental. [redacted]

Both referrals were routed to [redacted] for an initial determination of how to proceed. (SA50-54.) This was a critical moment, because with the passage of time, it becomes increasingly difficult or impossible to identify relevant witnesses and collect evidence. As one [redacted] testified, "Time is not on our side

with investigations. . . . [I]f you wait, you lose things. So it's very important to initiate that investigation immediately." (ICA991.)

As the Grand Jury concluded, [redacted] handled these referrals while operating under a known conflict of interest: [redacted]

By [redacted]'s own admissions, he knew about the conflict in realtime. [redacted]

[redacted] approved the initial [redacted] without investigation. Two weeks later, [redacted] Instead, he assigned it to [redacted] where, [redacted]

[redacted], it languished for the next [redacted]. (SA43-49, SA185-186, ICA1765-73.)[1]

[redacted] conduct deviated from [redacted] prior practice and procedure, as well as [redacted]'s own prior practice as a supervisor, in multiple different ways:

[redacted]

[1] [redacted]

[redacted] further testified that, if [redacted] had been assigned the [redacted] investigation initially, he would have sent a "whole team to go out there" to interview witnesses and locate and secure time-sensitive evidence. (ICA791-92, ICA814, ICA844.)

*Second*, under [redacted] own routine practice, the [redacted] would never be approved without [redacted]

[2] [redacted]

[redacted]

*Third*, there were other "major red flags" in the [redacted] that called for further follow-up investigation. (ICA992.) [redacted]

Rather than assign [redacted] immediately to [redacted], as would be the standard practice, [redacted] ensured that he would retain control over the job by assigning it to [redacted] under his own supervision—[redacted]

[redacted]

Throughout [redacted], in the hands [redacted], the [redacted] investigation made virtually no progress. As [redacted] testified, "the investigation, when it was handed to me [redacted], consisted of [redacted] It was very limited, the extent of the investigation." (ICA802.)

**c. [redacted] prejudged the outcome, telling an [redacted] that the allegations were "a bunch of bullshit" and words to the effect that, "[redacted] and they want us to investigate [redacted]? Fuck him."**

The Grand Jury found that no later than [redacted], before any real investigation had taken place, [redacted] had made statements demonstrating that he had prejudged the outcome, and that he had determined not to investigate the incident thoroughly. (SA80.)

More specifically, the Grand Jury heard testimony from [redacted] an [redacted] supervisor who reported to [redacted]. [redacted] gave the following testimony to the Grand Jury:

> A [redacted] **said there's a complaint up here right now that is going on where a [redacted] and that's a bunch of bullshit.** [redacted] **This job is bullshit.** He was telling me this and I had no idea at that time what he was even talking about. I had no idea why he was talking about this job, none. But he made it very clear that we shouldn't be investigating this job and it's bullshit and [redacted]
>
> . . .
>
> Q . . . **Did he ever describe to you any investigation that was done that convinced him that no further investigation was needed?**
>
> A **No.**
>
> Q Did he ever describe any investigative steps at all that were taken in that?
>
> A No. None.

(ICA2235-36.)

[redacted] confirmed that, in [redacted], [redacted] had informed him about [redacted] comments on the [redacted] incident. In particular, as told to [redacted] had told [redacted], "'They want us to investigate this. [redacted] He said fuck him." (ICA824-25.) Those comments to [redacted] are reflected in notes taken by [redacted] in [redacted] (ICA1578), and [redacted] confirmed them in substance when he testified in 2019 (ICA2235).

**3. [redacted] and [redacted]'s unprecedented lack of cooperation, and [redacted] failure to investigate promptly, impeded a parallel investigation by [redacted].**

As further detailed below, the Grand Jury also found that [redacted] and [redacted] (referred to as [redacted]) had refused to cooperate with a parallel investigation conducted by [redacted] and that [redacted]'s mismanagement of the [redacted] investigation had resulted in the loss of evidence that was critical to [redacted].

**a. The parallel [redacted] investigation into [redacted].**

[redacted]

[redacted]

[redacted]

**b. [redacted] and [redacted] withheld cooperation from [redacted] in a manner that was unprecedented.**

[redacted] contacted [redacted], which provided her with evidence including [redacted] (ICA699.) [redacted]

Accordingly, more evidence about [redacted] was critical to [redacted] determination of whether [redacted]

[redacted] and [redacted] both followed up with [redacted], to request further documentation to assist

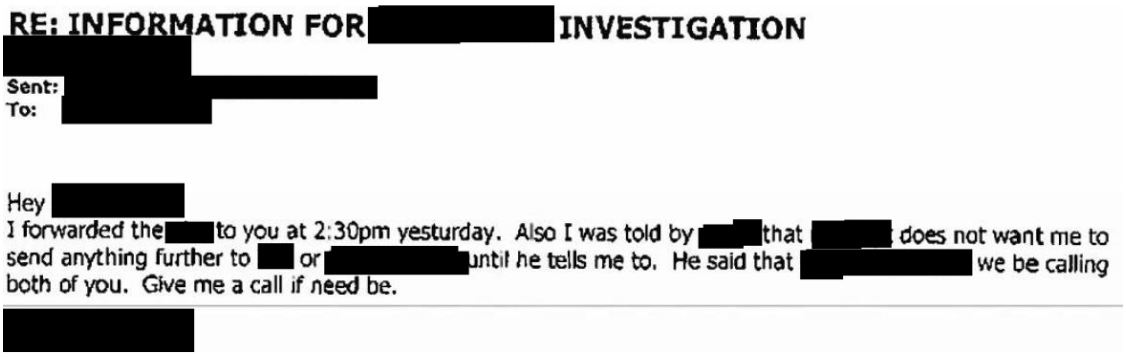
with their investigation. Those inquiries were rebuffed in a manner that, in [redacted] experience, was unprecedented. In particular, [redacted] testified:

> Q. . . . Was there anything after you left [redacted] that you made efforts to either acquire or learn?
>
> A. Correct.
>
> Q. And tell the ladies and gentlemen of the Grand Jury about that?
>
> A. We called [redacted] to find out more about [redacted], why he was originally [redacted], which wa[s] the standard when we have a [redacted].
>
> Q. Okay.
>
> A. And then once we found out why he was [redacted] we wanted to get more information about the incident leading up to that. **After a while it seemed that we were getting resistance and we didn't get anything, I don't believe.**
>
> Q. Now, you indicated that you had been involved in investigations regarding [redacted]s before. **Have you ever had any problems getting the type of information that you were looking for about why [redacted]?**
>
> A. **No.**

(ICA883; *see also* ICA702-04.) Consistent with [redacted]'s testimony, [redacted] also testified that, at a certain point, the [redacted] informed her that he "could no longer provide [her] information, and that [she] would need to contact [redacted] directly . . . ." (ICA702.)

As shown in the email below, the Grand Jury obtained documentary evidence establishing that, as of [redacted], [redacted], the

[redacted], had been directed to withhold any further information from [redacted] until instructed otherwise:



RE: INFORMATION FOR [redacted] INVESTIGATION

[redacted]
Sent: [redacted]
To: [redacted]

Hey [redacted]
I forwarded the [redacted] to you at 2:30pm yesturday. Also I was told by [redacted] that [redacted] does not want me to send anything further to [redacted] or [redacted] until he tells me to. He said that [redacted] we be calling both of you. Give me a call if need be.

[redacted]

(ICA1812.) The Grand Jury received testimony from [redacted], but neither witness had an explanation for why [redacted] should withhold *any* information in its files from [redacted]. (ICA1050, ICA2671.) Indeed, [redacted] had no recollection of ever instructing anyone to withhold documents from [redacted], and he could not identify any situation where [redacted] would be justified in doing so: "There is no reason to. We always cooperate." (ICA2671.)

After being rebuffed by [redacted], [redacted] then contacted [redacted], and she specifically asked [redacted] to give her "access to his investigative materials and access to his findings in the case." (ICA703.) [redacted] refused to cooperate. In particular, [redacted] described how [redacted] rebuffed her repeated requests for information:

> Q. Did he [[redacted]] give you a reason why he was not giving access?
>
> A. He said that the investigation was ongoing. That he wouldn't release his findings until the investigation was complete. That that

would take several months, and most likely would not happen until I had finalized my own [redacted].

Q. . . . [A]t that point didn't you need to know what the investigation yielded in order for you to be able to [redacted]?

A. Yes.

Q. Did you explain that?

A. Yes.

Q. **And the response you got was that you're not getting anything until you finish?**

A. **Yes.**

Q. **And you basically said I can't make a determination without knowing what else is out there from the investigation?**

A. **Correct.**

(ICA1241.)

[redacted] refusal to cooperate with the [redacted] investigation is inconsistent with [redacted] standard practice, as explained by Petitioner [redacted]self. In particular, Petitioner testified that, if [redacted] had "asked [[redacted]] for [information]" and "[i]f [[redacted]] could get it," then "absolutely" [redacted] would provide [redacted] with access to any information it required. (ICA2469.)

**c. [redacted]'s erratic and confrontational behavior at [redacted], after being informed that [redacted].**

[redacted]

[redacted]

[redacted]

In [redacted]'s experience, [redacted]'s behavior was unprecedented, and to [redacted] it "seemed like [redacted] had almost a personal interest" in the outcome of her investigation. (ICA744-45.) Indeed, [redacted] found [redacted] conduct to be so unusual that she "actually mentioned it to [redacted]." As [redacted] testified:

> Q. . . . [Y]our perception was that it seemed like [redacted] had almost a personal interest in this?
>
> A. Yes.
>
> Q. Why did you say that? What led you to that perception?
>
> A. He became almost upset when I told him that I [redacted] He became very persistent in offering alternative explanations for how [redacted] occurred.
>
> . . .
>
> A. **So to be clear, I felt that [redacted] was personally invested in the outcome while I was still actively investigating the case itself, to the point that I had actually mentioned it to [redacted] because it struck me as being odd. . . .**

(ICA723-24, ICA748-49.)

**4. The delay in referring the investigation to [redacted] resulted in the loss of crucial evidence.**

Following [redacted] meeting at [redacted], [redacted] (referred to as High-Ranking Official #1 or Petitioner) directed

that the [redacted] investigation be reassigned to [redacted], which immediately began investigating the event as an urgent [redacted] (SA8-9, SA56-59.) At that late stage, [redacted] began the thorough investigation that should have begun [redacted] earlier. (SA191.) Despite [redacted] efforts, the delay resulted in the loss of vital evidence and fundamentally compromised the investigation. [redacted]

(SA30.)

**5. Multiple senior [redacted] supervisors were livid and demanded an investigation into how [redacted] mishandled the [redacted], but Petitioner refused and closed ranks.**

[redacted] mismanagement of the [redacted] investigation caused a firestorm within the upper echelons of [redacted], and multiple [redacted] supervisors were outraged by [redacted]'s conduct.

[redacted] rang the alarm bells first. On [redacted], he met with [redacted] (his direct supervisor) and High-Ranking Official #1 to discuss the investigation into [redacted]. [redacted] described the meeting as follows:

> A. . . . [O]n [redacted], the following week, at a staff meeting, I was summoned to the [redacted] office; present was [redacted]. And at that point I reiterated my concern with this investigation. I really questioned the fact that how did this investigation get [redacted]

[redacted]

[redacted]

[redacted]

> A. I mean I was shocked at that time. I said, so basically you give her the most important job and let her fail. I was baffled by that explanation. I was insistent. I said I don't want this investigation. **And I said if you feel confident that [redacted] did nothing wrong, you do an investigation and put your name on it.** I didn't want the investigation. I said take it back. He was resistant to that. I mean it became quite heated. . . .

(ICA810.)

Following that meeting, [redacted] submitted a formal memo to High-Ranking Official #1, "respectfully request[ing] that an [redacted] Investigation be conducted to look at the actions of [redacted] in relation to [redacted] and the subsequent investigation of [redacted]." (ICA1788.) At the bottom of that memorandum, High-Ranking Official #1 stamped it, "DISAPPROVED." In longhand, High-Ranking Official #1 wrote an annotation directed to [redacted]: "Inform [redacted] that he is responsible only for [redacted] investigation. Any other concerns re: this investigation are [redacted]." (ICA1788, ICA2480.)

Despite calls for accountability from within [redacted], Petitioner refused to initiate an [redacted] investigation into [redacted]'s mismanagement. [redacted]

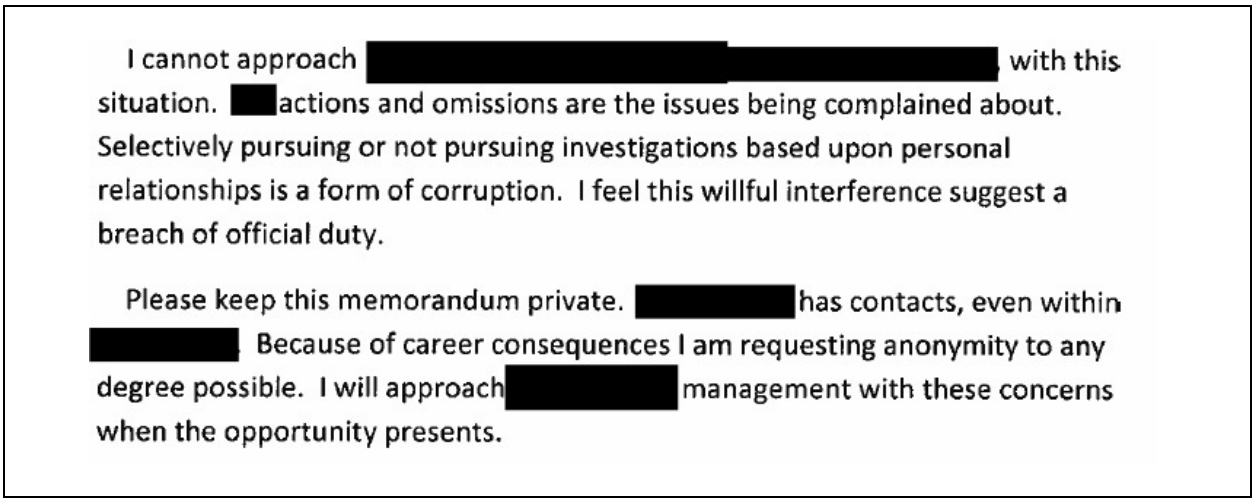
[redacted] testified that, "[a]s far as the investigation I requested, it was never conducted." (ICA849.)

Separately, [redacted] was moved to send a memorandum to [redacted], raising "ethical, moral, and legal issues with the way some [redacted] are being investigated, or not investigated, as well as managed, or willfully mismanaged, by the [redacted] [Petitioner]." (SA52.) That memorandum was exhibited to the Grand Jury, and it identified the [redacted] incident as "Example 1" of the [redacted] that had resulted in a series of complaints from investigators and supervisors from within [redacted]:

> [redacted]
>
> I just wanted to make you aware of assignments at [redacted] that may not meet professional standards. I am getting complaints from investigators and supervisors about the handling of these cases. They cite ethical, moral and legal issues with the way some cases are being investigated, or not investigated, as well as managed, or willfully mismanaged, by [redacted] They fear reprisal from [redacted] if any objections are raised.
>
> . . .


(ICA1776.)

At the conclusion of his memorandum, [redacted] expressed fear of retaliation at the hands of Petitioner for raising these concerns:



I cannot approach [redacted] with this situation. [redacted] actions and omissions are the issues being complained about. Selectively pursuing or not pursuing investigations based upon personal relationships is a form of corruption. I feel this willful interference suggest a breach of official duty.

Please keep this memorandum private. [redacted] has contacts, even within [redacted]. Because of career consequences I am requesting anonymity to any degree possible. I will approach [redacted] management with these concerns when the opportunity presents.

(ICA1779.)

During this time period, according to [redacted], "[i]t was a tense work environment" within [redacted]. (ICA850.) Eventually, the tension reached a breaking point. Upset about the mismanagement of investigations at [redacted], including especially the [redacted] matter and the subsequent attempt to discipline [redacted] for the failure of that investigation, [redacted] confronted Petitioner and requested a transfer to [redacted]. (ICA851.) [redacted] was then "thr[own] out of the building" and "told . . . to leave." (ICA851.)

Later that day, Petitioner held a staff meeting, and "bluntly said, you can tell I've had enough of the bullshit. If you don't like it, there's the fucking door." (ICA852, ICA850.)

Frustrated with the lack of accountability, [redacted] and another [redacted] opted to take that door, and they were transferred [redacted] [redacted]. (ICA850-52.) [redacted] was also transferred out of [redacted]—to serve as [redacted], a "dues-paying" position, and one that is typically staffed by [redacted] for a few months. For a more senior [redacted], that position is considered a punishment. (SA68, ICA852.) [redacted] was assigned to [redacted] for three and a half years. (SA68, ICA852.)

**6. Report and Recommendations of Grand Jury 30.**

[redacted]

[redacted]

Grand Jury 30 completed the investigation—to the extent that was possible. With counsel present, Petitioner testified before Grand Jury 30 for half a day, but [redacted] testimony was cut short by the loss of a quorum. The Commonwealth invited Petitioner to return to give further testimony prior to the expiration of the Grand Jury's term, but Petitioner declined. [3] (ICA2411-94; SA1059-60.)

Although Grand Jury 30 viewed its findings as "outrageous" (SA11) and found it "inconceivable . . . that nothing should come of [its] investigation" (SA104-105), it determined that it could not "recommend criminal charges" against any [redacted] (SA11), particularly in light of the [redacted] because [redacted] had so completely botched its initial investigation.

[3] The Commonwealth provided both [redacted] and Petitioner an opportunity to be heard before Grand Jury 30. (ICA2411, ICA3215.) [redacted] declined to appear. (SA383-84, SA387-88, ICA3215.) Of the other potential respondents identified by the supervising judge, [redacted] testified before [redacted] (SA168, ICA457), and the [redacted] did not testify, but gave statements during [redacted] investigation that were read into the Grand Jury's record (ICA195, ICA207, ICA222, ICA232, ICA249, ICA322, ICA429, ICA446).

On April 2, 2021, Grand Jury 30 voted to adopt and submit to the supervising judge a Report on the [redacted]. (SA138.)

In its Report, Grand Jury 30 acknowledged that it would be unable to recommend charges against any specific individual for actions that led to [redacted], in part because of "outrageous" conduct and the [redacted] culture that allowed such an incident—no matter who was responsible—to be buried from public scrutiny. (SA11, SA146.) The Grand Jury's "overriding sense," at the end of its investigation, was "that, more than anything else, almost everyone involved in, and with knowledge of, [redacted] wanted it, desperately, *to just go away*." (SA240.)

To avoid that "inconceivable" result, the Grand Jury adopted a Report to be released to the public "hopeful that new leadership will acknowledge the problems highlighted in this report and effectively address them going forward." (SA147.) Consistent with this goal of addressing deficiencies "going forward," the Grand Jury's Report recommended that [redacted]:

- increase documentation regarding when and why [redacted] investigators decline to investigate a [redacted] (SA239);
- publish statistics on reported [redacted] and the outcomes of those investigations, beyond those published by [redacted] (SA239);

- adopt different policies for [redacted], as well as all [redacted], such as third-party audits of all such cases that are not referred for criminal prosecution (SA239); and

- more generally, be subject to oversight by an outside agency ("one not beholden to the reputational or financial incentives of the [redacted] or other City Agencies" including the [redacted]) to counteract a "toxic culture of quiet fixes and damage control" (SA240-43).

### B. The Pre-Publication Process Implemented by the Supervising Judge.

Prior to publication, the supervising judge implemented a thorough process to scrutinize the Report and hear from affected individuals.

#### 1. Judge Scott carefully examined the Report and its underlying record.

Prior to accepting the Report, the supervising judge conducted an exhaustive review of the Report and the underlying record. In particular, the Commonwealth furnished to the supervising judge the version of the [redacted] Report adopted by the jury including more than 900 footnote citations to the underlying record (ICA1-139) and accompanied by more than 3,000 pages of exhibits and testimony. (ICA140-3199.) On June 3, 2021, at an *in camera* hearing, the supervising judge determined that the conclusions drawn by the Grand Jury in the Report were supported by the preponderance of evidence and ordered it accepted pursuant to 42 Pa. C.S. § 4552. (SA136.) In so doing, she detailed the evidence she relied upon in the record to support her finding that the report was indeed supported by a preponderance of the evidence. (SA136, ICA3223-26.)

### 2. The supervising judge invited responses from multiple affected persons, heard their requests for relief, and ruled.

Petitioner received extensive process to limit undue damage to [redacted] reputation, including notice of the Grand Jury proceedings prior to their conclusion, an invitation to testify before the Grand Jury, the right to receive and review the Grand Jury's Report prior to public release, the opportunity to author a response to be appended to the published Report, and the right to be heard by Judge Scott regarding any other requests.

Upon acceptance of the Report, the supervising judge ordered that, pursuant to 42 Pa. C.S. § 4552(e), nine individuals named in the Report would be offered an opportunity to respond in writing and otherwise be heard by the court before the Report's public release. (SA247-64.) Those nine individuals were two supervisors at [redacted] (Petitioner and [redacted]) and seven [redacted] who had [redacted]. (SA247-64.) All of these individuals retained counsel, and the Commonwealth served orders upon counsel that notified these individuals of their respective opportunities to respond in writing or to otherwise be heard before the supervising judge. (SA245-46.) Of the nine individuals invited to respond, two individuals—[redacted] and Petitioner, both of whom also testified before the Grand Jury—chose to submit a written response to the Report. (SA265-68,

SA286-308.) The other seven individuals provided this opportunity did not submit any written response, but the six [redacted] did request other relief. (SA271-81, SA387-88.)

On August 19, 2021, after reviewing the submitted responses and requests for relief from all parties, the supervising judge heard argument. (SA330.) At that hearing, the supervising judge denied Petitioner's and the seven individual [redacted]' requests to reject the Report or to permanently seal it in its entirety. (SA335, SA355, SA369-70.) The supervising judge ordered that the Report would be redacted, and directed counsel to meet and confer regarding whether they could reach an agreement that accommodated all parties. (SA380-81.)

On October 22, 2021, the Commonwealth advised the court that it had reached a nearly complete agreement with the seven [redacted] regarding their proposed redactions. (SA393, SA394-608.) At a subsequent hearing on October 27, 2021, the court ruled on the few remaining disagreements. (SA614-62, SA634-39.) Following those rulings, those individual [redacted] did not pursue any further redactions to the Report and did not object to the release of that redacted Report. (SA1088.) Those redactions are not at issue here.

Additionally, based on those redactions, [redacted] asked that his submitted response not be appended to the publicly released redacted Report. (SA1089.)

In contrast, Petitioner and the Commonwealth were unable to reach an agreed resolution for redactions to the Report at any point. In particular, Petitioner reiterated [redacted] request that the Report be sealed in its entirety and never released (SA282-85, SA646), which was a result that was unacceptable to the Commonwealth and already ruled legally unsupported by the supervising judge. Petitioner also requested extensive redactions that removed entire sections from the Report, and frustrated the Grand Jury's stated purpose and recommendations, such as eliminating all references to [redacted]. (SA669-776.) The Commonwealth could not accede to these proposed redactions. (SA669.)

The supervising judge held further hearings where she heard the parties' positions and adjudicated the redactions proposed by Petitioner on a page-by-page, line-by-line basis. (SA782, SA1003.)

Over the Commonwealth's objection, the supervising judge ruled that Petitioner name would be removed from the Report and replaced with a pseudonym. (SA792, SA796-97, SA1008-09.) The supervising judge also ordered certain statements in the Report redacted or modified to cloak Petitioner's identity. (*E.g.*, SA1007-11, SA1014-16, SA1027.)

The supervising judge also ruled that the Grand Jury made some remarks in the Report were unduly editorial, and conducted a second, specific preponderance-of-the-evidence review on the criticisms of Petitioner. Based upon those findings,

the supervising judge ordered some passages redacted and others excised in full. Petitioner requested some of these redactions, the Commonwealth offered others, and the supervising judge ordered some redactions *sua sponte*. (*E.g.*, SA798, SA803, SA833-36, SA851-53, SA1017-18, SA1022-23, SA1027-29.)

Following those hearings, the parties met and conferred to produce a version of the Report that implemented the court's rulings, and the Commonwealth presented that version to the court. (SA1085, SA3-135.) On March 4, 2022, the court ordered that, effective March 14, 2022, the Report would be unsealed and released in a form that implemented its prior rulings. (SA1-2.)

### C. Proceedings Before This Court.

On March 10, 2022, High-Ranking Official #1 petitioned for specialized review in this Court, contending that the supervising judge erred in ordering the public release of the Report as redacted. (Pet. 11.) This Court ordered that publication of the Report be stated pending the resolution of this matter.

In February 2023, this Court granted review.

## SUMMARY OF ARGUMENT

I. The [redacted] Report satisfies the statutory criteria to qualify as a "grand jury report" under the Investigating Grand Jury Act, 42 Pa. C.S. § 4544. The [redacted] Report "propose[s] recommendations for legislative, executive, or administrative action in the public interest based upon stated findings," 42 Pa. C.S.

§ 4542, and its recommendations are animated by a public purpose not directed at a narrow group of individuals. That alone is sufficient. Further, the Report "relate[s]" to the use of allegedly [redacted] and the failed investigation that follows. That topic is encompassed in the statutory term "public corruption," defined to include unlawful (not necessarily criminal) activity by public officers under color of office.

II. The supervising judge did not err in concluding that the Grand Jury's findings were supported by a preponderance of evidence. The Grand Jury findings relating to [redacted] are supported by a wealth of evidence, and Petitioner now concedes some of its most important findings. The Grand Jury's findings regarding [redacted] failed investigation are also strongly supported and exceed the preponderance standard. Petitioner disputes those findings by pointing to investigators outside [redacted], without acknowledging that they were either ineffectual or affirmatively hampered by [redacted]. Petitioner also disputes findings that are not actually in the Report, involving a fanciful multi-agency overarching conspiracy theory, while Petitioner ignores the evidence establishing [redacted]s intentional mismanagement and Petitioner's own unwillingness to investigate or hold accountable [redacted]

III. Due process is a flexible concept that depends on the circumstances, and requires a balancing of interests. In this instance, releasing the [redacted] Report

would not deprive Petitioner of [redacted] reputational rights without due process, and the balancing of the relevant interests favors the Commonwealth.

IV. The supervising judge has broad discretion in determining what criticized individuals should be notified and permitted to respond, but that discretion must be exercised consistent with the Constitution. There is no freestanding constitutional right to be shielded from criticism; instead, the Constitution recognizes rights regarding "reputation," meaning one's "good name" or the community's opinion of one's character. The supervising judge properly viewed the Report as having a "spectrum" of critical remarks, ranging from of specific instances of poor job performance to allegations of serious and intentional misconduct in office. The supervising judge did not abuse her discretion by affording notice and an opportunity to respond for the latter, but not the former.

## ARGUMENT

### I. THE [redacted] REPORT SATISFIES THE STATUTORY REQUIREMENTS FOR A GRAND JURY REPORT.

A county investigating grand jury is empowered to investigate "the existence of criminal activity within the county which can best be fully investigated using the investigative resources of the grand jury." 42 Pa. C.S. § 4544(a); *In re Grand Jury Inv. No. 18*, 224 A.3d 326, 333 (Pa. 2020) (Donohue, J., concurring). "[A]t any time during its term, a majority of the investigating grand jury can vote to submit to the supervising judge an investigating grand jury report." *Grand Jury Inv.*

*No. 18*, 224 A.3d at 331 (citing 42 Pa. C.S. § 4552(a)). An investigating grand jury report is "a report submitted by the investigating grand jury to the supervising judge regarding conditions related to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon state findings." 42 Pa. C.S. § 4542(a). An investigating grand jury has no authority to adopt a report unless it satisfies at least one of the two statutory criteria. *Grand Jury Inv. No. 18*, 224 A.3d at 332-33.

In this instance, Grand Jury 30 had statutory authority to adopt the Report because that it meets both criteria.

### A. The Report is Authorized by Statute Because It Proposes Recommendations for Government Action in the Public Interest.

The [redacted] Report "propose[s] recommendations for legislative, executive, or administrative action in the public interest based upon stated findings." 42 Pa. C.S. § 4542. Taken as a whole, the Report and its recommendations are animated by an important public interest purpose beyond relief or condemnation concerning a narrow group of individuals. And Petitioner [redacted]self "admit[s]" that the Report "makes some public policy suggestions for [redacted] reform . . . . " (Pet'r's Br. 22.) On those facts, the Report satisfies the statutory criteria.

[redacted]

[redacted] After Grand Jury 30 concluded its own investigation, it acknowledged that it would be unable to recommend charges against any specific individual for actions that led to [redacted], in part because of "outrageous" conduct and the [redacted] culture that allowed such an incident—no matter who was responsible—to be buried from public scrutiny. (SA11, SA146.) The Grand Jury's "overriding sense," at the end of its investigation, was "that, more than anything else, almost everyone involved in, and with knowledge of, [redacted] wanted it, desperately, *to just go away*." (SA240.)

To avoid that "inconceivable" result, the Grand Jury adopted a Report to be released to the public "hopeful that new leadership will acknowledge the problems highlighted in this report and effectively address them going forward." (SA147.) Consistent with this goal of addressing deficiencies "going forward," the Report offered specific recommendations for the [redacted] to adopt, as detailed above (*see supra* Statement Section A.6).

These specific recommendations demand "legislative, executive, or administrative action in the public interest based upon stated findings." *Grand Jury Inv. No. 18*, 224 A.3d at 332 (citing 42 Pa. C.S. § 4542) They were not "added as an afterthought," as Petitioner mistakenly suggests. (Pet'r's Br. 26.)

Petitioner complains that only "seven pages" are "allotted" for the section that lists recommendations, and that the Grand Jury's recommendations are not sufficiently "specific" or detailed, as compared to the Grand Jury's detailed factual findings and its subsequent assignments of responsibility. (Pet'r's Br. 25.) But the Grand Jury's recommendations should not be evaluated in a vacuum; instead, it is the Grand Jury's detailed factual findings that convey the pressing *need* to address these problems going forward.

In that respect, it is useful to compare the [redacted] Report recommendations to those adopted by grand juries in prior cases examined by this Court.

In *Fortieth*, the grand jury adopted a 900-page report that identified more than 300 persons as child sexual abusers or facilitators. *In re Fortieth Statewide Inv. Grand Jury (Fortieth I)*, 190 A.3d 560, 511 (Pa. 2018). At the conclusion of that report, the grand jury dedicated only eight pages to making explicit recommendations, which related to changing certain statutes of limitations, clarifying penalties for failure to report child abuse, and prohibiting certain non-disclosure agreements. *Rpt. No. 1 of the Fortieth Statewide Inv. Grand Jury*, No. CP-02-MD-571-2016, at 307-315 (Allegheny Ct. Com. Pls.). There was no suggestion, however, that the report in *Fortieth* failed to meet the statutory criteria or that its recommendations were somehow too succinct to be in the public interest.

*See Fortieth I*, 190 A.3d at 515 (expressing "little doubt" that the grand jurors "would prefer for any mistakes [in the report] be eliminated . . . over suppression of their entire findings, explanations, and *recommendations*" (emphasis added)). In addressing these statutory criteria, Petitioner cannot distinguish *Fortieth* nor explain how the report in *Fortieth* could fare better under those criteria than the [redacted] Report.

In contrast to *Fortieth* and the [redacted] Report, the report in *Grand Jury Inv. No. 18* met neither criterion for reasons that are inapplicable here. In that case, this Court unanimously found that the grand jury's recommendations were "focus[ed] exclusively" on punishing a single, specifically named person and on providing "resources or catharsis" to his alleged victims. 224 A.3d at 332. The Court found that those recommendations were not "'in the public interest,' as contemplated by the Act," because they were focused on that specific alleged perpetrator and his victims and "were not directed at broad-based legislative, executive, or administrative action." *Id.* In the [redacted] Report, the reforms recommended are of the "broad-based" type that were found lacking in *Grand Jury Inv. No. 18.* While Grand Jury 30 "also hope[d] that th[e] report finally gives [redacted] some answers," this additional purpose in no way invalidates the recommendations it made for public reform. (SA147.)

### B. The [redacted] Report Relates to "Public Corruption," Defined to Include Unlawful Activity by Public Employees.

The Investigating Grand Jury Act defines "public corruption" to include (among other things) the unlawful activity of a public employee or officer in connection with that employment or office. *Id.* Under that clear and unambiguous language, "public corruption" extends to unlawful conduct that is not necessarily criminal. *See Grand Jury Inv. No. 18*, 224 A.3d at 332 (holding that the statute's plain language controls when it is "clear and free from ambiguity").

The Report and its recommendations relate to public corruption as defined. The Report finds that one or more [redacted] (SA147, SA167, SA204, SA210-11); *see also, e.g.*, [redacted] The Report finds a failure to adequately investigate any potentially unlawful conduct pertaining to [redacted], discusses the cultural conditions that fueled the inadequate investigation and subsequent fallout, and urges reform going forward as a result.

In addition, the Report relies for its findings on the testimony of multiple senior [redacted] who firmly believed investigations, including [redacted], were "steered" to minimize [redacted] accountability. Several further testified that in response to their complaints about inadequate [redacted] investigations, they feared

or actually experienced retaliatory employment actions by [redacted]—almost textbook conditions that not only relate to public corruption but enable and perpetuate it. (SA194-203, SA241-42, ICA812-23, ICA849-53, ICA1238-39, ICA1245-46, ICA1250-51, ICA1775-79, ICA2096, ICA2258-63, ICA2102, ICA2273-74.)

[redacted]

## II. THE SUPERVISING JUDGE DID NOT ERR IN FINDING THAT THE REPORT WAS SUPPORTED BY THE PREPONDERANCE OF EVIDENCE.

"Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report." 42 Pa. C.S. § 4552(a). Following the submission of such a report, "the supervising judge [is] required to examine the report and the confidential record of the proceedings and to issue an order accepting and filing the report as a matter of public record 'only if the report is

based upon facts received in the course of an investigation authorized by [the Investigating Grand Jury Act] and is supported by the preponderance of the evidence.'" *Fortieth I*, 190 A.3d at 564 (quoting 42 Pa. C.S. § 4552(b)).

The record here establishes that the supervising judge carefully followed the Investigating Grand Jury Act procedures and did not legally err. After the Grand Jury submitted the Report, the supervising judge thoroughly examined it and the underlying record, and she accepted the Report as supported by the preponderance of evidence. The final Report was delivered to the court after it was voted on by the Grand Jury, and the supervising judge reviewed the transcripts and exhibits over the course of several days, approving the [redacted] Report and putting the court's findings on the record on June 3, 2021. (SA137, SA1033, ICA3223-26.) In addition, the court determined that certain individuals would be granted a right to append a response to the Report, in part by determining the level and nature of criticism adhering to each on a case-by-case basis. (SA247-64, SA386-88, ICA3226-38.)

To the extent a supervising judge must perform discrete analysis of the "specific criticism of each individual" to ensure that the preponderance standard was met, not just report-wide, but specifically for Petitioner, *Fortieth I*, 190 A.3d at 575, the supervising judge heard Petitioner's request, following her acceptance of the Report, to reconsider her ruling that the Report was supported by a

preponderance of the evidence. (SA284, SA1034, SA1038.) She considered and rejected the request. (SA1034, SA1038.) The supervising judge's determinations are entitled to deference, and she did not legally err in reaching those findings.

In [redacted] principal brief on appeal, Petitioner newly "concedes" that the evidence supported many of the important findings in the [redacted] Report. Among those findings, Petitioner concedes that the preponderance of the evidence established that [redacted] (Pet'r's Br. 31.) Petitioner also concedes that the "grand jury had a factual basis for finding by a preponderance of the evidence that [redacted] all shared responsibility for [redacted]" (Pet'r's Br. 32)—an important concession that should militate strongly against any remedy that would result in an indefinite suppression of the Report as a whole.

Petitioner disputes the Grand Jury's findings regarding the various lapses and derelictions of duty within [redacted], and the instances of outright obstruction within [redacted] specifically, that befell the investigation of [redacted]. In challenging the Grand Jury's conclusions, however, Petitioner misconstrues them and [redacted] attempts to dispute their factual basis are meritless.

*First*, Petitioner disputes the Grand Jury's finding that "[redacted] was never thoroughly investigated" by referencing the investigative efforts that were undertaken by [redacted] (Pet'r's Br. 33-37.) Petitioner's argument is meritless.

[redacted]

[redacted]

Finally, with respect to the [redacted] investigation, Petitioner asserts that "[redacted] was properly and thoroughly investigated" supposedly because [redacted]"). (Pet'r's Br. 35-36 (emphasis added).) Indeed, [redacted] *did* investigate [redacted]—and its investigation was undermined by [redacted]'s lack of cooperation and his refusal to refer the case promptly to [redacted], resulting the loss of evidence essential to the [redacted]'s work. (*See supra* Statement Section A.2-3.) Indeed, Petitioner ultimately concedes (as he must) that "the investigation into [redacted] would almost certainly have proceeded more effectively and efficiently if the [redacted] had handled it from the outset" (Pet'r's Br. 43)—an implicit acknowledgement of the deficiencies in the

investigations that preceded [redacted]'s delayed involvement, and which prevented [redacted]

Next, Petitioner takes issue with a purported finding that is not in the Report—specifically, Petitioner claims that the Report identifies a fanciful, multi-agency conspiracy theory, involving collusion among [redacted] (Pet'r's Br. 42.) That is not what the Grand Jury found. Instead, the Grand Jury found that a wide range of individuals and institutions—acting on their own, not in some grand conspiracy—bore some degree of responsibility for [redacted] and for the investigative failures that followed.

[redacted]

[redacted]

But the Report does also find instances of active, knowing mismanagement and obstruction, particularly on the part of [redacted]. Petitioner claims that those findings are "outrageous" and based on "unfounded speculation," but Petitioner fails to grapple meaningfully with the overwhelming evidence that [redacted] departed from [redacted] standard practices and procedures, knowingly gave the investigation inadequate staffing and urgency, obstructed [redacted]'s parallel investigation [redacted], and acted so erratically and confrontationally that [redacted] believed he may have had a vested interest in the case and informed the [redacted] about his conduct. (*See supra* Statement Sections A.2-5.) Petitioner does not explain how [redacted]'s conduct could be construed as a good faith execution of his job responsibilities.

Finally, the Grand Jury heard evidence that, in [redacted], internal dissent among senior [redacted] supervisors boiled over regarding [redacted]'s handling of the [redacted] matter as well as other claimed instances of investigative mismanagement. The Grand Jury record establishes that, faced with those dissenting voices, Petitioner's response was not to welcome criticism, permit those allegations to be investigated, or take corrective action; instead, [redacted] response was to dispose of the matter quietly and internally, without opening a formal

investigation into what went wrong—in other words, to cover it up. In that regard, to those [redacted] who dissented and had raised moral and ethical concerns, Petitioner gave an ultimatum: "If you don't like it, there's the door." (*See supra* Statement Section A.5.)

The Report does not ascribe Petitioner's reaction to some convoluted, overarching conspiracy, but instead finds that it is consistent with an institutional culture that values "protect[ing] the reputation of the [redacted]" and a "reflexive reaction [within the [redacted] insulate anyone on 'their' side from any scrutiny . . . ." (SA241.)

And to this day—[redacted] *years* later—that cover-up has been largely successful, and there is still no public acknowledgment that [redacted] likely bore significant responsibility for [redacted] or that the subsequent investigation was so egregiously mishandled.

This Court should not permit that to stand.

## III. THE SUPERVISING JUDGE CORRECTLY FOUND THAT PUBLICATION WOULD NOT DEPRIVE PETITIONER OF [redacted] RIGHT TO REPUTATION AND DUE PROCESS.

"[T]he General Assembly has authorized Pennsylvania investigating grand juries to issue public reports," and "such reports—like the institution of the grand jury itself—have a long lineage." *Fortieth I*, 190 A.3d at 569. In addition, the

supervising judge of an investigating grand jury is vested with "discretion . . . to permit the public release of information." *Id.* at 563.

At the same time, this Court has recognized the "tension between the grand jury's reporting function and the constitutional rights [to reputation] of the individuals who are impugned in the report." *Id.* at 565. To resolve this tension, this Court's caselaw indicates that some degree of due process is required when a grand jury report implicates a person's right of reputation and criminal charges (which would otherwise trigger a variety of due process protections) are not forthcoming. *Id.*; *In re Fortieth Statewide Inv. Grand Jury (Fortieth II)*, 197 A.3d 712, 721 (Pa. 2018).

"Due process is a flexible concept and calls for such procedural protections as the circumstances require." *In re F.C. III*, 2 A.3d 1201, 1215 (Pa. 2010). This Court has used in many of its investigating grand jury decisions, generally in the context of motions to disqualify counsel or quash, a four-part test that centers the Commonwealth's interests in a functional, fair grand jury proceeding:

> (1) Whether the state interest(s) sought to be achieved can be effectively accomplished in some manner which will not infringe upon interests protected by constitutional rights;
>
> (2) Whether the state interest(s) (are) sufficiently compelling when compared with the interests affected, (to justify) any infringement of those interests;

> (3) Whether the state interest(s) (are) sufficiently compelling to justify the degree of infringement that is necessary to effectuate that interest;
>
> (4) Whether the provision under challenge represents the narrowest possible infringement consistent with effectuating the state interest involved.

*Pirillo v. Takiff*, 341 A.2d 896, 905 (Pa. 1975) (quoting *Moore v. Jamieson*, 306 A.2d 283, 289 (Pa. 1973)), *opinion reinstated*, 352 A.2d 11 (Pa. 1975). This balancing test is consistent with the three-part due process framework articulated in the *Mathews* line of cases. *See Fortieth II*, 197 A.3d at 721 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Bundy v. Wetzel*, 184 A.3d 551 (Pa. 2018)).

In the case at bar, the balance of factors favors release of the Report in its redacted form.

### A. The Commonwealth Cannot Accomplish Its Interest in Some Manner Besides Releasing the Report.

The state and public have a compelling interest in publication of the Report. Exposing mal- and misfeasance by public servants in the course of their duties is a time-honored use of the investigating grand jury.[4] In this case, there is no better

[4] *See Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. Penn. L. Rev. 73, 84 (Nov. 1987) ("There is a consensus among courts and commentators that, historically, common law grand juries performed a public reporting function by identifying official misconduct without initiating prosecution."); *see also* Rpt. of 22d Cty. Inv. Grand Jury, Misc. No. 003211-2007 (DHS Report); Rpt. of 23d Cty. Inv. Grand Jury, Misc. No. 0009901-2008 (Gosnell Report).

mechanism in place in the Commonwealth to review and address [redacted] oversight. Other agencies designed as watchdogs are, by nature, focused on fiscal management—waste and fraud. [redacted]

Misconduct within [redacted]—[redacted] to which [redacted] misconduct is reported—is particularly damaging to the public interest. If [redacted] are unfit, unwilling, or otherwise unprepared to [redacted], *no other watchdog is available*. [redacted]

Indeed, other than the grand jury, there are few if any other institutions with the independence and resources available to investigate the conduct of [redacted]—a reality that motivated the Grand Jury's urgent demand in its Report for independent, external oversight. To rely on the possibility that whistleblowers in single incidents might come forward—particularly in the face of potential [redacted]. As the

Grand Jury concluded, [redacted] is not in a position to effectively investigate [redacted] for potential misconduct, whether criminal or administrative.

### B. The Commonwealth's Interest in Correcting and Preventing Public Corruption is Compelling and Justifies Some Impairment of Petitioner's Reputational Rights.

In the case at bar, a grand jury report is particularly appropriate and necessary precisely because the investigative failures criticized in the Report undermined the possibility of any criminal prosecution and trial. Sealing this Report would incentivize government agencies to slow-pedal investigations where the evidence could reveal misconduct inconvenient to the investigator.

The public and broader state-actors in the Commonwealth need to understand, not only how [redacted], but also why no one heard about those circumstances, and *then* why no institutional changes were forthcoming. Without a grand jury report detailing the underlying incident, the claims and recommendations lose both gravitas and urgency—calls for reform and oversight that exist in response to hypothetical ills, not extant evils never cured. Without the naming of names—or at least titles—and thereby establishing those individuals' institutional access to information and influence, the conviction that the mishandling of the [redacted] investigation was at once avoidable, intentional and

a direct product of workplace cultural norms falls flat. In short, such claims need facts and examples to back them up.

[redacted] employees with prior knowledge of the underlying incident and involved parties may be able to deduce Petitioner's identity. However, this degree of infringement upon Petitioner's right-to-reputation is outweighed by the public interest at stake here. In this instance, the only alternative—permanently sealing an already redacted report—perfects the investigative failure and lack of institutional accountability the Grand Jury uncovered and railed against, and subverts the compelling state interest in publishing its factually supported recommendations.

### C. The Degree of Infringement of Petitioner's Reputation is Limited, Particularly in Light of [redacted] Office.

Under our constitution, the right to reputation is a fundamental right. *Fortieth I*, 190 A.3d at 566 (citing Pa. Const. Art. I, § 1). In this instance, any impairment of Petitioner's reputational interests by release of the redacted report is outweighed by the public's interest in its release. This is particularly so given Petitioner's leadership position in the public sphere.

First, any impairment to Petitioner's reputation is limited. Petitioner's name has been redacted from the Report, and [redacted] is identified only by a pseudonym "High-Ranking Official #1." Moreover, although Petitioner is criticized in the Report, [redacted] is not accused of conduct that is as viscerally reprehensible and odious as the child sexual abuse and facilitation allegations at issue in *Fortieth*. As this

Court's caselaw indicates, the scope of procedural protections depends upon the nature of the harm that would result from the publication of the Report. *See Fortieth I*, 190 A.3d at 574 (observing that "the stakes for individuals reproached . . . are substantially heightened" where the grand jury report involved "incendiary" allegations of child sexual abuse and facilitation). Here, even within the [redacted] Report, Petitioner is subjected to substantially less stringent criticism than others—for example, the [redacted] and [redacted] who undermined the [redacted] investigation.

Second, because of Petitioner's position as a public official, [redacted] reputational interests are offset by the public's legitimate need for information and open debate about its officials' on-duty conduct. The U.S. Supreme Court has recognized that we share a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and as a result, public officials must meet a higher burden to establish damages for "[i]njury to official reputation." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). In a similar vein, Petitioner's reputational interest is outweighed by the important public interest in the Grand Jury's findings, because "[t]he protection of the public requires not merely discussion, but information," *id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

Finally, Petitioner's reputational interests are further diminished by the specific nature of [redacted] position. As [redacted], Petitioner oversaw the [redacted] that had principal responsibility for investigating potential misconduct by [redacted]. Individuals in public leadership positions of this kind are subject to public scrutiny. *Cf. Ali v. Phila. City Planning Comm'n*, 125 A.3d 92, 99 (Pa. Cmlwth. 2015) (noting that, in context of Right to Know Law, openness of records is "designed to . . . prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions").

### D. Finally, Petitioner Received Ample Due Process Protections Resulting in the Narrowest Possible Infringement Consistent with Effectuating the Compelling State Interest Involved.

This Court has held that "increased procedural protections are implicated in the interest of fundamental fairness" where a report has "a primary objective . . . to censure the conduct of specific individuals," rather than to "address general welfare concerns . . . . " *Fortieth I*, 190 A.3d at 574. In contrast, where the report is "designed to address general welfare concerns, but may have a collateral impact on reputational rights," this Court did not indicate that the same "increased procedural protections" would necessarily apply. *Id.* Nonetheless, Grand Jury 30 provided ample process to Petitioner, well in excess of the process found inadequate in *Fortieth*.

### 1. Petitioner received all the process he was legally due.

In weighing reputation interests within the grand jury context, due process begins with notice and a right to be heard, and in the grand jury context, this necessarily implicates the ability to testify before the Grand Jury itself. Much of the analysis of both *Fortieth* cases is grounded in the fact that the petitioners there were not given an opportunity to testify before the grand jury, and without the grand jury in session, had no opportunity to remedy that fundamental issue.

Secondarily, the statutory right-of-response provides another avenue for protection. *Fortieth II*, 197 A.3d at 716. Whether a written response appended to a report is considered "meaningful" depends on considerations such as the likelihood individual responses would be negated or overcome by the size, tenor and scope of the report at issue, or that the cumulative, inflammatory effect of specific allegations would so inflame a reader as to impact their critical faculties and render them incapable of a measured assessment of an individual's authored response. *Id.* at 715.

- Unlike the petitioners in *Fortieth*, Petitioner had the opportunity to testify before the Grand Jury.

In *Fortieth*, this Court expressed disbelief that the Attorney General did not provide living persons, who were later accused of heinous crimes in the grand jury's report, the opportunity to testify. There, this Court found it "difficult to

understand why an attorney for the Commonwealth would not wish to present such testimony from living individuals . . . ." *Fortieth I*, 190 A.3d at 574.

In contrast here, Petitioner availed [redacted]self of the foremost pillar of due process—the opportunity to be heard, first hand, by testifying before the Grand Jury. Near the end of Grand Jury 30's term, Petitioner appeared and testified for a half day, but [redacted] testimony was cut short by the loss of a quorum. (SA1059-60, ICA2411-94.) The Commonwealth invited Petitioner to return and provide additional testimony prior to the expiration of the Grand Jury's term, but [redacted] declined. (SA1059-60.)

- Unlike *Fortieth*, Petitioner submitted a written response that is more likely to be an effective remedy to protect [redacted] right of reputation.

Petitioner was given the opportunity to respond to the finished Report. In *Fortieth*, this Court held that "the opportunity to append a hearsay rebuttal statement to a 900-page report otherwise impugning an individual as a sexual predator or facilitator alongside more than 300 others amidst the hierarchy of a religious institution" is not an "effective" remedy to protect the right of reputation. *Id.* at 574-75.

The circumstances at issue here differ significantly and render Petitioner's response substantially more effective. With much respect to both [redacted], all assigned investigators, and prior ADAs, the "scope and tenor" of the [redacted]

Report, at just over 100 pages with a handful of significantly criticized individuals, simply does not compare with the opus at issue in *Fortieth*. They are both deeply important, but different documents. The [redacted] Report does not condemn a long, undifferentiated list of named individuals for universally reviled crimes.

Instead, the Report concludes that one or more [redacted], and that [redacted] attempted to (and somewhat successfully did) suppress an investigation that would have made the circumstances of that [redacted] public. While "horrifying," these allegations are not the kind and quality of specific crimes that inflame public sentiment to such a degree that critical examination of the Report and responses would suffer. [redacted] here is one [redacted]— not countless innocent, defenseless children. Secondly, while criticism of [redacted] for [redacted] is grave, and criticism of various other City personnel for negligence, poor job performance, delay and suspected obstruction, is harsh, it is simply not as explicitly and exclusively criminal as the pedophilia and sex assault outlined in *Fortieth*.

Petitioner's rebuttal to the Grand Jury's conclusions would be the sole response appended to the Report. The likelihood that a reader could effectively assess Petitioner's response as appended to the report is significantly higher than in

*Fortieth*, where an overwhelming number of individuals were seriously impugned and where a reader would have great difficulty assessing the merits of any individual person's response.

Further, Petitioner has been permitted to redact [redacted] name even from [redacted] own written response, voluntarily providing [redacted] own version of events (which the Grand Jury did not find credible), under cloak of pseudonymity. Pursuant to its power to submit reports, the Grand Jury should be permitted to name those individuals who testified before it and are later found to be an integral part of the misconduct and/or corruption under investigation, particularly public employees. Unlike [redacted] colleagues who also testified at great risk to their reputations, employment and social connections, Petitioner will not see [redacted] name in print, simply because the Grand Jury credited them while criticizing [redacted]—a perverse outcome.

The fact that Petitioner had the opportunity to testify, along with a meaningful opportunity to be heard in a subsequent right of response, is all the process that is legally due to Petitioner to protect [redacted] reputational rights in this instance.

**2. Petitioner received relief that minimized any impairment of [redacted] right of reputation.**

This Court has determined that, rather than withholding a report in its entirety, redaction can be an appropriate remedy in instances where the individual's constitutional right to reputation requires a judicial remedy. *Fortieth*

*II*, 197 A.3d at 723; *Fortieth I*, 190 A.3d at 576. In addition to testifying and appending a response to the Report, Petitioner also benefited from multiple pre-deprivation hearings held by the supervising judge that resulted in significant redactions of the Report.

- Unlike in *Fortieth*, the supervising judge conducted a searching review to determine that the Report was supported by the preponderance and she made line-by-line rulings and redactions in response to challenges offered by Petitioner.

In *Fortieth*, this Court found that judicial preponderance-of-evidence review was inadequate to protect the named persons' reputational rights for several reasons: the standard is "best suited to adversarial proceedings," and grand jury proceedings are one-sided affairs; the grand jury need not consider exculpatory evidence and is not bound by rules of evidence; and, in the case of the "predator priests" report specifically, "the supervising judge may have performed his preponderance-of-the-evidence review on a report-wide basis, rather than discretely determining if the grand juror's specific criticism of each individual appellant was supported by the preponderance of the evidence." *Id.* at 574-75.

In this appeal, the preponderance review by the supervising judge was substantially more thorough and searching than in *Fortieth*. Not only did the supervising judge conduct a thorough *in camera* review, but she also ruled on Petitioner's proposed redactions on a line-by-line basis, over the course of multiple hearings. In some instances, the supervising judge agreed with Petitioner that the

Commonwealth's interest in achieving the Report's primary purpose (transparency and recommendations) did not outweigh [redacted] specific reputational rights. In those instances, the court ordered that the findings be redacted.

The supervising judge's review and redaction of certain matters confirms that the lower court provided Petitioner fair and appropriate pre-deprivation process. For Petitioner to petition this Court for even *more* process and the sealing of the Report is breathtaking overreach.

## IV. THE SUPERVISING JUDGE PROPERLY EXERCISED DISCRETION IN DECIDING WHAT NONINDICTED PERSONS SHOULD BE NOTIFIED AND/OR REDACTED FROM THE REPORT.

Under the Investigating Grand Jury Act, "[i]f the supervising judge finds that the report is critical of an individual not indicted for a criminal offense[,] the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report." 42 Pa. C.S. § 4552(e); *see also Fortieth I*, 190 A.3d at 566 n.4.

That discretion is broad, but not boundless. Instead, as this Court has recognized, the "term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge." *Com. v. Baumhammers*, 960 A.2d 59, 86 (Pa. 2008) (quoting *Com. v. Widmer*, 744 A.2d 745, 753 (Pa. 2000)).

A lower court also abuses its discretion when it misapplies the governing legal standard, including any legal standard imposed by the Constitution. *See id.* ("Discretion is abused when . . . the law is not applied . . . "); *In re N.C.*, 105 A.3d 1199, 1210 (Pa. 2014) (finding that trial court committed reversible error by exercising its discretion to admit hearsay evidence in violation of the defendant's Confrontation Clause rights); *Brady v. Urbas*, 111 A.3d 1155, 1161 (Pa. 2015) (recognizing that this Court reviews *de novo* a lower court's discretionary decision, where the claimed error is that court's misapplication of the governing legal standard).

In this instance, the supervising judge was constrained to exercise her discretion such that named individuals would not be deprived of their "inherent and indefeasible rights . . . of acquiring, possessing, and protecting . . . reputation," Pa. Const. Art. I, § 1, "without due process of law," U.S. Const. Amend. XIV; *see also* Pa. Const. Art. I, §§ 1, 11; *Fortieth I*, 190 A.3d at 576 n.23.

Since 1790, our Constitution has recognized those "inherent and indefeasible" reputational rights. Pa. Const. Art. IX, § 1 (1790). Two years before adoption, in a case involving alleged libel by a newspaper publisher, this Court had opined on the importance of protection for one's "reputation": "[T]he injuries which are done to character and reputation seldom can be cured, and the most

innocent man may in a moment be deprived of his good name . . . " *Respublica v. Oswald*, 1 U.S. 319, 324 (Pa. 1788).

Importantly, there is no constitutional right to respond to *criticism* as such. Rather, the fundamental rights at stake are of "acquiring, possessing, and protecting . . . *reputation*"—in other words, one's "good name," the community's opinion of one's "character," or one's standing in the community. Accordingly, a supervising judge must give notice and an opportunity to be heard to named individuals who are criticized, only to the extent that the criticism is likely to impair their "good name," the community's opinion of their "character," or their standing in the community.

That proposed legal standard is consistent with this Court's decisions in *Fortieth I* and *Fortieth II*. There, this Court did not hold that all identifiable persons criticized in a grand jury report are necessarily guaranteed a corresponding right-of-reputation remedy. Instead, in *Fortieth*, this Court "agree[d]" with the Commonwealth that the allegations of child sex abuse at issue would "impugn the *reputations* of specific people—*will yield critical judgments by the citizenry*." *Fortieth I*, 190 A.3d at 508-509 (emphasis added); *see also id.* at 574 (observing that "the stakes for individuals reproached . . . are substantially heightened" where the grand jury report involved "incendiary" allegations of child sexual abuse and facilitation).

This Court also held that, at a minimum, reputational rights attach and are guaranteed a corresponding due process remedy when "a primary objective [of the report] is to publicly censure the conduct of specific individuals," as compared to "a grand jury report that is designed to address general welfare concerns, but may have a collateral impact on reputational rights." *Id.* at 511 (emphasis added). This Court emphasized that "a grand jury setting about [with a primary objective to censure the conduct of specific individuals] should apprehend that *increased procedural protections are implicated in the interest of fundamental fairness*." *Id.* (emphasis added). That holding suggests, in contrast, that "increased procedural protections" are not necessarily "implicated" when a grand jury's "design" is to "address general welfare concerns," notwithstanding its potential "collateral" impact on reputational rights. *Id.*

As explained above (*see supra* Part III), the Report is directed to general welfare concerns and the Commonwealth has a compelling interest in publishing it. Against that backdrop, the supervising judge properly exercised her discretion, as constrained by the Constitution, in determining whom to give notice and an opportunity to respond.

In particular, the supervising judge viewed the Report as containing a "spectrum" of criticism of varying degrees of severity for various named individuals. At one end of the "spectrum," the supervising judge found, "there is

simple criticism, like, you could have done your job a bit better," or individuals whose conduct may have amounted to an administrative or policy violation. The supervising judge rightly deemed critiques of that nature to be, in essence, collateral to the Report and impliedly found that such statements, in the context of the Report as a whole, were not likely to impair those individuals' good name or their standing in the community such that notice and a right of response was necessary as a constitutional matter. (ICA3227-28.) That determination is reasonable, especially given the length of time that has transpired since the events at issue.

At the other end of the spectrum, the court concluded that for certain individuals—specifically [redacted], High-Ranking Official #1, [redacted], and the [redacted]—the Grand Jury was "[n]ot just critical of their behavior, but [found] something that could get them potentially fired and very close to criminal." (ICA3209-10.) In that context, it is plausible that those individuals' good name and standing in the community could be affected if they were identified by name in the Report (although not remotely close to the extent as those accused in *Fortieth* of child sexual abuse or facilitation). Accordingly, the supervising judge did not err in affording those specific individuals notice and the right to respond.

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 127, I certify that the foregoing Commonwealth's Brief For Appellee complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that the foregoing Brief complies with the page/word limits set forth in Pa. R.A.P. 2135(a), because the Brief does not exceed 14,000 words, excluding supplementary matters as provided by Pa. R.A.P. 2135(b).

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