



0000T9SY CCGPRO 201602

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA :

v. :

GERALD A. SANDUSKY :

NO. CR-2421-2011

NO. CR-2422-2011

FILED FOR RECORD
 2016 MAY 27 PM 3:12
 DEBRA C. IMEL
 PROTHONOTARY
 CENTRE COUNTY, PA

**COMMONWEALTH OF PENNSYLVANIA'S BRIEF PERTAINING TO
JURISDICTION OF THE THIRTY-THIRD STATEWIDE INVESTIGATING GRAND
JURY**

TO THE HONORABLE JOHN M. CLELAND, SENIOR JUDGE SPECIALLY PRESIDING:

I. INTRODUCTION

Gerald A. Sandusky ("Sandusky"), convicted by a jury of the sexual abuse of 10 pre-teen and teenaged boys, filed a petition for relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"),¹ 42 Pa.C.S. § 9541 *et seq.*, wherein he requested a new trial based upon 15 allegations of ineffectiveness of counsel. Thereafter, he submitted a second amended PCRA petition on March 7, 2016. In his latest filing, Sandusky included, *inter alia*, a new claim that trial counsel was ineffective for failing to move to quash the presentment issued by the Thirty-Third Statewide Investigating Grand Jury ("33rd SWIGJ") on the grounds that the grand jury did not have jurisdiction to investigate any allegations of sexual abuse. By order dated May 4, 2016, this Court directed the parties to submit briefs on the underlying issue of whether the grand jury lacked subject matter jurisdiction to inquire into the allegations regarding Sandusky. The Commonwealth of Pennsylvania ("Commonwealth") now submits the instant brief.

¹ Specifically, Sandusky filed a petition for post-conviction relief on April 2, 2015 under seal. An amended petition was thereafter filed on May 6, 2015.

II. FACTS NECESSARY FOR DETERMINATION

On March 3, 2009, Michael T. Madeira, Esquire, then District Attorney of Centre County (“District Attorney Madeira”), formally referred the investigation into allegations that Sandusky sexually assaulted Aaron Fisher to the Pennsylvania Office of Attorney General (“OAG”). See H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit “B.” The case was referred to the OAG due to a conflict of interest; namely, that Sandusky was well-known to District Attorney Madeira and that Sandusky was the adoptive father of the brother of District Attorney Madeira’s wife. The OAG formally assumed jurisdiction of the case on March 18, 2009. See *id.*

On May 1, 2009, the OAG submitted a Notice of Submission of Investigation No. 29 (“Notice 29”) to the Thirtieth Statewide Investigating Grand Jury (“30th SWIGJ”). See H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit “C.” Notice 29 provided, in relevant part, that the Pennsylvania State Police were pursuing an investigation into an alleged sexual assault by a Centre County male upon a juvenile male with whom he had become acquainted through his sponsorship of a charity for disadvantaged youth. Notice 29 further stated that:

The powers of the grand jury are needed in order for the investigation of this matter to advance to a satisfactory conclusion. In particular, the power of the grand jury to compel the attendance of witnesses is needed. Witnesses with knowledge may be too embarrassed or intimidated to admit their knowledge of the violations because the actor is well-regarded and influential and is also known as the founder of a charity that raises funds for and serves disadvantaged children. Young men who are potentially involved are in fear of revealing what they know due to the suspect’s power and influence.

The power of the grand jury to compel testimony under oath is needed. It is critical in a sexual assault case where no physical evidence exists to test the reliability of information provided by the witness and to obtain testimonial evidence which could be used at a criminal trial as substantive evidence if the witness testifies differently at trial.

The power of the grand jury to subpoena documents is needed in order to obtain information that would not otherwise be available. Specifically, telephone records and business records may be needed to corroborate the testimony of the witnesses.

Id. (internal citation omitted) Notice 29 was accepted by the supervising judge of the 30th SWIGJ on May 5, 2009. When the grand jury's term expired in January of 2011, the investigation was re-submitted to the 33rd SWIGJ as Notice 1 and accepted by the supervising judge.

On November 4, 2011, the 33rd SWIGJ issued a Presentment recommending that criminal charges be filed against Sandusky in connection with the sexual abuse of eight victims.² See H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "P." Thereafter, on December 7, 2011, the grand jury issued another Presentment wherein it was recommended that criminal charges be filed against Sandusky in connection with the abuse of two additional victims.³ See H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "Q."

² Specifically, the 33rd SWIGJ recommended that Sandusky be charged with seven counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); eight counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); eight counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); eight counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); eight counts of endangering the welfare of children, 18 Pa.C.S. § 4304; one count of criminal attempt to commit indecent assault, 18 Pa.C.S. § 901 (18 Pa.C.S. § 3126(a)(8)); and one count of aggravated indecent assault, 18 Pa.C.S. § 3125 (a)(8).

³ Specifically, the 33rd SWIGJ recommended that Sandusky be charged with four counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); two counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); two counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); two counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); and two counts of endangering the welfare of children, 18 Pa.C.S. § 4304.

III. ARGUMENT

It is Sandusky's position that once a multi-county or statewide investigating grand jury ("SWIGJ") is impaneled, it may only investigate cases involving organized crime or public corruption (or both) that span more than one county. Such an interpretation ignores several salient points: 1) The OAG has the power to investigate any criminal offense that it is authorized to prosecute under the Commonwealth Attorneys Act; 2) The legislature would never have intended the absurd result of precluding the OAG from utilizing a SWIGJ to investigate criminal offenses that it is authorized to prosecute; 3) The statute pertaining to the submission of investigations to an investigating grand jury contains no language that limits or excludes investigation into particular criminal offenses; and 4) Case law is well-settled that where properly impaneled, the purpose for which an investigating grand jury is convened does not place a limitation on the grand jury's authority to investigate other crimes committed in a county. Accordingly, Sandusky's challenge to the subject matter of jurisdiction of the SWIGJ (as the issue underlying his claim of counsel's ineffectiveness) must fail.

The sole source of the Attorney General's authority to institute and prosecute criminal cases is the Commonwealth Attorneys Act. *See* 71 P.S. § 732-101, *et seq.* Section 206 of this Act provides that:

(a) Law enforcement; criminal investigations.--The Attorney General shall be the chief law enforcement officer of the Commonwealth; the district attorney shall be the chief law enforcement officer for the county in which he is elected. The *Attorney General shall have the power to investigate any criminal offense which he has the power to prosecute under section 205*[FN1]; he shall continue the existing programs relating to drug law enforcement. The Pennsylvania State Police shall cooperate with the Attorney General and furnish such services as the Attorney General shall request.

(b) Investigating grand juries.--*The Attorney General shall convene and conduct investigating grand juries as provided in the act of November 22, 1978 (P.L. 1148, No. 271), known as the "Investigating Grand Jury Act."*[FN2]

FN1 71 P.S. § 732-205.

FN2 19 P.S. § 265 et seq. (repealed); see now, 42 Pa.C.S.A. § 4541 et seq.

71 P.S. § 732-206 (emphasis added) The plain wording of the statute thus makes clear that: 1) The OAG can investigate any criminal offense that it has the power to prosecute under Section 205 of the Commonwealth Attorneys Act; and 2) That the OAG shall utilize grand juries in connection with those investigations as provided for in the Investigating Grand Jury Act. With respect to the OAG's power to prosecute, the Commonwealth Attorneys Act provides, in relevant part:

(a) Prosecutions.--The Attorney General shall have the power to prosecute in any county criminal court the following cases:

(1) Criminal charges against State officials or employees affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such State officials or employees or benefit from such influence or attempt to influence.

(2) Criminal charges involving corrupt organizations as provided for in 18 Pa.C.S. § 911 (relating to corrupt organizations).

(3) Upon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter or who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office.

(4) The Attorney General may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings. Upon the filing of the petition, the president judge shall request the Supreme Court to assign a judge to hear the matter. The judge assigned shall hear the matter within 30 days after appointment and make a determination as to whether to allow supersession within 60 days after the hearing. The district attorney shall be given notice of the hearing and may appear and oppose the granting of the petition. Supersession shall be ordered if the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.

(5) When the president judge in the district having jurisdiction of any criminal proceeding has reason to believe that the case is a proper one for the intervention of the Commonwealth, he shall request the Attorney General to represent the Commonwealth in the proceeding and to investigate charges and prosecute the defendant. If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with the court and proceed as provided in paragraph (4). If the Attorney General determines that the case is not a proper case for intervention, he shall notify the president judge accordingly.

(6) Criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision.

(7) Indictments returned by an investigating grand jury obtained by the Attorney General.

(8) Criminal charges arising out of activities of the State Medicaid Fraud Control Unit as authorized by Article XIV (relating to fraud and abuse control), act of June 13, 1967 (P.L. 31, No. 21), known as the "Public Welfare Code,"¹ and the Federal law known as the "Medicare-Medicaid Antifraud and Abuse Amendments.

71 P.S. § 732-205 (emphasis added). The Commonwealth Attorney's Act of October 15, 1980, P.L. 950, No. 164 was enacted on the heels of the Investigating Grand Jury Act of October 5, 1980, P.L. 693, No. 142, § 216(a)(2). Section 4542 of Title 42 - - on which Sandusky relies for his jurisdictional argument - - sets forth the definitions for certain words and phrases in the Investigating Grand Jury Act. "Multicounty investigating grand jury" is defined as follows:

A Statewide or regional investigating grand jury convened by the Supreme Court upon the application of the Attorney General and having jurisdiction to inquire into organized crime or public corruption or both under circumstances wherein more than one county is named in the order convening said investigating grand jury.

42 Pa.C.S. § 4542. According to Sandusky, the plain language of Section 4542 necessarily limits the jurisdiction of the SWIJG to investigations involving only organized crime or public corruption (or both). However, it strains logic to conclude that the legislature would enact the Commonwealth Attorney's Act - - providing the OAG with the power to investigate any of the

eight types of cases set forth above at 71 P.S. § 732-205 and providing the OAG with the power to utilize the SWIGJ in connection with those investigations - - if the Grand Jury Act set forth such a marked limitation with respect to the type of case that a SWIGJ could investigate. If Sandusky's narrow reading is correct, that would mean that the legislature never intended for the OAG to be able to utilize the investigative resources of the SWIGJ whenever a District Attorney's office referred a case to the OAG (that did not involve organized crime or public corruption),⁴ and never intended for the OAG to utilize a SWIGJ to investigate allegations of Medicaid fraud.^{5 6} Such a conclusion is absurd and, therefore, contrary to the canons of statutory interpretation. *See* 1 Pa.C.S. § 1922(1) (in construing statutes, it is presumed that the legislature did not intend an absurd result).

Moreover, the phrase "multicounty investigating grand jury" appears in the section of the Investigating Grand Jury Act pertaining to its **empanelment**. Section 4544 provides, in relevant part, as follows:

(a) General rule.--Application for a multicounty investigating grand jury may be made by the Attorney General to the Supreme Court. In such application the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth and that, in his judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543 (relating to convening county investigating grand jury). The application shall specify for which counties the multicounty investigating grand jury is to be convened. Within ten days of receipt of such application, the court shall issue an order granting the same. Failure by an individual justice to grant such application shall be appealable to the entire Supreme Court.

⁴ 71 P.S. § 732-205(a)(3)

⁵ 71 P.S. § 732-205(a)(8)

⁶ Additionally, as an aside it should be noted that the OAG is statutorily authorized to investigate insurance fraud, *see* Pa.C.S. 4117(h)(2) ("In addition to the authority conferred upon the Attorney General by the act of October 15, 1980 (P.L. 950, No 164), known as the

(b) Contents of order.--An order issued under subsection (a) shall:

- (1) convene a multicounty investigating grand jury having Statewide jurisdiction, or jurisdiction over all counties requested in the application by the Attorney General;
- (2) designate a judge of a court of common pleas to be the supervising judge over such multicounty investigating grand jury and provide that such judge shall with respect to investigations, presentments, reports, and all other proper activities of said investigating multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty investigating grand jury;
- (3) designate the counties which shall supply jurors and in what ratios;
- (4) designate a location or locations for the multicounty investigating grand jury proceeding; and
- (5) provide for such other incidental arrangements as may be necessary including the Commonwealth's share of expenses.

All matters to be included in such order shall be determined by the justice issuing the order in any manner which he deems appropriate, except that the Supreme Court may adopt general rules, consistent with the provisions of this section, establishing standard procedures for the convening of multicounty investigating grand juries.

42 Pa.C.S. § 4544. This section immediately follows the statute that governs the process for convening a **county** investigating grand jury. Thus, it is clear that the legislature intended to distinguish between county and multicounty (or statewide) investigating grand juries with respect to **empanelment** of those bodies. Had the legislature intended to limit the **type** of case that a SWIGJ could investigate once it was impaneled, it could have expressly provided such limiting language in 42 Pa.C.S. § 4550. Instead, that section as written applies equally to both county and statewide investigating grand juries:

(a) General rule.--Before submitting an investigation to the investigating grand jury the attorney for the Commonwealth shall submit a notice to the supervising judge. This notice shall allege that the matter in question should be brought to the attention of the investigating grand jury because the investigative resources of the grand jury are necessary for proper investigation. The notice shall allege that one or more of the investigative resources of the grand jury are required in order to adequately investigate the matter.

(b) Effect of notice.--After the attorney for the Commonwealth has filed the notice submitting a matter to the investigating grand jury any or all of the

investigative resources of the investigating grand jury may be used as regards the investigation.

42 Pa.C.S. § 4550. The purpose of an investigating grand jury - - either county or statewide - - is singular: It is to provide resources to properly and adequately investigate crimes in the Commonwealth of Pennsylvania. The fact that the parameters for empanelment of the two different types of investigating grand juries are different does nothing to alter the purpose. The OAG certainly established the necessity for utilizing the resources of the SWIGJ to investigate Sandusky after the OAG received a proper referral pursuant to the Commonwealth Attorney's Act.

Unlike Sandusky who relies on the concurring opinion of former Justice Nix from 1983 in case of *Appeal of Stout*, 460 A.2d 249, 251 (Pa. 1983), the Commonwealth's position is buttressed by solid case law. In *Commonwealth v. McCauley*, 588 A.2d 941 (Pa. Super. 1991), the defendant argued on appeal that the SWIGJ did not have authority to investigate and issue a Presentment recommending that he be charged with murder because Section 4544 of the Investigating Grand Jury Act (pertaining to empanelment) limited its jurisdiction to investigation of matters of organized crime or public corruption. According to McCauley, had a county investigating grand jury been convened, the OAG would in fact have had the authority to utilize the resources of the grand jury. In rejecting this position, the Superior Court of Pennsylvania stated:

Concededly, the investigating grand jury which issued the presentment against appellant had been impaneled for purposes of a multicounty investigation of public crime and corruption. However, the legitimate underlying purpose for which the grand jury is convened does not hinder investigations into other matters which may be brought before it. If, during an investigation of ongoing criminal activity, a grand jury comes upon criminal activity which has been completed, it is not required to close its eyes thereto. Where properly impaneled, the purpose for which a grand jury is convened does not restrict the grand jury from investigating actions which constitute either criminal activity or probable violations of the criminal laws of the Commonwealth. The State Attorney

General's Office investigating the case chose to bring this murder case before the grand jury already impaneled rather than impanel a new one pursuant to section 4543. The purpose for which a grand jury is convened does not place a limitation on the grand jury's authority to investigate other crimes committed in a county. As explained in 42 Pa.C.S. § 4548, a grand jury's authority encompasses investigation into statutorily defined criminal offenses committed in the county or counties in which it is summoned.

Id. at 269-70 (internal citations). The Supreme Court of Pennsylvania had the opportunity to review a challenge to the jurisdiction of the supervising judge of the SWIGJ in the case of *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa 2006). In that particular case, it was argued that the SWIGJ could not be convened to investigate any matters except those involving organized crime and/or public corruption and spanning more than one county. Because the Notice of Submission did not involve those particular crimes, and the alleged criminal activity only occurred in Lancaster County, the Petitioner argued that the investigation should be quashed. In response, the OAG asserted that the Petitioner had conflated the statutory prerequisites for empanelment of the SWIGJ with the powers of the SWIGJ to inquire into offenses against the criminal laws of the Commonwealth. Citing the *McCauley* case, the OAG further argued that there was no requirement that there be a complete overlap between the application to convene a SWIGJ and the particular matters that are later submitted to its attention. The Supreme Court agreed with the OAG's argument, stating:

[W]e agree with the Attorney General that such framework simply does not require that every matter submitted to a multi-county or statewide investigating grand jury needs to independently meet each one of the criteria that are threshold to the convening of the investigative body in the first instance. As the Attorney General observes, the statutory requirements relative to the empanelling of a statewide investigating grand jury and the statutory powers of the grand jury to inquire into criminal offenses once empanelled are different. *Compare* 42 Pa.C.S. § 4544(a), *with* 42 Pa.C.S. § 4548(a). For this reason, we reject Lancaster Newspapers' jurisdictional challenge to Notice 12, as it is presently framed.

Id. at 512. Sandusky's attempt to distinguish *McCauley* and *In re Twenty-Fourth Statewide Investigating Grand Jury* is illusory. He claims his jurisdictional argument is novel because those particular cases did not discuss the interplay between the "definitions" section of the Investigating Grand Jury Act (Section 4542) and the section that sets forth the "powers" of the grand jury (Section 4548). However, this is a distinction without a difference. The same result would still have been reached; namely, that once properly empaneled, a SWIGJ's jurisdiction is not limited to investigation of cases that involve organized crime and/or public corruption.

IV. CONCLUSION

In light of the foregoing, the Commonwealth respectfully requests this Court to deny Sandusky's ineffective assistance of counsel claim with respect to trial counsel's failure to challenge the subject matter jurisdiction of the 33rd SWIGJ.

Respectfully submitted,


BRUCE L. CASTOR, JR.
Solicitor General

BRUCE R. BEEMER
First Deputy Attorney General

LAWRENCE M. CHERBA
Executive Deputy Attorney General
Criminal Law Division

AMY ZAPP
Chief Deputy Attorney General
Appeals and Legal Services Section

BY:



JENNIFER A. PETERSON
Deputy Attorney General
Attorney ID No. 84357
jpeterson@attorneygeneral.gov

Pennsylvania Office of Attorney General
Appeals & Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-0158

Date: May 27, 2016

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION**


COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. CR-2421-2011
	:	NO. CR-2422-2011
GERALD A. SANDUSKY	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person(s) and in the manner indicated below.

Service by first class mail addressed as follows:

*Alexander H. Lindsay, Jr., Esquire
J. Andrew Salemme, Esquire
110 East Diamond Street
Suite 301
Butler, PA 16001-5982
(Counsel for Gerald A. Sandusky)*



JENNIFER A. PETERSON
Deputy Attorney General
Attorney ID No. 84357
jpeterson@attorneygeneral.gov

Date: May 27, 2016