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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: CENTRE COUNTY, PENNA.
vs. : CRIMINAL DIVISION
:
GERALD SANDUSKY : CP-14-CR-2421-2011
: CP-14-CR-2422-2011

ANSWER OF THE HONORABLE BARRY FEUDALE TO THE REPLY BRIEF

Judge Barry Feudale, by his counsel, Samuel C. Stretton, Esquire, hereby answers the Reply Brief of Alexander Lindsay, Esquire in opposition to Judge Feudale's Motion to Quash. It should be noted that Mr. Lindsay, in his Brief, did not have the courtesy of sending Mr. Stretton a copy and did not even include Mr. Stretton in the Proof of Service. This ex parte communication with the Court should be discouraged. It is particularly upsetting that a criminal defense lawyer such as Mr. Lindsay wouldn't have the courtesy to send to a fellow criminal defense lawyer, Mr. Stretton, a copy of the Brief in Opposition to what Mr. Stretton filed.

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Judge Feudale incorporates by reference his Motion to Quash the Subpoena with the Brief.

In reviewing the Brief of Mr. Sandusky, a few points must be made. First, the Brief did not argue or discuss the issue

raised of Grand Jury secrecy. Clearly, Judge Feudale is bound by the Grand Jury secrecy and he would not be able to testify.

Second, as to the concept of judicial privilege, Mr. Lindsay seems to suggest the judicial privilege is limited to civil cases and would not apply to criminal matters. But the case is not so limited (see Leber v. Stretton, 928 A.2d 262 (Pa. Super., 2007)). Although Leber arose out of a libel suit, the judicial privilege is not limited. The same public policy reasons would apply.

There was a suggestion by Mr. Lindsay Judge Feudale waived that judicial privilege. But it is hard to understand how that suggestion could be made. The fact he might have testified before the Grand Jury Judge in a secret proceeding certainly could not be construed as any such waiver, assuming there was such testimony.

What Mr. Lindsay does not point out is that the judicial privilege doesn't apply just to the judge. It applies to the judicial institution. This is not like the attorney client privilege where a client can waive the privilege or the lawyer can with the client's permission. As a result, a judge cannot waive the privilege. In the case of Morrison v. Kimmelman, 650 F.Supp. 801 (District Court N.J., 1986), the District Court for New Jersey held in a habeas corpus proceeding that a judge could not be compelled to testify to the effect that the evidence had

on his decision during a bench trial. The District Court stated that even if the judge had voluntarily agreed to testify, "the fact that the state trial judge might be willing to testify is irrelevant to this consideration." Id 806, 807. The Court looked at the important policies for protecting the institution, which the Court found outweighed a judge's willingness to waive the privilege or testify.

There is a line of cases in various jurisdictions, particularly applying federal law that recognizes a review of a trial judge's deliberative process, is not like the attorney/client privilege that can be invoked and waived. Attorney/client privilege exists in the context of an attorney/client relationship. But that is not the situation in judicial privilege, which involves the institution and the integrity of the institution. In Grant v. Shalala, 989 F.2d 1332 (3rd Cir., 1993) the Court noted the following:

"It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper...The Supreme Court observed that questioning a judge or administrator about the process by which a decision had been reached would undermine the judicial or administrative process." Id 1345.

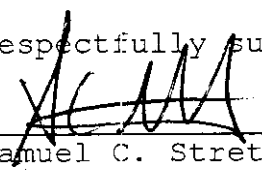
See also United States v. Roth, 332 F.Supp 2d 565 (Southern District N.Y., 2004) and Hatcher v. McBride, 650 S.E.2d 104, 113 (Western VA Supreme Court, 2006).

In the case of United States v. Matthews, 68 M.J. 29 (Ct. of Appeals of the Air Force, 2009) the Court set forth good summary of cases that support why a judge should not testify. Similarly, in Ciarlone v. City of Reading, 263 F.R.D. 198 (E.D. Pa., 2009) the Court expressed similar concerns and discussed the judicial privilege and history.

In conclusion, judicial privilege is an important privilege and should not be waived and perhaps cannot be waived by the individual judge since it is an institutional privilege. The judicial privilege should result in the quashing of the subpoena.

Finally, as noted above, the question of Grand Jury secrecy is of the utmost importance. That is the second basis to quash the subpoena since there is absolutely no way Judge Feudale could testify without violating Grand Jury secrecy.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify I am this date serving a copy of the Answer of Judge Barry Feudale to the Reply Brief in the captioned matter upon the following persons in the manner indicated below.

Service by Federal Express addressed as follows:

1. Honorable John M. Cleland, Senior Judge
c/o Office of the Court Administrator and
Office of the Clerk of Courts of Centre County
Centre County Courthouse
102 South Allegheny Street
Bellefonte, PA 16823

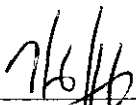
Service by First Class Mail addressed as follows:

2. Honorable Norman A. Krumenacker III, President Judge
Cambria County Courthouse
200 South Center Street
Ebensburg, PA 15931
3. Jennifer Peterson, Esquire
Assistant Attorney General
Office of the Attorney General
Criminal Prosecutions Sections
16th Floor - Strawberry Square
Harrisburg, PA 17102

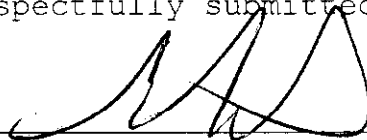
4. Alexander Lindsay, Esquire
The Lindsay Law Firm
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Butler, PA 16001

4. Former Judge Barry Feudale
223 Happy Hollow Road
Coal Township, PA 17866

Respectfully submitted,



Date



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