

IN THE SUPREME COURT OF PENNSYLVANIA

No. 197 MM 2014

IN RE: THE THIRTY-FIFTH STATEWIDE INVESTIGATING GRAND JURY

PETITION OF ATTORNEY GENERAL KATHLEEN G. KANE

SUPPLEMENTAL MEMORANDUM OF LAW
IN SUPPORT OF ATTORNEY GENERAL KATHLEEN G. KANE'S
QUO WARRANTO ACTION

Proceedings upon Attorney General Kathleen G. Kane's December 18, 2014 *Quo Warranto* Action in this Court's Original Jurisdiction pursuant to Pa. C.S. § 721

PETITIONER'S BRIEF

Amil M. Minora, Esq.
Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
(570) 961-1616

Gerald L. Shargel, Esq.
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-2637

*Attorneys for Attorney General
Kathleen G. Kane*

Received in Supreme Court

FEB 4 2015

Middle

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.....	1
ORDERS IN QUESTION	2
STATEMENT OF THE SCOPE AND STANDARD OF REVIEW	3
STATEMENT OF THE QUESTIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	6
SUMMARY OF ARGUMENT.....	10
ARGUMENT FOR APPELLANT	12
I. There Is No Statutory Authority in Pennsylvania for the Appointment of a Special Prosecutor to Investigate the Office of Attorney General; The Independent Counsel Authorization Act and its Legislative History Demonstrate that Judge Carpenter’s Appointment of a Special Prosecutor in this Case was Unlawful.....	12
A. There is No Current, Valid Statutory Authority for the Appointment of a Special Prosecutor.....	12
B. The Independent Counsel Authorization Act and its Legislative History Demonstrate that in its Absence No Power Exists to Appoint a Special Prosecutor to Investigate the Office of Attorney General.....	13
II. This Court’s Decision in <u>Smith v. Gallagher</u> is Directly On Point; There is No Direct Conflict Between <u>Smith v. Gallagher</u> and <u>In re Dauphin County Fourth Investigating Grand Jury</u>.....	20
A. The Holding of <u>Smith v. Gallagher</u> is Directly On Point and Should Control in this Case	20
B. There is No Direct Conflict Between this Court’s Decisions in <u>Smith v. Gallagher</u> and <u>In re Dauphin County</u>.....	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

Commonwealth v. Perry, 798 A.2d 697 (2002).....24

In re Bruno, 101 A.3d 635 (Pa. 2014).....1

In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011)..... *passim*

In re L.J., 79 A.3d 1073 (2013).....24

In re Milton Hershey School, 911 A.2d 1258 (Pa. 2006)3

Reed v. Harrisburg City Council, 995 A.2d 1137 (Pa. 2010).....3

Smith v. Gallagher, 185 A.2d 135 (Pa. 1962)..... *passim*

STATUTES AND RULES

18 Pa. C.S. §§ 9301, *et seq.* *passim*

42 Pa. C.S. § 721.....1

42 Pa. C.S. §§ 4541, *et seq.*6, 12, 13

71 P.S. §§ 732-101, *et seq.*.....12, 22

P.L. 102, No. 19 (1998)13

P.L. 1148, No. 27112

Pa. R. Crim. P. 220, *et seq.*6

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: . . .
. . .
THE THIRTY-FIVE STATEWIDE . . . *QUO WARRANTO* ACTION
INVESTIGATING GRAND JURY . . .
. . .
PETITION OF . . . No. 197 MM 2014
ATTORNEY GENERAL . . .

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
ATTORNEY GENERAL KATHLEEN G. KANE'S *QUO WARRANTO* ACTION

STATEMENT OF JURISDICTION

This Court has original jurisdiction over Attorney General Kane's *quo warranto* action.

Section 721 of the Pennsylvania Judicial Code enumerates the types of cases over which this Court has original jurisdiction: "*habeas corpus*, mandamus or prohibition to courts of inferior jurisdiction, and *quo warranto* as to any officer of statewide jurisdiction." In re Bruno, 101 A.3d 635, 665 (Pa. 2014) (citing 42 Pa.C.S. § 721).

On May 29, 2014, Thomas E. Carluccio, Esq. was appointed by Hon. William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, as a "Special Prosecutor." (Exhibit A, Order of Hon. William R. Carpenter, dated May 29, 2014, at 1.) His mandate was to conduct a "substantive investigation ... into allegations that statewide Grand Jury secrecy may have been compromised." (Id.)

Because the Mr. Carluccio was appointed as an "officer of statewide jurisdiction," this Court has original jurisdiction over this *quo warranto* action. See 42 Pa.C.S. § 721.

ORDERS IN QUESTION

Two Orders are at issue in this case.

First, on May 29, 2014, Hon. William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, issued an Order appointing Thomas E. Carluccio, Esq. as “Special Prosecutor with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any alleged disclosure of information protected by the law and/or intentional and/or negligent violations and rules of Grand Jury secrecy as to a former Statewide Investigating Grand Jury[.]” (Exhibit A at 1-2.)

Second, on December 30, 2014, Judge Carpenter issued an Order in response to Attorney General Kane’s *quo warranto* motion stating that his “action in appointing Special Prosecutor Carluccio was proper,” and that Attorney General Kane’s *quo warranto* action “is now moot.” (Exhibit D, Order of Hon. William R. Carpenter, dated December 30, 2014, at 2, 4.) Judge Carpenter wrote that the *quo warranto* action was moot because “[o]n December 18, 2014, the Thirty-Fifth Statewide Investigating Grand Jury issued Presentment No. #60, finding that there were reasonable grounds [to believe] that Attorney General Kane was involved in violations of [the] criminal law our Commonwealth.” (*Id.* at 4-5.) Judge Carpenter wrote that “[s]ubsequently, on December 19, 2014, [he] entered an Order Accepting Presentment No. #60.” Judge Carpenter further wrote that he “referred the entire matter to the District Attorney of Montgomery County for any prosecution.” (*Id.* at 5.)

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The questions presented for review in this *quo warranto* action are “purely legal,” and therefore the “standard of review is *de novo* and scope of review is plenary.” See Reed v. Harrisburg City Council, 995 A.2d 1137, 1139, 1141 (Pa. 2010) (quoting In re Milton Hershey School, 911 A.2d 1258, 1261 (Pa. 2006)).

STATEMENT OF THE QUESTIONS INVOLVED

This Court requested supplemental briefing on two questions:

- (I) Question: Does the now-expired Independent Counsel Authorization Act, 18 Pa. C.S. §§ 9301 *et seq.*, and its legislative history shed light on the authority of a Judge to unilaterally select and appoint a Special Prosecutor to conduct an investigating grand jury into the actions of the Office of Attorney General?

Answer: We submit that the answer is yes; the Independent Counsel Authorization Act (which expired in 2003) and its legislative history demonstrate that (1) in its absence there is no authority for the judiciary to appoint a Special Prosecutor to conduct an investigating grand jury into the actions of the Office of Attorney General, and (2) such an appointment would never be lawful without appropriate procedures and safeguards in place to prevent abuse. Judge Carpenter did not address this question when he entered an Order appointing a Special Prosecutor (on May 29, 2014), or when he entered an Order accepting a Presentment issued by the investigating grand jury (on December 30, 2014). He did not address the Independent Counsel Authorization Act, its provisions and safeguards, its legislative history, or its expiration in 2003.

- (II) Question: Is there a conflict of law between this Court's decision in Smith v. Gallagher, 185 A.2d 135 (Pa. 1962), which held that a Judge had no lawful authority to appoint a Special Prosecutor to conduct an investigating grand jury, and In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011)?

Answer: We submit that the answer is no; this Court's decision in In re Dauphin County addressed a limited grant of authority for a Special Prosecutor to conduct an inquiry, not a full grant of executive power allowing a Special Prosecutor to conduct an investigating

grand jury, issue subpoenas, and initiate a prosecution at his discretion, as occurred in Smith, and here. Judge Carpenter did not address this question when he entered an Order appointing a Special Prosecutor (on May 29, 2014), or when he entered an Order accepting a Presentment issued by the investigating grand jury (on December 30, 2014). He did not address this Court's holding in Smith, at all.

STATEMENT OF THE CASE

This is a *quo warranto* action to quash the appointment of Thomas E. Carluccio, Esq. as Special Prosecutor for the 35th Statewide Investigating Grand Jury, and to vacate the Presentment issued by the Investigating Grand Jury.

On May 29, 2014, Hon. William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, issued an Order appointing Thomas E. Carluccio, Esq. as “Special Prosecutor with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any alleged disclosure of information protected by the law and/or intentional and/or negligent violations and rules of Grand Jury secrecy as to a former Statewide Investigating Grand Jury[.]” (Exhibit A at 1-2.) The Order stated that the appointment was made “in accordance with the authority vested in [the court] by the 1078 Pennsylvania Investigating Grand Jury Act of 1978, 42 Pa. C.S. § 4541, *et seq.* and the procedural rules that followed (Pa. R. Crim. P. 220, *et seq.*) as well as relevant case law.” (Id. at 1.)

Also on May 29, 2014, Judge Carpenter sent a letter to Hon. Ronald D. Castille, former Chief Justice of this Court. (Exhibit B, Letter of Hon. William R. Carpenter, dated May 29, 2014, at 1.) Judge Carpenter informed the Court that he was “appointing a Special Prosecutor to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General’s Office.” (Id.) Judge Carpenter added: “I have decided that the matter is important enough to appoint a Special Prosecutor, Thomas E. Carluccio, Esq.” (Id.) Judge Carpenter closed the letter by stating: “Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge.” (Id.)

As “Special Prosecutor,” Mr. Carluccio was charged with investigating whether the Office of Attorney General unlawfully disclosed confidential grand jury material. The material at issue included two memoranda: one drafted in 2009 and the other in 2014. Both related to a 2009 grand jury proceeding.

On September 11, 2014, Attorney General Kane received a subpoena under which she was ordered to appear as a witness before the Pennsylvania Statewide Investigating Grand Jury “to testify and give evidence regarding alleged violations of the laws of the Commonwealth of Pennsylvania[.]”¹ The subpoena was signed by Supervising Judge William R. Carpenter. It instructed Attorney General Kane to direct any questions about her appearance to Thomas Carluccio.

On November 17, 2014, Attorney General Kane appeared as ordered before the grand jury. She answered each question posed by Mr. Carluccio, and her answers were absolutely truthful. She told the grand jury that she had authorized the release of the 2014 memorandum, because she believed it did not contain confidential grand jury information, and because she believed strongly in a policy of public transparency. She told the grand jury that she did not authorize the release of the 2009 memorandum, and indeed had never even seen it.

On December 18, 2014, Attorney General Kane filed a *quo warranto* action in this Court to quash the appointment of Thomas E. Carluccio, Esq. as Special Prosecutor for the 35th Statewide Investigating Grand Jury, as unlawful and unconstitutional. (Exhibit C, Memorandum of Law in Support of Attorney General Kathleen G. Kane’s *Quo Warranto* Action, at 1-2.) Attorney General Kane argued that Judge Carpenter’s appointment of a Special Prosecutor was

¹ This subpoena is not attached as an exhibit because it remains sealed as part of the underlying grand jury proceeding. It was not part of the record at the time this *quo warranto* action was unsealed.

unlawful because he lacked the statutory authority to do so, and unconstitutional because it violated the separation of powers inherent in the Pennsylvania constitution. (Id.)

On December 30, 2014, Judge Carpenter issued an Order in response to Attorney General Kane's *quo warranto* motion stating that his "action in appointing Special Prosecutor Carluccio was proper," and that Attorney General Kane's *quo warranto* action "is now moot." (Exhibit D at 2, 4.) Judge Carpenter wrote that the *quo warranto* action was moot because "[o]n December 18, 2014, the Thirty-Fifth Statewide Investigating Grand Jury issued Presentment No. #60, finding that there were reasonable grounds [to believe] that Attorney General Kane was involved in violations of [the] criminal law our Commonwealth," and "[s]ubsequently, on December 19, 2014, [he] entered an Order Accepting Presentment No. #60." (Id. at 4-5) Judge Carpenter wrote that he "referred the entire matter to the District Attorney of Montgomery County for any prosecution." (Id.)

On January 2, 2015, Mr. Carluccio filed an Answer to Attorney General Kane's *quo warranto* action. (Exhibit E, Memorandum in Support of the Answer of Special Prosecutor to the *Quo Warranto* Action, dated January 2, 2015.) He argued that "[u]nder both statute and the Pennsylvania Constitution, the Supervising Judge maintains the legal authority ... to appoint a Special Prosecutor." (Id. at 2.) He cited, however, no statute or constitutional provision that would grant Judge Carpenter the power to unilaterally select and appoint a Special Prosecutor to investigate the Office of Attorney General.

On January 14, 2015, Attorney General Kane filed a Reply. (Exhibit F, Reply Memorandum of Law in Support of Attorney General Kathleen G. Kane's *Quo Warranto* Action, dated January 14, 2015.)

On January 21, 2015, this Court issued an Order directing the parties to file supplemental briefs on an expedited briefing schedule. (Exhibit G, Letter and Order, dated January 21, 2015.)

Related proceedings, under Docket No. 7 MM 2015, remain under seal.

SUMMARY OF ARGUMENT

First, there is no legal authority – no current, valid statute exists in the Commonwealth of Pennsylvania – permitting Judge Carpenter’s unilateral selection and appointment of a Special Prosecutor to investigate the Office of Attorney General. At one time, the appointment of a Special Independent Prosecutor *was* lawful in Pennsylvania, under the Independent Counsel Authorization Act, 18 Pa. C.S. §§ 9301 *et seq.* That Act, however, expired in 2003, and no statute has been enacted to replace it. The legislative history of the Act demonstrates that in its absence there is no statutory authority for the appointment of a Special Prosecutor to conduct an investigating grand jury into the actions of the Office of Attorney General. The legislative history of the Act, and the framework of the Act itself, also demonstrate that Judge Carpenter’s unilateral selection and appointment of a Special Prosecutor would never have been lawful, even during the period the Act was effective. The Act contained detailed procedures and safeguards (including appointment of an independent counsel by majority vote of a randomly-selected three Judge panel, and only after preliminary investigation) designed to prevent abuse.

Second, this Court – more than 50 years ago – in Smith v. Gallagher, 185 A.2d 135 (Pa. 1962) (overruled on other grounds), held that a judge had no legal authority to unilaterally select and appoint a Special Prosecutor to conduct an investigating grand jury. This Court’s holding in Smith was unequivocal, and should control in this case. There is no direct conflict between this Court’s decisions in Smith and In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011). In re Dauphin County involved the appointment of a Special Prosecutor to conduct only a limited inquiry – he was *not* granted the power to conduct an investigating grand jury, to issue subpoenas, or to initiate a criminal prosecution at his own discretion. In other

words, he was not deputized with the full power and authority of the executive branch, in violation of the separation of powers inherent in the Pennsylvania constitution.

ARGUMENT FOR APPELLANT

I There Is No Statutory Authority in Pennsylvania for the Appointment of a Special Prosecutor to Investigate the Office of Attorney General; The Independent Counsel Authorization Act and its Legislative History Demonstrate that Judge Carpenter's Appointment of a Special Prosecutor in this Case was Unlawful

A. There is No Current, Valid Statutory Authority for the Appointment of a Special Prosecutor

There is no current, valid statutory authority in Pennsylvania for the appointment of a Special Prosecutor to conduct an investigating grand jury into the actions of the Office of Attorney General. Certainly, there is no statute granting a Judge the authority to select and appoint a Special Prosecutor on his own initiative, without procedural safeguards or oversight in place.

To the contrary, there is ample authority granting the Attorney General or a District Attorney the exclusive authority to conduct an investigating grand jury.

The Commonwealth Attorneys Act, 71 P.S. §§ 732-101 *et seq.*, specifically grants to the Attorney General the power to conduct an investigating grand jury. Pursuant to Section 732-206(b) of the Commonwealth Attorneys Act, "The Attorney General shall convene and conduct investigating grand juries as provided in the act of November 22, 1978 (P.L. 1148, No. 271), known as the 'Investigating Grand Jury Act.'" This statute vests authority to conduct investigations under the Investigating Grand Jury Act with the Attorney General, and provides for no exceptions.

The Investigating Grand Jury Act, 42 Pa. C.S. §§ 4541, *et seq.*, which governs the procedure for an investigating grand jury, specifically references an "Attorney for the Commonwealth" as the party empowered to conduct an investigation. And, the Act explicitly defines an "Attorney for the Commonwealth" as "[t]he district attorney of the county in which a

county investigating grand jury is summoned, or his designee, or the Attorney General or his designee if the Attorney General has superseded the district attorney; the Attorney General, or his designee, with respect to multicounty investigating grand juries.” 42 Pa. C.S. § 4542. In this case, which involves a multicounty investigating grand jury, the exclusive power to conduct that investigating grand jury is vested by statute in the Attorney General. No exception is provided in the Act for the appointment of a “Special Prosecutor” to step in and assume the duties of a statutorily-defined “Attorney for the Commonwealth.” See id. §§ 4541, *et seq.*

Certainly, nowhere in the Commonwealth Attorneys Act or the Investigating Grand Jury Act is a Judge imbued with the legal authority to select and appoint a Special Prosecutor to supersede the responsibilities of an Attorney for the Commonwealth, on his own initiative.

Such a statute did exist in Pennsylvania, but it expired in 2003 (see *infra*). No statute has been enacted to replace it.

**B. The Independent Counsel Authorization Act and its Legislative History
Demonstrate that in its Absence No Power Exists to Appoint a Special Prosecutor to
Investigate the Office of Attorney General**

In 1998, Pennsylvania adopted the Independent Counsel Authorization Act, 18 Pa. C.S. §§ 9301, *et seq.*² The purpose of the Independent Counsel Authorization Act was to provide a structured, controlled framework for conducting an investigation of the Attorney General, or a current or former employee of the Office of Attorney General. If a series of requirements were met, a Special Independent Prosecutor could be appointed, alleviating a potential conflict in a case where the Office of Attorney General would otherwise be forced to investigate one of its own employees.

² The Act was signed into law on February 18, 1998, by Pennsylvania Governor Thomas J. Ridge. See P.L. 102, No. 19 (1998)

The legislative history of the Act, and the provisions of the Act itself, demonstrate that in its absence there is no authority in Pennsylvania law for the appointment of a Special Prosecutor to investigate the Office of Attorney General. Likewise, the legislative history and provisions of the Act demonstrate that a Judge could never unilaterally select and appoint a Special Prosecutor to conduct an investigation of the Office of Attorney General. Under the Act, the appointment of a Special Independent Prosecutor would only be appropriate and lawful if a comprehensive set of procedures and safeguards were in place to prevent abuse of the office.

On June 10, 1997, there was discussion in the House of Representatives on the bill amendment (SB 635, A 2645, 181st Gen. Ass., 1997 Sess.) that would later become the Independent Counsel Authorization Act. Representative Albert Masland, the sponsor of the amendment and co-sponsor of its bill form (HB 1378), explained the purpose of the Act, and why it was necessary:

[B]asically what we are doing is we are establishing a manner in which we can investigate situations that arise in the Attorney General's Office or in cases where the Attorney General may have a conflict. *And right now we do not have an independent prosecutor here in Pennsylvania like they do at the Federal level. Basically, this would establish an independent counsel who would be able to step in and investigate matters, refer them for trial, basically pursue them just as an Attorney General or a district attorney would whenever there is a situation where there may be a conflict in the Attorney General's Office or when the impropriety may be such that it was done by the Attorney General or by a member of the Attorney General's staff.*

H. 181-40, 1997 Sess., at 1245 (Pa. June 10, 1997) (emphasis added).

In concluding his remarks, Representative Masland stated that he believed the Act was "essential," because without it there was no provision in the law for appointing a Special Prosecutor to lead an investigation of the Office of Attorney General: "*I truly believe that this measure is essential to us, and without it, there really is nothing to take its place.*" H. 181-40 at 1247 (emphasis added).

Representative Masland's reading of Pennsylvania law is clear: in the absence of additional legislation, there is no statutory authority for the appointment of a Special Prosecutor to investigate the Office of Attorney General.

Legal commentators arrived at the same conclusion. In a Comment in the Dickinson Law Review titled "Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working," dated Summer 2000, John M. Coles wrote, under the heading "Why the Statute is Necessary":

[T]here is no provision in the Commonwealth Attorneys Act to provide an outside trigger mechanism for a situation where possible prosecution by the attorney general may result in a conflict of interest. ... Therefore, some additional legislation was necessary in order to close this apparent 'loophole' in the Commonwealth Attorneys Act. ... Closing this loophole was one of the most important objectives of the Pennsylvania statute's prime sponsors. Representative Jeffrey E. Piccola pushed for passage of the legislation during his tenure in the House of Representatives. He continued his strong support of the law after he won a special election and became a member of the Senate of Pennsylvania in 1995. Senator Piccola said that 'the state law closes the loophole created by existing legislation and provides for a truly independent investigative procedure.'

John M. Coles, Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working, 104 Dick. L. Rev. 707, 721-22 (2000).

The legislative history of the Act also demonstrates the serious concern that a Special Prosecutor could conduct an investigation in a partisan or unfair manner, without proper oversight. To address that concern, the drafters of the Act included safeguards to prevent such abuse. On June 10, 1997, when the issue was raised, Representative Masland replied that there would be safeguards written directly into the Act:

There are some safeguards in this whole process that ensure that we are not going to be authorizing someone to be running pellmell across the Commonwealth. There has to be an initial preliminary investigation by the General Counsel's Office before that person even appoints a special investigative counsel, who will then conduct another preliminary investigation to see if there are really grounds for these charges before we even get to the independent counsel.

H. 181-40 at 1247.

John M. Coles, in his Comment, noted the importance of those safeguards:

Another reason why Pennsylvania's statute is likely to succeed is the number of safeguards built into the statute in order to prevent its abuse. The statute has provisions that require independent counsels to follow strict ethical standards and to comply with tight reporting deadlines. In addition, there are limitations on the independent counsel's ability to expand the jurisdiction of his prosecutorial inquiry.

Coles, Preserving, supra, at 725.

The legislative history of the Independent Counsel Authorization Act strongly supports our argument that Mr. Carluccio's appointment to the office of Special Prosecutor was unlawful. The drafters of the Act believed it was "essential," because in its absence there is no authority in Pennsylvania law for the appointment of a Special Prosecutor to investigate the Office of Attorney General. When the Act expired in 2003, the statutory authority for the appointment of a Special Prosecutor expired along with it. Mr. Carluccio's appointment (in 2014) therefore exceeded Judge Carpenter's authority, and was contrary to law.

Further, the legislative history demonstrates that Mr. Carluccio's appointment would never have been lawful. It was made without regard to the procedures and safeguards put in place by the Act's drafters to avoid potential abuse.

An examination of the Act itself provides additional clarity.

The Independent Counsel Authorization Act "establishes a systemic investigative process that must be followed in order to appoint an independent counsel." Coles, Preserving, supra, at 712.

The first part of the process is a two-step "preliminary investigation." 18 Pa. C.S. § 9312. If the General Counsel of the Commonwealth receives information that there may be

grounds to investigate the Office of Attorney General³, it has 30 days to determine “whether grounds to investigate exist, ... consider[ing] only the specificity of the information received and the credibility of the source of the information.” Id. §§ 9312(a), (c). “If within that 30-day period the General Counsel determines that the information is not specific or is not from a credible source,” the General Counsel must “close the matter” and proceed no further. Id. § 9312(d). If, however, “within that 30-day period the General Counsel determines that the information is specific and from a credible source,” the General Counsel would “appoint a special investigative counsel to commence a preliminary investigation with respect to that information.” Id.

The special investigative counsel conducting a preliminary investigation would be required to comply with a set of strict procedures. Id. § 9313. He would have 90 days to determine whether further investigation was warranted. Id. § 9313(a). And, he would have “limited authority.” Id. § 9313(b). In conducting a preliminary investigation, the special investigative counsel would “have no authority to convene grand juries, plea bargain, grant immunity or issue subpoenas.” Id. At the conclusion of the preliminary investigation, the special investigative counsel would report to a Special Independent Prosecutor’s Panel. Id. §§ 9314, 9315.

If the special investigative counsel determined that further investigation was not warranted, he would “promptly” notify the Special Independent Prosecutor’s Panel, and the Panel would “have no power to appoint an independent counsel with respect to the matters involved.” Id. § 9314.

³ Individuals subject to a preliminary investigation under the Act include “[t]he Attorney General, any Deputy Attorney General or any individual working in the Attorney General’s office who is defined as a ‘public employee’ under the Public Official and Employee Ethics Law,” and certain former employees of the Office of Attorney General. Id. § 9312(c).

If, however, the special investigative counsel determined that further investigation was warranted, he would “apply to the panel for the appointment of an independent counsel” – a Special Independent Prosecutor. Id. § 9315.

Under the Act, therefore, before any investigation could proceed to the grand jury stage or any subpoena could be issued, and before a Special Independent Prosecutor could be appointed, both the General Counsel and a special investigative counsel would have to be satisfied that grounds to investigate the Office of Attorney General existed, based in specific and credible evidence. In this case, of course, Judge Carpenter skipped those steps entirely. He appointed Mr. Carluccio as a Special Prosecutor immediately, and gave him the authority to conduct an investigating grand jury and issue subpoenas from the start.

Judge Carpenter also selected and appointed Mr. Carluccio on his own – a major break from the provisions of the Independent Counsel Authorization Act, which established a “Special Independent Prosecutor’s Panel” to consider an application for appointment. See id. §§ 9302, 9311. Under the Act, the Special Independent Prosecutor’s Panel would be composed of “one judge of the Commonwealth Court and two judges, including senior judges, of the courts of common pleas of the Commonwealth.” Id. § 9311. The members of the panel would be randomly “chosen by lot.” Id. The procedure for selecting members of the Panel would be “supervised by the Court Administrator of Pennsylvania in the Administrative Office of Pennsylvania Courts.” Id. The Administrative Office of Pennsylvania Courts would “disclose to the public the membership of the panel.” Id. Each member of the Panel would “hold office for a term of three years.” Id. § 9311(b). All decisions of the Panel would be made “by majority vote of the members.” Id. § 9311(d).

This randomly selected three-judge Panel would hold the exclusive power to appoint a Special Independent Prosecutor and define his “prosecutorial jurisdiction.” Id. §§ 9319(a)(1-2). Never was it contemplated that a Special Independent Prosecutor would be appointed by a single Judge, on his own initiative, as Judge Carpenter did here. The individual selected to hold the office would be chosen by the Panel, jointly, based on an application submitted by the special investigative counsel, and with consideration given to a set of specific guidelines and restrictions. Id. §§ 9316, 9319(a)(2). In this case, Mr. Carluccio was selected by criteria known only to Judge Carpenter, and without reference to any delineated guidelines.

The Act also imposed “[s]tandards of conduct applicable to independent counsel, persons serving in office of independent counsel and their law firms.” Id. § 9339. These standards included “[r]estrictions on employment while independent counsel and appointees are serving,” id. § 9339(a); “[p]ostemployment restrictions on independent counsel and appointees,” id. § 9339(b); and a “[o]ne-year ban on representation by members of firms of independent counsel,” id. § 9339(c). In this case, Mr. Carluccio was, of course, subject to none of those restrictions.⁴

Significantly, the Act also provided for the removal of an appointed independent counsel for “good cause,” which included, but was not limited to, “violations of any ethical rules governing the independent counsel, the Attorney General or district attorneys.” Id. § 9343(a).

Examination of the Independent Counsel Authorization Act and its legislative history makes two things clear. When the Act expired in 2003, there was no longer any statutory authority for the appointment of a Special Prosecutor to investigate the Office of Attorney

⁴ The Act further imposes standards for the “[c]ustody of records of independent counsel,” id. § 9340, and “[c]ost controls and administrative support,” id. § 9341. None of those standards would apply to Mr. Carluccio in this case.

General.⁵ And, even when the Act was effective, it required adherence to a rigorous procedural framework. Judge Carpenter’s appointment of Thomas Carluccio as Special Prosecutor in this case was unlawful on both fronts. Judge Carpenter had no authority for the appointment, and certainly no authority to make the selection and appointment of Mr. Carluccio on his own initiative, without regard to any procedures and safeguards considered essential by the Pennsylvania Legislature. For both of these reasons, we maintain that the appointment should be quashed, and the Presentment voided.

**II This Court’s Decision in Smith v. Gallagher is Directly On Point;
There is No Direct Conflict Between Smith v. Gallagher and In re Dauphin County
Fourth Investigating Grand Jury**

A. The Holding of Smith v. Gallagher is Directly On Point and Should Control in this Case

This Court – more than 50 years ago – in Smith v. Gallagher, 185 A.2d 135 (1962) (overruled on other grounds), held that a Judge had no legal authority to appoint a Special Prosecutor to conduct a grand jury investigation. The holding of Smith remains valid, and should control the outcome of this case.

In Smith, this Court addressed, *inter alia*, the appointment of an attorney as “Special Prosecutor” by a Judge of the Court of Quarter Sessions of Philadelphia County, who charged him with conducting an investigation using a “Special Grand Jury.” Id. at 137. This Court concluded that the Judge had acted without the authority of law, in part because “Special Prosecutor” was “an office which does not exist” under Pennsylvania law. Id. at 137, 149

⁵ Efforts by the Pennsylvania Legislature in 2013 and 2015 to resurrect the Independent Counsel Authorization Act further support our position that in its absence there is no authority for the appointment of a Special Prosecutor. See SB 292, 2013 Sess. (Pa. 2013); HB 146, 2015 Sess. (Pa. 2015).

(“[T]here is no public office in Pennsylvania known as Special Prosecutor.”) Correspondingly, this Court held that the Judge had exceeded his legal authority in appointing an attorney to hold that public office.

Here, as in Smith, Judge Carpenter “permitted himself an arbitrary exercise of judicial power.” See id. at 143. When Judge Carpenter ignored the plain language of the Commonwealth Attorneys Act and the Investigating Grand Jury Act (which grant exclusive investigative authority to Attorneys for the Commonwealth), “he abused his discretion.” See id. And, “[w]hen he appointed a ‘Special Prosecutor,’ he attempted the impossible because he was making an appointment to a phantom office.” See id. Thomas Carluccio was appointed to a public office that does not exist under the current statutory law of the Commonwealth, by a Judge who had no lawful authority to select and appoint him.

As this Court wrote in Smith, the facts here “emphasize what can occur when the regular forms and procedure of government are not followed, and judges embark on independent ventures, sailing in ships without sails of authority, using engines devoid of constitutional power and employing a compass lacking decisional direction.” See id. at 140.

The Court in Smith also addressed the resulting constitutional separation of powers violation. The Court held that by appointing a Special Prosecutor, the Judge of the Court of Quarter Sessions had “disfranchise[d] the people of Philadelphia in the realm of their freedom to select a District Attorney of their own choice.” Id. at 151. The Court held that leading a grand jury investigation was (at the time) solely within the power of the District Attorney, who “may not be removed from his office except by impeachment. No judge may dictatorially order him to refrain from doing his work.” Id.

In this case, Judge Carpenter – a member of the judiciary – clearly infringed on the exclusive domain of the executive branch. The power to conduct grand jury investigations is vested in the Attorney General by statute. 71 P.S. § 732-206(b). That power cannot be appropriated by the judiciary. Further, Judge Carpenter’s May 29, 2014 Order explicitly grants Mr. Carluccio “independent authority and jurisdiction to investigate *and prosecute to the maximum extent authorized by law*” any acts that he believed constituted criminal offenses. (Exhibit A at 1.) Permitting Mr. Carluccio to prosecute criminal offenses at his discretion clearly infringes on the exclusive power of the executive branch. As in Smith, an error of constitutional dimensions was committed in this case through the “arbitrary dismissal” of the Attorney General, a public official who was “elected by the people.” See Smith, 185 A.2d at 151. Judge Carpenter had no authority to put in the Attorney General’s place “a person whose qualifications have not been passed upon by the people, to discharge serious and solemn duties which involve the liberties and securities of the people.” See id.

B. There is No Direct Conflict Between this Court’s Decisions in Smith v. Gallagher and In Re Dauphin County

There is no direct conflict between this Court’s decisions in Smith v. Gallagher, 185 A.2d 135 (Pa. 1962) and In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011).

First and foremost, the cases are distinguishable because the powers granted to the Special Prosecutor in In re Dauphin County were expressly limited. The Special Prosecutor in that case was *not* deputized with the full power and authority of a prosecutor to unilaterally conduct an investigating grand jury, issue subpoenas, and initiate a prosecution at his discretion. In In re Dauphin County, the Special Prosecutor was granted the authority “to conduct inquiry,”

and “to retain reasonable investigative, clerical and secretarial services to facilitate the discharge of his duties.” Id. at 499. By express order, he was not granted the unilateral power to compel testimony or conduct a hearing, without petitioning the court for additional authorization. Id.⁶ And, nothing in his grant of authority would permit his involvement in the issuing of a presentment, or to otherwise initiate a criminal prosecution. Id.

In Smith, and in the present case, a single Judge endowed a private attorney with the full power of the executive branch – allowing him to conduct a full grand jury proceeding with all of the ancillary powers that entails. Here, Judge Carpenter granted Mr. Carluccio “full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law.” (Exhibit A at 1.) This is an extraordinary grant, essentially deputizing Mr. Carluccio as a prosecutor with the full “power,” “authority” and “jurisdiction” of the executive branch. As this Court held in Smith, this grant is without authority, contrary to law, and unconstitutional as a separation of powers violation. On this point alone, Smith and In re Dauphin County are clearly distinguishable on the facts, and therefore those two decisions are not in direct conflict.

Another significant factual distinction is that In re Dauphin County involved an inquiry initiated by the Supervising Judge of a currently-sitting grand jury, with regard to alleged leaks from that grand jury proceeding. In Smith, and in the present case, the authority to conduct an investigating grand jury was granted to a Special Prosecutor by a completely different Judge with no direct ties to the underlying grand jury proceeding. See Smith, 185 A.2d at 141. This demonstrates just how far Judge Carpenter exceeded his authority in the present case. His grant

⁶ The power granted in In re Dauphin County to conduct an “inquiry” is similar to the “limited authority” of a special investigative counsel under the Independent Counsel Authorization Act. See 18 Pa. C.S. § 9313(b).

of full prosecutorial power to Mr. Carluccio involved a grand jury proceeding that occurred a full five years earlier, and was supervised by a completely different Judge. See id. (“[T]he authority to charge a grand jury, in a situation like the one at bar, could only come through the approval of the assignment judge and the individual grand jury judges sitting during the months involved. No such approval was even remotely suggested in the case before us.”). On this ground, again, the cases of Smith and In re Dauphin County are clearly distinguishable.

Finally, it should be noted that in In re Dauphin County, the legal issue of whether the appointment of a Special Prosecutor was authorized by statute was not addressed by either the Court or the parties. Nor did the Court analyze the provisions of the Commonwealth Attorneys Act, the Investigating Grand Jury Act, the already-expired Independent Counsel Authorization Act, or this Court’s earlier holding in Smith. The legal justification (or lack thereof) for the appointment of a Special Prosecutor was only tangential to the Court’s central holding in In re Dauphin County, which related to the application of the Pennsylvania Shield Law. See 19 A.3d at 507-10. The Special Prosecutor’s appointment was addressed in *dicta*, was not fully adjudicated, and was not necessary to the determination of the case. Therefore any portion of In re Dauphin County addressing the appointment of a Special Prosecutor would not constitute the binding precedent of this Court. See In re L.J., 79 A.3d 1073, 1081 (2013) (doctrine of *stare decisis* “only applies to issues actually raised, argued and adjudicated, and only where the decision was necessary to the determination of the case,” and “is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to *dicta* or *obiter dicta*.”) (citing Commonwealth v. Perry, 798 A.2d 697, 707 (2002)).

For all of the preceding reasons, there is no direct conflict between this Court’s decisions in Smith and In re Dauphin County. The holding of Smith remains vital, the facts of Smith are

on point here, and the facts of In re Dauphin County are distinguishable. Smith should control the outcome of this case.

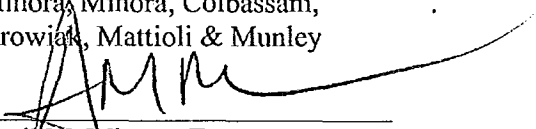
Conclusion

For the reasons set forth above, and in our opening Memorandum of Law, Attorney General Kane's *quo warranto* action should be granted.

Judge Carpenter exceeded his authority in unilaterally appointing a Special Prosecutor to conduct an investigating grand jury into the actions of the Office of Attorney General. He deputized a Special Prosecutor with all of the powers of the executive branch – powers that were not his to delegate. He acted without statutory authority, and in contravention of this Court's precedent. Mr. Carluccio's appointment should be quashed as unlawful and invalid, and any report or presentment issuing from this investigating grand jury should be vacated.

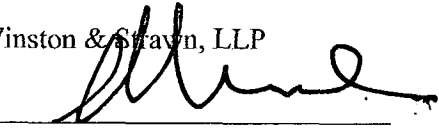
Dated: February 3, 2015

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley



Ami M. Minora, Esq.
Attorney for Attorney General Kathleen G. Kane
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
(570) 961-1616

Winston & Strawn, LLP



Gerald L. Shargel, Esq.
Attorney *Pro Hac Vice* for Attorney General
Kathleen G. Kane
200 Park Avenue
New York, NY 10166
(212) 294-2637

Exhibit

A

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA


IN RE: : MD 1424-2014
THE STATEWIDE :
INVESTIGATING GRAND JURIES : MONTGOMERY COUNTY COMMON PLEAS
: :
: :
: In Re: Powers and Responsibilities of
: Special Prosecutor Exercising
: Extraordinary Jurisdiction; on Allegations that
: Secret Grand Jury or Related Information was
: Unlawfully and/or Negligently
: Accessed/Released/Compromised

SEALING ORDER

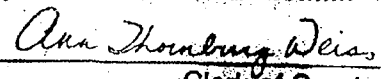
AND NOW, this 29th day of May, 2014; it is hereby ORDERED, that the attached Order of May 29, 2014 be filed under seal with the Clerk of Courts of Montgomery County until further Order of this Court.

CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.
2014 MAY 29 AM 8:53

BY THE COURT:


WILLIAM R. CARPENTER, J.
Supervising Judge

True and correct Copy
Certified from the record
This 29 Day of MAY A.D. 2014


Clerk of Courts
plm

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:

THE STATEWIDE

INVESTIGATING GRAND JURIES

:
:
: MONTGOMERY COUNTY COMMON PLEAS
:
:
: In Re: Powers and Responsibilities of
: Special Prosecutor Exercising
: Extraordinary Jurisdiction; on Allegations that
: Secret Grand Jury or Related Information was
: Unlawfully and/or Negligently
: Accessed/Released/Compromised

ORDER

AND NOW, this 29th day of May, 2014, after "preliminary investigation"; this court in its capacity as Supervising Judge of the 35th Statewide Investigating Grand Jury, finds there are reasonable grounds to believe a further more substantive investigation is warranted into allegations that statewide Grand Jury secrecy may have been compromised: It is therefore ORDERED and DIRECTED by this Court in accordance with the authority vested in it by the 1078 Pennsylvania Investigating Grand Jury Act of 1978, 42 Pa. C.S. § 4541, *et seq.* and the procedural rules that followed (Pa.R.Crim.P 220, *et seq.*) as well as relevant case law; that **THOMAS E. CARLUCCIO, ESQUIRE**, be and is hereby appointed Special Prosecutor with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any alleged illegal disclosure of information protected by the law and/or intentional and/or

negligent violations and rules of Grand Jury secrecy as to a former Statewide Investigating Grand Jury, such as;

1. 42 Pa. C.S. § 4549(b) Disclosure of proceedings by participants other than witnesses... "all such persons shall be sworn to secrecy, and shall be in contempt of court if they disclose/reveal any information which they are sworn to keep secret."
2. 18 Pa. C.S. § 5101 Obstructing administration of law or other governmental function – "a person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty.
3. Any other applicable offense.

It is FURTHER ORDERED by the Court that the Special Prosecutor:

1. Shall use any appropriate currently empaneled Grand Jury to investigate any alleged or suspected violations of secrecy or concomitant crimes related to such.
2. Shall have the right to request an application for an immunity order from the Attorney General.
3. Shall have the right to employ all appropriate resources including a minimum of one investigator and if necessary, one support staff.

4. Shall have day-to-day independence and will be free to structure the investigation as he wishes and to exercise independent prosecutorial discretion whether, which and when any potential witness should be brought before the Grand Jury and/or whether, which and when charges should be brought, including contempt of court.
5. Shall be permitted, while serving as Special Prosecutor, to consult with past and present members of the Office of Attorney General and take such action as is necessary to ensure that matters he is investigating and/or prosecuting in his role as Special Prosecutor are brought to a successful conclusion, so long as such consultation/action does not present a conflict of interest with his duties as Special Prosecutor and/or violate the secrecy oath.
6. Shall be empowered to respond to interference with his investigation by also having authority to investigate and prosecute crimes committed in the course of, and with the intent to interfere with the Special Prosecution's investigation such as Perjury, Intimidation of witnesses and other applicable and relevant violations of the law.
7. Shall comply with all relevant statutory and case law as well as all applicable canons of ethics.
8. Shall be removed from the position of Special Prosecutor only by the personal action of the Grand Jury Judge and/or the Pa Supreme Court.

9. Shall be appointed for a period not to exceed six months from today, unless the Special Prosecutor makes a written request to the Court for an extension setting forth the reasons for the extension.
10. The Special Prosecutor shall be compensated at the rate of \$65.00 an hour to be paid by the Commonwealth of Pennsylvania. The investigator/support staff chosen by the Special Prosecutor shall be compensated at the rate of \$20.00 an hour. All those seeking compensation shall keep detailed records of time and services rendered. All shall provide the Supervising Grand Jury Judge with a monthly accounting of time/services rendered.
11. Shall provide the Supervising Grand Jury Judge with periodic summaries of any progress.
12. Submit a report addressed to the Pennsylvania Supreme Court, and the Supervising Grand Jury Judge, setting forth any findings and recommendations on any proposed statutory, rulemaking or recommended practices that would preserve the critical requirement of secrecy in Grand Jury proceedings as well as insuring the rights of defendants to a fair trial and maintaining the integrity of our Grand Juries.

BY THE COURT:

A handwritten signature in black ink, appearing to read "W.R. Carpenter", written over a horizontal line.

WILLIAM R. CARPENTER, J.
Supervising Judge

Copies sent on May 29, 2014

By First Class Mail to:

Chief Justice Ronald D. Castille

Pennsylvania Attorney General Kathleen G. Kane

Thomas E. Carluccio, Esquire

Exhibit

B

PRESIDENT JUDGE
WILLIAM J. FURBER, JR.
ASSOCIATE JUDGES
JOSEPH A. SMYTH
STANLEY R. OTT
BERNARD A. MOORE
WILLIAM R. CARPENTER
RHONDA LEE DANIELE
EMANUEL A. BERTIN
THOMAS M. DELRICCI
R. STEPHEN BARRETT
THOMAS C. BRANCA
STEVEN T. O'NEILL
THOMAS P. ROGERS
GARRETT D. PAGE
KELLY C. WALL
CAROLYN TORNETTA CARLUCCIO
WENDY DEMCHICK-ALLOY
PATRICIA E. COONAHAN
LOIS EISNER MURPHY
GARY S. SILOW
RICHARD P. HAAZ
CHERYL L. AUSTIN
GAIL A. WEILHEIMER
STEVEN C. TOLLIVER, SR.

COURT OF COMMON PLEAS



MONTGOMERY COUNTY
THIRTY-EIGHTH JUDICIAL DISTRICT
NORRISTOWN, PENNSYLVANIA
19404

SENIOR JUDGES
WILLIAM T. NICHOLAS
S. GERALD CORSO
CALVIN S. DRAYER, JR.
KENT H. ALBRIGHT
ARTHUR R. TILSON

May 29, 2014

The Honorable Ronald D. Castille
Chief Justice of Pennsylvania
Supreme Court of Pennsylvania
1818 Market Street, Suite 3730
Philadelphia, PA 19103

Re: Statewide Investigating Grand Juries

Dear Chief Justice:

Enclosed you will find an Order appointing a Special Prosecutor to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General's Office.


As the current supervising Grand Jury Judge, this matter was brought to my attention. My preliminary review included in camera sealed testimony from two individuals with knowledge.

I have decided that the matter is important enough to appoint a Special Prosecutor, Thomas E. Carluccio, Esquire. He is a former prosecutor, served in the Department of the Attorney General in Delaware for fourteen years and a Special Assistant United States Attorney. In addition Tom has done Grand Jury work, and is honest, capable and reliable.

Please call me if you would like to discuss this matter further.

Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge.

Sincerely,


William R. Carpenter, J.
Supervising Judge

WRC/cns
Cc. Thomas E. Carluccio, Esquire

Exhibit

C

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:

THE THIRTY-FIVE STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF
PENNSYLVANIA NO. 176 M.D.
MISC. DKT. 2012

MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

NOTICE OF *QUO WARRANTO* ACTION

QUO WARRANTO ACTION

Attorney General Kathleen G. Kane, by and through her counsel, Amil M. Minora, Esq., hereby submits a *quo warranto* action to quash the appointment of Thomas E. Carluccio, Esq., as Special Prosecutor for the 35th Statewide Investigating Grand Jury.

1. This Court has the authority to hear this Action pursuant to Section 721 of the Pennsylvania Rules of the Judicial Code.
2. The annexed Attorney Verification and Memorandum of Law are respectfully submitted in support of this Action.

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley


Amil M. Minora, Esq.

Attorney for Attorney General Kathleen G. Kane
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
(570) 961-1616

Received In Supreme Court

DEC 23 2014

Middle

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:

THE THIRTY-FIVE STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF
PENNSYLVANIA NO. 176 M.D.
MISC. DKT. 2012

MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

QUO WARRANTO ACTION

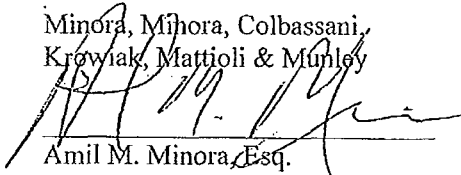
ATTORNEY VERIFICATION

I, Amil M. Minora, Esq., hereby verify the following:

1. I am an attorney duly admitted to practice in Pennsylvania and before this Court.
2. My office, Minora, Minora, Colbassani, Krowiak, Mattioli & Munley is located at 700 Vine Street Scranton, PA 18510.
3. I represent Attorney General Kathleen G. Kane in this matter, and as such, am fully familiar with the facts and circumstances of this case.
4. This Verification is respectfully submitted in support of Attorney General Kane's *quo warranto* action.
5. I hereby state that the facts set forth in this motion are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904.

Dated: December 17, 2014
New York, New York

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley



Amil M. Minora, Esq.

Attorney for Attorney General Kathleen G. Kane

Attorney ID: 22703

700 Vine Street

Scranton, PA 18510

(570) 961-1616

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:

THE THIRTY-FIVE STATEWIDE
INVESTIGATING GRAND JURY

QUO WARRANTO ACTION

SUPREME COURT OF
PENNSYLVANIA NO. 176 M.D.
MISC. DKT. 2012

MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY GENERAL

KATHLEEN G. KANE'S *QUO WARRANTO* ACTION

INTRODUCTION

This memorandum is respectfully submitted in support of Attorney General Kathleen G. Kane's *quo warranto* action to quash the appointment of Thomas E. Carluccio, Esq. as Special Prosecutor for the 35th Statewide Investigating Grand Jury. Judge William R. Carpenter's appointment of the Special Prosecutor, by Order dated May 29, 2014, was absolutely unlawful. There is no legal authority – no statute on record in the Commonwealth of Pennsylvania – permitting Judge Carpenter's unilateral appointment of an attorney to the public office of Special Prosecutor for an investigating grand jury. Indeed, by law that public office does not exist at all.

Judge Carpenter's appointment of a Special Prosecutor was also unconstitutional because it violated the separation of powers inherent in the Pennsylvania constitution. The power to investigate and prosecute is held exclusively by the executive – in this case, with regard to an

Received in Supreme Court

DEC 23 2014

Middle

investigating grand jury, the Attorney General. The judiciary may not, on its own initiative, infringe on the powers granted to the executive by statute.

As this Court wrote in a highly instructive decision more than 50 years ago, the facts of this case “emphasize what can occur when the regular forms and procedure of government are not followed, and judges embark on independent ventures, sailing in ships without sails of authority, using engines devoid of constitutional power and employing a compass lacking decisional direction.” See Smith v. Gallagher, 185 A.2d 135 (1962) (overruled on other grounds).

Because Judge Carpenter unlawfully and unconstitutionally exceeded his authority in appointing a Special Prosecutor, we respectfully move in this *quo warranto* action for the appointment to be quashed. We request a ruling that the Special Prosecutor’s appointment was invalid, that the Special Prosecutor has no authority to hold such public office, and that no legitimate report or presentment can issue from this Investigating Grand Jury.¹

STATEMENT OF FACTS

On May 29, 2014, Hon. William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, issued an Order appointing Thomas E. Carluccio, Esq. as “Special Prosecutor with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any alleged disclosure of information protected by the law and/or intentional and/or negligent violations and rules of Grand Jury secrecy as to a former Statewide Investigating Grand Jury[.]” (Exhibit A, Order

¹ We have filed this memorandum of law under seal, but we respectfully move to unseal this filing. For the reasons set forth below, we submit that this is a matter of the utmost public importance, involving core constitutional questions. The public should have access to the arguments of the parties and the ultimate ruling of this Court.

dated May 29, 2014, at 1-2.) The Order stated that the appointment was made “in accordance with the authority vested in [the court] by the 1078 Pennsylvania Investigating Grand Jury Act of 1978, 42 Pa. C.S. § 4541, *et seq.* and the procedural rules that followed (Pa. R. Crim. P. 220, *et seq.*) as well as relevant case law.” (*Id.* at 1.) The Order was captioned in part “In Re: Powers and Responsibilities of Special Prosecutor Exercising Extraordinary Jurisdiction.” (*Id.*)

Also on May 29, 2014, Judge Carpenter sent a letter to Hon. Ronald D. Castille, Chief Justice of this Court. (Exhibit B, Letter dated May 29, 2014.) Judge Carpenter informed the Court that he was “appointing a Special Prosecutor to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General’s Office.” (*Id.*) Judge Carpenter added: “I have decided that the matter is important enough to appoint a Special Prosecutor, Thomas E. Carluccio, Esq.” (*Id.*) Judge Carpenter closed the letter by stating: “Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge.” (*Id.*)

STATEMENT OF JURISDICTION

This Court has original jurisdiction over this *quo warranto* action.

Section 721 of the Pennsylvania Judicial Code enumerates the types of cases over which this Court has original jurisdiction: “*habeas corpus*, *mandamus* or prohibition to courts of inferior jurisdiction, and *quo warranto* as to any officer of statewide jurisdiction.” *In re Bruno*, 101 A.3d 635, 665 (2014) (citing 42 Pa.C.S. § 721).

In this case, the Special Prosecutor was appointed to investigate in connection with the 35th Statewide Investigating Grand Jury. (Exhibit A at 1.) The Special Prosecutor’s mandate was to conduct a “substantive investigation ... into allegations that statewide Grand Jury secrecy

may have been compromised.” (Id.) The underlying allegation was that there may have been “illegal disclosure of information” relating to “a former Statewide Investigating Grand Jury.” (Id. at 1-2.)

Because the Special Prosecutor in this case was an “officer of statewide jurisdiction,” this Court has original jurisdiction over this *quo warranto* action. See 42 Pa.C.S. § 721.

STATEMENT OF STANDING

A *quo warranto* action is the appropriate vehicle for Attorney General Kane to challenge the appointment of the Special Prosecutor. And, Attorney General Kane has standing to bring this action in *quo warranto*.

First, a *quo warranto* action is the proper vehicle for challenging the appointment of the Special Prosecutor. “The general rule is well settled that a *quo warranto* action constitutes the proper method to challenge title or right to public office.” Matter of One Hundred or More Qualified Electors of Municipality of Clairton, 683 A.2d 283, 132 (1996) (citing Andrezjwski v. Borough of Millvale, 673 A.2d 879, 881 (1996)). “The rationale for the exclusive nature of the *quo warranto* remedy is that:

[*Q*]uo warranto is the Gibraltar of stability in government tenure. Once a person is duly elected or duly appointed to public office, the continuity of his services may not be interrupted and the uniform working of the governmental machinery disorganized or disturbed by any proceeding less than a formal challenge to the office by that action which is now venerable with age, reinforced by countless precedent, and proved to be protective of all parties involved in a given controversy, namely *quo warranto*.

Matter of One Hundred or More Qualified Electors, 683 A.2d at 132 (quoting In re Board of School Directors of Carroll Twp., 180 A.2d 16, 17 (1962)). Here, a *quo warranto* action is the

appropriate “formal challenge” the appointment of Thomas Carluccio to the “public office” of Special Prosecutor. See Matter of One Hundred or More Qualified Electors, 683 A.2d at 132.

A *quo warranto* challenge to the appointment of a Special Prosecutor was addressed by the Commonwealth Court in Gwinn v. Kane, 339 A.2d 838, 840-41 (Pa. Cmwlth 1975). In Gwinn, the court held that “where a person has entered upon a public office, which office is allegedly unconstitutional, *quo warranto* is the proper proceedings to oust the incumbent because the office he occupies has no legal existence.” Id. at 841 (citing Commonwealth v. Denworth, 145 Pa. 172, 22 A. 820 (1891); Snyder v. Boyd, 26 Dauph. 375 (1923)). The court held that there would be no justification “for denying to *quo warranto* the testing of the legality of a public office for alleged want of statutory authority to create it.” Id. We submit that for the same reason, *quo warranto* is the appropriate action here, to challenge the legality of the public office of Special Prosecutor for “want of statutory authority to create it.” See id.

Second, Attorney General Kane has standing – as an individual – to bring this *quo warranto* action. “Generally, a *quo warranto* action is the exclusive means of challenging the title or right to public office, and only the Attorney General or local district attorney may institute a *quo warranto* action.” Reed v. Harrisburg City Council, 995 A.2d 1137, 1140 (2010) (citing In re One Hundred or More Qualified Electors, 683 A.2d at 286). However, “[a] private party with a special interest in the matter, or who has been specially damaged, may institute a *quo warranto* action.” Reed, 995 A.2d at 1140 (citing In re One Hundred or More Qualified Electors, 683 A.2d at 286 (“A private person will have standing to bring a *quo warranto* action only if that person has a special right or interest in the matter, as distinguished from the right or interest of the public generally, or if the private person has been specially damaged.”)); Zemprelli v. Daniels, 436 A.2d 1165, 1167 (1981) (Attorney General, district attorney, or private party with

special interest may bring *quo warranto* action)). In other words, “[a] private person must show in himself an interest in the controversy. ... He must possess some peculiar, personal interest aside from his general interest as a member of the public.” Reed, 995 A.2d at 1140 (citing Stroup v. Kapleau, 313 A.2d 237, 238-39 (1973); Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 879 (1933)) (internal quotation marks omitted).

In this case, as a subject of the Special Prosecutor’s investigation, Attorney General Kane clearly has a “special interest” in the validity of the Special Prosecutor’s appointment, separate and apart from the interest of the general public. See Reed, 995 A.3d at 1140. Attorney General Kane was subpoenaed to testify before the Grand Jury. In an Affidavit dated October 17, 2014, Special Prosecutor Carluccio stated that Attorney General Kane should “be compelled to testify and subject herself ... to a reasonable line of questioning,” to determine if she had “direct or inferential information on matters pertaining to the unauthorized disclosure of the existence and contents” of confidential Grand Jury information. (Exhibit C, Affidavit dated October 17, 2014, at 2.) And, implicit in Special Prosecutor Carluccio’s decision to question Attorney General Kane – and apparent from his subsequent questioning on November 17, 2014, when Attorney General Kane appeared and testified before the Grand Jury – was the understanding that she was not only a witness in this case, but that her own individual actions were a subject of the investigation. (See id.) Any report or presentment issued from this Investigating Grand Jury would clearly impact her both personally and professionally.

Because Attorney General Kane has a personal interest aside from the general interest of the public in the illegality of the Special Prosecutor’s appointment, she has standing to bring this *quo warranto* action. See Reed, 995 A.3d at 1141. As a subject of a pending investigation, called to testify before the Grand Jury, her “special interest” is manifest. See Zontek v. Brown,

613 A.2d 683, 684-85 (Pa. Commw. Ct. 1992) (“In this case, the petitioners have a special interest in the appointed members of the commission, because those members are involved in or will ultimately be involved in the commission’s investigations of the petitioners’ alleged violations of the Ethics Act. This court’s decision in Gwinn clearly supports the petitioners’ position and our conclusion is that they have standing to bring a *quo warranto* action.”).

ARGUMENT

The appointment of a Special Prosecutor in this case was unlawful. Judge Carpenter had no legal authority, based in any statute, to appoint a Special Prosecutor. Indeed, the position of Special Prosecutor itself has no basis in the statutory law of this Commonwealth. Further, the appointment of a Special Prosecutor by the judiciary was a constitutional separation of powers violation. The appointment infringed on the exclusive power of the Attorney General and the executive branch to investigate and prosecute alleged Grand Jury violations.

First, Judge Carpenter had no legal authority to appoint a Special Prosecutor in this case. Judge Carpenter’s Order dated May 29, 2014 cited two sources of supposed statutory authority for the appointment of a Special Prosecutor. It stated that the appointment was made “in accordance with the authority vested in [the court]” by (a) the Investigating Grand Jury Act, 42 Pa. C.S. § 4541, *et seq.*; and (b) “the procedural rules” relating to investigating grand juries, Pa. R. Crim. P. 220, *et seq.* (Exhibit A at 1.) Judge Carpenter was wrong. *None* of the cited statutes provide the court with the legal authority to appoint a Special Prosecutor “with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any illegal disclosure of [Grand Jury] information[.]”

(See Exhibit A at 1.) Indeed, none of the statutes cited by Judge Carpenter refer to the appointment of a Special Prosecutor at all.

The Investigating Grand Jury Act specifically defines an “Attorney for the Commonwealth” as “The district attorney of the county in which a county investigating grand jury is summoned, or his designee, or the Attorney General or his designee if the Attorney General has superseded the district attorney; the Attorney General, or his designee, with respect to multicounty investigating grand juries.” 42 Pa. C.S. § 4541. No exception is provided in the Act for the appointment of a “Special Prosecutor” to step in and assume the duties of a statutorily-defined “Attorney for the Commonwealth.” See 42 Pa. C.S. § 4541, *et seq.* Likewise, nowhere in the Criminal Procedure Law relating to investigating grand juries is the term “Special Prosecutor” referenced. See Pa. R. Crim. P. 220, *et seq.* Certainly, nowhere in those statutes is the court imbued with the legal authority to appoint a Special Prosecutor to supersede the responsibilities of an Attorney for the Commonwealth. See *id.*²

Judge Carpenter’s Order dated May 29, 2014 was captioned in part “In Re: Powers and Responsibilities of Special Prosecutor Exercising Extraordinary Jurisdiction.” (Exhibit A at 1.) Indeed, this was a grant of “Extraordinary Jurisdiction” to the Special Prosecutor – an extraordinary and unlawful grant that went far beyond any legal authority set forth in any statute of the Commonwealth.

² Elsewhere in the Criminal Procedure Law the term “Attorney for the Commonwealth” is defined as “not only the district attorney and any deputy or assistant district attorney in the county, but also the Attorney General, and any deputy or assistant attorney general, in those cases which the Attorney General is authorized by law to prosecute in the county.” Comment to Pa. R. Crim. P. 507.

Judge Carpenter wrote to this Court that same day: "I have decided that the matter is important enough to appoint a special prosecutor, Thomas E. Carluccio, Esquire." (Exhibit B.) We respectfully submit that no case is "important enough" to justify disregarding the statutory law established by the Pennsylvania legislature.

By law, the *only* appropriate authority to lead a grand jury investigation is the Attorney General. Under Article 4, Section 4.1 of the Pennsylvania Constitution, the Attorney General "shall be chosen by the qualified electors of the Commonwealth," and "shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law." Pa. Const. Art 4 § 4.1. The Commonwealth Attorneys Act, 71 P.S. §§ 732-101 *et seq.*, specifically grants to the Attorney general the exclusive power to conduct grand jury investigations. Pursuant to Section 732-206(b) of the Commonwealth Attorneys Act, "The Attorney General shall convene and conduct investigating grand juries as provided in the act of November 22, 1978 (P.L. 1148, No. 271), known as the 'Investigating Grand Jury Act.'" 71 P.S. § 732-206(b). The statute vests authority to conduct investigations under the Grand Jury Act exclusively with the Attorney General, and provides for no exceptions.

In this case, due to the "allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General's Office" (Exhibit B), the Attorney General may have been disqualified from leading the investigation. Under those circumstances, the solution would *not* be to appoint a Special Prosecutor on the court's own initiative, without the support of law, and in contravention of the plain language of the Commonwealth Attorneys Act. An obvious solution may have been to turn to the District Attorney of Montgomery County; under other subsections of the Act, the power of the District Attorney is referenced concurrently with that of the Attorney General. See, e.g., 71 P.S. § 732-206(a) ("The Attorney

General shall be the chief law enforcement officer of the Commonwealth; the district attorney shall be the chief law enforcement officer for the county in which he is elected.”). Whatever the appropriate and lawful resolution may have been, we submit that Judge Carpenter’s unilateral actions in this case were not legal, and were not supported by any statutory authority. In the words of this Court, they were a perfect example of “what can occur when the regular forms and procedure of government are not followed, and judges embark on independent ventures, sailing in ships without sails of authority, using engines devoid of constitutional power and employing a compass lacking decisional direction[.]” See Smith v. Gallagher, 185 A.2d 135, 140 (1962) (addressed more fully below).

Judge Carpenter’s May 29, 2014 Order also cited “relevant case law” as a source of the court’s authority to appoint a Special Prosecutor in this case. (Exhibit A at 1.) No such case law originating from this Court exists. To the contrary, the Court – more than 50 years ago – addressed this very issue in Smith v. Gallagher, 185 A.2d 135 (1962) (overruled on other grounds), and held that a Judge had no legal authority to appoint a Special Prosecutor to conduct a grand jury investigation.

In Smith, this Court addressed, *inter alia*, the appointment of an attorney as “Special Prosecutor” by a Judge of the Court of Quarter Sessions of Philadelphia County, who charged him with conducting an investigation using a “Special Grand Jury.” Id. at 137. This Court concluded that the Judge had acted without the authority of law, in part because “Special Prosecutor” was “an office which does not exist” under Pennsylvania law. Id. at 137, 149 (“[T]here is no public office in Pennsylvania known as Special Prosecutor.”) Correspondingly, this Court held that the Judge had exceeded his legal authority in appointing an attorney to hold that public office.

Here, as in Smith, Judge Carpenter “permitted himself an arbitrary exercise of judicial power. When he treated with aloofness the provisions of the [Commonwealth Attorneys Act], he abused his discretion. When he appointed a ‘Special Prosecutor,’ he attempted the impossible because he was making an appointment to a phantom office.” See Smith, 185 A.2d at 143. Special Prosecutor Carluccio was appointed to a public office that does not exist under the statutory law of the Commonwealth, by a Judge who had no lawful authority to appoint him. As a result, we respectfully submit that Attorney General Kane’s *quo warranto* motion challenging the appointment of the Special Prosecutor, and that Special Prosecutor’s authority to hold public office, should be granted, and the appointment should be quashed.

Judge Carpenter’s unilateral appointment of Special Prosecutor Carluccio was also unconstitutional, as it violated the separation of powers inherent in the Pennsylvania Constitution.

“The separation of powers principle is ‘[o]ne of the distinct and enduring qualities of our system of government,’ which has been present in our Constitution since the first convention prepared the document in 1776.” Robinson Twp., Washington County v. Commonwealth, 83 A.3d 801, 991 (2013) (quoting Jubelirer v. Rendell, 953 A.2d 514, 529 (2008)). “Our Constitution vests legislative power in the General Assembly; executive power in the Executive Department consisting, *inter alia*, of the Governor, the Attorney General, and various administrative agencies, as provided by law; and judicial power in a unified judicial system and, ultimately, in the Supreme Court.” Robinson Twp., 83 A.3d at 991 (citing Pa. Const. Art. II § 1; Art. IV § 1; Art. V § 1). “The judiciary interprets and applies the law, and its proper domain ‘is in the field of the administration of justice under the law.’” Robinson Twp., 83 A.3d at 991 (quoting Commonwealth v. Sutley, 378 A.2d 780, 783 (1977)). “Meanwhile, the duty of the

executive branch is to ensure the faithful execution of laws.” Robinson Twp., 83 A.3d at 991 (citing Pa. Const. Art. IV § 2). “The core tenet of the separation of powers principle is that a branch of government is prohibited from exercising the functions committed exclusively to a co-equal branch.” Robinson Twp., 83 A.3d at 991 (citing Sutley, 378 A.2d at 783).

In this case, Judge Carpenter – a member of the judiciary – clearly infringed on the exclusive domain of the executive branch. The power to conduct grand jury investigations is vested in the Attorney General by statute. 71 P.S. § 732-206(b). That power cannot be unilaterally appropriated by the judiciary. We respectfully submit that a Judge cannot decide on his own initiative, in direct contravention of statutory authority, to endow a Special Prosecutor with power entrusted by the Pennsylvania legislature to the Attorney General, and her alone.

This Court touched on the separation of powers issue in Smith. The Court held that by appointing a Special Prosecutor, the Judge of the Court of Quarter Sessions had “disfranchise[d] the people of Philadelphia in the realm of their freedom to select a District Attorney of their own choice.” Id. at 151. The Court held that leading a grand jury investigation was (at the time) solely within the power of the District Attorney, who “may not be removed from his office except by impeachment. No judge may dictatorially order him to refrain from doing his work.” Id.

As in Smith, an error of constitutional dimensions was committed in this case through the “arbitrary dismissal” of the Attorney General, a public official who was “elected by the people.” See id. Judge Carpenter had no authority to put in the Attorney General’s place “a person whose qualifications have not been passed upon by the people, to discharge serious and solemn duties which involve the liberties and securities of the people.” See id. Judge Carpenter cited no valid authority “for his unprecedented action.” See id. We respectfully submit that this

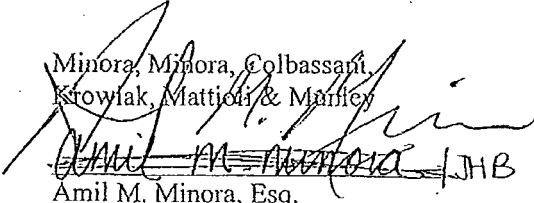
constitutional separation of powers violation is, standing alone, sufficient to warrant relief in this *quo warranto* action.

In this case, Judge Carpenter exceeded his lawful authority in appointing Special Prosecutor Carluccio to public office. In doing so, he also violated the separation of powers doctrine inherent in the Pennsylvania Constitution. For both of these reasons, we respectfully submit that under this *quo warranto* action the Special Prosecutor's appointment should be quashed. We request a ruling that the Special Prosecutor's appointment was invalid, that the Special Prosecutor has no authority to hold such public office, and that no legitimate report or presentment can issue from this Investigating Grand Jury.

CONCLUSION

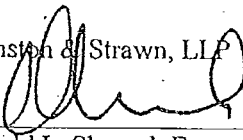
For the reasons set forth above, we respectfully submit that the relief requested in this *quo warranto* action should be granted.

Dated: December 17, 2014


Minora, Minora, Colbassani,
Krowiak, Mattioni & Marley

~~Amil M. Minora~~ JHB
Amil M. Minora, Esq.

Attorney for Attorney General Kathleen G. Kane
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
(570) 961-1616

Winston & Strawn, LLP


Gerald L. Shargel, Esq.
Attorney *Pro Hac Vice* for Attorney General
Kathleen G. Kane
200 Park Avenue
New York, NY 10166
(212) 294-2637

Exhibit

D

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PENNSYLVANIA
THE THIRTY-FIVE STATEWIDE : NO. 197 MM 2014
INVESTIGATING GRAND JURY :
: MONTGOMERY COUNTY COMMON PLEAS
: M.D. 2644-2012
: NOTICE NO. 123

SEALING ORDER

AND NOW, this 30th day of December, 2014, it is hereby ORDERED, that the attached Opinion of December 30, 2014 be filed under seal with the Supreme Court of Pennsylvania until further Order of this Court.

BY THE COURT:



WILLIAM R. CARPENTER, J.
Supervising Judge

FILED UNDER SEAL

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE:	:	
	:	
THE THIRTY-FIFTH STATEWIDE	:	SUPREME COURT DOCKET
INVESTIGATING GRAND JURY	:	NO. 197 MM 2014
	:	
	:	MONTGOMERY COUNTY
	:	COMMON PLEAS
	:	NO. 2644-2012

OPINION

CARPENTER J.

DECEMBER 30, 2014

FACTUAL AND PROCEDURAL HISTORY

On May 29, 2014, this Court in its capacity as Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury, found that there were "reasonable grounds to believe a further more substantive investigation" into allegations that statewide Grand Jury secrecy may have been compromised was warranted, and on that date this Court appointed Thomas E. Carluccio, Esquire as Special Prosecutor.

Specifically, the May 29, 2014 Order followed an *in camera* proceeding which established that there was a leak of secret Grand Jury information and that the leak most likely came from the Office of the Attorney General. Accordingly, I determined that the appointment of a Special Prosecutor was necessary and appropriate.

ISSUES

- I. Whether the appointment of a Special Prosecutor was proper.
- II. Whether the Quo Warranto Action is now moot.

DISCUSSION

I. The appointment of a Special Prosecutor was proper.

Attorney General Kathleen Kane has filed a *Quo Warranto* Action, challenging my action as the Supervising Judge of the Thirty-Fifth Statewide Grand Jury, to appoint a Special Prosecutor by way of an Order dated May 29, 2014. On that date, Special Prosecutor Thomas E. Carluccio was appointed to conduct an investigation into allegations that statewide Grand Jury secrecy might have been compromised, after a preliminary investigation. My action in appointing Special Prosecutor Carluccio was proper. It did not exceed my authority.

My authority for the appointment of a special prosecutor is based upon the case of In re Dauphin County Fourth Investigating Grand Jury, 610 Pa. 296, 19 A.3d 491 (2014). This case dealt with the appointment of an special prosecutor in connection with alleged grand jury leaks, and the Court stated that, “[w]hen there are colorable allegations or indications that the sanctity of the grand jury process has been breached and those allegations warrant investigation, the appointment of a special prosecutor to conduct such an investigation is appropriate. And, even where the investigations of special prosecutors do not lead to prosecutable breaches of secrecy, they may provide insight into the often-competing values at stake, as well as guidance and context so that prosecutors and supervising judges conducting future proceedings may learn from the examples.” Id. at 504.

The Court explained the vital role a supervising judge in regard to the grand jury process and emphasized the “[t]he very power of the grand jury, and the secrecy in which it operates, call for a strong judicial hand in supervising the proceedings” Id. at 503. The Court further explained as follows:

We are cognizant that the substantial powers exercised by investigating grand juries, as well as the secrecy in which the proceedings are conducted, yield[] the potential for abuses. The safeguards against such abuses are reflected in the statutory scheme of regulation, which recognizes the essential role of the judiciary in supervising grand jury functions.

Id. at 503 – 504 (citing from In re Twenty-Fourth Statewide Investigating Grand Jury, 589 Pa. 89, 907 A.2d 505, 512 (2006)).

Thus, Pennsylvania's grand jury process is 'strictly regulated,' and the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings. The supervising judge has the continuing responsibility to oversee grand jury proceedings, a responsibility which includes insuring the solemn oath of secrecy is observed by all participants.

Id. at 504 (citations and internal quotation marks omitted).

The In re Dauphin County Court cited two cases that involved the appointment of a special prosecutor when there were allegations of grand jury leaks. The Court first cited to a Lackawanna Common Pleas Court case, In re County Investigating Grand Jury VIII (Lack. Com. Pl. 2005).

In the Lackawanna Common Pleas Court case there were allegations made, including, that e-mail communications had been exchanged between the Lackawanna District Attorney's Office and a newspaper reporter that divulged grand jury information, that a grand jury witness had been contacted by the reporter a short time after the witness appeared before the grand jury and was questioned about private matters that had been disclosed only to the grand jury. In re Dauphin County, 19 A.3d at 504. A preliminary review by the common pleas court judge verified only the existence of the emails that were exchanged between the reporter and a member of the District Attorney's office during the time the grand jury was conducting the relevant investigation. It was based upon this review that the common pleas court judge appointed a special prosecutor to investigate the allegations of a grand jury leak. *Id.*

The Pennsylvania Supreme Court in In re Dauphin County cited an additional example involving a special prosecutor in connection with alleged grand jury leaks and the complex interest and values implicated in an appointment of a special prosecutor. The Court cited to Castellani v. Scranton Times, 598 Pa. 283, 956 A.2d 937 (2008). In Castellani, the supervising judge appointed a special prosecutor to investigate allegations of grand jury leaks in connection with a statewide investigating grand jury tasked with investigating allegations of abuse of the county prisoners by the prison guards. In re Dauphin County, 19 A.3d at 506.

Not only is there strong precedent that permits a supervising judge to appoint a special prosecutor when there are allegations of grand jury leaks; but also, at the time I appointed the Special Prosecutor on May 29, 2014, by way of a court order, which was delivered to Chief Justice Ronald D. Castille, I wrote a letter to Chief Justice Castille. In that letter, I explained what I had done and I ended the letter with the following language, "Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge." See, Exhibit "A", Letter dated May 29, 2014 to Chief Justice Castille. All of my letters to Chief Justice Castille have concluded with similar language. I have never been informed that I erred or exceeded my authority.

The Supervising Judge of a Statewide Investigating Grand Jury must have inherent authority to investigate a grand jury leak, when there is a conflict of interest as there is here. Clearly, Attorney General Kane could not investigate herself. Otherwise potentially serious violations of grand jury secrecy could go unaddressed.

Accordingly, Attorney General Kane's *Quo Warranto* Action lacks merit, and should be denied.

II. The Quo Warranto Action is now moot.

Further, I believe that this *Quo Warranto* Action is now moot. On December 18, 2014, the Thirty-Fifth Statewide Investigating Grand Jury issued Presentment No. #60, finding

that there were reasonable grounds that Attorney General Kane was involved in violations of criminal law of our Commonwealth. See, Exhibit "B", Presentment No. #60, dated December 18, 2014; specifically, Perjury, 18 Pa.C.S.A. §4902, False Swearing, 18 Pa.C.S.A. §4903, Official Oppression, 18 Pa.C.S.A. §5301 and Obstruction Administration of Law or Other Governmental Function, 18 Pa.C.S.A. §5101. Subsequently, on December 19, 2014, I entered an Order Accepting Presentment No. #60. See, Exhibit "C", Order Accepting Presentment No. #60, dated December 19, 2014. Furthermore, I referred the entire matter to the District Attorney of Montgomery County for any prosecution. Therefore, this Quo Warranto Action has been rendered moot.

Finally, the Attorney General has requested to "unseal this filing" See, Attorney General Kane's Memorandum of Law in Support of *Quo Warranto* Action, December 17, 2014, p. 2, n. 1. If her filing is unsealed then, in fairness to the public, the members of the Grand Jury, and members of The Office of Attorney General, my Opinion and Exhibits should also be unsealed.

CONCLUSION

I respectfully submit that Attorney General Kane's *Quo Warranto* Action lacks merit and should be denied. In addition, it has been rendered moot.

BY THE COURT:



WILLIAM R. CARPENTER J.
SUPERVISING JUDGE OF THE THIRTY-
FIFTH STATEWIDE INVESTIGATING
GRAND JURY

EXHIBIT "A"

COURT OF COMMON PLEAS



MONTGOMERY COUNTY
THIRTY-EIGHTH JUDICIAL DISTRICT
NORRISTOWN, PENNSYLVANIA
19404

PRESIDENT JUDGE
WILLIAM J. FURBER, JR.
ASSOCIATE JUDGES
JOSEPH A. SMYTH
STANLEY R. OTT
BERNARD A. MOORE
WILLIAM R. CARPENTER
RHONDA LEE DANIELE
EMANUEL A. BERTIN
THOMAS M. DELRICCI
R. STEPHEN BARRETT
THOMAS C. BRANCA
STEVEN T. O'NEILL
THOMAS P. ROGERS
GARRETT D. PAGE
KELLY C. WALL
CAROLYN TORNETTA CARLUCCIO
WENDY DEMCHICK-ALLOY
PATRICIA E. COONAHAN
LOIS EISNER MURPHY
GARY S. SILOW
RICHARD P. HAAZ
CHERYL L. AUSTIN
GAIL A. WEILHEIMER
STEVEN C. TOLLIVER, SR.

SENIOR JUDGES
WILLIAM T. NICHOLAS
S. GERALD CORSO
CALVIN S. DRAYER, JR.
KENT H. ALBRIGHT
ARTHUR R. TILSON

May 29, 2014

The Honorable Ronald D. Castille
Chief Justice of Pennsylvania
Supreme Court of Pennsylvania
1818 Market Street, Suite 3730
Philadelphia, PA 19103

Re: Statewide Investigating Grand Juries

Dear Chief Justice:

Enclosed you will find an Order appointing a Special Prosecutor to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General's Office.

As the current supervising Grand Jury Judge, this matter was brought to my attention. My preliminary review included in camera sealed testimony from two individuals with knowledge.

I have decided that the matter is important enough to appoint a Special Prosecutor, Thomas E. Carluccio, Esquire. He is a former prosecutor, served in the Department of the Attorney General in Delaware for fourteen years and a Special Assistant United States Attorney. In addition Tom has done Grand Jury work, and is honest, capable and reliable.

Please call me if you would like to discuss this matter further.

Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge.

Sincerely,

William R. Carpenter, J.
Supervising Judge

WRC/cns

Cc. Thomas E. Carluccio, Esquire

EXHIBIT A

EXHIBIT "B"

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:

SUPREME COURT OF PENNSYLVANIA
NO. 171 M.D.D MISC. KT 2012

THE THIRTY-FIFTH STATEWIDE

MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

INVESTIGATING GRAND JURY

NOTICE No # 123

TO THE HONORABLE WILLIAM R. CARPENTER, SUPERVISING JUDGE:

PRESENTMENT No. # 600

We, the Thirty-Fifth Statewide Investigating Grand Jury, duly charged to inquire into offenses against the criminal laws of the Commonwealth, have obtained knowledge of such matters from witnesses sworn by the Court and testifying before us. We find reasonable grounds to believe that various violations of the criminal laws have occurred. So finding with no fewer than twelve concurring, we do hereby make this Presentment to the Court.



Foreperson – The Thirty-Fifth Statewide
Investigating Grand Jury

DATED: The 18 day of December, 2014

EXHIBIT "C"

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PENNSYLVANIA
THE THIRTY-FIVE STATEWIDE : NO. 171 M.D. MISC DKT. 2012
INVESTIGATING GRAND JURY : MONTGOMERY COUNTY COMMON PLEAS
: M.D. 2644-2012
: NOTICE NO. 123

ORDER ACCEPTING PRESENTMENT NO #60


A. The Court finds Presentment No #60 of the Thirty-Fifth Statewide Investigating Grand Jury is within the authority of said Grand Jury and is in accordance with the provisions of this Investigating Grand Jury Act, 42 Pa.C.S. §4541, *et seq.* Further I find that the determination of the Thirty-Fifth Statewide Investigating Grand Jury is supported by Probable Cause and establishes a Prima Facie case against Attorney General Kathleen Kane. Accordingly, this Presentment is accepted by the Court.

B. The County conducting the trial of all charges pursuant to this Presentment shall be Montgomery County.

C. The District Attorney for Montgomery County, or her designee, is hereby authorized to prosecute as recommended in the Presentment by instituting appropriate criminal proceedings in the aforesaid County.

SO ORDERED this 19th day of December, 2014.

BY THE COURT:



WILLIAM R. CARPENTER, J.
Supervising Judge

EXHIBIT C

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PENNSYLVANIA
: NO. 197 MM 2014
THE THIRTY-FIVE STATEWIDE :
: MONTGOMERY COUNTY COMMON PLEAS
INVESTIGATING GRAND JURY : M.D. 2644-2012
:
: NOTICE NO. 123

CERTIFICATE OF SERVICE

I, William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, certify that a true and correct copy of the attached Opinion was forwarded to the persons set forth below via First Class Mail on December 30, 2014.



WILLIAM R. CARPENTER, J.
Supervising Judge
Montgomery County Court of Common Pleas
P.O. Box 311
Norristown, PA 19404

Prothonotary Irene Bizzoso
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue
Suite 4500
P.O. Box 62575
Harrisburg, PA 17106

Chief Justice Ronald D. Castille
Supreme Court of Pennsylvania
1818 Market Street
Suite 3730
Philadelphia, PA 19103

Attorney General Kathleen G. Kane
Pennsylvania Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Amil M. Minora, Esquire
Attorney for Attorney General Kathleen G. Kane
700 Vine Street
Scranton, PA 18510

Gerald L. Shargel, Esquire
Attorney Pro Hac Vice for
Attorney General Kathleen G. Kane
200 Park Avenue
New York, NY 10166

Thomas E. Carluccio, Esquire
Special Prosecutor
1000 Germantown Pike
Suite D3
Plymouth Meeting, PA 19462

Exhibit

E

FILED UNDER SEAL

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

.....
SUPREME COURT OF PENNSYLVANIA
NO. 197 M.D.D MISC. KT 2012

.....
MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

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

Thomas E. Carluccio, Special Prosecutor to the Investigatory Grand Jury hereby answers the *Quo Warranto Action* filed by, Attorney General Kathleen G. Kane, indiv., and states in support thereof as follows:

1. Admitted.
2. Admitted in part and Denied in part. It is admitted that a Memorandum of Law in support of the aforesaid Quo Warranto Action is indeed attached to such Motion. However, any assertion that the Memorandum of Law represents law that is dispositive to the underlying issues: (i) that the Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury maintains the requisite legal authority to establish an investigation into allegations that statewide grand jury secrecy might have been compromised; (ii) that such legal authority was unconstitutional because it violated the separation of powers inherent in the Pennsylvania Constitution; and/or (iii) that the Supervising Judge did not maintain the requisite legal authority to appoint a Special Prosecutor – are all denied. To the contrary THE INVESTIGATING GRAND

JURY ACT, and specifically 42 Pa.C.S. §4548(a) and § 4542 thereunder are both conclusive to establishing the Supervising Judge maintains legal authority to undertake the subject Statewide Investigating Grand Jury, and to appoint a Special Prosecutor. By way of further answer, Attorney General 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 notably without reservation to question the propriety of appointing a Special Prosecutor, while merely challenging the procedure in making such appointment¹; (ii) her making Application to the Supreme Court seeking three modes of relief- to quash the subpoena – vacate a standing Protective Order – and dismissal of the Grand Jury²; and (iii) Attorney General Kane’s physical attendance before the Grand Jury under subpoena without any communication of a reservation of rights challenging the authority of the Supervising Judge, and appointment of a Special Prosecutor – and as such has effectively waived the right to pursue an argument challenging the legal authority of the Supervising Judge to establish a statewide investigating grand jury in this matter and appointing a Special Prosecutor thereto.

WHEREFORE, the *Quo Warranto Action* filed by Attorney General Kane, Indiv. should be

¹ Wherein Attorney Kane not only sought to quash a subpoena, but also sought production of the Order appointing the Special Prosecutor to determine if the subpoena served upon her by the Special Prosecutor her might be quashed “... arising from defects in the appointment” (See last sentence of page 2 of the Brief accompanying her Motion) without reservation of rights to a claim the Supervising Judge exceeded his authority and/or constitutionality of establishing a Statewide Investigating Grand Jury and/or appointment of the Special Prosecutor.

² The later application for relief to dismiss the grand jury was made by Attorney General Kane, not because of assertions the Supervising Judge exceeded his authority to institute a statewide grand jury investigation and/or the constitutionality of such action – but rather because of assertions that no breach of grand jury secrecy had occurred because upon independent investigation, the Attorney General believed the materials released to the press were not subject to grand jury secrecy protection, and that the unidentified person(s) releasing such materials had not signed an Oath of Secrecy. Parenthetically, we note how it can be determined a given individual did not sign an Oath of Secrecy, who remains unidentified is vexing to say the least.

denied, under law and for events which effectively render such arguments moot.

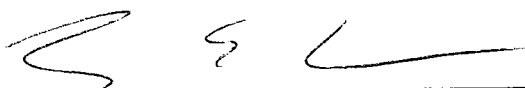


Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

DATED: 11/2/15

VERIFICATION

I, Thomas E. Carluccio, Esq. as Special Prosecutor to the Investigating Grand Jury No #35 appointed by the Pennsylvania Supreme Court, hereby state that after due diligence and investigation into the operative events underlying the subject matter of the *Quo Warranto Action* filed of record with the Court by Attorney General Kathleen G. Kane, indiv., I hereby represent that the averments set forth in the foregoing Answer to the said Action are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

.....
SUPREME COURT OF PENNSYLVANIA
NO. 197 M.D.D MISC. KT 2012

.....
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.

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

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 38th 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.¹ 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,

¹ 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, Indiv. should be denied, under law and for events which render such arguments moot.



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

DATED: 1/2/15

EXHIBIT A

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, : NO. 176
REQUESTING AN ORDER DIRECTING THAT AN :
ADDITIONAL MULTICOUNTY INVESTIGATING : MISC. DOCKET 2012
GRAND JURY HAVING STATEWIDE :
JURISDICTION BE CONVENED :

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:

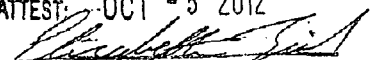
AND NOW, comes Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania, who makes application pursuant to the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541 *et seq.*, for the creation of an additional multicounty investigating grand jury having statewide jurisdiction, and in support thereof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

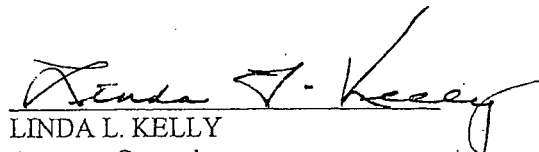
12. In my judgment as Attorney General:

- 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.

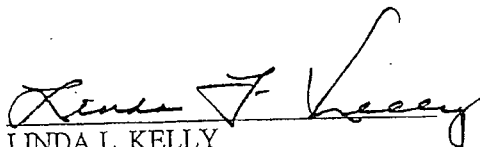
Respectfully submitted,


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 OF
MONTGOMERY COUNTY

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 4th 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, 38th 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.

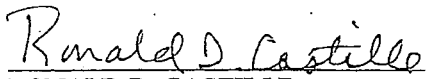
4. The Court Administrator of Pennsylvania is directed to draw six counties at random from the eastern district of Pennsylvania, pursuant to the provisions of Rule 241(a)(1) of the Pennsylvania Rules of Criminal Procedure, Pa. R. Crim. P. 241(a)(1), and that these six counties, plus Montgomery County, 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

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF PENNSYLVANIA
NO. 197 M.D.D MISC. KT 2012

MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

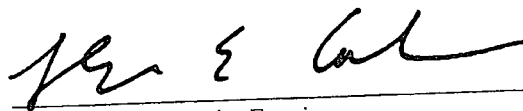
CERTIFICATE OF SERVICE

I, Thomas E. Carluccio, Esquire do hereby certify that a true and correct copy of the *Answer of Special Prosecutor to the Quo Warranto Action and Memorandum of Law in Support thereof* has been filed of record with the Pennsylvania Supreme Court , and a copy of which has been directed on the 7th day of January, 2015 by first class U.S. Mail, postage prepaid, to all parties in interest, as follows:

Amil M. Minora, Esq.
700 Vine Street
Scranton, PA 18510

Gerald L. Shargel, Esq.
200 Park Avenue
New York, NY 10166

The Hon. William R. Carpenter
Court of Common Pleas of Montgomery
County
P.O. Box 311
Norristown, PA 19404-0311



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF PENNSYLVANIA
NO. 197 M.D.D MISC. KT 2012

MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

**ANSWER OF SPECIAL PROSECUTOR
TO THE MOTION TO FILE UNDER SEAL THE QUO WARRANTO ACTION
OF ATTORNEY GENERAL KATHLEEN G. KANE, INDIV.**

Thomas E. Carluccio, Special Prosecutor to the Investigatory Grand Jury hereby answers the *Motion to File under Seal the Quo Warranto Action* filed by, Attorney General Kathleen G. Kane, Indiv., and states in support thereof as follows:

1. Admitted in part and Denied in part. It is admitted that Attorney General Kane, Indiv., has filed a Quo Warranto Action seeking, among other things, to quash the appointment of a Special Prosecutor to the Thirty-Fifth Statewide Investigating Grand Jury. However, any assertion that the said Action, and legal arguments thereunder, represents law that is dispositive to the underlying claims are denied.

2. Admitted in part and Denied in part. It is admitted that all proceedings associated with the Thirty-Fifth Statewide Investigating Grand Jury together with pleadings presented to both the Court of Common Pleas, Montgomery County, Pennsylvania and this Honorable Court, which all effectively seek to challenge the establishment of the said Investigating Grand Jury and the appointment of the Special Prosecutor - are under seal. It is denied that in the public interest

all such pleadings should remain under seal, and the Special Prosecutor advocates that such pleadings be made available to the public.

3. The representation in this Paragraph 3 merely references the Attorney Verification annexed to the Motion, and no response is required.

WHEREFORE, the Special Prosecutor advocates that the *Motion to File under Seal the Quo Warranto Action (and its accompanying Memorandum of Law in Support thereof)* be denied, *and that* all pleadings of record challenging the establishment of the said Investigating Grand Jury and the appointment of the Special Prosecutor be made available to the public.

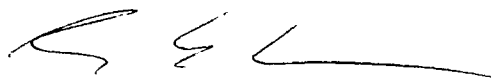


Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

DATED: 1/2/15

VERIFICATION

I, Thomas E. Carluccio, Esq. as Special Prosecutor to the Investigating Grand Jury No #35 appointed by the Pennsylvania Supreme Court, hereby state that after due diligence and investigation into the operative events underlying the subject matter of the *Motion to File under Seal the Quo Warranto Action (and its accompanying Memorandum of Law in Support thereof)* filed of record with the Court by Attorney General Kathleen G. Kane, Individ., I hereby represent that the averments set forth in the foregoing Answer to the said Motion are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

:
: SUPREME COURT OF PENNSYLVANIA
: NO. 176 M.D.D MISC. KT 2012
:

:
: MONTGOMERY COUNTY COMMON PLEAS
: M.D. 2644-2012
:

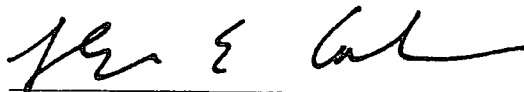
CERTIFICATE OF SERVICE

I, Thomas E. Carluccio, Esquire do hereby certify that a true and correct copy of the *Answer of Special Prosecutor to the Motion to File under Seal the Quo Warranto Action* has been filed of record with the Pennsylvania Supreme Court , and a copy of which has been directed on the 7th day of January, 2015 by first class U.S. Mail, postage prepaid, to all parties in interest, as follows:

Amit M. Minora, Esq.
700 Vine Street
Scranton, PA 18510

Gerald L. Shargel, Esq.
200 Park Avenue
New York, NY 10166

The Hon. William R. Carpenter
Court of Common Pleas of Montgomery
County
P.O. Box 311
Norristown, PA 19404-0311



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF PENNSYLVANIA
NO. 197 M.D.D MISC. KT 2012

MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

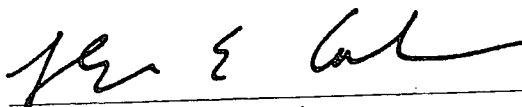
CERTIFICATE OF SERVICE

I, Thomas E. Carluccio, Esquire do hereby certify that a true and correct copy of the *Answer of Special Prosecutor to the Motion to File under Seal the Quo Warranto Action* has been filed of record with the Pennsylvania Supreme Court , and a copy of which has been directed on the 7th day of January, 2015 by first class U.S. Mail, postage prepaid, to all parties in interest, as follows:

Amil M. Minora, Esq.
700 Vine Street
Scranton, PA 18510

Gerald L. Shargel, Esq.
200 Park Avenue
New York, NY 10166

The Hon. William R. Carpenter
Court of Common Pleas of Montgomery
County
P.O. Box 311
Norristown, PA 19404-0311



Thomas E. Carluccio, Esquire
Attorney I.D. No. # 81858
Plymouth Greene Office Campus
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19464-2484
(484) 674-2899
Special Prosecutor of Investigating Grand Jury No. #35

Exhibit

F

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:

THE THIRTY-FIVE STATEWIDE
INVESTIGATING GRAND JURY

QUO WARRANTO ACTION

SUPREME COURT OF
PENNSYLVANIA NO. 176 M.D.
MISC. DKT. 2012

MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

REPLY MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY GENERAL

KATHLEEN G. KANE'S *QUO WARRANTO* ACTION

This memorandum is respectfully submitted in reply to the Memorandum of Law in Support of the Answer of Special Prosecutor to the *Quo Warranto* Action of Attorney General Kathleen G. Kane ("Answer"), dated January 2, 2015.

Special Prosecutor Thomas E. Carluccio's arguments can be addressed succinctly, for they fail to counter most of the points raised in our opening Memorandum of Law.

Mr. Carluccio argues that "[u]nder both statute and the Pennsylvania Constitution, the Supervising Judge maintains the legal authority ... to appoint a Special Prosecutor" to the Thirty-Fifth Investigating Grand Jury. (Answer at 2.) Yet he fails to cite *any* statute that provides the Supervising Judge with the legal authority to appoint a Special Prosecutor "with full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law any offenses related to any illegal disclosure of [Grand Jury] information[.]"

(See Exhibit A to AG Kane's Memorandum of Law, Order of Judge Carpenter, dated May 29, 2014, at 1.) Nor does he cite any provision of the Pennsylvania Constitution that confers such power on the Supervising Judge.

Mr. Carluccio claims that Attorney General Kane "relies upon a self-serving and constrained reading of 42 § 4244(a) to assert that only the Attorney General may establish a multicounty investigating grand jury upon application to the Supreme Court[.]" (Answer at 2.) This argument is inexplicable, given the plain language of the statute, which in fact states that "application for a multicounty investigating grand jury *may be made by the Attorney General to the Supreme Court.*" See 42 Pa. C.S. § 4244(a) (emphasis added). No exception to the exclusive authority of the Attorney General is provided in 42 Pa. C.S. § 4244(a). Therefore Attorney General Kane's reading is neither "self-serving" nor "constrained;" rather, it is the *only* accurate reading based on the language chosen by the Pennsylvania legislature.

Indeed, even looking beyond Section 4244(a), it is inconceivable that Mr. Carluccio believes the statutory authority in this case favors his position. In our Memorandum of Law, we cited numerous statutes that demonstrate precisely why it is unlawful for a Supervising Judge to appoint a Special Prosecutor on his own initiative, including 42 Pa. C.S. § 4541 (defining an "Attorney for the Commonwealth" as "the Attorney General, or his designee, with respect to multicounty investigating grand juries."), the Investigating Grand Jury Act, 42 Pa. C.S. § 4541, *et seq.*, and the Criminal Procedure Law relating to investigating grand juries, Pa. R. Crim. P. 220, *et seq.* (providing no authority for the appointment of a "Special Prosecutor" to assume the duties of a statutorily-defined "Attorney for the Commonwealth."), and Pa. Const. Art 4 § 4.1 and 71 P.S. §§ 732-101 *et seq.* (providing for the Attorney General to "exercise such powers and

perform such duties as may be imposed by law,” including, specifically, the exclusive power to conduct grand jury investigations, without exception).

Given all of this authority – and the conspicuous lack of any exception drafted into the statutory law or the Pennsylvania Constitution by the legislature – Mr. Carluccio’s argument that “[u]nder both statute and the Pennsylvania Constitution, the Supervising Judge maintains the legal authority ... to appoint a Special Prosecutor” (see Answer at 2) holds no water. He is simply wrong, and his position has no basis in the law of the Commonwealth.

Just as conspicuously, Mr. Carluccio absolutely failed to address our citation to Smith v. Gallagher, 185 A.2d 135 (1962) (overruled on other grounds). In Smith, this Court explicitly held that a Judge had no legal authority to independently appoint a Special Prosecutor to conduct a grand jury investigation. Here, as in Smith, Judge Carpenter “permitted himself an arbitrary exercise of judicial power,” “abused his discretion,” and “attempted the impossible because he was making an appointment to a phantom office.” See Smith, 185 A.2d at 143. As we previously argued, Mr. Carluccio was appointed to a public office that does not exist under the statutory law of the Commonwealth, by a Judge who had no lawful authority to appoint him. Mr. Carluccio had no response to Smith in his Answer.¹

Mr. Carluccio also failed to respond to our argument that Judge Carpenter’s unilateral appointment of a Special Prosecutor was unconstitutional because it violated the separation of powers inherent in the Pennsylvania Constitution. We respectfully maintain that this is a supremely important consideration under the facts of this case. Judge Carpenter had no authority to appoint in the Attorney General’s place “a person whose qualifications have not been passed

¹ Instead, Mr. Carluccio relied singularly on case law where the power of the judiciary to appoint a Special Prosecutor was *not* directly at issue (see Answer at 2, 5) – and therefore was not directly addressed or resolved as a point of law.

upon by the people, to discharge serious and solemn duties which involve the liberties and securities of the people." See Smith, 185 A.2d at 151. This constitutional separation of powers violation is, standing alone, sufficient to warrant relief in this *quo warranto* action.

Finally, Mr. Carluccio argues that the *quo warranto* action is now moot, because Attorney General Kane "voluntarily submitted herself" to the jurisdiction of this Court by filing prior motions. (Answer at 5.) Mr. Carluccio's position is baseless. Clearly, if Judge Carpenter had no legal authority to appoint a Special Prosecutor, and his action in doing so was unsupported by the statutory law of this Commonwealth and was a constitutional separation of powers violation, those core issues do not simply disappear because Attorney General Kane challenged the Grand Jury proceeding on multiple fronts. Nor is the *quo warranto* action moot because the Grand Jury issued a Presentment. If anything, the fact that a Grand Jury without lawful authority ultimately issued a Presentment only *compounds* the violation of Attorney General Kane's statutory and constitutional rights. Allowing the process to continue further would cause Attorney General Kane to suffer immediate and irreparable harm, both personal and professional.

Because Judge Carpenter exceeded his lawful authority *ab initio*, by appointing Mr. Carluccio to public office without authority and in violation of the separation of powers doctrine inherent in the Pennsylvania Constitution, we respectfully maintain that under this *quo warranto* action the Special Prosecutor's appointment should be quashed. We continue to request a ruling that the Special Prosecutor's appointment was invalid, that the Special Prosecutor has no

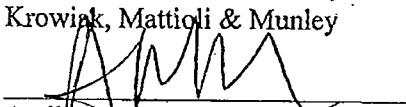
authority to hold such public office, and that no legitimate Presentment can issue from this Investigating Grand Jury.²

CONCLUSION

For the reasons set forth above, we respectfully maintain that the relief requested in Attorney General Kane's *quo warranto* action should be granted.

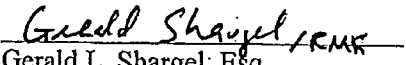
Dated: January 14, 2015

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley



Amil M. Minora, Esq.
Attorney for Attorney General Kathleen G. Kane
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
(570) 961-1616

Winston & Strawn, LLP



Gerald L. Shargel, Esq.
Attorney *Pro Hac Vice* for Attorney General
Kathleen G. Kane
200 Park Avenue
New York, NY 10166
(212) 294-2637

² As noted in our opening Memorandum of Law, although we have filed this Reply under seal, we respectfully move to unseal this *quo warranto* action. We maintain that this is a matter of the utmost public importance, involving core constitutional questions. The public should have access to the arguments of the parties and the ultimate ruling of this Court.

Exhibit

6

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: THE THIRTY-FIFTH STATEWIDE : No. 197 MM 2014
INVESTIGATING GRAND JURY :

PETITION OF: ATTORNEY GENERAL, :
KATHLEEN G. KANE :

ORDER

PER CURIAM

AND NOW, this 21st day of January, 2015, the Application for Leave to File Original Process is **GRANTED**. The parties are **DIRECTED** to file supplemental briefs discussing, inter alia, the apparent conflict between Smith v. Gallagher, 185 A.2d 135, 137 (Pa. 1962), and In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011), and the legislative history surrounding the appointment of special prosecutors. See, e.g., 18 Pa.C.S. §§9301 et seq. (expired Feb. 18, 2003).

The Prothonotary is **DIRECTED** to establish an expedited briefing schedule for the supplemental briefs and to list this matter for oral argument at this Court's March 2015 session.

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:

THE THIRTY-FIVE STATEWIDE
INVESTIGATING GRAND JURY

SUPREME COURT OF
PENNSYLVANIA NO. 176 M.D.
MISC. DKT. 2012

MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

QUO WARRANTO ACTION

197 MM 2014

PROOF OF SERVICE

I hereby certify that on February 3, 2015, I caused the service of a Supplemental Memorandum of Law in Support of Attorney General Kathleen G. Kane's *Quo Warranto* Action in a the above-captioned *Quo Warranto* Action upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

Service by Federal Express addressed as follows:

Thomas E. Carluccio
Special Prosecutor
(484) 674-2899
Law Office of Thomas E. Carluccio
1000 Germantown Pike, Suite D-3
Plymouth Meeting, PA 19462

Hon. William H. Carpenter
Court of Common Pleas
Montgomery County Court House
2 East Airy Street
P.O. Box 311
Norristown, PA 19404

Date: February 3, 2015

Winston & Strawn LLP



Gerald L. Shargel, Esq.
Attorney for Attorney General Kathleen G. Kane
200 Park Ave., New York, NY 10166
(212) 294-2637

Received in Supreme Court

FEB 4 2015

Middle