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IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 125 EM 2019

In re: Conflict of Interest of the Office of the Philadelphia District Attorney,

Petition of Maureen Faulkner, Widow of deceased Police Officer Daniel Faulkner

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ANSWER OF PETITIONER OPPOSING RESPONDENT'S MOTION FOR PROTECTIVE ORDER TO LIMIT DISCLOSURE OF DISCOVERY AUTHORIZED IN THE APRIL 7, 2020 ORDER

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Petitioner, by and through undersigned counsel, Bochetto & Lentz, P.C., hereby submits the following Answer Opposing Respondent's Motion for Protective Order to Limit Disclosure of Discovery Authorized in the April 7, 2020:

I. The DAO's Objections to Discovery Have Already Been Considered and Rejected.

The District of Attorney's Office ("DAO") devotes seven pages of its Motion to "objections" directed at the discovery which the Special Master already ordered to take place. See Motion at 6-13. On April 5, 2020, Petitioner filed a Motion for Leave to Take Discovery, and the parties participated in a hearing on that Motion on April 7, 2020, during which argument was heard on the propriety of the discovery. As a result of that hearing, the Special Master entered a April 7, 2020 Order directing the parties to conduct depositions of four individuals concerning four issues set forth in the Order.

Those depositions are now taking place. Indeed, two of the deponents were deposed today, the third deposition is scheduled to take place tomorrow April 21, and the fourth will be taken on Wednesday, April 22. In sum, the propriety of the discovery ordered is no longer an issue as the ordered depositions are proceeding as Ordered by the Special Master. The stated objections are therefore moot and need not be reconsidered by the Special Master.

II. These Proceedings Should Not Be Shielded From the Public

The DAO requests the Court to shield the discovery proceedings from the public and to impose a gag order on counsel based on three pages of legal argument set forth at pages 14 – 16 of the Motion. In those three pages, the DAO suggests the deposition transcripts should be sealed because the contents of the depositions will result in "disclosure of privileged and highly confidential information regarding the DAO's discretionary strategic decision-making." See Motion at 14.

The DAO fails to acknowledge that it placed its own strategic decision-making at issue when it filed its Response to the King's Bench Petition. Starting at page 24 of the DAO's Response there is a heading labeled "The District Attorney's strategic decision to not oppose Defendant Cook's remand request."[1] Underneath that heading, the DAO proceeds to provide 6 pages detailing the alleged reasoning underlying the "strategic decisions" for the DAO not opposing the remand.

The DAO states that it "did not oppose the remand request because it desires to bring the case to a conclusion as expeditiously as possible." (Ex. A, Response at 27.) The DAO further claimed that:

> [w]ere the District Attorney's Office to oppose the remand request, and were the Superior Court to deny the remand request, then once the current rounds of appeals

[1] The relevant excerpts of the DAO's Response to the King's Bench Petition (pages 24-30) are attached hereto as Exhibit "A."

> is completed, Defendant Cook would no doubt file yet another PCRA petition based on the supposed new evidence. This would then entail another whole round of PCRA and appellate proceedings regarding issues similar to those currently on appeal.
>
> * * * *
>
> The District Attorney's Office believed that opposing the remand request would do nothing more than to extend the litigation for many more years, which is something neither the District Attorney nor Mrs. Faulkner desires.

(Ex. A, Response at 27.)

The DAO's Response also addressed testimony from Joseph McGill, and why obtaining that testimony "now" was allegedly deemed important, stating:

> If the Superior Court granted the remand and if the PCRA court determined that an evidentiary hearing was necessary, the District Attorney's Office planned to present the trial prosecutor, Joseph McGill, Esquire, at that hearing. Defendant Cook's newly-discovered-evidence claims all involve Mr. McGill. Mr. McGill (like many who were involved in Defendant Cook's trial) is advancing in age. Thus, the District Attorney believed it would be advantageous to obtain his testimony now, while he is unquestionably available, than it would be to push this issue years down the road when, due to the passage of time, he may no longer be available to testify.

(Ex. A, Response at 28-29.)

The DAO's Response to the King's Bench Petition was not filed under seal. It was -- and still is -- a public document. In fact, the DAO's Response was widely

reported in the media.[2] Despite raising the issues surrounding its "strategic decisions" in a public document, the DAO is now urging the Special Master to place testimony about those same strategic decisions under seal, outside of the public's view.

To the extent any of the information was privileged or confidential, the DAO itself already disclosed the information in a public document, and therefore affirmatively waived any applicable privilege or claim to confidentiality. BouSamra v. Excela Health, 210 A.3d 967, 978 (Pa. 2019)("[W]e hold that the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it.")

What is more, the DAO itself placed its deliberative process privilege information "at issue" by extensively relying on it in its Response . The DAO cannot use the alleged privilege as a basis to shield information from the public when it chose to utilize such allegedly privileged information as a defense in these proceedings. See, e.g., Peerview, Inc. v. Liberty Stoneridge LLC, 466 EDA 2012, 2013 WL 11275490, at *4 (Pa. Super. Ct. Mar. 19, 2013)("[T]he appellate courts of this jurisdiction have found waiver when the communication is made in the presence of or communicated to a third party or to the court, when the client relies

[2] See, e.g., https://kywnewsradio.radio.com/articles/news/krasner-responds-to-faulkner-s-claims-he-cant-be-impartial

on the attorney's advice as an affirmative defense, or when the confidential information is placed ***at issue***.")(quoting Carbis Walker, LLP v. Hill, Barth and King, LLC, 930 A.2d 573, 579 (Pa. Super. 2007)(emphasis added).

Finally, the DAO's position is completely contrary to public policy. Pennsylvania jurisprudence has long recognized that the public has a right of access to judicial records based upon the First Amendment to the United States Constitution, see Zdrok v. Zdrok, 829 A.2d 697, 699-700 (Pa. Super. 2003), the common-law right to access doctrine, see Cendant Corp. v. Forbes, 260 F.3d 183, 192 (3d Cir. 2001), and the Pennsylvania Right to Know Act, 65 P.S. §§66.1-66.4. See The Morning Call Inc. v. Lower Saucon, 627 A.2d 297, 300-301 (Pa. Cmwlth. Ct. 1993). The right of access to judicial records in civil cases "promotes public confidence in the judicial system" and "helps assure that judges perform their duties in an honest and informed manner." Cendant Corp., supra.

The public's right to access concern posed here is particularly troubling since the DAO is not only seeking to seal testimony, but also seeks a broad "gag order" on counsel and presumably Petitioner without justification. "[E]ven a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." Com. v. Genovese, 487 A.2d 364, 367

(Pa. Super. 1985) (quoting Capital Cities Media, Inc. v. Toole, 463 U.S. 1303 (1983)).

It is respectfully submitted that the Special Master should not enter any form of a protective order or "gag order" in this matter. The requested relief is merely attempting to shield the public from information that the DAO itself placed in the public domain. In effect, allowing the DAO to place its deliberative process in the public domain while shielding the investigation of that process from the public would impermissibly allow the DAO to use the privilege as a proverbial shield and sword. It would also be counter-intuitive to the purpose of these proceedings – to "preserve a bilateral sense of justice" such that the community at large can have confidence in the adjudication of this important case.

The requested protective order should be denied.

Respectfully submitted,

BOCHETTO & LENTZ, P.C.

/s/ George Bochetto

Dated: April 20, 2020

By: _____

George Bochetto, Esquire
David P. Heim, Esquire
John A. O'Connell, Esquire

Attorneys for Petitioner

CERTIFICATE OF PUBLIC ACCESS COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 20, 2020

/s/ George Bochetto
George Bochetto, Esquire

CERTIFICATE OF SERVICE

I, George Bochetto, Esquire, hereby certify that the foregoing Answer to Motion for Protective Order was served on the following counsel via the Court's Electronic Notice and via email:

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Dated: April 20, 2020

/s/ George Bochetto
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EXHIBIT A

when he became aware of the tweet, he brought it to the District Attorney's attention; the District Attorney determined that it violated the Office's established Social Media Policy; the District Attorney spoke with the Communications Director about the matter; and the Communications Director was provided written notice that her tweet violated the Office's media policy (Prabhakaran Affidavit, ¶¶ 11-14). Thus, contrary to what Mrs. Faulkner's attorneys claim, the inappropriate tweet cannot be taken as showing that the District Attorney's Office has a conflict of interest in this case.

3. The District Attorney's strategic decision to not oppose Defendant Cook's remand request.

Petitioner Faulkner has failed to identify any conflicts of interest requiring the District Attorney's Office's disqualification from this case. At bottom, it appears that her request to have the Office removed is based on nothing more than her disagreement with (or misunderstanding of) a strategic decision made by the Office. Specifically, Mrs. Faulkner is displeased that the Office did not oppose Defendant Cook's request for the case to be remanded to the PCRA court for the consideration of alleged newly-discovered evidence.[17] Petitioner Faulkner's disagreement with this decision is not a basis for removing the Office from the case.

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[17] As explained above, almost all of the facts that Mrs. Faulkner relies upon to argue that the District Attorney's Office has a conflict of interest were known (or knowable) to her when this case was in the PCRA court. Mrs. Faulkner, however, (footnote continued . . .)

The relevant facts are as follows: While Defendant Cook's fifth PCRA petition was pending in the PCRA court, the PCRA court judge directed the Philadelphia District Attorney's Office to produce for his review its complete file for the case. The Office subsequently provided the PCRA court judge with 32 boxes, which it believed constituted the complete file.

After the PCRA court reinstated Defendant Cook's appellate rights, the District Attorney's Office discovered six additional boxes containing documents relating to this case. These six boxes had been stored in a different location than the 32 boxes previously turned over to the PCRA court. The District Attorney's Office informed the PCRA court judge that it had discovered these additional boxes, and, in the interests of full transparency, it made them available to Defendant Cook's attorneys for review.

Defendant Cook subsequently filed his appellate brief in the Superior Court for his reinstated PCRA appeals. On that same date, he also filed a motion for a remand to the PCRA court to consider what he contends is newly-discovered evidence his attorneys found while reviewing the contents of the six boxes. The alleged newly-discovered evidence consists of a letter written by an eyewitness to

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did not seek removal of the District Attorney's Office in that court. Instead, as she concedes in her petition, it was the Office's decision not to oppose Defendant Cook's remand request that led her to seek the Office's removal from the case (*see* King's Bench Petition, 5).

the trial prosecutor asking about money supposedly owed to him; handwritten notes Defendant Cook contends show the prosecutor kept track of the races of the prospective jurors during jury selection; and documents relating to the prosecution of a second eyewitness's prostitution cases. Defendant Cook stated that these newly-discovered documents relate to the claims he has raised in his present appeal before the Superior Court. Accordingly, he asked the Superior Court to remand the case to the PCRA court so it could consider the alleged new evidence.

The District Attorney's Office filed a response to Defendant Cook's remand motion. In the response it stated that, "[w]ithout, at the present time, taking a position on the relevance and/or significance of these newly-discovered documents, the Commonwealth does not oppose a remand so that the documents may be presented to the PCRA court."[18] The Superior Court subsequently entered an order stating that it was deferring decision on Defendant Cook's remand motion to the panel assigned to decide the merits of his appeal (and so the motion there pends).

In the King's Bench petition, Mrs. Faulkner's attorneys assert that by not opposing the remand motion, the District Attorney's Office has essentially "refuse[d] to carry out [its] responsibility to enforce the law and defend the prosecution of a stone-cold murderer" (King's Bench Petition, 5). Unfortunately, Mrs.

[18] Commonwealth's Response to Defendant's Motion for Remand to the PCRA Court to Consider Newly-Discovered Evidenced, attached as Exhibit A.

Faulkner's attorneys have, once again, made an exaggerated allegation that simply is not true.

The District Attorney's Office did not oppose the remand request because it desires to bring the case to a conclusion as expeditiously as possible. Defendant Cook has claimed that the "newly-discovered evidence" relates to the issues raised in his current appeal. Were the District Attorney's Office to oppose the remand request, and were the Superior Court to deny the remand request, then once the current round of appeals is completed, Defendant Cook would no doubt file yet another PCRA petition based on the supposed new evidence. This would then entail another whole round of PCRA and appellate proceedings regarding issues similar to those currently on appeal.

The District Attorney's Office's desire to bring this case to a conclusion in the quickest way possible is fully reasonable. As her own attorneys state, Mrs. Faulkner "has had to endure [Defendant Cook's] seemingly never ending, serial appeals and PCRA petitions over the course of the last 38 years" (King's Bench Petition, 16). The District Attorney's Office believed that opposing the remand request would do nothing more than to extend the litigation for many more years, which is something neither the District Attorney nor Mrs. Faulkner desires.

It is notable that in a different section and context of the King's Bench petition, Mrs. Faulkner's attorneys acknowledge that after Defendant Cook's death

sentence was vacated, a prior administration decided not to re-seek the death penalty (King's Bench Petition, 15). According to Mrs. Faulkner's attorneys, this decision was made "in an effort to bring this matter to a close after nearly 30 years" of litigation (*id.*). Mrs. Faulkner's attorneys reference this prior decision without offering any criticism of it, even though, unlike the current District Attorney's decision regarding a procedural matter, that decision effectively granted substantive relief to Defendant Cook. The current District Attorney is similarly not criticizing the prior administration's decision not to re-seek the death penalty "in an effort to bring this matter to a close" (*id.*). He makes this observation simply to demonstrate that his own desire to bring this matter to a close as soon as possible is not at all remarkable.

A second reason for the District Attorney's decision not to oppose Defendant' Cook's remand request was its conclusion that a remand might be the best way to address the claims regarding the "newly-discovered evidence." If the Superior Court granted the remand and if the PCRA court determined that an evidentiary hearing was necessary, the District Attorney's Office planned to present the trial prosecutor, Joseph McGill, Esquire, at that hearing. Defendant Cook's newly-discovered-evidence claims all involve Mr. McGill. Mr. McGill (like many who were involved in Defendant Cook's trial) is advancing in age. Thus, the District Attorney believed it would be advantageous to obtain his testimony now, while he

is unquestionably available, than it would be to push this issue years down the road when, due to the passage of time, he may no longer be available to testify.

Petitioner Faulkner's attorneys seem to believe that the Philadelphia District Attorney could have "contested the legitimacy of the so-called 'new evidence'" in the Superior Court (*see* King's Bench Petition, 4). They do so by pointing to the numerous factual statements Mr. McGill makes in his affidavit regarding Defendant Cook's claims. What Mrs. Faulkner's attorneys fail to appreciate, however, is that the Superior Court is not a fact-finding court. Thus, a remand to the PCRA court would be necessary so a fact finder (the PCRA court judge) could determine their credibility. It was for this reason too that the District Attorney did not oppose Defendant Cook's remand motion.

That the District Attorney agreed to a remand in this case as part of a strategic decision is not at all without precedent. For example, in 1997, a different Philadelphia District Attorney (the Honorable Lynne Abraham) informed this Court she did not oppose "a limited remand [to the PCRA court] for the purpose of taking any relevant and admissible testimony with respect to these [Defendant Cook's] withheld allegations."[19] The prior District Attorney did not oppose the remand be-

[19] Commonwealth's Answer to Defendant [Cook's] Petition for a Second Pre-Appeal Remand, ¶ 5, filed April 14, 1997, attached as Exhibit J.

cause she believed it would be the best way to conclusively dispose of Defendant Cook's claim.[20]

The present District Attorney similarly decided not to oppose Defendant Cook's most recent remand request because he believed a remand could be the best and most expeditious way to resolve this matter. The District Attorney understands that Mrs. Faulkner may not agree with this strategic decision. That disagreement, however, does not provide a basis for removing the District Attorney from this case. *Cf. Commonwealth v. Williams*, 980 A.2d at 521-22 (the fact that the defendant might fault the strategy pursued by his attorney, did not mean that the attorney was acting under a conflict of interest).

4. The case law supplied by Mrs. Faulkner's attorney's does not support her claim.

Mrs. Faulkner's attorneys fail to identify any cases that demonstrate that disqualification of the District Attorney's Office would be proper here. Curiously, the case they devote the most attention to is *Commonwealth v. Robinson*, 204 A.3d 326 (Pa. 2018) (*see* King's Bench Petition, 25-28, 31-33). Mrs. Faulkner's attorneys appear to be unaware that the four justices who heard the case were "equally divided." *Commonwealth v. Robinson*, 204 A.3d at 326 (*per curiam* order). Thus, the PCRA court's dismissal of Robinson's PCRA petition (which was preceded by

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[20] See Exhibit J, ¶ 5.