IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
v.	:	
	:	
GERALD A. SANDUSKY,	:	
	:	HONORABLE SENIOR JUDGE
PETITIONER.	:	JOHN M. CLELAND
	:	
	:	

TYPE OF PLEADING:

BRIEF--Remedy for Governmental Misconduct via Leaking Grand Jury information--quashal of presentment and dismissal of charges.

FILED ON BEHALF OF:

PETITIONER, GERALD A. SANDUSKY

COUNSEL FOR PETITIONER:

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STATEMENT OF THE QUESTION INVOLVED

1. Whether the appropriate remedy for governmental misconduct in leaking grand jury information, which constitutes a denial of due process, is the quashal of the presentment and dismissal of the charges.

Suggested Answer: Yes.

STATEMENT OF THE RELEVANT FACTS

Following a disagreement with his mother regarding her insistence that he go with Mr. Sandusky to an event rather than with his friends, Aaron Fisher, then fifteen, told his mother that Mr. Sandusky touched him inappropriately overtop his clothing. Aaron Fisher's mother contacted the Central Mountain High School principal and guidance counselor on or about November 18, 2008. On or about November, 19, 2008, Aaron Fisher met with the principal and guidance counselor. He did not allege that Mr. Sandusky engaged in any sexual conduct.

Jessica Dershem, a Clinton County caseworker, subsequently interviewed Aaron Fisher. Aaron Fisher did not disclose that sexual intercourse of any type occurred. Instead, Aaron Fisher stated that Mr. Sandusky cracked his back approximately thirty times. Ms. Dershem apparently reported to Mr. Rosamilia that Aaron Fisher was uncooperative because he did not actually disclose any sexual abuse. The pair then sent Aaron Fisher to Michael Gillum, a psychologist.

On November 20, 2008, Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky. In her report, Ms. Dershem wrote that Mr. Sandusky

was involved in ten back cracking episodes and she notified Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing. It appears that while Mr. Fisher made no allegations of sexual misconduct to Ms. Dershem, upon questioning by Mr. Gillum, he indicated sexual abuse transpired.

As of December 12, 2008, Aaron Fisher still had yet to inform law enforcement authorities that Mr. Sandusky had sexually abused him. In fact, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire. Ultimately, Trooper Cavanaugh met with Clinton County District Attorney Michael Salisbury regarding the allegation of inappropriate touching. District Attorney Salisbury transferred the case to Centre County because the alleged conduct occurred in that county.

The Center County District Attorney had a conflict of interest based on his wife being the sister of the adopted daughter of Mr. Sandusky. Accordingly, he referred the case to the Office of Attorney General ("OAG"). The OAG assumed jurisdiction over the matter on March 18, 2009. Rather than pursue the case as a prosecution for sexual misconduct under the ordinary process of filing a criminal information, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009.

At the time of the referral, the only alleged victim to come forward of which the Commonwealth was aware was Aaron Fisher, a/k/a Victim #1. PCRA Appendix, Moulton Report, at 43-49. The Commonwealth sought to identify additional victims, but was unable to do so at that time. ***Id.*** at 50-53. In March 2010, Deputy Attorney General Jonelle Eshbach prepared a draft presentment related solely to Aaron Fisher, because "she believed that after a year of looking, the investigation was unlikely to find additional victims, at least until after charges were filed, and because she felt that Aaron Fisher deserved to have his allegations heard in court. Eshbach had no illusions that a case against Sandusky, with Aaron Fisher as the sole victim, would be easy. Nevertheless, she believed she had adequate corroboration at that time to charge and try Sandusky; she also hoped that once Aaron Fisher's allegations against Sandusky were made public, other victims would come forward." ***Id.*** at 57.

Her supervisors expressed serious concern about the likelihood of a successful prosecution due to problems with Aaron Fisher's credibility, and the lack of other victims. Indeed, Chief Deputy Attorney General Frank Fina had reservations about the draft presentment. According to the Moulton Report, "Fina recalls that his first reaction to the presentment was the "very strong" belief that the case was too weak to go forward; he believed that Sandusky would be acquitted at trial (if the case got that far), both because Aaron Fisher was not a strong witness and because Sandusky

had significant resources and an outstanding reputation in the community. Moreover, he believed that an acquittal would likely doom any subsequent prosecution. In Fina's view, the key was finding more victims before the case was charged." ***Id.*** at 59-60.

The investigation continued to stall through the summer of 2010 because the prosecution was not able to identify any other victims. ***Id.*** at 59-64. ("Between Fina's August 12 [2010] admonition that the investigation 'must do everything possible to find other victims' and the end of October [2010], the investigation did not succeed in identifying any new victims."). The investigation had completely stalled until a November 3, 2010, email to Centre County Assistant District Attorney Stacy Parks Miller suggested investigators interview Michael McQueary. ***Id.*** at 66.

Although Mr. McQueary did testify, no additional witnesses were presented to the Thirtieth Statewide Investigating Grand Jury by the time its term expired in January 2011, and the case was referred to the Thirty-Third Statewide Investigating Grand Jury. ***Id.*** at 71. Contrary to popular belief, Mr. McQueary did not testify before the Thirty-Third Investigating Grand Jury. On March 31, 2011, The Centre Daily Times and The Patriot-News published stories, written by Sara Ganim, describing information from the grand jury investigation of Mr. Sandusky. Ms. Ganim had previously directly contacted Deb McCord, mother of Z.K. and told her that she should reach out to investigators. Specifically, on or about March 30, 2011,

Corporal Joseph Leiter wrote a report detailing a conversation with Ms. McCord, stating:

> On Thursday, March 24, 2011, I received a telephone call from Deb McCord relative being again contacted by Sara Ganim, Harrisburg Patriot News, apologizing for not writing the Jerry Sandusky article earlier as she had previously told McCord she would do but that she was going to print the article over the weekend of March 26 and Ganim was calling McCord to see if she wanted to add anything to her previous statements. McCord advised Ganim that she did not make any previous statement and that she had nothing to speak to her about. Ganim then told McCord that the State Police were not going to do anything with this investigation and that Ganim was providing McCord with an opportunity to have her story told. Again McCord advised Ganim that she had nothing to say to her and hung up.
>
> On Monday, March 28, 2011 I received a telephone call from Deb McCord who related that she had received a text message from Sara Ganim on this date at 0930 hours. Ganim said in the text, "Debra. It's Sara from the Patriot. I just want to pass along this agent's name and number. The attorney general has expressed interest in helping you." McCord did not respond. A copy of this text is attached to the station copy of this report.

PCRA Appendix, at 458. No investigation into who the agent was that Ms. Ganim was in contact with at the time was conducted. Mr. Fina and Ms. Eshbach did set up an internal sting that apparently they were only aware of in an attempt to ferret out a potential source of leaks. That minimal investigation uncovered nothing. The Ganim story resulted in Ronald Petrosky, a former janitor, reporting a hearsay statement from another individual that Mr. Sandusky sexually assaulted a child in a

shower at Penn State University. Also, following the unlawful leak of grand jury material, Attorney Benjamin Andreozzi, contacted investigators regarding a new alleged victim.

Subsequent to the March 2011 Ganim article, a grand jury session was held on April 11, 2011. During this session, Attorney Frank Fina requested a secrecy order, prohibiting the grand jury witnesses from discussing the facts or substance of their testimony before the grand jury to anyone other than the witnesses' own attorneys. This order was prospective only.

Despite Attorney Fina being concerned about grand jury leaks, and the Supervising Grand Jury Judge later appointing two special prosecutors to investigate potential grand jury leaks, no investigation was completed. In addition to the March 2011 Ganim story, on December 11, 2011, the Harrisburg Patriot-News described the grand jury testimony of Dr. Jonathan Dranov in a story written by Sara Ganim entitled "Another Version of Mike McQueary's Story About Jerry Sandusky Surfaces." The source of this article was someone with "knowledge of Dranov's testimony before the grand jury". It was this article that Attorney Fina referred to in his PCRA testimony. It has been learned that Dr. Dranov was not the source of the information nor did he have counsel present during the grand jury proceeding.

On March 24, 2012, Michael Isikoff of NBC News ran a story reporting extensively about the 1998 investigation of Mr. Sandusky. The report did not

include information from psychologist John Seasock, which had exonerated Mr. Sandusky. However, the internet version of that report attached a copy of psychologist Alycia Chamber's 1998 report from that investigation, a report that described Mr. Sandusky's actions negatively. A later news story by Michael Isikoff of NBC News on June 11, 2012, reported that the Office of Attorney General had obtained:

> New evidence in this case, internal e-mails and documents they say show former president Graham Spanier and others discussed whether they needed to tell authorities about a 2001 allegation involving a late night encounter between a naked Sandusky and a young boy in the Penn State shower room. The sources say documents show Penn State even did legal research on the issue. But in one e-mail exchange two sources say Spanier and former Vice President Gary Schultz agreed it would be, quote, humane to Sandusky not to inform social services and the incident never got reported.

That same day a KDKA-TV news reporter reported, "In documents obtained by KDKA-TV investigators, the Attorney General's Office indicates former vice president Schultz kept a secret file with allegations regarding Sandusky and sex abuse." This report disclosed matters that were not public. Additionally, an April 3, 2012, ESPN story appeared online that directly quoted from the grand jury testimony of Joe Paterno. That story would also appear in ESPN the Magazine on April 16, 2012.

The leaks were not merely related to information from the grand jury investigation. The original grand jury presentment itself was improperly leaked and

placed online. According to Attorney Fina's PCRA hearing testimony, then Attorney General Linda Kelly was extremely displeased and ordered an investigation. Heading that investigation were two of the agents who had taken the presentment to the district magistrate office before it was leaked, Agent Anthony Sassano and Agent Randy Feathers.

According to Mr. Fina, the OAG handed over its investigation to the Judicial Conduct Board apparently on the belief that it may have been a member of the district magistrates office that leaked the presentment. Approximately one month after the original presentment, a grand jury session on December 5, 2011 brought about testimony from two new purported victims, S.P. and R.R. They had made allegations only after seeing the original presentment. On December 7, 2011, the Grand Jury voted to approve a new presentment describing S.P. and R.R. as victims. ***See*** PCRA Appendix, at 300.

Following Mr. Sandusky's evidentiary hearing on August 22, 2016, the PCRA court issued an order directing the undersigned to file a brief on the appropriate remedy, assuming *arguendo*, that the government leaked grand jury information. This brief follows.

SUMMARY OF THE ARGUMENT

Where a grand jury's decision to issue a presentment and recommend charges is influenced by prosecutorial misconduct and it receives information that it

otherwise would not have been provided, the quashal of the presentment and dismissal of the charges is the appropriate remedy. As illustrated by Commonwealth v. ***Schultz***, 133 A.3d 294 (Pa. Super. 2016), ***Commonwealth v. Curley***, 131 A.3d 994 (Pa. Super. 2016), and ***Commonwealth v. Spanier***, 132 A.3d 481 (Pa. Super. 2016), quashal of the presentment and dismissal of the charges is appropriate where the grand jury process was abused.[1] Specifically, where a grand jury presentment has been tainted by governmental misconduct or a grand jury otherwise receives improper evidence, it is appropriate to quash charges arising therefrom. ***Schultz, supra***; ***Curley, supra***; ***Spanier, supra***; ***see also Commonwealth v. McCloskey***, 277 A.2d 764 (Pa. 1971); ***Commonwealth v. Cohen***, 289 A.2d 96 (Pa. Super. 1972) (plurality); ***cf. In re County Investigating Grand Jury VIII***, 2003, 2005 WL 3985351 (quashal of charges would be appropriate if it was demonstrated that grand jury leaks substantially influenced the decision to issue a presentment and recommend the filing of criminal charges); ***Commonwealth v. Williams***, 565 A.2d 160, 164 (Pa. Super. 1989).

In ***Schultz*** and ***Spanier***, the Court concluded, in addition to finding that the attorney client privilege was violated, that the prosecutor's actions in improperly

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1 Although the ***Schultz, Curley***, and ***Spanier*** cases were decided after Mr. Sandusky's trial; they are not new constitutional rules or new rules of law but were based on pre-existing precedent and standards. Further, a number of the charges against Mr. Schultz and Mr. Curley were brought at the same time as those against Mr. Sandusky and were the result of the same presentment. Mr. Sandusky has articulated the appropriate governing standard for new laws in his brief regarding *in camera* review of therapy notes filed this same day.

procuring such privileged information before a grand jury warranted quashing the presentment and the dismissal of various charges for which the defendants sought dismissal. Quoting from a Hawaii Supreme Court decision, the ***Schultz*** Court stated, "Where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy." ***Schultz, supra*** at 327. Applying this principle, it concluded that charges arising out of an improper presentment must be dismissed.

Instantly, Mr. Sandusky's right to an impartial grand jury proceeding was unquestionably prejudiced because the government, in violation of grand jury secrecy laws, provided information to the media. This leak resulted in various individuals coming forward to make similar accusations against Mr. Sandusky after repeated suggestive interviews conducted by law enforcement. Since the government violated grand jury secrecy in order to advance their case, which certain prosecutors such as Attorney Fina believed to be weak, Mr. Sandusky's right to an impartial grand jury was infringed. The leak also further tainted the grand jury process because it made public certain information that could be adopted by other alleged victims to establish a level of credibility.[2] Absent the leak, the

[2] The Commonwealth itself during Mr. Sandusky's PCRA hearings expressed that it did not believe one accuser because he only came forward to make allegations after the grand jury presentment and tracked information contained therein. It did not articulate how this was materially distinguishable from S.P. and R.R. Indeed, R.R. was also represented by the very attorney who represented Allan Myers, the accuser that the Commonwealth now claims it did not believe. It should be noted that the OAG is charged with investigating large scale fraud, yet

Commonwealth could not have charged Mr. Sandusky with alleged crimes against any victim other than Aaron Fisher and possibly the person identified as Victim 2.

ARGUMENT

As articulated in a prior brief in this matter, "Broadly speaking, there are two kinds of grand juries-(1) an indicting grand jury and (2) an investigating grand jury." ***Appeal of Hamilton***, 180 A.2d 782, 790 (Pa. 1962). Pennsylvania no longer regularly employs indicting grand juries in contrast to the federal system. The investigating grand jury and its power to subpoena witnesses and documents and "conduct deliberations in secret was what made it a particularly appropriate and (often) vitally necessary body or instrument to protect the public from criminal misconduct of public officials and from widespread evils." ***Appeal of Hamilton***, ***supra*** at 791.

As one court eloquently reasoned, "There is reason in the law for excluding from the searching and piercing eye of a grand jury, offenses alleged to have been committed by known individuals. It lies in the fundamentals of our democracy, in the establishment of civil rights with which every American is endowed." ***In re Grand Jury Investigation of Registration Commn.***, 22 Pa. D. & C.2d 285, 292 (Pa. Quar. Sess. 1960).

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apparently did nothing to preclude Allan Myers from recovering a large settlement based on his claim of being Victim 2.

The distinction between an indicting grand jury and investigating grand jury is subtle. An investigating grand jury does not directly charge individuals with crimes. Rather, it issues a presentment, which recommends charges be filed. In Pennsylvania, the prosecution then determines whether to pursue filing criminal charges by a criminal complaint. In the present case, grand jury presentments were used as the basis for the criminal complaints filed against Mr. Sandusky. Although an indicting grand jury and investigating grand jury are distinct, Pennsylvania has adopted federal standards in determining whether an investigating grand jury's presentment should be quashed and charges arising therefrom dismissed. ***See Williams, supra; cf. Schultz, supra.***

In ***Williams, supra***, the Pennsylvania Superior Court addressed a claim regarding an allegation that the prosecution set a "perjury trap" and committed prosecutorial misconduct. More specifically, the defendant claimed that the prosecution used the investigating grand jury process for the sole purpose of extracting perjured testimony. The ***Williams*** Court recognized that federal courts, in determining whether dismissal of charges or the suppression of evidence was warranted based on governmental misconduct before a grand jury, applied two approaches. First, citing ***Bank of Nova Scotia v. United States,*** 487 U.S. 250 (1988), which Mr. Sandusky relied upon in his PCRA petition, it opined that dismissal is appropriate where prejudice can be established. To demonstrate prejudice, the

violation must either substantially influence the grand jury's decision to indict or there is "'grave doubt' that the decision to indict was free from the substantial influence of such violations." ***Williams, supra*** at 164.

Applying that concept herein, if the governmental leaks substantially influenced the grand jury presentment then dismissal is appropriate. Similarly, where there is grave doubt whether the grand jury presentment was free from the influence of the leaked information, dismissal is warranted. Here, the Moulton Report conclusively establishes that the March 2011 Ganim articles substantially influenced the presentment because it led to numerous additional accusers. Indeed, it is evident that the prosecution was reluctant to move forward with a presentment that solely involved Aaron Fisher.

Additionally, the ***Williams*** Court recognized a second situation where dismissal based on governmental misconduct would be justified. "Under the second approach, dismissal may be proper where no actual prejudice is shown 'if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit.'" Instantly, leaks of grand jury material in Pennsylvania have become entrenched and flagrant. Mr. Sandusky previously articulated in his PCRA petition the issues that have arisen in Pennsylvania concerning grand jury leaks. Since that time, former Attorney General Kathleen

Kane has been convicted of various charges based on improperly leaking grand jury information. She herself cited serial leaks of grand jury information in a motion filed in her own case.

The ***Williams*** Court's approach is also consistent with prior Pennsylvania law. In ***McCloskey***, ***supra***, an investigating grand jury was used in conjunction with an indicting grand jury. An investigating grand jury first issued two presentments recommending charges against various individuals. The court in charge of the investigating grand jury accepted those presentments and the district attorney submitted the recommendations of the investigating grand jury to the indicting grand jury. The indicting grand jury returned true bills charging the various individuals.

Relevant to this matter is that the five defendants in ***McCloskey*** requested that they be permitted to have counsel present for their testimony before the investigating grand jury. At that time, Pennsylvania law did not statutorily mandate a right to counsel at such a proceeding. The defendants were not permitted to have counsel present. The lower court ultimately quashed the indictments against the individuals concluding that they had a constitutional right to consult with their attorneys outside the grand jury room. The ***McCloskey*** Court disagreed with the constitutional analysis and instead reasoned,

> we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he 'cannot consult with counsel while he is giving

> testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question.

McCloskey, supra at 777. It continued by setting forth, "Even though a witness was not given the proper warning, we would not disturb a later indictment unless the presentment and subsequent indictment were based, in part, on the self-incriminatory testimony of the defendant." The High Court concluded that for three of the defendants they were "given an insufficient warning, and their indictments were based on the fourth presentment of the investigating grand jury." ***Id.*** at 779. Since the presentments from the investigating grand jury were based in part on their incriminating testimony before that investigating grand jury, it quashed the indictments and suppressed their testimony. ***See id.***

The Superior Court ruled similarly in ***Cohen, supra***. In Cohen, the individual was indicted based on an investigating grand jury's recommendation. Cohen sought to quash the indictments and suppress his testimony before the investigating grand jury because the court did not advise him of his right to remain silent in the face of incriminating questions nor did it advise him of his right to the advice of counsel. Applying ***McCloskey***, the ***Cohen*** Court quashed the charges because the investigating grand jury's presentment served as the basis for the indictments.

Thereafter, in ***Commonwealth v. Bradfield***, 508 A.2d 568 (Pa. Super. 1986), the Superior Court recognized that the quashal of a presentment is appropriate where the court is convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights. There, the defendant asserted that a prosecutor's statements to the investigating grand jury were so inflammatory and prejudicial that the presentments should have been quashed. Ultimately, the court determined that the prosecutor's comments were not so egregious as to substantially interfere with Bradfield's rights. Importantly, however, it acknowledged that quashal of the presentment is an appropriate remedy.

The ***Bradfield*** Court relied in part on ***Commonwealth v. Brownmiller***, 14 A.2d 907 (Pa. Super. 1940). The salient claim in ***Brownmiller*** revolved around an allegation of prosecutorial misconduct. That Court held that, "A careful review of the evidence taken in support of the charges that the defendant was prejudiced in the manner which the investigation of his conduct was had by the investigating grand jury, brings us to the conclusion that there was not sufficient proof of any irregularity, unlawful or improper conduct that would have warranted the court below in quashing the indictment." ***Id.*** at 911. Nonetheless, had there been evidence to show unlawful or improper conduct on the part of the government, quashal of the charges would have resulted.

More recently, in ***In re County Investigating Grand Jury VIII, 2003***, 2005 WL 3985351, the court addressed a motion to quash an investigating grand jury presentment based on allegations of a grand jury leak. While the court did not quash the presentment, it recognized that as a viable remedy. In the ***County Investigating Grand Jury VIII*** case, the investigating grand jury recommended criminal charges against four prison guards. Based on the presentments, those guards were charged. The guards each filed motions to quash the presentments, which would have resulted in dismissal of the charges. One of the guards specifically sought quashal based on an allegation that the district attorney's office had disclosed grand jury information to a reporter.

After a special prosecutor was appointed, the news reporter voluntarily disclosed her sources. The Court, applying federal decisional law, ***Bank of Nova Scotia***, ***supra***, and ***Williams***, ***supra***, declined to quash the presentments. It reasoned that because there was no evidence that the information contained in the pertinent newspaper articles influenced the grand jury's decision to issue a presentment, no prejudice existed. In contrast, the Moulton Report demonstrates that the Ganim articles and subsequent newspaper articles and news stories containing potential grand jury information did substantially influence the investigation as the investigation prior thereto was stalled and pertained to only one accuser.

Even more recently, the Pennsylvania Superior Court in a series of three decisions, which involved the grand jury investigation of Mr. Sandusky, quashed charges that resulted from presentments. ***See Schultz, supra***; ***Curley, supra***; and ***Spanier, supra***. The primary issue in those decisions involved whether the defendants' attorney-client privilege had been violated. In ***Schultz***, after determining that the defendant's rights were violated, the Superior Court addressed the proper remedy. In doing so it noted that, "Schultz seeks quashal of the perjury, obstruction of justice, and related conspiracy charges, as well as preclusion of Ms. Baldwin from testifying in any other proceedings relative to his privileged communications with her." ***Schultz, supra*** at 325-326.

The ***Schultz*** Court then discussed ***McCloskey, supra***, and ***Cohen, supra***, as well as ***State v. Wong***, 97 Hawaii, 40 P.3d 914 (2002), and determined that quashal of the charges was the proper remedy. The ***Schultz*** panel, quoting ***Wong***, set forth:

> when a prosecutor seeks arguably privileged testimony, the prosecutor must either (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue. In the latter instance, the prosecutor should proceed with the understanding that if the person who might claim the privilege has not been given notice and an opportunity to be heard on the issue of privilege, a court's allowance of testimony may be overturned after the holder of the privilege can be heard by the court.

Wong, supra at 521, 40 P.3d 914.

Schultz, supra at 327.

The ***Schultz*** Court continued,

> The ***Wong*** Court highlighted that the state elicited the attorney's testimony without distinguishing between matters that were privileged and determined that allowing the testimony was in error. In quashing the indictments therein, it reasoned,
>
> > If the illegal or improper testimony clearly appears to have improperly influenced the grand jurors despite the presence of sufficient evidence amounting to probable cause to indict the defendant, the defendant would be entitled to a dismissal. Where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy.
>
> ***Id.*** at 526, 40 P.3d 914.

Schultz, supra at 327.

Critically important, the ***Wong*** Court, in quashing the charges, did so with prejudice. Specifically, the lower court in ***Wong*** had dismissed the charges without prejudice. However, the Hawaii High Court determined that the prosecutorial misconduct therein warranted dismissal with prejudice. In ***Schultz***, the Superior Court specifically admonished Attorney Frank Fina, stating,

> We acknowledge that Attorney Fina misled Judge Feudale by claiming that the Commonwealth would not inquire into matters concerning Ms. Baldwin's communications with Schultz, Curley, and Spanier. In this regard, we highlight that:
>
> > [a prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

> impartially is as compelling as its obligation to govern at all; ... As such, he is in a peculiar and very definite sense the servant of the law, ... He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> ***Berger v. United States***, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).
>
> Attorney Fina stated that the Commonwealth assumed the risk of proceeding without a clear determination regarding the privilege concerns at play, which is precisely the risk that has now borne fruit in the form of a challenge to the charges flowing in part from such foul blows. **Since the obstruction of justice and related conspiracy charges in this matter relied extensively on a presentment from an investigating grand jury privy to impermissible privileged communications, we quash** the counts of obstruction of justice and the related conspiracy charge.

Schultz, supra at 328 (emphasis added).

In ***Spanier***, ***supra***, the Superior Court quoted at length from Attorney Fina's questioning of Attorney Cynthia Baldwin, who the Court determined violated the attorney client privilege by testifying against Spanier. It did so after highlighting that Attorney Fina had expressly instructed the supervising grand jury judge that he would not inquire into privileged communications. The ***Spanier*** Court asserted, "In light of Attorney Fina's representation to Judge Feudale, and mindful of Pa.R.Prof.Conduct 3.10, we find his subsequent questioning of Ms. Baldwin, absent

prior judicial approval on the privilege question, to be highly improper." ***Spanier***, ***supra*** at 488 n.11. The Court then quashed the challenged charges against Spanier.

In short, the quashal of a presentment and the charges arising therefrom is an appropriate remedy when an individual's rights are violated by the manner in which the grand jury investigation is conducted. Such a remedy is longstanding and clearly established. Whenever a presentment that leads to criminal charges is tainted, dismissal of the charges is warranted. Instantly, the leak of grand jury material did substantially influence the decision to issue a presentment and it was not free from the influence of the leaked material. Moreover, it is apparent that grand jury leaks have become 'entrenched and flagrant' in Pennsylvania grand jury investigations. Accordingly, counsel could not have had any reasonable basis for not moving to quash and seeking dismissal of the charges.

CONCLUSION

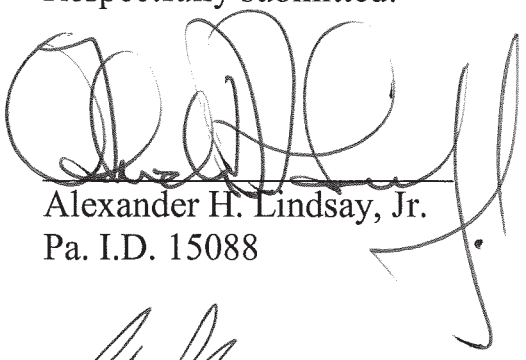
In the present case, in light of the Moulton Report's indication that the leak of the grand jury material is what drove the case from being a flawed case with a single unreliable victim to the litany of alleged victims with stories of abuse, it is beyond cavil that Mr. Sandusky was prejudiced by the leaking of grand jury material. Dismissal of the charges against Mr. Sandusky is the appropriate remedy, as it is evident that the Commonwealth would not have identified victims 3-10 without the grand jury leak to the media. Mr. Sandusky has averred that the Commonwealth

may have intentionally leaked the grand jury investigation as a last-ditch effort to attempt to identify more victims, and to bolster the case relating to Aaron Fisher that the internal supervisors in OAG believed was too weak to stand on its own. Accordingly, the charges against Mr. Sandusky relating to victims 3-10 should all have been dismissed. The leak to Ms. Ganim and others unconstitutionally violated Mr. Sandusky's due process right to a not only a fair trial, but a fair grand jury investigation.

Since the allegations relating to Victims 3-10 should never have been presented to a jury, Mr. Sandusky is also entitled to a new trial on the charges relating to Aaron Fisher and Victim 2, as it is impossible to delineate how the prejudicial impact of the improperly admitted evidence bled through and bolstered the case as to those accusers. Indeed, the prosecution itself argued that Mr. Sandusky's course of conduct demonstrated his guilt.

For all the aforementioned reasons, Mr. Sandusky has demonstrated his claim has arguable merit, that prejudice existed, counsel would have no reasonable basis for not seeking to quash the charges and that the appropriate remedy for governmental misconduct in violating grand jury secrecy rules is dismissal of the relevant charges with prejudice.

Respectfully submitted:



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CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
	:	
v.	:	
	:	
GERALD A. SANDUSKY,	:	
	:	HONORABLE SENIOR JUDGE
PETITIONER.	:	JOHN M. CLELAND

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of August, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

Via First Class Mail

Assistant Attorney General Jennifer Peterson
Office of the Attorney General – Criminal Prosecutions Section
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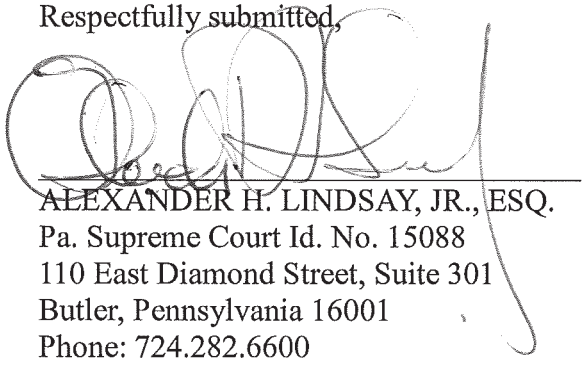
Harrisburg, PA 17120

Respectfully submitted,



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OF COUNSEL
JOHN J. VIERTHALER
THOMAS R. CERASO (1934 - 2009)

August 31, 2016

Debra C. Immel
Prothonotary & Clerk of Courts
Centre County Courthouse
102 South Allegheny Street
Bellefonte, PA 16823

Re: ***Commonwealth v. Gerald A. Sandusky***
CP-14-CR-2421-2011
CP-14-CR-2422-2011

Dear Ms. Immel:

Please find enclosed for filing two briefs in the above case.

If you have any questions please call.

Very Truly Yours,

THE LINDSAY LAW FIRM, P.C.

s/ *Alexander H. Lindsay, Jr.*

Alexander H. Lindsay, Jr.

AHL:ms
Cc: Assistant Attorney General Jennifer Peterson
Enclosures