9-3

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

IN RE:	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE	:	
INVESTIGATING GRAND JURY	:	DAUPHIN CO. COMMON PLEAS
	:	No. CP-22-CR-5164-2011
	:	

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

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
v.	:	
	:	DAUPHIN CO. COMMON PLEAS
	:	No. 1386-MD-2012
GARY C. SCHULTZ,	:	
Defendant.	:	
	:	

SEALING ORDER

AND NOW, to-wit, this _____ day of _____, 2013, it is hereby ORDERED that the enclosed Reply be filed under seal with the Clerk of Courts of Dauphin County until further order of this Court.

BY THE COURT:

_____, J.

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

IN RE:	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE	:	
INVESTIGATING GRAND JURY	:	DAUPHIN CO. COMMON PLEAS
	:	No. CP-22-CR-5164-20
	:	

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

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
v.	:	
	:	DAUPHIN CO. COMMON PLEAS
	:	No. 1386-MD-2012
GARY C. SCHULTZ,	:	
Defendant.	:	
	:	

DEFENDANT GARY C. SCHULTZ' REPLY TO COMMONWEALTH'S ANSWER TO DEFENDANTS' JOIN MOTION TO QUASH PRESENTMENT AS DEFECTIVE FOR RELYING ON ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS AND WORK PRODUCT

TO THE HONORABLE BARRY FEUDALE, SUPERVISING JUDGE:

AND NOW, comes the defendant, Gary Charles Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully files the within Reply to the Commonwealth's Answer to Defendants' Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product and states the following in support:

INTRODUCTION

"Where a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice." *Nasim v. Shamrock Welding Supply Company,* 387 Pa. Super. 225, 228, 563 A.2d 1266, 1268 (1989)(quoting *Wills v. Kane,* 2 Grant 60, 63 (Pa. 1853)). This doctrine of judicial estoppel serves "'to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment.' " *Commonwealth v. TAP Pharm. Prods.,* 36 A.3d 1112, 1150 (Pa. Cwlth 2011.

The Commonwealth has dealt doubly with our Motions. In its Answer to Defendant Schultz and Curley's Omnibus Pretrial Motions before Judge Hoover, which alleged that Attorney Baldwin denied Defendants any representation in their grand jury appearances before this Court, the Commonwealth maintained "that attorney Baldwin represented the defendants," Commonwealth Answer to Defendants' Omnibus Pretrial Motions ("Exhibit A" hereto) at p.21. Now, the Commonwealth asserts that Ms. Baldwin was never either Defendant's "individual attorney." Commonwealth Answer to Motion to Quash at 4. Therefore, that most basic aspect of an attorney-client relationship, confidentiality, does not apply.

The Commonwealth also has not dealt fairly with this Court. When the Defendants appeared to testify before the Thirtieth Grand Jury on January 12, 2011, with Attorney Baldwin claiming to be their attorney, the Commonwealth realized there was at least "the possibility of a conflict," but never raised it with this Court, at a time when the Court could have prevented the current mess. *See*

Exhibit A at 23. When Ms. Baldwin appeared before the Thirty-Third Grand Jury to testify against her former clients as a Commonwealth witness in October 2012, the Commonwealth, despite letters from current counsel for the Defendants and contrary to established procedures for the determination of privilege issues, again kept the Court in the dark about the sensitive and complex privilege issues the Court now faces, depriving the Defendants of an opportunity to be heard and the Court of a chance to administer justice when it could have mattered.

I. The Record Before the Court – the Unsealed Grand Jury Proceedings, the Affidavits, and the Commonwealth's Admissions – Establish Beyond Dispute that Ms. Baldwin Represented Mr. Schultz in Connection with the Grand Jury Investigation.

A. The Commonwealth Errs in Suggesting that Counsel For a Corporation Cannot Jointly Represent It and Its Employees.

The Commonwealth's Answer relies principally on an unsupported assertion that as a matter of law, since attorney Baldwin was General Counsel for PSU, "Curley and Schultz do not have the right to assert privilege. Each chose to use PSU's counsel as his representative and therefore cannot claim now that she was his individual attorney, regardless of how he *or* attorney Baldwin chose to characterize that relationship." Answer at 4 (emphasis added). The Commonwealth's position is that even if Attorney Baldwin told everyone – this Court, the OAG, Messrs. Curley and Schultz – that she represented Messrs. Curley and Schultz in their individual capacity as grand jury witnesses, that declaration was a legal impossibility.

The Commonwealth's position contradicts this Court's own words on January 12, 2011. After Ms. Baldwin identified herself as "providing representation for both of those identified witnesses," (January 12, 2011 Colloquy with Judge Feudale, "Exhibit B" hereto, at 8), the Court advised Curley and Schultz, "First, you have the right to the advice and assistance of a lawyer. This means you have the right to the services of a lawyer with whom you may consult concerning all matters pertaining to your appearance before the Grand Jury." *Id.* at 8-9. The Court then specified that the lawyer representing them was Ms. Baldwin: "you may confer with *her*." *Id.* at 9. (emphasis added).

The law also is to the contrary. "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 (Conflicts of Interest: Current Clients)." Pa. R. Prof. C. 1.13(e). It is well-established that an individual, including a constituent of an organizational client, "may reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the entity, thus creating an implied client-lawyer relationship." Restatement (Third) of Law Governing Lawyers § 14, cmt. f (2000).

In fact, the very cases upon which the Commonwealth relies acknowledge that employees consulting an attorney who also represents the corporation "may hold a privilege as to communications made by them in their *individual* capacities." *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 41, 641 A.2d 1, 4 (1994) (emphasis added). *See also In the Matter of Bevill, Bresler & Schulman Asset*

Management Corporation, 805 F.2d 120, 125 (3d Cir. 1986)("[A]n individual officer may have an individual claim of attorney-client privilege with regard to communications with corporate counsel.").

When it comes to a grand jury, the joint representation must be full: the attorney must be able to represent each client zealously and, unless waived, maintain each client's confidences. In *In re Fifth Pennsylvania Statewide Investigating Grand Jury [No. 2]*, 50 Pa.D&C3d 617 (Dauphin Co CCP 1987), counsel for the mayor, who was a target of the investigation, also sought to represent the chief of police, but only in a narrow capacity. Counsel confirmed that "he will not be a party to any matters that come up between him [the chief] and the attorney general, and will not go into the grand jury room with [the chief]." *Id.* at 622. The chief of police agreed and sought to waive any conflict of interest, but the court refused to accept the waiver, holding that under the circumstances "counsel's multiple representation has already resulted in counsel's inability to fully protect the rights of his client as envisioned by the right to representation set forth in the Grand Jury Act." *Id.* at 623. "Adequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest." *Id.* at 622. *See also* Report of Lawrence Fox, "Exhibit C" hereto, at 4-5.

As a grand jury witness in an investigation that encompassed his conduct, Mr. Schultz faced potential personal criminal liability. *See* 18 Pa.C.S.A. §307(e)(1) ("A person is legally accountable for any conduct he performs or causes to be

performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.") That is why the Investigating Grand Jury Act afforded him a right to an attorney: his exposure was personal, and thus he needed personal counsel, as this Court explained in its colloquy, for consultation, advice, and representation. That the attorney also represented PSU cannot be dispositive. His "potential prison sentence is outside the scope of the corporation's concerns and affairs." *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1041 (10th Cir. 1998)("[A] corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs").

Ms. Baldwin's role as general counsel for PSU and her concurrent and conflicted representation of Mr. Schultz as a grand jury witness, although improper, do not destroy the privilege. If "an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct." *In re Teleglobe Communications Corp.*, 493 F.3d 345, 368 (3d Cir. 2007). Nothing in the record before the Court suggests that Mr. Schultz knowingly and intelligently waived his right to counsel in the grand jury or the confidentiality of his communications with that counsel. As Mr. Fox put it:

> But we are told by the Commonwealth the foregoing does not apply here because Messrs. Schultz and Curley should have known

> that Penn State, as Cynthia Baldwin's client, controlled the privilege and could waive it at any time, not only for Penn State but for Messrs. Schultz and Curley. What an extraordinary, frivolous and dangerous assertion! What the Commonwealth is telling the court is that, without warning or explanation, let alone informed consent, Messrs. Schultz and Curley were supposed to understand that even though the clients, the court and the grand jury were all told in no uncertain terms by Ms. Baldwin – on the record – that she was representing these two, Ms. Baldwin was totally free to disclose any of the privileged information of her two individual clients at any time and without warning if Penn State directed her to do so. That turns the law of privilege literally upside-down, rendering it a false protection and leaving the clients helpless before the power of the Commonwealth.

Exhibit C, at 12.

We also cannot accept the Commonwealth's assertion that "PSU has waived *any* privilege relating to this investigation." Answer at 4 (emphasis added). Counsel recently received a copy of a letter from PSU's counsel to the OAG, and in that letter, PSU carved out from its waiver "communications with Messrs. Schultz, Curley, and Spanier." January 15, 2013 Michael Mustokoff letter, "Exhibit D" hereto.

B. The *Maleski / Bevill* Test Does Not Apply Where The Attorney Explicitly Represents That She Is Counsel To The Individuals.

"The Commonwealth has conceded that attorney Baldwin stated that she represented Curley and Schultz at the time that each testified before the grand jury." Commonwealth Answer to Motion to Quash at 4. Further, the Commonwealth also "admitted that Attorney Baldwin did not inform the Supervising Judge of any dual representation involving the Defendant and the Pennsylvania State University at the time of the Defendant's testimony before the Grand Jury." Exhibit A, at p.5, ¶18. Under these circumstances, the

Maleski/Bevill test does not apply. It is needed only where a court requires aid in assessing whether corporate counsel represented an officer or an employee for a corporation in an individual capacity, not where the attorney explicitly declared to the court, in the presence of the prosecution and the grand jury witness, that she represented the witness. That standard is simply a tool to assist the court in making the determination as to whether the individual expected individual representation from the corporate counsel. *Maleski*, 641 A.2d at 4.[1]

C. The Appropriate Standard For Determining The Existence Of An Attorney-Client Relationship Is Whether Mr. Schultz Reasonably Believed That Attorney Baldwin Represented Him.

The standards for determining the existence of an attorney-client relationship turn on the client's reasonable beliefs. In the absence of a formal agreement, Pennsylvania courts recognize an attorney-client relationship where:

> 1) the purported client sought advice or assistance from the attorney;
> 2) the advice sought was within the attorney's professional competence;
> 3) the attorney expressly or impliedly agreed to render such assistance; and
> 4) it is reasonable for the putative client to believe the attorney was representing him.

Kirschner v. K&L Gates, LLP, 46 A.3d 737, 748-49 (Pa. Super. 2012). *See also* Restatement (Third) of Law Governing Lawyers § 14 (2000) (adopting a similar test); Exhibit C, Fox Report at 4-8 ("The Tie Goes to the Client.") "The traditional definition is that a lawyer-client relationship arises if someone seeks legal advice from a lawyer and the lawyer gives or impliedly agrees to give it, or if a lawyer knows that someone reasonably believes himself to be the lawyer's client and the

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1 The *Maleksi* court also suggested that its test was limited to the context of statutory liquidation under the Insurance Department Act, where estate maximization is a statutory goal. *Id.*

lawyer does not dispel that belief." Exhibit C, at 6 (quoting ABA/BNA Lawyers' Manual on Professional Conduct § 31:101). The lawyer is ethically obligated to clarify a potential client's belief that the attorney is acting as his representative. *See* Rules of Professional Conduct, Rule 4.3(c)(imposing on the lawyer the duty of dispelling misunderstandings about his role).

At the time Mr. Schultz consulted with attorney Baldwin, he was not an employee of Penn State. He had been retired for nearly two years. The representation was in connection with a grand jury subpoena issued to him personally, not as a Penn state representative. He reasonably believed that Ms. Baldwin was representing him. Schultz Affidavit, hereto "Exhibit E", at ¶ 10. Contrary to the Commonwealth's unsupported factual assertion in its Answer that Mr. Schultz knew of a subpoena to Penn State, he had no knowledge that Penn State, the institution, had been subpoenaed for documents or anything else. *See* Freeh Report, hereto "Exhibit F", at 82 (indicating that Messrs. Spanier, Paterno and Curley knew of the subpoena to PSU, but a nondisclosure order prevented Penn State from telling anyone else about it).

Mr. Schultz "confided highly personal information about his activities to his lawyers in order to secure their opinions about the criminal ramifications of these acts." *See United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990). In *Walters*, the defendant, a sports agent, consulted the agency's counsel as to whether his actions in having college athletes sign draft agent representation contracts constituted a crime. The court held that even though the entity's very business was

agent representation of athletes, since the individual employee was discussing with the criminality of his conduct, the issue was personal and the conversation privileged as to the individual, not just as to the entity. *Id.*

Mr. Schultz' situation is similar to that in the *Walters* case, but worse. Not only did Ms. Baldwin tell Mr. Schultz that she represented him in connection with the grand jury investigation and testimony, she repeated it to this Court and Attorney General on the record in front of Mr. Schultz. Exhibit B, Colloquy at 8. Then, Mr. Schultz repeated his belief under oath in the grand jury, with Ms. Baldwin beside him, and Ms. Baldwin tacitly assented. Grand Jury Transcript, hereto "Exhibit G", at 3. In light of these facts, Mr. Schultz' belief -- and this Honorable Court's -- that Ms. Baldwin personally represented him was not only reasonable, but undisputed at the time he testified. *See* Exhibit B at 9. It should be indisputable now.

II. If Ms. Baldwin's Status as PSU General Counsel Prevented Her From Being Mr. Schultz' Attorney, Then the OAG Knowingly Permitted an Improper Person to Attend the Grand Jury Proceedings, in Violation of the Investigating Grand Jury Act.

The Commonwealth asserts that because Mr. Schultz – who is not a lawyer – knew that Ms. Baldwin was general counsel for PSU, he must have also been aware that Ms. Baldwin could not act as his counsel. Answer at p. 2, ¶13, p. 4-5. But the Commonwealth's argument cuts against it: its experienced criminal deputies were equally aware of Ms. Baldwin's status as corporate counsel. *See* Exhibit B, Colloquy at 8. If that knowledge alone notified Schultz that Baldwin was not his attorney, it also was notice to the OAG. By then permitting Ms. Baldwin to participate in and

attend the grand jury proceedings on January 12, 2011, the Commonwealth violated its duty to keep the proceedings secret from all but the witness and his own attorney. *See* 42 Pa.C.S.A § 4549(b) and Pa. R. Cr. P. 231 (A).

The Commonwealth's deliberate failure to inform this Honorable Court of the presence of an unauthorized person in the grand jury room constitutes serious prosecutorial misconduct that warrants quashing the Presentment. *See Commonwealth v. Levinson,* 480 Pa. 273, 286-87, 389 A.2d 1062, 1068 (1978).

In order to warrant dismissal, the defendant must be able to demonstrate that the prosecution's misconduct resulted in prejudice against him. *Commonwealth v. Williams*, 388 Pa. Super. 153, 160, 565 A.2d 160, 164 (1989). Prejudice occurs where the defendant can establish that the prosecution's acts of misconduct "'substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Williams*, 388 Pa. Super. at 160, 565 A.2d 160 at 164 (citing *The Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988))(quoting *U.S. v. Mechanik,* 475 U.S. 66, 78 (1986))).

The OAG's misconduct was three-fold. First, it violated grand jury secrecy by allowing Ms. Baldwin into the grand jury. Second, it divested this Honorable Court of the opportunity to evaluate Ms. Baldwin's conflict of interest in order to fulfill the Supervising Judge's duty to protect the witness' statutory rights to counsel and to maintain grand jury secrecy. Third, the OAG deliberately invaded the defense camp and intruded on the attorney-client relationship by encouraging the

defendants to confide in, seek advice from, and testify in the grand jury before someone they thought was their counsel, but the OAG knew was not. *See Commonwealth v. Scarfo*, 416 Pa. Super. 329, 374-78, 611 A.2d 242, 264-66 (1992); *State v. Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011); *United States v. Voigt*, 89 F.3d 1050, 1070-71 (3d Cir. 1996).

Presentment Number 29 itself lays out the prejudice from these malfeasances: "Baldwin also testified that it was absolutely clear from her discussion with Spanier that he had extensively discussed the substance of Curley and Schultz' grand jury testimonies from January 2011 with each of those individuals." Presentment at 25. Baldwin, with the OAG's acquiescence, infiltrated the grand jury acting as Defendants' pseudo-attorney and then used the knowledge she gained there to help the OAG establish the charges recommended in Presentment No. 29. The misconduct substantially influenced the decision to return the Presentment. In fact, Baldwin's testimony appears to have been nearly the entire basis of Presentment No. 29. Either it must be dismissed, or, at a minimum, Ms. Baldwin's testimony must be suppressed.

Also, as we argued in our Omnibus Pretrial Motion in No. CP-22-CR-5164-2011, Exhibit G to our Motion to Quash, and our Reply, "Exhibit H" hereto, such complete denial of counsel in the grand jury mandates either dismissal of that case or suppression of Mr. Schultz' testimony. The Commonwealth seeks this Court's ruling on that Motion as well.

III. The Prosecution's Failure to Seek a Preliminary Judicial Ruling on the Applicability of the Crime Fraud Exception

Prevents It From Raising the Issue Retroactively and Constitutes Misconduct Requiring Dismissal.

The crime fraud exception to the attorney-client privilege applies only in very narrow circumstances. The standard is as the Commonwealth states: "the crime-fraud exception results in loss of the privilege's protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity." *Nationwide Mutual Insurance Co. v. Fleming,* 924 A.2d 1259, 1265 (Pa. Super. 2007). What the Commonwealth fails to state, however, is that the party asserting this exception has the burden of proving its applicability, *In re: Investigating Grand Jury of Philadelphia County,* 527 Pa. 432, 440, 593 A.2d 402, 406 (1991); and that burden is such that "the evidence proposed to establish the fact [of the crime fraud exception] is sufficient to go to the jury for the purpose." *Nadler v. Warner Company,* 321 Pa. 139, 144, 184 A. 3, 5 (1936).[2] In fact, the leading Pennsylvania cases ruling upon the applicability of the exception all resulted in findings that the party seeking disclosure had not proven the exception's applicability. *In re: Investigating Grand Jury of Philadelphia County,* 527 Pa. 432, 440, 593 A.2d 402, 406 (1991); *Nadler v. Warner Company,* 321 Pa. 139, 144, 184 A. 3, 5 (1936); *Brennan v. Brennan,* 281 Pa. Super. 362, 422 A.2d 510 (Pa. Super 1980).[3]

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[2] This is more demanding than the federal standard, at least as interpreted by the Third Circuit Court of Appeals. *See In re GJ,* No. 12-1697, slip op. at 34-36 (3d Cir. Dec. 11, 2012)(rejecting a sufficient to go to the jury standard in favor of a reasonable oasis standard). Of course, the scope of the attorney-client privilege and exceptions to it are matters of state law, and federal precedent has only persuasive value.

[3] *Fleming* is not a crime fraud case; it discusses the exception in dicta. *Commonwealth v.Boggs, 695 A.2d 839 (Pa Super. 1997).* and *Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327 (1986),* discussed by the Commonwealth in its Answer at 6, do not expressly address the crime fraud exception. *Boggs* appears to be a case in which, although the police officer posed an attorney, the defendant's motivation in speaking to the pseudo-

In order to properly invoke the crime-fraud exception to the attorney-client privilege, the Commonwealth must make an initial showing to the court that a crime or fraud existed and that the communication was intended to further it. "To preserve the integrity of the privilege, the burden of proof is upon the party asserting that disclosure of the information would not violate the attorney-client privilege. The question of whether the privilege is properly invoked is to be resolved upon the specific facts of each case." *In re: Investigating Grand Jury of Philadelphia County No. 88-00-3503*, 593 A.2d 402, 406 (Pa. 1991). In that case, handwritten documents about which a question of privilege had been raised were sealed and presented to a supervising judge for *in camera* review before submission to the grand jury. *Id.* at 404. The Supreme Court stated that "[T]his was the appropriate procedure." *Id.*

Likewise, the Pennsylvania Supreme Court in *Nadler v. Warner* insisted that a showing be made to the court before the crime-fraud exception may be invoked: "The protection of the [attorney-client privilege] is lost when both attorney and client are guilty or if the client alone is guilty. But before the fact may be shown the court must be satisfied that the evidence proposed to establish the fact is sufficient to go to the jury for the purpose." *Nadler v. Warner*, 184 A. 3, 6 (Pa. 1936).

The United States Supreme Court discussed what is required to establish the applicability of the crime-fraud exception in *United States v. Zolin*, 491 U.S. 554

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attorney had nothing to do with seeking legal advice, but rather with contracting for a murder. 695 A.2d at 843. In *Maguigan*, the Court never discussed the crime-fraud exception because it ruled that defense counsel's knowledge of a fugitive client's whereabouts was not privileged in the first place. 511 A.2d at 1335-37. But the Court cautioned that how the attorney learned of the client's whereabouts was a protected confidential communication. *Id.* at 1338.

(1989). The Court held:

> *In camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability. Finally, we hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

Zolin, 491 U.S. at 574-575. Put another way, before a party can offer evidence of communications with an attorney or attorney work-product under the crime-fraud exception to the attorney-client privilege, that party must entrust the issue to a judge. *See In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001)(" We have found no case in which this court affirmed an order to produce documents under the crime-fraud exception where the district court did not first review the documents in camera."); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986)(Noting that every federal court of appeals that has considered the crime-fraud exception has reviewed the documents *in camera.*)

What these cases have in common is an insistence that the party claiming that the crime-fraud exception to the attorney-client privilege applies must first allow the court to make that determination before seeking to introduce the communications in question. A party cannot declare on its own that the exception applies. *See generally State v. Wong*, 97 Hawaii 512, 519, 40 P. 3d 914, 921 (2002) (prosecution must obtain judicial ruling before presenting allegedly privileged

testimony; surveys cases)(attached as Exhibit I).[4] *See also* Exhibit C, Fox Report at 14-16.

The Hawaii Supreme Court's thorough opinion in *Wong* is especially instructive. There, the prosecution elicited grand jury testimony from each of two defendants' lawyers without first obtaining judicial approval and, after indictment, defended its actions by invoking the crime-fraud exception. The Court surveyed opinions from state and federal courts throughout the nation, including our Supreme Court's decision in *In re Grand Jury of Philadelphia County,* 527 Pa. 432,, 593 A.2d 401 (1991), and found that all required that the prosecution bear the burden of proving the crime-fraud exception before admitting the testimony to the grand jury. *Wong*, 40 P.3d at 922-23. The Court noted, "Imposition of burdens of proof or persuasion necessarily require that questions concerning attorney-client privilege must be put before and decided by a judge, whether the testimony is sought in criminal or civil proceedings, before a grand jury, in discovery, or at trial." *Id.* at 923. In addition, the Court relied upon the clear statement in Rule 104 of the Rules of Evidence that "preliminary questions concerning . . . the existence of privilege . . . shall be determined by the court." *Id.* at 922. Pennsylvania's Rule 104 is identical. Pa. R. Evid. 104(a).

The prosecution argued that to obtain dismissal, the defense had to show, post-indictment, that the testimony it elicited in the grand jury was in fact

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4 Some courts insist that "where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992). Although the *Haines* court specifically declined to decide whether the same procedures should be used in cases involving grand jury investigations, at least one court has observed that even then, the presumption should be that the privilege-holder must be allowed to participate. *United States v. Boender,* 649 F.2d 650, 658 (7th Cir. 2011).

privileged. *Id.* at 924. The Court rejected this and ruled that, in effect, the prosecution waived its opportunity to obtain a ruling on the crime-fraud or privilege issues, and dismissed the indictment with prejudice on the basis of prosecutorial misconduct.[5] *Id.* The Court held that by introducing the evidence without first seeking judicial approval,

> [T]he State's actions in these cases threatened the integrity of the judicial process and denied the defendants the process they were due. The State acted here in complete disregard of the attorney-client privilege and the rules of evidence. In doing so, the State deprived the defendants of a timely opportunity to raise the attorney-client privilege issue and to seek a preliminary judicial determination of it.

Id. at 929.

In characterizing the prosecution's actions as "a serious threat to the integrity of the judicial process," the Court quoted the Third Circuit Court of Appeals:

> [T]he prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

Id. at 930 (quoting *United States v. Serubo*, 604 F.3d 807, 817 (3d Cir. 1979)).

This Court should reach the same result here. As we explained in our

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5 There were other instances of prosecutorial misconduct that caused the Supreme Court to go beyond the trial court's dismissal without prejudice.

opening Motion to Quash, we notified the prosecution and Ms. Baldwin that our clients did not waive their privilege, and we asked to be heard before she testified. Nonetheless, the prosecution forged ahead without permitting us to be heard and bypassed this Court, rendering useless its duty to supervise the grand jury.

Now, the prosecution attempts to fix the problem it created by asking us and the Court to trust that it "scrupulously avoided any questions relating to topics protected by the attorney-client privilege or the work-product doctrine." Answer at 7-8. It invites the Court to examine the transcript *ex parte*. *Id.*

This cannot be tolerated. As *Wong* establishes, proper respect for the independence of the grand jury and the role of this Honorable Court demanded that the showing be made before, not after, the challenged testimony. Further, there is no need to hide Ms. Baldwin's testimony from us. As we explained at length in our Motion for Disclosure of her testimony, none of the purposes for grand jury secrecy apply any longer, and fair adjudication of this issue requires disclosure. The prosecution had its chance to justify its actions and forfeited it.

IV. Even If The Commonwealth Can Survive Its Failure To Follow The Proper Procedure In Invoking The Crime-Fraud Exception, It Has Not Met Its Burden Of Showing That The Exception Applies.

The crime-fraud exception must be proven communication by communication. It permits disclosure only of those particular communications shown to be in furtherance of a crime or fraud, not of all communications that might be relevant to proving such a crime or fraud. *See Commonwealth v. Maguigan*, 511 A.2d at 1338 (even if knowledge of client's whereabouts is not privileged, communications with

the client concerning that issue are); *United States v. Richard Roe, Inc.*, 68 F.3d 38, 40-41 (2d Cir. 1995); *In re Antitrust Grand Jury*, 805 F.2d at 168. Also, the crime-fraud determination must be made client by client; a finding that one client communicated with the attorney in furtherance of a crime or fraud does not extinguish the privilege as to co-clients of the same attorney. *In re Grand Jury Proceedings*, 417 F.3d 18, 24-25 (1st Cir. 2005).

With respect to Mr. Schultz, the prosecution makes no attempt to identify the crimes at issue and how each communication furthered the crime. Rather, the Commonwealth has proclaimed, without proffering any support, that the crime-fraud exception applies to all communications between Mr. Schultz and Ms. Baldwin and that it is "unable to discuss the testimony of Attorney Baldwin in detail due to the rules relating to Grand Jury secrecy." Answer at 7. The Commonwealth proceeds to assure the Court that, "[I]n his examination of Attorney Baldwin, the attorney for the Commonwealth scrupulously avoided any questions relating to topics protected by the attorney-client privilege or the work product doctrine." Answer at 7-8. (It is unclear if this is a sly way of saying the Commonwealth avoided nothing, because its position is that only PSU had a privilege with Ms. Baldwin, and it waived that privilege.) Rather than trust this Court to make the proper ruling as to whether the crime-fraud exception applied in this context, the Commonwealth takes it upon itself to *inform* this Court that it does.

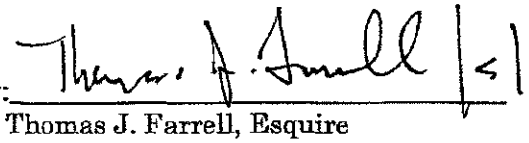
This is not a conclusion that the Commonwealth has the authority to draw.

To the contrary, the law is clear on two points: first, questions of privilege and exceptions to it must be determined by judges, preferably with participation of the privilege-holder, not by a party wishing to exploit the exception in furtherance of its own agenda. Second, the party challenging the privilege has the burden of proving an exception, and that burden requires that "the court should *resolve all doubts in favor of non-disclosure.*" *Brennan v. Brennan,* 281 Pa. Super. at 372, 422 A.2d at 516. The Commonwealth has bypassed the proper procedure and has not deigned to attempt to carry its burden. The privilege must be upheld.

Conclusion

We have carried our burden of showing that the privilege applied with the affidavits, the transcripts and other evidentiary material we have submitted. The Commonwealth, after it shunned proper procedure, now has failed to offer any evidentiary support to carry its burden of proving any exceptions to the privilege. On the record as it stands, the Presentment must be quashed.

Respectfully submitted,

By: 

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

IN RE:	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE	:	
INVESTIGATING GRAND JURY	:	DAUPHIN CO. COMMON PLEAS
	:	No. CP-22-CR-5164-2011
	:	

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

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
v.	:	
	:	DAUPHIN CO. COMMON PLEAS
	:	No. 1386-MD-2012
GARY C. SCHULTZ,	:	
Defendant.	:	
	:	**REQUEST EXPEDITED REVIEW**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within pleading was sent by email and First Class Mail, this 31st day of January, 2013, to the following:

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/s/

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COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY
v.	:
	: No. CP-22-CR-5165-2011
TIMOTHY M. CURLEY, Defendant	: : CHARGES: PERJURY; PENALTIES : FOR FAILURE TO REPORT
COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY
v.	:
	: No. CP-22-CR-5164-2011
GARY CHARLES SCHULTZ, Defendant	: : CHARGES: PERJURY; PENALTIES : FOR FAILURE TO REPORT

COMMONWEALTH'S ANSWER TO DEFENDANTS' OMNIBUS PRETRIAL MOTIONS

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Linda L. Kelly, Attorney General, Bruce R. Beemer, Chief of Staff, and James P. Barker, Chief Deputy Attorney General, who file this Commonwealth's Answer to Defendants' Omnibus Pretrial Motions, and in support thereof aver as follows:

EXHIBIT A-1

I. BACKGROUND

On November 7, 2011, following a Grand Jury investigation and return of a presentment, a criminal complaint was filed charging the Defendants, Timothy M. Curley and Gary Charles Schultz, with Perjury[1] and Penalties for Failure to Report.[2] Each Defendant has entered a plea of not guilty. Following a preliminary hearing on December 16, 2011, the charges were held for court. The Defendants waived their appearance at formal arraignment and the Commonwealth filed a Criminal Information on January 19, 2012.

On November 1, 2012, a second criminal complaint was filed with respect to each Defendant, charging them with Endangering the Welfare of Children[3] (two counts), Obstructing the Administration of Law or Other Governmental Function,[4] and Criminal Conspiracy (three counts).[5] Also, a third Defendant, Graham B. Spanier, was charged with the same offenses as Defendants.

Currently pending before the Court are Omnibus Pretrial Motions filed by the Defendants. Both Defendants seek dismissal of the charges or, in the alternative, suppression of their Grand Jury testimony based on an alleged conflict of interest on the part of counsel who represented them at the time they appeared before the Grand Jury. Also, Defendant Schultz seeks relief relating to pretrial publicity, to compel discovery, and an evidentiary hearing.

---

[1] 18 Pa.C.S. § 4902(a).
[2] 23 Pa.C.S. § 6319.
[3] 18 Pa.C.S. § 4304(a).
[4] 18 Pa.C.S. § 5101.
[5] 18 Pa.C.S. § 903(a).

EXHIBIT A-2

II. DEFENDANT CURLEY'S OMNIBUS PRETRIAL MOTION

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

7. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

8. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

9. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

10. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

EXHIBIT A-3

11. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, it is admitted that the Defendant was interviewed by Special Agents of the Office of Attorney General while accompanied by Attorney Baldwin and that he testified before the Grand Jury; otherwise, the allegation is denied and proof thereof is demanded.

12. Admitted, with correction. The initial criminal complaint was filed on November 7, 2011.

13. Neither admitted nor denied. A hearsay, after-the-fact statement by an attorney representing the Pennsylvania State University is not relevant to any matter in issue before the Court. To the extent that a response is required, it is admitted that the *Harrisburg Patriot-News* so reported. It is denied that the opinion of another attorney would have any legal effect on the status of counsel as representing or not representing the Defendant.

14. Neither admitted nor denied. To the extent a response is required, the allegations of this paragraph are denied. *See* ¶ 13, above.

15. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

16. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

EXHIBIT A-4

17. Admitted in part and denied in part. It is admitted that Attorney Baldwin stated that she represented the Defendant. The remainder of this paragraph is neither admitted nor denied. The Commonwealth does not have sufficient information to respond to the remainder of this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

18. Admitted in part and denied in part. It is admitted that Attorney Baldwin did not inform the Supervising Judge of any dual representation involving the Defendant and the Pennsylvania State University at the time of the Defendant's testimony before the Grand Jury. Attorney Baldwin's "current position" with regard to her status at the time of the Defendant's testimony is not relevant to any matter before the Court.

19. Admitted that the transcript so provides.

20. Admitted that the transcript so provides.[6]

21. Admitted that the transcript so provides.

22. Denied.

23. Admitted in part and denied in part. It is admitted that the Defendant might attempt to introduce such evidence. It is denied that such evidence is admissible. The Court is the expert on the law. *See Waters v. State Employees' Retirement Bd.*, 955 A.2d 466, 471 n.7 (Pa. Commw. 2008) ("It is well-settled that an expert is not permitted to give an opinion on a question of law... The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning."; citations omitted); *41 Valley Associates v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 14 n.12 (Pa. Commw. 2005) (citing *Browne v. Commonwealth*, 843 A.2d 429, 433 n.1

[6] This answer presumes that "Eshbach" refers to former Senior Deputy Attorney General Jonelle Eshbach.

EXHIBIT A-5

(Pa. Commw. 2004)). *See also Bessemer Stores Inc. v. Reed Shaw Stenhouse, Inc.*, 344 Pa. Super. 218, 223, 496 A.2d 762, 765 (1985) (legal conclusions are inadmissible).

24. Admitted in part and denied in part. *See* ¶ 23, above.

25. Admitted in part and denied in part. *See* ¶ 23, above.

26. Admitted in part and denied in part. *See* ¶ 23, above.

27. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon. Any fact recited in this paragraph is denied and proof thereof is demanded.

28. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

29. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. Further, the Supervising Judge advised Defendant Schultz of his constitutional right to remain silent before the Grand Jury. Exhibit C at 8-9.

30. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. It is specifically denied that any "abusive and confusing questioning" took place.

EXHIBIT A-6

31. Admitted in part and denied in part. *See* ¶ 23, above.

32. Admitted in part and denied in part. *See* ¶ 23, above.

33. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, it is denied that the Defendant is entitled to relief.

34. Admitted.

35. Admitted.

36. Admitted that representatives of the Office of Attorney General knew Attorney Baldwin's title and that she appeared and stated that she was representing the Defendants for purposes of the Grand Jury.

37. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

38. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

39. Admitted in part and denied in part. It is admitted that each Defendant recalled the report by McQueary in a different way. It is denied that inconsistent recall would necessarily lead members of the Office of Attorney General to "know" that witnesses will lie under oath or that their testimony would be inconsistent.

40. Denied. The Office of Attorney General was not be aware of any actual conflict of interest on the part of Attorney Baldwin and therefore had no basis for raising the conflict before the Supervising Judge.

41. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph

EXHIBIT A-7

is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

42. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

43. Neither admitted nor denied. This paragraph is a statement of intent as to which the Commonwealth has no information. It is admitted that the Office of Attorney General did not provide notice to the Supervising Judge of any conflict of interest because it had no basis for doing so.

44. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that this paragraph recites appropriate actions when the Supervising Judge is notified of an actual conflict of interest. It is denied that such actions are the only actions that the Supervising Judge might take. Further, it is denied that notice to the Supervising Judge was required in this case.

45. Denied.

46. Admitted in part and denied in part. See ¶ 23, above.

47. Admitted in part and denied in part. See ¶ 23, above.

48. Denied. It is specifically denied that any conflict on the part of counsel gave the Defendant the right to commit Perjury or excused the commission of Perjury.

49. Denied.

EXHIBIT A-8

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

III. DEFENDANT SCHULTZ'S OMNIBUS PRETRIAL MOTION

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

7. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

8. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

EXHIBIT A-9

9. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

10. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

11. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

12. Admitted.

13. Admitted that representatives of the Office of Attorney General were so informed by Attorney Baldwin.

14. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

15. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

16. Denied.

17. Admitted in part and denied in part. It is admitted that each Defendant recalled the report by McQueary in a different way. It is denied that inconsistent recall would necessarily lead members of the Office of Attorney General to be "aware" that witnesses will lie under oath or that their testimony would be inconsistent. It is further denied that Defendant Schultz's recall of the 1998 incident would be "inconsistent" with Defendant Curley's lack of recall of that incident.

EXHIBIT A-10

18. Neither admitted nor denied. This paragraph is a statement of intent as to which the Commonwealth has no information. It is admitted that the Office of Attorney General did not provide notice to the Supervising Judge of any conflict of interest because it had no basis for doing so.

19. Admitted in part and denied in part. It is admitted that the Office of Attorney General did not move to disqualify counsel. It is denied that the Office of Attorney General was "keenly aware" of any conflict of interest.

20. Admitted that the transcript so provides.

21. Admitted that the transcript so provides.

22. Denied.

23. Admitted.

24. Neither admitted nor denied. A hearsay, after-the-fact statement by an attorney representing the Pennsylvania State University is not relevant to any matter in issue before the Court. To the extent that a response is required, it is admitted that the *Harrisburg Patriot-News* so reported. It is denied that the opinion of another attorney would have any legal effect on the status of counsel as representing or not representing the Defendant.

25. Neither admitted nor denied. To the extent a response is required, the allegations of this paragraph are denied. *See* ¶ 24, above.

26. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

EXHIBIT A-11

27. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

28. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

29. Admitted in part and denied in part. It is admitted that the Defendant might attempt to introduce such evidence. It is denied that such evidence is admissible. The Court is the expert on the law. *See Waters v. State Employees' Retirement Bd.*, 955 A.2d 466, 471 n.7 (Pa. Commw. 2008) ("It is well-settled that an expert is not permitted to give an opinion on a question of law... The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning."; citations omitted); *41 Valley Associates v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 14 n.12 (Pa. Commw. 2005) (citing *Browne v. Commonwealth*, 843 A.2d 429, 433 n.1 (Pa. Commw. 2004)). *See also Bessemer Stores Inc. v. Reed Shaw Stenhouse, Inc.*, 344 Pa. Super. 218, 223, 496 A.2d 762, 765 (1985) (legal conclusions are inadmissible).

30. Admitted in part and denied in part. *See* ¶ 29, above.

31. Admitted in part and denied in part. *See* ¶ 29, above.

32. Admitted in part and denied in part. *See* ¶ 29, above.

33. Admitted in part and denied in part. *See* ¶ 29, above.

EXHIBIT A-12

34. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

35. Denied.

36. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is denied.

37. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. Further, the Supervising Judge advised Defendant Schultz of his constitutional right to remain silent before the Grand Jury. Exhibit C at 8-9.

38. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

39. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

40. Denied.

41. Denied. The questioning was not improper.

42. Admitted in part and denied in part. *See* ¶ 29, above.

43. Admitted in part and denied in part. *See* ¶ 29, above.

EXHIBIT A-13

44. Admitted in part and denied in part. *See* ¶ 29, above.

45. Denied.

46. Denied.

47. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

48. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that this paragraph recites appropriate actions when the Supervising Judge is notified of an actual conflict of interest. It is denied that such actions are the only actions that the Supervising Judge might take. Further, it is denied that notice to the Supervising Judge was required in this case.

49. Denied.

50. Admitted in part and denied in part. *See* ¶ 29, above.

51. Admitted in part and denied in part. *See* ¶ 29, above.

52. Admitted in part and denied in part. *See* ¶ 29, above.

53. Denied.

54. Denied.

55. Admitted.

56. Admitted, with correction. A presentment is not a charging document but a vehicle by which a grand jury recommends that charges be filed via a criminal

EXHIBIT A-14

complaint. Sandusky was not "charged in the same Presentment," although the Presentment recommended charges against these Defendants and Sandusky.

57. Admitted in part. It is admitted that the "Freeh Report" generated substantial publicity, both favorable and unfavorable to Defendants. The remainder of this paragraph is neither admitted nor denied as the document speaks for itself, although any characterization of the "Freeh Report" is specifically denied.

58. Denied.

59. Admitted in part and denied in part. It is admitted that substantial publicity attended the trial of Sandusky. The remainder of the paragraph is denied as hyperbole.

60. Denied.

61. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

62. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

63. Admitted in part and denied in part. Defendant's characterizations of the reasons for seeking relief are denied. That Defendant seeks such relief is admitted.

64. Admitted in part and denied in part. It is admitted that discovery has been provided and is ongoing. As to the specific items demanded:

(a) Only one victim interview was recorded and that interview is unrelated to the instant charges.

(b) The recorded interview of Joseph V. Paterno has been provided.

EXHIBIT A-15

(c) The only evidence that might potentially fall within the ambit of Rule 404(b) is evidence of the 1998 incident. Defendants have been provided with notice of that evidence.

(d) Any further written statements or reports will be provided.

IV. MEMORANDUM OF LAW

I. A PRETRIAL MOTION TO DISMISS CHARGES THAT IS BASED ON EVENTS ALLEGED TO HAVE OCCURRED BEFORE A GRAND JURY MUST BE ADDRESSED BY THE SUPERVISING JUDGE.

Defendants contend that the charges against them should be dismissed or their Grand Jury testimony suppressed because prior counsel, Cynthia Baldwin, Esquire, had conflicts of interest based on her representation of other witnesses during the Grand Jury investigation as well as the Pennsylvania State University (Penn State). The first problem with Defendants' Motions is that they are directed to the wrong judge. In the Order granting the application of the Office of Attorney General to convene the Thirty-Third Statewide Investigating Grand Jury, the Honorable Ronald D. Castille, Chief Justice of the Supreme Court of Pennsylvania, ordered as follows:

> The Honorable Barry F. Feudale, Senior Judge of the Court of Common Pleas, Eighth Judicial District, Northumberland County, Pennsylvania, is hereby designated as Supervising Judge of the Thirty-Third Statewide Investigating Grand Jury. All applications and motions relating to the work of the Thirty-Third Statewide Investigating Grand Jury – including motions for disclosure of grand jury transcripts and evidence – shall be presented to said Supervising Judge. ...

In re: Application of Thomas W. Corbett Jr., Attorney General of the Commonwealth of Pennsylvania, Requesting an Order Directing that an Additional Multicounty Investigating Grand Jury Having Statewide Jurisdiction Be Convened, No. 217 M.D. 2010, at 1 ¶ 2 (Pa. December 27, 2010).

EXHIBIT A-16

The plain language of the Order of Court dated December 27, 2010, makes it clear that the Omnibus Pretrial Motion is properly directed to Judge Feudale, the Supervising Judge of the Grand Jury that heard the evidence against Defendants and recommended that charges be filed. The crux of Defendants' Omnibus Pretrial Motions is that the attorney who represented them during the Grand Jury investigation labored under a conflict of interest. As such, the Motion should be heard by Judge Feudale, consistent with the Order of Court, which is consistent with statutory authority relating to the claims raised by Defendants. *See* 42 Pa.C.S. 4549(c)(4) (when counsel representing multiple witnesses before grand jury will or is likely to be adversely affected by representation of another client, supervising judge may order separate representation of witnesses). Based on both sources of authority, the Motion should be denied.

II. A DEFENDANT IS NOT ENTITLED TO DISMISSAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT PRIOR TO TRIAL WHEN JEOPARDY HAS NOT ATTACHED, WHEN THE CONDUCT OF WHICH THE DEFENDANT COMPLAINS IS ATTRIBUTABLE ONLY TO DEFENSE COUNSEL, THE PROSECUTORS HAD NO AUTHORITY TO ACT TO ADDRESS PURPORTED CONSTITUTIONAL VIOLATIONS, THERE IS NO EVIDENCE OF THOSE VIOLATIONS, AND THE EXISTENCE OF A VIOLATION DOES NOT PERMIT A DEFENDANT TO COMMIT A CRIME.

Defendants seek dismissal based on a claim of prosecutorial misconduct. Because most such claims are raised in the context of trial, the standard of review generally is expressed in terms relating to trial:

> The phrase "prosecutorial misconduct" has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. *See Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L.Ed.2d 618 (1987) ("To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.") (internal quotation marks omitted); *Donnelly v. DeChristoforo*, 416

EXHIBIT A-17

> U.S. 637, 643, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."). However, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511, 104 S. Ct. 2543, 81 L.Ed.2d 437 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982).

Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (2008).

Similarly, claims of prosecutorial misconduct so egregious as to warrant the extreme remedy of barring retrial are expressed in terms of conduct during trial:

> Under both the federal and state constitutions, double jeopardy bars retrial where the prosecutor's misconduct was intended to provoke the defendant into moving for a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L.Ed.2d 416 (1982); *Commonwealth v. Simons*, 514 Pa. 10, 522 A.2d 537 (1987). In *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), our Supreme Court recognized that the standard set forth in *Oregon v. Kennedy, supra*, was inadequate to protect a defendant's rights under the Pennsylvania Constitution. The Court stated:
>
> > We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.
>
> *Smith*, at 186, 615 A.2d at 325 (quoted in *Commonwealth v. Martorano*, 559 Pa. 533, 537-38, 741 A.2d 1221, 1223 (1999), *rearg. denied* 1999 Pa.LEXIS 3828 (Pa.12/27/99)).
>
> Prosecutorial misconduct includes actions intentionally designed to provoke the defendant into moving for a mistrial or conduct by the prosecution intentionally undertaken to prejudice the defendant to the point where he has been denied a fair trial. *Smith*, at 186, 615 A.2d at 325. The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant subjected to the kind of prosecutorial misconduct intended to subvert a defendant's constitutional rights. *Id.* at 186, 615 A.2d at 325. However, *Smith* did not create a *per se* bar to retrial in all cases of intentional prosecutorial overreaching. *See Commonwealth v. Simone*, 712 A.2d 770 (Pa.Super.1998), *appeal denied*, 557 Pa. 628, 732 A.2d 614 (1998). "Rather, the *Smith* Court primarily was concerned with prosecution tactics, which actually were designed to demean or subvert the truth seeking process." *Id.* at 774-75. The *Smith* standard precludes retrial

EXHIBIT A-18

where the prosecutor's conduct evidences intent to so prejudice the defendant as to deny him a fair trial. A fair trial, of course is not a perfect trial. Errors can and do occur. That is why our judicial system provides for appellate review to rectify such errors. However, where the prosecutor's conduct changes from mere error to intentionally subverting the court process, then a fair trial is denied. *See Commonwealth v. Martorano & Daidone*, 453 Pa. Super. 550, 684 A.2d 179, 184 (1996), *affirmed Martorano*, 559 Pa. 533, 741 A.2d 1221 (1999). "A fair trial is not simply a lofty goal, it is a constitutional mandate, ... [and] [w]here that constitutional mandate is ignored by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." *Martorano*, 559 Pa. at 539, 741 A.2d at 1223 (*quoting Martorano & Daidone*, 684 A.2d at 184). We must first determine if Chmiel's claims of prosecutorial misconduct are meritorious, and then, we must determine if such claims bar retrial on double jeopardy grounds.

> Our standard for a claim of prosecutorial misconduct is as follows:
>
> > The primary guide in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict. *Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974); *Commonwealth v. VanCliff*, 483 Pa. 576, 397 A.2d 1173 (1979). In making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding, Code of Professional Responsibility, Canon 7, E.D. 7-19-7-39, and the prosecution, like the defense, must be accorded reasonable latitude in fairly presenting its version of the case to the jury. *Commonwealth v. Cronin*, 464 Pa. 138, 346 A.2d 59 (1975).
>
> *Commonwealth v. Rainey*, 540 Pa. 220, 235, 656 A.2d 1326, 1334 (1995) (*quoting Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991)).

Commonwealth v. Chmiel, 777 A.2d 459, 463-464 (Pa. Super. 2001).

Defendants point to no specific authority that would permit dismissal based on purported prosecutorial misconduct and, in fact, the only basis would be principle of double jeopardy.

EXHIBIT A-19

The first problem with Defendants' argument is that they fail to present circumstances implicating double jeopardy concerns. According to Defendants,[7] after learning of the Grand Jury investigation, they met with Cynthia Baldwin, Esquire, regarding their appearance before the Grand Jury. Attorney Baldwin also was General Counsel for Penn State. There have been public statements indicating that Attorney Baldwin was representing Penn State and not the Defendants in their individual capacities. The Notes of Testimony of the Defendants' colloquy and oath before the Supervising Judge and their appearance before the Grand Jury indicate that Attorney Baldwin was identified as Defendants' counsel.

Based on Defendants' own factual recitation, their argument fails. Plainly, jeopardy has not attached:

> In Pennsylvania, jeopardy does not attach and the constitutional prohibition against double jeopardy has no application until a defendant stands before a tribunal where guilt or innocence will be determined. In a criminal jury trial, jeopardy attaches when the jury is sworn. In a bench trial, however, jeopardy attaches when the trial court begins to hear the evidence.

Commonwealth v. Ortega, 995 A.2d 879, 887 (Pa. Super. 2010) (quoting *Commonwealth v. Vargas*, 947 A.2d 777, 780-781 (Pa. Super. 2008)) (quotation marks, citations omitted), *alloc. denied*, 20 A.3d 1211 (Pa. 2011). The jury in this case has not been selected, much less sworn, and no defendant has waived the right to a jury trial. Jeopardy plainly has not attached and so there can be no double jeopardy violation.

Additionally, there cannot have been an instance of prosecutorial misconduct. Nothing alleged by the Defendants remotely touches upon the fairness of the (yet to be

[7] For purpose of this Memorandum of Law, the facts alleged by Defendants will be presumed to be true. As reflected in the Commonwealth's Answer, many of those facts are denied. However, even assuming the veracity and accuracy of Defendants' recitation, they are not entitled to relief, as demonstrated in this Memorandum of Law. The Commonwealth continues to deny the facts challenged in the Answer except for purposes of its argument herein.

EXHIBIT A-20

conducted) trial. At best, the Defendants allege that counsel during the Grand Jury investigation had a conflict of interest[8] and that the Commonwealth should have taken action to remove the conflict. They cite no authority for the proposition that criminal charges are subject to dismissal under these circumstances. To the contrary, the law is clear that the Double Jeopardy Clause does not apply.

Also, at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest. Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate in the investigation. Such an action would not conflict with the interests of the other witnesses represented by Attorney Baldwin, who also were cooperating. That the Defendants actually intended to mislead the Grand Jury and the Commonwealth would not alter the fact that, at the time they were represented by Attorney Baldwin, there was no conflict of interest.

The purported notice to the Commonwealth of the "actual" conflict of interest was that Defendant Schultz remembered the 1998 incident while Curley said that he did not remember it. That one witness does not remember an incident that the other remembers does not make their testimony "inconsistent," as the Defendants contend. The matter would have been different if Defendant Curley had testified that the 1998 incident never occurred, but that was not his statement and not his testimony. This information simply did not reveal a conflict of interest.

Moreover, the Defendants' statements would not impact on any purported duty on the part of the Commonwealth to act with respect to the representation of multiple witnesses. The Commonwealth had no reason to question Attorney Baldwin's conduct

[8] Defendants ignore the fact that they benefitted from the multiple representation in that he learned about the testimony of other Penn State witnesses.

when all of her clients had the same interest. In fact, the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541-4553, provides that an attorney "shall not continue in multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client." 42 Pa.C.S. § 4549(c)(4). The supervising judge makes the final determination "that the interest of an individual will or is likely to be adversely affected." *Id.* Noticeably absent from this provision is any authority or duty on the part of the attorney for the Commonwealth to usurp the role of defense counsel and inquire whether counsel has an actual conflict of interest even when there is no apparent conflict of interest and no basis for believing that a conflict exists. A failure to commit such a flagrant violation of the attorney-client relationship does not constitute prosecutorial misconduct.

Simply stated, multiple representation does not necessarily amount to a conflict of interest, and so multiple representation is permitted except as limited by § 4549(c)(4). And it is defense counsel and the supervising judge who are primarily charged with recognizing a conflict of interest and remedying the situation.[9] Significantly, defense counsel does so in "the exercise of ... independent professional judgment." A prosecutor is not familiar with discussions between counsel and the client, does not know the goal of the representation, and does not know the substance of any anticipated defense. The prosecutor therefore has a limited ability to "exercise ...

[9] This is not to say that the Commonwealth has no interest in ensuring that a defendant has adequate representation and that the judicial process is protected. *See, e.g., In re Paradyne Corp.*, 803 F.2d 604, 608 n.7 (11th Cir. 1986) (government had standing to move for disqualification of defense counsel based on its interest in preventing reversals and its duty to report ethical violations to the court).

EXHIBIT A-22

independent professional judgment" and must rely on information available through the record and, to some extent, from defense counsel.

In this case, the Commonwealth knew that defense counsel was experienced and aware of the possibility of a conflict. The information available to the Commonwealth also included the fact that the Defendants apparently intended to cooperate, as evidenced by their statements. There would be no reason under these circumstances for the Commonwealth to jump to the conclusion that an actual conflict of interest existed. The Commonwealth could not know that the Defendants intended to provide inaccurate testimony.

Given that there was no conflict of interest, actual or apparent, the fact that the Commonwealth had no basis for moving to disqualify defense counsel also leads to the conclusion that there was no prosecutorial misconduct. There certainly was no prosecutorial misconduct so egregious as to implicate double jeopardy principles, presuming that those principles apply to Grand Jury proceedings.

The Defendants also claim that the purported conflict of interest violated their right to counsel. Succinctly stated, the Fifth Amendment right to counsel applies to custodial interrogation and means simply that if the person in custody affirmatively asks for counsel, questioning must cease. *Commonwealth v. Briggs*, 12 A.3d 291, 319-320 and n. 30 (Pa. 2011), *cert. denied*, 132 S. Ct. 267 (2011). *See also Miranda v. Arizona*, 384 U.S. 436 (1966).

In addition to the fact that there was no conflict, as discussed above, the Defendants were not in custody at the time of their testimony. *Commonwealth v. Columbia Investment Corp.*, 457 Pa. 353, 361-362, 325 A.2d 289, 293-294 (1974)

EXHIBIT A-23

(subject of a grand jury subpoena is not "in custody" for purposes of *Miranda*). *See also United States v. Mandujano*, 425 U.S. 564 (1976) (plurality; defendant need not have been provided with *Miranda* warnings before grand jury testimony that formed the basis for perjury prosecution).[10]

> The other constitutional source of the right to counsel is the Sixth Amendment.
>
> > The right to counsel attaches at a particular point in time which reflects its "criminal prosecution" roots: "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Commonwealth v. McCoy*, 601 Pa. 540, 975 A.2d 586, 590 (2009) (quoting *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, [213], 128 S. Ct. 2578, 2592, 171 L.Ed.2d 366 (2008)).

Commonwealth v. Colavita, 606 Pa. 1, 28, 993 A.2d 874, 890-891 (2010). In this case, apart from the absence of an actual conflict of interest as discussed above, the Defendants had not been charged at the time that the purported conflict of interest existed, i.e. during the Grand Jury proceedings. By the time of their preliminary arraignment, when the right attached, the Defendants had retained new counsel. There was no deprivation of the constitutional right to counsel.[11]

The Defendants also claims to be entitled to relief based on a purported violation of 42 Pa.C.S. § 4549(c)(4). Again, there was no actual conflict of interest, and so that statutory provision was not violated. Moreover, § 4549(c)(4) confers on the Commonwealth no duty to affirmatively investigate every multiple representation based on the possibility of a conflict of interest. The onus is placed on defense counsel to

[10] Any argument under Article I, § 9 of the Pennsylvania Constitution also fails, as the rights protected under that provision are no broader than those protected by the Fifth Amendment. *Commonwealth v. Arroyo*, 555 Pa. 125, 134-135, 723 A.2d 162, 166-167 (1999).

[11] The right to counsel under Article I, § 9 also attaches at the formal initiation of adversarial judicial proceedings, as the provision is coterminous with the Sixth Amendment. *Arroyo* at 136, 723 A.2d at 167; *McCoy* at 546-547, 975 A.2d at 590.

EXHIBIT A-24

make an independent professional judgment regarding any conflict and the supervising judge then exercises discretion to allow counsel to continue or to substitute counsel. It should be added that § 4549(c) provides for no relief in the form of dismissal or disqualification of the Office of Attorney General, as the Defendants seek. It allows only for the substitution of counsel.

The only other potential source of authority relating to the relief sought by the Defendants is the Pennsylvania Rules of Professional Conduct, specifically 1.7 (relating to current conflicts of interest generally), 1.8 (relating to specific conflicts of interest), 1.16 (relating to declining or terminating representation), 8.3 (relating to reporting professional misconduct), and 8.4 (defining professional misconduct). However, any purported violation of those Rules is, at best, a basis for disciplinary proceedings and not a basis for relief in this Court because "[t]he rules that govern the ethical obligations of the legal profession (presently, the Rules of Professional Conduct) do not constitute substantive law." *Commonwealth v. Chmiel*, 558 Pa. 478, 495, 738 A.2d 406, 415 (1999) (citations omitted).

In short, apart from failing to raise an actual conflict of interest of which the Commonwealth should have been aware, the Defendants cite no authority for the proposition that an alleged conflict of interest on the part of counsel at the time of a Grand Jury investigation warrants dismissal of charges, particularly Perjury. Effectively, the Defendants' argument amounts to a contention that appearing before a Grand Jury with conflicted counsel allows a witness to lie to the Grand Jury. No legal authority is cited for such a proposition because no such authority exists.

* * *

EXHIBIT A-25

Defendant Schultz also complains of the pretrial publicity associated with this case but does not request a change of venue or venire. Rather, Defendant Schultz requests relief relating to the manner in which *voir dire* will be conducted. The Commonwealth takes no position on that issue and leaves the conduct of *voir dire* to the discretion of the Court.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying the Defendants' Omnibus Pretrial Motions.

Respectfully submitted,
LINDA L. KELLY
Attorney General

By: Bruce R. Beemer per JPB
BRUCE R. BEEMER
Chief of Staff
Attorney No. 76148

By: James P. Barker
JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 787-3391
Date: November 14, 2012

EXHIBIT A-26

VERIFICATION

The facts recited in the foregoing Commonwealth's Answer to Defendants' Omnibus Pretrial Motions are true and correct to the best of my knowledge and belief. This statement is made with knowledge that a false statement is punishable by law under 18 Pa. C.S. § 4904(b).

By: Bruce R. Beemer per JPB
BRUCE R. BEEMER
Chief of Staff
Attorney No. 76148

By: James P. Barker
JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 787-6346

Date: November 14, 2012

EXHIBIT A-27

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Answer to Defendants' Motions for Severance of Counts and Defendants with Memorandum of Law upon the persons and in the manner indicated below:

Via U.S. First-Class Mail,
Postage pre-paid:

Caroline Roberto, Esquire
Law & Finance Building
5th Floor
429 Fourth Avenue
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(Counsel for Timothy M. Curley)

Thomas J. Farrell, Esquire
Farrell & Reisinger
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(Counsel for Gary Charles Schultz)

Carolyn C. Thompson, Esquire
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(District Court Administrator)

By: James P. Barker

JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315

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(717) 787-6346

Date: November 14, 2012

EXHIBIT A-28

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
THIRTIETH STATEWIDE INVESTIGATING GRAND JURY

IN RE: NOTICE NO. 29

TRANSCRIPT OF PROCEEDINGS
OF GRAND JURY

BEFORE: BARRY FEUDALE, SUPERVISING JUDGE

DATE: JANUARY 12, 2011, 9:04 A.M.

PLACE: STRAWBERRY SQUARE
VERIZON TOWER, EIGHTH FLOOR
WALNUT STREET
HARRISBURG, PA 17120

[redacted]

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL
BY: JAMES BARKER, ESQUIRE
FRANK FINA, ESQUIRE
JONELLE ESHBACH, ESQUIRE
FOR - COMMONWEALTH

...

PENNSYLVANIA STATE UNIVERSITY
BY: CYNTHIA BALDWIN, ESQUIRE
FOR - TIM CURLEY AND GARY SCHULTZ

SHANNON MANDERBACH
REPORTER-NOTARY PUBLIC

ARCHIVE REPORTING
& CAPTIONING SERVICE, INC.
2338 N. Second Street • Harrisburg, PA 17110
(717) 234-5922
FAX (717) 234-6190

EXHIBIT B-1

MR. BARKER: Judge, we're here on Notice 29. We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.

EXHIBIT B-2

JUDGE FEUDALE: Represented by?

MS. BALDWIN: My name is Cynthia Baldwin, general counsel for Pennsylvania State University.

JUDGE FEUDALE: Will you be providing representation for both of those identified witnesses?

MS. BALDWIN: Gary is retired but was employed by the university and Tim is still an employee.

JUDGE FEUDALE: Good morning. I'm Barry Feudale. I'm a Senior Judge from Northumberland County. I've been assigned by Chief Justice Ronald Castille to supervise the 30th Statewide Investigative Grand Jury which has subpoenaed both of you to appear as witnesses before it.

As witnesses before the Grand Jury, you're entitled to certain rights and subject to certain duties which I am now going to explain to you. All of these rights and duties are equally important and it's important that you fully understand each of them.

First, you have the right to the advice and assistance of a lawyer. This means you

EXHIBIT B-3

have the right to the services of a lawyer with whom you may consult concerning all matters pertaining to your appearance before the Grand Jury.

You may confer with your lawyer at any time before, during and after your testimony. You may consult with your lawyer throughout your entire contact with the Grand Jury. Your lawyer may be present with you in the Grand Jury room during the time you're actually testifying and you may confer with her at that time.

You also may at any time discuss your testimony with your lawyer and except for cause shown before this Court, you may disclose your testimony to whomever you choose, if you choose.

You also have the right to refuse to answer any question pending a ruling by the Court directing you to respond if you honestly believe there are proper legal grounds for your refusal. In particular, you have the right to refuse to answer any question which you honestly believe may tend to incriminate you.

Should you refuse to answer any question, you may offer a reason for your refusal, but you're not obliged to do so. If you answer

EXHIBIT B-4

some questions or begin to answer any particular question, that does not necessarily mean you must continue to answer your questions or even complete the answers you have started.

Now, any answers you give to any question can and may be used against you either for the purpose of a Grand Jury Presentment, Grand Jury Report or a Criminal Information.

In other words, if you're uncertain as to whether you may lawfully refuse to answer any question or if any other problem arises during the course of your appearance before the Grand Jury, you may stop the questioning and appear before me, either alone or in this case with your counsel, and I will rule on that matter whatever it may be. Now, do you understand these rights?

MR. CURLEY: Yes.

MR. SCHULTZ: Yes, sir.

JUDGE FEUDALE: Next, a witness before the Grand Jury has the duty to give full, truthful, complete and honest answers to all questions asked except where the witness appropriately refuses to answer on a proper legal ground.

I'm hereby directing both of you to

EXHIBIT B-5

observe and obey this duty. In this regard I must caution you that if a witness answers untruthfully, he may be subjected to prosecution for perjury which is punishable under the Crimes Code of Pennsylvania. It's a very serious offense. It's a felony.

So I ask you, do you have any questions regarding your rights and obligations before this Grand Jury?

MR. CURLEY: No.

MR. SCHULTZ: No.

JUDGE FEUDALE: Noting no questions, please raise your right hand. You do solemnly swear or affirm that the testimony you will give before the 30th Statewide Investigative Grand Jury in the matters being inquired into by it will be the truth, the whole truth and nothing but the truth. If so, say I do.

MR. CURLEY: I do.

MR. SCHULTZ: I do.

JUDGE FEUDALE: Any motions?

MS. ESHBACH: We are requesting that both our agent as well as the State Trooper be permitted to be present in the room.

JUDGE FEUDALE: That motion is

EXHIBIT B-6

granted.

EXHIBIT B-7

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

IN RE:	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE	:	
INVESTIGATING GRAND JURY	:	DAUPHIN CO. COMMON PLEAS
	:	No. CP-22-CR-5164-2011
	:	

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

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	SUPREME COURT PENNSYLVANIA
	:	217 M.D. MISC. DKT. 2010
v.	:	
	:	DAUPHIN CO. COMMON PLEAS
	:	No. 1386-MD-2012
GARY C. SCHULTZ,	:	
Defendant.	:	
	:	**REQUEST EXPEDITED REVIEW**

I have carefully reviewed the facts and circumstances of Cynthia Baldwin's relationship with Gary Schultz and Timothy Curley and have concluded, to a reasonable degree of professional certainty, that Ms. Baldwin represented both Mr. Schultz and Mr. Curley before the grand jury, that Mr. Schultz and Mr. Curley are now former clients of Ms. Baldwin, and that Ms. Baldwin violated the standard of care in her representation of Mr. Schultz and Mr. Curley, compromising their rights to effective representation in so many respects that their entitlement to relief seems compelling.

I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania, the Appellate Division, Second Department of the Supreme Court of New York,

EXHIBIT C-1

the Supreme Court of Connecticut, the United States Supreme Court, and numerous federal circuit courts of appeal and district courts. Currently, I am the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility. I am also the Supervising Lawyer of the Ethics Bureau at Yale, a pro bono endeavor to provide ethics advice, counseling and support to those who cannot afford such services. I am a partner and former managing partner of Drinker Biddle & Reath LLP, a general practice law firm of approximately 650 lawyers with a principal office in Philadelphia and branch offices in New Jersey, New York, California, Delaware, the District of Columbia, Illinois and Wisconsin.

I have regularly been consulted and testified about the ethics and professional responsibility of lawyers in various proceedings in both state and federal courts throughout the United States. I have spent my entire career as a trial lawyer, first at Community Action for Legal Services in New York City and, since 1972, at Drinker Biddle & Reath LLP. My specialties are general commercial litigation and the representation of and consultation with lawyers regarding their professional responsibilities.

I was a lecturer on law at Harvard Law School, teaching legal ethics and professional responsibility, from 2007 through 2010. I was the I. Grant Irey, Jr. Adjunct Professor of Law at the University of Pennsylvania Law School from 2000 through 2008, teaching the same topic. I have lectured on legal ethics at more than 35 law schools throughout the country, have been a visiting professor at Cornell University Law School, and was the Robert Anderson Fellow at the Yale Law School in 1997.

I have produced and participated in more than 200 continuing legal education seminars, and I have written extensively in the field. I am the author of Legal Tender: A Lawyer's Guide

EXHIBIT C-2

to Professional Dilemmas (ABA 1995); co-author (with Professor Susan Martyn) of Traversing the Ethical Minefield (Aspen 1st ed. 2004; 2nd ed. 2008), a casebook in professional responsibility, Red Flags: Legal Ethics for Lawyers (ALI-ABA, 1st ed. 2005, 2nd ed. 2010, Supplement 2009), and Your Lawyer, A User's Guide (LexisNexis 2006); co-author (with Professors Susan Martyn and W. Bradley Wendel) of The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes (Aspen 2006-2007 ed., 2007-2008 ed., 2008-2009 ed., 2009-2010 ed., 2010-2011 ed., 2011-2012 ed., 2012-2013 ed.); co-author (with Professor Susan Martyn) of The Ethics of Representing Organizations: Legal Fictions for Clients (Oxford University Press 2009); and author of almost 100 articles on legal ethics and related topics and several book chapters. I am the editor and contributing author of Raise the Bar: Real World Solutions for a Troubled Profession (2007) and Ethics Centennial (2009), both published by the ABA.

I am a former member and Chair of the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute's 12-year project, The Restatement of the Law Governing Lawyers. I am a Fellow of the American College of Trial Lawyers, and I was a member of Ethics 2000, the ABA Commission established to review the Model Rules of Professional Conduct. Currently, I am also a member of the Board of the Connecticut Bar Foundation.

My résumé is annexed hereto as Exhibit A.

Introduction

Ms. Baldwin's violations are serious. Indeed, one could teach much of the required course in professional responsibility based on what occurred in these representations,

EXHIBIT C-3

representations that went badly awry. If the rights of Mr. Schultz and Mr. Curley to effective representation had not been violated, they would not be subject to the criminal charges they presently face.

Cynthia Baldwin Was Lawyer for Mr. Schultz and Mr. Curley For All Purposes Before the Grand Jury

The question of representation should not be an issue. Indeed, I have never seen the question of clienthood challenged by a lawyer on such an unambiguous record. First, Ms. Baldwin enters the grand jury room on behalf of both individuals as a lawyer, a statutory right that was only available to her if she were representing Mr. Schultz and Mr. Curley; in fact, as counsel only to Penn State she would have been barred from such an appearance. *See* 42 Pa. Cons. Stat. Ann. § 4549(c); Pa. R. Crim. P. 231. Second, Ms. Baldwin, by her answer to the presiding judge, represented on the record that she was representing Mr. Schultz and Mr. Curley. She had a chance to assert her present justification, see infra, that she was only representing them as representatives of Penn State, an impermissible limitation but at least a warning; but Ms. Baldwin stated nothing of the kind. Third, in the grand jury room, when Mr. Schultz and Mr. Curley each testified that he was represented by Ms. Baldwin, she was silent. She failed to correct what she would characterize as the misunderstanding of her role by Mr. Schultz and Mr. Curley because, according to Ms. Baldwin's lawyer, it would have been inappropriate to "disrupt" the proceedings to disabuse the putative clients of their mistake. In Ms. Baldwin's view it was apparently much more important to keep the testimony "flowing" (testimony that had barely commenced) than clarify whether she was fulfilling the witnesses' constitutional right to counsel. In my view, the record could not be clearer. Mr. Schultz and Mr. Curley were led to their respective criminal predicaments represented by Cynthia Baldwin.

EXHIBIT C-4

There Are No Second Class Clients

Ms. Baldwin's assertion that she was representing Mr. Schultz as a representative of her real client, Penn State, not only advances a defense that finds no support in our ethical standards, but also confirms her conflict of interest. The idea that a lawyer can represent the officers or employees of an organizational client under some kind of a watered down, second-class version of clienthood finds no support in the Pennsylvania Rules of Professional Conduct. *See In re Fifth Pa. Statewide Investigating Grand Jury [No. 2]*, 50 Pa. D & C.3d 617, 622 (Dauphin Cnty. Ct. Com. Pl. 1987) ("Adequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest."); ABA/BNA Lawyers' Manual on Professional Conduct § 31:109 ("[C]ourts do not appear to accept the notion of an 'accommodation client.'"); Lawrence J. Fox, Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores, 44 S. Tex. L. Rev. 185, 193 (2002) (noting that rules do not provide for "second-class quasi-client status"). Those rules recognize one form of client, and that client is entitled to the benefit of all the lawyer duties under the rules, as well as the same fiduciary duties lawyers owe every client. So once Ms. Baldwin admits she represented Mr. Schultz in some capacity her conduct must be judged by the same standards that apply to every lawyer for every client.

The Tie Goes to the Client

Even if one were to view the record as raising some doubt about Ms. Baldwin's lawyer role, the result would be the same. The burden is always on the lawyer, not the putative client, to clear up any misunderstandings. This principle is reflected in multiple ways. For example, if Ms. Baldwin did not represent Mr. Schultz and Mr. Curley, then the only possible alternative is that Mr. Schultz and Mr. Curley were unrepresented, triggering Rule 4.3 of the Pennsylvania

EXHIBIT C-5

Rules of Professional Conduct, the rule governing interactions with the unrepresented. That rule provides two ethical requirements.

First, the lawyer is required, in the face of confusion, to clarify the lawyer's role and interest in the matter. *See* Pa. Rules of Professional Conduct 4.3(c). But, as the record reads, Ms. Baldwin did not tell Mr. Schultz or Mr. Curley, "I only represent Penn State; I don't represent you; if Penn State asks me to do so, I will blame you; even share your confidential information with Penn State." No, Ms. Baldwin allowed Mr. Schultz and Mr. Curley to tell the judge, the prosecutors and the grand jurors – with Ms. Baldwin silently sitting there – that Ms. Baldwin was representing each of them.

Second, the lawyer dealing with an unrepresented person must refrain from giving the unrepresented person any advice, with but one exception: the advice to get a lawyer. See Pa. Rules of Professional Conduct 4.3(b). Regrettably, as we shall see, Ms. Baldwin offered Messrs. Schultz and Curley much advice, some of it dreadfully wrong, even violating the rules of professional conduct in the process. So whatever Ms. Baldwin says now, her conduct unequivocally demonstrated back then that she represented Mr. Schultz and Mr. Curley, facts which are uncontradicted and, in my view, dispositive.

Moreover, the jurisprudence is clear. When the putative client has a reasonable basis for concluding that the individual is a client, the lawyer has an absolute obligation to disabuse the client of that notion, or be deemed the client's lawyer. *See Moen v. Thomas*, 682 N.W.2d 738, 743 (N.D. 2004) ("An attorney-client relationship 'may arise when a putative client reasonably believes that a particular lawyer is representing him and the lawyer does not disabuse the individual of this belief.'[] Furthermore, a lawyer who knows an individual believes an attorney-client relationship exists, even if that belief is unreasonable, should disabuse the individual of

EXHIBIT C-6

that belief.") (citations omitted); *Lefta Assocs. v. Hurley*, No. 1:09-cv-2487, 2012 WL 4484948, at *19 (M.D. Pa. Sept. 27, 2012) ("It is the reasonableness of the client's belief that the attorney is providing legal services pursuant to an attorney-client relationship that controls the issue [of whether an attorney-client relationship exists], not the attorney's own belief."); ABA/BNA Lawyers' Manual on Professional Conduct § 31:101 ("The traditional definition is that a lawyer-client relationship arises if someone seeks legal advice from a lawyer and the lawyer gives or impliedly agrees to give it, **or if a lawyer knows that someone reasonably believes himself to be the lawyer's client and the lawyer does not dispel that belief.**") (emphasis added). But here we have a written record that demonstrates not only did that not occur, but that, to the contrary, Ms. Baldwin told the court she represented Mr. Schultz and Mr. Curley by word and deed, letting the statements of Mr. Schultz and Mr. Curley that each was represented by her go uncorrected as a court reporter recorded her silence in the official transcript.

Where Is the Retainer Letter?

From the beginning of these two representations Ms. Baldwin violated important ethical obligations. First, our Pennsylvania Rules of Professional Conduct require that the lawyer communicate to a new client, in writing, "the basis or rate of the [lawyer's] fee . . . before or within a reasonable time after commencing the representation." Pa. Rules of Professional Conduct 1.5(b).

Second, Ms. Baldwin had particular responsibilities because she was compensated by Penn State, not by Mr. Schultz and Mr. Curley. The Rules of Professional Conduct provide:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

EXHIBIT C-7

(3) information relating to representation of a client is protected as required by Rule 1.6.

Pa. Rules of Professional Conduct 1.8(f); *see also id.* cmt. [11] ("Because third-party payers frequently have interests that differ from those of the client, . . . lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client."); *id. cmt.* [12] ("Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee or arrangement or by the lawyer's responsibilities to the third party payer (for example, where the third-party payer is a co-client)."); *Pirillo v. Takiff*, 341 A.2d 896, 903-04 (Pa. 1975) (affirming disqualification of lawyer from representing policemen where fees were paid by Fraternal Order of Police, and where interests of Order conflicted with interests of policemen).

Third, when representing multiple clients in the same matter, the lawyer must inform all clients of the potential for conflicts of interest. *See* Pa. Rules of Professional Conduct 1.7(b)(4) and cmt [18] ("When representation of multiple clients in a single matter is undertaken, the information [the lawyer provides] must include the implications of the common representation, including possible effects loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved."). Where, as here, a lawyer represents multiple potential defendants whose interests may diverge, the conflict is clear. *See Pirillo*, 341 A.2d at 906 (finding that lawyer could not represent multiple potential defendants in grand jury proceedings where they might incriminate each other); 42 Pa. Cons. Stat. Ann. § 4549(c)(4) (prohibiting lawyer from representing multiple witnesses in grand jury proceedings where conflict is likely).

EXHIBIT C-8

These rules are not technical requirements, the violation of which is of no material moment. If Ms. Baldwin had sent retainer letters to Mr. Shultz and Mr. Curley and, in doing so, addressed the issues that she was required to consider, particularly conflicts and confidentiality, neither Mr. Schultz nor Mr. Curley would likely find themselves in the legal jeopardy they currently face.

The Prosecutor's Characterization of the Relationship Between Messrs. Schultz and Curley and Lawyer Cynthia Baldwin Is Frivolous

One would think that the Commonwealth has no standing to even comment on the lawyer-client relationship between Messrs. Schultz and Curley, on the one hand, and Cynthia Baldwin on the other. It is the Commonwealth whose lawyers were fully aware of the conflicts under which Ms. Baldwin was laboring at the time of the grand jury proceeding, stood silent, took full advantage of the conflicts, and never informed the court of the nature and extent of the conflicts so that the court could fulfill its duty of assuring that the rights of Messrs. Schultz and Curley to effective representation were not systematically violated in the extreme. In short, the Commonwealth's lawyers abdicated their responsibilities as ministers of justice and protectors of the constitutional rights of the accuseds and, therefore, should be disqualified from even addressing the questions of the role of counsel and the attorney-client privilege raised here.

But that standing question need not be reached since the Commonwealth's presentation on these issues strays so far from what the law requires that it is not worthy of real consideration here. Indeed, the construct the Commonwealth's lawyers offer the court could be dismissed as comedic if the implications of the Commonwealth's position were not so catastrophic to the rights of the individual clients of Ms. Baldwin. The Commonwealth actually asserts that because Messrs. Schultz and Curley were aware that Ms. Baldwin was general counsel for Penn State

EXHIBIT C-9

they should have understood that they were merely second-class clients and, as a result, are entitled to no attorney-client privilege whatsoever.

As I have already noted, the Rules of Professional Conduct only contemplate one form of clienthood. And that form is full compliance with the Rules of Professional Conduct relating to conflicts of interest, confidentiality, competence, communication, client control and all of the other obligations the rules mandate for all clients. Therefore, once Cynthia Baldwin announced to Messrs. Schultz and Curley, the court, the grand jury, as well as the Commonwealth's lawyers, that she represented both of them, she was required, in fact, to represent both of them to the full extent required by her fiduciary duties, *see Capital Care Corp. v. Hunt*, 847 A.2d 75, 84 (Pa. Super. Ct. 2004), the Pennsylvania Rules of Professional Conduct, the Pennsylvania statutory provisions governing the right to counsel before a grand jury, 42 Pa. Cons. Stat. Ann. § 4549(c), and, not by the way, the United States Constitution. U.S. Const. amend. V, VI. Nor does the Commonwealth suggest that Ms. Baldwin ever warned Messrs. Schultz and Curley that her real client was Penn State or that, when she told them she was representing them, her fingers were crossed behind her back, and she never fully intended to fulfill that obligation, let alone warn them that they would not receive the benefit of attorney-client privilege because of their second-class status.

I do not believe for a moment that if such a warning were given it would be of any significance. Lawyers are not allowed to take on representations that somehow do not include the attorney-client privilege. Indeed, there is no protection, no protection whatsoever, applicable to the lawyer-client relationship that is more important than the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("explaining that purpose of privilege "is to encourage full and frank communication between attorneys and their clients and thereby

EXHIBIT C-10

promote broader public interests in the observance of law and administration of justice"); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 47 and n.1 (Pa. 2011) (highlighting purpose and importance of privilege); *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986) ("The attorney-client privilege is deeply rooted in our common law and can be traced to the reign of Elizabeth I, where it was already unquestioned. It is the most revered of our common law privileges . . . .") (internal citation omitted). So for the Commonwealth to argue Ms. Baldwin represented Messrs. Schultz and Curley, but that she did so, quite properly, without providing them with the benefit of the attorney-client privilege, and that the lay clients should have divined that they were not entitled to the attorney-client privilege from Ms. Baldwin's exalted status as counsel at Penn State, asserts a position that has no basis in any law or any support in the Pennsylvania Rules of Professional Conduct.

In Joint Representations There Can Be No Waiver of the Attorney-Client Privilege as to the Client That Is Asserting the Privilege Unless That Client Waives the Privilege

The law governing the attorney-client privilege in a joint representation is clear. As to all lawyer-client communications among the multiple clients and the lawyer, there can be no waiver of the privilege unless each client has given his or her informed consent – a defined term[1] – to waive the privilege. *See In re Teleglobe Commc'ns, Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) ("[W]aiving the joint-client privilege requires the consent of all joint clients.") (citing Restatement (Third) of the Law Governing Lawyers § 75(2)).[2] To have a different rule would mean that there could never be a joint representation, no matter how otherwise conflict-free the

[1] "'Informed consent' denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Pa. Rules of Professional Conduct 1.0(e).

[2] "[A] client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients." *In re Teleglobe*, 493 F.3d at 363 (citing Restatement (Third) of the Law Governing Lawyers § 75(2) cmt. e).

EXHIBIT C-11

joint representation might be. And that is because each client in the joint representation would always be in jeopardy that that client might lose protection of the privilege involuntarily as the co-client took advantage of an individual's right to waive in order to gain some competitive advantage, or in the case of criminal matters, leniency for cooperation. So, in order to waive the privilege here, Ms. Baldwin would have been required to seek the informed consent of Messrs. Schultz and Curley before she could disclose any conversations she had with those two gentlemen while she was representing them. Yet the record I have reviewed demonstrates that there never was so much as a telephone call or other communication to either Messrs. Schultz and Curley or their new lawyers seeking such a waiver. Nor would there be any reason why either of them would even nod at such an ill-advised waiver.

But we are told by the Commonwealth the foregoing does not apply here because Messrs. Schultz and Curley should have known that Penn State, as Cynthia Baldwin's client, controlled the privilege and could waive it at any time, not only for Penn State but for Messrs. Schultz and Curley. What an extraordinary, frivolous and dangerous assertion! What the Commonwealth is telling the court is that, without warning or explanation, let alone informed consent, Messrs. Schultz and Curley were supposed to understand that even though the clients, the court and the grand jury were all told in no uncertain terms by Ms. Baldwin – on the record – that she was representing these two, Ms. Baldwin was totally free to disclose any of the privileged information of her two individual clients at any time and without warning if Penn State directed her to do so. That turns the law of privilege literally upside-down, rendering it a false protection and leaving the clients helpless before the power of the Commonwealth.

EXHIBIT C-12

Even if Ms. Baldwin Incorrectly Thought She Might Disclose Privileged Information, She Was Not Entitled to Decide That Question for Herself

Ms. Baldwin's sins here are both manifold and manifest. Turning against one's clients is the greatest betrayal a lawyer can commit. But that is what Ms. Baldwin did here, stripping the clients of any opportunity to object to her misdeeds. Either she was subpoenaed to the grand jury or she voluntarily agreed to appear. Either way, she ran right through the red light by, in fact, testifying before the grand jury without notice to her former clients.

Why were they entitled to this notice? Because if Ms. Baldwin planned to disclose one iota of privileged information to the grand jury, her former clients were entitled to notice so that they could take appropriate action to prevent that testimony from being elicited before her former clients had a chance to argue before a court of law that Ms. Baldwin was violating the attorney-client privilege in doing so.

No lawyer is permitted to disclose confidential information without the informed consent of the client. No lawyer is permitted to testify to privileged information under subpoena without either asserting the attorney-client privilege or giving the former client an opportunity to do so. *See In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975) (former counsel that received grand jury subpoenas was obligated to assert attorney-client privilege with respect to documents it "deemed arguably protected by the attorney-client privilege"); Pa. Eth. Op. 98-97 (advising that lawyer "should assert the attorney/client privilege and [the lawyer's] ethical duty of confidentiality in every instance where it is plausible that such restrictions on disclosure apply" and that "[i]n cases of doubt, [the lawyer] should not attempt to unilaterally determine the privilege or ethical issues on [his] own but instead seek a determination by the Court"). And the last thing a former lawyer may do is take the law into her own hands, decide

EXHIBIT C-13

that former clients were not entitled to the privilege, give them no opportunity to object, give the courts no opportunity to adjudicate the question, and simply provide the privileged information on her own motion.

There was a time when Ms. Baldwin was a judge who decided such questions. So perhaps she forgot that in representing Messrs. Schultz and Curley she was now simply a lawyer without the power to adjudicate the most sensitive questions of all relating to a client, to wit, whether a lawyer can be forced to testify about lawyer-client communications undertaken in confidence for the purpose of offering or receiving legal advice. But as a result of Ms. Baldwin's misconduct, Messrs. Schultz and Curley went six months without being aware of Ms. Baldwin's betrayal and only learned of her shocking abandonment of her former clients when the new indictment was issued. Ms. Baldwin's conduct in this regard cries out for relief.

It Was a Crime for Ms. Baldwin and the Commonwealth's Lawyers to Decide the Crime-Fraud Exception

Permit me again to address some first principles. If the attorney-client privilege is the most sacred protection for the right of a client to consult a lawyer with confidence that the client's innermost secrets will not be disclosed by the lawyer, then the crime fraud exception to the privilege, which does permit inquiries into communications between lawyer and client, is one that must be applied with great circumspection and care only after the client, represented by counsel, has had a full opportunity to assert that the crime fraud exception does not apply. This doctrine is so carefully circumscribed that the courts are not even permitted to look at the challenged privileged communication unless those who assert the crime fraud exception should independently establish, without reference to the challenged communications, that there is a good reason to believe this exception is likely to be applicable in this situation. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) ("Before engaging in *in camera* review to determine the

EXHIBIT C-14

applicability of the crime-fraud exception, 'the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.") (internal citation omitted).

The conduct of the Commonwealth and Ms. Baldwin with respect to this assault on the attorney-client privilege of Messrs. Schultz and Curley makes a mockery of the foregoing. Apparently, the Commonwealth decided the crime fraud exception should apply. What a surprise! Opponents of those asserting the privilege bandy about the applicability of the crime fraud exception all the time when it is in their best interests to do so. If successful, they will have invaded the sanctity of the lawyer-client relationship, and perhaps gained access to some information damaging to their adversary.

It would appear that Ms. Baldwin instigated the crime fraud exception allegation or, in any event, went along with it, testifying to communications between Messrs. Schultz and Curley and herself, without any notice to the clients, stripping the clients of any opportunity they would have to demonstrate to the contrary that the crime fraud exception should not apply. In my experience, this conduct on the part of former counsel is not only a blatant betrayal, but is unprecedented in the annals of lawyer representation of clients.

Even if she were convinced that some court would decide that the crime fraud exception should apply, Ms. Baldwin was not permitted to act on that conclusion. Rather, she had an absolute obligation to notify the clients and give them every opportunity to convince the court that both the Commonwealth and Ms. Baldwin were incorrect and, in any event, were not entitled to make the decision sua sponte. *See* Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine 711 (5th ed. 2007) (noting that holder of privilege must be given

EXHIBIT C-15

an opportunity to rebut whether communications were "in furtherance of a contemplated crime or fraud"); *cf. Commw. v. Harris*, 32 A.3d 243, 248-51 (Pa. 2011) (reaffirming right to immediate appeal of orders overruling claims of privilege because of importance of privilege and inability of later appeal to undo harm of disclosure).

Ms. Baldwin's role in this is particularly suspect in my view because the only motivation for her cooperating with the prosecution in this way, abandoning her clients so completely, is so that she could be held harmless for her misconduct in telling the clients and the court that she represented these two individuals when, in fact, she was not providing them legal representation at all. Indeed, nothing demonstrates more her conflicts of interest than her conduct with respect to the crime fraud exception.

Conclusion

The role of the lawyer is a sacred one. Its entire purpose is to provide clients with that one true champion who will advocate for the client and remain loyal to the client throughout and even long after the representation ends. Faced with the authority of the state to bring criminal charges, all of these obligations become even more important and of constitutional dimensions. As a result, when lawyers feign representation, but in fact abandon their clients and, worse yet, become instrumentalities of the state, aiding the prosecution of their clients, the entire system of

EXHIBIT C-16

justice is systematically destroyed. Yet that is precisely what happened here when Cynthia Baldwin went from stating that she was representing Messrs. Schultz and Curley, to providing them with no effective representation whatsoever, to betraying them in her testimony before the grand jury. This extraordinary set of circumstances cries out for relief.

Lawrence J. Fox

New Haven, CT
January 15, 2013

EXHIBIT C-17

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January 15, 2013

Frank G. Fina
Chief Deputy Attorney General
Office of the Attorney General of Pennsylvania
Strawberry Square, Flr. 16
Harrisburg PA 17120

Bruce Beemer
Chief of Staff
Office of the Attorney General of Pennsylvania
Strawberry Square, Flr. 16
Harrisburg PA 17120

Re: ***In re: The Thirty-Third Statewide Investigating Grand Jury*, 217 M.D. Misc. Dkt. 2010 (Pa. Sup. Ct.), No. 1325 M.D. 2010 (Dauphin Cty. C.C.P.)**

Dear Frank and Bruce:

Enclosed, please find a copy of recently-discovered notes concerning the Office of General Counsel's response to a subpoena requesting University police records. These notes were discovered during Amy McCall's move to a new office space—they had been misfiled with materials unrelated to Sandusky investigations.

We provide these notes consistent with the University's agreement to waive privilege as to the Office of General Counsel's efforts to comply with the Commonwealth's grand jury investigation related to Gerald Sandusky, specifically excluding privileged communications with or concerning outside counsel, and communications with Messrs. Schultz, Curley, and Spanier.

Should you have any questions about these documents or their discovery, please let me know.

Very truly yours,

Michael M. Mustokoff

MMM
Enclosure

EXHIBIT D-1

cc: Elizabeth K. Ainslie, Esquire
Caroline M. Roberto, Esquire
Thomas J. Farrell, Esquire
Daniel R. Walworth, Esquire

EXHIBIT D-2

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CP-22-CR-5164-2011
v.	:	
	:	Charges: Perjury; Penalties for
GARY CHARLES SCHULTZ,	:	Failure to Report or to Refer
	:	
Defendant.	:	

AFFIDAVIT OF GARY C. SCHULTZ

1. I, Gary C. Schultz, am the defendant in this case.

2. In December 2010, Cynthia A. Baldwin, General Counsel for the Pennsylvania State University ("PSU") called me and informed me that she had been contacted by the Office of the Pennsylvania Attorney General ("OAG") about a grand jury subpoena for my testimony. At the time, I was retired from PSU, having retired in June 2009. She asked if I would authorize her to accept service of a subpoena from the OAG, and I agreed to so authorize her.

3. The date for my grand jury testimony was January 12, 2011, and Ms. Baldwin suggested we meet before then.

4. Ms. Baldwin never told me that an option might be submitting to an interview rather than testifying before the grand jury.

5. I met with Ms. Baldwin at her office in Old Main on January 5, 2011. Only she and I were in attendance. Ms. Baldwin informed me that the grand jury investigation focused on Jerry Sandusky, not on me or PSU, and that I was being called purely as a witness. She told me that this was the second or third grand jury to

EXHIBIT E-1

look into Jerry Sandusky's actions. She informed me that I would be asked about an event that happened in the early 2000s.

6. Ms. Baldwin told me that neither I nor PSU were under investigation. Ms. Baldwin told me that she had interviewed Tim Curley and Joe Paterno, and their memories were consistent with mine. She explained that I was entitled to have legal counsel in the grand jury. She said that I could consult with my attorney during the testimony, but the attorney could not address the grand jury. She said that I could have outside counsel, if I wished, but at that point, seeing that all the stories were consistent, she could represent me, Tim Curley and Joe Paterno as well. I responded that I would not know who to call and that if Ms. Baldwin was fine with it, so was I.

7. I told her what I remembered and expressed frustration over my lack of memory. I suggested that I talk to Tim Curley, Joe Paterno or Graham Spanier to refresh my memory, but Ms. Baldwin told me that I should not talk to anyone about this. She said that any reasonable person would understand my failure to recall.

8. I also told her that I might have had a file on Sandusky, that it might still be in my former office, and that it might help refresh my memory. Ms. Baldwin told me that she did not want me to look for or review any materials.

9. Ms. Baldwin also told me that PSU and I were not targets of the investigation and that I would be treated as a witness. There never was any discussion of the Fifth Amendment privilege or the risk of self-incrimination.

10. I believed that Ms. Baldwin was representing me during and in connection with the grand jury proceedings and that she was looking out for my best interests. Based on her representations, I did not believe I needed a separate lawyer.

11. When I arrived at the grand jury on January 12, 2011, Ms. Baldwin accompanied me to the interview by prosecutors before I testified. Prosecutors were

EXHIBIT E-2

hostile and challenged my recollection of events, indicating that they had evidence that Jerry Sandusky had anally raped the boy in the shower. During this time, I fully believed that Attorney Baldwin was my attorney and representing my best interests. After the interview, she did not advise me to exercise my Fifth Amendment right or to retain separate counsel.

12. Ms. Baldwin first told me that I should retain separate counsel approximately one week before charges were filed against me.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on, October 25, 2012.

Gary C. Schultz

NOTARIAL SEAL
JUDY ANN CARMICHAEL
Notary Public
PITTSBURGH CITY, ALLEGHENY COUNTY
My Commission Expires Oct 11, 2016

EXHIBIT E-3

I. Subpoenas Issued for the Grand Jury Testimony of Senior University Officials

On January 7, 2010, the Grand Jury issued a subpoena seeking production of all the University employment and personnel records for Gerald A. Sandusky ("Sandusky").[377] The Penn State employee handling the subpoena consulted with a lawyer at McQuaide Blasko, the State College law firm that served at the time as outside legal counsel for Penn State, about how to respond to the subpoena.[378] This lawyer, who had no grand jury experience, then spoke with colleague Wendell Courtney, although this lawyer told the Special Investigative Counsel that they did not discuss any potential reason for the subpoena or any prior incidents involving Sandusky.[379] The lawyer also did not discuss the nature of the investigation with anyone from the Attorney General's Office.[380]

Through McQuaide Blasko, Penn State agreed with the Attorney General's Office on a non-disclosure order concerning the subpoena.[381] At the time, Penn State staff compiled a list of all persons who knew of the subpoena, which included Spanier, Paterno and Curley.[382]

On September 16, 2010, a *Patriot-News* reporter contacted Spanier. The two exchanged emails as to Spanier's knowledge of an investigation of Sandusky for suspected criminal activity while he was a Penn State employee.

On December 22, 2010, the McQuaide Blasko lawyer called then-University General Counsel Baldwin to inform her that a prosecutor from the Attorney General's Office had called McQuaide Blasko to say that the Grand Jury would like to hear testimony from "some very important people" at Penn State.[383] The lawyer also provided Baldwin with background information about the January 2010 subpoena.[384]

On December 28, 2010, at 9:30 a.m., Baldwin spoke with two prosecutors from the Attorney General's office, who explained that the office would be issuing subpoenas for Schultz, Paterno and Curley to appear before the Grand Jury.[385] Baldwin explained in an interview with the Special Investigative Counsel that she asked if the University or its staff were targets of the investigation.[386] According to Baldwin, the prosecutors said that they were looking at Sandusky, although Baldwin's notes of the conversation do not reflect discussion of this issue.[387] Baldwin did not seek the assistance of an

EXHIBIT F-1

COMMONWEALTH OF PENNSYLVANIA
THIRTIETH STATEWIDE INVESTIGATING GRAND JURY

IN RE: NOTICE NO. 29

TRANSCRIPT OF PROCEEDINGS
OF GRAND JURY

WITNESS: GARY SCHULTZ

DATE: JANUARY 12, 2011, 12:02 P.M.

PLACE: STRAWBERRY SQUARE
VERIZON TOWER, EIGHTH FLOOR
WALNUT STREET
HARRISBURG, PA 17120

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL
BY: JONELLE ESHBACH, ESQUIRE
FRANK FINA, ESQUIRE
FOR - COMMONWEALTH

PENNSYLVANIA STATE UNIVERSITY
BY: CYNTHIA BALDWIN, ESQUIRE
FOR - GARY SCHULTZ

SHANNON MANDERBACH
REPORTER-NOTARY PUBLIC

I N D E X

EXAMINATION

GARY SCHULTZ, called as a witness, being previously sworn, testified as follows:

EXAMINATION

BY MS. ESHBACH:

Q Would you please introduce yourself to the Grand Jury and spell your last name for the court reporter's benefit?

A Sure. My name is Gary Schultz, S-c-h-u-l-t-z. I am a retired senior vice president for finance and business at Penn State University.

Q You are accompanied today by counsel, Cynthia Baldwin; is that correct?

A That is correct.

Q When did you retire from the university?

A In June of 2009.

Q In June of 2002, did you occupy that position as senior vice president?

A Yes, I did.

Q Could you please explain to the Grand Jury in that capacity what operations of the university were under your authority?

A Yes. Within an academic institution, we have the chief academic officer. That's commonly referred to as the provost. That's not me. I really run the operations of the university, the physical plant, all the facilities and services of those facilities, all the housing and food services; if you have ever been on Penn State campus, the Nittany Lion Inn, the airport, all kinds of printing and fleet, human resources, university police, and all the finance elements of the university which would include the controller, the budget office and the investment office.

Q With regard to Penn State's athletic program, the Grand Jury has already met the athletic director. Could you explain your position vis-a-vis Mr. Curley as the athletic director?

A Yes. Mr. Curley directly reports to the president of the university, but kind of a day-to-day working arrangement is that he would often behave like he reported to me as well.

Q I'd like to direct your attention to a time around spring break of 2002 as it's been reported to us. Do you recall being called and requested to attend a meeting with Coach Paterno

EXHIBIT G-1

2013 JAN -4 AM 11:53

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CP-22-CR-5164-2011
v.	:	
	:	
GARY CHARLES SCHULTZ,	:	
	:	
Defendant.	:	

REPLY BY DEFENDANT GARY C. SCHUTLZ TO COMMONWEALTH'S ANSWER TO DEFENDANTS' OMNIBUS PRE-TRIAL MOTION

AND NOW, comes the defendant, Gary Charles Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully files this Reply to the Commonwealth's Answer to his Omnibus Pre-Trial Motions:

I. The Commonwealth's Concessions are Sufficient to Establish that the Defendants Were Deprived of Any Proper Representation and Are Entitled to Relief.

The Commonwealth concedes many significant factual and legal propositions, so much so that the concessions themselves establish the deprivation of counsel. Whether the Court accepts this – and we believe that the more prudent course would be to allow the parties to make a full factual record – we start with those concessions, for they frame the issues before the Court and reflect the seriousness of the violations here.

First, the Commonwealth concedes "that attorney Baldwin represented the defendants." Commonwealth Answer at p.21. She represented as much to

EXHIBIT H-1

both the Court and the Commonwealth without ever adding the spurious limitation she now advances. *See id.* at p. 5 ¶17; p. 7 ¶36; p. 10, ¶13; p. 23. The Commonwealth does ***not*** contest the defendants' assertions that her representation was full and personal and carried with it all the obligations to effective assistance that the law requires and that she failed to advise Mr. Schultz of any limitation or conflict in her representation. Its acknowledgement that a conflict would have precluded her joint representation, *see id.* at p. 14, ¶17 (admitting that a conflict of interest would violate a witness' right to counsel) reflects a belief that her attorney-client relationship with Curley and Schultz required that she afford them effective, conflict-free and full representation.

Second, the Commonwealth effectively admits that Ms. Baldwin did not consider herself Mr. Schultz or Mr. Curley's counsel and did not represent their personal interests in the Grand Jury. In response to Defendants' allegations to this effect, the Commonwealth states, "Neither admitted nor denied," and "The Commonwealth does not have sufficient information to respond to this paragraph of the Motion." Commonwealth Answer at p.4, ¶16; p.11-12, ¶¶24-27. Such a non-denial is equivalent to an admission, because the Commonwealth *does* have sufficient information to respond: it has access to its cooperating witness, Cynthia Baldwin. *See Cercone v. Cercone,* 254 Pa. Super. 381, 388-389, 386 A.2d 1, 3-5 (1978)(A general denial or demand for proof will be deemed an admission; "merely averring lack of

EXHIBIT H-2

knowledge is ineffective when it affirmatively appears . . . defendant had sufficient knowledge on which to base an admission or specific denial."); October 26, 2012, Presentment No. 29 at 20-32 (reciting Baldwin's grand jury testimony at length). As to the legal effect of this, the Commonwealth admits that our statement that "where counsel fails to exercise any professional judgment on the client's behalf, it is as if the witness had no counsel, and no specific showing of prejudice is required," Schultz Omnibus Pretrial Motion at ¶ 34, "is an accurate statement of law," Commonwealth Answer at p.13 , ¶34.

Third, the Commonwealth does not take issue with the proposition that the Investigating Grand Jury Act establishes a right to the same sort of effective assistance of counsel as does the Sixth Amendment under *Strickland v. Washington*, 466 U.S. 688 (1984); and *Commonwealth v. Pierce*, 575 Pa. 153, 527 A.2d 973 (1987). *See* Commonwealth Answer at p. 12, ¶28 (accepting as an "accurate statement of the law" Schultz' allegation that he had a statutory right to the assistance of counsel in the grand jury.)

Fourth, the Commonwealth admits, albeit obliquely, that Deputy Attorney General Frank Fina discussed *something* about a conflict issue, whether characterized as potential or actual, with Ms. Baldwin on January 12, 2011. The Commonwealth does not deny Defendant Schultz' allegation in paragraph 18 of his Motion that Mr. Fina told numerous attorneys that "he advised her that he believed that she was operating under a conflict of interest." The Commonwealth's Answer at page 11, ¶ 18, and page 21 denies

EXHIBIT H-3

that the discussion involved mention of an actual conflict, but notably does not deny Schultz' allegation that Mr. Fina described the confrontation with Ms. Baldwin to numerous attorneys.

Conclusive proof that this discussion occurred lies in the otherwise incomprehensible sentence at page 23 of the Answer, "In this case, the Commonwealth *knew* that defense counsel was experienced [sic] and aware of the possibility of a conflict."[1] The Commonwealth could know of defense counsel's - Ms. Baldwin's - subjective awareness only if its representative discussed it with her, as we allege Mr. Fina did. The disagreement between our positions turns on whether the facts known to Fina and discussed with Baldwin amounted to an actual or potential conflict, a disagreement that must be resolved at a hearing.

Fifth, the Commonwealth admits that had an actual conflict of interest been apparent to the Commonwealth, it would have been obligated to move to disqualify defense counsel. At paragraph 47 of his Motion, Schultz alleged, "Prosecutors in the grand jury proceeding have the obligation and responsibility to raise the conflict of interest before the presiding judge to prevent a violation of the witness' right to counsel." The Commonwealth admitted that this "paragraph is an accurate statement of the law." Commonwealth Answer at p.14, ¶47. *See also id. at* pp. 22-23.

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[1] To the contrary, Judge Freeh, a former FBI agent, federal prosecutor and federal trial judge, cited Ms. Baldwin's lack of criminal defense or prosecution experience as a handicap and faulted Ms. Baldwin, who had no criminal defense or prosecution experience, for failing to engage "experienced criminal counsel." Freeh Report at 80. Criminal defense practice is a specialty that holds complexities, savagery, and perils that often escape even those lawyers, such as Ms. Baldwin, accomplished in other areas.

EXHIBIT H-4

Finally, the Commonwealth concedes away an essential element of its perjury charges against Curley and Schultz, the intent to deceive. Defendants testified on January 12, 2011, approximately one month after the Commonwealth had interviewed and submitted to the grand jury the testimony of its principal witness against Curley and Schultz on the perjury charge, Michael McQueary. The OAG interviewed each before their testimony, and Curley and Schultz gave statements that matched the grand jury testimony each provided later that day, the very testimony that is charged as the alleged perjury.

Between the defendants' January 12, 2011, testimony and the filing of the Complaint on November 4, 2011, and the first Criminal Information on January 19, 2012, nothing changed. The Commonwealth did not obtain any new evidence against defendants, aside from the testimony of John McQueary corroborating some of his son's testimony. Yet the Commonwealth now says of the January 12 interviews, "Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate in the investigation." Commonwealth Answer at 21. Further, "The information available to the Commonwealth also included the fact that the *Defendants apparently intended to cooperate, as evidenced by their statements.* There would be no reason under these circumstances for the Commonwealth to jump to the conclusion that an actual conflict of interest existed. The Commonwealth could not know that the Defendants intended to provide inaccurate testimony." *Id.* at 23 (emphasis added). Substitute the substantially identical January 12

EXHIBIT H-5

testimony for the January 12 statements, and we find the Commonwealth conceding that the Defendants' intent in providing their testimony was to be cooperative and *not* to provide inaccurate testimony.

We doubt that the Commonwealth intends to disavow its perjury charge, though hope springs eternal. But the above demonstrates the contortions into which the Commonwealth twists to avoid acknowledging that upon hearing the defendants' statements at the interviews preceding the substantially identical grand jury testimony, the OAG knew that defendants were likely to be prosecuted for perjury and that there was a conflict among all four of Ms. Baldwin's clients: Mr. Curley, Mr. Schultz, Coach Paterno and PSU.

These concessions establish, at minimum, that the Commonwealth agrees that the Defendants had the right to personal counsel before the grand jury; that Baldwin did not consider herself to be their counsel and did not intend to protect their personal interests, but represented otherwise to the Commonwealth, the Supervising Judge and the Defendants; and that the Commonwealth accepts that "where counsel fails to exercise any professional judgment on the client's behalf, it is as if the witness had no counsel, and no specific showing of prejudice is required," Schultz Motion at ¶34; Commonwealth Answer at p.13, ¶34. Together, these concessions establish that Defendants were deprived of their right to counsel. As we argued in our opening Brief at 15-16, the most modest remedy that could be imposed is the suppression of defendants' grand jury testimony.

EXHIBIT H-6

II. Most of The Commonwealth's Answer – Its Double Jeopardy Discussion and its Hyperbole about Perjury – Miss the Issue before the Court.

A. The conflict issue is only one of several deprivations of counsel.

The Commonwealth asserts that "The crux of Defendants' Omnibus Pretrial Motions is that the attorney who represented them during the Grand Jury Investigation labored under a conflict of interest." Answer at p. 17. To the contrary, the conflict of interest is only one of the insults the right to counsel suffered, and not the most serious. The worst was Attorney Baldwin's surreptitious intent to deprive the witnesses of any representation at all, of any exercise of the independent and loyal professional judgment that the Commonwealth accepts as central to counsel's role, see page 2, *supra*; *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

The Commonwealth completely ignores our primary argument that Mr. Schultz had a statutory right to counsel and that Ms. Baldwin's failure to act as his counsel, rather than as PSU's, constructively and completely denied him the right to counsel. It also ignores our arguments at Point I.D. of our opening Brief that Ms. Baldwin acted incompetently in failing to investigate and to advise our clients properly.[2] Instead, the Commonwealth again mischaracterizes our argument and knocks down the

[2] The Commonwealth's only comment on these arguments is the observation that the Supervising Judge "advised Defendant Schultz of his constitutional right to remain silent before the Grand Jury." Answer at p.13, ¶37. True, but this highlights the harm Schultz suffered: he thought that he had counsel looking out for his interests who advised him to go ahead and testify. Instead, his counsel had an agenda she hid from him (and from the Supervising Judge) – represent only PSU's interests.

EXHIBIT H-7

mischaracterization. "Effectively, the Defendants' argument amounts to a contention that appearing before a Grand Jury with conflicted counsel allows a witness to lie to the Grand Jury." Answer at 25. Of course, we do not agree that Mr. Schultz lied to the Grand Jury, and even the Commonwealth now seems to attribute any "inaccuracies" in the Grand Jury testimony to differences in recollection. Answer at p.7, ¶39; p.10, ¶17. More to the point, however, the Commonwealth does not cite any authority for the proposition that the protections of due process and the right to counsel evaporate when the charge is perjury.

The Commonwealth also completely ignores our argument that Ms. Baldwin had a fatal and actual conflict in representing both PSU and the individual witnesses.[3] The assertion that she could represent Schultz and Curley in any but an individual capacity is frivolous, for the law is clear that a corporate officer is individually culpable for alleged criminal acts he undertakes as a corporate officer. 18 Pa.C.S.A. §307(e)(1)("A person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.") The law likewise is clear that such actions by high managerial agents like Messrs. Curley and Schultz expose the entity to criminal prosecution. 18 Pa.C.S.A.

[3] We join codefendant Curley's response in all respects, including his argument about the conflict. As he states, the conflict between his story and Mr. Schultz's is not limited to their recollection about the 1998 incident, but also includes their conflicting recollection about McQueary's story. No doubt this conflict was actual and serious; after all, one of the allegations of perjury against Mr. Curley is that he denied that the contact was sexual. *See* Commonwealth's Response to Defendants' Motion for a Bill of Particulars, Exhibit A (March 30, 2012).

EXHIBIT H-8

§307(a)(3). In such circumstances, it is routine and standard operating procedure for entity counsel to sacrifice the entity's agents even to the point of coercing them to waive their privileges against self-incrimination to convince prosecutors of the entity's cooperativeness and to persuade the government not to prosecute the entity. *See generally* Abbe David Lowell and Christopher D. Man, *Federalizing Corporate Internal Investigations And The Erosion Of Employees' Fifth Amendment Rights*, 40 Geo. L.J. Ann. Rev. Crim. Proc. iii (2011); David M. Zornow and Keith D. Krakaur, *On The Brink Of A Brave New World: The Death Of Privilege In Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147 (2000).

An example illustrates the conflict. According to the Attorney General, at the same time she represented Mr. Schultz and Mr. Curley, Ms. Baldwin was responding to a subpoena to PSU for documents. (There is no evidence that Mr. Schultz, who was retired at the time, knew of the subpoena to PSU. He did not receive a litigation hold letter or any documentation asking him to preserve or seek documents.) PSU did not have any Fifth Amendment privilege against incriminating itself by authenticating and producing documents. *In re Grand Jury*, 836 F.2d 150, 151 (3d Cir. 1987). Mr. Schultz, as an individual, did. *United States v. Hubbell*, 530 U.S. 27 (2000). Any attorney representing him would have advised him not to play any part in producing documents nor to make any statements about his role in such production because it could be used against him. In conflict and in

EXHIBIT H-9

recognition that PSU had no Fifth Amendment privilege, counsel for PSU would have tried to have all custodians seek and produce all documents to convince the prosecutors of the entity's good faith. In fact, since Ms. Baldwin turned over the representation of PSU to competent outside counsel, PSU has cooperated with the investigation, produced mountains and clouds of documents and witnesses to testify about them, and avoided prosecution.

B. We Don't Argue Double Jeopardy, But Prosecutorial Misconduct.

We do not know where the Commonwealth gets this idea or the related one that we seek the "extreme remedy of barring retrial," Answer at 18. There are many types of prosecutorial misconduct other than double jeopardy violations – vouching, inflammatory arguments in closing, the failure to disclose exculpatory evidence, etc. – and participating in the deprivation of the right to counsel is one.

If the OAG was aware, contrary to the understandings Schultz and Curley expressed in their grand jury testimony, *see* Schultz Omnibus Pretrial Motion, Exhibit D p.3 (Schultz grand jury), and that Judge Feudale expressed in his colloquy with the Deputy AG and the witnesses, *see id.* at Exhibit C, pp.8-9, that Ms. Baldwin represented only PSU and not the witnesses, then the OAG committed serious misconduct. First, it violated grand jury secrecy by allowing Ms. Baldwin into the grand jury. Ms. Baldwin and the OAG later used the information she improperly obtained by attending the Defendants' grand jury testimony to their prejudice in her own

EXHIBIT H-10

testimony, which led to the new Presentment No.29.

Second, if this is true, the OAG deliberately invaded the defense camp and intruded on the attorney-client relationship by encouraging the defendants to confide in, seek advice from, and testify in the grand jury before someone they thought was their counsel, but the OAG knew was not. *See Commonwealth v. Scarfo*, 416 Pa. Super. 329, 374-78, 611 A.2d 242, 264-66 (1992); *State v. Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011); *United States v. Voigt*, 89 F.3d 1050, 1070-71 (3d Cir. 1996). The OAG then compounded that prejudice by using the information which that pseudo-attorney obtained to bring new charges against defendants, as expressed in Presentment No. 29.

III. Expert Testimony is Admissible.

In its response, the Commonwealth erroneously argues that expert evidence about the deficient representation of Mr. Schultz at the Grand Jury is inadmissible because the Court is the "expert on the law." *See* Commonwealth's Response, ¶ 29. The Commonwealth's assertion is meritless. Expert opinion regarding Ms. Baldwin's representation, conflicts, and the standard of practice for attorneys representing entities and their employees and grand jury witnesses should be permitted.

The Commonwealth's argument relies on inapposite case law. In *Waters v. State Employees' Retirement Board*, 2008 Pa. Commw. LEXIS 339, 955 A.2d 466, 471, n. 7 (2008), the Plaintiff offered expert testimony on

EXHIBIT H-11

statutory construction of the governing law. That is not the case here. In *41 Valley Associates v. Board of Supervisors of London Grove Twp.*, 882 A.2d 5, 14, n. 12 (Pa. Commw. 2004), the issue for the court was "compatibility with the Township's comprehensive plan and applicable zoning regulations," which the Commonwealth court held was a question of law. In *dicta*, the Court concluded that "in general, expert opinion on a question of law is inadmissible." *Id.* Similarly, *In Bessemer Stores, Inc. v. Reed Shaw Stenhouse*, Inc., 344 Pa. Super. 218, 223, 496 A.2d 762, 765 (1985), the issue was whether the appellee's admission in its original answer should have been admitted into evidence as admissions of fact or conclusions of law. The court did not mention or even reference expert testimony.

In contrast, expert testimony is readily admitted in legal malpractice cases regardless of whether a jury or judge sits as the fact finder, because, as in other professional malpractice cases, experts establish and explain the professional standard of care. In *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480-81 (3d Cir. 1979), for example, the Third Circuit, applying Pennsylvania law, was presented with the issue of whether a legal malpractice expert was needed when a judge sits as fact finder, since on some level a judge "may be more familiar with the relevant standard of care and is more likely to be competent to evaluate defendant's conduct in light of that standard." The Court held that an expert was required, even in a legal malpractice bench trial. "[A]lthough the judge may be competent to evaluate

EXHIBIT H-12

defendant's conduct in light of the relevant standard of care, the actual standard of care itself is a question of fact that is best left to the presentation of evidence with the opportunity for cross-examination and rebuttal." *Lentino*, 611 F.2d at 481 (citations omitted). The Court concluded that "a subjective standard, which would allow the trial judge to use his own knowledge if he were familiar with the appropriate standard of conduct, would effectively change a question of fact-finding into one of discretion and require appellate courts the unwanted task of evaluating the trial judge's personal knowledge." *Id.* This is also true in "bench trials of legal malpractice claims except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of ordinary experience and comprehension of even non-professional persons." *Lentino*, 611 F.2d at 480. The Superior Court has followed *Lentino's* rule. *See Storm v. Golden*, 371 Pa. Super. 368, 376 & n.3, 538 A.2d 61, 64-65 & n.3 (Pa. Super. 1988) (legal expert needed in all but the simplest legal malpractice case); *Britton v. Considine*, 2005 Phila. Ct. Com. Pl. LEXIS 82 (January 13, 2005)(summary judgment against plaintiff and legal malpractice case dismissed for failure to offer expert testimony), *aff'd without opinion*, 894 A.2d 813 (Pa. Super. Ct. 2005).

The need for expert testimony is especially acute "where the legal malpractice claim raises the issue of a conflict of interest." *Destefano & Associates, Inc. v. Cohen*, 2002 Phila. Ct. Com. Pl. LEXIS 54, at * 11, n. 4

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(citing *Beech Tree Run, Inc. v. Kates*, 2000 U.S. Dist. LEXIS 12805 (E.D. Pa. Sept. 7, 2000) (holding that an alleged legal malpractice claim based on a conflict of interest requires expert testimony)). In *Beech Tree*, the court refused to "conclude that an alleged conflict of interest is such a simple matter than no expert testimony would be required to prove it's [sic] illegal existence." *Beech Tree Run*, 2000 U.S. Dist. LEXIS 12805, at *22-23.

Here, the legal issues alleged in Defendant's Omnibus Motion, including the conflict of interest allegations, are complex and involve a specialized area of legal practice, the representation of grand jury witnesses, unfamiliar to most practitioners. Further, as one of our experts, Professor Fox, has written, representation of organizational employees by the organization's counsel, even outside the uniquely dangerous context of criminal grand jury representation, is "an ethical minefield everyone ignores." Lawrence J. Fox, *Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores*, 44 S. Tex. L. Rev. 185 (2002). Testimony from attorneys who have special and recognized expertise through practical experience and scholarship in these areas will be helpful to establish and explain the standard of care. As Ms. Baldwin's performance itself demonstrates, these standards are not commonly known among laypersons or most lawyers, and expert testimony will certainly assist this Court in making an informed decision.

EXHIBIT H-14

IV. The Motion Should be Heard By the Trial Judge, Not the Grand Jury Judge, Because it is not within the Scope of the Supreme Court's Order; the Supervising Judge No longer Has Authority over the Issue and the Supervising Judge is a Potential Witness on this Motion.

The Commonwealth argues that this Motion should be heard by the 33rd Grand Jury Supervising Judge. Answer at 16. The Commonwealth does not assert that hearings on this motion should be secret and has not moved to seal any of the pleadings relating to this motion.

For its jurisdictional argument, the Commonwealth relies entirely on the Supreme Court's order at 217 M.D. 2010 (December 27, 2010) appointing Judge Feudale as the Supervising Judge of the 33rd Grand Jury. After reciting its reliance on the Investigating Grand Jury Act, that Order reads in pertinent part, "All applications and motions relating to the work of the Thirty -Third Statewide Investigating Grand Jury -- including motions for disclosure of grand jury transcripts and evidence -- shall be presented to said Supervising Judge ." *Id.* The Order did not purport to expand the Supervising Judge's authority beyond the statute.

The admission of evidence at Mr. Schultz' trial does not fall within the scope of the Order. It is not part of the grand jury's work. That work, so far as it relates to the charges in the January 19, 2012, Information, ended with the issuance of a Presentment which was incorporated into a Complaint.

Moreover, at issue in this Motion is not conduct before the 33d Grand Jury, but the 30th. Ms. Baldwin represented Mr. Schultz during his

EXHIBIT H-15

testimony before the 30th Statewide Investigating Grand Jury, *see* Presentment at 12; Information, Count 1 (both alleging perjury before 30th Statewide Grand Jury). The Supervising Judge's authority over that Grand Jury stemmed from the Supreme Court's November 6, 2008, Order at 190 MM 2008, and that Order, and the grand jury it authorized, has expired, and with it, the authority of the supervising judge. *See* Judge David N. Savitt & Brian P. Gottlieb, *Pennsylvania Grand Jury Practice* § 41.03 (1983)(when grand jury's term expires, so too does supervising judge's authority to maintain secrecy and control disclosures).

The Investigating Grand Jury Act confers on Supervising Judges responsibility for maintaining the secrecy of grand jury proceedings and controlling disclosure. *See* 42 Pa.C.S.A. §§ 4544(b), 4549-4552 (describing powers of grand jury supervising judge); *In re Dauphin County Fourth Investigating Grand Jury; Report of Special Prosecutor Blakey*, 610 Pa. 296, 318, 19 A.3d 491, 503-04 (2011)(describing role of grand jury supervising judge); *Camiolo v. State Farm Fire & Cas. Co.*, 334 F.3d 345, 351 n.4 (3d Cir. 2003) (same). The December 27, 2010 Order relies upon that authority without expanding it. Besides maintaining secrecy and controlling disclosures, the Supervising Judge's responsibilities parallel the investigative work of the grand jury and do not include the adjudication of substantive claims, such as suppression motions. *See Voicenet Communications, Inc. v. Pappert*, 2004 U.S. Dist. LEXIS 15283, Civil Action No. 04-1318 (E.D. Pa.

EXHIBIT H-16

Aug. 5, 2004)(*Younger* abstention inappropriate because supervising judge did not have authority to adjudicate claim that Attorney General and law enforcement officers illegally seized plaintiffs' computer equipment).

Finally, Judge Feudale is a potential defense witness on this motion to rebut the testimony of Cynthia Baldwin. Ms. Baldwin publicly maintained that when she appeared with Messrs. Curley and Schultz, she had an off-the-record conversation with Judge Feudale in which she informed him that she represented only Penn State and not the witnesses as individuals and obtained from him special permission to sit through the testimony. *See* Sara Ganim, *Special Report: Penn State Counsel Cynthia Baldwin's Role before Grand Jury Could Affect Tim Curley and Gary Schultz's Perjury Case, Experts Say*, Patriot News, February 2, 2012 (Exhibit D to Schultz Omnibus Pre-Trial Motion)[4]; Ben Present, *Questions Surround Penn State GC's Role Before Grand Jury*, The Legal Intelligencer, February 16, 2012 (attached as Exhibit A to this Reply).[5] Should Ms. Baldwin repeat this dubious story, Judge Feudale would refute it.

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[4] "Davis [Penn State counsel] agreed 'it is unusual for a lawyer to be present at a grand jury.' But, he said: 'At a state grand jury in Pennsylvania, it is up to the discretion of the judge to permit a lawyer to be present. The judge asked Cynthia, 'Who are you representing?' She said the university. And he said, 'You may listen if you wish.' She said, 'Thank you.' "

[5] "Lanny Davis, who also represents Penn State and ***who Baldwin has authorized to speak on her behalf*** . . . told the Patriot-News and The Legal that, when Baldwin told supervising judge Barry Feudale and representatives from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony. Then, Davis told The Legal, when the administrators testified that Baldwin was their attorney, she did not think it was "appropriate" to interrupt the proceedings and clarify. 'It struck her as they are confused and it struck her as not appropriate to interrupt,' Davis said in an interview. 'That's the judgment she made, and it was a good-faith judgment not to interrupt the proceeding.'" (emphasis added).

EXHIBIT H-17

V. The Court Should Hold An Evidentiary Hearing.

Our Motion, which is amply supported by a client affidavit and evidentiary materials, and the Commonwealth's Answer raise numerous factual disputes. We requested an evidentiary hearing in our Motion at p.19, and the Commonwealth has not opposed it.

Respectfully submitted,

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EXHIBIT H-18

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CP-22-CR-5164-2011
v.	:	
	:	
GARY CHARLES SCHULTZ,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Reply, was emailed and mailed, First Class Mail, postage pre-paid, this 4th day of January, 2013, to the following:

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EXHIBIT H-19

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EXHIBIT H-20

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Questions Surround Penn State GC's Role Before Grand Jury

Ben Present

The Legal Intelligencer

02-16-2012

Following the news that Penn State University general counsel Cynthia Baldwin was allowed into the grand jury proceedings of two former university administrators, whom she now claims she was not individually representing, several criminal defense attorneys posed the same question: how?

The answer to that question, along with what it means for the upcoming trials of former athletic director Tim Curley and former vice president of business and finance Gary Schultz, varied among legal observers. Both Schultz and Curley face charges of failure to report sex abuse and perjury, stemming from statements they made to grand jurors last year. According to their testimony to the grand jury, both Curley and Schultz thought Baldwin was their attorney at the hearings.

Baldwin has labeled the whole thing a misunderstanding, the Harrisburg Patriot-News first reported. Baldwin's take on how everything unfolded came from Washington attorney Lanny Davis, who also represents Penn State and who Baldwin has authorized to speak on her behalf. Davis told the Patriot-News and The Legal that, when Baldwin told supervising judge Barry Feudale and representatives from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony.

Then, Davis told The Legal, when the administrators testified that Baldwin was their attorney, she did not think it was "appropriate" to interrupt the proceedings and clarify.

"It struck her as they are confused and it struck her as not appropriate to interrupt," Davis said in an interview. "That's the judgment she made, and it was a good-faith judgment not to interrupt the proceeding."

Following the news, some sources interviewed by The Legal said the state's grand jury law on rights of counsel is clear. Represent a witness, or wait outside, criminal defense lawyers said the law provides. Sources questioned whether Baldwin's appearance was an indicator of Penn State's influence over a massive sex-abuse scandal that, as prosecutors allege, both Schultz and Curley could have stopped but did not.

Related Articles:

- Penn State Discloses Sandusky Scandal–Related Legal Fees
- Was Penn State's GC Counsel for University Officials?
- Penn State General Counsel Steps Down, Leaving Scandal Behind
- Penn State's (belated) Law Department

Philadelphia defense attorney Richard Q. Hark said it was "generally indicative of the power and sway" Penn State had over the proceedings.

"A corollary would be allowing an attorney for the Catholic Church to be present at grand jury proceedings against certain high-level priests that are the targets of, and testifying before, the grand jury and then being able to report back to the church," Hark said.

EXHIBIT A
EXHIBIT H-21

But if Penn State ever wielded control over its exposure, that has since unraveled. The scandal, which hit firestorm status after the state charged former assistant coach Jerry Sandusky with 40 counts of sex abuse, has since led to the ouster of former President Graham Spanier, as well as the university's most revered figure, former head football coach Joe Paterno. Paterno died last month.

Asked to respond to the questions raised by The Legal's sources regarding Baldwin's presence in the grand jury room, Davis said Baldwin would have been second-guessed had she interrupted to clarify her role or had she remained silent, as he said she did.

"If you're asking me to respond to some expert quarreling with Cynthia Baldwin being in the room, tell them to take their case to the judge," Davis said in an interview.

When contacted by The Legal, Feudale, the supervising judge, declined to comment on his impression of Baldwin's role or how she gained access to the proceedings.
"The primary responsibility of the grand jury judge is to ensure secrecy," Feudale told The Legal when asked about the apparent misunderstanding.

So why was Baldwin, an attorney representing Penn State—an interested third party—allowed inside?

"I don't give interviews regarding grand jury proceedings," he then said.

In two developments this week, Schultz and Curley filed motions asking the state to drop the charges against them. Curley, through his attorney, Caroline Roberto, argued in a motion to quash filed Monday that the story of key witness Mike McQueary could not be corroborated without the testimony of Paterno.

Schultz followed suit Tuesday, petitioning for a writ of habeas corpus on grounds that prosecutors cannot corroborate McQueary's testimony. Schultz also argued that statements he made to the grand jury about his understanding of the story McQueary told him—that McQueary's account was "not that serious" and did not amount to a crime—were patently ambiguous and warranted a dismissal of the perjury charge. Schultz, through his attorney Tom Farrell, further argued that his statements to the grand jury could not amount to perjury because they were his opinions, or "unschooled conclusions of law," rather than a false assertion of fact.

He filed a separate motion to join Curley's motion to dismiss both charges.

McQueary has testified, both before the grand jury and in open court, that he saw Sandusky sexually assault a boy in a Penn State locker room in 2002. He reported the incident to Paterno, who told McQueary to report what he'd seen to Schultz and Curley.

Following discrepancies between McQueary's testimony and that of the two administrators, the state brought charges against Schultz and Curley.

Paterno testified before the grand jury but was not charged with any wrongdoing. According to the Patriot-News, Baldwin was not present for those proceedings.
Other legal observers said that no judge would have allowed Baldwin into the proceedings if it was clear she did not represent either of the men personally. Prosecutors, had they known she was there as a representative of Penn State, would have objected, observers said.

And, according to Davis, the prosecutors were aware Baldwin was Penn State's lawyer and did not object.

Nils Frederiksen, spokesman for the state Attorney General's Office, said that state law prohibited him from commenting on the matter.

"Officially, the only thing we can say is we are prohibited by law from discussing grand jury matters," Frederiksen said.

Other sources offered theories on the exchange between Baldwin and the tribunal.
"The judge interpreted it to believe that she represented [Schultz and Curley] as agents of the university," said Dennis Cogan, a Philadelphia criminal defense attorney.

If Davis has it correct—"I'm basing my comments on what I'm told by Cynthia Baldwin," he said—attorneys interviewed by The Legal were split on what Baldwin's role in the grand jury room in January 2011 would mean for the trials of Schultz and Curley.

Some criminal defense attorneys said the biggest impact would be felt by Baldwin who, according to the Patriot-News, did not bring up the subject of representation with the administrators at the grand jury hearing. According to Davis, Baldwin did tell both men they could get their own attorney after she received their grand jury subpoenas in December 2010.

According to Davis, representatives from the Attorney General's Office called Baldwin to let her know that Schultz, Curley, and Paterno were all going to be served subpoenas.

"As a courtesy," Davis said in an interview, Baldwin offered to give the men their subpoenas rather than letting them go through the, as he put it, the "traumatic and embarrassing experience" of being served.

"It does not make the university counsel their lawyer," Davis said of the courtesy.

The Patriot-News quoted Davis as saying that, at that point, Baldwin felt she had fulfilled "what she believed her obligation is."

But Philadelphia criminal defense attorney Michael J. Engle said the impact of her presence could run deeper. In fact, the defendants could have a "viable motion" to dismiss the perjury charges, Engle said, because they directly stemmed from their comments to grand jurors.

"It creates a taint to the grand jury process and the report and charges that flow from that presentment," Engle said.

According to Engle, the immediate past president of the Pennsylvania Association of Criminal Defense Lawyers, the process by which Pennsylvania attorneys are allowed access to grand jury proceedings is always the same. It goes like this: An attorney clarifies representation to his or her client and to the state prosecutors before the proceedings. Then, the role of counsel is clarified on the record in front of the supervising grand jury judge before witnesses testify. Then it is clarified a third time before grand jurors and state prosecutors.

"It is always the same," Engle said. "There is a standard protocol they ask these people about identifying counsel."

Asked if the judge would have set aside state grand jury laws in allowing Baldwin inside, Engle said: "Anything is possible. . . I just can't imagine a supervising grand jury judge allowing that to happen. If that happened, it was a gross miscarriage of justice," he said. "I find it hard to believe that representatives from the Office of the Attorney General and the supervising grand jury judge would ignore the Grand Jury Act and allow an attorney who does not represent a witness in the grand jury room."

Pennsylvania grand jury law states that "a witness subpoenaed to appear and testify before an investigating grand jury. . . shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury." The law does not, however, extend similar rights to an attorney for an interested third party.

One provision in the law—42 C.S. Section 4945(c)(4)—stipulates that attorneys should not represent multiple clients before a grand jury if representing one client means harming another.

But in a proceeding where Baldwin claimed to have represented a party that should have never had counsel in the room, how do you address that conflict?

"There is clearly a risk of conflict between [Schultz and Curley's] interests and Penn State's interests," said Widener Law professor Jules Epstein.

Was Penn State technically a party? Epstein could not say. On whether there was a conflict, at that point, between Schultz and Curley, Epstein said maybe not.

It is not completely clear whether Schultz and Curley were targets of the grand jury heading into the proceedings, although sources have told The Legal they were not. According to Epstein, that would have changed things.

In fact, Epstein said, "it would seem incumbent on prosecutors" to raise a conflict of interest if they had actually targeted the two administrators.

A spokesperson for Farrell and Roberto, Schultz and Curley's attorneys, respectively, declined to comment on Baldwin's role in the grand jury room and the effect it would have on the administrators' trials.

Baldwin would not comment on the record for The Legal.

97 Hawai'i 512
Supreme Court of Hawai'i.

STATE of Hawai'i, Plaintiff-Appellant,
v.
Richard Sung Hong WONG, Mari Stone Wong, and Jeffrey R. Stone, Defendants-Appellees.
State of Hawai'i, Plaintiff-Appellant,
v.
Henry Haalilio Peters and Jeffrey R. Stone, Defendants-Appellees.

Nos. 22671, 23151. | Feb. 22, 2002.

Defendants were charged with theft, commercial bribery, perjury, hindering prosecution, and criminal conspiracy. The First Circuit Court, Michael R. Town, J., dismissed. State appealed. The Supreme Court held that: (1) prosecutor engaged in misconduct by presenting testimony of defendant's tax attorney to the grand jury without first seeking judicial review on attorney-client privilege; (2) it was prosecutorial misconduct at grand jury stage to omit clearly exculpatory testimony; and (3) dismissal with prejudice was proper remedy.

Affirmed in part, vacated in part, and remanded with instructions.

West Headnotes (15)

[1] **Criminal Law**
⇐Amendments and Rulings as to Indictment or Pleas

An appellate court reviews a trial court's decision to dismiss an indictment for abuse of discretion.

2 Cases that cite this headnote

[2] **Criminal Law**
⇐Discretion of Lower Court

The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

3 Cases that cite this headnote

[3] **Criminal Law**
⇐Burden of Showing Error

The burden of establishing abuse of discretion by the trial court is on the appellant, and a strong showing is required to establish it.

4 Cases that cite this headnote

[4] **Grand Jury**
⇐Conduct of Proceedings in General

The Circuit Court has supervisory power over grand jury proceedings to insure the integrity of the grand jury process and the proper administration of justice.

2 Cases that cite this headnote

[5] **Grand Jury**
⇐Privilege
Privileged Communications and Confidentiality
⇐Determination

Imposition of burdens of proof or persuasion necessarily require that questions concerning attorney-client privilege must be put before and decided by a judge, whether the testimony is sought in criminal or civil proceedings, before a grand jury, in discovery, or at trial. Rules of Evid., Rule 104.

3 Cases that cite this headnote

EXHIBIT I-1

[6] **Privileged Communications and Confidentiality**
⊕Determination

When a prosecutor seeks testimony that is arguably subject to attorney-client privilege, he must either: (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue. Rules of Evid., Rules 104, 503.

[7] **Privileged Communications and Confidentiality**
⊕Determination

Legitimate law enforcement may require that witnesses be questioned in confidence, and when issue of privilege is involved, each such case must be judged on its own merits to determine whether judicial determination of privilege without presence and argument of person entitled to claim privilege will meet requirements of due process; at minimum, in absence of opportunity for privilege holder to raise issue or in face of faithless lawyer failing to raise issue before court of competent jurisdiction, prosecutor must seek court ruling on privilege issue. U.S.C.A. Const.Amend. 14.

[8] **Grand Jury**
⊕Privilege

Prosecutor engaged in misconduct in criminal conspiracy case by presenting testimony of defendant's tax attorney to the grand jury without providing notice to defendant and by his bolstering attorney's testimony by characterizing it as subject to the crime-fraud exception to the attorney-client privilege without first seeking judicial review on the matter; prosecutor's actions overreached and usurped the grand jury's function to determine whether there was probable cause to believe that a crime was committed. Rules of Evid., Rules 104, 503.

2 Cases that cite this headnote

[9] **Indictment and Information**
⊕Grand or Petit Jury Irregularities

Prosecutor's misconduct in criminal conspiracy case of improperly presenting testimony of defendant's tax attorney to the grand jury so tainted the grand jury process that it was appropriate to dismiss indictment against codefendants, where prosecutor presented testimony without providing notice to defendant and he bolstered the testimony by characterizing it as subject to the crime-fraud exception to the attorney-client privilege without first seeking judicial review on the matter. Rules of Evid., Rules 104, 503.

3 Cases that cite this headnote

[10] **Grand Jury**
⊕Privilege

Prosecutor engaged in misconduct in theft case by presenting testimony of estate's attorney, which violated court's order that there would be no attorney testimony without judicial review regarding attorney-client privilege, and prejudiced defendant in that testimony left the impression that it was a breach of trust for defendant, an estate trustee, to invest in projects related to estate's investments.

EXHIBIT I-2

Rules 104, 503.

1 Cases that cite this headnote

[11] **Grand Jury**
⇐Scope of Proof; Admissibility

Prosecutor engaged in misconduct, at grand jury stage of perjury case, by preventing witness from providing clearly exculpatory testimony; perjury allegedly occurred in prior grand jury proceeding when defendant testified that witness told him to contact a third party about buying a condominium unit, but prosecutor in the subsequent proceeding did not allow witness to testify about his role in the matter, which would have been the only direct testimony on the subject.

1 Cases that cite this headnote

[12] **Indictment and Information**
⇐Grand or Petit Jury Irregularities

Dismissal of an indictment due to prosecutorial misconduct is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way.

[13] **Indictment and Information**
⇐Grand or Petit Jury Irregularities

If the illegal or improper testimony clearly appears to have improperly influenced the grand jurors despite the presence of sufficient evidence amounting to probable cause to indict the defendant, then the defendant would be entitled to a dismissal.

[14] **Indictment and Information**
⇐Regularity of Proceedings or Findings of Grand Jury

When a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy.

1 Cases that cite this headnote

[15] **Indictment and Information**
⇐Grand or Petit Jury Irregularities

Dismissal, with prejudice, of indictments charging perjury, criminal conspiracy, theft, and other offenses was proper remedy for prosecutor's misconduct before grand jury of presenting testimony in violation of attorney-client privilege and omitting clearly exculpatory testimony; prosecutor's actions, some of which were taken in contravention of the Circuit Court's clear instructions to seek preliminary judicial review, represented a serious threat to the integrity of the judicial process. Rules of Evid., Rules 104, 503.

6 Cases that cite this headnote

Attorneys and Law Firms

**916 *514 Lawrence A. Goya, (Joanne L. Ha'o, with him on the briefs), Deputy Attorneys General, for plaintiff-appellant/cross-appellee.

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Renee M.L. Yuen, Honolulu, for defendant-appellee Henry Haalilio Peters.

Jerel Fonseca of Fonseca & Ching, on the brief, Honolulu, for defendant-appellee Mari Stone Wong.

Circuit Judge MASUOKA, Acting C.J., in Place of MOON, C.J., Recused; Circuit Judge IBARRA, in Place of LEVINSON, J., Recused; Circuit Judge KOCHI, in Place of NAKAYAMA, J., Recused; Circuit Judge RAFFETTO, in Place of RAMIL, J., Recused; and Circuit Judge CHANG, in Place of ACOBA, J., Recused; Acting JJ.

Opinion

PER CURIAM.

Plaintiff-Appellant State of Hawai'i appeals from orders dismissing indictments against Defendants-Appellees Richard Sung Hong Wong, Mari Stone Wong, Henry Haalilio Peters, and Jeffrey R. Stone. The circuit court orders, entered by the Honorable Michael R. Town, were entered without prejudice. We affirm the dismissals, but remand with instructions to enter the dismissal orders with prejudice.

I. *Background*

A. *Appeal No. 22671, First Circuit Criminal No. 99-0678*

The Office of the Attorney General secured an indictment against Richard Sung Hong Wong (Wong), Jeffrey R. Stone (Stone), and Mari Stone Wong (M.Wong). The indictment's charges of theft in the first degree (Wong), commercial bribery (Stone), perjury (Wong), hindering prosecution in the first degree (M.Wong), and criminal conspiracy (Wong, Stone, and M. Wong), arose out of a series of business and personal transactions. In sum, the indictment alleged that Wong, a trustee of the Bishop Estate/Kamehameha Schools (Estate), manipulated the Estate into giving his brother-in-law, Stone, a "sweetheart deal" on what was called the Kalele Kai project and, in return, Stone secured for Richard and Mari Wong a sale price for their apartment that was $115,800 more than the apartment was worth. According to the State, the $115,800 was money that should have gone to the Estate and Wong's keeping of the money was a theft from the Estate. All of the other charges relate to the alleged theft or the investigation of it.

According to the testimony before the grand jury, the Kalele Kai project was a leasehold condominium construction project on Estate land. The developer, Bedford Properties, borrowed seventy-six million dollars from Mitsui Bank and Trust Company and formed a partnership, Kapalele Associates, with Mitsui to develop the project.

Kapalele Associates had cash flow problems when the leasehold units did not sell. To generate sales, Kapalele Associates purchased the fee interest from Estate for $21.9 million. The fee interest was purchased by agreement of sale. However, Kapalele Associates eventually defaulted on the Mitsui Bank loan and could not perform the agreement of sale for the fee interest. In the summer of 1995, Stone offered to buy the Kalele Kai project and to assume the fee purchase agreement with Estate. To finance the purchase, a Stone company, Pacific Northwest Ltd., and an Ohio corporation, the National Housing Corporation, formed One Keahole Partners (OKP), a partnership.

**917 *515 Stone sent OKP's proposal to Trustee Wong. Wong forwarded the proposal to the Principal Executive of the Estate's Asset Management Group. Wong recused from trustee deliberations concerning OKP's Kalele Kai proposal. OKP acquired the Kalele Kai project after a majority of the remaining trustees approved OKP's assumption of the fee purchase agreement.[1]

In 1996 Stone's company, Pacific Northwest, Ltd., purchased a Kahala home that was in foreclosure, renovated the home, and sold the home to Richard and Mari Wong. The Wongs financed the home, in part, with a $613,200 credit for their Wilder Avenue apartment. The State alleged the Wilder Avenue apartment was worth no more than $498,000 and that the $115,800 difference between the $498,000 value of the Wilder Avenue apartment and the $613,800 credit was a payoff by Stone for the Kalele Kai deal and a theft by Wong of monies due the Estate.

To secure the indictments, the State called, among others, Stone's former tax lawyer, disbarred attorney Richard Frunzi[2] to testify before the grand jury. The State called Frunzi before the grand jury without seeking a court ruling about the extent to which Frunzi could testify.[3]

Frunzi did not notify Stone that Frunzi was going to

EXHIBIT I-4

testify before the grand jury and Frunzi did not get Stone's permission to testify about their professional relationship. Frunzi testified without raising any privilege issue on behalf of his former client, Stone. At the State's urging, Frunzi explained his testimony to the grand jury:

> [State]: Now, prior to asking you questions about Mr. Stone, do you recognize that there ordinarily would be a prohibition from you testifying about those kinds of matters?
>
> [Frunzi]: Yes. The rules of the Bar Association and the Code of Professional Conduct prohibit an attorney from divulging any confidential communications or proprietary information to a client-about a client to anybody else, but there are certain exceptions. And one of the exceptions is that if a crime is committed or to be committed, there's what's called a crime fraud exception.
>
> [State]: Okay. And that's what you are basing your ability to testify on today.
>
> [Frunzi]: Yes

Richard Wong, joined by Mari Wong and Jeffrey Stone, moved to dismiss the indictment for lack of probable cause and prosecutorial misconduct. The circuit court granted the motion and dismissed the indictment without prejudice. The circuit court explained:

> [T]his Court will respectfully grant the motions to-Defendants' Motion to Dismiss the indictment for the following reasons:
>
> One, the government used the privileged testimony of an attorney, Richard Frunzi, albeit at that time he was suspended in lieu of discipline, he was also incarcerated in federal custody pending sentencing, although that's not terribly relevant. And this privileged testimony did not meet the crime-fraud exception to the Hawai'i Rules of Evidence. I think that's very clear.
>
> Neither Mr. Frunzi, nor the government, notified Mr. Stone or the Court that **918 *516 his attorney, Mr. Stone's attorney, Mr. Frunzi, would be testifying.
>
> Further, the government on its own did not seek Court review ahead of time as this Court believes is required by law.
>
> Secondly, the Court finds that the government, by attesting to the quality of the testimony, by referring to or allowing Mr. Frunzi to refer to it as under the crime-fraud exception before the grand jury who are lay persons from the general community, illegally bolstered Mr. Frunzi's testimony, thereby prejudicing the Defendants.
>
> Assuming *arguendo* ... that there is no requirement to approach this Court as a supervising judge ahead of time, the Court finds, nevertheless, that Mr. Frunzi's testimony was, in fact, privileged and the crime-fraud exception did not apply.

The State appealed. Additional facts are set out below where necessary.

B. *Appeal Number 23151, First Circuit Criminal Number 99-1502*

The Office of the Attorney General secured an indictment against former Bishop Estate Trustee Henry Haalilio Peters (Peters) and Jeffrey R. Stone (Stone). The indictment's charges of theft in the first degree (Peters), commercial bribery (Stone), criminal conspiracy (Peters and Stone), accomplice to theft in the first degree (Stone), and perjury (Stone), arose out of the Kalele Kai transactions, set out above, and an allegation that Stone secured the sale of Peters' residential apartment for $192,500 more than its alleged value.

The indictment alleges, in sum, that Stone induced Peters to approve OKP's acquisition of the Kalele Kai project by convincing another person to pay more for Peters' apartment than it was worth, that Stone financed the purchase of the apartment through OKP, OKP accepted the deed to the apartment in lieu of repayment of the money borrowed to finance its purchase, and that Peters used the value of his apartment, including the alleged $192,500 excess, to purchase an apartment on a higher floor in the same building. The State alleges the $192,500 should belong to the Estate and that Peters' retention of that value is a theft from the Estate. These allegations formed the basis of the theft, commercial bribery, conspiracy, and accomplice to theft charges against Peters and Stone. In addition, the State alleged, in sum, that Stone lied to a prior grand jury when Stone testified that he was contacted by Glenn Okada about the availability of an upper floor unit in Peters' building and Okada told him to contact Peters about the possibility of buying the higher floor apartment.

In the course of presenting the case to the grand jury, the

State called several witnesses, including Nathan Aipa, acting chief operating officer and formerly General Counsel for the Estate, and Glenn Okada, President and Chairman of the Board of GKO Corporations and GO Realty. The State did not seek the circuit court's approval before it called Aipa to testify, did not notify Peters that Aipa would testify, and did not secure a waiver of attorney-client privilege from Peters. Aipa was called, according to the State, "[t]o provide the grand jury with more specific information from which to determine whether Peters knew that any benefit he received from a transaction in which the trust was also involved needed to be returned to the trust[.]" To that end, the State questioned Aipa about an unrelated matter, referred to as the McKenzie Methane gas investment, for which legal advice was sought and conveyed to the trustees. The State questioned Okada about Peters' purchase of the higher floor apartment, but it did not allow Okada to explain that Okada, not Stone, initiated discussion of the transaction with Peters.

The State moved to *nolle prosequi* the criminal conspiracy charge and the motion was granted. Peters and Stone moved to dismiss the other counts. The circuit court granted the motions to dismiss, without prejudice. In granting the motions and dismissing the theft, accomplice to theft, and perjury charges, the circuit court said, in part:

> [T]he defendants' right to a fair and impartial grand jury proceeding was prejudiced by the Attorney General's misconduct *517 in **919 failing to seek permission of the court and to obtain a proper waiver of the attorney-client privilege from Henry Haalilio Peters prior to eliciting testimony before the grand jury from Nathan Aipa, Esq. on the subject of Trustee Peters' knowledge and involvement in the McKenzie methane gas investment, discussions and related legal opinion;
>
> ... the defendants' right to a fair and impartial grand jury proceeding was prejudiced by the Attorney General's preventing witness Glenn Okada from answering questions several times in order to suppress clearly exculpatory evidence;
>
> ... the attorney-client privilege is a sacred and important privilege and ... the violation of that privilege is unacceptable; ... the Attorney General's office was on crystal clear notice of the process to seek prior court permission to call attorneys before the grand jury and knew in fact that the court was supervising the grand jury; and that neither Trustee Peters or his counsel ... was given prior notice by either the Attorney General or Mr. Aipa of the subpoena to the grand jury[.]

The circuit court dismissed the commercial bribery charge. In doing so, the circuit court explained:

> [T]he reason [for the dismissal] is that the government chose not to allow what could have been clearly exculpatory evidence by Glenn Okada for reasons of their own about Mr. Stone's committing perjury. That had to affect how the grand jury saw the other counts in the Court's view.
>
> Secondly, the criminal conspiracy matter never should have been brought, including the overt acts. And the fact it was, in the Court's view, could easily have influenced the grand jury. And all the other reasons set forth in the moving papers.

The circuit court denied reconsideration and the State appeals. Additional facts are set out below where necessary.

II. *Standard of Review*

The State contends the circuit court erred when it granted the Defendants' motions to dismiss the indictments.

[1] [2] [3] An appellate court reviews a trial court's decision to dismiss an indictment for abuse of discretion. *State v. Chong*, 86 Hawai'i 282, 288 n.2, 949 P.2d 122, 128 n.2 (1997). The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. *E.g., State v. Klinge*, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (citations omitted). The burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it. *E.g., State v. Kupihea*, 80 Hawai'i 307, 312, 909 P.2d 1122, 1127 (1996) (citation omitted).

III. *Discussion*

[4] A grand jury is a constituent part of the court or branch of a court having general criminal jurisdiction. *In re Moe*, 62 Haw. 613, 616, 617 P.2d 1222, 1224 (1980). The circuit court has supervisory power over grand jury proceedings to insure the integrity of the grand jury

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process and the proper administration of justice. *Id.; Cf. United States v. Williams,* 504 U.S. 36, 47, 112 S.Ct. 1735, 1742, 118 L.Ed.2d 352 (1992) (United States Supreme Court concluded the federal grand jury "belongs to no branch of the institutional Government" and that "its institutional relationship with the [federal] Judicial Branch has traditionally been, so to speak, at arm's length").

This court recently "reaffirm[ed] the principle that prosecutorial conduct that undermines the fundamental fairness and integrity of the grand jury process by 'invad[ing] the province of the grand jury or tend[ing] to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence *fairly* presented before them,' *[State v.] Joao,* 53 Haw. [226] at 229, 491 P.2d [1089] at 1091 [4] ... is ****920 *518** presumptively prejudicial." *State v. Chong,* 86 Hawai'i 282, 284, 949 P.2d 122, 124 (1997). This court explicitly stated that Justice Kidwell's concurrence in *State v. Bell,* 60 Haw. 241, 589 P.2d 517 (1978),

> ... accurately distilled *Joao's* relative place within "the criteria which should govern" the grant or denial of a motion to dismiss an indictment:
>
> > ... [A] grand jury proceeding is not adversary in nature. An application of this principle is found in the rule that an indictment may not be attacked on the ground of the incompetency of the evidence considered by the grand jury, where prosecutorial misconduct is not involved. *State v. Layton,* 53 Haw. 513, 497 P.2d 559 (1972); *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The function of a grand jury to protect against unwarranted prosecution does not entail a duty to weigh the prosecution's case against that of the defense, or even to determine that the prosecution's case is supported by competent evidence.
> >
> > On the other hand, an indictment that is the result of *prosecutorial misconduct or other circumstances which prevent the exercise of fairness and impartiality by the grand jury* may be successfully attacked. *State v. Joao,* 53 Haw. 226, 491 P.2d 1089 (1971); *State v. Pacific Concrete and Rock Co.,* 57 Haw. 574, 560 P.2d 1309 (1977).
>
> *Bell,* 60 Haw. at 256-57, 589 P.2d at 526 (Kidwell, J., concurring) (emphasis added).
>
> *State v. Chong,* 86 Hawai'i 282, 288-89, 949 P.2d 122, 128-29 (1997) (footnote omitted).

Most of the issues posed by the State concern application of the attorney-client privilege and application of the "crime-fraud" exception that allows otherwise privileged testimony to be presented. The United States Supreme Court has described the common law attorney-client privilege and the crime fraud exception as follows:

> We have recognized the attorney-client privilege under federal law, as the oldest of the privileges for confidential communications known to the common law.... Although the underlying rationale for the privilege has changed over time, ... courts long have viewed its central concern as one to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.... That purpose, of course, requires that clients be free to make full disclosure to their attorneys of past wrongdoings, ... in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice[.]
>
> The attorney-client privilege is not without its costs.... [S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.... The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection-the centrality of open client and attorney communication to the proper functioning of our adversary system of justice-ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.... It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy, ... between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime....

United States v. Zolin, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625-6, 105 L.Ed.2d 469 (1989) (quotation marks and citations omitted). The United States Court of Appeals for the Ninth Circuit explained:

> The attorney-client privilege is essential to preservation of liberty against a powerful government. People need lawyers to guide them

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> through thickets of complex government requirements, and, to get useful advice, they have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government.

United States v. Chen, 99 F.3d 1495, 1499 (9th Cir.1996) (citation omitted).

****921 *519** In Hawai'i the common law attorney-client privilege and the exceptions to it are codified as Rule 503 of the Hawai'i Rules of Evidence (HRE). *See* HRS § 626-1, Rule 503 (1993);[5] *DiCenzo v. Izawa*, 68 Haw. 528, 535, 723 P.2d 171, 175 (1986) ("HRE 503 ... codified the common-law attorney-client privilege long recognized by the courts of Hawai'i"). The attorney-client privilege rule "applies at all stages of all actions, cases, and proceedings[,]" HRE Rule 1101(c), including grand jury proceedings. *See* HRE Rule 1101(d) ("The [Hawai'i] rules [of evidence](*other than with respect to privileges*) do not apply ... [to] ... proceedings before grand juries."). (Emphasis added.) The attorney-client privilege applies in both civil and criminal cases. HRE 503; *Swidler and Berlin v. United States*, 524 U.S. 399, 408-9, 118 S.Ct. 2081, 2087, 141 L.Ed.2d 379 (1998). The attorney-client privilege serves broader purposes than the constitutional privilege against self-incrimination. *Id.* at 407-408, 118 S.Ct. at 2086.

A. *Judicial determination of attorney-client privilege*

The State first argues the circuit court erred when it dismissed the indictment against Stone and the Wongs because the ****922 *520** State did not seek judicial review before it presented Frunzi's testimony to the grand jury. The State opines it was not required to seek judicial review before it presented Frunzi's testimony to the grand jury. We disagree.

Rule 104 of the Hawai'i Rules of Evidence provides, with stunning clarity, that "[p]reliminary questions concerning ... the existence of a privilege ... shall be determined by the court[.]" More than twenty years ago, this court set out the procedure to be followed when issues about the attorney-client privilege or exceptions to the privilege are raised. This court said the burden of establishing the privilege was upon the party asserting it and set out the manner in which privilege could be proven. The court instructed that

> [p]*roper practice requires preliminary judicial inquiry into the existence and validity of the privilege and the burden of establishing the privilege rests on the claimant*[,] ... [and observed] Any other rule would "foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed."

Sapp v. Wong, 62 Haw. 34, 38-39, 609 P.2d 137, 140(1980) (citations omitted; emphasis added). *See also DiCenzo v. Izawa*, 68 Haw. 528, 536, 723 P.2d 171, 176 (1986) ("A proper application of the codified privilege ... requires preliminary judicial inquiry into the existence and validity of the privilege ... [o]therwise, meaningful inquiry into the existence of an attorney-client relationship ... and the character of the communication ... would be foreclosed.") (quotation marks and citations omitted).

In addition, a host of foreign case authority states, in sum, that the attorney-client privilege belongs to the client, the burden of establishing the attorney-client privilege falls upon the client, and the burden of establishing the crime fraud exception to the attorney-client privilege falls upon the proponent of the exception. *See, e.g., Swidler and Berlin v. United States*, 524 U.S. 399, 118 S.Ct.2081, 141 L.Ed.2d 379 (1998) (grand jury subpoena; scope of privilege); *In re Sealed Case*, 223 F.3d 775 (D.C.Cir.2000) (grand jury subpoena); *In re Grand Jury Subpoena*, 187 F.3d 996 (8th Cir.1999)(grand jury subpoena; motion to compel); *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir.1998) (pretrial motion to compel); *In re Richard Roe, Inc.*, 168 F.3d 69 (2d Cir.1999) (appeal from civil contempt order for defiance of order requiring testimony and disclosure of documents to grand jury); *In re Sealed Case*, 162 F.3d 670 (D.C.Cir.1998) (motion to quash grand jury subpoena); *In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554 (9th Cir.1998) (appeal from order requiring former attorney to testify before grand jury); *In re Bruce R. Lindsey*, 158 F.3d 1263 (D.C.Cir.1998) (motion to compel grand jury testimony); *In re Grand Jury Subpoenas*, 144 F.3d 653 (10th Cir.1998) (motion to compel grand jury testimony); *United States v. Rakes*, 136 F.3d 1 (1st Cir.1998) (pre-trial motion to suppress); *United States v. Bauer*, 132 F.3d 504 (9th Cir.1997) (trial testimony); *In re Sealed Case*, 107 F.3d 46 (D.C.Cir.1997) (appeal from contempt citation for failure to testify and produce documents); *In re Grand Jury Proceedings*, 102 F.3d 748 (4th Cir.1996) (action to quash grand jury subpoenas); *United States v. Chen*, 99 F.3d 1495 (9th Cir.1996) (appeal challenging order denying motions to quash grand jury subpoena);

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re Grand Jury Proceedings, 87 F.3d 377 (9th Cir.1996) (appeal from district court order requiring former corporate counsel to testify before grand jury); *Olson v. Accessory Controls and Equipment Corp.*, 254 Conn. 145, 757 A.2d 14 (2000)(review of protective order in wrongful termination action); *Lahr v. State of Indiana*, 731 N.E.2d 479 (Ind.App.2000) (criminal appeal; trial testimony); *Purcell v. District Attorney for the Suffolk District*, 424 Mass. 109, 676 N.E.2d 436 (1997)(motion to quash subpoena to testify at trial); *In re Grand Jury of Philadelphia County*, 527 Pa. 432, 593 A.2d 402 (1991) (appeal from orders entered in conjunction with supervision, administration, and operation of grand jury; notes seized pursuant to search warrant); *Morley v. MacFarlane*, 647 P.2d 1215 (Colo.1982) (appeal from order denying injunctive relief); *Henderson v. State*, 962 S.W.2d 544 (Tex.Crim.App.1998)(criminal appeal; trial testimony); *People v. Paasche*, 207 Mich.App. 698, 525 N.W.2d 914 (1994) ****923 *521** criminal appeal; search warrant for attorney's files); *State v. Fodor*, 179 Ariz. 442, 880 P.2d 662 (Ct.App.1994) (criminal appeal; wiretap conversation between attorney and client); *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512 (Minn.Ct.App.1991) (civil appeal from protective order); *In re Grand Jury Subpoena ad Testificandum Served on Louis Gonnella, Esq.*, 238 N.J.Super. 509, 570 A.2d 53 (1989) (motion to quash grand jury subpoena); *In re Grand Jury Subpoena of Lynne Stewart*, 144 Misc.2d 1012, 545 N.Y.S.2d 974 (Supr.Ct.1989) (motion to quash grand jury subpoena).[6]

[5] Imposition of burdens of proof or persuasion necessarily require that questions concerning attorney-client privilege must be put before and decided by a judge, whether the testimony is sought in criminal or civil proceedings, before a grand jury, in discovery, or at trial. To the extent the circuit court concluded the State should have sought judicial review before presenting Frunzi's testimony to the grand jury, the circuit court was correct as a matter of law and did not abuse its discretion.

[6] [7] In sum, when a prosecutor seeks arguably privileged testimony, the prosecutor must either (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue. In the latter instance, the prosecutor should proceed with the understanding that if the person who might claim the privilege has not been given notice and an opportunity to be heard on the issue of privilege, a court's allowance of testimony may be overturned after the holder of the privilege can be heard by the court.[7]

B. *The State improperly presented and bolstered Frunzi's testimony.*

The State contends the trial court erred when it found Richard Frunzi's testimony was protected by attorney-client privilege and should not have been presented to the grand jury. The State argues that Stone failed to present proof, in support of his motion to dismiss, that the communications between Stone and Frunzi were intended to be confidential and concerned legal services that Stone was seeking from Frunzi. The State opines Stone's testimony on the post-indictment motion to dismiss was nothing more than an impermissible blanket claim of privilege. The State opines the circuit court should have "insisted in being shown, line by line, if necessary exactly what statements of Frunzi's, if any, were privileged[.]" In addition, the State opines the crime-fraud exception to the attorney-client privilege applied, that the State did not improperly bolster Frunzi's testimony, and that the Wongs cannot assert Stone's attorney-client privilege to bar the State from indicting them.

In other circumstances we might engage in lengthy discussion about the client's burden to establish the attorney-client privilege as noted above.[8] In the circumstances of this case, however, our focus is upon whether the State's pre-indictment actions prevented the ****924 *522** grand jury from the "exercise of fairness and impartiality" that due process demands. *See e.g., State v. Chong*, 86 Hawai'i 282, 289, 949 P.2d 122, 129 (1997) (quoting *Bell, supra* and *Joao, supra*). The issue that was before the circuit court and that is before this court is whether the indictment should have been dismissed due to prosecutorial misconduct.

The State's arguments that Stone failed to meet his burden of establishing the attorney-client privilege in the post-indictment proceedings are not well taken. Had Stone or the State sought "preliminary judicial inquiry into the existence and validity of the privilege," *Sapp v. Wong*, 62 Haw. at 38, 609 P.2d at 140, Stone would certainly have borne the burden of showing the attorney-client privilege applied. In other circumstances Stone's failure to assert the privilege before the testimony was presented to the grand jury might have led to a conclusion Stone waived the privilege. The State,

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however, did not give Stone the opportunity to raise the privilege issue so that a preliminary judicial determination could be made and Frunzi did not raise the privilege issue on Stone's behalf. Instead, the State presented Frunzi's testimony to the grand jury without notice to Stone. In addition, the State presented Frunzi's testimony to the grand jury as privileged testimony to which the crime-fraud exception applied.

When the State called Frunzi as a witness, it elicited testimony from him that Frunzi (1) would "be talking about [Frunzi's] specific representation of [his] client, Jeffrey Stone[,]" (2) that "there ordinarily would be a prohibition from [Frunzi] testifying about those kinds of matters[,]" but (3)that Frunzi could testify "if a crime is committed or to be committed[.]" The State elicited Frunzi's testimony without any distinction as to matters that might or might not be covered by the attorney-client privilege. With regard to the crime-fraud exception, the State's examination emphasized Frunzi's judgment that crimes had been or were to be committed by eliciting from Frunzi his affirmation "... that's what [he was] basing [his] ability to testify on today[.]"

[8] [9] The State's emphasis on the extraordinary nature of Frunzi's testimony and its emphasis that Frunzi was testifying under the crime-fraud exception to the attorney-client privilege clearly invaded the grand jury's function of determining whether there was probable cause to believe a crime had been committed by putting before the grand jury the attorney's conclusion that crimes had been or were about to be committed when the attorney was consulted. The State's actions in this regard overreached and usurped the grand jury's function of determining probable cause as to whether a crime was committed, were an egregious disregard of Stone's right to an impartial grand jury, and tainted the grand jury process to such an extent that we cannot say the circuit court abused its discretion when it also dismissed the indictment against the Wong defendants. Having presented Frunzi's testimony without a judicial determination of privilege and having bolstered Frunzi's testimony by characterizing it to the grand jury as privileged testimony subject to the crime-fraud exception to the privilege, the State is in no position to now argue that Stone failed to meet his burden with regard to the existence of the attorney-client privilege.

C. The State improperly presented Aipa's testimony

The State argues that presenting Aipa's testimony to the grand jury did not prejudice defendants' rights to a fair and impartial grand jury; argues that Aipa's testimony did not touch on privileged matters; argues that if Aipa's testimony was privileged, the privilege belonged to the Estate, not to Peters; and argues the Estate waived any privilege it might have had by disclosing the communications to others. Additionally, the State again argues that "notice and judicial preclearance are not prerequisites for presenting testimony from an attorney to a grand jury" and opines that the circuit court could not require the prosecutor to preclear Aipa's testimony under the circuit court's general supervisory powers over the grand jury. We disagree.

Unlike a federal grand jury, a Hawai'i grand jury is a constituent part of the court or branch of a court having general criminal jurisdiction. *In re Moe*, 62 Haw. 613, 616, 617 P.2d 1222, 1224 (1980); *Cf. United States* **925 *523 *v. Williams*, 504 U.S. 36, 37, 112 S.Ct. 1735, 1742, 118 L.Ed.2d 352 (1992) (the federal grand jury "belongs to no branch of the institutional government"). The circuit court has supervisory power over grand jury proceedings to insure the integrity of the grand jury process and the proper administration of justice. *Moe*, 62 Haw. at 616, 617 P.2d at 1224. The circuit court properly exercised its supervisory authority, upon dismissing a prior indictment, when it gave the State clear direction that a judicial determination of privilege was necessary before attorney testimony could be presented to the grand jury. The State ignored that clear direction and presented Aipa's testimony without notice to Peters and without seeking a judicial determination about attorney-client privilege.

[10] The State's attorney was duty bound to comply with the circuit court's requirement unless and until the requirement was overruled by a court of competent jurisdiction. Instead, the State ignored the circuit court's requirement and put before the grand jury attorney testimony that had not been reviewed for the existence and validity of the attorney-client privilege as required by the rules of evidence, *see* discussion at III. A. above, and the circuit court's order. Finding that the State had presented attorney testimony to the grand jury in violation of the court's clear order and concluding that disregard of its clear order warranted dismissal, the circuit court exercised its supervisory powers and dismissed the indictment.

The circuit court did not make a finding that violation of its order resulted in actual prejudice to Peters, but actual prejudice is clearly shown by the record. The State's presentation of Aipa's testimony clearly induced an action

other than that which grand jurors in uninfluenced judgment would have deemed warranted on evidence fairly presented to them. *See State v. Joao*, 53 Haw. 226, 229, 491 P.2d 1089, 1091 (1971). When presenting Aipa's testimony regarding the McKenzie Methane investment, the prosecutor presented testimony showing only that the trustees requested and were advised about the ethical propriety of investing in projects related to the Estate's investments in McKenzie Methane; that it might be a breach of trust for a trustee to invest in an investment related to the Estate's investment; and that Peters had invested in McKenzie Methane. The limited testimony the State elicited from Aipa left the impression that Peters' investment in the McKenzie Methane matter was a breach of trust. The testimony at the hearing on the motion to dismiss, however, revealed that outside counsel opined the trustees and the employees of the Estate were not ethically prohibited from investing in another McKenzie Methane investment and the trustees and employees, including Peters, complied with the legal advice they received from outside counsel. In short, Aipa's less than complete grand jury testimony regarding McKenzie Methane wrongfully implied that Peters had breached his fiduciary responsibility then and was in breach of trust again in the matter before the grand jury. Leaving the grand jury with such a misleading inference "undermined the fundamental fairness and integrity of the grand jury process" and prevented the grand jury "from the exercise of fairness and impartiality" with regard to Peters that due process demands. *State v. Chong*, 86 Hawai'i 282, 284, 949 P.2d 122, 124 (1997).[9]

926 *524 **D. *The State improperly limited Okada's testimony before the grand jury*

The State contends the circuit court erred when it concluded the State withheld clearly exculpatory evidence from the grand jury. The State argues the testimony Glenn Okada was prevented from giving was not clearly exculpatory. We disagree.

As noted previously, the perjury charge against Stone was premised upon testimony Stone gave before a prior grand jury about being contacted by Okada with regard to contacting Peters about the availability of an upper floor unit in Peters' building. Before the grand jury, the State questioned Glenn Okada, as follows:

> [Prosecutor]: ... Now, did you know that Henry Peters moved from apartment 202 to apartment 1203 some time in January 1996?
>
> [Okada]: I found out later that he had bought it.
>
> [Prosecutor]: Okay. Now, prior to Mr. Peters making a move, did you ever talk to him about him possibly making that move from 202 to 1203?
>
> [Okada]: Well, he-yeah, he was interested in buying another unit, upper floor unit early on but, you know, I'm kind of semi-retired so I never really pursued it. I looked at that unit and I can't recall whether it was Brenda Bagano or Jeff Stone that told me about the unit 'cause they know that I was buying some distressed properties, so-in my pension plan-so I looked at the unit but the owner, the Japanese owner never lived in the unit and we had water damage on the top floor of all the units, including my unit, which the contractor and subcontractors had to repair, and that unit 1203, when I looked at it, it had-it had quite a bit of water damage so the wallpapers, the carpet which was a very expensive carpet that we had in the units itself was-was-had to be all replaced and the unit, since it never had been lived in, the appliances, you know, had no warranty anymore, so-
>
> [Prosecutor]: Okay, Mr. Okada, let me ask you just so that we're clear. The first time that you heard about Henry Peters moving from 12-from 202 to 1203, how did you find out?
>
> [Okada]: Well, I think Jeff Stone may have mentioned that to me at one of our luncheons.
>
> [Prosecutor]: Okay. And as far as you ever talking to Mr. Peters about moving from 202 to 1203, did that ever happen?
>
> [Okada]: He may have mentioned that he was looking at the apartment and I may have mentioned to him that I had looked at the apartment and saw that it was, yeah, had a lot of damage in the apartment.
>
> [Prosecutor]: All right. Now, Mr. Okada, do you remember testifying before the grand jury on October-excuse me-on November 25, 1998?
>
> [Okada]: Yeah.
>
> [Prosecutor]: Okay. And that was similar to the kind of arrangement today, in other words, you were called in and you were sworn under oath?

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[Okada]: Yeah.

[Prosecutor]: Okay. And questions were asked of you?

[Okada]: Yes.

[Prosecutor]: Now, do you remember being asked these questions and you giving these answers?

The question started off, "Just so that we're clear and there isn't any confusion, the only time that you apparently heard about Peters buying into apartment 1203 was when Jeffrey Stone may have told you about it?"

And your answer was, "Yeah."

[Okada]: Yeah.

[Prosecutor]: Wasn't that your answer?

[Okada]: Yeah.

**927 *525 [Prosecutor]: And wasn't that the truth at the time?

[Okada]: Well, I had-I had kind of forgotten about the looking at the apartment before until I had spoken to Brenda Bagano later and she reminded me that I looked at the unit.

[Prosecutor]: All right. But in terms of when it was that you first heard about Henry Peters moving into apartment 1203, that was when Jeffrey Stone told you about it, isn't that correct?

[Okada]: Yeah.

[Prosecutor]: And the next question was, "And you had nothing to do about telling him about apartment 1203?" And the answer was, "No?"

[Okada]: Yeah, I had forgotten about me-

[Prosecutor]: The answer was, "no?"

[Okada]: Yeah. Well, at that-I couldn't recall.

[Prosecutor]: Mr. Okada, the answer was "no?"

[Okada]: Yeah.

[Prosecutor]: Okay. Thank you.

... And just so that we're clear, when you testified before the grand jury previously on November 25 about that last question, and you had nothing to do about telling him about apartment 1203, you were telling the truth at that time?

[Okada]: Yeah. I had forgotten about-

[Prosecutor]: Were you telling the truth at that time?

[Okada]: Yeah.

[Prosecutor]: Thank you....

At the hearing on the motion to dismiss, Okada testified about being questioned before the grand jury:

[Stone's counsel]: Now, Mr. Okada, you were called before the grand jury by [the prosecutor] on more than one occasion, correct?

[Okada]: Yes.

[Stone's counsel]: And the last time you were there, do you remember that you were trying to give an answer and you were interrupted?

[Okada]: Yes.

[Stone's counsel]: And it was [the prosecutor] who interrupted you?

[Okada]: Yes.

...

[Stone's counsel]: ... Do you remember when he interrupted you?

[Okada]: Yeah.

[Stone's counsel]: And you were trying to go back and tell him something, is that correct?

[Okada]: Yes.

...

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[Stone's counsel]: Now again, we started here you've told us [the prosecutor] interrupted you during the grand jury and you started to tell him something. What was it that you would have told him if he would have let you finish?

> [Okada]: That I had forgotten that I had looked at the unit. And what happened was that after I looked at the unit, I had lunch or I called Jeff Stone to tell him that I knew Henry was looking for an upper floor unit. From time to time, he and I would have lunch or meet Henry Peters; and he wanted to kind of get a pulse on the market from me, my perspective.
>
> So in one of my meetings with him, he indicated to me that he was interested in getting an upper floor unit because his unit was on the second floor. So I forgot that I had mentioned-I had called Jeff or had lunch with him and mentioned to Jeff that Henry was looking for an upper floor unit and that if he would call Henry to see if he'd be interested in buying that upper floor unit.
>
> And I called Henry to tell him that, well, I thought the unit would sell for about sixty to maybe eighty thousand dollars less than the true market value because of the damage, the water damages to the apartment which were not repaired, because the owner never made any attempt to claim the damage.
>
> ...
>
> ****928 *526** [Stone's counsel]: Now, is that what you would have testified to in substance if [the State's attorney] had not interrupted you?
>
> [Okada]: Yeah.
>
> [Stone's counsel]: And here now today under oath, just so we're clear, you were the one who called Jeff Stone and told Mr. Stone to call Mr. Peters about Unit 1203?
>
> [Okada]: Yeah.

The State argues, in sum, the testimony that Okada was prevented from giving was not clearly exculpatory and the State had no obligation to present it. The State opines Okada's testimony was, at best, contradictory. The State argues the circuit court's finding that Okada was prevented from giving clearly exculpatory evidence was the kind of speculation that other courts have found to be undue interference with the grand jury process. We disagree with the State's arguments.

[11] This court has rejected an approach to claims of prosecutorial misconduct that would require the prosecutor to put before the grand jury "any and all evidence [that] might tend to exculpate the defendant," *Bell*, 60 Haw. at 243, 589 P.2d at 519, or that would merely tend "to negate guilt," *Id.* at 247, 589 P.2d at 521, and has concluded a court should dismiss an indictment only when the prosecutor failed to present evidence that "clearly would have negated guilt" or presented evidence that would "undermine[ ] the authority of the grand jury to act at all[.]" *Id.* at 247, 589 P.2d at 521 (quoting *United States v. Mandel*, 415 F.Supp. 1033, 1041-2 (D. Maryland 1976)).

In this case, unlike *Bell*, one witness could provide the evidence concerning whether Stone lied when Stone testified that Okada contacted Stone and told Stone to contact Peters about the possibility of buying apartment 1203. The prosecutor put that witness, Okada, before the grand jury and asked him about when Okada heard about Peters "moving" and "buying" apartment 1203. The prosecutor did not allow Okada to testify about his role in making the availability of apartment 1203 known to Stone and Peters. Okada's testimony would have been the only direct testimony on the subject, it was not in contradiction of Okada's testimony about "moving" and "buying," and it would clearly have negated guilt.

The circuit court did not err when it dismissed the perjury count of the indictment.

E. *Remedy*

[12] [13] [14] We are mindful that dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way. *State v. Mendonca*, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985); *State v. Pulawa*, 62 Haw. 209, 215-16, 614 P.2d 373, 377-78 (1980). The State, citing *State v. Scotland*, 58 Haw. 474, 572 P.2d 497 (1977) and other cases, argues that if we conclude there was prosecutorial misconduct, the appropriate remedy would be suppression of the evidence, not dismissal of the indictment. We disagree. We have concluded the privileged and bolstered testimony presented by the State and the exculpatory testimony omitted by the State prevented the grand jury from acting fairly and impartially. *See Chong, supra,*

quoting *Bell, supra.* "If the illegal or improper testimony clearly appears to have improperly influenced the grand jurors despite the presence of sufficient evidence amounting to probable cause to indict the defendant,[10] [the defendant] would be entitled to a dismissal." *Scotland,* 58 Haw. at 477, 572 P.2d at 499. "Where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy." *State v. Joao,* 53 Haw. 226, 230, 491 P.2d 1089, 1092 (1971).

[15] In *State v. Moriwake,* 65 Haw. 47, 647 P.2d 705 (1982) this court held that a trial court's power to administer justice may be properly invoked to dismiss an indictment with prejudice. Our duty to administer justice requires that we invoke that authority **929 *527 here to mandate dismissal of these indictments with prejudice. As the *Moriwake* court noted:

> [W]e are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:
>
> > Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court.
>
> *State v. Braunsdorf,* 98 Wis.2d 569, 297 N.W.2d 808, 817 (1980) (Day, J., dissenting).

State v. Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982). In *State v. Alvey,* 67 Haw. 49, 57-58, 678 P.2d 5, 10 (1984), this court noted that a judge's inherent power to dismiss an indictment is not generally so broad as to dismiss an indictment with prejudice before trial unless the State's misconduct represents a serious threat to the integrity of the judicial process or there is a clear denial of due process, a violation of some constitutional right, is an arbitrary action, or is the result of some other governmental misconduct. In *Moriwake, supra,* and in *Alvey, supra,* this court

> cautioned that a trial court's inherent power to dismiss an indictment is not a broad power and that trial courts must recognize and weigh the State's interest in prosecuting crime against fundamental fairness to the defendant ... [and] made clear that, even if "there are serious questions" about a material element of a crime, it is not within the trial court's discretion to usurp the function of the trier of fact before trial.

State v. Lincoln, 72 Haw. 480, 825 P.2d 64, 70-71(1992). We are cognizant of the State's strong interest in prosecuting crime, but we are equally cognizant that the State's duty is to pursue justice, not convictions, and the prosecutor has a duty to act as a minister of justice to pursue prosecutions by fair means. We must weigh the State's interests against the defendants' rights to fundamental fairness, including an unbiased grand jury. In doing so, we cannot but conclude that the State's actions in these cases threatened the integrity of the judicial process and denied the defendants the process they were due. The State acted here in complete disregard of the attorney-client privilege and the rules of evidence. In doing so, the State deprived the defendants of a timely opportunity to raise the attorney-client privilege issue and to seek a preliminary judicial determination of it. In addition, the State improperly bolstered the testimony of a witness by wrongly presenting the testimony as privileged testimony within the crime fraud exception to the attorney client privilege, and prohibited a witness from presenting clearly exculpatory evidence. The State's actions cannot but have improperly influenced the grand jury and prevented it from operating with fairness and impartiality. The State's actions here, some of which were taken in contravention of the circuit court's clear instructions to seek preliminary judicial review, represent a serious threat to the integrity of the judicial process and merit dismissal with prejudice.

We take notice that these defendants have been charged with serious crimes several times. In each instance the indictments have been dismissed due to prosecutorial misconduct. In a dissent in *United States v. Williams,* 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), United States Supreme Court Associate Justice John Paul Stevens discussed the dangers of misconduct by a United States Attorney. His discussion on the subject is applicable to misconduct by any prosecuting attorney:

> Justice Sutherland's identification of the basic reason why [prosecutorial] ... misconduct is intolerable merits

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repetition:

"The [prosecutor] ... is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and **930 *528 very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S.[78], at 88, 55 S.Ct. at [629,] 633 [79 L.Ed. 1314].

It is equally clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. As the Court of Appeals for the Third Circuit recognized, "the costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there

> "the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." *United States v. Serubo*, 604 F.2d 807, 817 (1979).

United States v. Williams, 504 U.S. 36, 62-3, 112 S.Ct. 1735, 1750, 118 L.Ed.2d 352 (1992) (Stevens, J. dissenting).

The State's interest in prosecuting these cases is, at this point, clearly outweighed by the lack of fundamental fairness that would ensue were we to allow these prosecutions to continue.

IV. *Conclusion*

The circuit court's orders of dismissal are affirmed. The circuit court's orders that the dismissals are without prejudice are vacated and these cases are remanded to the circuit court with instructions to enter the dismissals with prejudice.

Parallel Citations

40 P.3d 914

Footnotes

1 The record contains information that both OKP and the Estate reaped considerable benefit from the transaction. OKP was estimated to have reaped a nine million dollar profit. Rather than having to deal with a bankrupt developer, the Estate apparently received the expectations from its original agreement with Kapalele Associates, plus significantly increased annual payments at a higher rate of interest, immediate rights to some of the money generated from the sale of condominium units, and, among other things, additional security in the form of mortgages and partner guarantees that provided recourse in the event of OKP's default.

2 Frunzi was allowed to resign from the practice of law in lieu of discipline on April 10, 1997. *See* Supreme Court Case Number 20583, *Office of Disciplinary Counsel v. Richard L. Frunzi*. A resignation in lieu of discipline is a disbarment. RSCH 2.14(d). Frunzi testified before the grand jury on January 14, 1999.

3 The State also subpoenaed Stone attorneys James Stubenberg and Jonathan Durrett. Stubenberg and Durrett raised privilege issues on Stone's behalf and the parties sought and obtained a court ruling concerning the extent to which Stubenberg and Durrett could testify.

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4 In *State v. Joao*, the State introduced a grand jury witness as "the original defendant charged with murder" who "decided to make a clean breast." 53 Haw. at 227, 491 P.2d at 1090. This court held that the prosecutor's conduct was contrary to the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions and affirmed the circuit court's dismissal of the indictment. 53 Haw. at 230, 491 P.2d at 1091-2.

5 **Rule 503. Lawyer-client privilege.** (a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A "representative of the lawyer" is one directed by the lawyer to assist in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Prevention of crime or fraud. As to a communication reflecting the client's intent to commit a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(3) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(4) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(5) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients; or

(7) Lawyer's professional responsibility. As to a communication the disclosure of which is required or authorized by the Hawai'i rules of professional conduct for attorneys.

6 We recognize that some of the opinions cited in the lengthy list were filed after the State of Hawai'i presented its evidence to the grand juries in the actions covered by these appeals. We list them only to note the wealth of authority available on the subject of attorney-client privilege and the burden of seeking exception to it. The list could have been much longer.

7 We are aware that legitimate law enforcement may require that witnesses be questioned in confidence. When an issue of privilege is involved, each such case must be judged on its own merits to determine whether a judicial determination of privilege without the presence and argument of the person entitled to claim the privilege will meet the requirements of due process. At minimum, in the absence of an opportunity for the holder of the privilege to raise the issue or in the face of a faithless lawyer failing to raise the issue before a court of competent jurisdiction, the prosecutor must seek a court ruling on the privilege issue.

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8 We have reviewed Frunzi's testimony and conclude that most of it was privileged and none of the privileged testimony was subject to the crime-fraud exception to the attorney-client privilege. In the circumstances of this case, we see no need to burden this opinion or to further breach the privilege with a lengthy exegesis on the subject.

9 Having reviewed Aipa's testimony, it is apparent that much of Aipa's testimony concerned advice and consultation with the Estate trustees, including Peters, about the trustees' legal duties. The State's own characterization of Aipa's testimony belies its conclusion that Aipa's testimony was not privileged. The State says Aipa was called "[t]o provide the grand jury with more specific information from which to determine Peters knew that any benefit he received from a transaction in which the trust was also involved needed to be returned to the trust[.]" The "specific information" was, according to Aipa's testimony, the legal advice that was sought and rendered by outside counsel. In short, Aipa testified about "the aid of persons having knowledge of the law and skilled in its practice," *see e.g. Zolin*, 491 U.S. at 562, 109 S.Ct. at 2625, and that, by any definition, is legal advice. The State argues the attorney-client privilege belonged to the Estate, not Peters. We disagree, but see no reason to reach this issue of first impression for Hawai'i in this case. *Cf. Huie v. DeShazo*, 922 S.W.2d 920 (Tex.1996) (Texas Supreme Court concluded "the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.") "Client" in the Texas evidence code is defined exactly as it is in the Hawai'i Rules of Evidence and Hawai'i trustees, like those of Texas, are empowered to hire and consult attorneys and to act on the attorneys' advice. *See* HRS § 554A-3(c)(23) (Supp.2000) and *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del.Ch.1976) (Delaware supreme court concluded that in litigation between trust beneficiaries and trustees, the attorney-client privilege did not bar discovery because the legal counsel was sought to aid the beneficiaries).

10 Given our disposition of this appeal, we make no judgment about probable cause.

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

IN RE:	:	SUPREME COURT PENNSYLVANIA 217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE INVESTIGATING GRAND JURY	:	DAUPHIN CO. COMMON PLEAS No. CP-22-CR-5164-2011

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

COMMONWEALTH OF PENNSYLVANIA,	:	SUPREME COURT PENNSYLVANIA 217 M.D. MISC. DKT. 2010
v.	:	DAUPHIN CO. COMMON PLEAS No. 1386-MD-2012
GARY C. SCHULTZ, Defendant.	:	**REQUEST EXPEDITED REVIEW**

I have carefully reviewed the facts and circumstances of Cynthia Baldwin's relationship with Gary Schultz and Timothy Curley and have concluded, to a reasonable degree of professional certainty, that Ms. Baldwin represented both Mr. Schultz and Mr. Curley before the grand jury, that Mr. Schultz and Mr. Curley are now former clients of Ms. Baldwin, and that Ms. Baldwin violated the standard of care in her representation of Mr. Schultz and Mr. Curley, compromising their rights to effective representation in so many respects that their entitlement to relief seems compelling.

I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania, the Appellate Division, Second Department of the Supreme Court of New York,

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the Supreme Court of Connecticut, the United States Supreme Court, and numerous federal circuit courts of appeal and district courts. Currently, I am the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility. I am also the Supervising Lawyer of the Ethics Bureau at Yale, a pro bono endeavor to provide ethics advice, counseling and support to those who cannot afford such services. I am a partner and former managing partner of Drinker Biddle & Reath LLP, a general practice law firm of approximately 650 lawyers with a principal office in Philadelphia and branch offices in New Jersey, New York, California, Delaware, the District of Columbia, Illinois and Wisconsin.

I have regularly been consulted and testified about the ethics and professional responsibility of lawyers in various proceedings in both state and federal courts throughout the United States. I have spent my entire career as a trial lawyer, first at Community Action for Legal Services in New York City and, since 1972, at Drinker Biddle & Reath LLP. My specialties are general commercial litigation and the representation of and consultation with lawyers regarding their professional responsibilities.

I was a lecturer on law at Harvard Law School, teaching legal ethics and professional responsibility, from 2007 through 2010. I was the I. Grant Irey, Jr. Adjunct Professor of Law at the University of Pennsylvania Law School from 2000 through 2008, teaching the same topic. I have lectured on legal ethics at more than 35 law schools throughout the country, have been a visiting professor at Cornell University Law School, and was the Robert Anderson Fellow at the Yale Law School in 1997.

I have produced and participated in more than 200 continuing legal education seminars, and I have written extensively in the field. I am the author of Legal Tender: A Lawyer's Guide

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to Professional Dilemmas (ABA 1995); co-author (with Professor Susan Martyn) of Traversing the Ethical Minefield (Aspen 1st ed. 2004; 2nd ed. 2008), a casebook in professional responsibility, Red Flags: Legal Ethics for Lawyers (ALI-ABA, 1st ed. 2005, 2nd ed. 2010, Supplement 2009), and Your Lawyer, A User's Guide (LexisNexis 2006); co-author (with Professors Susan Martyn and W. Bradley Wendel) of The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes (Aspen 2006-2007 ed., 2007-2008 ed., 2008-2009 ed., 2009-2010 ed., 2010-2011 ed., 2011-2012 ed., 2012-2013 ed.); co-author (with Professor Susan Martyn) of The Ethics of Representing Organizations: Legal Fictions for Clients (Oxford University Press 2009); and author of almost 100 articles on legal ethics and related topics and several book chapters. I am the editor and contributing author of Raise the Bar: Real World Solutions for a Troubled Profession (2007) and Ethics Centennial (2009), both published by the ABA.

I am a former member and Chair of the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute's 12-year project, The Restatement of the Law Governing Lawyers. I am a Fellow of the American College of Trial Lawyers, and I was a member of Ethics 2000, the ABA Commission established to review the Model Rules of Professional Conduct. Currently, I am also a member of the Board of the Connecticut Bar Foundation.

My résumé is annexed hereto as Exhibit A.

Introduction

Ms. Baldwin's violations are serious. Indeed, one could teach much of the required course in professional responsibility based on what occurred in these representations,

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representations that went badly awry. If the rights of Mr. Schultz and Mr. Curley to effective representation had not been violated, they would not be subject to the criminal charges they presently face.

Cynthia Baldwin Was Lawyer for Mr. Schultz and Mr. Curley For All Purposes Before the Grand Jury

The question of representation should not be an issue. Indeed, I have never seen the question of clienthood challenged by a lawyer on such an unambiguous record. First, Ms. Baldwin enters the grand jury room on behalf of both individuals as a lawyer, a statutory right that was only available to her if she were representing Mr. Schultz and Mr. Curley; in fact, as counsel only to Penn State she would have been barred from such an appearance. *See* 42 Pa. Cons. Stat. Ann. § 4549(c); Pa. R. Crim. P. 231. Second, Ms. Baldwin, by her answer to the presiding judge, represented on the record that she was representing Mr. Schultz and Mr. Curley. She had a chance to assert her present justification, see infra, that she was only representing them as representatives of Penn State, an impermissible limitation but at least a warning; but Ms. Baldwin stated nothing of the kind. Third, in the grand jury room, when Mr. Schultz and Mr. Curley each testified that he was represented by Ms. Baldwin, she was silent. She failed to correct what she would characterize as the misunderstanding of her role by Mr. Schultz and Mr. Curley because, according to Ms. Baldwin's lawyer, it would have been inappropriate to "disrupt" the proceedings to disabuse the putative clients of their mistake. In Ms. Baldwin's view it was apparently much more important to keep the testimony "flowing" (testimony that had barely commenced) than clarify whether she was fulfilling the witnesses' constitutional right to counsel. In my view, the record could not be clearer. Mr. Schultz and Mr. Curley were led to their respective criminal predicaments represented by Cynthia Baldwin.

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There Are No Second Class Clients

Ms. Baldwin's assertion that she was representing Mr. Schultz as a representative of her real client, Penn State, not only advances a defense that finds no support in our ethical standards, but also confirms her conflict of interest. The idea that a lawyer can represent the officers or employees of an organizational client under some kind of a watered down, second-class version of clienthood finds no support in the Pennsylvania Rules of Professional Conduct. *See In re Fifth Pa. Statewide Investigating Grand Jury [No. 2]*, 50 Pa. D & C.3d 617, 622 (Dauphin Cnty. Ct. Com. Pl. 1987) ("Adequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest."); ABA/BNA Lawyers' Manual on Professional Conduct § 31:109 ("[C]ourts do not appear to accept the notion of an 'accommodation client.'"); Lawrence J. Fox, Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores, 44 S. Tex. L. Rev. 185, 193 (2002) (noting that rules do not provide for "second-class quasi-client status"). Those rules recognize one form of client, and that client is entitled to the benefit of all the lawyer duties under the rules, as well as the same fiduciary duties lawyers owe every client. So once Ms. Baldwin admits she represented Mr. Schultz in some capacity her conduct must be judged by the same standards that apply to every lawyer for every client.

The Tie Goes to the Client

Even if one were to view the record as raising some doubt about Ms. Baldwin's lawyer role, the result would be the same. The burden is always on the lawyer, not the putative client, to clear up any misunderstandings. This principle is reflected in multiple ways. For example, if Ms. Baldwin did not represent Mr. Schultz and Mr. Curley, then the only possible alternative is that Mr. Schultz and Mr. Curley were unrepresented, triggering Rule 4.3 of the Pennsylvania

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Rules of Professional Conduct, the rule governing interactions with the unrepresented. That rule provides two ethical requirements.

First, the lawyer is required, in the face of confusion, to clarify the lawyer's role and interest in the matter. *See* Pa. Rules of Professional Conduct 4.3(c). But, as the record reads, Ms. Baldwin did not tell Mr. Schultz or Mr. Curley, "I only represent Penn State; I don't represent you; if Penn State asks me to do so, I will blame you; even share your confidential information with Penn State." No, Ms. Baldwin allowed Mr. Schultz and Mr. Curley to tell the judge, the prosecutors and the grand jurors – with Ms. Baldwin silently sitting there – that Ms. Baldwin was representing each of them.

Second, the lawyer dealing with an unrepresented person must refrain from giving the unrepresented person any advice, with but one exception: the advice to get a lawyer. See Pa. Rules of Professional Conduct 4.3(b). Regrettably, as we shall see, Ms. Baldwin offered Messrs. Schultz and Curley much advice, some of it dreadfully wrong, even violating the rules of professional conduct in the process. So whatever Ms. Baldwin says now, her conduct unequivocally demonstrated back then that she represented Mr. Schultz and Mr. Curley, facts which are uncontradicted and, in my view, dispositive.

Moreover, the jurisprudence is clear. When the putative client has a reasonable basis for concluding that the individual is a client, the lawyer has an absolute obligation to disabuse the client of that notion, or be deemed the client's lawyer. *See Moen v. Thomas*, 682 N.W.2d 738, 743 (N.D. 2004) ("An attorney-client relationship 'may arise when a putative client reasonably believes that a particular lawyer is representing him and the lawyer does not disabuse the individual of this belief.'[] Furthermore, a lawyer who knows an individual believes an attorney-client relationship exists, even if that belief is unreasonable, should disabuse the individual of

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that belief.") (citations omitted); *Lefta Assocs. v. Hurley*, No. 1:09-cv-2487, 2012 WL 4484948, at *19 (M.D. Pa. Sept. 27, 2012) ("It is the reasonableness of the client's belief that the attorney is providing legal services pursuant to an attorney-client relationship that controls the issue [of whether an attorney-client relationship exists], not the attorney's own belief."); ABA/BNA Lawyers' Manual on Professional Conduct § 31:101 ("The traditional definition is that a lawyer-client relationship arises if someone seeks legal advice from a lawyer and the lawyer gives or impliedly agrees to give it, **or if a lawyer knows that someone reasonably believes himself to be the lawyer's client and the lawyer does not dispel that belief.**") (emphasis added). But here we have a written record that demonstrates not only did that not occur, but that, to the contrary, Ms. Baldwin told the court she represented Mr. Schultz and Mr. Curley by word and deed, letting the statements of Mr. Schultz and Mr. Curley that each was represented by her go uncorrected as a court reporter recorded her silence in the official transcript.

Where Is the Retainer Letter?

From the beginning of these two representations Ms. Baldwin violated important ethical obligations. First, our Pennsylvania Rules of Professional Conduct require that the lawyer communicate to a new client, in writing, "the basis or rate of the [lawyer's] fee . . . before or within a reasonable time after commencing the representation." Pa. Rules of Professional Conduct 1.5(b).

Second, Ms. Baldwin had particular responsibilities because she was compensated by Penn State, not by Mr. Schultz and Mr. Curley. The Rules of Professional Conduct provide:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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(3) information relating to representation of a client is protected as required by Rule 1.6.

Pa. Rules of Professional Conduct 1.8(f); *see also id.* cmt. [11] ("Because third-party payers frequently have interests that differ from those of the client, . . . lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client."); *id. cmt.* [12] ("Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee or arrangement or by the lawyer's responsibilities to the third party payer (for example, where the third-party payer is a co-client)."); *Pirillo v. Takiff*, 341 A.2d 896, 903-04 (Pa. 1975) (affirming disqualification of lawyer from representing policemen where fees were paid by Fraternal Order of Police, and where interests of Order conflicted with interests of policemen).

Third, when representing multiple clients in the same matter, the lawyer must inform all clients of the potential for conflicts of interest. *See* Pa. Rules of Professional Conduct 1.7(b)(4) and cmt [18] ("When representation of multiple clients in a single matter is undertaken, the information [the lawyer provides] must include the implications of the common representation, including possible effects loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved."). Where, as here, a lawyer represents multiple potential defendants whose interests may diverge, the conflict is clear. *See Pirillo*, 341 A.2d at 906 (finding that lawyer could not represent multiple potential defendants in grand jury proceedings where they might incriminate each other); 42 Pa. Cons. Stat. Ann. § 4549(c)(4) (prohibiting lawyer from representing multiple witnesses in grand jury proceedings where conflict is likely).

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These rules are not technical requirements, the violation of which is of no material moment. If Ms. Baldwin had sent retainer letters to Mr. Shultz and Mr. Curley and, in doing so, addressed the issues that she was required to consider, particularly conflicts and confidentiality, neither Mr. Schultz nor Mr. Curley would likely find themselves in the legal jeopardy they currently face.

The Prosecutor's Characterization of the Relationship Between Messrs. Schultz and Curley and Lawyer Cynthia Baldwin Is Frivolous

One would think that the Commonwealth has no standing to even comment on the lawyer-client relationship between Messrs. Schultz and Curley, on the one hand, and Cynthia Baldwin on the other. It is the Commonwealth whose lawyers were fully aware of the conflicts under which Ms. Baldwin was laboring at the time of the grand jury proceeding, stood silent, took full advantage of the conflicts, and never informed the court of the nature and extent of the conflicts so that the court could fulfill its duty of assuring that the rights of Messrs. Schultz and Curley to effective representation were not systematically violated in the extreme. In short, the Commonwealth's lawyers abdicated their responsibilities as ministers of justice and protectors of the constitutional rights of the accuseds and, therefore, should be disqualified from even addressing the questions of the role of counsel and the attorney-client privilege raised here.

But that standing question need not be reached since the Commonwealth's presentation on these issues strays so far from what the law requires that it is not worthy of real consideration here. Indeed, the construct the Commonwealth's lawyers offer the court could be dismissed as comedic if the implications of the Commonwealth's position were not so catastrophic to the rights of the individual clients of Ms. Baldwin. The Commonwealth actually asserts that because Messrs. Schultz and Curley were aware that Ms. Baldwin was general counsel for Penn State

they should have understood that they were merely second-class clients and, as a result, are entitled to no attorney-client privilege whatsoever.

As I have already noted, the Rules of Professional Conduct only contemplate one form of clienthood. And that form is full compliance with the Rules of Professional Conduct relating to conflicts of interest, confidentiality, competence, communication, client control and all of the other obligations the rules mandate for all clients. Therefore, once Cynthia Baldwin announced to Messrs. Schultz and Curley, the court, the grand jury, as well as the Commonwealth's lawyers, that she represented both of them, she was required, in fact, to represent both of them to the full extent required by her fiduciary duties, *see Capital Care Corp. v. Hunt*, 847 A.2d 75, 84 (Pa. Super. Ct. 2004), the Pennsylvania Rules of Professional Conduct, the Pennsylvania statutory provisions governing the right to counsel before a grand jury, 42 Pa. Cons. Stat. Ann. § 4549(c), and, not by the way, the United States Constitution. U.S. Const. amend. V, VI. Nor does the Commonwealth suggest that Ms. Baldwin ever warned Messrs. Schultz and Curley that her real client was Penn State or that, when she told them she was representing them, her fingers were crossed behind her back, and she never fully intended to fulfill that obligation, let alone warn them that they would not receive the benefit of attorney-client privilege because of their second-class status.

I do not believe for a moment that if such a warning were given it would be of any significance. Lawyers are not allowed to take on representations that somehow do not include the attorney-client privilege. Indeed, there is no protection, no protection whatsoever, applicable to the lawyer-client relationship that is more important than the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("explaining that purpose of privilege "is to encourage full and frank communication between attorneys and their clients and thereby

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promote broader public interests in the observance of law and administration of justice"); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 47 and n.1 (Pa. 2011) (highlighting purpose and importance of privilege); *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986) ("The attorney-client privilege is deeply rooted in our common law and can be traced to the reign of Elizabeth I, where it was already unquestioned. It is the most revered of our common law privileges . . . .") (internal citation omitted). So for the Commonwealth to argue Ms. Baldwin represented Messrs. Schultz and Curley, but that she did so, quite properly, without providing them with the benefit of the attorney-client privilege, and that the lay clients should have divined that they were not entitled to the attorney-client privilege from Ms. Baldwin's exalted status as counsel at Penn State, asserts a position that has no basis in any law or any support in the Pennsylvania Rules of Professional Conduct.

In Joint Representations There Can Be No Waiver of the Attorney-Client Privilege as to the Client That Is Asserting the Privilege Unless That Client Waives the Privilege

The law governing the attorney-client privilege in a joint representation is clear. As to all lawyer-client communications among the multiple clients and the lawyer, there can be no waiver of the privilege unless each client has given his or her informed consent – a defined term[1] – to waive the privilege. *See In re Teleglobe Commc'ns, Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) ("[W]aiving the joint-client privilege requires the consent of all joint clients.") (citing Restatement (Third) of the Law Governing Lawyers § 75(2)).[2] To have a different rule would mean that there could never be a joint representation, no matter how otherwise conflict-free the

[1] "'Informed consent' denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Pa. Rules of Professional Conduct 1.0(e).

[2] "[A] client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients." *In re Teleglobe*, 493 F.3d at 363 (citing Restatement (Third) of the Law Governing Lawyers § 75(2) cmt. e).

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joint representation might be. And that is because each client in the joint representation would always be in jeopardy that that client might lose protection of the privilege involuntarily as the co-client took advantage of an individual's right to waive in order to gain some competitive advantage, or in the case of criminal matters, leniency for cooperation. So, in order to waive the privilege here, Ms. Baldwin would have been required to seek the informed consent of Messrs. Schultz and Curley before she could disclose any conversations she had with those two gentlemen while she was representing them. Yet the record I have reviewed demonstrates that there never was so much as a telephone call or other communication to either Messrs. Schultz and Curley or their new lawyers seeking such a waiver. Nor would there be any reason why either of them would even nod at such an ill-advised waiver.

But we are told by the Commonwealth the foregoing does not apply here because Messrs. Schultz and Curley should have known that Penn State, as Cynthia Baldwin's client, controlled the privilege and could waive it at any time, not only for Penn State but for Messrs. Schultz and Curley. What an extraordinary, frivolous and dangerous assertion! What the Commonwealth is telling the court is that, without warning or explanation, let alone informed consent, Messrs. Schultz and Curley were supposed to understand that even though the clients, the court and the grand jury were all told in no uncertain terms by Ms. Baldwin – on the record – that she was representing these two, Ms. Baldwin was totally free to disclose any of the privileged information of her two individual clients at any time and without warning if Penn State directed her to do so. That turns the law of privilege literally upside-down, rendering it a false protection and leaving the clients helpless before the power of the Commonwealth.

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Even if Ms. Baldwin Incorrectly Thought She Might Disclose Privileged Information, She Was Not Entitled to Decide That Question for Herself

Ms. Baldwin's sins here are both manifold and manifest. Turning against one's clients is the greatest betrayal a lawyer can commit. But that is what Ms. Baldwin did here, stripping the clients of any opportunity to object to her misdeeds. Either she was subpoenaed to the grand jury or she voluntarily agreed to appear. Either way, she ran right through the red light by, in fact, testifying before the grand jury without notice to her former clients.

Why were they entitled to this notice? Because if Ms. Baldwin planned to disclose one iota of privileged information to the grand jury, her former clients were entitled to notice so that they could take appropriate action to prevent that testimony from being elicited before her former clients had a chance to argue before a court of law that Ms. Baldwin was violating the attorney-client privilege in doing so.

No lawyer is permitted to disclose confidential information without the informed consent of the client. No lawyer is permitted to testify to privileged information under subpoena without either asserting the attorney-client privilege or giving the former client an opportunity to do so. *See In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975) (former counsel that received grand jury subpoenas was obligated to assert attorney-client privilege with respect to documents it "deemed arguably protected by the attorney-client privilege"); Pa. Eth. Op. 98-97 (advising that lawyer "should assert the attorney/client privilege and [the lawyer's] ethical duty of confidentiality in every instance where it is plausible that such restrictions on disclosure apply" and that "[i]n cases of doubt, [the lawyer] should not attempt to unilaterally determine the privilege or ethical issues on [his] own but instead seek a determination by the Court"). And the last thing a former lawyer may do is take the law into her own hands, decide

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that former clients were not entitled to the privilege, give them no opportunity to object, give the courts no opportunity to adjudicate the question, and simply provide the privileged information on her own motion.

There was a time when Ms. Baldwin was a judge who decided such questions. So perhaps she forgot that in representing Messrs. Schultz and Curley she was now simply a lawyer without the power to adjudicate the most sensitive questions of all relating to a client, to wit, whether a lawyer can be forced to testify about lawyer-client communications undertaken in confidence for the purpose of offering or receiving legal advice. But as a result of Ms. Baldwin's misconduct, Messrs. Schultz and Curley went six months without being aware of Ms. Baldwin's betrayal and only learned of her shocking abandonment of her former clients when the new indictment was issued. Ms. Baldwin's conduct in this regard cries out for relief.

It Was a Crime for Ms. Baldwin and the Commonwealth's Lawyers to Decide the Crime-Fraud Exception

Permit me again to address some first principles. If the attorney-client privilege is the most sacred protection for the right of a client to consult a lawyer with confidence that the client's innermost secrets will not be disclosed by the lawyer, then the crime fraud exception to the privilege, which does permit inquiries into communications between lawyer and client, is one that must be applied with great circumspection and care only after the client, represented by counsel, has had a full opportunity to assert that the crime fraud exception does not apply. This doctrine is so carefully circumscribed that the courts are not even permitted to look at the challenged privileged communication unless those who assert the crime fraud exception should independently establish, without reference to the challenged communications, that there is a good reason to believe this exception is likely to be applicable in this situation. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) ("Before engaging in *in camera* review to determine the

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applicability of the crime-fraud exception, 'the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.") (internal citation omitted).

The conduct of the Commonwealth and Ms. Baldwin with respect to this assault on the attorney-client privilege of Messrs. Schultz and Curley makes a mockery of the foregoing. Apparently, the Commonwealth decided the crime fraud exception should apply. What a surprise! Opponents of those asserting the privilege bandy about the applicability of the crime fraud exception all the time when it is in their best interests to do so. If successful, they will have invaded the sanctity of the lawyer-client relationship, and perhaps gained access to some information damaging to their adversary.

It would appear that Ms. Baldwin instigated the crime fraud exception allegation or, in any event, went along with it, testifying to communications between Messrs. Schultz and Curley and herself, without any notice to the clients, stripping the clients of any opportunity they would have to demonstrate to the contrary that the crime fraud exception should not apply. In my experience, this conduct on the part of former counsel is not only a blatant betrayal, but is unprecedented in the annals of lawyer representation of clients.

Even if she were convinced that some court would decide that the crime fraud exception should apply, Ms. Baldwin was not permitted to act on that conclusion. Rather, she had an absolute obligation to notify the clients and give them every opportunity to convince the court that both the Commonwealth and Ms. Baldwin were incorrect and, in any event, were not entitled to make the decision sua sponte. *See* Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine 711 (5th ed. 2007) (noting that holder of privilege must be given

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an opportunity to rebut whether communications were "in furtherance of a contemplated crime or fraud"); *cf. Commw. v. Harris*, 32 A.3d 243, 248-51 (Pa. 2011) (reaffirming right to immediate appeal of orders overruling claims of privilege because of importance of privilege and inability of later appeal to undo harm of disclosure).

Ms. Baldwin's role in this is particularly suspect in my view because the only motivation for her cooperating with the prosecution in this way, abandoning her clients so completely, is so that she could be held harmless for her misconduct in telling the clients and the court that she represented these two individuals when, in fact, she was not providing them legal representation at all. Indeed, nothing demonstrates more her conflicts of interest than her conduct with respect to the crime fraud exception.

Conclusion

The role of the lawyer is a sacred one. Its entire purpose is to provide clients with that one true champion who will advocate for the client and remain loyal to the client throughout and even long after the representation ends. Faced with the authority of the state to bring criminal charges, all of these obligations become even more important and of constitutional dimensions. As a result, when lawyers feign representation, but in fact abandon their clients and, worse yet, become instrumentalities of the state, aiding the prosecution of their clients, the entire system of

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justice is systematically destroyed. Yet that is precisely what happened here when Cynthia Baldwin went from stating that she was representing Messrs. Schultz and Curley, to providing them with no effective representation whatsoever, to betraying them in her testimony before the grand jury. This extraordinary set of circumstances cries out for relief.

Lawrence J. Fox

New Haven, CT
January 15, 2013

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