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Filed in Supreme Court

JAN 7 2015

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FILED UNDER SEAL

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:	:	SUPREME COURT OF PENNSYLVANIA NO. 176 M.D.D MISC. KT 2012
THE THIRTY-FIFTH STATEWIDE INVESTIGATING GRAND JURY	:	MONTGOMERY COUNTY COMMON PLEAS M.D. 2644-2012

**MEMORANDUM IN SUPPORT OF  
THE ANSWER OF SPECIAL PROSECUTOR  
TO THE QUO WARRANTO ACTION  
OF ATTORNEY GENERAL KATHLEEN G. KANE, INDIV.**

I. BACKGROUND

Attorney General Kathleen G. Kane, individually and apart from the Office of Attorney General (OAG) has filed of record a *Quo Warranto Action* challenging the legal authority of the Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury to empanel and supervise such Grand Jury and to appoint a Special Prosecutor thereto.

Supervising Judge, William R. Carpenter, has issued his Opinion of record with this Court on 12/20/2014.

Thomas E. Carluccio, Esq., as appointed Special Prosecutor has timely filed his Answer to the Quo Warranto Action, and presents this Legal Memorandum in support thereof.

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## II. ARGUMENT

A. The Investigating Grand Jury Act, including without limitation, the Pennsylvania Constitution, are both applicable in this concern, and confirm the authority of the Supervising Judge to establish the Thirty-Fifth Investigating Grand Jury, and to appoint a Special Prosecutor therefore.

Under both statute and the Pennsylvania Constitution, the Supervising Judge maintains the legal authority to oversee the proceedings of the Thirty-Fifth Investigating Grand Jury, and to appoint a Special Prosecutor thereto. In the interest of judicial economy, the Special Prosecutor adopts in full the discussion and legal analysis set forth in Supervising Judge Carpenter's Opinion as dispositive on the issues raised by Attorney General Kane in her *Quo Warranto Action*.

In short, there is sufficient legal precedent for a Supervising Judge to appoint a special prosecutor and/or oversee grand jury proceedings. See *In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa. 296, 19 A.3d 491 (2014); *In Re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006); *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 78 (Pa. 1980). *Castellani v. The Scranton Times*, 956 A.2d 937 (PA. 2008).

B. A Constrained Reading of 42 §4544(a) Yields a Nonsensical Outcome, Which is Contrary to the Preservation of the Integrity of the Grand Jury System and Undermines the Proper Oversight of the Conduct of the Office of Attorney General, While Invoking Avoidable Conflicts-in-Interest.

Here it is presumed that Attorney General Kane relies upon a self-serving and constrained reading of 42 §4544(a) to assert that only the Attorney General may establish a multicounty investigating grand jury upon application to the Supreme Court, and that the

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Supervising Judge in the underlying matter has limited authority, not the least of which is to appoint a Special Prosecutor. Such position is nonsensical in view of the underlying events relating to documentation subject to grand jury secrecy protection improperly released to the public news media by yet identified person(s) within the OAG.

Moreover, and of consequence, the Thirty-Fifth Investigating Grand Jury was indeed empanel and supervised in accordance with the requirements of 42 §4544(a), notably under Application for an Order Directing that a Multicounty Grand Jury be Convened by the then Attorney General Linda Kelly. A copy of the Application is attached hereto, made a part hereof and marked **Exhibit A**. Further, upon such Application, This Honorable Court issued its Order of 10/4/2012 designating the Hon. William R. Carpenter of the 38<sup>th</sup> Judicial District, Montgomery County, Pennsylvania as the subject Supervising Judge. A copy of the aforementioned Order is attached hereto, made a part hereof and marked **Exhibit B**.

In view of the Application and Order, consistent with law and the Pennsylvania Constitution, the Supervising Judge maintains the plenary power to supervise the proceedings of the applicable grand Jury and to appoint a Special Prosecutor where warranted. Such action was undertaken here, and is not out of the ordinary – as charged by Attorney General Kane.

With the convening of the Thirty-Fifth Statewide Investigating Grand Jury and appointment of a Special Prosecutor, attention is directed to addressing the investigation of improper disclosure of information and documentation properly protected under grand jury secrecy.

Of interest, both the OAG and Attorney General Kane have effectively admitted the disclosure of OAG materials came from within the OAG, and perhaps from the Attorney General

herself.<sup>1</sup> Notwithstanding such admission, Attorney General Kane advances an interpretation of 42 §4544(a) which yields an illogical result that effectively prevents the establishment of a multicounty investigating grand jury to investigate into the internal administrative affairs of the OAG on all occasions where the Attorney General is not inclined to seek convening a multicounty investigating grand jury. The implications for continued government corruption or serious breaches of grand jury secrecy, unabated by the review of a grand jury, such as here, are glaringly obvious. As such, it is respectfully asserted that Attorney General Kane overstates her case, in making claim that only the Attorney General may lawfully investigate what would be an investigation of the conduct of the OAG, and that such right is protected by the Pennsylvania Constitution.

The Special Prosecutor elects to adopt the conclusions drawn by David C. Toomey, *Special Investigating Grand Jury*, 111 U. Pa.L.Rev., 954, (1963), that grand juries are best qualified to address misconduct and maintain public confidence and integrity in the court system and that the courts maintain the "inherent power" to convene and supervise the operations a grand jury, wherein it is stated:

"Because of its unique investigative powers, the grand jury is potentially the most effective body to which the public can look for exposure of corruption. This potential has not been fully realized because of the inflexible application of common-law 'rules' regarding the court's 'inherent power.' ... [H]owever, a review of the grand jury's development and the power of the courts to supervise and administer the criminal judicial system indicates that courts do have the power to act in extraordinary situations. To deny this nonstatutory power is to impair effective public control of governmental corruption,

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<sup>1</sup> It is noted that in multiple press releases by both Attorney General Kane and her legal counsel, she has offered a defense to any personal charges that might be made against her that she could not be held in contempt for any improper release of grand jury information because she either did not personally sign an Oath of Secrecy, or alternatively that the documentation disclosed to the press did not constitute work product to which grand jury secrecy protection attaches under the Investigating Grand Jury Act.

thereby undermining public faith in the political impartiality of the judiciary.  
“Id. At 973

Finally, Attorney General Kane, either individually and/or through the OAG has failed to articulate before this Court, in her pleadings or otherwise, any reasonable methodology on how the OAG might properly and realistically investigate itself in this situation, thereby eliminating the inherent conflicts-in-interest that would arise. Indeed, it is respectfully asserted that the conflicts of interest so clearly associated with the OAG conducting an investigation of itself on matters pertaining to violations of grand jury secrecy represent a position which is irresponsible. This is simply not a simple concern appropriate for a run-of-the-mill internal investigation.

In conclusion, the Supervising Judge properly presents to this Honorable Court the holding in *In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa. 296, 19 A.3d 491 (2014) which stands for the proposition that upon application by the Attorney General a Supervising Judge maintains the legal authority to empanel and oversee a state wide investigating grand jury to address alleged grand jury leaks. Here such application exists in furtherance of 42 Pa.C.S.A. 4544. For the reasons highlighted above, such holding represents sound legal precedent, and properly applies to the underlying matter.

**C. Events Associated with the Conduct of Attorney General Kane Render the Challenges Afforded under the Quo Warranto Action - Moot.**

It must be acknowledged, that Attorney Kane has voluntarily submitted herself to the jurisdiction of this Honorable Court through multiple actions, including without limitation: (i) her filing a Motion to Quash the Grand Jury Subpoena; (ii) her making Application to the Supreme Court seeking multiple modes of relief; and (iii) her physical attendance before the

Grand Jury in furtherance of an issued subpoena. All of such entries to the jurisdiction of this Court were made without any reservation of rights challenging the authority of the Supervising Judge, and the appointment of a Special Prosecutor. Accordingly, Attorney General Kane's conduct have effectively resulted in her waiver and relinquishment to challenge the legal authority of the Supervising Judge which she has now made with her *Quo Warranto Action*. It is therefore respectfully submitted that in voluntarily submitting to the jurisdiction of this Honorable Court, Attorney General Kane's claims are effectively rendered moot.

### III. CONCLUSION

For the foregoing reasons, and under both the Constitutional and statutory authority referenced, the *Quo Warranto Action* filed by Attorney General Kane, Individ. should be denied, under law and for events which render such arguments moot.



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(484) 674-2899  
*Special Prosecutor of Investigating Grand Jury No. #35*

DATED: 1/2/15

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# EXHIBIT A

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Application for an Order Directing  
that a Multicounty Grand Jury be Convened by the then Attorney General Linda Kelly

IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

IN RE: APPLICATION OF LINDA L. KELLY, :  
ATTORNEY GENERAL OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
REQUESTING AN ORDER DIRECTING THAT AN :  
ADDITIONAL MULTICOUNTY INVESTIGATING :  
GRAND JURY HAVING STATEWIDE :  
JURISDICTION BE CONVENED :

NO. 176

MISC. DOCKET 2012

APPLICATION REQUESTING AN ORDER DIRECTING  
THAT AN ADDITIONAL MULTICOUNTY INVESTIGATING GRAND  
JURY HAVING STATEWIDE JURISDICTION BE CONVENED

TO THE HONORABLE RONALD D. CASTILLE, CHIEF JUSTICE OF  
PENNSYLVANIA:

AND NOW, comes Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania, who makes application pursuant to the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541 *et seq.*, for the creation of an additional multicounty investigating grand jury having statewide jurisdiction, and in support thereof avers as follows:

1. On June 23, 2010, upon the application of the Attorney General, the Court issued an Order directing that an additional multicounty investigating grand jury having statewide jurisdiction—the Thirty-Second Statewide Investigating Grand Jury—be convened.

2. The Thirty-Second Statewide Investigating Grand Jury was impaneled in Norristown, Montgomery County, on October 26, 2010.

TRUE & CORRECT COPY

ATTEST: OCT - 5 2012

  
ELIZABETH E. ZISK  
CHIEF CLERK



3. By majority vote on February 29, 2012, the Thirty-Second Statewide Investigating Grand Jury voted to expand its term by a period of 6 months.

4. The last session of the Thirty-Second Statewide Investigating Grand Jury is October 19, 2012, and the Thirty-Second Statewide Investigating Grand Jury expires on October 26, 2012.

5. A total of 132 criminal investigations have been submitted to the Thirty-Second Statewide Investigating Grand Jury to date, 106 of which involve allegations of organized crime or public corruption or both.

6. Of those 132 investigations, 35 investigations will not be completed prior to the expiration of the Thirty-Second Statewide Investigating Grand Jury and will continue to require the investigative resources of a statewide investigative grand jury. Of these 35 investigations, 33 involve allegations of organized crime or public corruption or both. Another 6 investigations that will be ready to be presented to the proposed new grand jury will be new investigations. All of these new investigations involve allegations of organized crime or public corruption or both.

7. There are currently two other active statewide investigating grand juries in the Commonwealth of Pennsylvania:

A. The Thirty-Third Investigating Grand Jury was created by this Court's Order of November 27, 2010, and is located in Harrisburg, Dauphin County. The Supervising Judge of this grand jury is the Honorable Barry Feudale. This grand jury was impaneled on March 7, 2011, and its term will expire on March 7, 2013, with a final scheduled session on February 15, 2013, the grand jury having voted to extend its term.

B. The Thirty-Fourth Statewide Investigating Grand Jury was created by this Court's Order of April 14, 2011, 2011, and is located in Pittsburgh, Allegheny County. The Supervising Judge of this grand jury is the Honorable Norman H. Krumenacker. This grand jury was impaneled on August 8, 2011, and its term will expire on February 8, 2013, with a final scheduled session on January 18, 2013, unless the grand jury votes to extend its term.

8. The 41 investigations described above that will require the resources of a statewide investigating grand jury cannot be adequately conducted by the Thirty-Third Statewide Investigating Grand Jury located in Harrisburg. This grand jury is currently running at full capacity, operating one full week per month, Monday through Friday, from 8:30 a.m. to 5:00 p.m. A total of 48 investigations have been submitted to this grand jury to date, 16 of which involve allegations of organized crime or public corruption or both. As the date on which this grand jury will expire approaches, it is anticipated that the presentation of evidence will accelerate so that investigations may be completed before its expiration.

9. The 41 investigations described above that require the resources of a statewide investigating grand jury cannot be adequately conducted by the Thirty-Fourth Statewide Investigating Grand Jury located in Pittsburgh. This grand jury, which was impaneled on August 8, 2011, is currently running at full capacity, operating one full week per month, Monday through Friday, from 8:30 a.m. to 5:00 p.m. A total of 41 investigations have been submitted to this grand jury to date, 30 of which involve allegations of organized crime or public corruption or both. As the date on which this grand jury will expire approaches, it is anticipated that the

presentation of evidence will accelerate so that investigations may be completed before its expiration.

10. Moreover, the 41 investigations described above that require the resources of a statewide investigating grand jury originate in the eastern district of Pennsylvania. Transporting witnesses and evidence from Norristown to the middle and western districts of Pennsylvania is impractical and costly, and, in my opinion as Attorney General, would prevent the Commonwealth from adequately and effectively conducting these investigations

11. The 41 investigations described above that require the resources of a grand jury cannot be adequately conducted by a county grand jury because venue over these investigations lies throughout numerous counties in Pennsylvania.

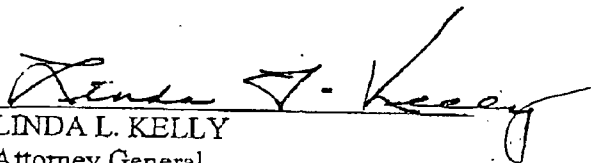
12. In my judgment as Attorney General:

- A. The convening of an additional statewide investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth;
- B. The investigation of organized crime or public corruption or both cannot be adequately performed by a county investigating grand jury available under section 4543 of the Investigating Grand Jury Act, 42 Pa. C.S. § 4543;
- C. The volume of work of the Thirty-Third and Thirty-Fourth Statewide Investigating Grand Juries exceeds the capacity of these grand juries both to discharge their obligations and to assume the obligations of the Thirty-Second Statewide Investigating Grand Jury; and

D. The powers of an additional statewide investigating grand jury are needed to fully and adequately investigate organized crime and public corruption in Pennsylvania. Because persons with knowledge of these activities are often unwilling to discuss them, the ability of the grand jury to compel the attendance of witnesses and to compel their testimony under oath is needed. The ability to take testimony under oath is also needed in order to preserve the testimony of these witnesses for later evidentiary use in the event the witnesses testify differently at trial. The ability to apply for orders of immunity for witnesses involved in organized crime and public corruption is also needed in order for the Commonwealth to conduct a full and adequate investigation of these illicit activities. In my experience, persons or entities involved in these activities often keep records describing their activities. The power of the grand jury to compel the production of this documentary evidence is also required in order to conduct a full and adequate investigation.

WHEREFORE, the Attorney General of the Commonwealth of Pennsylvania respectfully requests that this Honorable Court, within 10 days of the filing of this application, issue an order directing that an additional multicounty investigating grand jury having statewide jurisdiction be convened, pursuant to the provisions of Sections 4544 and 4547 of the Investigating Grand Jury Act, 42 Pa. C.S. §§ 4544, 4547. Because there exist throughout the Commonwealth criminal activities encompassed in the definition of organized crime and public corruption as set forth in the Act that require the resources of an additional multicounty investigating grand jury for proper and complete investigation, and because Montgomery County is reasonably accessible to persons having business with the grand jury due to available transportation facilities, it is further requested that this Honorable Court designate Montgomery County as the location for the additional multicounty investigating grand jury having statewide jurisdiction.

Respectfully submitted,

  
LINDA L. KELLY  
Attorney General  
Commonwealth of Pennsylvania

Date: August 28, 2012

VERIFICATION

I, LINDA L. KELLY, Attorney General of the Commonwealth of Pennsylvania, hereby verify that the facts set forth in the foregoing application are true and correct to be the best of my knowledge or information and belief. This verification is given subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.



LINDA L. KELLY  
Attorney General  
Commonwealth of Pennsylvania

Date: August 28, 2012

# **EXHIBIT B**

Order of the Chief Justice of Pennsylvania, Ronald D. Castille

IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

2012 NOV 19 AM 7:54

CLERK OF COURTS  
OFFICE  
MONTGOMERY COUNTY  
PENNSYLVANIA

IN RE: APPLICATION OF LINDA L. KELLY, :  
ATTORNEY GENERAL OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
REQUESTING AN ORDER DIRECTING THAT AN :  
ADDITIONAL MULTICOUNTY INVESTIGATING :  
GRAND JURY HAVING STATEWIDE :  
JURISDICTION BE CONVENED :

NO. 176

MISC. DOCKET 2012

MD 2644.2012

ORDER OF COURT

AND NOW, this 4<sup>th</sup> day of OCTOBER, 2012, upon consideration of the application of Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania, and it appearing to the Court that the granting of the application is appropriate under the Investigating Grand Jury Act, 42 Pa.C.S. § 4541 *et seq.*, it is hereby ORDERED as follows:

1. The Acting Attorney General's application requesting an order directing that an additional multicounty investigating grand jury having statewide jurisdiction ("Thirty-Fifth Statewide Investigating Grand Jury") be convened is hereby GRANTED.

2. The Honorable WILLIAM R. CARPENTER, Judge of the Court of Common Pleas, 38<sup>th</sup> Judicial District, MONTGOMERY County, Pennsylvania, is hereby designated as Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury. All applications and motions relating to the work of the Thirty-Fifth Statewide Investigating Grand Jury—including motions for disclosure of grand jury transcripts and evidence—shall be presented to said Supervising Judge. With respect to investigations, presentments, reports, and all other proper activities of the Thirty-Fifth Statewide Investigating Grand Jury, Judge WILLIAM R. CARPENTER, as Supervising Judge, shall have jurisdiction over all counties throughout the Commonwealth of Pennsylvania. Judge



WILLIAM R. CARPENTER may temporarily designate another Judge who has been appointed by this Court as the Supervising Judge of a multicounty grand jury having statewide jurisdiction to act as Acting Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury when he is absent or otherwise unavailable.

3. Montgomery County is designated as the location for the Thirty-Fifth Statewide Investigating Grand Jury proceedings.

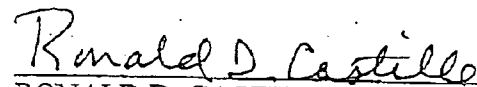
4. The Court Administrator of Pennsylvania is directed to draw six counties at random from the eastern district of Pennsylvania, pursuant to the provisions of Rule 241(a)(1) of the Pennsylvania Rules of Criminal Procedure, Pa. R. Crim. P. 241(a)(1), and that these six counties, plus Montgomery County, shall together supply jurors for the Thirty-Fifth Statewide Investigating Grand Jury.

5. The Court Administrator of Pennsylvania is directed to obtain the names and addresses of persons residing in the aforesaid counties who are eligible by law to serve as grand jurors, pursuant to the provisions of Rule 241(a)(2) of the Pennsylvania Rules of Criminal Procedure, Pa. R. Crim. P. 241(a)(2).

6. The total of such names of prospective jurors to be collected shall be 200, of which 50 shall be selected at random and summoned by the Court Administrator of Pennsylvania to Montgomery County. The Supervising Judge shall impanel the investigating grand jury from this panel of 50 prospective jurors. If it becomes necessary, additional prospective jurors shall be summoned by the Supervising Judge from among the remaining 150 prospective jurors.

7. The Thirty-Fifth Investigating Grand Jury will remain in session for not more than 18 months following the date that it is impaneled by the Supervising Judge.

8. The Attorney General of the Commonwealth of Pennsylvania, or her designee in charge of the Thirty-Fifth Statewide Investigating Grand Jury, may apply, if necessary, to the Supervising Judge for an extension of the term of the Thirty-Fifth Statewide Investigating Grand Jury for an additional period of up to six months, if, at the end of its original term, the investigating grand jury determines by majority vote that it has not completed its business. The grand jury's term, including any extension thereof, shall not exceed 24 months from the date it was originally impaneled by the Supervising Judge.

  
RONALD D. CASTILLE  
Chief Justice of Pennsylvania

TRUE & CORRECT COPY

ATTEST: OCT - 5 2012

  
ELIZABETH E. ZISK  
CHIEF CLERK

