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87 WM 2018

**IN THE SUPREME COURT OF PENNSYLVANIA**

\_\_\_\_\_  
[REDACTED]  
\_\_\_\_\_

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

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**PETITIONER [REDACTED]'S BRIEF IN SUPPORT OF HIS  
PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**

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Efrem M. Grail, Esquire  
PA ID No. 81570  
Brian C. Bevan, Esquire  
PA ID No. 307488  
THE GRAIL LAW FIRM  
436 Seventh Avenue  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
[egrail@graillaw.com](mailto:egrail@graillaw.com)  
[bbevan@graillaw.com](mailto:bbevan@graillaw.com)

[REDACTED]

Date: July 10, 2018

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>TABLE OF CITATIONS.....</b>	<b>4</b>
<b>INTRODUCTION.....</b>	<b>6</b>
<b>STATEMENT OF JURISDICTION.....</b>	<b>8</b>
<b>ORDERS IN QUESTION.....</b>	<b>8</b>
<b>STATEMENT OF SCOPE AND STANDARD OF REVIEW.....</b>	<b>9</b>
<b>STATEMENT OF QUESTIONS INVOLVED.....</b>	<b>10</b>
<b>STATEMENT OF THE CASE.....</b>	<b>10</b>
<b>SUMMARY OF THE ARGUMENT.....</b>	<b>14</b>
<b>ARGUMENT FOR PETITIONER.....</b>	<b>15</b>
<b>I.    <b>There Is No Indication That The Supervising Judge Fulfilled The Court’s Clear Duty Under The Investigating Grand Jury Act To Consider The Grand Jury’s Evidence And Make A Determination Whether Or Not The Report’s Conclusions About Petitioner Are Supported By The Preponderance Of The Evidence.....</b></b>	<b>15</b>
<b>II.   <b>The Grand Jury’s Release Of The Names And Identifying Characteristics Of Those Persons Of Whom It Is Critical But Did Not Indict For A Criminal Offense Is Not For A Purpose Supported By The Investigating Grand Jury Act.....</b></b>	<b>18</b>

**A. The Plain Language Of The Act Conveys A Limited Purpose –  
And Limited Subject Matter Jurisdiction – To Investigate  
Organized Crime And Public Corruption.....18**

**B. The Plain Language Of The Act Conveys A Limited Purpose – And  
Limited Subject Matter Jurisdiction – For The Grand Jury to Issue  
an Investigative Report.....19**

**III. The Supervising Judge Violated Petitioner’s Fundamental Rights  
To His Good Reputation And Due Process Of Law Under Article I,  
Sections 1, 9, And 11 Of The Pennsylvania Constitution By Denying  
Him A Pre-Deprivation Hearing.....22**

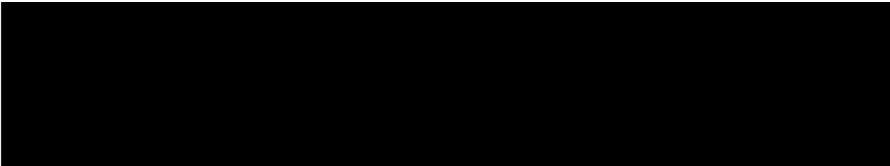
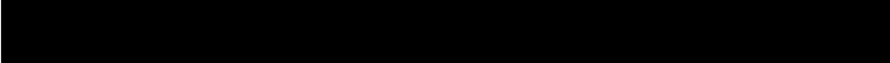
**STATEMENT OF THE RELIEF SOUGHT.....22**

**CONCLUSION.....24**

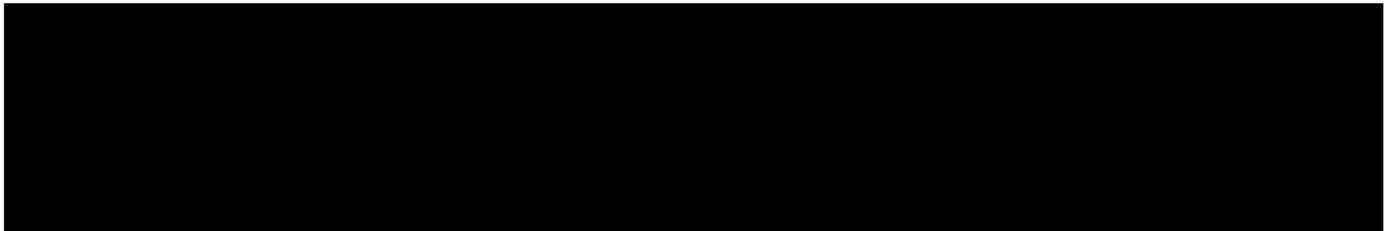
**TABLE OF CITATIONS**

**Cases**

**Pages**

	.....16
	.....16
<u>In re Thirty-Third Statewide Investigating Grand Jury,</u> 86 A.3d 204 (Pa. 2014).....	8
	.....8
<u>Levy v. Senate of Pennsylvania,</u> 65 A.3d 361 (Pa. 2013).....	8

**Statutes**



42 Pa. C.S. § 722(5).....	8
42 Pa. C.S. § 702(b).....	8
42 Pa. C.S. § 4541 <u>et seq.</u> .....	<i>passim</i>

**Regulations**

Pa.R.A.P. 312.....	8
Pa.R.A.P. 313(b).....	8

**Regulations (con'd)**

Pa.R.A.P. 1513(d)(5).....14

Pa.R.A.P. 2116(a)..... 14

Pa.R.A.P. 137.....14

Pa.R.A.P. 3331(a)(3), (a)(5).....8

**Exhibits**

June 14, 2018 Order .....A

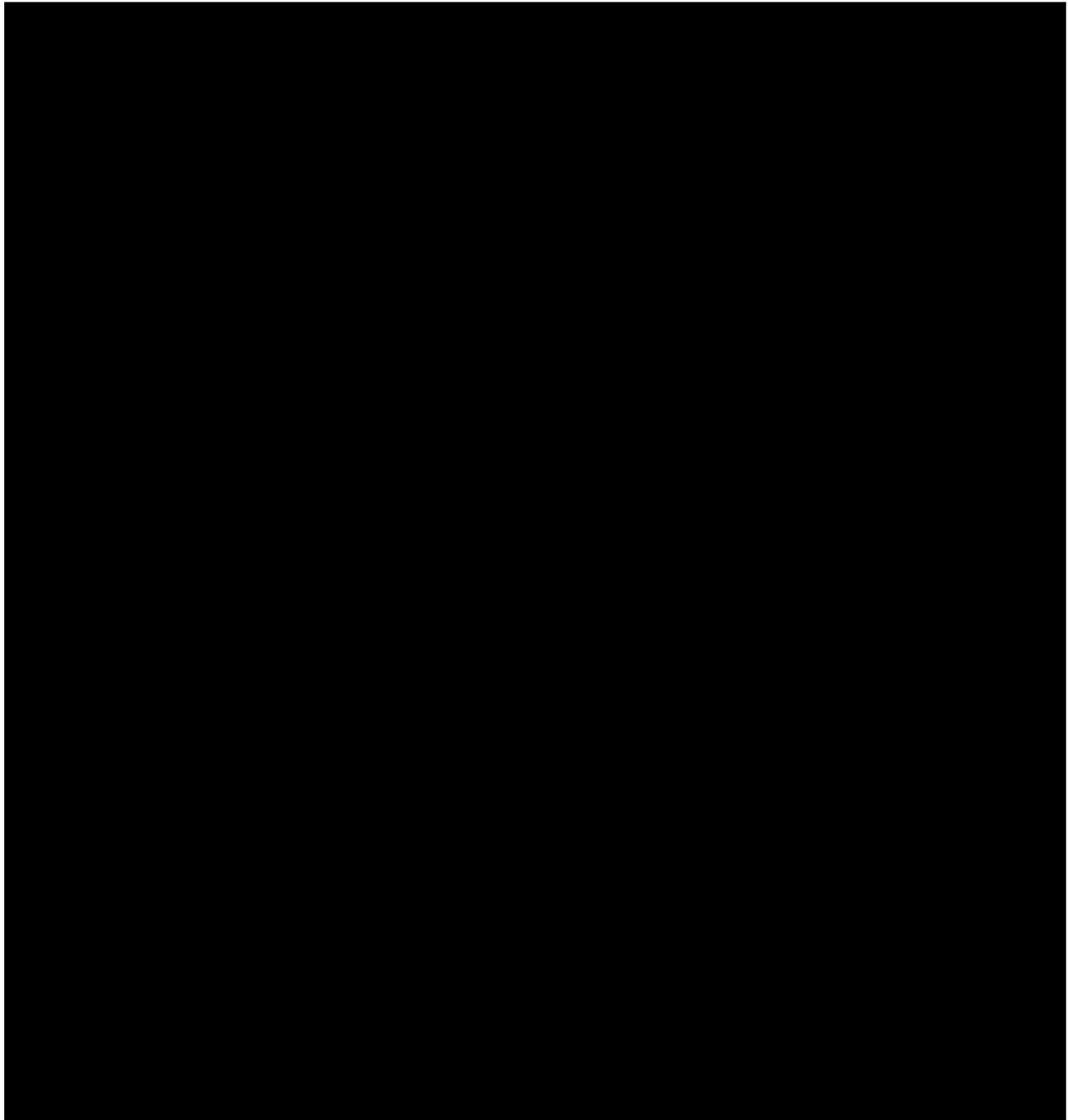
May 22, 2018 Order .....B

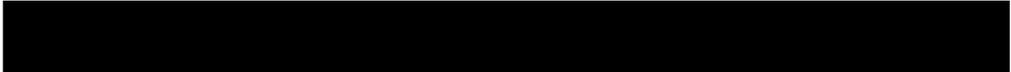
Fortieth Statewide Investigating Grand Jury Report No. 1, “Appendix”  
(select pages).....C

Fortieth Statewide Investigating Grand Jury Report No. 1,  
“Introduction” .....D

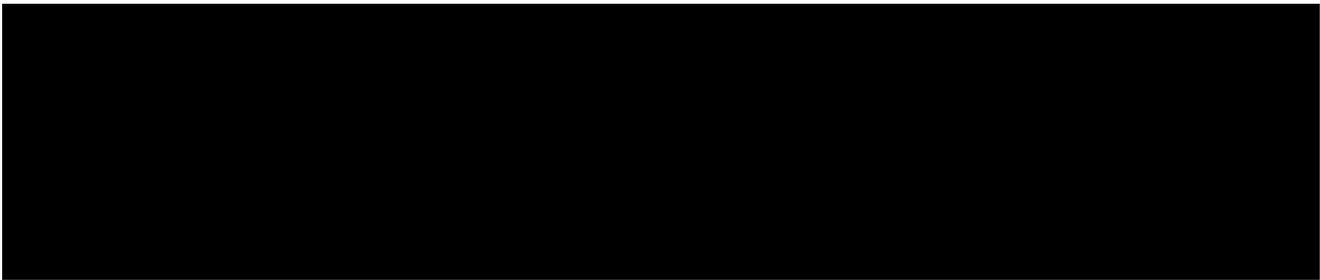
Fortieth Statewide Investigating Grand Jury Report No. 1, [REDACTED]  
[REDACTED] (select pages)..... .E

**INTRODUCTION**

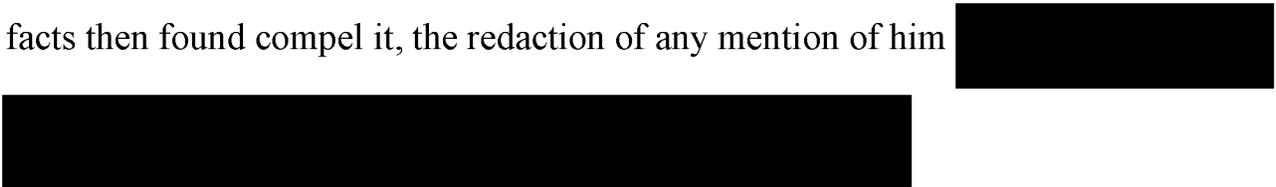


Simply put, there is no way, on the basis of the record to date, that any real review of the evidence before the Grand Jury could lead to the Report's conclusion, by a preponderance 

one, as the Investigating Grand Jury Act requires. No real due process has been nor will be afforded to Petitioner in his attempts to seek justice and maintain his good name and reputation, as the Commonwealth's case law and Constitution require, without this Court's intervention and requirement that Petitioner be afforded due process through a pre-deprivation hearing to review the Grand Jury's and the Supervising Judge's conclusions below about the record evidence, and to supplement it if necessary. And equally, there is no way that this Court could find the Report to be for a legitimate purpose authorized by the Investigating Grand Jury's enabling legislation; for this reason alone, the Report's naming of names for



As demonstrated more fully below, the facts and the law compel but one result here: no Report concerning Petitioner should be released without a proper review by the standard mandated by the Investigating Grand Jury Act. Nor should any Report be allowed to be accepted and released without Petitioner being afforded the opportunity for a pre-deprivation review of the evidence against him (including full notice and a meaningful opportunity to be heard) -- and, if the true facts then found compel it, the redaction of any mention of him



**STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction pursuant to 42 Pa. C.S. § 722(5) and Pa.R.A.P. 3331(a)(3), (a)(5), or alternatively, as a collateral order, Rule 313(b). The Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury, has certified his June 14, 2018 Revised Order for immediate appeal pursuant to 42 Pa. C.S. § 702(b) and Pa.R.A.P. 312.

**ORDERS IN QUESTION**

The Orders to be reviewed are, first: the Revised Order entered on June 14, 2018, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury<sup>1</sup>, which states as follows:

, this 14th day of June, 2018, the Motion by Father  to Redact Grand Jury Report No. 1 as not supported by the Evidence and Motion for Pre-Deprivation Evidentiary Hearing are DENIED. See Order and Opinion of June 5, 2018.

Further, the request to certify this matter for immediate appeal is GRANTED, as the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the matter.

Finally, the Request to stay all further proceedings before this Court pending such interlocutory appeal is hereby DENIED. Any response to the report [42 Pa§4552 (e)] is due June 22, 2018;

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<sup>1</sup> June 14, 2018 Order attached as Exhibit “A”.

and second, Judge Krumenacker's previous May 22, 2018, Amended Order Accepting Investigating Grand Jury Report No. 1 And Directing Further Action Prior To the Report Being Made Part of the Public Record,

**AND NOW**, this 22<sup>nd</sup> day of May 2018, upon examination of Investigating Grand Jury Report No. 1, and finding that said report, within the scope of the Grand Jury's authority, proposes recommendation for legislative, executive or administrative action in the public interest based upon stated findings, and further finding that said report is based upon facts received in the course of an investigation authorized by the Investigating Grand Jury Act, 42 Pa.C.S. Sec. 4541 *et seq.*, and is supported by the preponderance of the evidence...<sup>2</sup>

**STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The Court, in its July 6<sup>th</sup> Scheduling Order, identified three questions for Petitioner to address on appeal (*see* Statement of Questions Involved, immediately below.) Each of the Questions Involved are questions of law. The Supreme Court's standard of review over questions of law is *de novo*, and the scope of review is plenary. In re Thirty-Third Statewide Investigating Grand Jury, 86 A.3d 204, 215 (Pa. 2014) (citing Levy v. Senate of Pennsylvania, 65 A.3d 361, 367 (Pa. 2013); Kopko v. Miller, 892 A.2d 766, 770 (Pa. 2006)).

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<sup>2</sup> May 22, 2018 Order attached as Exhibit "B".

**STATEMENT OF THE QUESTIONS INVOLVED**

1. Whether the supervising judge ignored the court's clear duty under the Investigating Grand Jury Act to consider the grand jury's evidence and make a determination whether or not the Report's conclusions about Petitioner are supported by the preponderance of the evidence?

*Implied (but not directly addressed) in the negative by the Supervising Judge's Revised Order of June 14, 2018 and the June 5, 2018 Opinion and Order referenced therein.*

2. Whether the grand jury's release of the names and identifying characteristics of those persons of whom it is critical but did not indict for a criminal offense is not for a purpose supported by the Investigating Grand Jury Act?

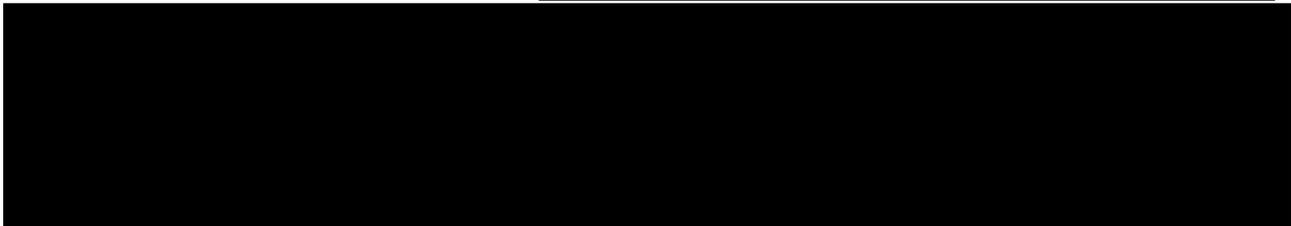
*Not addressed by the Supervising Judge's Revised Order of June 14, 2018 or the June 5, 2018 Opinion and Order referenced therein.*

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

*Answered in the negative by the Supervising Judge's Revised Order of June 14, 2018 and the June 5, 2018 Opinion and Order referenced therein.*

**STATEMENT OF THE CASE**

This Court is by now well aware of the extraordinary events leading up to these expedited proceedings. 



You have been named in a grand jury report. Please find enclosed the portion of the report which I have been authorized to release to you by the Supervising Judge of the 40<sup>th</sup> Statewide Investigating Grand Jury pursuant to 42 Pa.C.S. § 4552(e). You will also find the Court's order providing thirty (30) days to respond from today's date. Please be advised any response may be made public.

Attached to the letter from Mr. Dye was the following Order and Notice entered by the Honorable Norman A. Krumenacker, III, Supervising Judge:

**AND NOW**, this 2<sup>nd</sup> day of May 2018, pursuant to 42 Pa.C.S. § 4552(e), the Court finds that Report 1 of the 40<sup>th</sup> Statewide Investigating Grand Jury is critical of certain individuals. [REDACTED]

**IT IS ORDERED** that the Attorney for the Commonwealth shall provide a copy of this order to any living party so named. The provision of this order shall constitute sufficient notice.

**IT IS FURTHER ORDERED** that individuals so named shall have 30 days to file a sealed response with the Court, and provide a copy to the Attorney for the Commonwealth.

Through counsel, Petitioner sought relief from the Supervising Judge of the Grand Jury, Norman Krumenacker, by filing a motion for relief<sup>3</sup> on June 8, 2018, in the court below. Without hearing or opinion, the court denied Fr.

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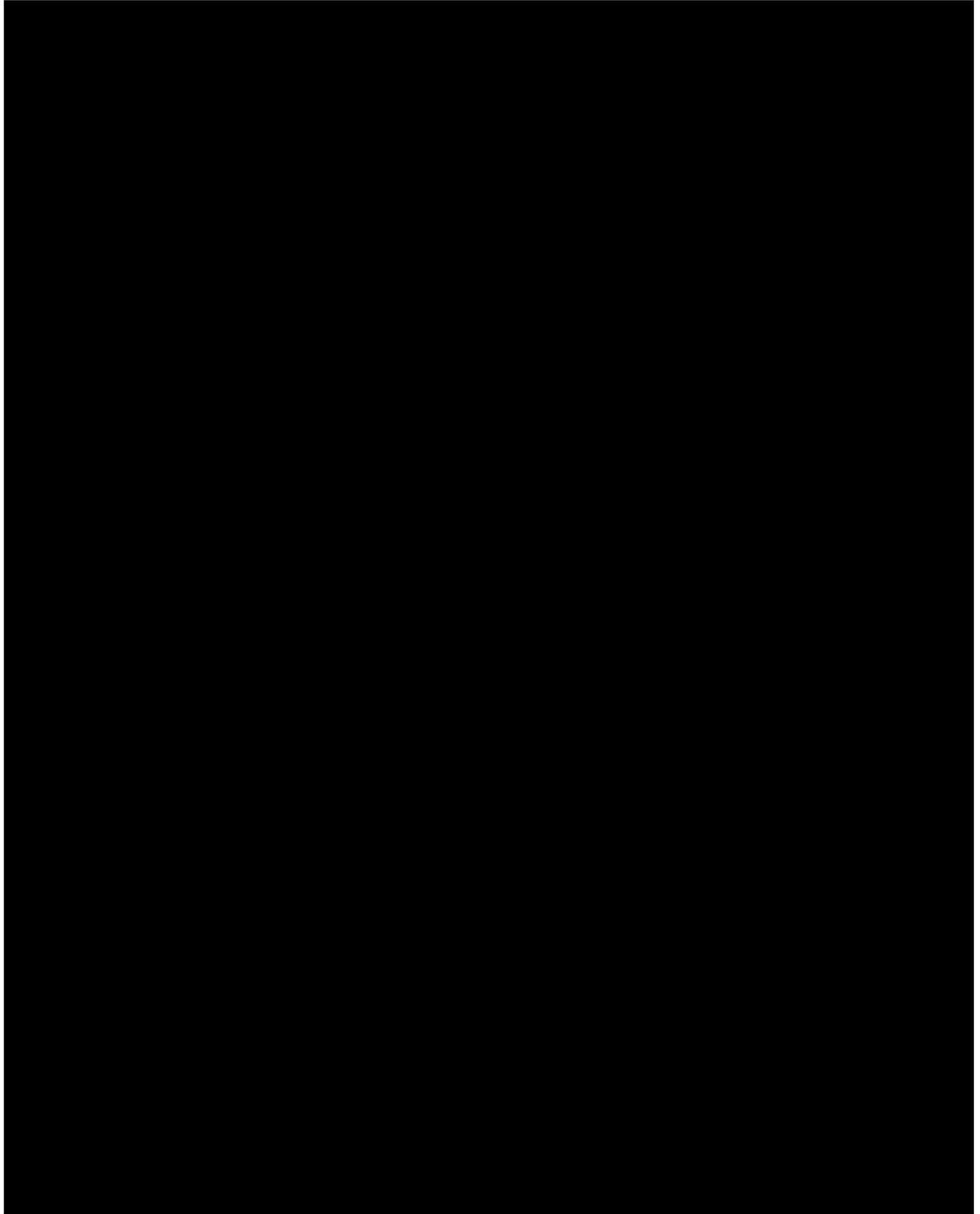
<sup>3</sup> “Motion For This Court’s Determination That The Grand Jury Report As It Concerns Petitioner [REDACTED] Is Not Supported By A Preponderance Of The Evidence, And As A Result, Must Be Stricken Upon This

[REDACTED]. At counsel's request, Judge Krumenacker entered a Revised Order two days later, on June 14<sup>th</sup>, explicitly referencing his previous, June 5 Order and Opinion, and determining that the case involves a controlling question of law as to which "there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the matter." [REDACTED] brought his Emergency Petition for Review in the Nature of an Appeal before this Court on June 18<sup>th</sup>, accompanied by an Emergency Application for Stay Pending Appeal. Since then, the media, a self-professed victim and the Office of the Attorney General ("OAG") have filed motions seeking to have the Grand Jury Report ("the Report") unsealed and the Stay lifted before this Court's decision of the merits. On July 6, this Court issued its Order soliciting full merits' briefing on this and several other petitions before it. This Appeal followed.

[REDACTED]

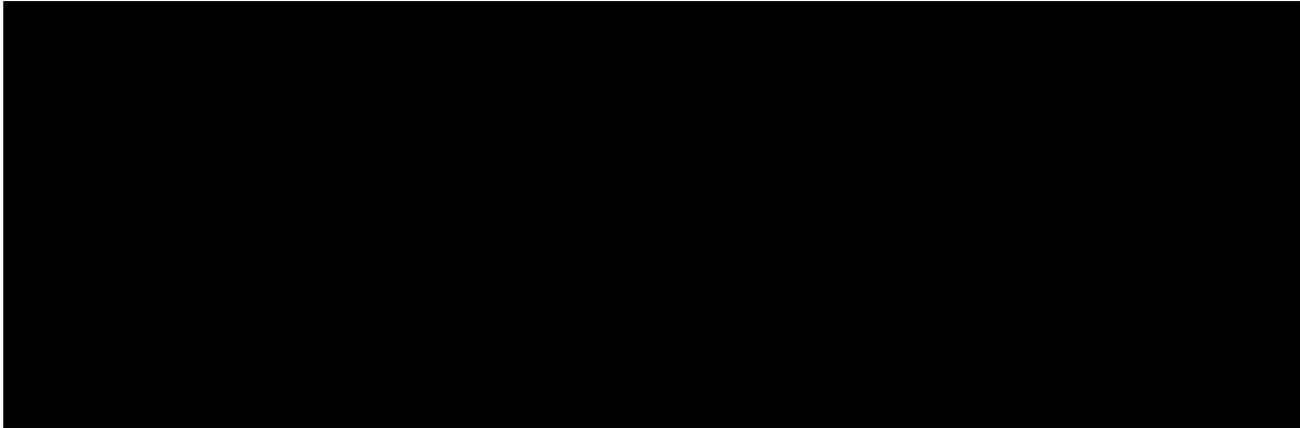
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Court's Rejection Thereof; Or, In The Alternative, For A Pre-Deprivation Evidentiary Hearing", June 8, 2018.



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<sup>4</sup> Attached hereto as Exhibit E



**SUMMARY OF THE ARGUMENT**

Petitioner seeks this Court’s relief to preserve his reputation from wrongful attack and destruction based on less than the preponderance of the evidence and in an effort wholly outside of due process and other protections afforded him by rights under statute and Constitution. Given notice only now, and told he may provide a “response” to follow [REDACTED] Petitioner seeks this Court’s order: to provide the record of the Grand Jury and the Court demonstrating whether or not they carried out their statutory duty in considering the evidence, and whether they applied the requisite standard, as the statute requires; to provide him with a pre-deprivation hearing to demonstrate through evidentiary presentation and testimony that the Grand Jury’s Report as to him is false and defamatory, as due process requires; and further, to redact or excise completely it’s section concerning him which are not supported by the preponderance of the evidence, as justice requires. As important, Petitioner seeks this Court’s

determination of whether the Grand Jury's Report serves a proper purpose under statute; if not, it must be quashed or altered to fit within the narrow confines which the law of the Commonwealth allows.

**ARGUMENT FOR PETITIONER**

**I. The Supervising Judge Ignored The Court's Clear Duty Under The Investigating Grand Jury Act To Consider The Grand Jury's Evidence And Make A Determination Whether Or Not The Report's Conclusions About Petitioner Are Supported By The Preponderance Of The Evidence**

[Petitioner, pursuant to Pa.R.A.P. 1513(d)(5), 2116(a) and 2137, has joined in and adopts by reference the legal arguments in the Merits Brief Setting Forth Common Legal Arguments of [REDACTED] ("Petitioners' Common Brief") submitted on behalf of himself along with the Petitioners at [REDACTED] including that Brief's Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. He also joins in any other Briefs filed by Petitioners that have filed appeals raising similar challenges to Report No. 1, especially the Merits' Brief submitted [REDACTED]

To emphasize Petitioners' Common Brief, before any consideration of releasing a Grand Jury report, the Grand Jury itself, and then the Supervising Court thereafter, must first make a determination that the report "is based upon facts

received in the course of an investigation . . . and is supported by the preponderance of the evidence.” 42 Pa. C.S. Sec. 4552(b) (“Investigating Grand Jury Reports;

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**II. The Grand Jury’s Release Of The Names And Identifying Characteristics Of Those Persons Of Whom It Is Critical But Did Not Indict For A Criminal Offense Is Not For A Purpose Supported By The Investigating Grand Jury Act**

**A. The Plain Language Of The Act Conveys A Limited Purpose – And Limited Subject Matter Jurisdiction – To Investigate Organized Crime And Public Corruption**

The Investigating Grand Jury Act is codified at 42 Pa. C.S § 4541 *et seq.* As the plain language of the Act makes clear, a statewide or “multicounty” investigating grand jury has “jurisdiction to inquire into *organized crime* or *public corruption* or both under circumstances wherein more than one county is named in the order convening said investigating grand jury.” *Id.* § 4542 (emphasis added); *see also id.* § 4544. “Organized crime” and “public corruption” are both defined in the Act. *Id.* § 4542.<sup>5</sup> Neither definition applies here.

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<sup>5</sup> **“Organized crime.”** The unlawful activity of an association trafficking in illegal goods or services, including but not limited to gambling, prostitution, loan sharking, controlled substances, labor racketeering, or other unlawful activities; or any continuing criminal conspiracy or other unlawful practice which has as its objective:

(1) large economic gain through fraudulent or coercive practices; or

(2) improper governmental influence.

**“Public corruption.”** The unlawful activity under color of or in connection with any public office or employment of:

(1) any public official or public employee, or the agent of any public official or public employee under color of or in connection with any public office or employment; or

Given the limited subject matter jurisdiction of multicounty investigating grand juries, the OAG must specifically justify the need for such a grand jury to investigate either organized crime or public corruption. *Id.* § 4544(a) (noting “the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary *because of organized crime or public corruption or both*”) (emphasis added). The naked facts here here preclude Attorney General Shapiro from honestly being capable of doing so.

**B. The Plain Language Of The Act Conveys A Limited Purpose – And Limited Subject Matter Jurisdiction – For The Grand Jury to Issue an Investigative Report**

Even if there were a proper jurisdictional basis in this matter, the multicounty investigating grand jury may then issue an “investigating grand jury report” only in limited purposes further defined in the Act: to propose recommendations for legislative, executive, or administrative action in the public interest based upon stated findings.” *Id.* § 4542. Of course, the “proposing [of] recommendations for legislative, executive, or administrative action in the public interest *based upon stated findings*,” § 4542 (emphasis added), must necessarily refer to findings from the investigation into organized crime and public corruption; otherwise, making

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(2) any candidate for public office or the agent of any candidate for public office. *Id.*

recommendations beyond the scope defined in the Act would create much broader subject matter jurisdiction than the Act permits, and lead to investigations into issues having nothing to do with “organized crime” or “public corruption” (as defined in the Act.<sup>6</sup>) As has happened here.

Given the limited statutory grant of subject matter jurisdiction to multicounty grand juries (including the one at issue here) and the reports they might author, the OAG *cannot* use the grand jury process in a manner not authorized by statute, for publicity, or as a focus for elected officials’ pet focus. In particular, the Act does *not* authorize any investigating grand jury – whether for organized crime, public

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<sup>6</sup> Legislatures in other states have addressed this. New York law requires that a grand jury report submitted for this particular reason – *i.e.*, for “[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings” – may not be “*critical of an identified or identifiable person.*” See N.Y. Crim. Proc. Law § 190.85(1)(c), (2)(b) [emphasis added].

corruption, or otherwise – to defame innocent third parties or to publish erroneous, misleading, unreliable, and scandalous rumors. Such conduct violates Petitioners’ fundamental constitutional interest in their good reputations.

The Grand Jury Report does make recommendations to the legislature, as contemplated under Section 4542. For example, the Grand Jury recommends changes to existing criminal and civil statutes of limitations. Exhibit F, Report at 7-9 (“Introduction”). The Grand Jury, however, does not stop with legislative



Exhibit F, Report at 2 (“Introduction”) (emphasis added).

These stated purposes stretch well beyond the statutory limits on permissible purposes of an investigating grand jury report under Section 4542. The Grand Jury



redaction of Petitioner's name and other identifying information from the Grand Jury Report prior to its filing as a public record under Section 4552(b).

**III. The Supervising Judge Violated Petitioner's Fundamental Rights To His Good Reputation And Due Process Of Law Under Article I, Sections 1, 9, And 11 Of The Pennsylvania Constitution By Denying Him A Pre-Deprivation hearing**

[Petitioner pursuant to Pa.R.A.P. 1513(d)(5), 2116(a) and 2137, has joined in and adopts by reference the legal arguments in the Merits Brief Setting Forth Common Legal Arguments of [REDACTED] ("Petitioners' Common Brief") submitted on behalf of himself along with the Petitioners at Docket Nos. [REDACTED], including that Brief's Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. He also joins in any other Briefs filed by Petitioners that have filed appeals raising similar challenges to Report No. 1, especially the Merits' Brief submitted by counsel [REDACTED].]

**STATEMENT OF THE RELIEF SOUGHT**

For all of the foregoing reasons, Petitioner respectfully requests that:

1. This Court make a threshold determination that this Grand Jury Report is not the product of a proper purpose supported by the Investigating Grand Jury Act; and in the alternative,
2. The Supervising Judge's Order of June 14, 2018, denying his Motion For Pre-Deprivation Hearing be reversed;

3. This matter be remanded with instructions to the Supervising Judge to:
  - a. Make a determination that the specifics of the Report as to Petitioner,<sup>7</sup> either are, or are not, proved by the preponderance of the evidence;
  - b. Hold a Pre-Deprivation hearing for Petitioner, at which he is given meaningful notice and an opportunity to be heard, in the event that the Court below makes findings about him, and determines they are supported by a preponderance of the evidence; and,
  - c. At the hearing, any information determined to be false, misleading or not supported by a preponderance of the evidence be deleted from the Report.

**CONCLUSION**

Accordingly, for the reasons set forth above, Petitioner, [REDACTED] respectfully requests that the Court grants his Emergency Petition for Review in the Nature of an Appeal.

Respectfully submitted this 10<sup>th</sup> day of July 2018.

By: /s/ Efrem M. Grail  
Efrem M. Grail, Esquire  
PA ID No. 81570  
Brian C. Bevan  
PA ID No. 307488  
THE GRAIL LAW FIRM  
436 Seventh Ave.  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
egrail@grailaw.com  
bbevan@grailaw.com

*Attorneys for Petitioner,*  
[REDACTED]

*\*\*\*FILED UNDER SEAL\*\*\**

**CERTIFICATE OF COMPLIANCE**

I, Efrem M. Grail, Esquire, certify that this filing complies with 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.

By: /s/ Efrem M. Grail

Efrem M. Grail, Esquire

PA ID No. 81570

THE GRAIL LAW FIRM

436 Seventh Avenue

Koppers Bldg., 30<sup>th</sup> Floor

Pittsburgh, PA 15219

Phone: (412) 227-2969

Fax: (856) 210-7354

egrail@grailaw.com

*Attorney for Petitioner,*



Date: July 10, 2018

*\*\*\*FILED UNDER SEAL\*\*\**

**CERTIFICATE OF COMPLIANCE**

I, EfreM M. Grail, Esquire, certify that this filing, is less than 30  
Pages and does not exceed 14,000 words.

By: /s/ EfreM M. Grail  
EfreM M. Grail, Esquire  
PA ID No. 81570  
THE GRAIL LAW FIRM  
436 Seventh Avenue  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
egrail@grailaw.com

*Attorney for Petitioner,*



Date: July 10, 2018

**IN THE SUPREME COURT OF PENNSYLVANIA**

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IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

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**PETITIONER [REDACTED] IN SUPPORT OF HIS  
EMERGENCY PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, Efrem M. Grail, hereby certify this 10<sup>th</sup> day of July, 2018, that a copy of the foregoing is hereby filed and served upon the following:

Pittsburgh (Western District) Supreme Court Prothonotary:  
Via PACFile

Via U.S. Mail:  
The Honorable Norman A. Krumenacker, III  
Supervising Judge, 40<sup>th</sup> Statewide Investigating Grand Jury  
Cambria County Court of Common Pleas Courthouse  
200 South Center Street  
Ebensburg, PA 15931

With a Courtesy Copy via electronic mail to:  
Karen A. Hogue, Executive Assistant  
[nakbench@co.cambria.pa.us](mailto:nakbench@co.cambria.pa.us)

And by Electronic Mail (per agreement) to:

Jennifer A. Buck, Esq.  
Daniel J. Dye, Esq.  
Carson Blythe Morris, Esq.  
Leigh Ann Snyder (SDAG Buck's Assistant)  
Criminal Law Division  
1600 Strawberry Square  
[jbuck@attorneygeneral.gov](mailto:jbuck@attorneygeneral.gov)  
[ddye@attorneygeneral.gov](mailto:ddye@attorneygeneral.gov)  
[cbmorris@attorneygeneral.gov](mailto:cbmorris@attorneygeneral.gov)  
[lsnyder@attorneygeneral.gov](mailto:lsnyder@attorneygeneral.gov)

And to:

Julie L. Horst  
Grand Jury Secretary  
Criminal Law Division  
1600 Strawberry Square  
Harrisburg, PA 17120  
[jhorst@attorneygeneral.gov](mailto:jhorst@attorneygeneral.gov)

By: /s/ Efreem M. Grail  
PA ID No. 81570  
THE GRAIL LAW FIRM  
436 Seventh Ave.  
Koppers Bldg., 30<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Phone: (412) 227-2969  
Fax: (856) 210-7354  
[egrail@grailaw.com](mailto:egrail@grailaw.com)

*Attorney for Petitioner*

