IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 75, 77, 78, 79, 80, 81, 82, 84, 86, 87, 89 WM 2018

In re: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

SUPPLEMENTAL BRIEF FOR RESPONDENT, COMMONWEALTH OF PENNSYLVANIA

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

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INTRODUCTION

This is a major case of first impression involving grand jury procedures and other governmental reporting processes implicating the right to reputation. At the same time, it is one facet of a much larger and longer international story of child sex abuse in the Catholic Church.

In 2002, *The Boston Globe* uncovered decades of abuse and coverup. In 2005, a Philadelphia County Investigating Grand Jury issued a report pursuant to 42 Pa. C.S. § 4552(e), detailing scores of abuse cases and the efforts to conceal them in the Philadelphia Archdiocese. In 2009, an Irish governmental report reached similar conclusions about abuse in that country. In 2012, the government of Australia formed a royal commission, which conducted a nationwide investigation and released a report on institutional responses to child sex abuse. In 2016, a report of the 37th Statewide Investigating Grand Jury of Pennsylvania described hundreds of cases of child sex abuse in the Altoona-Johnstown Diocese. In 2017, Cardinal Pell of Australia, one of the highest officials in the Catholic Church, was charged with criminal offenses related to child sex abuse and now faces trial. In May of this year, every bishop in Chile – 31 – offered to resign over the handling of clergy sex abuse; five of the resignations have so far been accepted. In July of this year, Cardinal McCarrick, the former archbishop of Washington, D.C., became the first cardinal to resign as a result of the sex abuse scandal.

Shortly thereafter, this Court announced its intent "to facilitate the publication – as expeditiously as possible – of as full a final report as may be released consistent with the protection of the petitioner-appellants' fundamental rights secured by the Pennsylvania Constitution." *In re 40th Statewide Investigating Grand Jury*, 2018 WL 3650493 at *1 (Pa., July 27, 2018). Pursuant to this Court's directives, the Interim Redacted Report 1 of the 40th Statewide Investigating Grand Jury was posted as a public record on August 14.

One week later, the leader of the Catholic religion published an unprecedented formal statement, *Letter of His Holiness Pope Francis to the People of God*. The Letter acknowledged the pain of clergy sex abuse victims, which "was long ignored, kept quiet or silenced. But their outcry was more powerful than all the measures meant to silence it." The Pope declared his intent "to prevent such situations from happening, but also to prevent the possibility of their being covered up and perpetuated." He concluded by observing that "[a]n awareness of sin helps us to acknowledge the errors, the crimes and the wounds caused in the past."

Following release of the Interim Redacted Report, the Office of Attorney General set up a telephone hotline to receive information from members of the public about clergy sex abuse. So far there have been over 1,100 calls. Some may concern incidents of abuse or endangering that still fall within the statute of limitations; some

may prove pertinent to matters already addressed in redacted and unredacted portions of the report.

In addition, as many as ten other jurisdictions in the United States have indicated an intent to undertake similar investigations; some are looking into statutory changes to expand grand jury investigation and reporting powers. And the bishop's conference of Germany has just completed a report documenting the abuse of over 3,600 children in that country, systematically covered up for decades.[1]

But the report has also hit home for many at a more personal level. The Carr sisters lived just two doors down from their local church in the Diocese of Pittsburgh. The younger sister was assaulted as a child by the parish priest while doing chores in the church office. Her mother had just died; her older sister was already away at college. She never dreamed that the priest had done exactly the same thing to her sibling eight years earlier, when she too worked in the office. The sisters are now in their 70's. Only after the report was published did they see their assailant's name and learn they were not alone.[2]

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[1] "In German Catholic Churches, Child Sex Abuse Victims Top 3,6000, Study Finds," *The New York Times*, Sept. 12, 2018, https://www.nytimes.com/2018/09/12/world/europe/german-church-sex-abuse-children.html.

[2] "With Release of Grand Jury Report, Mary Robb Jackson and Her Sister Make a Terrible Discovery," *Pittsburgh Post-Gazette*, Aug. 22, 2018, http://www.post-gazette.com/local/city/2018/08/22/mary-robb-jackson-grand-jury-report-victims-catholic-church-diocese-pa-lawrence-oconnell-abuse-cynthia-sisters-pittsburgh/stories/201808210251.

Pennsylvania's grand jury system, under this Court's supervision, has played a vital role in the efforts to bring powerful institutions to account – for the Carrs and for others like them throughout the Commonwealth.

SUMMARY OF ARGUMENT

In July this Court announced a major new precedent under Art. I, § 1, holding that government actors cannot impair the right of reputation without providing due process of law to affected individuals. The Court has directed the parties to this litigation to address the form such process should take in the present context. In doing so, the Commonwealth endeavors follow this Court's guidance to reconcile both individual and public interests, as did this Court in facilitating interim release of the report to the fullest extent possible. Just as the Court emphasized the fundamental right of reputation, it also effectuated the ability of the grand jury to act as a check and balance on concentrations of power that are otherwise resistant to oversight. The Commonwealth's proposals seek to maintain that historic function while providing individuals with a meaningful opportunity to be heard by the jury and by the judge.

Petitioners seem uninclined to accommodate either of these interests. They insist that no process is adequate unless it equals or exceeds the unreachable standard of a criminal trial. They contend that a grand jury report on the perpetrators or enablers of long-hidden child sex abuse constitutes both criminal punishment and a *de facto* statute of limitations violation. They therefore seek to skip past any procedure for resolving their objections to the report, and instead to enshrine the current redactions in stone.

As a result, this is not the case it appeared to be. Petitioners' arguments for avoiding pre-deprivation process were available in the prior round of briefing; in fact they were available from the start of this litigation. At the time, they said they only wanted a way to make their case; only now do they say there *is* no way. If that is so, there is nothing to distinguish this case from any future report on institutional sex abuse. They would all be unconstitutional.

Petitioners' approach is especially unfortunate in the face of this Court's holding that no governmental actor may impair the right to reputation without due process. Grand juries are only one of many reporting processes created by the government to hold powerful institutions accountable to the governed. Pre-deprivation process requirements will apply to all of them. It is important that the balance be struck well.

ARGUMENT

I. This Court can provide procedures that will properly protect reputational rights in this case and in future cases.

When this case was before the Court in July, the Commonwealth defended existing grand jury practice and the constitutionality of the Grand Jury Act.[3] This Court rejected the Commonwealth's position and ordered further briefing and argument to consider new procedures to protect the due process rights of individuals named in grand jury reports. At the same time, the Court made clear that it will hold in trust the public's right to identify and address abuses in its most important institutions. The Commonwealth believes that procedures are available, both for this case and for subsequent grand jury matters, to balance these dual interests.

a. The grand jury should be recalled or, in the alternative, the matter should be rolled over to a new grand jury to resolve petitioners' claims.

Petitioners argue that at this point there is no process that would be enough process. In doing so, they assume that the prior grand jury can no longer act. That assumption appears to be shared by a footnote in this Court's July 27 opinion.[4] More extensive discussion in the opinion, however, points in a different direction. There

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[3] *See* 71 P.S. § 732-204((a) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction").

[4] *In re 40th Statewide Investigating Grand Jury*, 2018 WL 3650493 at *9 n.15 (Pa., July 27, 2018) (opportunity to appear before grand jury foreclosed since tenure expired).

the Court rejected the position that the Grand Jury Act leaves no room for additional pre-deprivation processes not specifically addressed in the Act. "[W]e observe that the statute is subordinate to the Constitution," and "the General Assembly does not intend to violate the Constitution." *In re 40th Statewide Investigating Grand Jury*, 2018 WL 3650493 at *13 (Pa., July 27, 2018). "Thus, the question becomes whether the statute may be interpreted as affording sufficient process, consistent with its design, or at least as not foreclosing a remedial pre-deprivation process." *Id.*

Such an interpretation is appropriate in this instance in order to recall the grand jurors for this one remedial task, which was not envisioned by the Grand Jury Act. The statute currently provides that the investigating grand jury term may not exceed 24 months. 42 Pa. C.S. § 4546(b). Here, however, there is no need to extend the grand jury's "term" – *i.e.*, its general authority to conduct new investigations or issue new presentments or reports. Rather, the grand jury would be called back only for the limited, ancillary purpose of addressing a confined set of factual disputes in the one-time circumstances of this case. The grand jurors remain under oath of secrecy in perpetuity, and thus stand in the same position as when they last met. Because the Act does not specifically address this unique situation, this Court has the ability to interpret the statute to afford the necessary process.

In the alternative, the matter of petitioners' objections could simply be rolled over to a new grand jury for resolution. This procedure is common in grand jury

practice when an existing grand jury has not completed an investigation. While a new grand jury would have to be brought up to speed on the details of the petitioners' cases, that is not a complicated process, and there is no legal impediment to such an approach.

In future cases, neither recall nor rollover will be necessary. Once new standards are established, grand juries and supervising judges will know precisely how to proceed.

b. Report subjects should be offered the chance to testify before the grand jury.

Either course would make available a forum to permit what the Court has recognized as the "ideal" solution: the opportunity for identified individuals to appear before the grand jury. July opinion at *15. These witnesses would have the same rights as other witnesses under the Act. *See* 42 Pa. C.S. § 4549(c). As the Court correctly noted, July opinion at *12, the Commonwealth should wish to present such testimony. On the other hand, experience counsels that many grand jury subjects may not be willing to go under oath, subject to perjury provisions. But that will be their choice to make.

Interestingly, petitioners' position here is that they do not want the choice. They contend that the conduct in question is too old, and therefore that it would be unfair to hold further proceedings before *any* grand jury. In effect, they seek a statute

of limitations not just for prosecution, but even for governmental inquiries such as grand jury reports.

But statutes of limitation are a matter of grace, not of right. The grand jury's report found existing statutes of limitation troubling enough even in their traditional application to criminal charges and civil actions. Under petitioners' rationale, virtually *no one* could lawfully have been investigated by this grand jury or mentioned in this report; it would not exist. Nor would any other report about clergy sex abuse – or about any misconduct successfully kept secret for decades – ever see the light of day. The cover-up would always work.

In similar fashion, petitioners oppose additional grand jury proceedings on the ground that they would somehow be tainted because there has been too much publicity. The Commonwealth will address petitioners' aspersions more fully in Argument II. For present purposes it is enough to observe that the courts of this Commonwealth are competent to function in the face of media attention. In recent years alone the courts have successfully handled legal actions involving both a sitting attorney general and a world-famous entertainer – and those were petit jury trials, conducted in the full public glare of hour-by-hour press coverage. Any pre-deprivation proceedings here, in contrast, will occur entirely in secret, like all grand jury matters, and will be subject to additional layers of process such as those suggested below. In the meantime, petitioners' anonymity will continue. They are

not entitled, however, to what they really seem to seek: a permanent injunction of any inquiry into their roles in Pennsylvania's clergy sex abuse scandal.

c. The grand jury should resubmit the report to the supervising judge, with specific citation to relevant evidence.

On remand, the grand jury should hear from those petitioners, if any, who choose to testify, together with additional evidence as the jurors deem appropriate. That evidence might include, for example, other individuals who were identified in church records concerning petitioners, or any new witnesses who may have come forward since release of the report. At that point, the jury should rewrite those portions of the report that may be affected by the new evidence.

The Commonwealth proposes that any references to a petitioner in the resubmitted report should be supported by citation to all specific exhibits or transcript pages pertinent to that petitioner. Such citation would greatly facilitate the discrete review in which the supervising judge[5] should engage, as discussed in more detail in subsection E below. This is a procedure that could also be adopted for future grand jury reports.

d. The judge should provide relevant portions of the report to those identified, and should hear any objections and argument from them.

[5] The term is used in the generic sense, not in reference to any specific judge. It is this Court that designates supervising judges for statewide investigating grand juries, and that, after due consideration, selected the judge who served in the proceedings below. The Court, therefore, is free to assign the appropriate judge to preside over any further proceedings here on remand.

If the resubmitted report still includes critical references to any petitioners, the appropriate sections should be distributed to them for comment. Similar distributions were performed in the past under the response provision of the statute, 42 Pa. C.S. § 4552(e). Cognizant of this Court's conclusion that such responses are inadequate by themselves to protect the right of reputation, July opinion at *12, the Commonwealth proposes a pre-publication process to challenge the report. Petitioners (and in future cases other subjects of grand jury reports) could elect to file written submissions and appear before the supervising judge to argue against the grand jury's judgment that they should be included in the report.

Once again, petitioners insist that such expanded process is still not sufficient. Relying on this Court's opinion in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), petitioners claim that reference to any part they played in the clergy sex abuse scandal subjects them to "lifetime stigma," and thus amounts to "punishment" in the constitutional sense. On this foundation, they argue that they may not be named unless first convicted at the equivalent of a full-blown, criminal trial – with all the accoutrements including rights to confrontation and compulsory process.

But petitioners' premise is incorrect and their characterization of *Muniz* borders on caricature. If *Muniz* were simply about "stigma," the opinion might have been only four pages long instead of more than 40. In *Muniz* this Court carefully considered seven different factors to determine whether SORNA's registration

regime qualified as punishment. The Court noted that SORNA requires a minimum of 15 years of in-person reporting, at which the registrant must provide, *inter alia*, a photograph, physical address, e-mail addresses, passport information, employment information, driver's license, fingerprints, and DNA. Much of this information, not just name, is posted on a public website, through which registrants' moves can be tracked. Violation of the requirements is subject to incarceration. *Id.* at 1206-08. Absent these aggravating factors, registration provisions do not constitute criminal punishment, but are instead "a remedial civil scheme." *Id.* at 1209. Thus *Muniz* distinguished SORNA from prior statutes that are not punitive even though they too publicly identify offenders.

Petitioners' claim accordingly has no basis in law – but it would have alarming effect on efforts to investigate and uncover institutional sex abuse. Absent a pre-existing criminal conviction, it would be beyond the power of any government entity to report on perpetrators or enablers of sexual abuse, because doing so would be stigmatizing. The inherently serious nature of the misconduct would create its own immunity.

That is how we arrived at the point where this report became necessary. For decades, no one was willing to inquire into or discuss the problem. It would have been too scandalous.

e. After full consideration, the judge should determine discretely whether criticism of individual objectors is supported by the grand jury record.

In its July opinion, at *12, the Court rejected an interpretation of 42 Pa. C.S. § 4552(b) (examination of record) that would allow review on a "report-wide basis." Accordingly, criticism of any individual should be reviewed on its own merit, and must be supported by the grand jury record. The procedure proposed here will permit the supervising judge to focus on each individual objector in relation to the pertinent evidence presented.[6]

As in our previous briefing, the Commonwealth submits that the court's function in this regard should be in the nature of judicial review rather than *de novo* fact-finding. The supervising judge would be in no position to make her own credibility determinations about testimony she has not herself heard. To do so she would have to re-call the relevant witnesses to testify all over again, in which case there would have been little point in having them testify to begin with before the grand jurors. While in this case only a small percentage of those named in the report are currently objecting, that will not be true in future cases; once pre-deprivation procedures are established, there may well be investigations in which most or all of those named may wish to invoke them. That will be their right, of course, but it will

[6] Just as the judge must conduct individualized review, so too does the grand jury make individualized findings, as this case illustrates. Church records identified many more priests than were ultimately encompassed in the report. In over a hundred instances, the jury determined that the available evidence did not warrant inclusion. Petitioners wish to portray the grand jury as indiscriminate and uncareful; their work product indicates otherwise.

mean that the supervising judge would make most or all of the findings contained in the report. Whatever the value or purpose of such a report might be, it could not accurately be called a *grand jury* report.

That leaves the question of the standard by which the supervising judge should conduct such review. The Commonwealth recognizes the concerns expressed by the Court on this point in its July opinion, at *12-*13. The Commonwealth suggests, however, that circumstances have changed as a result of that opinion. At the time, neither the statute nor rules of court laid out a detailed process for the protection of reputational rights. Now the Court has made clear that such a framework will be created.

The standard of review specified in the Grand Jury Act – preponderance of the evidence – can perform effectively as one part of that larger procedural structure. Going forward, a subject of a grand jury report would have the opportunity to testify before the grand jury, to lodge and argue pre-publication objections with the supervising judge, to receive individualized review of any criticism specific to him, and (as discussed in subsection G below), to attach a public response to the report when it is filed. Thereafter the appellate review process, together with this Court's administrative supervision of lower court judges, will provide further guidance concerning the manner in which the standard should be applied. Under all these

circumstances, the legislatively-proscribed, well-understood preponderance standard should be suitable to the task.

In their previous briefing, petitioners agreed that preponderance was the proper standard; that has quietly gone by the wayside. Now they contend that a much more restrictive review is required, because of the possibility of error. Indeed, they say, error is *certain*: they say they have already found them spread throughout the report. Supp. Common Brief at 8-9. But the "error" they identify amounts to an errata sheet of typos in a handful of dates.

Records indicate, for example, that Father Ruffenach's victim confronted him in the 1970's, not the 1980's (report at 366). Similarly, Father Fisher was ordained in 1995, not 1977 (report at 536); Father Haney was born in 1932, not 1952 (report at 541).

Father Hoehl's victim was 39 years old when he reported the abuse, not 33 (report at 663). The age of Father Flanagan's victim was mistakenly transposed from 43 to 34 (report at 838). Father Dzurko's victim reported at age 58, not 48 (report at 831). The victim of Father Griffin came forward not at age 42 but at 52 (report at 844).

This is the totality of the "error" petitioners have discovered – in a report of almost 900 pages and, by very conservative estimate, over 175,000 words. In July they warned that the report was replete with false accusations and "gross factual

errors" that would become clear once they could see the full document. Now they suggest they still haven't had enough time. But each of the petitioners received a full copy of the report on August 3rd, and the entire world has had it since August 14th. Petitioners are represented by a sophisticated legal team of over a dozen attorneys from six different law firms, including two of the state's largest. They have been going through the report, obviously with a fine-toothed comb, for at least a full month if not longer.[7] The seven numerical typos they found do not support arguments for a higher standard.

f. If supported in all respects, the report should be published together with any responses; if not, the report should be returned to the grand jury.

Once the appropriate review is completed, the supervising judge can decide if the report will be released. If the court concludes that the record supports the criticism of each and every identified individual, the report should be approved. If there is any individual for whom criticism is not supported by the record, the report should be sent back.

In the event the court approves publication, criticized individuals should have the opportunity to file a public response, in addition to the other procedures described above. The Court has correctly noted that the Grand Jury Act provides

[7] Each of the dioceses had already received – in early June – every portion of the report addressing that diocese and any of its priests. It appears that some or all of the dioceses and petitioners may have formed a joint defense agreement, parties to which may have shared both legal resources and portions of the report. *See In re Fortieth Statewide Investigating Grand Jury*, 2018 WL 3977858 at *10 (Pa., August 21, 2018).

discretion to the supervising judge on this point. July opinion at *4, *9. In the context of petitioners' as-applied challenge to the statute in this case, however, the point is moot: the supervising judge has already granted that opportunity to all those named in the report. As for future cases, the exercise of discretion requires that discretion not be abused. This Court can no doubt make clear its expectations in that regard. As noted in the Commonwealth's July briefing, proper exercise of discretion will presumably require approval of responses in all but the rarest cases, which will be defined by this Court. [8]

g. The grand jury may rewrite the report in conformance with the court's conclusions or, in future cases, may withdraw it.

If the supervising judge concludes he must return the report to the grand jury, he should of course advise it of the bases for his conclusion. The grand jury can then

[8] In this case, although responses were publicly filed from every named individual or entity who submitted one, petitioners nonetheless insist that the process was inadequate. Their complaint is with the manner in which the Office of Attorney General posted copies of these responses on its website. Petitioners misapprehend the statute's response provision. The filing of responses under § 4552(e) is a court function, not a prosecution function; the report and responses become part of the public record.

Nevertheless the Office of Attorney General did post copies of the responses on its own website, along with and at the same time as a copy of the report. Petitioners object that the report and responses were posted as two separate computer files, with separate links, rather than as one file with one link. The objection is baseless. The responses were posted as a separate file simply because the Commonwealth received only paper copies of those documents; the Office then scanned them into electronic format page by page, as images, not as text. By doing so, as it happens, the website may well have made the responses easier to find than if they had simply been tacked on at the end of the report. Had we done otherwise, petitioners might now be complaining that we "tampered" with the responses in order to "bury" them at the back.

consider whether the problems can be fixed, whether the relevant sections should be deleted, or, in future cases, whether the report as a whole should be withdrawn.

The proposed procedure is a way of implementing this Court's holding on the remedy of excision, July opinion at *14. In the end, the supervising judge will control release: no portions of a report will be published if they include criticism that the court has determined to be unsupported by the record. Interaction with the grand jury during this process, however, provides significant advantages. The jurors will be able to see and, hopefully, understand the court's concerns, rather than learning only after the fact how their work product has been altered. And, especially in cases where there are many objectors, or objections from key subjects of the report, future juries may prefer to amend reports in ways that may not always be anticipated by the supervising judge, while still implementing any excisions. In this case and in cases to come, involvement of the grand jury in the remedial pre-deprivation process will enhance both the legitimacy and the effectiveness of the outcome.[9]

These procedures, taken together, can protect reputational interests while preserving the historic watchdog function of the citizen grand jury. Yet petitioners, in another apparent effort to avoid the process they said they wanted, suggest that

[9] For similar reasons, the supervising judge should share with the grand jury responses from those objectors who choose to submit them before the report becomes final. If enhanced process is intended to improve the reliability of the reporting process, the jury itself should take part in that process to the extent possible.

Pennsylvania should follow "a critical mass" of other states by doing away with such reports entirely.

There is no "critical mass." Many of the states petitioner lists as "prohibiting this practice entirely" actually do exactly the opposite. California, for example, maintains perhaps the most robust grand jury investigation/reporting system in the nation. The state's supreme court has observed that, "[i]n California, unlike some other American jurisdictions, the grand jury's role as a vigilant 'watchdog' over the operations of a variety of local government activities has a long and well-respected heritage.... [T]he debate which reports provoke can lead only to a better understanding of public governmental problems." *People v. Superior Court (1973 Grand Jury)*, 531 P.2d 761, 764-65 (Cal. 1975).

In service of that function, noted the court, "[i]n California it is settled that the grand jury *may* criticize individuals in a watchdog report and that a superior court has no authority ... to suppress a report simply because it considers it ill-advised, insufficiently documented, or even libelous." *McClatchy Newspapers v. Superior Court*, 751 P.2d 1329, 1337 (Cal. 1988) (emphasis in original).

Florida, another state petitioners list as categorically banning critical reports, is in fact much like California. "Our grand juries have been given the right to express the view of the citizenry with respect to public bodies and officials in terms of a 'presentment' [*i.e.*, report], describing misconduct, errors, and incidences," observed

the Florida Supreme Court. "It is inevitable under these circumstances that public officials will be subject to criticism.... Obviously, the legislature has elected not to eliminate the potential for [such] citizen criticism." *Miami Herald Pub. Co. v Marko*, 352 So. 2d 518, 522 (Fla. 1977).[10]

While Florida provides a pre-publication process to challenge criticism as "unlawful" or "improper," "comments in a grand jury report are 'lawful' if they are made by an otherwise legally constituted grand jury on a matter which the grand jury is legally empowered to investigate.... [C]omments in a grand jury report are 'proper' if they have a factual foundation.... [W]e do not think 'the factual foundation' requirement, as stated above, obliges the circuit court to review the evidence presented to the grand jury.... It is sufficient if the grand jury's objected-to comments have a 'factual foundation' *in the report itself*." *Moore v. 1986 Grand Jury Report on Public Housing*, 532 So. 2d 1103, 1105-06 (Fla. Dist. Ct. App. 1988) (emphasis in original).

Georgia is yet another state that supposedly bans critical reports but in fact permits them after pre-publication process. *See, e.g., Thompson v. Macon-Bibb County Hospital Authority*, 273 S.E.2d 19, 21 (Ga. 1980) (approving of statutory

[10] As the court further explained, "[a] society governed by representative officials concomitantly requires citizen review of public action. The grand jury has proven a most effective and reliable mechanism for that purpose. Lay participation in periodic review of the performance of public officials and institutions also tends to foster understanding and respect for the government which has been created by and for the people.... Implicit in the power of the grand jury to investigate and expose official misconduct is the right of the people to be informed of its findings." *Id.* at 523.

scheme authorizing grand jury reports on official misconduct where, *inter alia*, official under criticism has opportunity to testify before grand jury and to file response appended to report); *In re July-August, 2003 DeKalb County Grand Jury*, 595 S.E.2d 674, 676 (Ga. Ct. App. 2004) (official's due process rights under *Thompson* were satisfied, distinguishing the 1961 case on which petitioners rely). [11]

Wyoming is a further example of a state that supposedly prohibits grand jury reports but in reality does not. Petitioners cite a county grand jury statute but ignore the statewide grand jury statute, which explicitly authorizes investigative reports of organized crime at the request of the state attorney general. Wyo. Stat. Ann. § 7-5-308.[12]

In addition to states such as these that directly contradict petitioners' "critical mass" claim, petitioners also list numerous jurisdictions that take no position on the utility of grand jury reports, and are therefore irrelevant. The cases cited from states such as Indiana, Iowa, Missouri, and Nebraska hold simply that, where grand juries

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[11] *See also* Conn. Gen Stat. Ann., § 54-47g, which petitioners cite for the proposition that Connecticut does not permit critical grand jury reports. In reality, the statute does not even address investigative grand juries in the sense at issue in this case: the so-called investigatory grand jury there is actually a judge, or a panel of three judges, not lay citizens. § 54-47b(3). Moreover, if such a panel makes any findings, they must by statutory presumption be made public; the statute shifts the burden of maintaining secrecy to the party seeking non-disclosure. Information involving a person not charged is disclosable unless, *inter alia*, it is "uncorroborated." § 54-47g(c); *see In re Investigatory Grand Jury Number 2007-04*, 977 A.2d 621, 624-25, 628 (Conn. 2009).

[12] *See also, e.g.,* Va. Code Ann. §§ 19.2-191, 213 (grand jury authorized to investigate and report on any condition that involves or tends to promote criminal activity, either in the community or by governmental authority; report may be open to public inspection on order of court).

are a creature of statute, the courts will not infer a power to issue investigative reports unless the statute specifies that power. That is plainly not the situation here.

Aside from their "prohibited entirely" cases, petitioners also acknowledge some other jurisdictions that – as Pennsylvania now will – permit grand jury reports if pre-publication process is provided. Significantly, however, these jurisdictions offer significantly *less* than the procedures that petitioners insist would be a constitutional minimum. None of them, for example, permits a named individual to cross-examine other grand jury witnesses, or provides for a *de novo* evidentiary hearing before the supervising judge, or requires proof beyond a reasonable doubt. That is hardly a surprising result. Injection of trial procedures such as cross-examination into the grand jury process would blow up the secrecy that is the essence of the system. *See, e.g., In re Fortieth Statewide Investigating Grand Jury*, 2018 WL 3977858 at *19, *24 (Pa., August 21, 2018) (Wecht, J., concurring and dissenting).

Petitioners, therefore, have greatly overstated the state of the law; "critical mass" appears to be something of an elegant term for cherry-picking. Indeed in the wake of the report in this case, states with no or more limited reporting provisions may be changing their grand jury laws in the opposite direction.[13] But by any name,

[13] Such a progression has already occurred in Colorado, one of the other states that petitioners inaccurately present as supporting their position. As the Colorado Supreme Court has explained, "[t]he repealed statute called for the trial court to make findings of fact to conclude that information

the choices made by other states should carry little weight here. Pennsylvania has made its own choices, and they are in tension in this case. Petitioners rely on the constitutional right to reputation, which, as this Court noted in *Muniz*, 164 A.3d at 1222-23, is protected more strongly in this Commonwealth than in many other jurisdictions. But Pennsylvania has also championed a vigorous grand jury reporting system, which enlists citizens as guardians – as spotters – where other institutions may fail.[14]

That is what happened here. The grand jury saw something: something that, in the past, other agencies of government didn't want to look at, or talk about. In theory, someone else might have exposed the abuse and the coverup; but no one did. That is why the Commonwealth believes the grand jury reporting system must be preserved: it gives people a needed check on the power of entrenched institutions. The Commonwealth suggests that the procedures proposed here will sustain

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in the grand jury's report was supported by a preponderance of the evidence. The [new] statute ... removes any inquiry into sufficiency of the evidence from the trial court." *In re 2000-2001 Dist. Grand Jury*, 22 P.3d 922, 928 (Colo. 2001). Reviewing legislative history, the court further observed that a prior version of the law "allowed the trial court to expunge any portion of the record not supported by a preponderance of the evidence ... and would have caused the trial court to substitute its judgment for that of the grand jury." The legislature chose to abandon that approach. Current law "allow[s] the court to review only the report drafted by the grand jury (not the record of the proceedings)." The court has "no discretion to redact." *Id.* at 926-27.

[14] Like the right of reputation, measures to protect safety and security also derive ultimately from the Pennsylvania Constitution's Declaration of Rights. Article I, section 2 provides: "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."

legitimate reputational interests without hamstringing the process that produced this report.

II. This Court should reject petitioners' efforts to bypass the process they pressed for.

The clergy-petitioners have maintained that their goal was a forum in which to challenge the grand jury's conclusions. Now, it appears, that is not the case; the relief they desire is not more process, but *no* more. They contend that no grand jury should be permitted to consider their still-secret claims of innocence, and that instead this Court's temporary redactions of the report should just be made permanent. As a basis for this result, they complain about various public statements by the Attorney General concerning the very public debate over this report and clergy sex abuse generally. Petitioners' objections to these statements, however, do not translate into a right to circumvent the process they themselves put in motion. The remaining portions of the report should be reviewed and, if accepted under the procedures described above, released.

a. The Pope is not a party here.

Petitioners first complain that the Attorney General issued an open letter addressed to Pope Francis, requesting that he direct church leaders not to cover up allegations of abuse by victims. Petitioners assert this was improper because it

constituted contact with a represented party under Pennsylvania Rule of Professional Conduct 4.2. The claim is odd on several levels.

Preliminarily, an open letter is not a personal contact; it is, by definition, a public statement. The church's efforts to effectively silence victims of abuse existed long before this report and go well beyond the litigation over its release. The Attorney General, an elected state official, issued a policy statement calling upon a world religious leader to exercise his moral authority. Whether such a statement could ever constitute a "communication" for purposes of Rule 4.2 is, at the very least, unclear.

More importantly, Pope Francis is not a represented party here. He is not a party at all. Petitioners' counsel do not claim to have been retained by the Pope, nor is the Catholic religion a single, civilly incorporated international legal entity. Even the "church leaders" referenced in the letter are not parties here. At most the phrase encompasses bishops of Pennsylvania dioceses; but all of the six bishops of the dioceses reviewed in this report have called for its release and have publicly distanced themselves from petitioners' efforts.

In any case, petitioners cannot explain why the remedy for a supposed Rule 4.2 violation should be the immediate excision of all reference to their roles in the Pennsylvania diocese clergy sex abuse scandal. Petitioners said all they wanted was a process to present their side of the story; now that it might happen, they don't. The

grand jury should consider their claims, the supervising judge should review them, and the matter should be resolved.

b. Petitioners' legal arguments, if accepted, would indeed require suppression of reports, like this one, on institutional sex abuse.

Petitioners next complain that the Attorney General has criticized efforts to delay release of the report, that they warned him not to, and that he failed to comply. They declare that they have only sought to assert their constitutional rights, and that they "have never sought to … suppress the Report," Supp. Common Brief at 45, as if these must be mutually exclusive efforts. Presumably, when petitioners assert that they have not sought to suppress the report, they mean that they only seek to suppress the parts about them, or that they have only sought to do so pending completion of pre-publication process. But neither claim would be accurate.

First, petitioners filed numerous motions to stay release of the *entire* document. It was the media intervenors – not petitioners – who suggested that the Court allow release of a redacted report. The joint petitioner response to the intervention motion *opposed* this proposal, as did the Commonwealth. When this Court adopted the redaction approach, it cautioned that "[t]he petitioner-appellants, on the other hand, must appreciate that, in addition to safeguarding their rights, it is also this Court's present aim to make the bulk of Report 1 available to the public as soon as possible." July opinion at *16. Petitioners cannot claim credit for this Court's resolution of the matter.

Nor, as is now apparent, can petitioners accurately state that they seek only a *temporary* stay; they now acknowledge that temporary should become permanent. Their primary arguments for that result – arguments that petitioners withheld from their July briefing – indicate that it was inevitable from the beginning. Petitioners contend that no process can be adequate, a) because the conduct in question is decades old, and b) because any report about that conduct would be "punitive." The Commonwealth has addressed the merits of these claims above. What is significant for present purposes is that neither claim was any less applicable at the beginning of this litigation, in May, than it is today. The conduct in question was still decades old, and a report identifying abusers would still have been, in petitioners' view, punitive. No amount of process could have changed that, then or now. Given their positions, petitioners could never have settled for a temporary stay; only permanent suppression of the report would provide redress.

And not just this report: petitioners' arguments would prevent *any* report about institutional sex abuse. If the abuse has long been concealed, then by definition the conduct is old, and a report would violate what petitioners themselves analogize to a statute of limitations for grand jury investigations. Even if the conduct is not old, moreover, it is still sex abuse, and reports about sex abuse are stigmatizing; therefore, according to petitioners, they constitute impermissible "punishment."

Petitioners never acknowledge the broader implications of these contentions. They instead declare at the start of their current briefing that they wish to "giv[e] expression" to the grand jurors' conclusions, Common Brief at 4, just as they declared at the end of their July briefing that "[t]o be sure, the abuse the Report alleges, if established, must be addressed. Those responsible must be held to account. And the tragic victims must be given their due." July Common Brief at 56. But their own legal positions, if adopted, would prevent that from ever happening, in this or in any other report.

For purposes of public consumption, of course, petitioners are free to say whatever they wish. But self-characterizations of their overall objectives in this litigation are not binding on other parties, and it is unclear why the Commonwealth would be obliged to agree with them, any more than it is required to agree with their repeated assertions that they are "innocent."[15] Despite their fine words to the contrary, petitioners' legal positions, if they prevailed, would indeed result in suppression of investigative reports on institutional sex abuse.

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[15] In their July briefing, petitioners went so far as to declare that "*all agree* Petitioners have committed no crime," that they were merely "innocent bystanders" to the abuse and cover-up that continued for years, and that they "have proved" all this to be true. On the basis of these announcements, petitioners then charged that the Attorney General "knowingly" lied, simply by stating his view that the report is accurate. July Common Brief at 50-51. But the Commonwealth does not agree with petitioners' self-serving assertions, and it is unclear why it would be expected to do so. Under this Court's orders, the Commonwealth cannot publicly explain the factual basis of its disagreement, any more than petitioners' have publicly revealed the factual basis for their claims of "innocence." Now they insist those claims should never be resolved at all.

In any event, the petitioners never really explain why public comments about their litigation goals would make it impossible to implement any form of pre-publication process for protection of reputational interests. Petitioners are still anonymous; their reputations have not been affected because the general public does not know who they are. The members of the 40th grand jury know; but they knew about petitioners, and the others named in the report, long before the current litigation even began. That knowledge about petitioners is based on the information in the grand jury record. If the matter is remanded to a new grand jury, they too will learn about petitioners from the evidence presented. If petitioners wish, they can supplement that evidence by appearing before the grand jurors themselves. The supervising judge will then review the matter, on an individual basis. There is no legitimate reason not to go forward with that process.

c. The "leak" allegation is disingenuous.

Finally, petitioners contend that they are entitled to excision because the Commonwealth purportedly disseminated information about their identities. While petitioners use the colloquial term "leak," their meaning is perfectly clear: a "leak" is the "intentional disclosure of secret information."[16] The accusation is spurious. Nor does it have any place here. This Court has already appointed a special master and established a process for maintaining the integrity of the redactions. Petitioners

[16] *See, e.g., Oxford English Dictionary Online*, https://en.oxforddictionaries.com/definition/leak.

reveal in their brief that they in fact invoked that process. Obviously, they were not content to allow it to operate.

An apparent reason is not difficult to discern. Petitioners elected to make the accusation public knowing it would be widely transmitted by the press – and knowing that the Commonwealth would be unable to rebut it factually due to grand jury secrecy. Indeed, after filing their brief, petitioners dashed to e-mail it to news outlets around the state, before the brief could even be publicly posted on this Court's website. Sure enough, accusations about the "leak" leaped to the top of news stories across the Commonwealth.

The Commonwealth of course cannot respond to the accusation in adequate detail here, and so may say only very little without jeopardizing secrecy concerns. Petitioners refer to two separate incidents. The first involves an internal document. Petitioners' allegation would suggest that only the Commonwealth had access to that document, but that is not correct: in fact it was shared with counsel for all the petitioners at their various offices around the state. The Commonwealth did not leak the document, but of course cannot vouch for what others with whom it was shared may have done with it. The Commonwealth will be filing a sealed affidavit laying out the circumstances, including details on all who were given access to the document.

The second incident concerns a technological glitch that was brought to the Commonwealth's attention by a member of petitioners' counsel's team. The problem was corrected at once. Petitioners do not identify, and the Commonwealth cannot locate, *any* information that was reported by *any* news source as a result of that incident. If the Commonwealth, as petitioners charge, was intentionally trying to divulge their identities to the public, it didn't do a very good job of it. The Commonwealth will be filing a sealed affidavit laying out the circumstances. Because the brief is a public filing, no further response can be made here.[17]

In any event, it is unclear why any of this entitles petitioners to immediate excision of their portions of the report, without the bother of going through the process they themselves insisted on. Petitioners' many complaints about press coverage suggest an effort to shoot the messenger, while portraying themselves as underdogs fighting an uphill media battle against the mighty state. But the story of clergy sex abuse is far bigger than any of the parties to this litigation. Its central

[17] This is not the first time that petitioners have used briefs to lodge factual allegations knowing that the Commonwealth, due to grand jury secrecy, would be unable to answer publicly. Petitioners' July briefing accused the Commonwealth of packing the report full of "gross factual errors," "unsupported conclusions," "misleading inferences," and "unreliable sources" – and that was just one page of the brief. July Common Brief at 19. Similar accusations were scattered throughout. As now, the brief was immediately sent out to the news media, and the accusations made headlines. The claims were adopted by church lobbyists to spread through the hallways of Harrisburg. Because the report was not yet public, and any specific rebuttal would have required sealed information, the Commonwealth was unable to offer a meaningful response. Once the Interim Redacted Report was released under this Court's auspices, however, the predicted gush of "gross factual errors," *etc.*, failed to materialize.

subject is neither the petitioners nor this Office, but the church. And if the church is presently trying to weather a storm, it is not because the Commonwealth somehow hypnotized reporters, editors, and editorialists across the country, from California to New England, into writing things they did not actually believe. It is because this report resonated with victims, with families, with policy-makers. It served the public.

III. This Court should take account of other forms of governmental reports bearing on reputational interests; grand jury reports are just one example.

In its July 27 opinion, this Court emphasized that reputational interests represent a fundamental right. As the Court noted, "[t]hat right cannot be impaired by governmental actors – or those operating under governmental authority – absent the affordance of due process of law to affected individuals." Opinion of July 27 at 28. The relevant provision, Pa. Const. art. I, § 1, makes no reference to grand juries, but instead provides a more general protection against any governmental actions that may affect reputational interests by criticizing individuals. Constitutionally mandated changes to grand jury process, therefore, will necessarily apply to all government actors. In devising remedial procedures, the Court may wish to consider other governmental reporting functions that implicate reputation.

Over time, the Commonwealth of Pennsylvania has created a variety of mechanisms, beyond the investigating grand jury, by which government officials

inquire into matters of concern and issue public findings. These reporting functions exist in all three branches of our government.

Executive branch

Under Pennsylvania law, a number of public offices exist specifically for the purpose of investigating and reporting on conduct, and potential wrongdoing, by individuals. These include the following:

Auditor General: The Auditor General is tasked under 72 P.S. § 401 *et seq.* with the duty to examine the records of any person or entity receiving state funds. Several months ago the Auditor General released a widely publicized 115-page report on the Philadelphia Parking Authority. The Report concluded that the PPA's former executive director "took advantage" of his position "for his personal benefit," to manipulate his compensation and engage in sexual harassment. The Report charged that the director's misconduct was the result of repeated failures by the board of directors to carry out its oversight functions.[18]

In releasing the PPA Report, the Auditor General commented that the director was an "unchecked tyrant" who should have been "fired ... on the spot," and that the board operated as an "absentee landlord." The Report led to calls for the

[18] Performance Audit Report, Philadelphia Parking Authority, Employment Policies and Procedures, December 2017, Commonwealth of Pennsylvania Department of the Auditor General, at 1-5.

resignation of the board chair, and of the entire six-member board.[19] While the Report did not name the executive director or the board members, they were all readily identifiable.

Inspector General. The State Inspector General exercises his authority to investigate and report on misconduct and abuses in any executive agency. 71 P.S. § 211 *et seq.* Last year the Inspector General issued a report on exam cheating by dozens of cadets at the Pennsylvania State Police academy. The Report concluded that, in many cases, the academy's instructors were responsible for the cheating, by giving cadets the test answers in advance.[20] The Report was the subject of extensive news coverage across the state. [21] Following release of the Report, some of the cadets alleged that they had done nothing wrong and were unfairly accused.[22]

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[19] *See, e.g., "Audit: PPA Allowed 'Unchecked Tyrant' Fenerty to Sexually Harass Staff,"* Daniel Craig, PhillyVoice.com, December 7, 2017; *"Pa. Auditor: Poor PPA Management Cost Philly Schools $78 Million,"* Claire Sasko, Philadelphia Magazine, Dec. 7, 2017.

[20] Investigative Report: Academic Cheating Within the Pennsylvania State Police 144th Cadet Class, Commonwealth of Pennsylvania Office of Inspector General, February 2, 2017.

[21] *See, e.g., "Report: Widespread Cadet Cheating, Instructor Misconduct at Pennsylvania State Police Academy,"* CBSPhilly.com, Feb. 3, 2017; *"Report: Pennsylvania State Police Academy Fostered Cheating,"* Steve Esack, Allentown Morning Call, Feb. 3, 2017; *"Investigation Finds Widespread Cheating at State Police Academy,"* Karen Langley, Pittsburgh Post-Gazette, Feb 3, 2017

[22] *"Did They Actually Cheat? New Questions About PSP Academy Scandal,"* ABC27.com, Oct. 2, 2017.

Inspector General reports are also common at the federal level. In 2016, for example, the Inspector General of the United States Department of State released a report that sharply criticized a former secretary of state and her staff for systemic violation of security protocols. Office of the

Coroners. The office of coroner long predates other investigative positions discussed here, but it remains in active use in 64 of Pennsylvania's 67 counties. Coroners are authorized by statute to determine whether a death was caused by criminal act or neglect. 16 P.S. § 1237. The coroner may in his discretion empanel a jury to assist in the investigation. 16 P.S. § 1245.1. The coroner's report may, or may not, lead to homicide charges; or it may be critical of other law enforcement authorities for their conduct in the case. As this Court has made clear, however, the conclusions of a coroner's inquest, like those of other reports discussed here, "are merely advisory to the public authorities." The inquest "is only a preliminary investigation and not a trial on the merits. Its finding is binding on no one." *Commonwealth ex rel. Czako v. Maroney*, 194 A.2d 867, 868 (Pa. 1963).

Legislative branch

The General Assembly has formed a variety of committees that hold hearings, and may issue reports, on matters of legislative concern. But the principal legislative

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Secretary: Evaluation of Email Records Management and Cybersecurity Requirements, Office of Inspector General, U.S. Department of State, May 2016. The Report's conclusions fueled a key, possibly decisive issue in that year's presidential election.

And in 2018, the Inspector General of the United States Department of Justice released a report that sharply criticized various FBI officials for their conduct in an investigation concerning the same former secretary of state. A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, Office of the Inspector General, U.S. Department of Justice, June 2018. The Report has so far led to the dismissal of at least one senior FBI official. The Report has also had impact on a still ongoing grand jury investigation under the leadership of a special counsel, which may itself result in the release of a government report.

reporting agency is the Joint State Government Commission, established in the 1930's "for the development of facts and recommendations on all phases of government." In recent years the Commission released a report on "wrongful convictions." The Report presented general recommendations, but based them on a number of Pennsylvania cases that it characterized as exonerations. Discussion of those cases included critical references to several of the police officers and prosecutors involved. The Report did not name these individuals, but they were readily identifiable.[23]

Judicial branch

A relatively recent development in this area is the creation of "interbranch commissions" to investigate and report on issues affecting the judicial system. While these commissions are created by statute and contain representatives from each branch, they are funded through the judiciary and administered under the Administrative Office of Pennsylvania Courts. The first such commission, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, was charged with implementing the recommendations of the Supreme Court Committee on Racial and Gender Bias. The Final Report of that committee, issued in 2003, was

[23] Report of the Advisory Committee on Wrongful Convictions, Joint State Government Commission, September 2011, at 235-50.

550 pages long. It presents general findings, without criticizing named or identifiable individuals.

But sometimes there is no other way. The second Interbranch Commission was created in 2009 to investigate the juvenile justice scandal in Luzerne County. The Commission's Report was replete with criticism of many individuals, many of whom were named. This criticism was not limited to the judges who were federally prosecuted; indeed, the Commission stated that its mandate was "to look beyond them at the conduct of others."[24]

The Interbranch Report criticized the actions of the chief county probation officer,[25] and of the chief counsel to the Judicial Conduct Board.[26] The Report asserted that prosecutors (both elected and line) "clearly abdicated their roles," "demonstrated no initiative, interest or concern," and "simply sat silent."[27] And the Report charged that the chief public defender did not "properly supervise" and "became complicit," while other defense lawyers "abdicated their responsibilities to zealously defend their clients."[28] While these were harsh words, which undoubtedly

[24] Interbranch Commission on Juvenile Justice Report, May 2010, at 19.

[25] *Id.* at 37-38

[26] *Id.* at 27-29.

[27] *Id.* at 47.

[28] *Id.* at 49.

have affected the standing of those involved in their relevant communities, the Commission could not otherwise have accomplished its purpose.

Ad hoc reports

Not all governmental reports are the product of established investigative authorities such as the Auditor General or the Interbranch Commission. On occasion officials have engaged outside counsel to investigate and report on institutional misconduct.

Two such reports arose from controversy surrounding the prosecution of former Penn State football coach Jerry Sandusky. In 2011, the Board of Trustees of the Pennsylvania State University secured counsel to act on the Board's behalf "[t]o identify any failures and their causes on the part of individuals associated with the University."[29]

The Penn State Report's findings were severely critical of several named individuals, in particular the university's president, its senior vice president, and the head football coach. The Report concluded that these individuals displayed "total and consistent disregard" for child sex abuse, that they "failed to protect against a

[29] Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, Freeh Sporkin & Sullivan, LLP, July 12, 2012, at 9. The legislature has designated Penn State, a state-related university, as "an instrumentality of the Commonwealth." 24 P.S. § 2510-503 (Declaration of policy). The University is a "state actor" for purposes of constitutional claims. *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 861 n.24 (3rd Cir. 1984).

child sexual predator" for over a decade, that they "exhibited a striking lack of empathy" for the victims, that they "repeatedly concealed critical facts" regarding the abuse in order to protect the institution, and that those ultimately responsible for the organization – its trustees – abdicated their responsibility to exercise any oversight.[30] Predictably, given the revered status of its subject, the Penn State Report generated considerable controversy in its own right.

That report was followed by another Sandusky-related inquiry. During the 2012 campaign for Attorney General of Pennsylvania, candidate Kathleen Kane criticized the length of the pre-indictment investigation of Sandusky, and suggested that it was delayed for politically motivated reasons. After winning the election, Kane appointed H. Geoffrey Moulton as a Special Deputy Attorney General to investigate the investigation. The resulting Report found no evidence that the prior elected attorney general had interfered for political purposes.

But the Moulton Report did offer substantial criticism of the prosecutors and investigators who worked on the case. The Report perceived, at various stages of the investigation, "notable failure," "missed opportunity," "long stretches" with little if any activity, and failure to prep a crucial witness for an important proceeding.[31]

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[30] Penn State Report at 14-16.

[31] Report to the Attorney General on the Investigation of Gerald A. Sandusky, H. Geoffrey Moulton, Jr., Special Deputy Attorney General, May 30, 2014, at 24, 27, 100, 102, 105, 107, 110, 122-23.

The Report characterized these errors, *inter alia*, as "indeed puzzling," "difficult to fathom," and "difficult to defend."[32] The consequences were grave: "Timeliness is particularly important in child-sexual-abuse investigations, because research suggests that child molesters are more likely to continue their behavior."[33] Thus, the unwarranted length of the investigation may well have endangered other children.[34]

The Moulton Report noted explicitly its decision to identify its subjects by name.[35] At the same time, the Report further noted that "certain persons" would "be provided an opportunity to review those portions of the report that pertain to them and to respond prior to publication." The Report determined that this was the process due to comply with the state constitutional right to reputation, citing Pa. Const. art. I, § 1 and *Simon v. Commonwealth,* 659 A.2d 631 (Pa. Cmwlth. Ct. 1995).[36]

To be sure, grand jury reports are not identical to these many other governmental reports affecting the constitutional right to reputation. The principal difference is that the Grand Jury Act, even as understood before this Court's July 27 opinion, provides more process than other investigative and reporting procedures:

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[32] *Id.* at 27, 111, 126, 129.

[33] *Id.* at 28.

[34] *Id.* at 116, 120.

[35] *Id.* at 10.

[36] *Id.* at 11-12.

judicial supervision, fully transcribed record, right to and presence of counsel, and established means of appellate review.

Nonetheless, these other reporting routes are instructive. Not all reports are about misconduct as disturbing as child sex abuse, but any critical findings about an identified or identifiable individual will have significant impact within his or her relevant community. And any criticism labeled as a "finding" by a report will likely be perceived as an "accusation" by its subject. Yet reports cannot shy away from such findings merely because the subject matter in a particular case may be especially egregious. If the scandal in Luzerne County, for example, had been about kids for sex instead of kids for cash, no doubt the Interbranch Commission would still have addressed it.

There are indeed times when the proper response to a public danger is to name it, and the people responsible for it. To remedy wrongdoing, in particular systemic wrongdoing, it may be necessary to expose and understand it, whether the problem is waste of millions, sexual harassment or abuse, or dysfunction in a local justice system. As a result, all governmental reporting methods will intersect with the right to reputation. None could function under the legal positions petitioners advocate here. Appropriate pre-deprivation processes, in contrast, will protect reputational interests without depriving the public of the benefit of governmental reports such as Report 1 of the 40th Statewide Investigative Grand Jury.

CONCLUSION

For these reasons, the Commonwealth respectfully requests this Court to remand the matter for implementation of the pre-publication process outlined above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

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

CERTIFICATE OF COMPLIANCE WITH RULE 127

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

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	:	**NOS. 75 WM 2018,**
	:	**77 WM 2018, 78 WM 2018**
	:	**79 WM 2018, 80 WM 2018**
	:	**81 WM 2018, 82 WM 2018**
	:	**84 WM 2018, 86 WM 2018**
	:	**87 WM 2018, 89 WM 2018**
	:	
	:	**Supreme Court of**
	:	**Pennsylvania**
	:	**2 W.D. Misc. Dkt. 2016**
	:	
	:	**Allegheny County Court of**
	:	**Common Pleas**
	:	**CP-02-MD-571-2016**

CERTIFICATE OF SERVICE

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