

IN THE SUPREME COURT OF PENNSYLVANIA

No. ■ WM 2018

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

Petition of ■

BRIEF IN SUPPORT OF PETITION FOR REVIEW

Appeal from the June 5, 2018 Order of Grand Jury
Supervising Judge Norman A. Krumenacker, III
Denying Petitioner's Motion For Pre-Deprivation Evidentiary Hearing

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I. STATEMENT OF JURISDICTION

The Supervising Judge certified his June 5, 2018 Order for immediate appeal pursuant to 42 PA.C.S. § 702(b) and PA.R.A.P. 312. This Court has exclusive jurisdiction over this appeal pursuant to 42 PA.C.S. § 722(5) and PA.R.A.P. 3331(a)(3).

II. ORDER IN QUESTION

The Order to be reviewed is the Order entered on June 5, 2018, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury. *See* Exhibit A.

ORDER

AND NOW, this 5th day of June 2018, upon consideration of the Motions for Pre-Depravation Hearing and for the reasons discussed in the foregoing Opinion, it is hereby ORDERED, DIRECTED, AND DECREED that the Motions For Pre-Depravation Hearing are DENIED. It is FURTHER ORDERED, DIRECTED, AND DECREED that the Motions for Stay are DENIED.

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

This Opinion and Order are not sealed.

BY THE COURT

NORMAN A. KRUMENACKER, III
Supervising Judge
Fortieth Statewide Investigating
Grand Jury

III. SCOPE AND STANDARD OF REVIEW

The constitutional question presented in this appeal, as well as the challenge to the sufficiency of the evidence supporting the Supervising Judge's determination below, are pure questions of law. As a result, this Court's standard of review is *de novo* and its scope of review is plenary. *See Commonwealth v. Shabazz*, 166 A.3d 278, 285 (Pa. 2017) (constitutional questions); *In re D.S.*, 39 A.3d 968, 973 (Pa. 2012) (sufficiency of the evidence).

IV. QUESTIONS PRESENTED¹

The questions presented in this appeal, as rephrased by this Court in its July 6, 2018, Order, are:

A. [REDACTED]

[REDACTED]

[REDACTED]

B. [REDACTED]

[REDACTED]

[REDACTED]

[Answered in the negative below]

[Suggested answers in the affirmative]

¹ In addition to this Brief, pursuant to Pa.R.A.P. 1513(d)(5), 2116(a) and 2137, the Petitioner has joined in and adopts by reference the legal arguments in the Merits Brief Setting Forth Common Legal Arguments of Clergy Petitioners (“Petitioners’ Common Brief”) submitted on behalf of himself along with the Petitioners at Docket Nos. 75, 77 through 82, 84, and 86 through 89 WM 2018, including that Brief’s Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. He also joins in any other Briefs filed by Petitioners that have filed appeals raising similar challenges to Report No. 1.

Please find enclosed the portions of the grand jury report which I have been authorized to release to you by the Supervising Judge of the 40th Statewide Investigating Grand Jury pursuant to 42 Pa.C.S. § 4552(e). The provision of this additional material provides you with thirty (30) days to respond from today's date. The information is being provided to better inform you as to the scope and nature of the report.

Please also note the enclosure of an order rescinding the Judge's May 2, 2018 order. The Court has accepted the grand jury's report in which you are named as provided by law. However, no judicial finding has been made beyond that judicial determination.

This matter may be discussed with your attorney. You are not obligated to respond. Please be advised that any response may be made public.

See Exhibit B. Attached to the letter from Attorney Dye was an Amended Order Accepting Investigating Grand Jury Report No. 1 and Directing Further Action Prior To the Report Being Made Part of the Public Record, entered by the Honorable Norman A. Krumenacker, III, Supervising Judge, on May 22, 2018. *See Exhibit C.*²

The information about [REDACTED] that is to be included in the Report includes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² The Petitioner attempted to appeal this Order by filing an Emergency Petition For Review In The Nature Of An Appeal. However, on June 12, 2018, this Court denied the petition as an impermissible interlocutory appeal, but without prejudice to challenge the June 5, 2018 Order.

[REDACTED]

The specific portions of the Report to which [REDACTED] objects are as follows:

“ [REDACTED] ”

See Exhibit D. (Emphasis added).

[REDACTED]

“ [REDACTED] ”

[REDACTED]

See Exhibit E.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] was never put on notice that he was the subject of a grand jury investigation for his conduct, nor was he afforded the privilege of appearing before the Grand Jury to explain his actions. Moreover, [REDACTED] has never been afforded any type of hearing in order to challenge the findings in the report. [REDACTED] has filed a motion for pre-deprivation hearing and motion for stay before the Supervising Judge, which were denied as set forth herein. Finally, while [REDACTED] has been invited to submit a sealed response to the information contained in the Report, there is no way for the now-expired Grand Jury to consider his response.

See 42 Pa.C.S. § 4552(e). Moreover, the Supervising Judge has refused to disturb the contents of the Report, regardless of its accuracy. *See* Exhibit A, Op. At 8-9.

VI. SUMMARY OF ARGUMENT

██████████ respectfully appeals from the Order of Supervising Judge Norman A. Krumenacker, III denying his Motion For Pre-Deprivation Hearing in connection with Grand Jury Report No. 1. The Report contains a graphic description of largely historical allegations of child sexual abuse in six dioceses of the Roman Catholic Church in Pennsylvania.

The Report's conclusion that ██████████

██████████ is false and not supported by a preponderance of the evidence supplied to the Grand Jury. 42 Pa.C.S. § 4552(b). Aside from the constitutional defects explained herein, the Report materially misrepresents ██████████

██████████ And yet the OAG and the Supervising Judge – who are aware of the errors in the Report and have not denied said errors exist - are unwilling to correct, redact, or amend the Report in any way.

Additionally, the process employed to reach this determination, which is certain to permanently destroy [REDACTED] personal and professional reputation, was made without a pre-deprivation evidentiary hearing in violation of his fundamental rights to his good reputation and due process of law under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution. Equally important, the Supervising Judge's refusal to expunge or redact the inaccurate information from the Report deprives [REDACTED] of his only adequate constitutional remedy.

Therefore, [REDACTED] respectfully requests that the Order of the Supervising Judge be reversed.

VII. ARGUMENT

As set forth below, the Report's conclusion that [REDACTED]

[REDACTED] See 42 Pa.C.S. § 4552(b).

Moreover, the process employed to reach this determination, which is certain to destroy [REDACTED] good reputation, was made without a pre-deprivation evidentiary hearing or the possibility of redaction or expungement of the false information in violation of his fundamental rights to his good reputation and due process of law under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution. Therefore, [REDACTED] requests that the Order denying his Motion For Pre-Deprivation Hearing be reversed with instructions that any information deemed to be inaccurate and/or unsupported by a preponderance of the evidence following a hearing be expunged or redacted from the Report prior to its issuance.

A. **The Report's Conclusion That [REDACTED] Is Not Supported By A Preponderance Of The Evidence, 42 Pa.C.S. § 4552(B), And Is Inconsistent With 23 P.S. § 6301 Et Seq.**

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

b) Examination by court.--The judge to whom such report is submitted shall examine it and the record of the investigating grand jury

and, except as otherwise provided in this section, shall issue an order accepting and filing such report as a public record with the court of common pleas established for or embracing the county or counties which are the subject of such report only if the report is based upon facts received in the course of an investigation authorized by this subchapter *and is supported by the preponderance of the evidence.*

42 Pa.C.S. § 4552(b) (emphasis added).

In the instant case, there is no evidence whatsoever in the record to support the Report's finding that [REDACTED]

[REDACTED]. To the contrary, [REDACTED]

[REDACTED] In any other judicial setting, such evidence could be presented by [REDACTED] during an evidentiary hearing and relief awarded. No less relief is due here. Therefore, the misinformation in the Grand Jury Report pertaining to [REDACTED] should be stricken from the Report.

B. The Supervising Judge Violated [REDACTED] Fundamental Rights To His Good Reputation And Due Process Of Law Under Article I Sections 1, 9, And 11 Of The Pennsylvania Constitution.

“[I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to ‘reputation,’ providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection.” *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 149 (Pa. 1994). As this Court has recently observed:

Due process is a flexible concept which “varies with the particular situation.” *Zinerman v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). Ascertaining what process is due entails a balancing of three considerations: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The central demands of due process are notice and an “opportunity to be

heard at a meaningful time and in a meaningful manner.” *Commonwealth v. Maldonado*, 576 Pa. 101, 108, 838 A.2d 710, 714 (2003) (quoting *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902); *see also Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692 (1944) (“The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.”).

Bundy v. Wetzel, --- A.3d ---, 2018 WL 2075562, *4 (Pa. 2018).

The Commonwealth Court has been particularly rigorous in its application of these constitutional principles to government reports and public registries. *See J.P. v. Department of Human Services*, 170 A.3d 575 (Pa.Cmwlth. 2017) (holding placement of teacher’s name on child abuse registry without a hearing violated due process); *Simon v. Com.*, 659 A.2d 631, 637 (Pa.Cmwlth. 1995) (holding inclusion of person’s name in a Pennsylvania Crime Commission report about organized crime without notice or an opportunity to be heard violated due process); *Pennsylvania Bar Association v. Com.*, 607 A.2d 850 (Pa.Cmwlth. 1992) (holding that placement of attorneys on motor vehicle fraud index without notice or hearing violated due process). At least one member of this Court has also begun to express misgivings about the informal manner in which Pennsylvania labels people as child abusers under the Child Protective Services Law. *See G.V. v. Department of Public Welfare*, 91 A.3d 667, 674 n.1 (2014) (Saylor, J., concurring) (“[T]he inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question” and “is in tension with the constitutional preference for pre-deprivation process.”).

While the instant case involves a Grand Jury report rather than inclusion in a child abuse registry, the former is much more public, while the latter includes at least some due process protections. 23 Pa.C.S. § 6341(c.2). By contrast, under the Investigating Grand Jury Act, a person criticized in a Grand Jury report is not guaranteed any form of due process at all. *See* 42 Pa.C.S. § 4552(e) (“The supervising judge *may* then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).”) (Emphasis added).

In the instant case, application of the *Mathews* test strongly suggests that a pre-deprivation evidentiary hearing is required prior to deprivation of ██████████ fundamental right to his good reputation through the issuance of Grand Jury Report No. 1.

First, the private interest affected by the governmental action is a fundamental right under the Pennsylvania Constitution, that being the right to one’s good reputation. *See* Pa. Const. art. I, §§ 1, 11. This is a particularly strong interest here, given that ██████████ is fighting against the heinous implication that ██████████ ██████████. Whether such a severe government branding is the result of an “investigative” or “adjudicative” process as discussed by the Supervising Judge is of no consequence. The damage to his reputation will be the same regardless of how the process is legally characterized.

Second, the risk of an erroneous deprivation of [REDACTED] fundamental right to his good reputation under the procedures employed below is significant. This Court need look no further than the grievous perversion of the truth in this case -- as well as the cases of other priests similarly situated to [REDACTED] who have also identified material and prejudicial errors in the Report -- as evidence of an ineffectual system. While the Supervising Judge cites to his role as judicial overseer who must determine that the Report is supported by a preponderance of the evidence, this is of little comfort to those who find themselves falsely accused in a Grand Jury Report because: (1) such persons do not have a right to testify before the Grand Jury or in a hearing before the Supervising Judge; (2) the prosecutor has no obligation to introduce exculpatory evidence; and (3) there is no obligation on the part of the prosecutor to make the Supervising Judge aware of the exculpatory or mitigating evidence before the judge renders a judicial determination. Moreover, while the number of witnesses and documents considered by the Grand Jury cited by the Supervising Judge may be dazzling to the media, the seasoned Supervising Judge of all people should understand that quantity has no relationship to quality [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Indeed, this is a particularly hollow gesture in the

absence of any evidence that [REDACTED] was made aware of the Grand Jury's concerns about [REDACTED]

Moreover, the value of additional safeguards inherent in a pre-deprivation evidentiary hearing conducted by the Supervising Judge are fundamental. Our legal system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). Here, there is no greater proof of this time-honored truism than in this case, where [REDACTED] [REDACTED] lack of participation resulted in a Report that misrepresented the truth of his actions with respect to [REDACTED] misconduct.

Finally, while the Commonwealth certainly has an interest in uncovering child sexual abuse wherever and whenever it occurs, the administrative burden of affording those criticized in the Grand Jury Report with the right to an evidentiary hearing is minimal. Contrary to the Supervising Judge's description in his Opinion, [REDACTED] is not seeking to wreak havoc during grand jury proceedings. Nor do his arguments bear any relation to grand jury proceedings leading up to the issuance of a Presentment, after which the full panoply of constitutional rights are afforded to the accused. Rather, in the absence of an invitation to testify in grand jury proceedings leading to the issuance of a Report, [REDACTED] is simply seeking an evidentiary hearing before the Supervising Judge at which time the truth of the allegations in the Report can be determined prior to publication. This should prove

to be of minimal burden to the Commonwealth, which has already assembled the evidence and presented it to the Grand Jury. Such a procedure would not be inconsistent with the Investigating Grand Jury Act, which vests the Supervising Judge with the power to accept some, all, or none of the information in the Report. *See* 42 Pa.C.S. § 4552(b). Moreover, if the General Assembly intended the Supervising Judge to be powerless to stop the publication of a grand jury report known to contain false information, it would be inconsistent with the Pennsylvania Constitution and this Court’s description of the important role of the Supervising Judge. *See In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011) (“The very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings.”). Finally, the allegations in the Report are decades old, and the apparent desire to issue the Report prior to the expiration of the summer legislative session should not constitute the type of urgency that warrants the permanent smearing of the innocent.

The Supervising Judge’s heavy reliance on *Hannah v. Larche*, 363 U.S. 420 (1960), is misplaced. In *Hannah*, the United States Supreme Court held, as a matter of federal constitutional law, that individuals summoned to appear before the federal Civil Rights Commission were not entitled to learn the identity of persons who filed complaints against them, nor were they permitted to cross-examine witnesses called

against them by the Commission, because the Commission's activities were "investigatory" rather than "adjudicative" in nature.

However, the High Court's decision in *Hannah* is distinguishable from the instant situation for numerous reasons. First, and most obviously, the Court's decision in *Hannah* is not binding on this Court's interpretation of the Pennsylvania Constitution. Indeed, it is black-letter law that this Court is free to interpret the Pennsylvania Constitution in a manner that provides greater rights to its citizens than that provided by the federal constitution. *See Commonwealth v. Edmunds*, 586 A.2d 887 (1991). Second, a Pennsylvania citizen's fundamental right to his/her good reputation, guaranteed by the Pennsylvania Constitution, was not at issue in *Hannah*. This is a critical distinction, because the federal constitution affords far less protection of one's reputational interest than the Pennsylvania Constitution. *See Paul v. Davis*, 424 U.S. 693 (1976) (holding that reputation is not protected under the federal due process clause in the absence of a "more tangible" injury, creating the so-called "stigma-plus" line of federal cases concerning reputation). Third, the holding of a pre-deprivation evidentiary hearing before the Supervising Judge will not cause the kind of disruptions in the investigative process that drove the decision in *Hannah*. Indeed, the investigation is over and the Grand Jury has been discharged. Finally, the Supervising Judge's decision to accept the Report as being supported by a preponderance of the evidence is an adjudicative, not an investigative, act. This is

a function of his judicial oversight role, which this Court has held is so critical in our grand jury system. For all of these reasons, the U.S. Supreme Court's decision in *Hannah* simply has no application here.

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

Finally, it is axiomatic that the demands of the Pennsylvania Constitution exceed the limitations of the Investigating Grand Jury Act.

Finally, any pre-deprivation evidentiary hearing would be pointless if the Supervising Judge did not have the authority to remove information in the Report that was determined to be false, misleading or not supported by a preponderance of the evidence. In criminal cases, this Court has held that expungement of a person's arrest record is constitutionally required following an acquittal. *Commonwealth v. D.M.*, 695 A.2d 770, 772 (Pa. 1997). In cases in which a criminal prosecution is terminated without conviction for reasons such as a *nolle prosequi* or A.R.D., this Court has identified the following factors outlined in *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981).

These include the strength of the Commonwealth's case against the petitioner, the reasons the Commonwealth gives for wishing to retain the records, the petitioner's age, criminal record, and employment history, the length of time that has elapsed between the arrest and the petition to expunge, and the specific adverse consequences the petitioner may endure should expunction be denied.

D.M., 695 A.2d at 772 (internal citations omitted). This constitutional right to expungement exists in other, non-criminal contexts as well. *See Carlacci v. Mazaleski*, 798 A.2d 186 (Pa. 2002) (establishing constitutional right to petition for expungement of Protection From Abuse Act record); *Wolfe v. Beal*, 384 A.2d 1187 (Pa. 1978) (establishing constitutional right to expungement of mental health records); *Simon v. Commonwealth*, 659 A.2d 631 (Pa.Cmwlt. 1995) (enjoining

continued publication and dissemination of government report unless the statements regarding the petitioner were deleted). In the instant case, the Supervising Judge has expressly foreclosed the remedy of expungement, which is [REDACTED] only adequate constitutional remedy to prevent the permanent destruction of his reputation.

VIII. CONCLUSION

Wherefore, for the reasons set forth in this brief, as well as the Merits Brief Setting Forth Common Legal Arguments Of Clergy Petitioners In Opposition To Premature Release of Unredacted Grand Jury Report No. 1, [REDACTED] respectfully requests that the Order denying his Motion For Pre-Deprivation Hearing be reversed with instructions that any information deemed to be inaccurate and/or unsupported by a preponderance of the evidence following a hearing be expunged or redacted from the Report prior to its issuance.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, Glenn A. Parno, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

In addition, I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135(a)(1). Based on the word count feature of the word processing system used to prepare this brief, this document contains 4,966 words.

CAPOZZI ADLER, P.C.

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CERTIFICATE OF SERVICE

I, Glenn A. Parno, Esquire, hereby certify that a copy of the foregoing Brief was served on July 10, 2018 via electronic mail upon the following:

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