

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

COMMONWEALTH OF PENNSYLVANIA :

VS. :

CP-14-CR-2421-2011

CP-14-CR-2422-2011

GERALD A. SANDUSKY :

MEMORANDUM AND ORDER

**Dated: November 12, 2015**

Counsel for the Defendant has filed a list of specific discovery requests that narrowed the broad ranging discovery requests contained in the Defendant's Amended Petition for Post Conviction Relief. He asks that he be permitted to conduct discovery before any hearing that may be granted on the Defendant's Petition for post-conviction relief.

Defense counsel also asks for subpoena power to require various people to appear and to submit to an examination under oath, and to require the production of various kinds of documents.

The discovery petition has been filed pursuant to Pa.R.Crim.P. 902(E)(1) which provides that "no discovery shall be permitted at any stage of the (Post Conviction) proceedings, except upon leave of court after a showing of exceptional circumstances."

Rule 902 does not define the term "exceptional circumstances" and caselaw provides little guidance except to make clear that the rule is not meant to

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be employed as a fishing expedition in search of information to support otherwise unsupported theories advanced in favor of a new trial.<sup>1</sup> Counsel's legal argument is support of his request for discovery, however, appears to equate "exceptional" with "high profile." He lists a number of factors that he argues makes this case "exceptional." However, it is not the case that must be "exceptional." The term exceptional in this context does not refer to the nature of the case – its notoriety, publicity, or public interest. Instead, the Rule refers to exceptional *circumstances* – which is a reference to some unique problem in the process of uncovering information that requires the aid of the court in the interests of justice. Discovery permitted by Rule 902 is not envisioned as a substitute for customary investigatory techniques.<sup>2</sup>

Just such an "exceptional circumstance" existed last week, for example, when I directed the Attorney General of Pennsylvania to submit to questioning under oath at a hearing regarding statements made by her and her press spokesman that led me to believe she had information regarding the source of leaks from the grand jury investigating this case.<sup>3</sup>

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<sup>1</sup> While it may be permissible for a court to grant discovery for a document shown to exist, it is not permissible, under the Rule, to grant discovery to find out if a document does exist. See: Commonwealth v. Carson, 913 A.2d 220, 244 (Pa. 2007); Commonwealth v. Bridges, 886 A.2d 1127 (Pa. 2005). Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000).

<sup>2</sup> While defense counsel argues that pre-hearing discovery will make the use of the court's time more efficient in any subsequent hearing for post-conviction relief, the purpose of the rule is not served by affording counsel the power to summon witnesses to appear and be questioned under oath, outside of the presence of the court, and to be subject to contempt proceedings if they fail to cooperate to counsel's satisfaction.

<sup>3</sup> As it turned out, the Attorney General testified that she had no information either proving or leading her to believe that any grand jury leaks in this case resulted from the

Defense counsel seeks discovery in three areas:

The first regards his assertion that the prosecutor made a false statement to the jury during his closing argument when he said he did not know the identity of victim 2.<sup>4</sup> Defense counsel seeks to develop information in support of the contention that the prosecutor's statement was not true.

In furtherance of that effort, defense counsel asks that he be given subpoena power to interview the person he contends is victim 2, two members of the Pennsylvania State Police, an inspector with the U.S. Postal Service Inspection Service, and the prosecutor who made the closing argument. In addition, counsel requests, among other things, "Any and all documents reflecting communications between any attorney, officer, investigator, agent, or other Commonwealth personnel or persons working with Commonwealth personnel (including but not limited to United States Postal Inspectors) and victim 2 and/or any agent, representative, or attorney of victim 2 relating to victim 2's testimony at trial in this matter." Similar requests are made for "documents" related to "victim 2's availability to testify at trial in this matter;" "efforts to serve a subpoena for trial upon victim 2, either directly or through counsel;" and "relating to victim 2's potential appearance, availability, and testimony at trial in this matter." (Defendant's List of Discovery Requests, p. 4-5).

This request can be further broken down into two parts for purposes of analysis: a request to subpoena people, and a request to subpoena documents.

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conduct of the supervising judge or any attorneys of the Office of Attorney General. See this court's Memorandum and Order of November 5, 2015.

<sup>4</sup> While the list of specific discovery requests identifies the one who the Defendant believes to be that person by name, I have substituted the term "victim 2" for the name used by defense counsel.

Regarding the request to subpoena people, I can discern no exceptional circumstances that require the pre-hearing assistance of the Court. As previously noted, pre-hearing discovery is not a substitute for standard investigative techniques. Defense counsel does not assert that those he seeks to depose will not talk to him. Indeed, the person alleged to be victim 2 has been interviewed, according to the Petition, numerous times including by an investigator for the defense. In addition, there is no reason to believe, or at least none is expressed in the Petition, that the law enforcement officers and the prosecutor will not testify if called to a hearing or respond to pre-hearing inquiries.

Regarding the request to subpoena documents, it is apparent on its face that a request for "any and all documents reflecting communication...." is overbroad under existing caselaw. In effect, the request is to direct the Commonwealth to produce significant portions of its investigative file so counsel can search for documents that support his theory. Defense counsel, however, "has no Constitutional right to conduct his own search of the State's files," Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) to "discern whether his assertions are true." Commonwealth v. Abu-Jamal, 720 A.3d 79, 91 (Pa. 1998).

Second, defense counsel seeks discovery to support his allegation that the Commonwealth violated its *Brady* obligation<sup>5</sup> when it failed to "disclose the

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<sup>5</sup> Brady v. Maryland, 373 U.S. 83 (1963) requires the Commonwealth to deliver to the defendant any evidence favorable to the accused that is material either to guilt or punishment, including evidence of an impeachment nature, and that is within the possession or control of the attorney for the Commonwealth. Commonwealth v. Spatz, 18 A.3d 244, 276 (Pa. 2011); Pa.R.Crim.P. 573(B)(1)(a). The duty of the Commonwealth to make such disclosures continues throughout a criminal prosecution, including post-conviction proceedings. Commonwealth v. Williams, 732 A.2d 1167 (Pa. 1999).

alleged victims' financial incentives to testify against Sandusky, including contingent fee agreements with private attorneys pursuant to private litigation against Penn State University." (Defendant's List of Discovery Requests, p. 12).

This request also implicates at the outset at least two inquiries: was trial counsel ineffective, as the defense now argues, by failing to request that such documents be disclosed by the Commonwealth, or in not issuing a subpoena to get them?; and, if such documents exist, are they Brady material that the Commonwealth should have disclosed?

There is no need to answer either question until it is at least established that such documents actually exist and that they are in the possession or control of the Commonwealth. These documents are in a different category from the documents sought in the first discovery request because there was testimony at trial from at least some of the victims that they signed some kind of agreement with a civil attorney. So it is not disputed that some sort of documents exist. I need not decide, however, whether the Commonwealth violated any Brady obligation until it can be determined whether or not any such documents are in the possession or control of the Commonwealth.

Rather than give subpoena power to defense counsel, however, I will direct the Commonwealth, in accordance with the attached order, to disclose to me, under seal, whether it possesses or has under its control any documents demonstrating any victim who testified at trial had a financial incentive to testify falsely – including, for example, contingent fee contracts with attorneys, book

contracts, and speaking fees -- and to deliver to me copies of any such documents.

Depending on the Commonwealth's reply, I will take such further action, if any, as may be appropriate, including providing a copy of the documents to defense counsel or ordering further discovery.

Finally, defense counsel requests discovery "regarding the investigating grand jury process used in this case." (Defendant's List of Discovery Requests, p. 17). Having already addressed the issue involving the statements of the Attorney General, as previously noted, the remainder of the issues raised by defense counsel regarding the grand jury proceedings must be addressed initially to the presiding judge of the grand jury, the Hon. A. Norman Krumenacker, III. See the Order of November 5, 2015.

Accordingly, I enter the following:

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GERALD A. SANDUSKY :

ORDER

And Now, November 12, 2015, in consideration of the foregoing, it is ordered as follows:

1. That on or before November 19, 2015, the Commonwealth shall disclose to the Court, under seal, whether or not it has in its possession or under its control any document demonstrating that any victim who testified at trial had a contingent fee agreement with a civil attorney, book contract, speaking fee, or any other financial incentive to falsify his testimony; and, if so, attach a copy of any such document to its disclosure.
2. That the request of defense counsel to be granted the power of compulsory process to compel persons to provide testimony or to compel the disclosure of additional documents, as enumerated in his List of Specific Discovery Requests filed on September 29, 2015, is denied.

BY THE COURT:



John M. Cleland, S.J.  
Specially Presiding