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

COMMONWEALTH OF

v.

GERALD A. SANDUSKY,

PETITIONER.

CP-14-CR-2421-2011
CP-14-CR-2422-2011

HONORABLE SENIOR JUDGE
JOHN M. CLELAND

2016 JUN -8 AM 11:05
CENTRE COUNTY, PA

TYPE OF PLEADING:

REPLY BRIEF-SUBJECT
MATTER JURISDICTION ISSUE

FILED ON BEHALF OF:

PETITIONER, GERALD A.
SANDUSKY

COUNSEL FOR PETITIONER:

ALEXANDER H. LINDSAY,
ESQUIRE
Pa. Supreme Court Id. No. 15088

J. ANDREW SALEMME,
ESQUIRE
Pa. Supreme Court Id. No. 208257

THE LINDSAY LAW FIRM
110 EAST DIAMOND STREET,
STE. 300
BUTLER, PENNSYLVANIA 16001
PHONE 724.282.6600
FAX: 724.282.2672
Email: al.lindsay186@gmail.com
andrew@lindsaylawfirm.com

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Cases

Appeal of Hamilton, 180 A.2d 782 (Pa. 1962) (Bell, C.J., dissenting)

Commonwealth v. Schultz, 133 A.3d 294, 314-15 (Pa. Super. 2016)

In re Grand Jury Investigation of Registration Commn., 22 Pa. D. & C.2d 285, 292 (Pa. Quar. Sess. 1960)

Petition of McNair, 187 A. 498, 503 (Pa. 1936)

Statutes

42 Pa.C.S. § 4542

42 Pa.C.S. § 4544(a)

42 Pa.C.S. § 4544(d)

SUMMARY OF THE ARGUMENT

The Commonwealth, in its argument, conflates the distinction between the power to investigate and the question presented herein, which relates to jurisdiction. It proffers that the Office of Attorney General (OAG) has power to prosecute under the Commonwealth Attorney's Act and that it would be an absurd result to preclude the OAG from utilizing a statewide investigating grand jury to investigate criminal offenses it can prosecute.

Mr. Sandusky has never argued nor contended that the OAG does not have the power to prosecute criminal offenses. The critical inquiry herein is not the power or authority of the OAG. Rather, the salient issue is the jurisdiction of a statewide investigating grand jury. The reason that there is no language in the Investigating Grand Jury Act limiting investigations into specific criminal offenses is because public corruption and organized crime can and often do involve a host of differing criminal offenses. It would, indeed, have been absurd for the legislature to expressly limit the criminal offenses that could be investigated when looking into public corruption and organized crime.

However, it is beyond cavil that the history of investigating grand jury's and intent of the Investigating Grand Jury Act was to provide a mechanism to investigate public corruption and organized crime. The

Investigating Grand Jury Act does not provide jurisdiction for a grand jury to investigate any criminal offense; rather, it grants power to investigate such criminal offenses where there is appropriate jurisdiction. Jurisdiction only exists to investigate such crimes where the grand jury is inquiring into public corruption and organized crime. For example, if it was believed that an elected official was running a sex ring, an investigation into sex offenses would be appropriate as part of the investigation into public corruption and organized crime.

Pointedly, the legislature did expressly limit the jurisdiction of a multi-county grand jury by providing unequivocally that such a body has “jurisdiction to inquire into organized crime or public corruption or both[.]” 42 Pa.C.S. § 4542. It further specified that a multi-county grand jury was only to be convened because it was necessary because of organized crime or public corruption or both and the investigation could not be adequately performed by a county investigating grand jury. Frankly, the Commonwealth has not even averred that the grand jury at issue was ever empaneled to investigate public corruption and organized crime.

There is a common phrase that “bad facts make bad law.” Instantly, only be re-writing and ignoring the unequivocal language of the Investigating Grand Jury Act to justify upholding the conviction of Mr.

Sandusky can one conclude that a multi-county grand jury has jurisdiction to inquire into offenses that are not related to public corruption or organized crime. To render such a holding would violate the separation of powers doctrine because the court would in fact be re-writing the statute by reading out the clear and unequivocal language provided by the legislature.¹

Once impaneled, a statewide investigating grand jury has jurisdiction to inquire into public corruption and organized crime and in doing so can investigate any crime. However, if its inquiry is not into public corruption and organized crime, as was the case herein relative to alleged Victim 1, the grand jury acted without jurisdiction.

¹ The Court, under the Commonwealth's interpretation, would be re-writing at least three separate portions of the Investigating Grand Jury Act: 42 Pa. C.S. § 4542; 42 Pa.C.S. § 4544(a), and 42 Pa.C.S. § 4544(d). Section 4544(d) would need to be re-written to provide that the impaneling of a multicounty investigating grand jury shall in no way diminish the responsibility and the authority of the district attorneys within their jurisdictions to investigate and prosecute any crime.

ARGUMENT

To properly understand why the Commonwealth's position is grossly mistaken, a brief historical primer on grand juries is warranted. "The grand jury is an ancient mode of procedure." *Commonwealth v. Schultz*, 133 A.3d 294, 314-15 (Pa. Super. 2016) (citing *Appeal of Hamilton*, 407 Pa. 366, 180 A.2d 782, 790 (1962) (Bell, C.J., dissenting)). "English grand juries 'originally decided matters in accordance with their personal knowledge or their knowledge of neighborhood affairs. Later, they summoned witnesses, investigated persons and conditions, made reports to the sovereign, and gradually became an indicting grand jury.'" *Appeal of Hamilton, supra* at 790." *Id.*

"Broadly speaking, there are two kinds of grand juries-(1) an indicting grand jury and (2) an investigating grand jury." *Appeal of Hamilton, supra* at 790. Pennsylvania no longer regularly employs indicting grand juries. However, as will be more fully set-forth below, it has retained the investigating grand jury, also referred to in the past as a "special grand jury." Investigating grand juries were originally convened because of "the existence of widespread corruption, violations of law, or serious crimes, or systematic criminal depredations by public officers, or that a matter of great public importance which is inimical to public interest (riots, etc.) has

occurred or is likely to occur[.]” *Id.* 791. In addition, they were used when such corruption and “the alleged crimes [could] not be readily discovered or coped with by the ordinary legal processes if promptly, vigorously and impartially pursued by the District Attorney.” *Id.*

In one of Pennsylvania’s leading cases on the grand jury process, the Pennsylvania Supreme Court opined,

The ordinary conception of the duties of a grand jury was to guard the right and liberties of the people; it was so understood at its inception. Because of the method by which its deliberations are conducted and the secrecy surrounding them, **it is a particularly suitable body to investigate misconduct of public officials and public evils.** These inquisitorial powers were recognized as early as 1791 in this commonwealth. *Lacaze v. State*, Add. 59, 71.

Petition of McNair, 187 A. 498, 503 (Pa. 1936) (emphasis added). The *McNair* Court continued, “In some states the power of investigation is virtually unlimited, and the grand jury, of its own motion, may originate and conduct them. But in Pennsylvania the freedom of the grand jury is very much restricted.” *Id.*

The *McNair* Court added,

A grand jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety (*Lloyd & Carpenter's Case*, *supra*; *Commonwealth v. Crans*, 2 Clark, 172, 192), health, demoralize the personal security of

members of the public, or permit systematic criminal depredations by public officers.

Id. at 504. These principles are clearly codified in the current Investigating Grand Jury Act, which has its main focus with respect to multi-county investigating grand juries, on investigating public corruption and organized crime. In this respect, the *McNair* Court further posited, “The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them[.]” *Id.* This aligns with the Investigating Grand Jury Act as well.

Thus, it is long-standing law in Pennsylvania that a grand jury investigation “cannot be aimed at individuals primarily, as such nor at the commission of ordinary crimes, but should be of matters of criminal nature wherein public officers or the interests of the general public are involved.” *McNair, supra* at 504 (internal citations omitted). It is evident that the current Investigating Grand Jury Act, as it relates to multi-county grand jury investigations, was intended to codify the common law Pennsylvania approach to grand jury investigations, which authorized investigations where “there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety, or health, or other criminal acts affecting these functions or of a widespread nature, jeopardizing or demoralizing public security or health[.]” *Id.*

Pointedly, as cogently discussed by Chief Justice Bell in his dissenting opinion in *Appeal of Hamilton, supra*, grand juries “exist first, for the protection of society, secondly, for the indictment of alleged criminals, thirdly, for the investigation of crimes and conditions which have created or are likely to create public harm, and fourthly, to protect from criminal charges innocent persons who have been erroneously or falsely accused of crime.” *Appeal of Hamilton, supra* at 790.

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.” *Id.* at 791. Indeed, “While individuals are always involved, the *primary objective* of a special grand jury proceeding is to ferret out and discover acts which are or are likely to be harmful to the public, rather than the ordinary prosecution of an individual criminal.” *Id.* at 792. (italics in original).

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).

With this background in mind, it becomes readily apparent that Mr. Sandusky’s position is supported not only by the plain language of the Investigating Grand Jury Act, but all of the historical evidence that provided the background for its adoption. The Investigating Grand Jury Act explicitly reads,

“Multicounty investigating grand jury.” 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 (emphasis added). In discussing the impaneling of a multi-county investigating grand jury, the legislature further provided,

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).

42 Pa.C.S. § 4544(a). It added that such investigations would not “diminish the responsibility and the authority of the district attorneys within their jurisdictions to investigate and prosecute organized crime or public

corruption or both.” 42 Pa.C.S. § 4544(d). Hence, it is evident that public corruption and organized crime were the focus of multi-county investigating grand juries, which is entirely consistent with the historical usage of investigating grand juries.

The Commonwealth’s position that it strains logic to conclude the legislature would provide the OAG with the power to investigate any criminal offense and the power to use an investigating grand jury, but limit the use of the latter to investigating public corruption and organized crime demonstrates a fundamental misapprehension and misreading of the laws upon which it relies. The OAG could have investigated Mr. Sandusky utilizing a host of resources that do not involve a grand jury investigation. The OAG routinely investigates offenses involving alleged child predators without utilizing a grand jury.

Indeed, the OAG has an entire unit devoted to undercover work that is intended to ferret out individuals using internet chat rooms to attempt to meet with underage children for sexual purposes. Similarly, the OAG has units devoted to drug investigations. The fact that the OAG can investigate crimes in Pennsylvania does not mean that a statewide investigating grand jury has jurisdiction to investigate crimes un-tethered from public corruption or organized crime.

The OAG writes out of the statute, defining a multi-county investigating grand jury, the language “having jurisdiction to inquire into organized crime or public corruption or both” 42 Pa.C.S. § 4542. It then re-writes the provision to read, “having jurisdiction to inquire into and investigate **any criminal activity** wherein more than one county is named in the order convening said investigating grand jury.” It does so by noting that the term “multicounty investigating grand jury” appears in Section 4544, which applies to impaneling a grand jury. Of course, it overlooks that the convening of a multi-county investigating grand jury is “because of organized crime or public corruption[.]” 42 Pa.C.S. § 4544(a). Furthermore, it disregards that this language would be unnecessary under its own interpretation whereby an investigating grand jury would have jurisdiction to investigate offenses not related to an inquiry into public corruption and organized crime.

The Commonwealth argues that had the legislature intended to limit the type of case it could investigate it would have expressly provided. Yet, it did do just that by defining the jurisdiction of a multi-county investigating grand jury. Moreover, the Commonwealth fails to grasp the distinction between jurisdiction and power and ignores that public corruption and organized crime can involve sex offenses, drug offenses, gambling, murder,

theft, robbery, kidnapping, and a host of other crimes. Since public corruption and organized crime encompass a broad variety of criminal offenses it would have been nonsensical to limit the type of case a grand jury could investigate in the manner described by the Commonwealth.

The OAG is simply wrong when it opines that the singular purpose of a grand jury investigation “is to provide resources to properly and adequately investigate crimes in the Commonwealth of Pennsylvania.” The primary purpose of the Investigating Grand Jury Act was to create mechanism to investigate public corruption and organized crime. Frankly, one cannot read the Investigating Grand Jury Act or the history of investigating grand juries without it becoming evident that the Act was designed for that express purpose.

Indeed, virtually every case resulting in charges being filed that was the result of a multi-county grand jury investigation involved some type of public corruption or organized crime. While the Commonwealth cites a solitary case in which a multi-county grand jury apparently investigated a crime unaffiliated with public corruption or organized crime that case simply did not engage in any jurisdictional analysis and was more fully discussed in Mr. Sandusky’s original brief.

Mr. Sandusky's interpretation of the relevant statutory provisions gives effect to all of the statute without requiring provisions to be rendered superfluous or written out of the law. In contrast, the Commonwealth's interpretation is inconsistent with the entire history of Pennsylvania law on investigating grand juries, ignores the plain language of the statute, renders portions of the law superfluous, and fails to give effect to all of the statute's provisions.

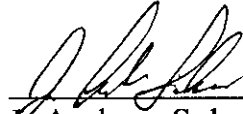
CONCLUSION

The historical purpose of an investigating grand jury was limited to investigating public corruption and organized crime. The Pennsylvania common law regarding the jurisdiction of an investigating grand jury was largely codified by the Investigating Grand Jury Act. The plain language of that Act provides that a multi-county investigating grand jury only has jurisdiction to inquire into public corruption and organized crime. The Commonwealth attempts to re-write multiple sections of the statute. Its interpretation is inconsistent with the plain and obvious meaning of the law, renders portions of the law superfluous, and ignores the entire history of investigating grand juries in Pennsylvania. The cases cited by the Commonwealth did not engage in any analysis of the jurisdictional issue before this Court.

The proper interpretation of the Investigating Grand Jury Act is that once a multi-county grand jury is impaneled it has jurisdiction to inquire into public corruption and organized crime and, in investigating those areas, may investigate any criminal offence. Nonetheless, where the inquiry is not into public corruption or organized crime, as occurred in the instant case, the grand jury acts without jurisdiction. Because the initial grand jury lacked subject matter jurisdiction and that information and investigation served as

the primary basis for the latter grand jury's presentment, the presentment must be quashed.

Respectfully submitted:



J. Andrew Salemme
Pa. I.D. 208257

110 East Diamond Street, Suite 300
Butler, Pennsylvania 16001
Phone: 724.282.6600
Fax: 724.282.2672
Email:
al.lindsay186@gmail.com
andrew@lindsaylawfirm.com

*Attorneys for Petitioner Gerald A.
Sandusky*

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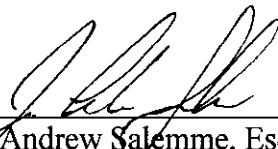
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of June, 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
16th Floor Strawberry Square
Harrisburg, PA 17120

Respectfully submitted,



J. Andrew Salemme, Esquire
Pa. Supreme Court Id. No. 208257
110 East Diamond Street, Suite 301
Butler, Pennsylvania 16001
Phone: 724.282.6600
Fax: 724.282.2672
Attorney For Gerald A. Sandusky