

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

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DEBRA C. IMMEL
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CENTRE COUNTY, PA

COMMONWEALTH OF

CP-14-CR-2421-2011

CP-14-CR-2422-2011

v.

GERALD A. SANDUSKY,

PETITIONER.

HONORABLE SENIOR JUDGE
JOHN M. CLELAND

TYPE OF PLEADING:

WITNESS CERTIFICATION OF
ATTORNEY GENERAL KATHLEEN
KANE

FILED ON BEHALF OF:

PETITIONER, GERALD A. SANDUSKY

COUNSEL FOR PETITIONER:

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

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

WITNESS CERTIFICATION of ATTORNEY GENERAL KATHLEEN KANE

AND NOW COMES, Petitioner, Gerald A. Sandusky, by and through his counsel, Alexander H. Lindsay, Jr., Esq., and J. Andrew Salemme, Esq., and the Lindsay Law Firm, P.C., and files this Witness Certification for Attorney General Kathleen Kane in compliance with the PCRA Court's May, 2 2016 order.

Kathleen Kane's date of birth is June 14, 1966. Her professional address is Pennsylvania Office of Attorney General, Strawberry Square, Harrisburg, Pennsylvania, 17120. Counsel hereby certify that Ms. Kane would testify as follows.¹

It is believed and therefore averred that consistent with her April 27, 2015 motion, in this regard, it is believed Ms. Kane will testify that Attorney Frank Fina was one of the attorneys in charge of the grand jury investigation into Jerry Sandusky. She will add that, during the grand jury investigation into Mr. Sandusky, leaks occurred from the government and that Attorney Fina did not seek any investigation into those leaks, although a special prosecutor was later

¹ Counsel contacted Ms. Kane's attorney's for her criminal case in order to speak with Ms. Kane; however, because that matter is separate from her duties as Attorney General, counsel then attempted to have the Office of Attorney General make Ms. Kane available.

appointed.² Ms. Kane will also add that under Attorney Fina's watch, the grand jury presentment was improperly leaked by being improperly placed on a website,³ which could only have been done by the government, and that no witness could have leaked that information. Ms. Kane will testify that she has filed a motion with the Court of Common Pleas of Montgomery County in which she avers the following:

As detailed below, **leaks of grand jury information have occurred repeatedly in recent high profile cases—including two of Frank Fina's own cases;** none of these other leaks appear to have resulted even in a grand jury investigation.

See attached Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, at 10. She will acknowledge that her Motion continued,

For example, **during the grand jury investigation into Jerry Sandusky, the very charges against the defendant were posted to the state court website while they were still supposed to be secret.** As mentioned earlier, the lead prosecutor on the Sandusky case was Frank Fina. However, there is no indication in the public record that Fina or any other prosecutor convened an investigating grand jury to examine that leak, and no one has been criminally prosecuted for it.

See id. at 12 (internal footnote omitted). In addition, Ms. Kane will testify that her motion provides,

In short, although **there have been leaks of grand jury information in other recent, high profile cases,** only Attorney General Kane has been prosecuted.

² Public information shows that two special prosecutors were ultimately assigned regarding leaks in the Sandusky investigation that pertained to Tim Curley, Gary Schultz, and Dr. Graham Spanier, but that they did not receive cooperation from the Office of Attorney General. *See* attached article. Mr. Sandusky is currently appealing a decision by the Honorable Judge Norman Krumenaker, III, to keep under seal certain information relative to the investigation and denying the appointment of a special master/prosecutor. That appeal is currently under seal and the undersigned are currently not permitted to discuss the substance of that matter.

³ The Commonwealth at the May 2, 2016 argument only addressed Mr. Sandusky's claim of a leak by arguing that a witness could have provided that information. Mr. Sandusky has provided prior argument regarding how the witnesses who had that information have denied having spoken with Ms. Ganim or provided her with that information. It is beyond cavil that a witness could not have leaked the presentment online.

Even when **there were grand jury leaks in two of Fina's own cases**, there is no evidence that he ever referred those leaks to a supervising judge or recommended a criminal investigation.⁴

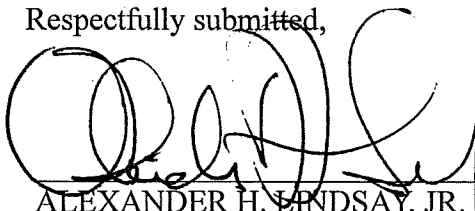
See id. at 13. Finally, as it relates to Ms. Kane's motion, she will testify that includes the following information,

When sensitive grand jury information was leaked in the highly-publicized Sandusky case (on which Fina was the lead prosecutor), and again in the Tyron Ali case (on which Fina was also the lead prosecutor), he apparently felt no similar "duty," as there is no evidence that he ever referred **those leaks** to the supervising judge[.]


Id. at 16 (emphases added).

Thus, Ms. Kane will testify that grand jury information was leaked by the government during the Sandusky investigation. She will further testify that Attorney Fina did not investigate those leaks and implicitly approved of the leaks since he did not conduct or seek to conduct an investigation into the grand jury leaks.

Respectfully submitted,



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⁴ One of the investigations being referenced by Ms. Kane was the Sandusky matter.

ATTACHMENT



http://www.dailyitem.com/news/feudale-hits-back-at-kane-over-leak-allegations/article_d3ca4c48-7f70-11e5-9a2a-57c63b163470.html

Feudale hits back at Kane over leak allegations

Eric Scicchitano Oct 30, 2015

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SUNBURY — Senior Judge Barry Feudale questions why it took a judicial order for Attorney General Kathleen Kane to bring alleged evidence to light that Feudale himself leaked confidential information illegally.

Kane accuses Feudale, a retired Northumberland County jurist, of sharing classified Supreme Court documents with two reporters from the Philadelphia Inquirer. She hasn't ruled out that additional leaks came from within her own office.

If what she intends to present to Senior Judge John Cleland affects her staff's work to keep convicted child molester Jerry Sandusky behind bars, Feudale says it should have already been shared internally.

"If she truly has something, she should be sharing it with her attorneys in the Office of the Attorney General," Feudale said Friday.

"It sounds to me like she's trying to assist Sandusky's attorney," he said. "She's in a way trying to impact her attorneys who are trying to uphold Sandusky's conviction."

Sandusky, a former Penn State assistant football coach, is challenging his 2012 conviction on 45 counts of sexual abuse against children. Among the claims is that calculated leaks unfairly favored prosecutors. He's serving a minimum of 30 years in prison and, as reported Friday by PennLive.com, is held in restrictive housing for his own protection.

Feudale presided over the grand jury that indicted Sandusky. Frank Fina, a former Snyder County resident and a Kane foe, was the lead prosecutor. Kane launched an investigation into the handling of the case on accusations it was slowed out of political favor for the gubernatorial campaign of Tom Corbett, the one-time attorney general during the Sandusky investigation. Kane's review couldn't prove the accusations.

What, exactly, Kane will reveal to Cleland under seal is unknown. It's due Wednesday. A spokesman denies Feudale's claim that Kane is aiding Sandusky's post-conviction action.

"The attorney general is in no way interested in assisting the Sandusky defense," Chuck Ardo said. "Her comments about Judge Feudale's behavior relate to his release of secret Supreme Court information and has nothing to do with the Sandusky trial in any way."

Judy Ritter, a criminal law professor with Widener University's Delaware campus, said Cleland could be looking to see whether the alleged leaked information in any way shows bias by Feudale in his role as the grand jury judge and if the jury pool was somehow contaminated as a result.

"Bias on behalf of the judge is a constitutional issue. It's a due process problem," Ritter said.

If it's established that confidential information was leaked and affected the case, Sandusky's conviction could be set aside and he could get a new trial, Ritter said.

"That's a big if," Ritter emphasized.

Feudale and Kane are again locked in battle more than two years after Kane successfully petitioned to have Feudale removed as a grand jury judge.

Kane reported Feudale's alleged leaks to the Judicial Conduct Board, her office announced Wednesday. On Thursday, Cleland ordered Kane to provide proof, which she agreed to do. Cleland is presiding over Sandusky's post-conviction request to vacate his conviction.

Feudale, who claims sensitive files were stolen from his office in 2013 by Kane or someone else at her direction, favors Cleland's order. He says it calls Kane's credibility into question.

Feudale says he has his own proof linking Kane and her "agents" to violations of laws and ethics. He plans to submit his findings early next week to the state Supreme Court among others and is petitioning to have his accusations reviewed by a grand jury.

"I believe Kane's acts/omissions reflect her as being the most corrupt, dishonest, deceptive politically motivated 'public servant' I have encountered in my 28 years as a judge," Feudale wrote in a statement to the media Thursday.

Ardo called the allegation "alarming."

"(Feudale) has had a long-standing disagreement with the attorney general. We look forward to seeing what evidence he has to back up his allegations," Ardo said.

Charges of felony perjury and related counts were filed against Kane on Aug. 6 in another case for allegedly leaking grand jury information to the Philadelphia Daily News and lying about it. Her law license remains under suspension, and state senators are forming a committee to potentially remove her from the elected office.

Maintaining his stance that he wouldn't violate secrecy rules, Feudale points to an order of his own in February 2013 where he tasked two special prosecutors to investigate allegations of leaks regarding the case against three Penn State administrators indicted in the wake of the Sandusky investigation, including ex-university president Graham Spanier.

The following May, Feudale was removed from grand jury deliberations. He says Kane failed to follow through on two orders to support the six-month investigation. An email from one of the prosecutors to Feudale speaks of frustration with the process.

"Ken Brown and I (James Reeder) are feeling somewhat adrift in regard to our special prosecutor assignment. ... The Office of the Attorney General is not cooperating with our requests for material," Reeder wrote to Feudale in June 2013.

Had he remained on the grand jury, and had Kane not cooperated with the special prosecutors, Feudale said he would have held her in contempt himself.

"She never went forward with the investigation, and that's a violation of an order of the court," he said.

Ardo said he was unaware of the orders.

ATTACHMENT

ORIGINAL

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

KATHLEEN G. KANE

No. 6239-15

No. 8423-15

2016 APR 27 PM 1:04

CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.

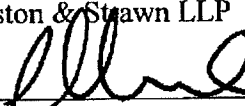
**MOTION OF ATTORNEY GENERAL KATHLEEN G. KANE
TO QUASH BASED ON SELECTIVE AND VINDICTIVE PROSECUTION**

Attorney General Kathleen G. Kane, by and through her counsel, Gerald L. Shargel, Esq., hereby moves the Court before the Honorable Wendy Demchick-Alloy, Justice of the Court of Common Pleas, Montgomery County, 2 East Airy Street, Norristown, Pennsylvania for an Order:

1. Quashing the charges in this case because Attorney General Kane is the victim of selective and vindictive prosecution;
2. And for any other relief the Court deems just and proper.

Dated: New York, New York
April 27, 2016

Winston & Strawn LLP


Gerald L. Shargel, Esq.

Seth C. Farber, Esq.

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Attorney for Attorney General Kathleen G. Kane

Attorney ID: 22703

ORIGINAL

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

KATHLEEN G. KANE

:
: No. 6239-15
: No. 8423-15
:
:

CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.
2016 APR 27 PM 1:04

MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY GENERAL
KATHLEEN G. KANE'S MOTION TO QUASH BASED ON
SELECTIVE AND VINDICTIVE PROSECUTION

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INTRODUCTION

Leaks of grand jury information are not uncommon; neither are disclosures of other confidential information about criminal investigations. However, prosecutions for these leaks or disclosures are extraordinary. Attorney General Kane was singled out for investigation and subsequent prosecution in this case as a result of the initiative of prosecutors with personal antagonism towards Attorney General Kane resulting from her exercise of her First Amendment rights and her lawful duties as Attorney General of the State of Pennsylvania. Because the Federal and Pennsylvania Constitutions prohibit such selective and vindictive prosecutions, the charges in this case must be dismissed.

LEGAL STANDARD

The defense of selective and vindictive prosecution is a question of law that is properly brought in a motion to dismiss, and is a complete defense to a criminal charge. Com. v. Butler, 601 A.2d 268, 270-71 (Pa. 1991) ("Butler II"). At the heart of the defense of selective or vindictive prosecution is the proposition that "[u]nder the equal protection clause of the Fourteenth Amendment of the United States Constitution, the government must afford similarly situated persons similar treatment." See Com. v. Butler, 533 A.2d 105, 108 (Pa. Super. Ct. 1987) ("Butler I"). In order to establish a case of prosecutorial selectiveness or vindictiveness, a defendant must show that: "(1) others who are similarly situated to the defendant are not generally prosecuted for similar conduct; and (2) the defendant has been intentionally and purposefully singled out for prosecution for an invidious reason." Id. at 109.

An "invidious reason" for prosecution can be demonstrated in one of two ways; either situation warrants "inquiry and judicial intervention." Com. v. Rocco, 544 A.2d 496, 498 (Pa. Super. Ct. 1988), appeal denied Com. v. Rocco, 559 A.2d 36 (1989). The first is "where a

prosecutive decision is based on discriminatory grounds of race, religion, national origin or other impermissible classification.” Id. The second is where “the accused is treated more harshly because he has successfully exercised a lawful right.” Id.; see also Butler II, 601 A.2d at 270 (stating that defense may be “based upon the theory that due process prohibits a prosecutor from punishing a criminal defendant in retaliation for that defendant’s decision to exercise a constitutional right”). It is the second situation that exists in this case.

STATEMENT OF FACTS

As a candidate for Attorney General, Attorney General Kane publicly and openly questioned and criticized the apparent mishandling of the Jerry Sandusky prosecution. In particular, she pledged that, if elected, she would commence a review of the Sandusky prosecution.¹ Shortly after taking office she began that review, even retaining a former federal prosecutor, H. Geoffrey Moulton, Jr., to lead the review and produce a report on his findings.²

Attorney General Kane’s review received considerable public attention, and press reports suggested that the review might result in a public finding critical of the prosecution team, including a finding that the investigation suffered from inexcusable delays.³ A lead prosecutor

¹ Jan Murphy, “State attorney general candidates want to review Sandusky case,” Pennlive.com, Aug. 30, 2012,

http://www.pennlive.com/midstate/index.ssf/2012/08/state_attorney_general_candida.html.

² Charles Thompson, “Attorney General Kane’s Sandusky deputy seen as fair, balanced,” Pennlive.com, Feb. 4, 2013,

http://www.pennlive.com/midstate/index.ssf/2013/02/attorney_general_kanes_sandusk.html.

³ Charles Thompson, “Attorney General Kathleen Kane nears launch of Sandusky probe,” Pennlive.com, Feb. 2, 2013,

http://www.pennlive.com/midstate/index.ssf/2013/02/attorney_general_kathleen_kane_2.html

(“The new inquiry, [Kane] has said, would look at, among other things: Whether enough agents and investigators were dedicated to the investigation at the start? Why Sandusky wasn’t arrested after the first credible case was built? Why Corbett’s staff took the case before a grand jury? Did campaign contributions from board members of The Second Mile, Sandusky’s youth charity, influence matters?”); Thompson, “Attorney General Kane’s Sandusky deputy seen as fair, balanced.” (“The pledge, in essence, is to conduct a thorough

in the Sandusky investigation had been Frank G. Fina, and E. Marc Costanzo assisted in the prosecution, as well.⁴ The investigation and subsequent prosecution of Mr. Sandusky received enormous publicity at the time,⁵ and, undoubtedly, was the capstone of Fina's career in the Office of the Attorney General ("OAG").

Fina and Costanzo had left the OAG shortly after Attorney General Kane took office,⁶ and, according to published reports, were incensed by the Attorney General's review of their work. For example, a March 5, 2013 article in the Legal Intelligencer stated:

Attorneys and agents from the Pennsylvania Attorney General's Office who were involved in the investigation and prosecution of Jerry Sandusky are 'outraged' that Attorney General Kathleen Kane is keeping her promise to investigate the office's handling of the case, and some are prepared to go public if the review's findings are overly critical of their work or inaccurate, sources close to the Sandusky investigation said.

'If they come after us, we're coming out publicly,' said one source who held a leadership post in the office and was involved in the investigation.

Ben Present, "Prosecutors Angered Over Kane's Sandusky Investigation," The Legal Intelligencer, Mar. 5, 2013.

review of the 33-month Sandusky probe to answer lingering questions about why Sandusky wasn't arrested after the first credible witness came forward; why the case was turned over to a grand jury; and whether external factors like then-Attorney General Tom Corbett's gubernatorial aspirations influenced its pacing.").

⁴ Sara Ganim, "Jerry Sandusky trial: Prosecutor is used to the spotlight," PennLive.com, June 10, 2012,

http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_prosecutor_is_u.html (Fina); Mark Shade and Dave Warner, "Jerry Sandusky waives preliminary hearing on child sex abuse charges," The Christian Science Monitor, Dec. 13, 2011,

<http://www.csmonitor.com/USA/Latest-News-Wires/2011/1213/Jerry-Sandusky-waives-preliminary-hearing-on-child-sex-abuse-charges> (Costanzo).

⁵ See, e.g., Joe Drape, "Sandusky Guilty of Sexual Abuse of 10 Young Boys," The New York Times, June 22, 2012, http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?_r=0

⁶ Craig R. McCoy, "Phila. DA assembles team to investigate corruption," Philly.com, Apr. 29, 2013, http://articles.philly.com/2013-04-29/news/38880260_1_veteran-prosecutors-political-corruption-attorney-general.

Approximately a year later, Attorney General Kane publicly criticized a second high-profile investigation conducted by Fina during his tenure at the OAG: the "Tyron Ali" investigation. In that investigation, Fina supervised a three-year undercover sting operation into allegations of public corruption. Attorney General Kane halted the investigation without bringing charges and publicly stated that Fina's investigation was poorly conceived, badly managed, and tainted by racism because it had targeted African Americans.⁷

Shortly after Attorney General Kane made her public statements, Fina (who by then had become a prosecutor in the Philadelphia District Attorney's Office) took the extraordinary step of writing an op-ed article publicly attacking Attorney General Kane's decision to close the Tyron Ali investigation. In that article, Fina wrote:

Attorney General Kathleen Kane ended that corruption investigation without charging any of the public officials involved, and she has in the past week made critical and negative assertions about my colleagues and I and the work that we performed in the investigation.

* * *

Surely, an elected official should be able to and required to speak to the citizens of this Commonwealth and explain how and why she made a decision to not pursue possible official corruption, and instead chose to criticize those who sought to bring possible crimes to light, and then remain silent when called to answer.

I await AG Kane's response to my invitation to speak to the citizens of this state – unless of course she remains silent at her lawyer's direction.

⁷ Angela Coulombis and Craig R. McCoy, "Kane: Targets committed crimes but sting still flawed," Philly.com, Mar. 19, 2014, http://articles.philly.com/2014-03-19/news/48334899_1_sting-operation-kane-sting-case ("While saying public corruption made her 'sick,' Kane said the sting was flawed and tainted by racism, and could not have led to successful prosecutions. 'There is nothing we can do to salvage this case,' she said.").

Frank G. Fina, "I challenge AG Kane to face me on the facts of corruption probe: Frank G. Fina," PennLive Op-Ed, Mar. 24, 2014, http://www.pennlive.com/opinion/2014/03/i_challenge_ag_kane_to_face_me.html.

Only six weeks later, on May 7, 2014, Fina and Costanzo were contacted by a reporter, Christopher Brennan, who indicated that he was working on a story that would be critical of their conduct of yet another significant investigation, in this case, their failure to pursue corruption charges against J. Whyatt Mondesire, the former head of the Philadelphia chapter of the NAACP. (Exhibit A, Transcript of Conference Held in Chambers, May 12, 2014, at 2-5.) This time, Fina and Costanzo took even more extraordinary measures in response to the specter of further bad publicity. First, even though Brennan himself was under no obligation of grand jury secrecy and had a First Amendment right to publish his story, Fina and Costanzo attempted to dissuade Brennan from doing so by intimating that grand jury secrecy obligations applied to him and that publication of the article would be a "problem." (*Id.* at 16.) Second, and even more unusually, and even though the Mondesire investigation had ended five years earlier, in 2009, Fina and Costanzo decided to instigate a criminal investigation.

Accordingly, the next day, on May 8, 2014, Fina and Costanzo sent a letter to Judge William R. Carpenter "to report the release of Grand Jury information." (Exhibit B, Letter from Chief Assistant District Attorney E. Marc Costanzo and Assistant District Attorney Frank G. Fina to Honorable William J. Carpenter, dated May 8, 2014, at 1.) They wrote that they had been contacted by a reporter who claimed to have documents containing "extensive evidence and information that clearly fall within the ambit of Grand Jury secrecy." (*Id.* at 1.) They offered to provide further details and answer questions and expressed a preference to do so at an *in camera* conference with Judge Carpenter. (*Id.* at 2.)

(Id. at 12-13.) Fina continued:

The Court: What you are saying is, it would appear, without any firm basis for knowledge, that it probably was leaked from within the Attorney General's Office. That is what you would suspect.

Mr. Fina: Your Honor, again I don't see any other reasonable explanation at this time.

(Id. at 14-15.)

Significantly, during the conference, Fina admitted to Judge Carpenter that he and Costanzo had a personal basis for antagonism against Attorney General Kane. In particular, Fina stated:

I know we are certainly feeling like a couple of ten-point bucks in the first week of deer season lately. I have reason to understand that the Office of the Attorney General has been looking through historical emails, particularly my emails.

(Id. at 13.)

Although Judge Carpenter likely took Fina's comments to refer to a concern about being the target of public criticism over his performance in the OAG, in fact Fina and Costanzo had a far more serious basis for their concern. The OAG email review eventually led to the discovery and public disclosure of pornographic, racist, misogynistic and homophobic emails from the government email files of numerous members of the OAG and other Pennsylvania public officials. That public disclosure has forced many of those officials from public office,⁹ and, when it was finally revealed that Fina and Costanzo had themselves received (and, in Fina's

⁹ See, e.g., Associated Press, "2nd top Pa. judge resigns over porn email scandal," CBSNews.com, Mar. 15, 2016, <http://www.cbsnews.com/news/pennsylvania-judge-michael-eakin-resigns-porn-email-scandal/>; Wallace McKelvey, "Porn email scandal forces resignation of Pa. fraud investigator," PennLive.com, Aug. 28, 2015, http://www.pennlive.com/midstate/index.ssf/2015/08/kane_porn_email_resignations.html.

On May 12, 2014, Fina and Costanzo appeared before Judge Carpenter in an *in camera*, sealed proceeding. (Exhibit A at 1.)⁸ During their appearance, Fina and Costanzo again stated that they had been contacted by a reporter who claimed to have information related to a prior grand jury proceeding. (*Id.* at 2-3.) Fina said that he believed it was his “duty” to report the leak and offered his legal conclusion that “the individual who had provided [the reporter] with this e-mail in all likelihood had committed a crime, possibly even a felony.” (*Id.* at 4.)

Judge Carpenter asked Fina and Costanzo what action they were requesting that the Court take. (*Id.* at 10.) In response, Fina noted that Judge Carpenter could investigate the alleged leak as a potential criminal violation. (*Id.* at 11-12.) Fina also suggested the appointment of a special prosecutor to pursue criminal charges. (*Id.* at 12) (“Judge Garb on one occasion appointed an independent prosecutor, answerable only to him, somebody from outside the A.G.’s Office, and that person looked into an alleged secrecy breach.”). Fina even insinuated that he himself would be particularly qualified to run a leak investigation. (*Id.* at 12) (“I have conducted some of these reviews when I was in the Attorney General’s Office on behalf of different supervising judges. I did it for Judge Garb. I also did it for Judge Feudale and a judge in Pittsburgh once.”).

Fina also suggested that the target of such a special prosecutor’s investigation should be the Office of Attorney General:

This document, as far as I’m aware, only existed on a historical database somewhere in the Attorney General’s Office. Who is looking through those historical e-mails I am not aware specifically, but it has now apparently been handed out to the media.

⁸ Fina and Costanzo acted in their official capacity in their correspondence with, and appearance before, the supervising judge of the investigating grand jury. First, they wrote Judge Carpenter on the stationery of the Philadelphia County District Attorney and signed their letter as Assistant District Attorneys. (Exhibit B at 1). Second, they gave their appearances at the start of the conference as Assistant District Attorneys in Philadelphia County. (Exhibit A at 1.) Third, before reporting the leak to Judge Carpenter, Fina had informed the Philadelphia County District Attorney that he would be doing so. (*Id.* at 6.)

case, also sent) such pornography,¹⁰ both faced public demands for their removal from the District Attorney's Office.¹¹ Articles reporting on those public demands for removal included graphic descriptions of some of the emails, including: "a 32-image pictorial circulated by Fina entitled 'Blonde Banana Split' [that] shows two women inserting bananas into their vaginas and anuses";¹² a 2009 email that Fina sent to his colleagues entitled "FW: New Office Motivation Policy Posters" "containing images with a theme of women sexually pleasing their bosses;"¹³ and, an email where "Fina indicated his favorite image was of a woman in a rainbow thong, with a caption underneath stating: 'Rainbows: Not as Gay as You Might Think.'"¹⁴

Judge Carpenter would have known none of this as he listened to Fina's and Costanzo's presentation, but these two Philadelphia County Assistant District Attorneys surely knew what their own email correspondence contained and surely recognized the threat to their careers and their reputations that Attorney General Kane's investigation of that correspondence posed.

¹⁰ Mary Wilson, "Court Releases Pornographic Emails Kane Wanted Public," WKSGnews.com, Aug. 26, 2015, <http://wskgnews.org/post/court-releases-pornographic-emails-kane-wanted-public#stream/0> ("The court also unsealed a selection of the pornographic e-mails Kane's office uncovered, revealing Fina and Costanzo among the messages senders and recipients.").

¹¹ See, e.g., Joel Mathis, "Why Doesn't Frank Fina Quit?" PhillyMag.com, Dec. 9, 2015, at <http://www.phillymag.com/news/2015/12/09/frank-fina-quit-resign/>; Tricia Nadolny, "Philadelphia DA reassigns prosecutors caught up in Porngate," The Morning Call, Dec. 4, 2015, <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-porngate-philly-prosecutors-reassigned-20151204-story.html> (referencing "repeated calls" for Fina and Costanzo's resignation due to the porngate scandal); Ernest Owens, "Councilwomen call for resignation of city prosecutors tied to Porngate," Metro, Nov. 12, 2015, at <http://www.metro.us/philadelphia/councilwomen-call-for-resignation-of-city-prosecutors-tied-to-porngate/zsJokl---YKb6laFaHelmY/> (referencing petition launched by group of Philadelphia Councilwomen calling for resignation of Fina and Costanzo).

¹² Tim Cwiek, "NOW Urges Firing of D.A. Staffers in Porn Ring," EPGN.com, Sept. 24, 2015, <http://www.epgn.com/news/local/9403-now-urges-firing-of-d-a-staffers-in-porn-ring>.

¹³ David Gambacorta and William Bender, "Fina plays central role in scandals," The Morning Call, Oct. 1, 2015, <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-kane-porn-email-frank-fina-20151001-story.html>.

¹⁴ Cwiek, "NOW Urges Firing of D.A. Staffers in Porn Ring."

Unaware of this personal reason for animosity by Fina and Costanzo towards Attorney General Kane, Judge Carpenter followed Fina's suggestion to launch a criminal investigation. Thus, on May 29, 2014, Judge Carpenter appointed Thomas Carluccio as Special Prosecutor and authorized his investigation into an alleged grand jury leak. (Exhibit C, Order Appointing Special Prosecutor, May 29, 2014, at 2.) That investigation resulted in the grand jury report, a subsequent referral to the Montgomery County District Attorney, and, eventually, the criminal charges lodged against Attorney General Kane in this case.

ANALYSIS

The charges in this case must be quashed because Attorney General Kane was the victim of selective and vindictive prosecution. First, others who are similarly situated are not generally prosecuted for similar alleged conduct. As detailed below, leaks of grand jury information have occurred repeatedly in recent high-profile Pennsylvania cases – including two of Frank Fina's own cases; none of these other leaks appear to have resulted even in a grand jury investigation, and certainly none have led to a criminal prosecution, as here. Second, Attorney General Kane was targeted for investigation and prosecution for an invidious reason. Specifically, the timing and circumstances of Fina's and Costanzo's actions, and Fina's statements, all support the inference that ADA Fina and ADA Costanzo instituted the Special Prosecutor's criminal investigation in an effort to retaliate against Attorney General Kane for exercising her First Amendment rights and for actions she took while carrying out the lawful duties of her elected office.

I. Others Similarly Situated Are Not Prosecuted

The first prong of the selective or vindictive prosecution standard is easily satisfied in this case, as "others who are similarly situated to the defendant are not generally prosecuted for

similar [alleged] conduct.” See Butler I, 533 A.2d at 109. Indeed, a Westlaw search reveals no reported decisions at all of Pennsylvania state court prosecutions for either leaks of grand jury information or violations of Pennsylvania’s Criminal History Record Information Act (CHRIA) for the past 25 years.¹⁵ But while such prosecutions are virtually unheard of, leaks of grand jury information are not. Indeed, and as discussed below, there have been numerous recent leaks of grand jury information in Pennsylvania and, as far as the public record reveals, none of these other leaks has led to a grand jury investigation, much less to a criminal prosecution.

For example, during the grand jury investigation into Jerry Sandusky, the very charges against the defendant were posted to the state court website while they were still supposed to be secret.¹⁶ As mentioned earlier, the lead prosecutor on the Sandusky case was Frank Fina. However, there is no indication in the public record that Fina or any other prosecutor convened an investigating grand jury to examine that leak, and no one has been criminally prosecuted for it. Similarly, during the “Bonusgate” scandal, a partial transcript of grand jury testimony was leaked to the Pittsburgh Post-Gazette.¹⁷ Once again, there is no public indication that any investigation of this incident ever occurred and, once again, no one has been prosecuted for the leak.

Even the March 17, 2014 Philadelphia Inquirer article that, according to the Complaint in this case (August 6, 2015 Complaint, Affidavit of Probable Cause, at 2), served as the alleged

¹⁵ For instance, a search across the Westlaw database for all Pennsylvania criminal cases with “violat!” in the same sentence as “Criminal History Record Information Act” yields no hits for actual prosecutions under CHRIA.

¹⁶ Sarah Ganim, “Attorney General to investigate early release of Sandusky charges as grand jury probe continues,” The Patriot News, Nov. 5, 2011, http://www.pennlive.com/midstate/index.ssf/2011/11/ag_to_investigate_early_releas.html.

¹⁷ Tracie Mauriello and Dennis B. Roddy, “Stetler aide links former lawmaker to Bonusgate,” Pittsburgh Post-Gazette, June 19, 2009, <http://www.post-gazette.com/news/state/2009/06/19/Stetler-aide-links-former-lawmaker-to-Bonusgate/stories/200906190180>.

“motive” for Attorney General Kane to release grand jury information contained multiple leaked facts from the Tyron Ali grand jury investigation. For example, that article reports such potentially disparaging facts as: “[f]our state lawmakers took money. ... State Rep. Ronald G. Waters accepted multiple payments totaling \$7,650; State Rep. Vanessa Brown took \$4,000; State Rep. Michelle Brownlee received \$3,500; and State Rep. Louise Bishop took \$1,500, said people with knowledge of the investigation.”¹⁸ Fina supervised the Ali investigation, but there is no evidence that he brought these leaks to the attention of a supervising judge in an effort to start an investigation and prosecution, as he did here. And, again in contrast to the treatment of Attorney General Kane in this case, no one has been prosecuted for the Ali leaks.

In short, although there have been leaks of grand jury information in other recent, high-profile cases, only Attorney General Kane has been prosecuted. Even when there were grand jury leaks in two of Fina’s own cases, there is no evidence that he ever referred those leaks to a supervising judge or recommended a criminal investigation. Among similarly situated individuals, Attorney General Kane stands alone.

II. Attorney General Kane Has Been Intentionally and Purposefully Singled Out for Prosecution for an Invidious Reason

The second prong of the selective or vindictive prosecution standard is also satisfied in this case, as the evidence strongly supports the inference that Attorney General Kane was intentionally and purposefully singled out for investigation and prosecution for an invidious reason. In particular, the timing and circumstances of Fina’s and Costanzo’s actions, and Fina’s statements, all suggest that these Assistant District Attorneys targeted Attorney General Kane because she had openly and publicly criticized their work on the Sandusky and Tyron Ali cases,

¹⁸ Angela Coulombis and Craig R. McCoy, “Kane shut down sting that snarled Phila. Officials,” Philadelphia Inquirer, Mar. 17, 2014, http://articles.philly.com/2014-03-17/news/48269239_1_investigation-kane-ali.

and because she had made public statements and taken actions reflecting poorly on their professional accomplishments and reputation. In effect, she was targeted because she had exercised her lawful duties as Attorney General and her First Amendment rights to make public statements about Fina's performance.

An individual has a constitutionally protected right to hold elected office and to carry out the lawful duties of that office. See, e.g., Snyder v. Bender, No. 1:09-CV-0927 (YPK), 2010 WL 2103640, at *4 (M.D. Pa. May 25, 2010) (discussing First Amendment right to run for elected office and citing Flinn v. Gordon, 775 F.2d 1551, 1554 (11th Cir. 1985), for proposition that an individual has "a constitutional right to run for office and to hold office once elected"). The lawful duties of Attorney General Kane's office include the review of past OAG prosecutions to determine if misconduct occurred (Sandusky), the decision to discontinue an investigation (Ali) and the communication to the public of the reasons for her decisions. Because the evidence points to the conclusion that ADA Fina initiated the criminal investigation of Attorney General Kane because of his antagonism against her due to her exercise of these lawful rights, the charges against her must be dismissed.

The Superior Court's decision in Butler I, 533 A.2d at 108-110, is instructive. In Butler, the defendant had been tried for prostitution three years prior. Id. at 105. At trial, she testified in her own defense. Id. When asked if she had ever been convicted of a crime, she answered that she had not. Id. She was acquitted. Id. Following her acquittal, she filed a civil action against a police detective and other government officials based on an allegedly coercive search. Id. Shortly after her civil suit was filed, county officials "discovered" that the defendant did in fact have a prior conviction, and she was arrested and tried for perjury based on her allegedly false testimony at her prior trial. Id. at 106.

During the perjury trial, the detective who was the subject of the defendant's civil suit testified that he was in fact the person who had learned of her prior conviction and had reported it to the District Attorney's Office. Id. Out of the jury's presence, "he claimed that it was merely coincidence that this information came to his attention after the civil suit was filed." Id. The court did not allow the defendant to develop this evidence at trial. Id.

On appeal, the Superior Court held that the trial court had erred in precluding evidence that was relevant to the issue of prosecutorial vindictiveness. Id. at 108. The Court noted that "it is unconstitutional for the government to prosecute an individual because the prosecutor has a personal animus against the defendant." Id. at 108-09 (citing United States v. DeMichael, 692 F.2d 1059, 1061 (7th Cir. 1982)). "Because it is constitutionally repugnant, selective prosecution constitutes a valid defense to a criminal charge." Id. The Court added:

Though the vast majority of prosecutors are dedicated and able public servants who would never misuse their tremendous power, our legal system strives to prevent even the occasional injustice. Thus, the defense of selective prosecution provides a check upon the arbitrary exercise of governmental power. When all else has failed, an individual victimized by governmental wrath is still protected by judicial vigilance.

Id. at 110.

The Court held that the prosecution of the defendant for perjury had at least "a suspicious air." Id. at 109. The Court wrote:

In this case, Butler claims that Delaware County prosecuted her for perjury because of her civil suit which is based upon an allegedly unconstitutional search. Certainly, the proximity in time between the filing of the civil suit and Detective O'Leary's re-awakening of interest in Butler's case has a suspicious air. It is also suspicious that O'Leary mysteriously found a Justice Department report in Butler's file soon after she filed her civil suit.

Id. The Court further wrote:

It is arguably logical that the County re-investigated Butler and dredged up previously ignored information in retaliation for her lawsuit. The effect was then

to single out Butler. The purpose was to retaliate for her exercise of protected constitutional rights.

Id.

The Court concluded that the defendant's allegations "made out a prima facie case of selective prosecution" because she had "asserted both discriminatory effect and discriminatory purpose." Id. The Superior Court held that because the defendant's claim of selective and vindictive prosecution had "arguable merit," the trial court "should have held an evidentiary hearing and given Butler an opportunity to present her defense." Id. at 110.

As in Butler I, "the proximity in time" between, on the one hand, (a) Attorney General Kane's public criticism of Fina's and Costanzo's work; (b) the "outrage" expressed by the Sandusky prosecutors and their threat that 'If they come after us, we're coming out publicly;' (c) Fina's op-ed piece (demonstrating his personal indignation about Kane's statements and actions in relation to the Tyron Ali case); and, on the other hand, Fina's and Costanzo's report to Judge Carpenter of allegedly leaked grand jury documents, and Fina's supposition that it must have involved Attorney General Kane and OAG, "has a suspicious air," to say the least. See id.

Also "suspicious" is Fina's statement that he believed it was his "duty" to report a leak in this five-year-old closed case. (See Exhibit A at 4.) When sensitive grand jury information was leaked in the highly-publicized Sandusky case (on which Fina was the lead prosecutor), and again in the Tyron Ali case (on which Fina was also the lead prosecutor), he apparently felt no similar "duty," as there is no evidence that he ever referred those leaks to the supervising judge and, indeed, no one has been criminally charged for those disclosures.

In sum, the evidence indicates that, in response to harsh and ongoing criticism of their professional accomplishments, and concerned about the potential consequences of an email review that would eventually disclose their pornographic emails and lead to calls for their

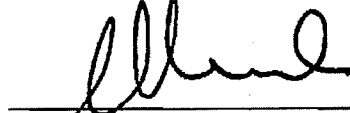
resignation, ADA Fina and ADA Costanzo singled out Attorney General Kane for investigation and prosecution. Such selective and vindictive prosecution is unconstitutional, and, as a result, the charges in this case should be quashed in their entirety. See Butler I, 533 A.2d at 109-10 (“Because it is constitutionally repugnant,” selective and vindictive prosecution constitutes valid and complete defense to criminal charge).

CONCLUSION

For the foregoing reasons, the charges against Attorney General Kane must be dismissed with prejudice. In the alternative, should the Commonwealth contest the factual bases of this motion, an evidentiary hearing is required. See Butler I, 533 A.2d at 110.

Dated: New York, New York
April 27, 2016

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IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
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

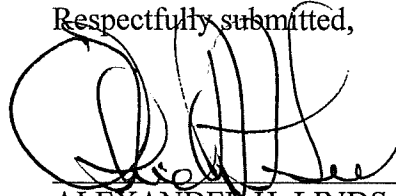
The undersigned hereby certifies that on the 9th day of May, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

Via First Class Mail

Honorable John M. Cleland, Sr. Judge c/o Office of the Court Administrator and
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Respectfully submitted,



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