

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. #197 MM 2014

IN RE: THE 35TH STATEWIDE INVESTIGATING GRAND JURY
PETITION OF ATTORNEY GENERAL KATHLEEN G. KANE

BRIEF OF SPECIAL PROSECUTOR

**in Opposition to the Quo Warranto Action
of Attorney General Kathleen G. Kane**

A Direct Appeal from the Order Entered on May 29, 2014 by the Honorable William R. Carpenter, Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury, Appointing Thomas E. Carluccio, Esquire as Special Prosecutor

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I. INTRODUCTION

Attorney General Kane argues in her Supplemental Memorandum of Law in Support of her *Quo Warranto* Action (“Supplemental Brief”) that Supervising Judge Carpenter was not authorized to appoint Thomas Carluccio as special prosecutor to investigate alleged grand jury leaks in the present case, citing the alleged absence of statutory authorization and relying on the case of *Smith v. Gallagher* in arguing that the position of “special prosecutor” does not exist in the Commonwealth. Attorney General Kane contends that the five-year period in which the Independent Counsel Authorization Act (the “ICAA”) was in effect was the only time in Pennsylvania history that supervising judges had the power to appoint special prosecutors to investigate leaks of statewide grand jury information. Finally, Kane attempts to distinguish this matter from Dauphin County by stating that the special prosecutor’s powers in that case were more limited than Carluccio’s powers were here, and that the same supervising judge overseeing the grand jury in which the leak occurred appointed the special prosecutor in that case.

Attorney General Kane’s arguments fail because: (1) this Court in *Dauphin County* held that supervising judges have the authority to appoint special prosecutors to investigate leaks of secret grand jury information; (2) Section 323 of the Judicial Code and 4548 of the Grand Jury Act further authorize supervising

judges to appoint special prosecutors to investigate grand jury leaks; (3) *Smith* is inapplicable to the present matter because the Thirty-Fifth Statewide Investigating Grand Jury was properly empanelled and that Court's *dicta* in that case regarding special prosecutors is no longer valid; and (4) supervising judges have had the authority to appoint special prosecutors before, during, and after the ICAA.

In addition, Kane has waived any objection to the appointment of Carluccio as special prosecutor by her actions in this case. Finally, even if Kane were successful in quashing the appointment, the grand jury's presentment, which recommends charges of perjury, official oppression, false swearing, contempt, and obstruction, would still stand.

II. STATEMENT OF JURISDICTION

Attorney General Kane's *Quo Warranto* action challenging the appointment of Thomas E. Carluccio, Esquire, as Special Prosecutor of the Thirty-Fifth Statewide Investigating Grand Jury is subject to this Court's original jurisdiction because, under 42 Pa.C.S. § 4541 *et seq.*, the multicounty Grand Jury to which Carluccio was appointed to serve as Special Prosecutor has statewide jurisdiction. *See* 42 Pa.C.S. § 721 ("The Supreme Court shall have original but not exclusive jurisdiction of all cases of . . . (3) *Quo Warranto* as to any officer of Statewide jurisdiction.").

III. ORDER IN QUESTION

This Court granted oral argument and directed briefing on Attorney General Kane's *Quo Warranto* Action to quash Judge Carpenter's appointment of a Special Prosecutor. This matter therefore involves a single order: Supervising Judge Carpenter's Order dated May 29, 2014 appointing Carluccio as the Special Prosecutor of the Thirty-Fifth Statewide Investigating Grand Jury. (See Judge Carpenter's Order dated May 29, 2014, a copy of which is attached hereto at **Exhibit A.**)

On December 30, 2014, Judge Carpenter issued an opinion supporting his May 29, 2014 Order, in which His Honor discussed several opinions from this Court approving or directing the appointment of a special prosecutor to investigate alleged leaks of secret grand jury information. (See Judge Carpenter's Opinion dated December 30, 2014, a copy of which is attached hereto at **Exhibit B.**) Judge Carpenter noted that this Court's precedents support his authority as the supervising judge of a statewide investigating grand jury to appoint a special prosecutor under the facts of this case. Judge Carpenter also opined that Attorney General Kane's *Quo Warranto* Action is moot because he has already accepted the Grand Jury's presentment finding reasonable grounds to believe that Attorney General Kane committed multiple criminal violations, and the matter has been

referred by His Honor to the District Attorney of Montgomery County for any potential prosecution. (See Exhibit B.)

IV. SCOPE AND STANDARD OF REVIEW

The authority of a supervising judge of a statewide investigating grand jury to appoint a special prosecutor to oversee the grand jury's investigation into an alleged leak of secret grand jury information is a question of law that calls for a *de novo* standard of review and a plenary scope of review. *Commw. Ex rel. Judicial Conduct Bd. V. Griffin*, 918 A.2d 87, 90 (Pa. 2007).

V. COUNTER STATEMENT OF THE QUESTIONS INVOLVED

The Court directed the parties to “file supplemental briefs discussing, *inter alia*, the apparent conflict between *Smith v. Gallagher*, 185 A.2d 135 (Pa. 1962), and *In re Dauphin County Investigating Grand Jury*, 19 A.3d 491 (Pa. 2011), and the legislative history surrounding the appointment of special prosecutors.” (See Supreme Court Order dated January 21, 2015, attached hereto at **Exhibit C.**)

Carluccio respectfully submits that the Court’s Order give rise to two main questions:

1. Did Supervising Judge Carpenter have the authority to appoint a special prosecutor to investigate alleged grand jury leaks under this Court’s decision in *Dauphin County* (and is *Smith* inapplicable where the Thirty-Fifth Statewide Investigating Grand Jury was properly empanelled and that Court’s *dicta* regarding special prosecutors in Pennsylvania is no longer valid)?
2. Was the effective period of the ICAA the only five-year stretch in the history of the Commonwealth that the supervising judge of an investigating grand jury could appoint a non-prosecutor attorney to oversee a grand jury investigation into an alleged violation of grand jury secrecy, which investigation did not target, but happened to lead to, an individual who works for the Office of the Attorney General?

VI. COUNTER STATEMENT OF THE CASE

On August 28, 2012, then-Acting Attorney General Linda L. Kelly filed with the Honorable Ronald D. Castille, then-Chief Justice of the Pennsylvania Supreme Court, an application requesting an order convening an additional multicounty investigating grand jury having statewide jurisdiction. (*See* Acting Attorney General Kelly's August 28, 2012 Application for a Statewide Investigating Grand Jury, attached hereto at **Exhibit D.**) On October 4, 2012, then Chief Justice Castille granted Acting Attorney General Kelly's Application, finding that it was "appropriate under the Investigating Grand Jury Act, 42 Pa.C.S. § 4541 *et seq.*" (*See* Chief Justice Castille's Order dated October 4, 2012, attached hereto at **Exhibit E.**) His Honor designated Judge William R. Carpenter as the Supervising Judge of the 35th Statewide Investigative Grand Jury, to sit in Montgomery County. (*See* **Exhibit E.**, ¶ 2.)

Chief Justice Castille's October 4, 2012 Order outlined the parameters of Judge Carpenter's jurisdiction and authority, as is customary for an Order of a Chief Justice of the Pennsylvania Supreme Court designating a judge of the commonwealth as the supervising judge of an investigative grand jury. The Order directed that

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. (See Exhibit E at ¶ 2.)

The Thirty-Fifth Statewide Investigating Grand Jury was impaneled in January 2013. The Thirty-Fifth Statewide Investigating Grand Jury thereafter proceeded in conducting investigations pursuant to submissions from the OAG. After the Grand Jury had been in session for more than one year, Judge Carpenter became aware of circumstances indicating that secret information related to a previous statewide investigating grand jury had been leaked. Supervising Judge Carpenter was informed, by a correspondence from former Office of the Attorney General (OAG) prosecutors, of a potential breach of grand jury secrecy. (See letter dated May 8, 2014 from former prosecutors of the OAG to the Supervising Judge, Exhibit F.) In response, Judge Carpenter conducted an *in camera* hearing on May 12, 2014. At such time, no events known by the Supervising Judge, nor other information before the Supervising Judge warranted more than what would be recognized as a straightforward investigation for contempt of court as recognized under The Investigating Grand Jury Act of 1978, 42 Pa.C.S. §4541, *et seq.*

In view of information obtained in the *in camera* hearing, Judge Carpenter was unable to determine the counties from which the source or sources operated in the unlawful disclosure of grand jury materials afforded secrecy protection. As such, assignment for investigation of the breach to a given county district attorney

was untenable under the circumstances.¹

What was clear from such Hearing was that the breach of grand jury secrecy included publication of certain documentation relating to grand jury proceedings, and that such documentation was believed to be in the exclusive control of the OAG. Clearly, there was no reasonable option available to Judge Carpenter to seek assistance of the Attorney General in undertaking an investigation into the breach. The conflict of interest in having the OAG undertake an investigation into its own internal affairs, and members of its staff was patently obvious.

Accordingly, it is clear that in good-faith, Judge Carpenter embarked upon appointing a Special Prosecutor for the limited purpose of investigating offenses related to an alleged disclosure of information protected by law arising from violations of Grand Jury secrecy. In furtherance of such charge, the Special Prosecutor was afforded the necessary, but limited, authority to subpoena witnesses. (See Exhibit A.) The appointment was made within refined and well-focused parameters, and the appointed Special Prosecutor was not authorized by the Order to pursue investigation of other matters, in an indiscriminate manner, or for an indeterminate time period. Attorney General Kane in her Supplemental Brief suggests to the contrary, and thereby provides the unwarranted

¹ The Supervising Judge would also have to consider with the appointment of a District Attorney issues beyond simple jurisdiction, including, but not limited to, maintaining oversight, secrecy, and conflicts of interest.

mischaracterization that the appointed Special Prosecutor was authorized to conduct himself in an unconstrained fashion.

As a result, following “an *in camera* proceeding which established that there was a leak of secret Grand Jury information,” on May 29, 2014, Judge Carpenter “found that there was ‘reasonable grounds to believe that a further more substantive investigation’ into allegations that statewide Grand Jury secrecy may have been compromised was warranted, and on that date [Supervising Judge Carpenter] appointed Thomas E. Carluccio, Esquire as Special Prosecutor.” (See Judge Carpenter’s Opinion dated December 30, 2014, Exhibit B.)

Judge Carpenter explained in his Order appointing Carluccio as Special Prosecutor that he did so pursuant to the Grand Jury Act of 1978, 42 Pa.C.S. § 4541 *et seq.* and the corresponding Pennsylvania Rules of Criminal Procedure, as well as multiple precedents from this Honorable Court related to supervising judges’ appointments of special prosecutors to oversee investigations of leaks of secret grand jury information. (See Supervising Judge Carpenter’s May 29, 2014 Order appointing Carluccio as Special Prosecutor, Exhibit A.) The Order specified that Carluccio was appointed Special Prosecutor for the limited purpose of overseeing the Grand Jury’s investigation into a leak of secret grand jury information. (See Exhibit A.) A copy of the May 29, 2014 Order was served on the Attorney General. *Id.* Throughout Carluccio’s service as special prosecutor, the

Grand Jury continued to hear investigations on other criminal matters with the assistance of the OAG.

Although Judge Carpenter has since explained that His Honor's *in camera* inspection, which initially established that there was a leak of secret Grand Jury information, led him to believe that the leak "most likely came from the Office of the Attorney General," (Exhibit B), his Order appointing Carluccio as Special Prosecutor did not direct Carluccio to conduct the Grand Jury's investigation of any particular person or group of people. To the contrary, Judge Carpenter's Order dated May 29, 2014 directed the Special Prosecutor to oversee an investigation of any offense related to "any 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." (See Exhibit A.) The Order was not directed at any individual or entity.

Also on May 29, 2014, Judge Carpenter sent a letter to then Chief Justice Castille enclosing the 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." (See May 29, 2014 letter from Judge Carpenter to then Chief Justice Castille, attached hereto at Exhibit G.) Like His Honor's Order appointing Carluccio as Special Prosecutor, Judge Carpenter's May 29, 2014 letter to then Chief Justice Castille did not identify as

the potential leaker of secret grand jury information any particular individual, nor did it single out the administration of any particular attorney general.

Judge Carpenter explained to then Chief Justice Castille that he had determined that the potential leak warranted the appointment of a special prosecutor after it was "brought to [Judge Carpenter's] attention" and following His Honor's preliminary review of the leak, which review "included sealed testimony from two individuals with knowledge." (See Exhibit G.) Judge Carpenter also requested that then Chief Justice Castille advise him if he was in error or had exceeded his authority as Supervising Judge in appointing a special prosecutor. (See Exhibit G.) Throughout the investigation, the Supervising Judge would get periodic reports from the special prosecutor and forward the progress of the investigation to the Chief Justice of the Pennsylvania Supreme Court through correspondence. Such correspondence clearly demonstrates the cautious and measured manner in which this whole process was conducted.

As the investigation developed, it became increasingly clear that some, if not all, the documentation released to the press was disclosed at the direction of Attorney General Kane. As detailed in the factual findings of the Thirty-Fifth Statewide Investigating Grand Jury in its Presentment on this matter, the Grand Jury made specific findings of who was aware of and orchestrated the disclosure. In addition, it was derived from press releases authorized by Attorney General

Kane, reports in news media quoting sources within her inner circle familiar with the matter, and later confirmed by Attorney General Kane herself. Indeed, on page 7 of her Supplemental Brief, Attorney General Kane asserts that she answered truthfully all questions of the Special Prosecutor, and admitted she allegedly authorized the release of a 2014 Memorandum, because she believed it did not contain confidential grand jury information.

The subject 2014 Memorandum effectively represented an interview transcript of a special agent within the OAG who is questioned at Attorney General Kane's direction about a 2009 grand jury investigation undertaken by prior staff attorneys within the OAG. This transcript, alone, includes grand jury information. In addition, there was a 2009 Memorandum detailing grand jury testimony and evidence that was publicly disclosed along with the 2014 transcript. Attorney General Kane has advanced the assertion that she was free to release the 2014 Memorandum, because she was not an interested party to the subject grand jury investigation due to her being a stay at home mother at the time of the 2009 grand jury, and additionally that she did not sign an Oath of Secrecy pertaining to the subject grand jury, and thus had not contractually imposed upon herself an

obligation of silence and to preserve grand jury secrecy.²

Prior to the filing of the *Quo Warranto*, the Attorney General asserted that she fully cooperated with the special prosecutor during the investigation, and at no time, prior to the Presentment against her did she or the OAG object to the appointment of the special prosecutor, or the proceedings before the Thirty-Fifth Statewide Investigating Grand Jury. Indeed, the Attorney General herself was served a copy of the appointment of the special prosecutor before the leaked information appeared in the paper on June 6, 2014. In spite of this knowledge,

² As reported in the local media:

"On Monday, Kane testified for more than two hours before a Montgomery County grand jury examining if she or her office improperly released confidential information to the Philadelphia daily News in June to embarrass a political foe. Unexpectedly, she acknowledged on her way to testify that her office had released information to a newspaper – but added that she did not believe it was grand jury material. But [Lanny] Davis, a Washington lawyer who won fame as special counsel to President Clinton in the 1990's argued Tuesday that not all information disclosed by Kane about the 2009 case was necessarily secret. For instance, he said, summary memos, written years after a probe concluded, could very well be public documents..... In an interview, Lanny Davis suggested that because Kane was at home raising two children in 2009, she was not bound by the secrecy laws that bar the release of grand jury information.[1] Davis said that responsibility did not start until Kane took her oath of office last year, and applies only to subsequent cases. 'It is our legal opinion that there has never been a case decided where a succeeding attorney general has been accused of violating an oath that she never took,' said Davis, who said the theory was based on legal research by himself and Kane's other attorney, New York defense lawyer Gerald Shargel." Craig R. McCoy and Angela Coulombis, Kane Lawyer Has New Leak Theory, The Philadelphia Inquirer, Nov.19, 2014, at B-1 and B10.

Another news report provided as follows: "Before heading into the grand jury last week in Trooper.... Kane told reporters that releasing information to the Philadelphia Daily News 'was done in a way that did not violate statutory or case law regarding grand jury secrecy.' " Brad Bumsted, Lead of Grand Jury Information Could Cost Attorney General Kane, TribLIVE (Nov.22, 2014), <http://triblive.com/opinion/editorials/7199385-74/kane-attorney-general?showmobile=false#axzz3JkDPLtxx>

Attorney General Kane did not intervene to prevent the dissemination and publication of the secret information, nor did she inform the Supervising Judge of her historical involvement and knowledge. The Attorney General has always maintained that she sought to help and cooperate with the special prosecutor's efforts.

On December 18, 2014, the Thirty-Fifth Investigating Grand Jury issued Presentment #60, finding reasonable grounds to believe that Attorney General Kane had committed various violations of the criminal laws.³ (See Presentment # 60 dated December 18, 2014, attached hereto at Exhibit H.) That same day, Attorney General Kane filed a "*Quo Warranto* action to quash the appointment of Thomas E. Carluccio, Esq., as Special Prosecutor for the 35th Statewide Investigating Grand Jury." (See *Quo Warranto* Action dated December 18, 2014, attached hereto at Exhibit I.) On December 19, 2014, Judge Carpenter entered an Order accepting Presentment #60, finding "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." (See Judge Carpenter's Order Accepting Grand Jury Presentment # 60 dated December

³ The crimes in the presentment include perjury, in violation of 18 Pa.C.S.A. § 4902, False Swearing in violation of 18 Pa.C.S.A. § 4903, Official Oppression, in violation of 18 Pa.C.S.A. § 5301, Obstructing the Administration of Law and Other Governmental Function, in violation of 18 Pa.C.S.A. §5101, and Criminal Contempt. (See Presentment 60.)

19, 2014, attached hereto at Exhibit J.)

On December 30, 2014, Judge Carpenter issued an opinion responding to Attorney General Kane's *Quo Warranto* Action and explaining that His Honor's authority to appoint a special prosecutor derived from this Court's interpretation and application of pertinent statutes. In particular, Judge Carpenter cited to three of this Court's decisions approving of the appointment of a special prosecutor to investigate grand jury leaks and/or directing the supervising judge of a grand jury to appoint a special prosecutor for the same purpose.

Judge Carpenter quoted *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 504 (Pa. 2011), wherein this Court unanimously⁴ agreed 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." (See Exhibit B at p. 2.) In further support of the conclusion that "[t]he Supervising Judge of a Statewide Investigating Grand Jury must have inherent authority to investigate a grand jury leak," Judge Carpenter discussed two cases relied upon by this Court in *Dauphin County: In re County Investigating Grand Jury VIII*, 2003, 2005 WL 3985351 (Lack. Com. Pl. 2005) and *Castellani v.*

⁴ Chief Justice Castille's opinion in *Dauphin County* was joined by Justices Eakin, Baer, Todd, McCaffery, and One Melvin. *Id.* at 492. Justice Saylor did not participate in the Court's consideration or decision. *Id.*

Scranton Times, 956 A.2d 937 (Pa. 2008). In the former case a special prosecutor was appointed to investigate alleged leaks by the OAG and a local district attorney in connection with a county-wide investigative grand jury, while the latter involved the appointment of a special prosecutor to investigate allegations of a grand jury leak in connection with a statewide investigative grand jury.

VII. SUMMARY OF THE ARGUMENT

Attorney General Kane argues in her Supplemental Memorandum of Law in Support of her *Quo Warranto* Action (“Supplemental Brief”) that Supervising Judge Carpenter was not authorized to appoint Carluccio as special prosecutor to investigate alleged grand jury leaks in the present case, citing the alleged absence of statutory authorization and relying on the case of *Smith v. Gallagher* in arguing that the position of “special prosecutor” does not exist in the Commonwealth. Attorney General Kane contends that the five-year period in which the Independent Counsel Authorization Act (the “ICAA”) was in effect was the only time in Pennsylvania history that judges had the power to appoint special prosecutors to investigate leaks of statewide grand jury information. Finally, Kane attempts to distinguish this matter from *Dauphin County* by stating that the special prosecutor’s powers in that case were more limited than Carluccio’s were here, and that the same supervising judge overseeing the grand jury in which the leak

occurred appointed the special prosecutor in that case.

Attorney General Kane's arguments fail because: (1) this Court in *Dauphin County* held that supervising judges have the authority to appoint special prosecutors to investigate leaks of secret grand jury information; (2) Section 323 of the Judicial Code and Section 4548 of the Grand Jury Act further authorize supervising judges to appoint special prosecutors to investigate grand jury leaks; (3) *Smith* is inapplicable to the present matter because the Thirty-Fifth Statewide Investigating Grand Jury was properly empanelled and that Court's *dicta* in that case regarding special prosecutors is no longer valid; and (4) supervising judges have had the authority to appoint special prosecutors before, during, and after the ICAA, which expired statute was always immaterial to a supervising judge's investigative and enforcement authority with respect to grand jury secrecy when it was in effect, and it remains so.

In addition, Kane has waived any objection to the appointment of Carluccio as special prosecutor by her actions in the underlying grand jury proceedings. Finally, even if Kane were successful in getting Carluccio's appointment quashed, the grand jury's presentment, which recommends charges of perjury, false swearing, official oppression, contempt and obstruction against her, would still stand.

VIII. ARGUMENT

A. SUPERVISING JUDGES HAVE THE POWER TO APPOINT SPECIAL PROSECUTORS TO INVESTIGATE GRAND JURY LEAKS UNDER STATUTE AND SUPREME COURT PRECEDENT

This Court held *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491 (Pa. 2011) that “the supervising judge [of a grand jury] has the singular role in maintaining the confidentiality of grand jury proceedings,” and that

Where 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 is appropriate.***

Id. at 504 (emphasis added).

In her Supplemental Brief, Attorney General Kane argues that *Dauphin County* is distinguishable from the present case because (1) “[t]he 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 prosecution at his discretion,” and (2) the special prosecutor in that case was appointed to investigate leaks by the supervising judge overseeing the same grand jury in which the leaks occurred. (See Kane’s Sup. Br. at 22-23 (italics in original).)

Attorney General Kane’s attempts to distinguish the present matter from *Dauphin County* fail because (1) special prosecutor Carluccio only conducted an investigation and not a prosecution of the alleged leaks and thus the issue of whether he was properly empowered to initiate prosecution is moot; and (2) the

fact that the alleged leak involved secret information from an earlier grand jury is irrelevant because supervising judges have an ongoing duty to protect the secrecy of grand jury proceedings.

Dauphin County therefore applies to the present case. Presented with “colorable allegations or indications that the sanctity of the grand jury process ha[d] been breached and those allegations warrant[ed] investigation,” Supervising Judge Carpenter’s appointment of Carluccio as special prosecutor to investigate the alleged leak of secret grand jury information was appropriate under this Court’s holding in *Dauphin County. Id.* at 504.

In addition, Section 323 of the Judicial Code and 4548 of the Grand Jury Act authorized Judge Carpenter to appoint Carluccio as special prosecutor in this case. *See* 42 Pa. C.S. §§ 323 and 4548.

Finally, Attorney General Kane’s reliance on *Smith v. Gallagher* is misplaced. The Court in that case held that the Judge who directed the empanelment of a “special grand jury” in that case had no authority to do so. There is no allegation in the present matter that the Thirty-Fifth Statewide Grand Jury was improperly empanelled or that Supervising Judge Carpenter had no authority to oversee it. *Smith* is thus inapplicable to the matter before the Court. That Court’s *dicta* regarding special prosecutors in the Commonwealth is no longer valid: special prosecutors have been appointed in numerous cases in the six

decades since *Smith* was decided, during which time the General Assembly has also enacted Sections 323 and 4548, which further authorize the appointment of special prosecutors by supervising judges. See 42 Pa. C.S. §§ 323 and 4548.

i. Dauphin County Controls the Matter Before the Court

The petitioners in *Dauphin County* were applicants for a casino license who asserted that newspaper articles demonstrated leaks of grand jury proceedings in which they testified, in violation of the secrecy requirements of the Investigating Grand Jury Act (the “Grand Jury Act”), 42 Pa. C.S. 4541 *et seq.* Exercising extraordinary jurisdiction “limited to the question of alleged violations of grand jury secrecy,” this Court issued an Order directing the supervising judge of a sitting grand jury “to consider whether a special prosecutor should be appointed to pursue the allegations [of grand jury leaks] and to forward an opinion setting forth his findings and recommendations to this Court” *Dauphin County, supra*, 19 A.3d at 497 (citations omitted). After the supervising judge submitted his recommendations, this Court entered an Order remanding 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 [Grand Jury Act], and to oversee such inquiry.” *Id.* at 498.

The President Judge in *Dauphin County* then selected and appointed an attorney who was not a prosecutor to oversee an investigation the alleged grand jury leaks. *Id.* at 499. The investigation in that case revealed that the assistant district attorney who was leading the grand jury investigation was the likely source of the leaked information, along with two state police troopers. *Id.* at 500. Records were subpoenaed from those individuals, as well as from reporters who wrote the articles containing the leaked information. *Id.* at 501. The special prosecutor in that case “observed that his investigation was impeded by the Pennsylvania Shield Law, citing the Superior Court’s decision in *Castellani v. The Scranton Times*, 916 A.2d 648 (Pa. Super. 2007).” *Id.* at 501.

The *Dauphin County* Court began its analysis by noting the history and importance of secrecy in grand jury proceedings:

In Pennsylvania, grand jury proceedings have traditionally been conducted in secrecy, and for a salutary reason. The secrecy of grand jury proceedings is “indispensable to the effective functioning of a grand jury.”

Id. at 502-03 (citations omitted).

In enacting the Grand Jury Act, “the General Assembly sought to preserve the traditional rule of secrecy in grand jury proceedings.” *Id.* at 503 (citing 42 Pa. C.S. § 4549(b)). The *Dauphin County* Court then discussed the role of the supervising judge in grand jury proceedings:

The very power of the grand jury, and the secrecy in which it must operate, call for a **strong judicial hand** in supervising the proceedings.

The seminal role of the supervising judge of a grand jury was recognized by this Court in *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006):

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 503-04 (citing *Twenty-Fourth Grand Jury, supra*, 907 A.2d at 512) (emphasis added)).

“Thus,” this Court held, “Pennsylvania’s grand jury process is ‘strictly regulated,’ and *the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings.*” *Id.* at 504 (citations omitted). 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 (quoting *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 78 (Pa. 1980)).

The *Dauphin County* Court then held that appointment of a special prosecutor by a supervising judge is the appropriate method to investigate “colorable allegations” of grand jury leaks:

Where 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 is appropriate.**

Id. at 504 (emphasis added).

The *Dauphin County* Court cited two cases as “illustrative.” The first case, *In re County Investigating Grand Jury VIII*, 2005 WL 3985351 (Lack. Com. Pl.

2005), involved alleged grand jury leaks by the district attorney's office and the Office of the Attorney General ("OAG"). The supervising judge of the county-wide grand jury appointed a special prosecutor to investigate the leak allegations. *Id.* at 504. The special prosecutor submitted a report of his findings to the supervising judge, who "found that the special prosecutor's investigation had not proven that matters of secrecy occurring before the grand jury had been disclosed to the reporter by the prosecution." *Id.* at 506.

The *Dauphin County* Court then discussed the case of *Castellani*, *supra*:

In that case, the supervising judge of a grand jury appointed a special prosecutor to investigate allegations of grand jury leaks with respect to the statewide investigating grand jury impaneled to investigate allegations of abuse of county prisoners by Lackawanna County prison guards. Two county commissioners appeared to testify before the grand jury in response to subpoenas issued by the Attorney General's Office. Newspaper articles were published subsequently, claiming that the commissioners were evasive and uncooperative.... The articles attributed the information about the grand jury proceedings to an unnamed source close to the investigation.

Id. at 506-07.

The supervising judge in *Castellani* "appointed a special prosecutor to investigate the source of the alleged unlawfully disclosed materials." *Id.* at 507. The special prosecutor submitted a report concluding that there was no breach of secrecy by the Attorney General's Office, and the supervising judge agreed. *Id.* The *Dauphin County* Court's favorable citation to *Grand Jury VIII* and *Castellani*, in which supervising judges appointed special prosecutors to investigate alleged leaks of grand jury information, lends further support to the appropriateness of

Supervising Judge Carpenter's appointment of Carluccio as special prosecutor in the present case.

In addition, Judge Carpenter cited *Dauphin County* at length in the Opinion that His Honor submitted in this case. See Judge Carpenter's Opinion dated December 30, 2014. (See **Exhibit B**). In particular, Judge Carpenter cited the "singular role" of the supervising judge in "maintaining the confidentiality of grand jury proceedings" and in "insuring [that] the solemn oath of secrecy is observed by all participants." See Judge Carpenter's Opinion at 3-4 (*citing Dauphin County* at 504).

a. Attorney General Kane's Attempt to Distinguish Dauphin County on the Basis That the Special Prosecutor There Did Not Have Authority to Prosecute Fails

In her Supplemental Brief, Attorney General Kane argues that *Dauphin County* is distinguishable from the present case in part because 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 prosecution at his discretion." See Kane's Supplemental Brief at 22 (*italics in original*). According to Attorney General Kane, "[p]ermitting Mr. Carluccio to prosecute criminal offenses at his discretion clearly infringes on the executive power of the executive branch." (See Kane's Sup. Br. at 22.)

Kane's argument fails because special prosecutor Carluccio only conducted an *investigation* of the alleged leaks in the present case; he did not initiate any *prosecution* related to those alleged leaks—at his discretion or otherwise. In fact, Carluccio is presently unable to initiate any prosecution related to the alleged leaks, because Judge Carpenter has transferred the Thirty Fifth Statewide Grand Jury's Presentment #60 to the District Attorney of the Montgomery County District Attorney's Office. (See Judge Carpenter's Opinion, Exhibit B at p. 4 -discussing His Honor's Order transferring Presentment #60).

Whether or not Carluccio had the authority to initiate prosecution related to the alleged leaks is therefore irrelevant, because he never initiated any prosecution in this case and he never can. Kane's attempt to distinguish the instant matter from *Dauphin County* on that basis thus constitutes an attack on a straw man.⁵

In addition, nowhere in Judge Carpenter's Order appointing Carluccio did his Honor grant him the right to subpoena witnesses. The Order merely permitted him to "use any appropriate currently empanelled Grand Jury to investigate any alleged or suspected violations of secrecy or concomitant crimes related to such." See Judge Carpenter's Order dated May 29, 2014. (See Exhibit A). Under

⁵ The appointment of special prosecutors in previous cases had included the power to prosecute. See Grand Jury VIII, *supra*; Castellani, *supra*. While there is support for imbuing a special prosecutor with authority to initiate prosecution, that authority is not at issue in the present matter because, as noted, Carluccio never exercised that authority, nor can he ever.

Pennsylvania law, it is the grand jury, not the attorney, which has the power to issue subpoenas and that are executed by the supervising judge. Carluccio merely acted as a vehicle through which the Grand Jury was able to exercise its own investigative powers. The subpoenas in the present case were issued pursuant to the Grand Jury's power and directive, including the one served on Attorney General Kane.

b. Attorney Kane's Attempt to Distinguish *Dauphin County* on the Basis That the Alleged Leak Here Involved an Earlier Grand Jury Also Fails

Attorney General Kane also asserts that *Dauphin County* is distinguishable from the present matter because the special prosecutor in that case was appointed by the supervising judge overseeing the same grand jury in which the leaks occurred. (See Kane's Sup. Br. at 23.) Attorney General Kane does not explain in her papers how the timing of the alleged leaks has any meaning, however, except to state that "[t]his demonstrates just how far Judge Carpenter exceeded his authority in the present case." (See Kane's Sup. Br. at 23.) The implication seems to be that while a supervising judge has authority to appoint a special prosecutor to investigate leaks of information obtained during proceedings before a sitting grand jury, a supervising judge is powerless to appoint a special prosecutor to investigate leaks from an earlier grand jury proceeding. This argument has no support in

Pennsylvania statutes or case law.

As this Court stated in *Dauphin County*, “the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings.” *Id.* at 504 (citations omitted). This responsibility, which entails ensuring that “the solemn oath of secrecy is observed by all participants,” is “*continuing*.” *Id.* at 504 (citations omitted) (emphasis added). It thus makes no difference that the alleged leaks in the present matter involved information from an earlier grand jury. Supervising Judge Carpenter had an ongoing duty to ensure the secrecy of grand jury proceedings, whether the alleged leak involved the sitting grand jury or one whose term had expired a few years earlier. *Id.*

Under Kane’s argument, the oath of secrecy taken in grand jury proceedings would last exactly as long as that grand jury was empanelled, and no longer. Once a new judge was assigned to be supervising judge over a grand jury, all of the information obtained during the previous grand jury sessions would become fair game for disclosure. This is not the intent of the Investigating Grand Jury Act, which seeks lasting secrecy of grand jury proceedings. *See* 42 Pa. C.S. 4541 *et seq.*; *Dauphin County, supra*, 19 A.3d at 502-04.

The fact that the alleged leak of secret grand jury information in the present case involved an earlier grand jury is thus irrelevant. Supervising Judge Carpenter had an ongoing duty to vigilantly guard against leaks of secret grand jury

information, and he was fully authorized to appoint a special prosecutor to investigate the alleged leak of information from an earlier grand jury. *See Dauphin County, supra*, 19 A.3d at 504; *June 1979 Allegheny County, supra*, 415 A.2d at 78.

ii. This Court's Holding in Dauphin County Authorizing Supervising Judge Carpenter's Appointment of Carluccio as Special Prosecutor Has Strong Statutory Support

Section 4548 of the Grand Jury Act gives the Supervising Judge the authority to bring to the attention of the grand jury potential "offenses against the criminal laws of the Commonwealth," and "in no case shall the investigating grand jury inquire into the alleged offenses on its own motion." 42 Pa. C.S. § 4548. Section 323 of the Judicial Code gives the supervising judge the power to issue "every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order," including enforcement of grand-jury secrecy. 42 Pa. C.S. § 323.

Taken together, these two statutes provide a supervising judge with the authority to appoint a special prosecutor to investigate grand jury leaks. A supervising judge may bring alleged leaks to the grand jury's attention, and issue any order necessary to carry out the investigation. *See* 42 Pa. C.S. §§ 323, 4548. A grand jury does not "inquire into the alleged offenses on its own," but instead is

guided by an attorney, who directs the investigation. *See* 42 Pa. C.S. § 4548.

As this Court stated in *Dauphin County*, it is the “singular role” of the supervising judge to maintain the confidentiality of grand jury proceedings. *Dauphin County, supra*, 19 A.3d at 504. Sections 323 and 4548 of the Judicial Code give the supervising judge statutory authority to carry out his mission of safeguarding the secrecy of grand jury information. *See* 42 Pa. C.S. §§ 323, 4548.

iii. **Smith v. Gallagher Does Not Apply to the Present Case**

The case of *Smith v. Gallagher*, 185 A.2d 135 (Pa. 1962), involved “certain actions taken in the Court of Quarter Sessions of Philadelphia County” in 1962, which “actions lack[ed] legality and [could not] be allowed to stand by the Court. *Id.* at 137. Specifically,

An asserted “Special Grand Jury” was ordered, for which there is no warrant in law; an attorney was appointed as “Special Prosecutor,” an[] office which does not exist; an investigation was directed without limitation as to subject matter of time, contrary to the most fundamental precepts of precision in the administration of law; a constitutional officer, duly elected by the people of Philadelphia County, was displaced from office, without due process; additional personnel was employed, supplemental quarters were rented, new facilities were obtained, all at the expense of the taxpayers when personnel, quarters and facilities for the contemplated action were already in existence.

Id. at 137-38.

In an opinion authored by Mr. Justice Musmanno, the Supreme Court in *Smith* described the highly unusual facts of that case: a city official had filed a

petition (referred to throughout the opinion as the “Leonard petition,” after its author) with the Court of Quarter Sessions “averring widespread violations of law in the government of the City of Philadelphia and that the district attorney ... was unable or unwilling to cope with the situation.” *Id.* at 138. The petition asked that “the grand jury be instructed to investigate into the matters described therein.” *Id.*

The *Smith* Court began by noting that a procedure that existed for grand juries in Philadelphia at the time: the 21-member Board of Judges assigned a judge from criminal division of the Court of Common Pleas to “conduct, supervise, direct and handle all matters pertaining to the grand jury which convenes in” City Hall. *Id.* at 138. “For a reason that was never explained,” the *Smith* Court stated, the petition was not presented to the Court of Common Pleas, but instead to the Court of Quarter Sessions, which handled miscellaneous matters. *Id.*

The petition found its way to President Judge Alessandrone, who was in charge of the Miscellaneous Division at the Court of Quarter Sessions, which had no involvement with grand juries. *Id.* at 138. The Supreme Court explained that in no way could a grand jury investigation be said to constitute a “miscellaneous” matter, and thus the petition was improperly before Judge Alessandrone, who should have *immediately transferred the petition to the Judge in charge of the grand jury that was sitting at the time:*

Among the incongruities in the history of this case, no light is shed on the inevitable query as to why Judge Alessandrone, once he perused the

Leonard petition, and, being thoroughly conversant with the division of duties and responsibilities in the criminal court, did not immediately refer the petition to [the supervising judge of the sitting grand jury], who was ready to instruct the grand jury ... during the entire month of April.

Id. at 138.

In the *Smith* case, the Philadelphia District Attorney “filed an answer to the Leonard petition in which he denied that he was unable or unwilling to meet the situation outlined in the petition” and “made factual averments in support of his assertion that he had been and was fully capable of performing properly the duties of his office.” *Id.* at 138-39. After the Leonard petition sat for four months, without explanation—the Court posited that “the judge was in grave doubt as to whether there should be a grand jury investigation”—Judge Alessandro “ordered what he called a ‘Special Grand Jury,’” without regard to the fact that

The July grand jury ... was in session, ready and prepared to take action, but the learned judge [Alessandro] ignored the established machinery of the court.

Id. at 140.

The Supreme Court in *Smith* stated that it put forth this factual background

[N]ot as censure, but to 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.

Id. at 140 (emphasis added).

After noting the unquestioned judicial integrity of Judge Alessandrone, the Court stated that “[o]rderly procedure in the Courts and the laying down of rules

for guidance of future conduct in matters of this kind, however, require the narrative and observations which have been made and which may follow.” *Id.* at 140. The history of the empanelment of the “special grand jury” in *Smith* “serves ... as a reminder of the manner in which the business of the Criminal Courts of Philadelphia should *not* be conducted.” *Id.* at 140 (emphasis added).

Importantly to the present matter, the *Smith* Court held that Judge Alessandrone did not have the authority to empanel a grand jury in the first instance:

Since a grand jury investigation could not ... be regarded as unfinished business and since Judge Alessandrone was not sitting in criminal court in July, the order he signed on the eleventh day of that month was of no more binding effect than if he were sitting in Delaware.

A judge must be assigned to the court over which he purports to preside. Judge Alessandrone in effect commandeered the grand jury courtroom when he took possession of the Leonard petition, but he was not assigned to the grand jury room. If he could assume jurisdiction, when not assigned thereto, over grand jury matters, then any judge in the criminal court could take similar jurisdiction....

Even if the call of a special grand jury could have been justified in law, it did not follow that Judge Alessandrone was the judge to preside over it.... [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.

Id. at 141.

The *Smith* Court noted that the proper procedure for substituting another attorney for the District Attorney was set forth by statute, which provided that a president judge, supervising a sitting county-wide grand jury, could request intervention from the Commonwealth by asking the Attorney General 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.” *Id.* at 142 (*citing* 71 P.S. § 297). The “special attorney or attorneys” would “supersede the district attorney of the county in which the case [or] cases may arise ...” *Id.*

The district attorney in *Smith* had moved the court to dismiss the Leonard petition on the basis that the petitioners had “failed to establish that the public interest would suffer from the application and the pursuit of the ordinary forms and procedures of law” *Id.* at 142. The district attorney in that case thus attested that he would have investigated the matter at issue. “These were assertions of substance made by an officer of the Court,” to which Judge Alessandrone should have “opened the door of inquiry, but he did not even raise a window.” *Id.* at 143. Unlike the District Attorney in *Smith*, Attorney General Kane never attested that she would have investigated the alleged leaks of grand jury information in the present matter, nor would it have been proper for her to do so, given the conclusions of the Grand Jury in its presentment .

The *Smith* Court then listed the errors of Judge Alessandrone *seriatim*:

[I]n refusing to consider the district attorney’s answer, the learned judge permitted himself an arbitrary exercise of judicial power. When he treated with aloofness the provisions of [Section 297], he abused his discretion. When he appointed a “Special Prosecutor,” he attempted the impossible because he was making an appointment to a phantom office. We will consider later the matter of the “Special Prosecutor,” and now take up the **main issue in the case**, namely, whether the court was

warranted in summoning what is called a "Special Grand Jury."

Id. at 143 (emphasis added).

As to the main issue in the case, the *Smith* Court held that "[t]he glaring infirmity in this entire proceeding was the failure of the Criminal Courts of Philadelphia to utilize the machinery already in existence." *Id.* at 147. In addition to having no authority to convene a grand jury, the Order by Judge Alessandrone had "directed an investigation which was unlimited in scope, timeless in duration, and responsible to but one person." *Id.* at 147-48.

The *Smith* Court then transitioned to the special prosecutor issue as follows:

Once regular procedure is ignored, irregularities follow quickly and without trammel.... As already stated, there is no public office in Pennsylvania known as Special Prosecutor....

Id. at 149.

The *Smith* Court then tied together the absence of the "office" of "Special Prosecutor" with the unbounded appointment of one by Judge Alessandrone in that case:

Not only does the office of Special Prosecutor not exist in Pennsylvania but there is no person in Pennsylvania on whom Judge Alessandrone, or even the *Pennsylvania Legislature*, could bestow the unconstitutional powers and concomitant unconstitutional immunities implicit in the learned judge's order. Under the provisions, [Special Prosecutor] would be empowered to investigate the "unlawful conduct" of *any* person within the vast geographical domains of metropolitan Philadelphia.

Whether conduct is or is not unlawful can only be determined through judicial process, but by means of this amazing document, which is without precedent or parallel in the history of Pennsylvania courts, [Special Prosecutor] could investigate, quiz, harass, harrass, 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. at 149-50 (italics in original).

a. *Smith* is Inapplicable Because the Thirty-Fifth Grand Jury was Properly Empanelled

The differences between *Smith v. Gallagher* and the present case are numerous and obvious. There is no suggestion by Attorney General Kane in her *Quo Warranto* filings that the statewide grand jury over which Judge Carpenter was supervising was improperly empanelled, nor can there be one. Yet that was the basis of the Court’s holding in *Smith*: that the Judge who empanelled the jury in that case had no authority to do so. The remainder of the *Smith* opinion was guidance on how not to conduct grand jury proceedings. Its discussion regarding “special prosecutors” is therefore *dicta*.

The *Smith* Court’s discussion of special prosecutors is also dated. The appointment of special prosecutors by supervising judges has become commonplace. The appointment of a non-prosecutor, variously referred to as “special prosecutors,” or “special masters,” or “independent counsel,” to investigate grand jury leaks is not the rarity that it was more than fifty years ago, when *Smith* was decided. See, e.g., *Dauphin County, supra*; *Castellani, supra*; *Grand Jury VIII, supra*. The power of supervising judges to appoint special prosecutors to investigate alleged grand jury leaks has been specifically approved

by this Court in *Dauphin County*. Also, Section 323 of the Judicial Code and Section 4548 of the Grand Jury Act, which also support the appointment by supervising judges of special prosecutors to investigate grand jury leaks, have been enacted since *Smith* was decided.

In her briefs supporting her *Quo Warranto* Action, Kane cites to the parts of the *Smith* opinion discussing the allegedly “phantom office” of special prosecutor. Obviously, however, the position exists, as “special prosecutors” have been appointed in numerous cases in the decades since *Smith* was decided. Attorney General Kane’s reliance on the *dicta* in *Smith* regarding special prosecutors—to the exclusion of the holding in the case, that the Judge there lacked the authority to empanel a “special grand jury” in the first instance—is therefore misplaced.

B. APPOINTMENT OF A SPECIAL PROSECUTOR TO INVESTIGATE THE OAG WAS PROPER BEFORE THE ICAA AND IT HAS BEEN PROPER SINCE THE EXPIRATION OF THE ICAA

It is understandable that the nomenclature “special prosecutor”—which had been used at times during the Legislature’s debates on the ICAA but does not appear in the text of the statute—led the Court to direct briefing on the ICAA. But Attorney General Kane’s discussion of the statute is a red herring.

The ICAA addressed the appointment of a special prosecutor to investigate

members of the OAG who were alleged to have committed crimes within the OAG's exclusive investigative jurisdiction. It did not address the investigation of an offense that could be looked into by another branch of government, such as a breach of grand jury secrecy, the investigation of which falls within a supervising judge's authority to "take steps necessary to "insure [that] the solemn oath of secrecy is observed by all participants." *Dauphin County*, 19 A.3d at 504. The ICAA never had any bearing on that authority.

i. The ICAA Was Enacted to Address Specific Situations Not Present Here

Attorney General Kane asserts that the ICAA was the only authority that ever allowed a supervising judge to appoint a special prosecutor to investigate a grand jury leak. She argues that when the statute expired in 2003, so did the power of a supervising judge to appoint a non-prosecutor attorney to oversee a grand jury's investigation into a breach of grand jury secrecy that may have involved the OAG. Attorney General Kane is wrong on both counts. The authority of a supervising judge to appoint a special prosecutor to oversee an investigation into leak allegations long predates the ICAA. Such authority existed at common law and it was statutorily memorialized with the enactment of the Grand Jury Act. *See Dauphin County Grand Jury Investigation Proceedings*, 2 A.2d 809, 814 (Pa.

1938) (holding that if the supervising judge determines 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 . . . thereupon appoint an attorney at law resident in another county to perform his functions”); 42 Pa.C.S. § 4548. The ICAA did not impact a supervising judge’s authority to appoint a non-prosecutor attorney to oversee a grand jury’s investigation into allegations involving the disclosure of confidential grand jury information.

Contrary to Attorney General Kane’s characterization, the ICAA was not a broad statute. Rather, it was enacted only to remedy the rare situation where a member of the OAG or an individual whose investigation would create a conflict for the OAG was alleged to have committed an offense that only the OAG could investigate. The ICAA was never intended to cover an investigation into the breach of grand jury secrecy, for such a breach is not within the OAG’s exclusive investigative jurisdiction. Supervising judges of the Commonwealth maintained investigative and enforcement powers with respect to grand jury secrecy before, during, and after the ICAA’s effective period. *Id.* The ICAA is therefore entirely irrelevant to the matter before the Court.

This brief will nevertheless discuss the legislative history of the statute as the Court has directed. Also, it will thereafter explain why Attorney General Kane is completely off base in contending that the effective period of the ICAA made up

the only five years in the history of the Commonwealth that the supervising judge of a grand jury could appoint a special prosecutor to investigate a grand jury leak.

ii. Legislative History of the ICAA

According to Attorney General Kane, the ICAA was enacted because, without it, an independent counsel *could* never be appointed to investigate the OAG. She is wrong. The legislative history of the ICAA and the text of the statute itself demonstrate that it was enacted to address the Legislature's concern that, without it, no one *would* ever appoint an independent counsel to investigate allegations that a member of the OAG or certain other individuals had committed an offense within the OAG's exclusive investigative jurisdiction. Independent counsel had been appointed before the ICAA to investigate allegations of criminal conduct by members of the OAG. But they were typically appointed by the Attorney General. The Legislature was therefore concerned that the OAG was incapable of policing itself and would fail to appoint an independent counsel to look into allegations that its own members had committed offenses that only the OAG could otherwise investigate.⁶ (*See, e.g., House Journal*, October 4, 1994,

⁶ The Legislature's concern was not quelled by the fact that local district attorneys theoretically could have investigated allegations that a member of the OAG had engaged in criminal conduct that the legislative and judicial branches

1628.)

This concern arose out of the Legislature's realization that under the Commonwealth Attorneys Act, 71 Pa. Stat. Ann. § 723-101 *et seq.*,⁷ the OAG acts in most instances as the sole decision maker with respect to whether members of the OAG or individuals whose investigation creates a conflict for the OAG will be investigated for their own alleged violations of the criminal code. The Legislature's inability to commence an independent investigation into allegations that members of the OAG had engaged in conduct within the OAG's exclusive investigate jurisdiction was highlighted for lawmakers in the early 1990s. At that time the sitting Attorney General was alleged to have committed crimes that only his office had the power to either investigate itself or appoint an independent counsel to investigate.⁸ The Attorney General's power to prevent the OAG from investigating him was viewed by lawmakers as a serious conflict of interest and

could not have. (See, e.g., House Journal, October 4, 1994, 1626) ("A local district attorney would have neither the jurisdiction nor the resources to investigate criminal conduct by members of the Office of the Attorney General occurring in more than one county, and the close working relationship between the Office of the Attorney General and many local district attorneys makes such investigation unlikely.").

7 The Commonwealth Attorneys Act was enacted in 1980. 71 Pa. Stat. Ann. § 723-101 *et seq.* Among other things, it changed the Attorney General from an appointed to an elected position, and it "made clear that the powers of the state Attorney General are no longer an emanation from some bed of common law precepts, but are not strictly a matter of legislative designation and enumeration." *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1985).

8 The 1994 criminal allegations against the then-sitting Attorney General "stemmed from his acceptance of campaign contributions . . ." Coles, *infra*, 104 Dick L. Rev. 710. Neither the legislature nor the judiciary had the jurisdiction to investigate those allegations. If the former Attorney General had been alleged to have breached grand jury secrecy, however, a supervising judge of a grand jury could have investigated the allegations against him.

demonstrative of a lack of checks and balances against the Attorney General.

Accordingly, in 1994,⁹ a group of legislators introduced a bill “establishing [a] special independent prosecutor’s panel . . . and providing for special investigative counsel and for independent counsel.” Independent Counsel Authorization Act, H.B. 2741, 1994 Leg., 1993-94 Reg. Sess. (Pa. 1994). As explained by one of the Bill’s sponsors, Representative Thomas Caltagirone, legislation regarding an independent counsel was introduced to address what its sponsors viewed as two distinct problems. The first was a situation where a member of the OAG was alleged to have engaged in “criminal conduct . . . occurring in more than one county,” which conduct would necessarily fall within the Attorney General’s exclusive investigate jurisdiction. The second was a situation where the “Attorney General’s Office has a personal, financial, or political conflict in any particular criminal proceeding.” (*See House Journal*, October 4, 1994, 1628.) Both perceived problems could arise only where a member of the OAG or an individual whose investigation would cause a conflict for the OAG was alleged to have committed a crime which, unlike the grand jury

⁹ A complete overview of “the legislative history of special prosecutors,” which the Court has requested, necessarily includes discussion of the reasons for which lawmakers first introduced the ICAA in 1994, the many legislative debates regarding the statute between its initial introduction and ultimate enactment in 1998, and the tumultuous political climate that prompted the drafting of the ICAA. Per the Court’s Order dated January 21, 2015, this brief has included such a comprehensive overview herein. In limiting her discussion of the ICAA to the final House debate of the statute and its text, Attorney General Kane has provided only a snapshot of the “history surrounding the appointment of special prosecutors.”

leak here, fell within the OAG's exclusive investigating jurisdiction.

The House of Representatives passed HB 2741 by a vote of 194-4 on October 4, 1994, *id.*, but the bill did not make it through the Senate. John M. Coles, Comment, *Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working*, 104 Dick L. Rev. 707, 711 n. 37 (2000).

When substantially identical legislation has introduced as HB 981 in 1995, then Attorney General Thomas W. Corbett submitted a letter agreeing with Representative Caltagirone's sentiments that there was a need in the Commonwealth for an "investigative arm" to inquire into allegations of criminal conduct by members of the OAG. (*See House Journal*, November 20, 1995, 2199-2200.) Attorney General Corbett wrote that the ICAA was needed to "correct what I believe to be an oversight of the original drafters of the Commonwealth Attorneys Act . . . It is my desire and goal to restore trust and integrity of the Office of Attorney General." (*See House Journal*, November 20, 1995, 2200.) The oversight that Attorney General Corbett was referring to was the Commonwealth Attorneys Act's omission of a provision designating an independent counsel to launch an investigation into allegations that a member of the OAG had committed a crime that fell within the exclusive investigative jurisdiction of the OAG.

HB 981 was unanimously approved by the House on November 20, 1995. (*See House Journal*, November 20, 1995, 2200.) A slightly amended version of the

bill was passed in the Senate by a vote of 50-0 on November 26, 1996, but the House was unable to consider the bill prior to the adjournment of the 1995-96 Legislative session. (Coles, 104 L. Rev. 707, 711 n. 37)

Finally, the ICAA was reintroduced and approved by both the House and Senate in February of 1998. (See Senate Journal, February 10, 1998, 1437; House Journal, February 11, 1998, 231.) Governor Tom Ridge signed the ICAA into law on February 18, 1998 and it became effective 60 days later. See Act of Feb. 18, 1998, Pub. L. 102, No. 19. The ICAA is no longer in effect, however, as it contained a sunset provision that rendered it expired on February 18, 2003. 1998 Pa. Laws 19, § 9352.

When it was in effect, the ICAA did not focus only on investigations of allegations that the Attorney General himself or herself had engaged in criminal conduct. Section 9312(c) listed a host of individuals to whom the statute automatically applied. Those individuals included:

- (1) The 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;
- (2) Any individual who leaves any office or position described in paragraph (1) during the incumbency of the Attorney General with or under who such individual served in the office of position, plus one year after such incumbency, but in no event longer than a period of three years after the individual leaves the office of position;

- (3) Any individual who held an office or position described in paragraph (1) during the incumbency of one Attorney General and who continued to hold office or position for not more than 90 days into the term of the next Attorney General, during the one-year period after the individual leaves office or position;
- (4) The chairman or treasurer of the principal campaign committee seeking the election or reelection of the Attorney General, and any officer of that committee exercising authority at the State level, during the incumbency of the elected attorney general.

1998 Pa. Laws 19, § 9312(c). The ICAA also covered anyone whose investigation by the OAG “may result in a personal, financial or political conflict of interest” (along with the individuals identified in § 9312(c), collectively referred to herein as “covered individuals”). *Id.* at 9312(b).

The Statute allowed the General Counsel of the Commonwealth to appoint an independent counsel to oversee an investigation into allegations that a person with statutorily-defined ties to the OAG had engaged in specific criminal conduct that otherwise fell within the OAG’s exclusive investigative jurisdiction. That conduct included “(1) An offense which is classified higher than a misdemeanor of the second degree [;] [and] (2) An offense which is classified higher than a summary offense and which involves a breach of the public trust.” 1998 Pa. Laws 19, § 9312(a).

The ICAA did not address the appointment of a special prosecutor to inquire into offenses committed by a covered individual that could have been investigated

by the legislature, the judiciary, or any other governmental agency. The statute was concerned only with criminal violations that were within the exclusive investigative jurisdiction of the OAG. The narrow focus of the statute makes sense. The ICAA was designed to prevent situations where deciding whether to launch an investigation into allegations of criminal conduct would create a conflict for the OAG. However, where a covered individual was alleged to have engaged in an impropriety that another branch of government could inquire into, the OAG did not have a conflict of interest in deciding whether that impropriety would be investigated. That decision would be left up to the relevant authoritative branch.

Accordingly, the ICAA would not have been triggered by an allegation of a breach of grand jury secrecy by a covered individual. Not only is such a breach a violation of the judicial code and punishable as contempt of court, 42 Pa.C.S. § 4549, but it is also within a judge's power to investigate. *See Dauphin County, supra*, 19 A.3d at 504. Attorney General Kane's reliance on the "controlled framework" outlined in the ICAA for appointing a special prosecutor is therefore misplaced. *Id.* (quoting *Twenty-Fourth Statewide Investigating Grand Jury, supra*, 907 A.2d at 512.) Judge Carpenter did not follow that framework in appointing Carluccio as Special Prosecutor because, like all other supervising judges who have appointed a special prosecutor to oversee a leak investigation, he was not required to do so.

As this Court has explained, since the enactment of the Grand Jury Act, “[t]he safeguards against” the potential abuses associated with the judicial appointment of a special prosecutor to investigate a grand jury leak have always been found in the “statutory scheme of regulation” governing grand juries. *Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d at 512. The “procedures and safeguards,” (Kane’s Sup. Br. at 16.), set forth in the ICAA for the appointment of a special counsel in other contexts never applied to grand jury leaks. Just as it does today, the statutory framework governing grand jury proceedings delineated during the ICAA’s effective period the parameters of the authority of a supervising judge in appointing a special prosecutor to inquire into a grand jury leak.

iii. The ICAA Would Not Have Governed the Present Matter Even if it Were in Effect Today

The ICAA’s system for initiating an investigation into alleged OAG impropriety never would have applied to a situation where, as here, a supervising judge of a grand jury became aware that an unidentified person may have leaked secret grand jury information. The statute would be inapplicable even if it were still in effect for two distinct reasons.

First, the ICAA did not require a judge to turn to the General Counsel to

seek to enforce grand jury secrecy or to obtain permission to inquire into whether an alleged breach of grand jury secrecy actually occurred. The statute provided for a system of appointing an independent counsel only where the General Counsel received credible allegations of criminal conduct by a covered individual, or where requested by the attorney general. 1998 Pa. Laws 19, § 9312(a)-(b). The ICAA's investigative process never would have been triggered by a supervising judge's receipt of information that grand jury secrecy had been violated, regardless of whether the alleged leaker was covered by the statute. The ICAA did not address the authority of a supervising judge to inquire into violations of the judicial code, *e.g.*, a breach of grand jury secrecy. *See* 42 Pa. C.S. § 4549. Such authority stems from statutes that were enacted two decades prior to the ICAA. *See* 42 Pa.C.S. § 4548(a); 42 Pa.C.S. § 323. Unlike the ICAA, these statutes are alive and well today, as is a supervising judge's authority to inquire into a grand jury leak as he or she sees fit.

Accordingly, the Court should give no credence to Attorney General Kane's assertion that Judge Carpenter's appointment of a Special Prosecutor was unlawful because His Honor "selected and appointed a Special Prosecutor on his own—a major break from the provisions of the Independent Counsel Authorization Act." (Kane's Sup. Br. at 18.) Not only is it irrelevant that Judge Carpenter did not comply with the provisions of an expired statute, but even if the statute was still on

the books, its provisions would not have applied to a supervising judge's appointment of a special prosecutor to investigate a grand jury leak.¹⁰

Second, the procedures for launching an investigation of a covered individual that were set forth in the ICAA applied only where that covered individual was the target of an investigation from its outset. That was not the case here. Neither Attorney General Kane nor any other individual who would have been covered by the ICAA was the target of the investigation that Judge Carpenter appointed Carluccio to conduct.

In fact, Judge Carpenter's Order appointing a special prosecutor made no mention of any individual or entity. At the time His Honor issued the Order, Judge Carpenter knew only that some unidentified person likely violated the confidentiality of grand jury information. His Honor therefore appointed a special prosecutor to oversee an investigation of who, if anyone, had committed the alleged breach. The ICAA did not apply to such a dragnet inquiry. So, while Attorney General Kane is wrong in arguing that the ICAA required judges to ask the General Counsel to appoint an independent counsel to inquire into violations of grand jury secrecy, the statute still would not have applied in this case even if she

¹⁰ This Court in Dauphin County directed a single judge to select and appoint a special prosecutor to conduct an investigation into alleged grand jury leaks. Dauphin County, *supra*, 19 A.3d at 498.

were correct, and even if the statute were in effect.

iv. Special Prosecutors were Appointed to Investigate the OAG Prior to the Passage of the ICAA

Attorney General Kane argues that a special prosecutor could be appointed to investigate the Attorney General or any individual that was covered by the ICAA *only* during the five-year period when the statute was in effect. Her predecessors disagreed. They knew that a special prosecutor could be appointed to investigate the OAG and, in fact, past Attorneys General did appoint special prosecutors to investigate members of the OAG who were alleged to have engaged in criminal conduct. Attorney General Kane's predecessors were right and she is wrong. Moreover, the actions and positions of Attorney Kane's predecessor Attorneys General make it abundantly clear that the absence of the ICAA does not limit the availability of special prosecutors to investigate the OAG.

When the ICAA was first introduced in 1994, the OAG argued that it was not necessary because "the Attorney General's Office presently appoints independent counsel to pursue matters involving political conflicts of interest." (See House Journal, October 4, 1994, 1626.) In other words, during the infancy of the ICAA, the OAG contended that the statute was superfluous because there was already a system in place whereby a special prosecutor could be appointed to

investigate the Attorney General, a member of the OAG, and/or any individual whose investigation would create a conflict for the OAG.

Past Attorneys General have also demonstrated that there was in fact such a system in place prior to the enactment of the ICAA. In 1996, for example, when the OAG faced a conflict of interest that rendered it incapable of investigating a recently ousted Attorney General, then-sitting Attorney General Corbett appointed a special prosecutor to investigate the OAG.¹¹ Importantly, the former Attorney General made this appointment prior to the ICAA, and the special prosecutor was appointed to look into allegations that then-active members of the OAG had engaged in criminal conduct.

Yet, Attorney General Kane now argues that “in its absence”—both before and after the passage of the ICAA—“there is no authority in Pennsylvania for the appointment of a Special Prosecutor to investigate the Office of the Attorney General.” (Kane’s Sup. Br. at 16.) Attorney General Kane’s position is disingenuous, hypocritical, and wrong. In advocating against the passage of the ICAA, the OAG contended that it could, and did, appoint special prosecutors when confronted with situations where an individual covered by the ICAA was accused

¹¹ See Robert Moran, Special Prosecutor Will Investigate Personal Legal Bills of Preate A Probe Will Find Out If Some Were Paid By Taxpayers. Preate Has Said The Bills Were For State Business, philly.com (Feb. 14, 2015, 2015, 4:10 PM) http://articles.philly.com/1996-01-17/news/25651074_1_legal-bills-attorney-general-ernie-preate-jack-dodds.

of criminal wrongdoing. And on at least one occasion, an Attorney General did just that. With these facts in mind, Attorney General Kane's current argument becomes the following: "without the ICAA only the Attorney General can appoint a special prosecutor to investigate either the Attorney General and/or the OAG." The nonsensical nature of Attorney General Kane's self-serving interpretation of the ICAA is demonstrated by the representations of past Attorneys General regarding their ability and willingness to appoint special prosecutors to investigate the OAG.

Lest there be any doubt that past Attorneys General disagreed with [Attorney General] Kane's incredible position regarding the appointment of a special prosecutor to investigate a grand jury leak, this brief directs the Court's attention to statements made by the OAG in 2004 (after the expiration of the ICAA). During a conference before the Honorable Isaac S. Garb, Supervising Judge of the Twentieth Statewide Investigating Grand Jury, regarding allegations that the OAG had leaked secret grand jury information, the OAG stated:

Just for the record, the Office of Attorney General completely concurs with [the Supervising Judge's] authority and really virtually unlimited authority to take a look into this and appoint whoever you desire to do so. We will not stand in your way.

See In re County Investigating Grand Jury VII, 2003, 2005 WL 3985351, p. 8
(Lack. Com. Pl. 2005)

During that same conference, the OAG expressed a clear and fine

understanding of the powers that the Grand Jury Act bestows upon supervising judges. Just as noted above, the OAG recognized that the supervising judge of a grand jury has “the sole and unlimited authority to review [leak allegations] and “to determine where that should go and what, if any, investigative agencies or efforts need to be made to investigate these allegations.” *Id.*

These past representations of the OAG make it very clear that the filings [Attorney General] Kane has submitted in support of her *Quo Warranto* Action should be read with a disclaimer in mind: “*the views expressed herein do not represent the views of the Office of the Attorney General of the Commonwealth of Pennsylvania—they are strictly those of Kathleen Kane.*” If such a disclaimer is not necessary, the OAG should say so. But unless and until the OAG endorses the views expressed in Kathleen Kane’s papers, there is no apparent disagreement between the current OAG and past OAGs. The contradictions between Kathleen Kane and the historical positions of the Office of the Attorney General are due to the blurred lines that Kathleen Kane has created in her filings between Citizen Kane the individual and Attorney General Kane.¹²

The Office of the Attorney General knows that the supervising judge of a

¹² Indeed, Kathleen Kane wishes to be on both sides of the fence. She invokes her status as a citizen in asserting standing to bring this *Quo Warranto* Action (Exhibit I), then she rests on her employment as the Attorney General of the Commonwealth in claiming that she is above investigation for breaching grand jury secrecy.

grand jury has the authority to appoint a special prosecutor to oversee a grand jury's investigation into a breach of grand jury secrecy, and it has not filed any papers in the present action to the contrary. The OAG is also well aware that independent counsels have customarily been appointed to investigate allegations of criminal conduct by members of the OAG. A thorough review of the OAG's positions on the appointment of special prosecutors—both in the media and in the courts—has revealed only one member of the OAG that has ever argued that in the absence of the ICAA a special prosecutor cannot be appointed to investigate the individuals that were covered by the statute: Kathleen Kane, *in her individual capacity*.

It is telling that the OAG did not bring this *Quo Warranto* Action despite having the authority to do so.¹³ *Reed v. Harrisburg City Council*, 995 A.2d 1137, 1139 (Pa. 2010). The OAG could not have done so with a straight face. Instead, this *Quo Warranto* Action was brought by Kathleen Kane the individual, not Attorney General Kane, based on arguments that starkly contrast the positions of

¹³ After all, the Grand Jury investigation that Carluccio oversaw included testimony from several members of the OAG. All things being equal, each of those individuals—as well as the OAG—has the same interest as Kathleen Kane in the lawfulness of Judge Carpenter's appointment of Carluccio as special prosecutor. But all things are not equal. Kathleen Kane is the only employee of the OAG who was found to have allegedly committed perjury before the Grand Jury and leaked secret grand jury information. This inequality between Kathleen Kane and the members of the OAG who followed the law likely explains why Kathleen Kane had to hire private counsel to bring her *Quo Warranto* Action. Getting caught breaking the law is the only "special right or interest," (*id.*), that Kathleen Kane has apart from her colleagues and the office she heads in asking this Court to determine that Judge Carpenter's appointment of Carluccio was unlawful.

the Office of the Attorney General.

v. Attorney General Kane's Interpretation of the ICAA would Lead to an Absurd Result

The ICAA applied no more to the Attorney General herself than it did to a non-attorney public employee of the OAG or anyone whose investigation by the OAG “may result in a personal, financial or political conflict of interest.” 1998 Pa. Laws 19, §§ 9312(b)-(c). Its reach included hundreds, and possibly over 1,000 individuals.¹⁴ Thus, according to Attorney General Kane’s argument that only during the ICAA’s effective period was there any “authority for the appointment of a Special Prosecutor to investigate the Office of the Attorney General,” (Kane’s Sup. Br. at 20-20), there were only five years in the history of the Commonwealth when an independent counsel could look into criminal allegations of any kind against any one of several hundred individuals. This suggestion is as absurd as it sounds.

Members of the OAG were never above the law, as Attorney General Kane suggests. Moreover, Grand Jury secrecy applies to all persons “all persons” privy

¹⁴ According to PennWATCH, the “searchable budget database-driven Internet website” created by the Pennsylvania Web Accountability and Transparency Act, as of January 15, 2015, the Office of the Attorney General employed 838 people. See Employee Count by Agency, [www.pennwatch.pa.gov](http://www.pennwatch.pa.gov/employees/Pages/Employee-Count-by-Agency.aspx) (Feb. 15, 4:11 M), <http://www.pennwatch.pa.gov/employees/Pages/Employee-Count-by-Agency.aspx>.

to confidential information, including every "juror, interpreter, stenographer, operator of a recording device, or any typist" 42 Pa.C.S. § 4549(b).

C. THE ATTORNEY GENERAL WAIVED HER QUO WARRANTO CLAIMS AS A MATTER OF LAW AND AS THEY ARE UNTIMELY.

The Attorney General's *Quo Warranto* action and associated arguments should be considered waived due to her statements and actions during the approximately seven (7) months preceding this attempt to thwart the work of the Special Prosecutor and findings of the Grand Jury. The Attorney General, her senior staff, and numerous other OAG employees asserted, and in some cases, actually provided, cooperation with the work of the Special Prosecutor and Investigating Grand Jury. Most pointedly, the Attorney General, her senior staff, and many OAG employees actually testified before the Grand Jury in this matter. Prior to the issuance of a Presentment in this investigation, only one witness attempted to quash their appearance before the Grand Jury, and that was the Attorney General. Having failed to get relief from this Supervising Judge or this very Court, the Attorney General testified before the Grand Jury November 17, 2014. At no point before or during her testimony did she raise any *Quo Warranto* issues regarding the Special Prosecutor or the Supervising Judge.

As previously stated, the Attorney General was served with a copy of the May 29, 2014 Order appointing a Special Prosecutor. There is ample evidence in

the Grand Jury record, which is available to this Court, that clearly demonstrates the Attorney General's knowledge of the Special Prosecutor's appointment nearly six (6) months before to her testimony. In pleadings filed before this Court on November 10, 2014, in this case but in an unrelated matter, the Attorney General made clear the level of alleged cooperation she and her office provided to the Special Prosecutor's investigation.¹⁵

This extraordinary admission by the Attorney General herself constitutes a clear and unequivocal waiver of her right to now assert the alleged illegal appointment and constitutional violations contained in her *Quo Warranto* action. Of consequence, it was not until it became clear to the Attorney General that her true activities, and involvement, in the illegal disclosure of grand jury information had been discovered by the grand jury that she sought to challenge the legality of the investigation.¹⁶

"A waiver in law is the act of intentionally relinquishing or abandoning

¹⁵ The Attorney General's Petition for Review of Orders entered by Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury filed on November 10, 2014 at Supreme Court Docket 171 MM 2014, p.4.

¹⁶ The Order of the Supervising Judge appointing a Special Prosecutor is clearly an order that was known to the Attorney General, per her own sworn testimony, shortly after issuance of the Order. A copy of the Order was served upon the Attorney General. See Exhibit A. No appeal, or attempt to appeal, this Order was made within 10 days, 30 days – or even within 180 days – by the Attorney General. Under Rule 3331(a)(1), a petition for review must be filed "within the time specified by Rule 1512(b)(3)." Rule 1512(b)(3) provides that "a determination governed by Rule 3331 (review of special prosecutions or investigations) shall be filed within ten days after the entry of the order sought to be reviewed." The filing of this action by Attorney General Kane – as a private citizen – does not appear to be timely under any known measure. See generally, *City of Philadelphia v. Goldstein*, 357 A.2d 260, 24 Pa.Cmwlth. 434, (1976).

some known right, claim or privilege. To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it.” *Brown v. City of Pittsburgh*, 409 Pa. 357, 360, 186 A.2d 399, 401 (1962). *See also, Commonwealth v. Gribble*, 580 Pa. 647, 863 A.2d 455 (2004).

The Attorney General certainly did not hesitate to appeal, directly to the Supreme Court, other unrelated Court Orders of the Supervising Judge that arose from the investigation conducted by the Special Prosecutor, but never raised the issue of the Special Prosecutor’s legality until after she perceived adverse action by the Grand Jury. Her failure to raise this claim in any of her prior appeals or prior to her testimony in the Grand Jury constitutes a waiver of her current attempts to challenge the legitimacy of the Special Prosecutor. *See Commonwealth v. Kravitz*, 441 Pa. 79, 84, 269 A.2d 912, 914 (1970).

In this instance, Kane not only knew of the appointment and purpose of the Special Prosecutor in May of 2014, she has also claimed to have provided resources and assistance. Most pointedly, this assistance did not include the disclosure of what she knew about the disclosure of Grand Jury information to the Philadelphia Daily News. It was only after being compelled to testify before the Grand Jury and the subsequent issuance of a Presentment – nearly seven months after the appointment of the Special Prosecutor – that Kane challenged the

authority of the Special Prosecutor. Each one of these calculated acts and omissions constitute “clear, unequivocal and decisive” actions abandoning any legitimate complaint about Supervising Judge’s appointment of the Special Prosecutor. Collectively, these self-serving actions cannot be reconciled with Kane’s current expressions of legal umbrage about her purported fealty to the principles of separation of powers. She has waived her right to such claims.

D. EVEN IF THE APPOINTMENT OF THE SPECIAL PROSECUTOR WERE QUASHED, THE PRESENTMENT WOULD STAND

The most puzzling question presented by Attorney General Kane’s *Quo Warranto Action* is what she is trying to accomplish. It is difficult to *See* her point. A *Quo Warranto* is properly addressed “to preventing a continued exercise of authority unlawfully asserted, rather than to correct what has already been done under the authority.” *Spykerman v. Levy*, 421 A.2d 641, 648 (Pa. 1980) (citing *State Dental Council & Exm. Bd. v. Pollock*, 318 A.2d 910 (Pa. 1974); *Johnson v. Manhattan R.R. Co.*, 289 U.S. 479 (1933)). Even if Supervising Judge Carpenter’s appointment of the special prosecutor were quashed, the grand jury’s presentment would still stand. *Id.*

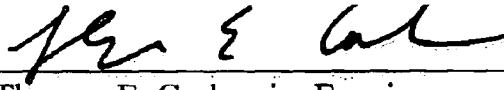
Moreover, a subpoenaed witness is under an obligation to tell the truth under oath, even if the proceeding in which the testimony is given is later deemed to have been invalid. The perjury recommendation in the presentment would thus still

stand, as would the other recommended charges (false swearing, obstruction, official oppression and contempt), even if the appointment were quashed.

There is also the question of whether the current *Quo Warranto* Action is ripe for review. The Supreme Court in *Dauphin County* noted that the Court in the *Grand Jury VIII* denied the defendant's motion to quash the presentment in that case because he "would be entitled to a preliminary hearing following the filing of criminal charges based upon the presentment under the IGJA, 42 Pa. C.S. §4551(e), which would further ameliorate any alleged prejudice suffered by him." *Dauphin County, supra*, 19 A.3d at 506. Since the defendant had failed to establish prejudice, the *Dauphin County* Court "concluded that there was no basis upon which to quash the grand jury's presentment." *Id.* In the event that the District Attorney elects to bring charges against Kane, she would then be entitled to a preliminary hearing, at which time any defects in the grand jury proceeding would be cured. *Id.*

IX. CONCLUSION

For the foregoing reasons, Supervising Judge Carpenter lawfully appointed a Special Prosecutor to oversee the leak investigation of the Thirty-Fifth Statewide Investigating Grand Jury, and Attorney General Kane's *Quo Warranto Action* should be denied.



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*Special Prosecutor of Investigating
Grand Jury No. #35*

Dated: February 18, 2015

IN RE:

THE STATEWIDE

INVESTIGATING GRAND JURIES

: MONTGOMERY COUNTY COMMON PLEAS

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:

WDR Gouda

WILLIAM R. CARPENTER, J.
Supervising Judge

True and correct Copy
Certified from the record

This 29 Day of MAY.....A.D. 2014.....

Anna Thornburg Weiss
Clerk of Courts
per

**IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA**

IN RE:

THE STATEWIDE

INVESTIGATING GRAND JURIES

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:
:
: **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

FILED UNDER SEAL

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

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

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:
:
:
:
:
:

SUPREME COURT DOCKET
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. TOLLIYER, 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

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:

THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

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

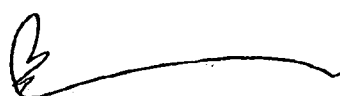
MONTGOMERY COUNTY COMMON PLEAS
M.D. 2644-2012

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

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

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

ORDER ACCEPTING PRESENTMENT NO #60

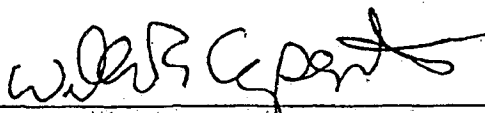
A. The Court finds Presentment No #60 of the Thirty-Fifth Statewide Investigating Grand Jury is within the authority of said Grand Jury and is in accordance with the provisions of this Investigating Grand Jury Act, 42 Pa.C.S. §4541, *et seq.* Further find that the determination of the Thirty-Fifth Statewide 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,
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

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

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

**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
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:

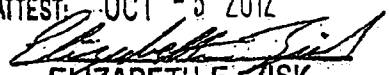
AND NOW, comes Linda L. Kelly, Attorney General of the Commonwealth of
Pennsylvania, who makes application pursuant to the Investigating Grand Jury Act, 42 Pa.C.S.
§§ 4541 *et seq.*, for the creation of an additional multicounty investigating grand jury having
statewide jurisdiction, and in support thereof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

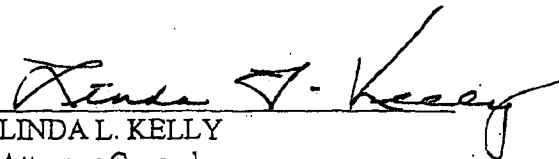
12. In my judgment as Attorney General:

- 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,

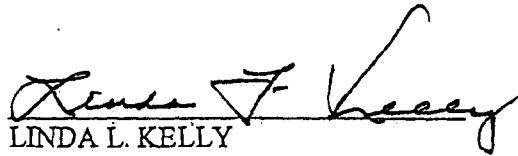


LINDA L. KELLY
Attorney General
Commonwealth of Pennsylvania

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

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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

NO. 176

MISC. DOCKET 2012

MD 2644-2012

2012 NOV 19 AM 7:54

CLERK OF
COMMONWEALTH
MONTGOMERY COUNTY

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



DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
(215) 686-8000

RECEIVED
MAY 15 2014
BY: _____

R. SETH WILLIAMS
DISTRICT ATTORNEY

May 8, 2014

Honorable William R. Carpenter
Supervising Judge Statewide Grand Jury
Montgomery County Courthouse
2 East Airy Street
Norristown, PA 19404

Via fax (610)-278-5192 and U.S. Mail

RE: Grand Jury Information

Dear Judge Carpenter:

We are providing this correspondence to report the release of Grand Jury information. Yesterday, the undersigned were separately contacted by an individual who represented himself as Chris Brennan, "a reporter with the Philadelphia Daily News". He stated that he was in possession of a 2009 email between Frank Fina, Marc Costanzo and William Davis. At the time, Frank Fina was Chief Deputy Attorney General for the Criminal Prosecutions section of the Attorney General's Office and Marc Costanzo and William Davis were prosecutors in that section. The email contained a lengthy review of the evidence and testimony from a Statewide Grand Jury investigation being conducted at the time. As part of that investigation, information derived from the Grand Jury - about a certain prominent individual who was never charged - was detailed in this internal email. We are hesitant to detail this information in a correspondence but will gladly do so in person. We can represent to the Court that the email contained extensive evidence and information that clearly fall within the ambit of Grand Jury secrecy. The reporter stated that he had a copy of the email and he even recited from it when questioned about the contents. The reporter also stated that the email was only between Fina, Davis and Costanzo. We can assure the Court that none of us disclosed this email.

We were subsequently called by William Davis, now in private practice in Delaware County, who relayed that he too had been called by Brennan about this email. All three of us, separately, informed Brennan that he possessed secret Grand Jury information and that whoever gave it to him had likely committed a serious crime. We are also certain that, as individuals who continue to be sworn to secrecy before the Grand Jury in question, we have an obligation to disclose this apparent breach of secrecy to the current Supervising Judge.

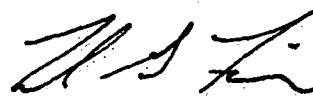
We are available, at the Court's discretion, to provide further details and answer any questions regarding this matter. We would prefer to do so on the record *in camera*, but obviously defer to the Court in this regard.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Marc Costanzo".

E. Marc Costanzo
Chief Assistant District Attorney

A handwritten signature in black ink, appearing to read "Frank G. Fina".

Frank G. Fina
Assistant District Attorney

Cc: Edward McCann
First Assistant District Attorney, Philadelphia District Attorney's Office

William Davis, Esquire



Exhibit "G"

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
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LOIS EISNER MURPHY
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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

**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**

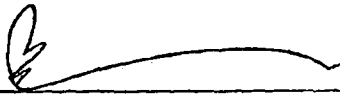
INVESTIGATING GRAND JURY

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



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.

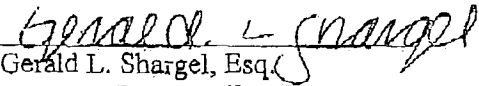
1. This Court has the authority to hear this Action pursuant to Section 721 of the Pennsylvania Rules of the Judicial Code.
2. The annexed Attorney Verification and Memorandum of Law are respectfully submitted in support of this Action.

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

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

Dated: December 17, 2014
New York, New York

To: Clerk of Court

Thomas E. Carluccio
Special Prosecutor

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

APPLICATION FOR LEAVE TO FILE
ORIGINAL PROCESS IN
QUO WARRANTO ACTION

PROOF OF SERVICE

I hereby certify that, on December 22, 2014, I caused the service of an Application for Leave to File Original Process in a *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

Date: December 22, 2014

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
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IN RE:

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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
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IN RE:

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QUO WARRANTO ACTION

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

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 Andrejowski 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. Cmnlth 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

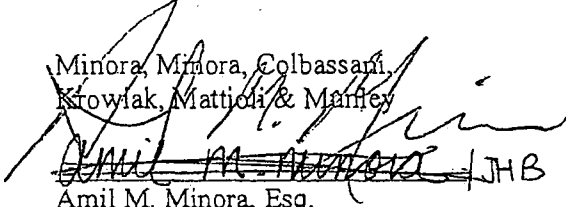
constitutional separation of powers violation is, standing alone, sufficient to warrant relief in this *quo warranto* action.

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.

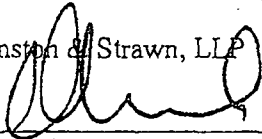
CONCLUSION

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, Mattioli & Marfey~~

~~Amil M. Minora~~ JHB
Amil M. Minora, Esq.
Attorney for Attorney General Kathleen G. Kane
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Winston & Strawn, LLP

Gerald L. Shargel, Esq.
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Kathleen G. Kane
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New York, NY 10166
(212) 294-2637

IN THE SUPREME COURT OF PENNSYLVANIA
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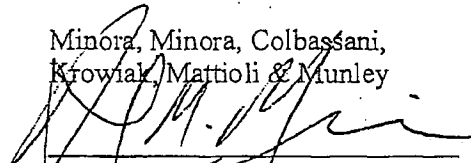
APPLICATION FOR LEAVE TO FILE
ORIGINAL PROCESS

QUO WARRANTO ACTION

APPLICATION FOR LEAVE TO FILE ORIGINAL PROCESS IN
QUO WARRANTO ACTION

Pursuant to Rule 3307 of the Pennsylvania Rules of Appellate Procedure, Attorney General Kathleen G. Kane, by and through her counsel, Arnil M. Minora, Esq., hereby applies for leave to file original process in this *quo warranto* action to quash the appointment of Thomas E. Carluccio, Esq., as Special Prosecutor for the 35th Statewide Investigating Grand Jury. The Supreme Court has original jurisdiction over this *quo warranto* action pursuant to Section 721 of the Pennsylvania Judicial Code, because the Special Prosecutor in this case is "an officer of statewide jurisdiction." 42 Pa. C.S. § 721.

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley



Arnil M. Minora, Esq.

Attorney for Attorney General Kathleen G. Kane
Attorney ID: 22703
700 Vine Street
Scranton, PA 18510
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MOTION TO FILE APPLICATION FOR
LEAVE TO FILE ORIGINAL PROCESS AND
QUO WARRANTO ACTION UNDER SEAL
PROOF OF SERVICE

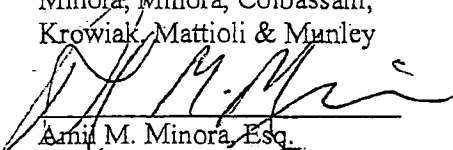
I hereby certify that I am this day causing the service of the foregoing Motion to File Application for Leave to File Original Process and *Quo Warranto* Action Under Seal upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

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

Date: December 22, 2014

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley



Amir M. Minora, Esq.
Attorney for Attorney General Kathleen G. Kane
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700 Vine Street
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MONTGOMERY COUNTY
COMMON PLEAS
M.D. 2644-2012

MOTION TO FILE
APPLICATION FOR LEAVE TO FILE
ORIGINAL PROCESS AND
QUO WARRANTO ACTION
UNDER SEAL

NOTICE OF MOTION

MOTION TO FILE UNDER SEAL

Attorney General Kathleen G. Kane, by and through her counsel, Amil M. Minora, Esq., hereby moves to file the enclosed Application for Leave to File Original Process and *Quo Warranto* Action under seal.

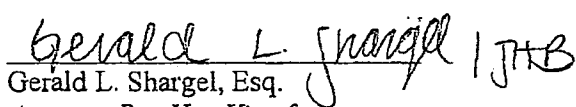
1. Attorney General Kane's *Quo Warranto* action asks that this Court quash the appointment of Thomas E. Carluccio, Esq. as Special Prosecutor for the 35th Statewide Investigating Grand Jury.
2. The subject of this challenge, the grand jury proceeding in which Special Prosecutor Thomas E. Carluccio, Esq. was appointed, is under seal. All challenges arising out of this proceeding should remain under seal.
3. The annexed Attorney Verification is respectfully submitted in support of this Application.

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

Dated: December 22, 2014
New York, New York

To: Clerk of Court

Thomas E. Carluccio
Special Prosecutor

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

MOTION TO FILE APPLICATION FOR
LEAVE TO FILE ORIGINAL PROCESS AND
QUO WARRANTO ACTION UNDER SEAL
PROOF OF SERVICE

I hereby certify that I am this day causing the service of the foregoing Motion to File Application for Leave to File Original Process and *Quo Warranto* Action Under Seal 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

Date: December 22, 2014

Minora, Minora, Colbassani,
Krowiak, Mattioli & Munley


Amir M. Minora, Esq.

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

MINORA, MINORA, COLBASSANI, KROWIAK, MATTIOLI & MUNLEY

Amil M. Minora
John J. Minora
Joseph S. Colbassani
Edward G. Krowiak
Jason J. Mattioli

ATTORNEYS AND COUNSELORS AT LAW
700 VINE STREET AT JEFFERSON AVENUE
SCRANTON, PA 18510-2441
PHONE (570) 961-1616
FAX (570) 558-1110 OR (570) 961-1691

Thomas W. Munley
Paul J. Ware
John R. Williams
Patrick M. Scanlon

December 22nd, 2014

Supreme Court of Pennsylvania
Prothonotary's Office
601 Commonwealth Avenue
Suite 4500
Harrisburg, PA 17120-0901

COPY

RE: In Re: The Thirty-Five Statewide Investigating Grand Jury:
Supreme Court of Pennsylvania No. 176 M.D.
Misc. Docket. 2012
Montgomery County Common Pleas
M.D. 2644-2012

To Whom It May Concern,

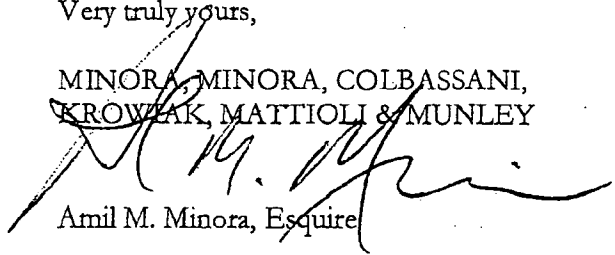
Please find enclosed the originals and copies of the Quo Warranto Action, Motion to File Under Seal, Application for Leave to File Original Process in Quo Warranto Action and Memorandum of Law in Support of Attorney General Kathleen Kane's Quo Warranto Action.

Kindly file the originals and return the time-stamped copies to me in the enclosed, self-addressed stamped envelope.

Thank you.

Very truly yours,

MINORA, MINORA, COLBASSANI,
KROWIAK, MATTIOLI & MUNLEY


Amil M. Minora, Esquire

AMM/cpg
Enclosures:
Cc: Thomas Carluccio, Esquire

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

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

ORDER ACCEPTING PRESENTMENT NO #60

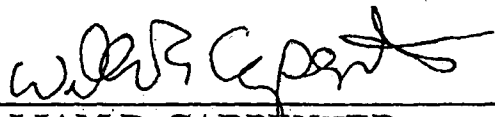
A. The Court finds Presentment No #60 of the Thirty-Fifth Statewide Investigating Grand Jury is within the authority of said Grand Jury and is in accordance with the provisions of this Investigating Grand Jury Act, 42 Pa.C.S. §4541, *et seq.* Further find that the determination of the Thirty-Fifth Statewide 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 SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE:

**THE THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY**

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

**SUPREME COURT OF PENNSYLVANIA
NO. 197 MM 2014**

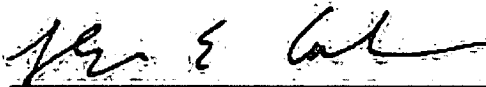
CERTIFICATE OF SERVICE

I, Thomas E. Carluccio, Esquire do hereby certify that a true and correct copy of the *Brief of Special Prosecutor in Opposition to the Quo Warranto Action of Attorney General Kathleen G. Kane* has been filed of record with the Pennsylvania Supreme Court , and a copy of which has been directed on the 18th day of February, 2015 by first class U.S. Mail, postage prepaid to all parties in interest, and to Petitioner's legal counsel via email on this date by agreement evidenced by the email exchange accompanied hereto, 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