IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: THE THIRTY-FIFTH STATEWIDE INVESTIGATING GRAND JURY	:	NO. 197 MM 2014
PETITION OF: ATTORNEY GENERAL, KATHLEEN G. KANE	:	

SUPPLEMENTAL OPINION

CARPENTER J. **FEBRUARY 18, 2015**

By way of Kathleen Kane's, as an individual, q*uo warranto* action, she is asking the Pennsylvania Supreme Court to suppress all evidence against her before a criminal complaint has been filed, before a preliminary hearing has been held, before she has been prosecuted, before any evidentiary hearing of any type has been held, before any lower court has ruled upon any motion and even before the District Attorney of Montgomery County has been served or heard. The Office of the Attorney General is not making this request. Indeed, it is hard to imagine that any Attorney General in the land would agree that this request has merit.

Attorney General Kane should not be granted such monumental relief simply because she is the Attorney General. No other citizen would be granted such relief and citizen Kane should be treated no better than any other citizen.

Suppression of all evidence should not be a remedy here. Indeed, no relief is warranted. A diverse group of honest, diligent, hard- working American citizens heard the hard and fast evidence against Kathleen Kane. This group of men and women,

black and white, republican and democrats deliberated and concluded that Kathleen Kane should be prosecuted for criminal offenses and criminal contempt.

Kathleen Kane also argues that it is "the Attorney General [who has] the power to conduct an investigating grand jury" under these circumstances, rather than a special prosecutor. See, Supplemental Memorandum of Law in Support of Quo Warranto Action, 2/4/15 p. 12. For reasons hereinafter discussed at length, this argument- that it is only "the fox who should be permitted to guard the henhouse" – is equally without merit.

Kathleen Kane has offered nothing and has shown nothing, to warrant the granting of the unprecedented, extraordinary relief that she has requested. The truth is crying to be heard. For reasons that follow her *quo warranto* action should be dismissed and the voice of the truth be allowed to speak.

INTRODUCTION

The appointment of an independent special prosecutor to investigate a breach of grand jury secrecy when there is an inherent conflict of interest with the Attorney General's Office or the Attorney General has been upheld by the judiciary based on both statutes and based upon common law. The inherent power of a court to appoint a special prosecutor under such circumstances flows as a corollary from 42 Pa.C.S.A §323, which allows a court to exercise whatever power is necessary to be able to function as a court. In addition, there have been two statutes that have directly addressed this issue, both of which indicated that the judiciary should perform this function. When, in our legal history, there has been no statute to directly deal with this issue, common law has prevailed, as articulated in In Re Dauphin County Fourth

Investigating Grand Jury, 19 A.3d 491 (Pa. 2011). In fact, In Re Dauphin County is directly on point since it dealt not only with a conflict of interest within the normal chain of command, but also with the violation of grand jury secrecy, both of which exist in this case.

In In Re Dauphin County, the Pennsylvania Supreme Court emphasized the vital importance of secrecy in grand jury proceedings, which is codified in the Grand Jury Act, and a supervising judge's inherent power to oversee that secrecy. The Court also properly recognized the power of a supervising judge to appoint an independent special prosecutor when there are allegations that grand jury secrecy was breached and that the breach involved either the district attorney's office or the Attorney General's Office. Moreover, In Re Dauphin County does not conflict with Smith v. Gallaher, 185 A.2d 135 (Pa. 1962).

Not only is the Smith case, which is relied on by the Attorney General, distinguishable from the instant case, it is inapplicable here. In Smith, the Court held that a common pleas judge had no authority to dismiss the district attorney summarily from all phases of a contemplated special grand jury investigation. This is the holding that Attorney General Kathleen G. Kane cites in her *quo warranto* argument; however, the Smith holding is confined to the facts of that case and the statute (since repealed) that was controlling at that time. Smith was decided under Section 907 of the Administrative Code of 1929, as amended in 1937, which does not address either the issue of grand jury secrecy or what mechanism should be used to investigate that breach when either a district attorney's office or the Attorney General's Office has been alleged to have been the source of that breach. Rather, it addressed the procedure that

must be followed when a district attorney will not or cannot perform his functions according to the law, i.e., the Attorney General can supersede that district attorney's role. Specifically, Section 907 of the Administrative Code of 1929 required the president judge to request that the Attorney General appoint a special prosecutor to supersede the district attorney's function. Because Smith does not deal with grand jury secrecy, or a conflict of interest within an Attorney General's Office to investigate that breach, its holding is inapplicable to the present case.

FACTUAL AND PROCEDURAL HISTORY

On May 29, 2014, in my capacity as Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury, I found that there were "reasonable grounds to believe a further, more substantive investigation" should be made into allegations that statewide Grand Jury secrecy had been compromised. On that date, this Court appointed Thomas E. Carluccio, Esquire as Special Prosecutor. 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.

On 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 Kathleen G. Kane was involved in violations of certain criminal laws of our Commonwealth; 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. §510, and

Criminal Contempt. Criminal Contempt is an affront to the dignity and authority of the court. Criminal Contempt is normally handled by the court and was not specifically referred to the District Attorney here.

Also on December 18, 2014, Attorney General Kane filed a *quo warranto* action in the Pennsylvania Supreme Court to quash the appointment of Special Prosecutor Carluccio. To date, the *quo warranto* action has not been decided.

On December 19, 2014, I found that the presentment contained probable cause and showed a *prima facie* case existed for all of the recommended offenses including Criminal Contempt. Therefore, I entered an Order Accepting Presentment No. #60. The matter has been referred to the District Attorney of Montgomery County for prosecution.

On December 30, 2014, I responded to Attorney General Kane's *quo warranto* action by way of an opinion, expressing the authority for my appointment of Special Prosecutor Carluccio.

On January 2, 2015, Special Prosecutor Carluccio filed an Answer to Attorney General Kane's *quo warranto* action. Attorney General Kane filed a reply on January 14, 2015. Subsequently, on January 21, 2015, the Pennsylvania Supreme Court directed, "the parties [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." On February 3, 2015, the Court issued a supplemental order permitting me to file this supplemental opinion.

ISSUES

I. Whether my appointment of Special Prosecutor Carluccio was proper, when courts have the inherent power to do such things that are reasonably necessary for the administration of justice.

II. Whether the legislative history supports the common law appointment of a special prosecutor when the Attorney General's inherent conflict of interest prohibits a fair and impartial investigation into a breach of grand jury secrecy.

III. Whether no conflict exists between *Smith v. Gallagher, 185 A.2d 135 (Pa. 1962)* and *In Re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011)*, since *Smith* does not involve the appointment of a special prosecutor in the context of a grand jury leak where an Attorney General has an inherent conflict of interest as does *In Re Dauphin County* and as the present case.

DISCUSSION

I. My appointment of Special Prosecutor Carluccio was proper, when courts have the inherent power to do such things that are reasonably necessary for the administration of justice.

A court must possess whatever power is necessary to be able to perform as a court. This inherent authority derives from our constitutional separation of powers. "The courts of this Commonwealth under our Constitution have certain inherent rights and powers to do all such things as are reasonably necessary for the administration of justice." See, e.g., Sweet v. Pennsylvania Labor Relations Bd., Washington County, 322 A.2d 362, 365 (Pa. 1974); Eshelman v. Comrs. Of the Co. of Berks, 436 A.2d 710, 712 (Pa.Cmwlth. 1981).

A court's inherent authority is also derived from the nature of a court, and is a power essential to its function as a court. It is an implied power, because it is vitally necessary to the exercise of all of its other powers. This implied rule is codified in 42 Pa.C.S.A. §323, which reads as follows:

§ 323. Powers

> Every court shall have power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make and all legal and equitable powers required for or incidental to the exercise of its jurisdiction, and, except as otherwise prescribed by general rules, every court shall have power to make such rules and orders of court as the interest of justice or the business of the court may require.

A supervising judge of an investigating grand jury must possess this inherent power to enforce the traditional rule of secrecy over grand jury proceedings because of the very nature of those proceedings. Additionally, when it is alleged that a breach of secrecy was caused by the very office which is normally charged with investigating such crimes, then the inherent authority of the court must include the ability to appoint an independent special prosecutor to investigate such allegations. Without the ability to investigate a breach in a non-partisan manner, the administration of justice would certainly be frustrated. "The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." Com. ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (citations omitted). Without such authority when a breach of secrecy is alleged, especially when that breach is alleged to have been caused by the very branch of government that should have investigated it, the authority of the court would be eviscerated. Accordingly, based upon my inherent power as the Supervising Judge of the Thirty-Fifth Statewide

Investigating Grand Jury, I appointed Special Prosecutor Carluccio to conduct an independent investigation into the breach of grand jury secrecy, since that breach was alleged to have come directly from the Attorney General's Office or the Attorney General herself, so that he could conduct a non-partisan investigation free from the taint and appearance of self-dealing.

Not only did Attorney General Kane have a conflict of interest in investigating violations of grand jury secrecy laws which in my inherent power required the appointment of a special prosecutor; but also, she had a conflict of interest in investigating the violation of the Criminal History Record Information Act. See Pa.C.S.A. §9101 *et seq*. which also required my appointment of a special prosecutor. The Attorney General is required to oversee and enforce the Act, not violate it.

Under the Act, investigative and intelligence information may be disseminated only upon request and only to a criminal justice agency as defined in the Act. See, 18 Pa.C.S.A. §9102 (Definitions); §9106(c)(1) &(4).[1] [2] Additionally, the Act

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[1] **"Criminal justice agency."** Any court, including the minor judiciary, with criminal jurisdiction or any other governmental agency, or subunit thereof, created by statute or by the State or Federal constitutions, specifically authorized to perform as its principal function the administration of criminal justice, and which allocates a substantial portion of its annual budget to such function. Criminal justice agencies include, but are not limited to: organized State and municipal police departments, local detention facilities, county, regional and State correctional facilities, probation agencies, district or prosecuting attorneys, parole boards, pardon boards, the facilities and administrative offices of the Department of Public Welfare [FN1] that provide care, guidance and control to adjudicated delinquents, and such agencies or subunits thereof, as are declared by the Attorney General to be criminal justice agencies as determined by a review of applicable statutes and the State and Federal Constitutions or both.

See, 18 Pa.C.S.A. § 9102.

does not permit the release of information where "no conviction has occurred; and no proceedings are pending seeking a conviction." 18 Pa.C.S.A. §9121(b)(2)(ii)(iii). In this case, investigative information was released to the Philadelphia Daily News, which is not a criminal justice agency, in violation of the Act and that information implicated Mr. J. Whyatt Mondesire, who had never been charged with a crime, in wrongdoing, also in violation of the Act.

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[2] **(c) Dissemination of protected information.—**

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(1) Intelligence information may be placed within an automated or electronic criminal justice information system and disseminated only if the following apply:

(i) The information is reliable as determined by an authorized intelligence officer.

(ii) The department, agency or individual requesting the information is a criminal justice agency which has policies and procedures adopted by the Office of Attorney General in consultation with the Pennsylvania State Police which are consistent with this act and include:

(A) Designation of an intelligence officer or officers by the head of the criminal justice agency or his designee.

(B) Adoption of administrative, technical and physical safeguards, including audit trails, to insure against unauthorized access and against intentional or unintentional damages.

(C) Labeling information to indicate levels of sensitivity and levels of confidence in the information.

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(4) Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

See,18 Pa.C.S.A. § 9102(c)(1)&(4).

Attorney General Kane has admitted publically and in her Supplemental Memorandum of Law in Support of *Quo Warranto* Action that she authorized the release of the 2014 Memorandum, which interestingly was not done through a traditional press release, but in a secret non-transparent manner. See, Supplemental Memorandum of Law in Support of *Quo Warranto* Action 2/4/15 p. 7. Accordingly, my appointment of a special prosecutor was necessary because Attorney General Kane was not going to investigate a violation of the Act that she caused to occur due to her inherent conflict of interest.

II. The legislative history supports the common law appointment of a special prosecutor when the Attorney General's inherent conflict of interest prohibits a fair and impartial investigation into a breach of grand jury secrecy.

The appointment and role of an independent special prosecutor to handle grand jury investigations, which might not otherwise be necessary, has a history in Pennsylvania grounded in both statute and in the common law. At times in our history, there has been statutory authority for the judiciary to appoint an independent special prosecutor, and at times this authority has been derived from our common law. The distinguishing characteristic of such appointments is that the special prosecutor is intended to operate outside the usual line of control, so that he would be politically independent.

In 1929, the Pennsylvania Legislature enacted the Administrative Code of 1929, P.L. 177, Art. IX, Section 907, 71 P.S. §297[3], as amended in 1937 and again in

[3] There have been several previous statutes regulating the temporary displacement of district attorneys, beginning with the Act of March 12, 1866, P.L. 85, 16 P.S. § 3432, including the Act of May 2, 1905, P.L. 351, 71 P.S. §§ 817–819, and the Act of June 7, 1923, P.L. 498, 550, § 907, and culminating in the Act of April 9, 1929, P.L. 177, § 907, 71 P.S. § 297. See, In Re Shelley, 2 A.2d 809, 812, n.1 (Pa. 1938).

1970, which allowed the president judges of the courts of common pleas to request in writing that the Attorney General intervene in criminal matters and supersede the district attorney. It provided as follows:

> **Section 907. Special Attorneys in Criminal Cases**. When the president judge in the district having jurisdiction of any criminal proceedings before any court of oyer and terminer general jail delivery or quarter sessions in this Commonwealth shall request the Attorney General to do so in writing setting forth that in his judgment the case is a proper one for the Commonwealth's intervention the Attorney General is hereby authorized and empowered to retain and employ a special attorney or attorneys as he may deem necessary properly to represent the Commonwealth in such proceedings and to investigate charges and prosecute the alleged offenders against the law. Any attorney so related and employed shall supersede the district attorney of the county in which the case or cases may arise and shall investigate prepare and bring to trial the case or cases to which he may be assigned...

This legislation however, left open the question of what happens when there is a direct conflict of interest within the Attorney General's Office or with the Attorney General herself. It only provided for a special prosecutor to be appointed under circumstances where, for whatever the reason, the district attorney was unable to perform his functions, as it provided a means to supersede the district attorney. This gap in the Administrative Code of 1929 was filled by Act No. 3, Section 2.

On July 30, 1938, an Act was passed by the General Assembly, Act No. 3 of the special session. Act No. 3 provided that if the Attorney General, after the district attorney's role is superseded, is unable to perform her duties impartially, she may be set aside by the court, which shall then appoint an attorney from another county of the

Commonwealth to act as special prosecutor. In Re Shelley, 2 A.2d 809, 813 - 814 (Pa. 1938).

> Section 2 of that Act No. 3 provided:
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> > Section 2. If any such investigation or proceeding, the court before which it is pending shall find, after hearing, that the Attorney General has failed or is unable to perform his duties impartially, such court may order the Attorney General to stand aside, and in such event shall appoint an attorney at law resident in another county of the Commonwealth of Pennsylvania to supersede and act in lieu of the Attorney General ...

In Re Shelley, 2 A.2d at 811. Act No. 3 was later repealed in 1939, by the Act of March 20, 1939, P.L. 8, known as Act No. 7. See, Commonwealth v. Fudeman, 396 Pa. 236, 243, 152 A.2d 428, 432 (Pa.1959). With the repealing of Act No. 3, there was again a gap in the law which was not directly addressed until 1998, when the Pennsylvania Legislature passed the Independent Counsel Authorization Act ("ICAA"), 18 Pa.C.S.A. §9301 *et seq.*

The ICAA authorized the investigation of enumerated public employees in the Attorney General's office, including, *inter alia*, the Attorney General and any Deputy Attorney General, and the chairman and treasurer of the principal campaign committee seeking the election or reelection of the Attorney General, when that person may have committed an offense which is classified higher than a second degree misdemeanor, or an offense which is classified higher than a summary offense and which involves a breach of the public trust. 18 Pa.C.S.A. §9312. The ICAA provided for the appointment of independent counsel and broadly defined the independent counsel's potential jurisdiction. Id. at §9319. Also, under the ICAA the method for the appointment of a special prosecutor was set forth. A Special Independent Prosecutor's Panel, comprised

of one judge from the Pennsylvania Commonwealth Court and two judges from the Pennsylvania courts of common pleas, were to appoint independent counsel after a preliminary investigation was made by a special investigative counsel. The special investigative counsel would then determine whether further investigation was warranted and the special investigative counsel would then apply to the Special Independent Prosecutor's Panel for the appointment of independent counsel. Id. at §§9311, 9312, 9315.

The purpose of the ICAA, as demonstrated through debate over the legislation, was to provide a process to allow an investigation by an independent prosecutor when the Attorney General's Office or the Attorney General had a potential conflict of interest, to ensure that no one was above the law. More specifically, on June 10, 1997, there was a debate in the Pennsylvania House of Representatives regarding Senate Bill 635 ("SB 635"), later to become the ICAA, during which Representative Masland of Cumberland County, a proponent of SB 635, explained that :

> But basically 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....
>
> ...and it will basically provide the people of the Commonwealth with the assurance that no one, whether that

person be in the Attorney General's Office or otherwise, is above the law.

H. No. 181 – 40, 1997 sess. at 1245 (Pa. June 10, 1997).

Representative Manderinio from Philadelphia similarly explained that the bill was about good government and ensuring the integrity of our governmental process. She also expressed the vital importance of having a fair process if there was any potential conflict of interest involving either the Attorney General herself or someone else in that office, could assure that there was no conflict or no self-dealing and that wouldl ensure a fair view of issues on behalf of the Commonwealth and its citizens. Id.

The only disagreement over SB 635 came from Representative Williams of Philadelphia who believed that this bill abdicated the legislature's responsibility to investigate matters that arise when an Attorney General is accused of a crime and cannot investigate herself. He believed that the impeachment process was sufficient to address that scenario. Id. at 1245 - 1247.

After debate, SB 635 was passed by the House, with 200 Yeas, 0 Nays, and 2 representatives excused from voting. Id. The Senate later passed SB 635, and it was approved by the Governor on February 18, 1998. There was a sunset provision in the Act, which provided for the Act to expire in 2003, which it did.

The legislative history shows that for most of our legal history in Pennsylvania there has been a gap in our statutory framework directly addressing the appointment of an independent special prosecutor in a situation when the Attorney General or that office has a conflict of interest, and such a gap exists today. When there has been direct statutory authority to supersede the Attorney General's Office, that statutory authority assigned the role of appointing an independent special prosecutor to

the judiciary; specifically, Act No. 3, which was passed on July 30, 1938, and the Independent Authorization Act, 18 Pa.C.S.A. §9301 *et seq*. Between these legislative enactments, special prosecutors have been properly appointed, but it has been done through authority found at common law, as was clearly recognized in In Re Dauphin County Fourth Investigating Grand Jury, 610 Pa. 296, 19 A.3d 491 (2011).

III. No conflict exists between *Smith v. Gallagher, 185 A.2d 135 (Pa. 1962)* and *In Re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011)*, since *Smith* does not involve the appointment of a special prosecutor in the context of a grand jury leak where an Attorney General has an inherent conflict of interest as does *In Re Dauphin County* and as the present case.

There is no conflict between Smith and In Re Dauphin County because Smith is no longer good law since it was decided under an outdated statute. Even if its holding survived the legislation it was decided under, it is readily distinguishable and inapplicable to this case involving a conflict of interest with the Attorney General's office in the context of a violation of grand jury secrecy.

Against the backdrop of the Administrative Code of 1929, as amended in 1937, the Pennsylvania Supreme Court in Smith announced that in a common pleas judge had no authority to empanel a "special grand jury" and dismiss the district attorney summarily from all phases of contemplated special grand jury investigation. Id. at 151. This is the basis of Attorney General Kane's *quo warranto* argument. However, the statute involved in Smith set forth the procedure for superseding the district attorney, which the judge in that case did not follow. The judge in Smith clearly exceeded his authority by circumventing the statute and replacing the district attorney, when there was already a statutorily created mechanism for doing so. Although the Smith case has not been specifically overruled, it is no longer a reliable precedent since

the statute on which it relied has been repealed. The repealing of the statute made the case not relevant. The Smith holding therefore must be confined to the specific facts and existing law of that case.

By comparison, In Re Dauphin County was decided at a time when there was no statutory framework to directly guide the appointment of a special prosecutor, in light of the expiration of the ICAA in 2003. In Re Dauphin County was therefore decided under our common law recognizing the inherent power a supervising judge has over secret grand jury proceedings. Clearly, the Pennsylvania Supreme Court in In Re Dauphin County implicitly approved of the inherent authority of a supervising judge to appoint a special prosecutor when the Court directed the President Judge of the Dauphin County Court of Common Pleas to appoint a special prosecutor to investigate allegations of the breach of grand jury secrecy. Now, just as then, there is still no statute in place to directly deal with the appointment of a special prosecutor when credible allegations are made against an Attorney General's Office or the Attorney General herself that grand jury secrecy laws were violated.

Therefore, there is clearly no conflict between these two cases because the facts (and law) of each case dictate a different result; and the facts of the present case are strikingly similar to those encountered in In re Dauphin County. Indeed In re Dauphin County is directly on point since it involved allegations of violations of grand jury secrecy; whereas ,the Smith case did not. The Smith case involved allegations that the district attorney was not doing his job in prosecuting violations of the law. It had nothing to do with grand jury secrecy and the inherent and necessary power that a

supervising grand jury judge possesses in order to uphold the secrecy and integrity of grand jury proceedings.

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

In In Re Dauphin County, the Pennsylvania Supreme Court relied on the inherent authority of a supervising judge overseeing a grand jury to ensure that grand jury secrecy, codified into law by the Grand Jury Act, by appointing a special prosecutor in the context of an alleged breach of grand jury secrecy by a district attorney's office. The pertinent facts are as follows: In May of 2006, the Dauphin County District Attorney filed an application to impanel an Investigating Grand Jury, relating to the licensing application of Louis A. DeNaples and Mount Airy #1, LLC for a slot machine license and the approval of that application by the Pennsylvania Gaming Control Board. Id. at 492.

In June of 2006, the Dauphin County District Attorney's application was approved by the President Judge of the Dauphin County Court of Common Pleas, and the President Judge appointed the Honorable Todd A. Hoover as the supervising judge of the grand jury. Id. 492 – 493.

In May of 2007, the grand jury issued three subpoenas to the Gaming Control Board and its Executive Director, directing them to produce documents relating to the DeNaples' and Mount Airy's gaming application and licenses. Id. at 493. DeNaples and Mr. Airy filed a petition to intervene, to stay grand jury subpoenas and for access to notice of submission. On July 23, 2007, a proceeding was held on these filings and during the proceeding, counsel for DeNaples and Mr. Airy argued to the supervising judge that protected information regarding the grand jury investigation had been improperly disclosed. Id.

On July 26, 2007, the supervising judge conducted an *in camera* conference to address newspaper articles that were published by several newspapers. Id. The news articles reported the existence of grand jury investigation involving petitioner DeNaples. Id. The articles claimed that "sources close to the investigation" had disclosed that the grand jury investigation involved whether petitioner DeNaples had lied in connection with his application for a casino license, and indicated that the D.A's Office had issue a subpoena to the Gaming Control Board. The articles also identified who had appeared to testify before the grand jury. Id.

On July 31, 2007, petitioners filed a motion for an evidentiary hearing regarding violation of grand jury secrecy alleging that many media reports of grand jury proceedings demonstrated a breach of secrecy. Id. Consideration of the motion was deferred by the supervising judge based upon the petitioners' appeal of several unrelated orders issued by the supervising judge. Id. at 493 – 494.

After the appeal was resolved, on January 2, 2008, the petitioners provided the supervising judge with copies of newspaper articles that had been published after the pending motion was filed. Id. at 497. Thereafter, the grand jury issued a presentment against DeNaples and Mr. Airy, which was accepted by the supervising judge on January 23, 2008. On February 11, 2008, DeNaples and Mt. Airy, filed an application for review pursuant to 42 Pa.C.S..A. §722(5) and Pa.R.A.P. 3331(a) and an application for stay of proceedings pending review with the Pennsylvania Supreme Court. The petition raised several claims and renewed allegations that there had been violations of the secrecy of the grand jury investigation. Id. at 497.

On May 2, 2008, the Pennsylvania Supreme Court entered a *per curiam* order granting the request for extraordinary jurisdiction, but limited to the question of alleged violations of grand jury secrecy. The order further provided:

> The matter is remanded to Supervising Judge Todd A. Hoover for the purpose of conducting an expedited evidentiary hearing relating to the allegations of violations of the secrecy provisions of the Investigating Grand Jury Act, 42 Pa.C.S. § 4541 et seq. *At the conclusion of the hearing, Supervising Judge Hoover is directed to consider whether a special prosecutor should be appointed to pursue the allegations* and to forward an opinion setting forth his findings and recommendations to this Court within ninety days of the date of this order. The remaining claims presented in the Renewed Application for Review, and the request for a stay are denied.

Id. at 497.(Emphasis added.)

The supervising judge, conducted the proceedings on June 30 and July 1, 2008, and on August 4, 2008, the supervising judge issued a report and recommendation, which was filed with the Pennsylvania Supreme Court for the Court's review. Id. at 498. On February 24, 2009, the Supreme Court entered a *per curiam* order, in which it in part remanded the matter to the "President Judge of the Dauphin County Court of Common Pleas with direction to appoint a special prosecutor to conduct further inquiry into the allegations of violations of the secrecy provisions of the Investigating Grand Jury Act...and to oversee such inquiry." Id.

On May 14, 2009, a special prosecutor was appointed by the president judge. Id. at 498 – 499. Following his appointment, the special prosecutor undertook a preliminary review of documents from the underlying grand jury proceedings. Id. at 500. After conducting his investigation, the special prosecutor issued his report on May 5, 2010. Id. at 499. In his report, the special prosecutor reasoned that the most likely

source of the information provided to the newspaper reporters were two Pennsylvania State Troopers and the assistant district attorney. Id. at 500. Although the special prosecutor could not determine with certainty the sources of the leaks, and no prosecution followed, the Court noted that the special prosecutor's investigation and report were significant and that the significance could not be overstated since he exposed a grand jury process that created an atmosphere where a breach of grand jury secrecy became inevitable. Id. at 503.

The Court then discussed of the important role that secrecy has traditionally played in grand jury proceedings. Id. at 503. This traditional role of secrecy was so essential to the grand jury process that it was codified into law by way of the Grand Jury Act. Id. at 503. The Court also emphasized the "strong judicial hand in supervising the proceedings" and the "seminal role" that a supervising judge of a grand jury has over such proceedings as was recognized by the Court in In Re Twenty-Fourth Statewide Investigating Grand Jury, 589 Pa. 89, 907 A.2d 505 (2006). Id. at 503 – 504. It quoted from In Re Twenty-Fourth Statewide Investigating Grand Jury, stating:

> 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 (quotations and citations omitted).

Against this background, the Court stated:

> *When 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 (Emphasis added.) The Court cited two cases with approval and discussed them, In Re: County Investigating Grand Jury VIII, 2003, 2005 WL, 3985351 (Lack.Com.Pl. 2005) and Castellani v. Scranton Times, 598 Pa. 283, 956 A.2d 937 (2008). In both of these cases, the Court cited, special prosecutors were appointed by supervising judges when there were allegations of breaches of grand jury secrecy by the District Attorney's Office and agents of the Attorney General's Office, respectively. Clearly, both required a procedure that would proceed outside the usual mechanism due to the nature of the alleged leaks, just as in the instant case.

In the Lackawanna Common Pleas Court case, In Re County Investigating Grand Jury VIII, the supervising judge reviewed allegations and confirmed the existence of emails that were exchanged between a newspaper reporter and a member of the District Attorney's office during the time the grand jury was conducting its investigation. The common pleas court appointed a prosecutor to investigate the allegations of a grand jury leak. In Castellani, again the supervising judge appointed a special prosecutor to investigate allegations of the unlawful breach of grand jury secrecy when there were allegations that the information was leaked to newspaper reporters by agents of the Attorney General's office. Both of these cases were cited with approval by the Pennsylvania Supreme Court in In Re Dauphin County.

In Re Dauphin County demonstrates that judicial appointment of a special prosecutor is appropriate and necessary when violations of grand jury secrecy are at

issue and are alleged to have been committed by those in the normal chain of command, i.e, the executive branch. In In Re Dauphin County there was no statute dictating the procedure by which to invoke the jurisdiction of a special prosecutor, and with that backdrop, the Pennsylvania Supreme court directed the lower court to appoint a special prosecutor. And although the issue of whether the appointment of the special prosecutor by the supervising grand jury judge was not at issue on appeal, the Court implicitly acknowledged that it is an appropriate procedure by citing two other cases in which a supervising judge appointed special prosecutors to investigate the leak of secret grand jury information, where the alleged violation of grand jury secrecy came from either district attorneys or agents of the Attorney General's Office. In such cases ,it is clear that the supervising judge has the inherent power to appoint a fair and impartial prosecutor.

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

The case of Smith was decided pursuant to a statute which has since been repealed. In 1962, when the Smith case was decided, the relevant statute was found at Section 907 in the Administrative Code of 1929, 71 P.S. §297. In pertinent part, it reads as follows:

> When the president judge, in the district having jurisdiction of any criminal proceedings, before any court of oyer and terminer, general jail delivery, or quarter sessions, in the Commonwealth, shall request the Attorney General to do so, in writing, setting forth that, in his judgment, the case is a proper one for the Commonwealth's intervention, the Attorney General is hereby authorized and empowered to retain and employ a special attorney or attorneys, as he may deem necessary, properly to represent the Commonwealth in such proceedings, and to investigate charges, and prosecute the alleged offenders against the law. Any

> attorney, so retained and employed, shall supersede the district attorney of the county in which the case of cases may arise, and shall investigate, prepare, and bring to trial the case or cases to which he may be assigned.

Id. at 185 A.2d at 142.

The underlying facts of Smith are as follows: In March of 1962, a petition was filed averring widespread violations of law in the Philadelphia government, and that the Philadelphia District Attorney was "unable or unwilling to cope with the situation". Id. at 138.

This petition was eventually assigned to a Philadelphia County Common Pleas Judge, Judge Alessandroni. On July 11, 1962, Judge Alessandroni ordered a special grand jury to be convened on September 5, 1962. Id. at 140. The July 11, 1962 order, directed the special grand jury

> to investigate and inquire into all matters set forth in the said petition, and any other matters which may properly come before it, including the investigation of any other unlawful conduct on the part of any public official or person within our jurisdiction.

Id. at 147 – 148. Additionally, on July 18, 1962, Judge Alessandroni issued another order appointing a special prosecutor:

> Pursuant to the order of the court dated the 11th day of July, 1962, W. Wilson White, Esquire, is hereby appointed Special Prosecutor in connection with the Special Grand jury to be convened as set forth in said order. He is accordingly authorized and directed to perform all of the duties lawfully incumbent upon him as Special Prosecutor and to investigate and inquire into all matters that may properly come before the said Special Grand Jury, including the investigation of any unlawful conduct on the part of any public official or person within our jurisdiction and to aid the

> Special Grand Jury in the making of proper presentment or presentments to the court as the ends of justice may require.

Id. at 149.

On appeal, the Pennsylvania Supreme Court faced the issue of whether Judge Alessandroni acted properly in appointing a special prosecutor, superseding the district attorney. Id. at 146. The Smith Court concluded that Judge Alessandroni had no authority to dismiss the district attorney summarily from all phases of the contemplated special grand jury investigation. It must be emphasized that at the time the Smith Court contemplated this issue, there was a statutory requirement, set forth in the Administrative Code, 71 P.S. §297, which required a president judge to request the Attorney General to supersede a district attorney, who then in turn could appoint a special prosecutor to investigate and prosecute on behalf of the Commonwealth. The Smith Court observed that "[i]nstead of considering this definitive procedure, Judge Alessandroni acted on his own volition and displaced the District Attorney." Id. at 142. In fact, the Smith Court noted that "[t]he glaring infirmity in this entire proceeding was the failure of the Criminal Courts of Philadelphia County to utilize the machinery already in existence." Id. at 147. The Smith Court reasoned that the July 18, 1962 order summarily dismissed the District Attorney...". Id. at 151.

Also significant to the holding of the Smith Court was the breadth and the all-encompassing manner in which the July 11, 1962 and the July 18, 1962 Orders were written. The Smith Court noted that the July 11, 1962 Order was so wide in scope and violative of due process, that given the way the order was written, it would mean that "every person in the County of Philadelphia would be subject to the inquisitorial powers of this body; it would mean that every act in the whole catalogue of 'unlawful conduct'

ranging through the most trivial infractions of traffic regulations, assault and battery...could be investigated..." Id. at 148. The Smith Court further observed that "there could be no assurance that, even with the best of intentions, the investigation authorized by the order of July11th would not cross the boundaries of democratic limitations and become an engine of oppression...". Id.

Also, the Smith Court found the July 18, 1962 Order appointing the special prosecutor similarly infirm because of the unlimited powers it bestowed upon the special prosecutor. The Smith Court first noted, "[t]here is no public office in Pennsylvania known as Special Prosecutor." Id. at 149. To that end, the Smith Court elaborated that in 21 listed "reported cases involving grand jury investigations, either requested or accomplished, in not one of them was there an official of any kind with duties even distantly approximating those assigned to W. Wilson White by Judge Alessandroni." Id. at 149. The Smith Court noted that under the July 18th Order, W. Wilson White would be empowered to investigate the 'unlawful conduct' of any person within the vast geographical domains of metropolitan Philadelphia." Id. The Smith Court further observed that 'this amazing document is without precedent or parallel in the history of Pennsylvania Courts. W. Wilson White could investigate, quiz, harass, harry, annoy, badger, command and worry any number of two million inhabitants on any subject which, according to his own unrestricted judgment, came within the purview of 'unlawful conduct.'". Id.

The holding of the Smith Court cannot be viewed in isolation, as Attorney General Kane would like this Court to do. Rather, it must be put into the context and the facts of that case. In Smith, the common pleas judge violated the rule of law as set forth

in the prevailing statute. In addition, the common pleas judge's orders, convening the grand jury and appointing the special prosecutor, were unlimited in scope so as to bestow powers upon the grand jury and the special prosecutor which would have rendered them illegal and unconstitutional. Further, the Smith case had absolutely nothing to do with the breach of grand jury secrecy.

In Smith, the allegations involved the failure of the district attorney to do his job in prosecuting violations of the law. Whereas, In Re Dauphin County arose from proceedings related to an investigation involving allegations of disclosures of protected information regarding the Dauphin County Fourth Investigating Grand Jury. In Re Dauphin County directly addressed grand jury secrecy and the necessity to maintain the secrecy involved in those proceedings and the inherent power of the supervising judge to oversee that the secrecy of those proceedings is maintained. This inherent power is even more crucial in a case such as In Re Dauphin County and in the present case, since in both cases the alleged breach of grand jury secrecy was attributed to the Office of Attorney General. This requires the judiciary, with its inherent authority to appoint an independent prosecutor from outside the normal mechanism to conduct a fair and impartial investigation of such alleged leaks of secret grand jury information, as was done in In Re Dauphin County and in the present case.

The appointment of an independent special prosecutor by the judiciary is completely proper, appropriate and necessary when there is a conflict of interest with the Attorney General's Office or with the Attorney General herself. It is absolutely essential that an independent investigation, free of taint or self-dealing be conducted under such circumstances. This is even more important when the allegations involve

breaches of grand jury secrecy. A supervising judge has the inherent authority, and the clear obligation, to uphold the integrity of the grand jury process, and to pursue the administration of justice. I would have violated my Oath of Office by walking away from this situation.

CONCLUSION

The Attorney General argues that she alone can violate grand jury secrecy and the Criminal History Record Information Act 18 Pa.C.S.A. Chapter 91 and be insulated from meaningful investigation. In fact, the Attorney General is required to oversee the Criminal History Record Information Act, not violate it. See, 18 Pa.C.S.A. § 9161 ("Duties of the Attorney General").

When a serious breach of grand jury secrecy and a violation of the Criminal History Record Information Act, comes from the Office of the Attorney General or the Attorney General herself, the Supervising Judge must act.

There are times when all that stands between measured criminal justice and chaos is "...some Judge on a high and windy place in his thin judicial robes" trying to do the right thing for the right reasons. (Borrowed from Thomas McBride, Esquire comments involving the "Red Scare" case.)

I was faced with acting or with violating my Oath of Office as a Judge of the Court of Common Pleas of Montgomery County. I was faced with acting or violating my duties and solemn responsibilities as the Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury, a job I did not ask for. I chose to take action for all the right reasons, and based on clear common law authority, and with the approval of the former Chief Justice. Frankly, these crimes and criminal contempt would not have been uncovered in any way other than the path that I took.

Without the dictates of a statute directly on point, I was governed by common law and the judiciary's inherent authority to appoint a special prosecutor as set forth in 42 Pa.C.S.A §323, because Attorney General Kane has an intrinsic conflict of interest and violations of grand jury secrecy were at issue. Accordingly, my appointment of Special Prosecutor Carluccio should be upheld.

BY THE COURT:

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

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE:	:	**SUPREME COURT OF PENNSYLVANIA**
	:	**NO. 197 MM 2014**
THE THIRTY-FIFTH STATEWIDE	:	
	:	
INVESTIGATING GRAND JURY	:	
	:	

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 of February 18, 2015 was forwarded to the persons set forth below via Electronic Mail and First Class Mail on February 18, 2015.

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