

**IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

Nos. 75, 77-82, 84-89, 106 WM 2018

**IN RE: FORTIETH STATEWIDE INVESTIGATING
GRAND JURY**

**BRIEF FOR *AMICUS CURIAE*
PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**Appeal from the June 5, 2018 Order of the Common Pleas Court at No. 571 M.D. 2016
Denying Various Petitioners' Motions For Pre-Deprivation Evidentiary Hearing**

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Date: August 2, 2018

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STATEMENT OF THE *AMICUS CURIAE*
PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants. PACDL membership currently includes more than 950 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL has an interest in the fairness and workings of the criminal justice system in Pennsylvania and has filed *amicus* briefs in other cases before this Court. PACDL's mission is to ensure the fair administration of justice and to advocate for the rights of persons subject to grand jury investigations in addition to those charged with, and those convicted of and imprisoned for, crimes. PACDL's members have a direct interest in the outcome of this appeal because of their concerns for ensuring that the privacy and reputational rights of all citizens

are protected, that law enforcement respects the boundaries of the Constitution of the United States, and the Constitution and statutes of the Commonwealth of Pennsylvania, and that there is clarity in the law as to both the scope of citizens' rights and the obligations of law enforcement with respect to their interactions with citizens of this Commonwealth.

Pursuant to Pa.R.A.P. 531(b)(2), PACDL states that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

SUMMARY OF ARGUMENT

I. Although as of July 27, 2018 there was “no challenge . . . to the release of Report 1 at large,” *In re: Fortieth Statewide Investigating Grand Jury*, Nos. 75, 77-82, 84, 86-89, 106 WM 2018, 2018 Pa. LEXIS 3834, at *21 (July 27, 2018) (“*In re: Grand Jury*”), PACDL respectfully submits that whether the Report comes within the allowable statutory and constitutional bounds of the IGJA is a necessarily antecedent legal determination that must be made before the Report’s publication.

Here, the lower court failed to consider whether this Grand Jury Report falls within statutorily approved purposes. For two reasons, it does not. First, the investigating grand jury’s stated intent to label private citizens as criminals for the relief of alleged victims (“We are going to name their names and describe what they did – both the sex offenders and those who concealed them.”) is *ultra vires* and unnecessary as “stated findings” either to discuss “conditions” related to criminal activity under investigation, or to propose recommendations for government action “in the public interest.” 42 Pa.C.S. § 4542. The public airing of names and identifying characteristics of private citizens who are accused of crimes, but who are unindicted, is not an allowable purpose under the Investigating Grand Jury Act (IGJA). Second, a threshold IGJA restriction on the submission of a multicounty investigating grand jury report is that it must relate either to

organized crime or public corruption as defined by statute. This Report relates to neither. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *36.

As this Court has recognized, the Report affects named individuals' fundamental, constitutional reputational rights and consequently implicates serious due process concerns. *Id.* *3, *36. Yet, no quantum of process can cure the Report's extra-legal nature. The Report's release would constitute a *per se*, irreparable violation of Petitioners' fundamental rights; it should be quashed.

II. Even if this Court determines that the Report's infirmities can be salvaged through additional process, due process demands, at a minimum, a pre-deprivation hearing. That fundamental constitutional rights are at issue is not disputed. The risk of erroneous deprivation of one's right to reputation under the Pennsylvania Constitution (Article I, Sections 1, 9 and 11) from publication of the Report without a pre-deprivation hearing is enormous given the subject of the investigating grand jury's Report, the investigating grand jury's stated purpose of "naming names," and the *ex parte* nature of a grand jury proceeding led by prosecutors without legal obligation to present exculpatory evidence or to offer the named individuals the opportunity to testify, much less to confront or cross-examine any witness against them. The injuries from publication of the Report here would almost certainly result in extremely serious, irreparable and unfair

prejudice to those accused but not charged, and that outweighs the alleged administrative burden of holding pre-deprivation hearings. As this Court has recognized, in these circumstances, the statutorily-provided “right of [written] response – entailing the opportunity to possibly 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 sufficiently effective” given the weighty constitutional rights at issue. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *28 (internal quotation marks omitted).

III. As this Court has indicated, *id.* at *29-*30, where, as here, the fundamental right of an unindicted private citizen to reputation is at risk by being identified and accused of heinous crimes in an investigating grand jury’s report, the potential audience for which is the entire Commonwealth and beyond, the civil damages preponderance of the evidence standard set forth by the IGJA is inadequate as a matter of due process. More than the mere loss of some money is at stake; a fundamental constitutional right is in jeopardy. In such cases, a stronger standard – capable of protecting these rights and consistent with these private individuals’ presumption of innocence – is required. Where, as here, the grand jury accuses citizens of crimes, proof beyond a reasonable doubt is the correct standard; at a

minimum the quasi-criminal evidentiary standard of clear and convincing evidence is required.

ARGUMENT

We are sick over all the crimes that will go unpunished and uncompensated. This report is our only recourse. We are going to name their names and describe what they did – both the sex offenders and those who concealed them. We are going to shine a light on their conduct, because that is what the victims deserve.¹ (emphasis added).

The investigating grand jury’s justification for its Report – punishing alleged wrongdoers to provide alleged victims with their just deserts – stands outside the law.² The Report’s chilling statement of purpose underscores the critical statutory and constitutional issues of first impression raised by this appeal. If the Report is published, private citizens will stand accused of serious crimes by an arm of the court without sufficient access to the underlying record and any meaningful ability to contest those charges in an adversary proceeding. Neither the governing statute nor our Commonwealth’s Constitution allows such an abuse of power.

¹ PACDL does not have access to the Grand Jury Report. This excerpt from the Report was quoted without redaction in No. 86 WM 2018, Petitioner[’s] Brief In Support Of His Emergency Petition For Review In The Nature Of An Appeal, at 24 (citing “Exhibit F,” Report at 2 (“Introduction”)).

² The Attorney General confirmed the improper purpose of the Report in his letter (with press release) to Pope Francis dated July 25, 2018: “As I prepared to [release the Report], anonymous petitioners implicated in this report went to court to stop me and silence the victims.” He urges the Pope to “direct church leaders” to abandon such efforts “and permit the healing process to begin.” *Available at* <https://www.attorneygeneral.gov/taking-action/statements/attorney-general-josh-shapiro-sends-letter-to-pope-francis-on-attempts-to-silence-survivors-and-block-release-of-report-on-child-sex-abuse/>. The Investigating Grand Jury Act does not authorize reports for the purpose of healing crime victims. *Compare* 18 P.S. § 11.101 *et. seq.* (Crime Victims Act).

The potential reputational and other harms flowing from the lower court's incorrect construction and misapplication of the Investigating Grand Jury Act (IGJA) implicate not only the statutory and constitutional rights of the individual Petitioners, but also the proper functioning of the grand jury as an institution vital to the Commonwealth's criminal justice system. Although as of July 27, 2018 there was "no challenge . . . to the release of Report 1 at large," *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *21, PACDL respectfully submits that whether the Report comes within the allowable statutory and constitutional bounds of the IGJA is a necessarily antecedent legal determination that must be made before the Report's publication. The lower court's ruling should be reversed and this matter remanded for proceedings consistent with the provisions of the IGJA and the Pennsylvania Constitution.

I. THE LOWER COURT ERRED IN FAILING TO CONSIDER WHETHER THIS GRAND JURY REPORT FALLS WITHIN STATUTORILY APPROVED PURPOSES FOR WHICH A MULTICOUNTY³ INVESTIGATING GRAND JURY MAY ISSUE A REPORT – IT DOES NOT.

Because the record shows that the investigating grand jury's Report does not come within the bounds defined by Pennsylvania statutes, and because its release would in any event violate fundamental rights of private individuals who are

³ The caption in this matter refers to a "statewide" investigating grand jury, a kind of multicounty investigating grand jury. *See* 42 Pa.C.S. § 4542 (defining "multicounty investigating grand jury" as "[a] statewide or regional investigating grand jury....").

named and accused but not charged in that Report, PACDL urges this Court to reverse. As it stands, the Report should not be publicly released.

A. The Investigating Grand Jury’s Stated Purpose of “Outing” Private Citizens as Criminals Is Improper and Not Authorized by The Investigating Grand Jury Act.

The IGJA accords investigating grand juries two investigative functions, to: (1) “inquire into offenses” and recommend (or not) a matter for criminal charging; and (2) submit a grand jury report. 42 Pa.C.S. §§ 4548(a), (b); 4552(a). While the IGJA contemplates that an investigating grand jury’s report may include comments that are “critical” of unindicted individuals, *id.* at § 4552(e), it nowhere authorizes a grand jury to issue a report identifying and publicizing private citizens as criminals (“the sex offenders and those who concealed them”) or whose “primary objective is to publically censure the conduct of specific individuals.” *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *27.

Criminal accusations go beyond mere “criticism” of individuals and organizations, which could legitimately relate to permitted *investigative*, rather than charging, grand jury functions. Criticism of, say, public officials regarding governance recommendations is an accepted burden of holding public office or employment and in keeping with a frequent subject of grand jury reports. *See, e.g., Stern, B., “Revealing Misconduct by Public Officials Through Grand Jury Reports,”* 136 U.Pa.L.Rev. 73, 90 n.56 (1987). The same is not true for criminal

accusations against private individuals. *See, e.g., In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *18-*19 (explaining that “courts draw a sharp distinction between grand jury reports that speak generally to public affairs and those that impugn named persons” and citing cases). *Cf.* 18 U.S.C. §§ 3331(a), 3333(a)(1) (In federal grand jury system, upon prosecutor’s request, a “special grand jury” may issue a report concerning “noncriminal misconduct, malfeasance, or misfeasance in office...by an appointed public officer or employee...”).

That other function, the charging function, is wholly separate from the issuance of a report and is one accompanied by the panoply of due process rights and protections attending a criminal prosecution. Yet, as quoted at the outset of this brief, the investigating grand jury’s stated purpose in seeking the publication of its Report is to “name names” and “shine a light” on the named individuals’ conduct for the benefit of alleged victims (“this is what the victims deserve”). It is not, as this Court explained, “couched in conventional ‘investigatory’ terms,” but labels over three hundred citizens as “predator priests” and describes their alleged conduct.⁴ *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *4. While perhaps borne of an understandable emotional impulse, shaming and punishing uncharged private citizens with accusations of criminal conduct is not needed either to discuss

⁴ As discussed in Argument I(B) below, these are alleged victims of a type of criminal activity entirely different than the only two types within the authorized jurisdiction of the multicounty investigating grand jury: organized crime and public corruption. 42 Pa.C.S. § 4542.

“conditions” related to criminal activity under investigation, or to propose recommendations for government action in the public interest as part of “stated findings.” 42 Pa.C.S. § 4542. Put another way, the public release of the names and identifying characteristics of private citizens who are accused of crimes, but who are unindicted, is not an allowable purpose under the IGJA.

Moreover, permitting an investigating grand jury report to identify private citizens as criminals subverts a long established rationale for grand jury secrecy: shielding an investigation’s subjects from stigma and public shaming from the release of grand jury information where the investigating grand jury and prosecuting authority ultimately determine not to recommend charges (for whatever reason), and there will be no trial at which such allegations can be contested. *See In re Investigating Grand Jury of Philadelphia Cnty.*, 496 Pa. 452,458, 437 A.2d 1128, 1130 (1981); *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218-19, n.9 (1979).

The Legislature was alert to the potential for this very misuse of the grand jury. In debating the IGJA, a representative noted: “We do not want grand juries in this state to become political vehicles of the prosecutors to embarrass individuals, knowing they cannot achieve a conviction.” PA 162d Gen. Assembly, Sess. of 1978, Legis. J., Vol. 1, No. 44 at 3166 (Sept. 21, 1978). More pointedly, as a sponsor of the Act noted: it “is not a bill designed to discredit people.” PA 162d

Gen. Assembly, Sess. of 1978, Legis. J., Vol. 1, No. 50 at 3740 (Nov. 14, 1978).⁵

Runaway grand juries – including those that stray from the approved subject matter of their investigation – are barred by law. 42 Pa.C.S. § 4548(a) (“...in no case shall the investigating grand jury inquire into alleged offenses on its own motion.”).

Here, the supervising grand jury judge apparently ignored the limited allowable purpose of a grand jury report (“proposing recommendations...”) in derogation of the policy of grand jury secrecy and the reputational interests it is designed to serve. The investigating grand jury’s Report accusing private citizens of crimes should be stricken as *ultra vires*. For this reason alone, the lower court’s ruling should be reversed and the matter remanded.

B. The Investigating Grand Jury’s Report Falls Outside the Permitted Statutory Purpose of Reporting on Conditions Related to Organized Crime or Public Corruption.

Under the IGJA, and distinct from its role in the criminal charging function, an investigating grand jury can issue a report, 42 Pa.C.S. § 4552(a), *if* that report emerges from an investigation authorized by law. A multicounty investigating grand jury can only be convened when, in the opinion of the Attorney General, that mechanism “is necessary *because of organized crime or public corruption or both*

⁵ This legislative history further supports the proposition that the General Assembly did not intend to encompass criminal accusations within the “criticism” permitted by the IGJA. *See* 42 Pa.C.S. § 4552(e).

involving more than one county of the Commonwealth” *Id.* at § 4544(a) (emphasis added). The statutory definition of “report” conforms to and reinforces this limitation; it may concern only the same two categories of crime which are the permissible subjects of a multicounty grand jury investigation.

“Investigating grand jury report.” A report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings.

Id. at § 4542.⁶

Since, under Section 4544, the multicounty investigating grand jury may only investigate certain categories of crime, and since, to fall within the bounds of Section 4544(a), the subset of “conditions” on which it may choose to report must be those relating to organized crime and public corruption, it follows that proposed recommendations for government “action in the public interest based on stated findings” must relate to suggested means of addressing these two categories of criminal conduct. Accordingly, the first clause of Section 4542 cabins the content

⁶ “Organized crime” is defined as involving either (i) the unlawful activity of an association trafficking in illegal goods or services or (ii) any other unlawful practice which has as its objective larger economic gain through fraudulent or coercive practices or improper governmental influence. 42 Pa.C.S. § 4542. “Public corruption” is generally defined as unlawful activity under color of or in connection with any public office. *Id.*

of that report with the restriction that it must regard “conditions relating to” organized crime or public corruption. *Id.*

This makes sense as a matter of statutory construction and legislative history. Statutes are not to be read so as to render a component meaningless or unnecessary. 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”). To the contrary, “the plain language of each section of a statute must be read in conjunction with [the others], construed with reference to the entire statute,” *Bowling v. Office of Open Records*, 621 Pa. 133, 156, 75 A.3d 453, 466 (2013), “general words shall be construed to take their meanings and be restricted by preceding particular words,” *Hoy v. Angelone*, 554 Pa. 134, 141, 720 A.2d 745, 748 (1998); 1 Pa.C.S. § 1903(b) (same), and courts “should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.” *Landay v. Rite Aid of Pa., Inc.*, 629 Pa. 287, 302, 104 A.3d 1272, 1282 (2014); *Hoy*, 554 Pa. at 141, 720 A.2d at 748 (“...the entire relevant language of the statute must be considered to ascertain the Legislature's intent.”).

If the second clause of Section 4542 was freestanding and unmodified by the first, it would appear to authorize a report on matters that a multicounty grand jury

may not investigate in the first place.⁷ The breadth of the second clause standing alone and read out of context would appear to permit a report and recommendations on conditions stemming from any societal problem at all. If this were so, not only would the first clause be impermissible surplusage under basic statutory construction principles, *Reginelli v. Boggs*, 181 A.3d 293, 305 (Pa. 2018), but it would contravene the statutory limitation on the specific purposes for which multicounty investigating grand juries can be impaneled. This makes no sense. *See* 1 Pa.C.S. § 1921(c)(6) (in ascertaining legislative intent, consider “[t]he consequences of a particular interpretation.”).

The IGJA’s legislative history similarly focuses on organized crime or public corruption. *See* PA 162d Gen. Assembly, Sess. of 1978, Legis. J. , Vol. 1, No. 39– House at 2804 (Sept. 12, 1978) (“Mr. Speaker, the bills just read....are the organized crime official corruption crime-fighting package....”); PA 162d Gen. Assembly, Sess. of 1978, Legis. J., Vol. 1, No. 51 at 1023-25 (Sept. 27, 1978) (“Give the local elected district attorney the tools with which to combat not only organized crime but corruption in public office” (quoting the Philadelphia Inquirer)); *id.* (“[A] tool for proper law enforcement in today’s climate of sophisticated organized crime and other types of corruption.”); *id.* (“needed very badly to fight organized crime and corruption”).

⁷ A single-county grand jury, on the other hand, can be utilized to look into any form of *criminal* activity. 42 Pa.C.S. § 4543(b).

Runaway grand juries – including investigating grand juries that stray from the statutorily restricted subject matters and purposes of investigation – are barred by law. 42 Pa.C.S. § 4548(a); *accord* Legis. J., Vol. 1, No. 44 at 3165 (“[G]rand jurors ... have become so imbued with their authority ... that they have attempted to conduct investigations that may be out of the scope of their jurisdiction, may be out of the scope of their authority and may not even involve violations of criminal law That is why ... grand juries ... are subject to the control of a supervisory judge.”); PA 162d Gen. Assembly, Sess. of 1978, Legis. J., Vol. 1, No. 48 at 3575 (Sept. 28, 1978) (“Safeguards are in the bill to prohibit the runaway grand jury.”).

The lower court failed to address the threshold IGJA limitation on the subject and purpose of multicounty investigating grand jury reports to organized crime and public corruption as defined by statute. As this Report relates to neither, for this reason too, the Report must be quashed and not made public.

C. Because the Report Is *Ultra Vires* and Unauthorized, No Amount of Additional Process Would Justify Its Release in Full.

This Court raises the question of whether any “process-related remedial measures [that] can be taken now . . . [would] justify the release of the specific criticisms pertaining to Appellants.” *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *31. As noted, the Report’s stated purpose of naming the accused and detailing inflammatory allegations against them, in attempted reparation to alleged victims, is outside the grand jury’s reporting function – falling, if anything, into the

charging function, which is properly followed by the constitutionally-guaranteed process attendant a criminal trial. *Supra* at Argument I(A). That error, like that of going beyond the multicounty investigating grand jury’s statutorily-allowed purposes, *supra* at Argument I(B), cannot be rectified by further available process.

These are not errors of process. They are fundamental, substantive, and jurisdictional errors going to the Report’s very existence. This Report – or, at a minimum, those portions accusing private citizens of crimes and detailing alleged misconduct – falls outside the grand jury’s authority. *See, e.g., Application of United Electrical Workers of America*, 111 F. Supp. 858, 866 (S.D.N.Y. 1953) (“I do not believe that it is within the power of a Grand Jury to make accusations against individuals falling short of indictment. . . . The great weight of authority is that such reports exceed the power of the Grand Jury and **may be expunged**” (emphasis added)); *In re: Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451, 1463-64 (D. Colo. 1992) (“When the grand jury delivers a public and unanswerable reprimand, it defeats the very purpose of its existence.”); *United States v. Briggs*, 514 F.2d 794, 803 (5th Cir. 1975) (grand jury lacks authority to accuse persons of a crime without naming them as defendants); *Application of Jordan*, 439 F. Supp. 199, 205 (S.D.W. Va. 1977) (“[Grand jury reports] *cannot* be examples of the grand jury’s accusing individuals of criminal misconduct through

publicized inferences of guilt” (internal quotation marks omitted) (emphasis added)).

The Report here strays from the investigating grand jury’s reporting function into its charging one, *sans* the procedural protections – the opportunity to have the charges tested in a criminal trial – attending a genuine criminal charge. The problem is particularly acute here, where the Report is *ultra vires*, it strays from the statutory mandate; labels private citizens in the most public of ways as “predator priests,” perpetrators of some of our culture’s most reviled crimes; and travels well beyond the definition of a “report,” which the statute envisions as a vehicle for proposing recommendations regarding governmental reforms. 42 Pa.C.S. § 4542. Offering the accused further process now cannot rectify this fundamental, underlying infirmity. The Report is disallowed entirely as a matter of due process, and cannot be salvaged with offers of additional procedure after the fact.⁸

⁸ Should the Court disagree, and find that the statute allows a multicounty grand jury to report on issues other than public corruption and organized crime, the fact remains that a grand jury report going beyond those topics is permitted only to “propos[e] recommendations for legislative, executive, or administrative action.” 42 Pa.C.S. § 4542. Accusing individuals of crime is no part of that task – indeed, the Report is explicit that its purpose was “recourse” for “crimes that will go unpunished.” At a minimum, those unnecessary and inflammatory portions of the Report should be expunged.

II. A PRE-DEPRIVATION HEARING IS NECESSARY TO PROTECT THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF THE NAMED PRIVATE INDIVIDUALS ACCUSED IN THE GRAND JURY REPORT.⁹

The Pennsylvania Constitution enshrines an individual's fundamental rights to reputation and due process of law under Article I, Sections 1, 9, and 11. "[T]he right of citizens to security in their reputations is not some lesser order precept" but "[r]ather, in Pennsylvania it is a fundamental constitutional entitlement." *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *24.¹⁰ This fundamental right to one's reputation is implicated by naming a non-indicted person in an investigating grand jury report. *See, e.g., id.* at *20, *24.

"The central demands of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (internal quotations omitted). The lower court's process of (1) first making a global, preponderance of evidence, adjudicative finding¹¹

⁹ This argument and Argument III below assume, *arguendo*, either that (a) this investigating grand jury's Report falls within the statutory definitions of organized crime or public corruption or (b) the second clause of Section 4542 allows an investigating grand jury to write a report and propose recommendations on any topic arising from any criminal investigation.

¹⁰ The Commonwealth is much more protective of reputation than the federal government. *Compare Paul v. Davis*, 424 U.S. 693, 708-09 (1976) (under U.S. Constitution, damage to reputation, alone, apart from some more tangible interests, is insufficient to invoke the protection of the Due Process Clause).

¹¹ The fact that the supervising judge purported to examine the report and the grand jury record and make a preponderance (adjudicative) finding removes this matter

regarding the Report, with no indication of having considered the evidence pertaining to each named non-indicted person, (2) only then affording the named persons the right to append their response to the report, apparently without providing access to the underlying evidence of record, and (3) denying these named persons a pre-deprivation hearing, violates these individuals' rights to reputation and due process.

As noted long ago, by a neighboring court:

In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted. An indictment charges a violation of a known and certain public law and is but the first step in a long process in which the accused may seek vindication through exercise of the right to a public trial, to a jury, to counsel, to confrontation of witnesses against him, and if convicted, to an appeal. A report, to the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body

from the ambit of *Hannah v. Larche*, 363 U.S. 420 (1960), even if *Hannah* was on point factually or dealt with the Pennsylvania Constitution, neither of which is the case. In any event, even if the proceeding is considered to be investigative, “when viewed in conjunction with the nature of the right involved, [that] fact....does not justify the abrogation of petitioners' right to possess and protect their reputations without due process of law.” *Simon v. Commonwealth*, 659 A.2d 631, 639 (Pa. Commw. 1995) (Pennsylvania Crime Commission report); cf. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *25-26 (“[T]he lines between a grand jury ‘investigation’ and an ‘adjudication’ are blurred when the grand jury renders wide-scale, individualized, condemnatory findings on the order of those announced in Report 1.”).

occupying a position of respect and importance in the community, its potential for harm is incalculable.

Wood v. Hughes, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26 (1961) (emphasis added); *see also In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *26 (nothing the “profound” differences between a grand jury report and a civil complaint); *cf. United States v. Smith*, 776 F.2d 1104, 1115 (3d Cir. 1985) (affirming protective order redacting unindicted coconspirators’ names from indictment, as “disclosure would almost certainly result in extremely serious, irreparable and unfair prejudice to those” named but not charged).

This Court has recognized that, at least in the current case, permitting the named individuals the statutorily-afforded “opportunity to possibly 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 sufficiently effective” to protect Petitioners’ rights. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *28. The Legislature is presumed to intend statutes to be constitutional. *See* 1 Pa.C.S. §1922(3). This IGJA provision should be read as setting forth a minimum right perhaps applicable to non-accusatory reports but not as a ceiling on the process available to aggrieved individuals in this case.

Nothing in Section 4552 bars the supervising judge from ordering a pre-deprivation hearing or other process *before* accepting or rejecting the Report, and

the Judicial Code invests courts with the “power to make such rules and orders of court as the interest of justice or the business of the court may require.” 42 Pa.C.S. § 323. After all, “[t]he grand jury is an arm of the criminal court.” *McNair’s Petition*, 324 Pa. 48, 58, 187 A. 498, 503 (1936).

Petitioners have briefed the three-pronged analysis required when assessing due process safeguards under *Bundy v. Wetzel*, 184 A.3d at 557. PACDL will not rehash that discussion. As this Court has held, if and when the Report is disclosed, a fundamental constitutional interest will be affected by government action. Moreover, the risk of *erroneous* deprivation of one’s right to reputation is enormous given the subject of the investigating grand jury’s Report, the investigating grand jury’s stated purpose (“We are going to name their names and describe what they did – both the sex offenders and those who concealed them.”), and the *ex parte* nature of a grand jury proceeding led by prosecutors with no legal obligation to present exculpatory evidence or to offer the named individuals the opportunity to testify, much less to confront or cross-examine any witness against them.

The procedural safeguards afforded by an individualized, “adversarial” pre-deprivation hearing would greatly reduce the risk of an erroneous deprivation of one’s right to reputation by enabling the supervising judge to review in context whether the investigating grand jury’s record supports the Report. *See Polk Cnty.*

v. Dodson, 454 U.S. 312, 318 (1981) (Our “system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”); *In re Investigating Grand Jury of Philadelphia County (Appeal of Washington)*, 490 Pa. 31, 38-41, 415 A.2d 17, 21-22 (1980) (supervising judge hears evidence challenging the validity of allegations in an application to empanel a grand jury). Conversely, an after-the-fact opportunity merely to file a written response provides no timely, meaningful protection at all. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *28; *Simon*, 659 A.2d at 639 (A right of rebuttal after a Pennsylvania Crime Commission publication linking named individuals to organized crime was “an unconscionable abrogation of a state protected constitutional right without procedural due process.”).

Finally, as to administrative burden, it is respectfully submitted that the injuries from publication of the Report here “would almost certainly result in extremely serious, irreparable and unfair prejudice to those” named but not charged, *Smith*, 776 F.2d at 1115, and that outweighs the alleged burden of holding pre-deprivation hearings. Equally dispositive, to the extent it is determined that the public interest in the investigating grand jury’s proposed recommendations for government action must be satisfied by a prompt release of the Report, that interest could be met simply by releasing the Report with redactions of the names and identifying characteristics of all affected individuals. *See Simon*, 659 A.2d at 639-

40 (enjoining report's publication absent redaction of statements about petitioners).

The assertion of overriding burden here cannot be sustained.

If an investigating grand jury report, carrying the imprimatur of being issued by a fair and neutral body, is going to accuse an individual of a crime, that person needs to have the opportunity to review and present evidence and address those concerns prior to judicial acceptance of that report. For this reason, the ruling of the lower court should be reversed.

III. THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS AND REPUTATION REQUIRE MORE THAN A "PREPONDERANCE" STANDARD OF PROOF, AT LEAST FOR NAMED INDIVIDUALS WHO ARE NOT PUBLIC OFFICIALS.

Embedded in the question of pre-deprivation due process rights raised below is that of the standard of proof required under the Constitution. The IGJA requires the supervising judge to determine whether the investigating grand jury's report is supported by a preponderance of the evidence. 42 Pa.C.S. § 4552(b). This standard is constitutionally deficient.

Preponderance of the evidence essentially means the greater weight of the evidence favoring one side or the other in a non-criminal lawsuit. *Addington v. Texas*, 441 U.S. 418, 423 (1979). Where, as here, the fundamental right to an

unindicted private citizen's¹² reputation is at risk by being identified and accused of heinous crimes in an investigating grand jury's report, the potential audience for which is the entire Commonwealth and nation, the civil law preponderance of the evidence standard is inadequate as a matter of due process. *Cf. In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *28 (given Report's contents, "the supervising judge's statutory preponderance-based review may be inadequate, in the grand jury setting, to serve as a sufficient protective measure").

At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

Addington, 441 U.S. at 423. The stakes here are so much higher than money; a fundamental constitutional right is implicated by a report making criminal accusations, compiled by an arm of the court. The consequences of an erroneous deprivation would be extremely severe – the deprivation of a right that occupies a position “on the *highest plane*, that is, on the same level as those pertaining to life, liberty, and property.” *Am. Future Sys., Inc.*, 592 Pa. at 77 n.7, 923 A.2d at 395 n.7 (emphasis added).

¹² Many, if not all, of the named individuals accused of crimes in the investigating grand jury report are private citizens, not public officials. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *7. Unlike the IGJA, the civil law of defamation provides stronger protections for private individuals than for public figures. *Am. Future Sys., Inc. v. Better Bus. Bureau*, 592 Pa. 66, 83-84, 923 A.2d 389, 400 (2007).

This is not a case in which the accused’s “identity is disclosed to a small number of persons in a very narrow range of situations with the understanding that it will not be revealed to any unauthorized individuals.” *Compare G.V. v. Dep’t of Pub. Welfare*, 625 Pa. 280, 290, 91 A.3d 667, 672 (2014) (“substantial evidence” standard sufficient for placing accused’s name on child abuse registry, because the information in the report is not readily available, and so the individual will not be stigmatized before the general public – the adverse effects on reputation will be very limited); *In re Vencil*, 638 Pa. 1, 152 A.2d 235 (Pa. 2017) (preponderance standard regarding request to have the records of civil commitment expunged).

Here, the publication, and inevitable media and Internet re-publication, of these allegations will reach the entire Commonwealth and beyond,¹³ destroying the named persons’ personal, social, familial and professional reputation. *See Commonwealth v. Williams*, 557 Pa. 285, 309, 733 A.2d 593, 606 (1999) (“One’s livelihood, domestic tranquility and personal relationships are unquestionably put in jeopardy by sexual predator notification provisions.”). Where the consequences of publication are so severe and irreversible, due process commands an evidentiary standard greater than that applicable in a civil suit over money (preponderance).¹⁴

¹³ *See* footnote 2, *supra*, regarding the Attorney General’s recent, Internet-posted letter to Pope Francis with accompanying press release.

¹⁴ Many of the individuals accused of criminal wrongdoing in the Report are members of the clergy. *In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *7. PACDL takes no

The lack of a custodial penalty does not negate the penal and criminal nature of this investigating grand jury's Report. *Cf. In re Winship*, 397 U.S. 358, 363-64 (1970) (“[A] society that values the good name . . . of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . It is [] important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”). Investigating grand jury reports, like the one at issue, that raise purely criminal accusations against unindicted and presumed innocent¹⁵ private citizens should be tested against the most demanding standard – the one applicable to criminal allegations having the potential to affect “highest plane” rights, namely, beyond a reasonable doubt. A lesser standard permits the government, with judicial imprimatur, to destroy a private individual’s fundamental reputational right through criminal accusations untested against the most stringent evidentiary standard.

position as to whether any heightened burden or additional rights may apply in such a case under the Religious Freedom Protection Act, 71 P.S. §§ 2401–2407.

¹⁵ *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1373 (6th Cir. 1978) (Weick, J., dissenting) (“Persons being investigated by a grand jury are presumed to be innocent[.]”); *People v. Buffalo Gravel Corp.*, 195 N.Y.S. 940, 944 (Sup. Ct. 1922) (“[T]he grand jury is an investigating and accusing body against whose finding the presumption of innocence still prevails.”).

Short of a beyond-a-reasonable-doubt standard, and at a *minimum*, the quasi-criminal standard of clear and convincing evidence is required:

One typical use of the [clear and convincing] standard is in **civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant**. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly **reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof**. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to **protect particularly important individual interests in various civil cases**.

Addington, 441 U.S. at 424 (emphasis added). As in cases involving civil commitment, deportation, parental rights and denaturalization, the rationale of *Santosky* is equally applicable here:

This Court has mandated an intermediate standard of proof -- "**clear and convincing evidence**" -- **when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."**.... Notwithstanding "the state's 'civil labels and good intentions,'"....the Court has deemed this level of certainty **necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."**

Santosky v. Kramer, 455 U.S. 745, 756-57 (1982) (terminating parental rights) (emphasis added) (citations omitted); *see Commonwealth v. Maldonado*, 576 Pa. 101, 113, 838 A.2d 710, 715, 717-18 (2003) (sexual predator status under Megan's

Law results in “severe and irreversible” consequences; clear and convincing evidence required). The supervising judge here should be required to evaluate the evidence against each named private citizen under the higher criminal or quasi-criminal standards, not the purely civil preponderance standard.

The IGJA’s preponderance standard is constitutionally infirm as applied to the facts of this case. The one-sided nature of the investigating grand jury investigative process leading to its Report, led *ex parte* by the prosecutor, dramatically heightens the risk of erroneous (or even biased) fact finding and, with that, the erroneous deprivation of the reputational right. In such circumstances, a higher evidentiary standard serves a necessary, constitutional risk-mitigating purpose. *Cf., e.g., Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 876-78 (Pa. Commw. Ct. 2014) (Concurring op., Pellegrini, J.) (fundamental fairness mandates clear and convincing evidence standard where the government profits from forfeiture actions, creating inherent conflict of interest). Should this Court determine to remand the matter, it should be with directions to apply the beyond a reasonable doubt, or at least clear and convincing, evidentiary standard to the evidence as regards each individual¹⁶ named in the Report.

¹⁶ No matter what evidentiary standard applies, the court must make an individualized determination with respect to each named person to sufficiently safeguard those individuals’ rights. *Cf. In re: Grand Jury*, 2018 Pa. LEXIS 3834 at *29 (“review on a report-wide basis . . . can afford no assurance of any protection for individual reputational rights, when the safeguard can be overwhelmed by the tenor and scale of a

CONCLUSION

The grand jury's historic function is to stand *between* the lone citizen and the state's monopoly power to deprive a citizen of reputation, property and liberty via a properly lodged charge of criminal conduct. The process leading to this investigating grand jury Report stood that function on its head. If the Report is filed as of public record, presumptively innocent, private citizens will have their reputations defamed, having been accused of serious crimes – of a kind that no multicounty investigating grand jury is authorized to investigate – by a court-approved document, with no meaningful ability to review or contest the evidence underlying the Report's accusation and no ability to correct the contents of the Report itself.

For the reasons stated in this Brief, the Pennsylvania Association of Criminal Defense Lawyers respectfully requests that this Court reverse the lower court's ruling.

grand jury report such as Report 1"). There is no indication from its opinion that the lower court understood this.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 531(b)(3) and 1115(f) of the Pennsylvania Rules of Appellate Procedure, I, Ronald H. Levine, certify that this Brief of *Amicus Curiae* Pennsylvania Association of Criminal Defense Lawyers complies with the applicable word count limit. This certificate is based on the word count of the word processing system used to prepare the brief.

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I further certify that this filing 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.

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