IN THE SUPREME COURT OF PENNSYLVANIA

No. 197 MM 2014

IN RE: THE THIRTY-FIFTH STATEWIDE INVESTIGATING GRAND JURY

PETITION OF ATTORNEY GENERAL KATHLEEN G. KANE

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

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

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

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

This Supplemental Reply Memorandum of Law is respectfully submitted in response to Thomas E. Carluccio's Brief of Special Prosecutor in Opposition to the *Quo Warranto* Action of Attorney General Kathleen G. Kane, dated February 18, 2015 ("Carluccio Opp.") and Judge William R. Carpenter's Supplemental Opinion, dated February 18, 2015. ("Carpenter Supp.").[1]

Neither Mr. Carluccio nor Judge Carpenter present viable legal arguments in opposition to Attorney General Kane's *quo warranto* action. Judge Carpenter had no legal authority to unilaterally appoint a Special Prosecutor to conduct an investigating grand jury. The legislative history and plain language of the Independent Counsel Authorization Act support this position,

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[1] With all due respect to Judge Carpenter, this Supplemental Opinion is unsettling. It is, in fact, not a Jurist's Opinion. Rather, it is a Respondent's Brief drafted by a zealous advocate. It is highly unusual to have a judge file an appellate brief *in support of his own actions.* It is more unusual, and troubling, to have a judge demonstrate clear and emotionally-charged partisan support for one position, and personal animus toward a particular litigant.

We respectfully submit that based on Judge Carpenter's demonstrated bias (see, e.g., Carpenter Supp. at 2) ("The truth is crying to be heard. ... [Attorney General Kane's] *quo warranto* action should be dismissed and the voice of truth should be allowed to speak."), to the extent that this Court's decision results in further proceedings below, Judge Carpenter should be recused.

and the case of In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011) is easily distinguishable on several grounds.

ARGUMENT FOR APPELLANT

I. MR. CARLUCCIO'S ARGUMENTS REGARDING THE INDEPENDENT COUNSEL AUTHORIZATION ACT ARE MERITLESS.

In our Supplemental Memorandum of Law, it is argued that an examination of the legislative history and plain language of the Independent Counsel Authorization Act are significant in this case. They demonstrate that: (a) the Act was drafted for the purpose of empowering the judiciary to appoint a Special Prosecutor to investigate the Office of Attorney General; (b) in its absence there is no statutory authority for the judiciary to appoint a Special Prosecutor to conduct an investigating grand jury for that purpose; and (c) defined procedures and safeguards are necessary if the judiciary is empowered to appoint a Special Prosecutor.

In response, Mr. Carluccio argues that an examination of the Act is unimportant, because it would never have applied under the facts of this case. (Carluccio Opp. at 37-38). Mr. Carluccio is simply wrong. His argument contradicts relevant statutory law and the legislative history of the Independent Counsel Authorization Act.

Mr. Carluccio argues that the Act would never have applied under the facts of this case because it was enacted to apply "only" in the event of a conflict – "the rare situation" where the Office of Attorney General "was alleged to have committed an offense that only the [Office of Attorney General itself] could investigate." (Carluccio Opp. at 38.) Here, Mr. Carluccio argues that there was no such conflict because the judiciary could have, on its own, investigated a leak of grand jury information from the Office of Attorney General. (Id.) This is wrong as a matter

of basic Pennsylvania statutory law, as it relates to the method of investigation employed in this case.

As a matter of law, only the Office of Attorney General is empowered to conduct an investigating grand jury. The Commonwealth Attorneys Act, 71 P.S. §§ 732-101, *et seq.*, specifically grants *the Attorney General* that power. The Investigating Grand Jury Act, 42 Pa. C.S. §§ 4541, *et seq.*, which governs the procedure for an investigating grand jury, specifically references an "Attorney for the Commonwealth" (OAG and District Attorneys) as the party empowered to conduct an investigation. In this case, which involves a multicounty investigating grand jury, the exclusive power to conduct that investigating grand jury is again vested by statute in the Attorney General.[2]

Therefore, this case *does* present a potential conflict – the Office of Attorney General held the exclusive power to conduct an investigation into its own affairs – and the Act would certainly have applied, had it not expired. As Mr. Carluccio acknowledged: the Act allowed for the appointment of a Special Prosecutor "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.*" (Carluccio Opp. at 44) (emphasis added). Conducting an investigating grand jury *is* the Office of Attorney General's "exclusive jurisdiction," by law. The Act therefore would have applied under the facts of this case, and an examination of the Act and its legislative history are clearly important. They demonstrate that when the Act expired in 2003, the judiciary's power to appoint a Special

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[2] The express conferral of this authority upon an "Attorney for the Commonwealth" is significant as a matter of statutory construction. The maxim of construction *expressio unius est exlusio alterius* holds that where a statute specifically mentions one thing, it can be construed as an intentional exclusion of anything else. As such, the Act's specific grant of investigatory power upon an attorney for the Commonwealth is reasonably interpreted as a bar of any other individual or entity exercising that power.

Prosecutor to conduct an investigating grand jury into allegations against the Office of Attorney General expired with it.

As detailed in our Supplemental Memorandum of Law, the legislative history of the Act supports this reading. On June 10, 1997, Representative Albert Masland explained the purpose of the Act, and why it was necessary:

> [B]asically what we are doing is we are establishing a manner in which we can investigate situations that arise in the Attorney General's Office or in cases where the Attorney General may have a conflict. ***And right now we do not have an independent prosecutor here in Pennsylvania*** like they do at the Federal level.

H. 181-40, 1997 Sess., at 1245 (Pa. June 10, 1997) (emphasis added). Representative Masland added that the Act was "essential," because without it there was no provision in the law for appointing a Special Prosecutor to lead an investigation of the Office of Attorney General: "*I truly believe that this measure is essential to us, and without it, there really is* ***nothing*** *to take its place.*" H. 181-40 at 1247 (emphasis added). The legislative history of the Act demonstrates that in the absence of additional legislation, there is no statutory authority for the appointment of a Special Prosecutor to conduct an investigating grand jury into allegations against the Office of Attorney General. The judiciary, absent the Act, *does not have this power.* An examination of the Act is therefore highly significant in this case.[3]

Mr. Carluccio raises two other arguments that are equally meritless. First, he argues that the Act only applied when the General Counsel, in the first instance, received allegations of

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[3] Again, as a matter of statutory construction, a statute may not be construed in a manner that renders its provisions mere surplusage. If, as Mr. Carluccio and Judge Carpenter claim, the judiciary has the *inherent* power to appoint a special prosecutor and conduct a grand jury investigation, the entire Independent Counsel Authorization Act would be redundant to, and superfluous in light of, a pre-existing authority of the judiciary to do so. This is untenable as a matter of statutory construction. It is also belied by the legislative history showing that the drafters of the Act did not believe that *anyone* had the authority to appoint a special prosecutor to investigate the Attorney General, absent the provisions of the Act.

criminal conduct by the Office of Attorney General. (Carluccio Opp. at 47.) Where an allegation was received instead by a Judge (as here), he argues, the statute never would have been triggered. (Id.) Of course, this is not how the Act was designed to function. It established a multi-step procedure for investigating an allegation of potential wrongdoing by the Office of Attorney General. Such an investigation, by the terms of the Act, would have to be initiated by the General Counsel. A single judge could not thwart the plain language and intent of the Act by refusing to forward an allegation to the General Counsel and instead acting alone, outside the procedural framework of the Act. Indeed, a judge would have no power to do so.

Second, Mr. Carluccio argues that the Act only applied when a "covered individual was the target of an investigation from the outset." (Id. at 48.) In this case, he argues, because Judge Carpenter's original Order appointing him "made no mention of" the Office of Attorney General, the Act would never have been triggered. (Id.) Again, this is nonsensical.[4] The intent of the Act – to provide a set procedural framework, with defined safeguards – could not be thwarted by a vaguely drafted Order naming no particular individual or Office. If at any time there was an allegation that the Office of Attorney General engaged in covered conduct, that allegation would have to be forwarded to the General Counsel, and the ensuing investigation would have to run through the procedure set forth in the Act. Otherwise the Act could be circumvented at will, and would have no practical effect.

Mr. Carluccio next argues that the Act is unimportant in this case, because even in the absence of the Act "a special prosecutor could be appointed to investigate the OAG and, in fact, past Attorney's General did appoint special prosecutors to investigate members of the OAG who

[4] Had Judge Carpenter believed the Office of Attorney General was not involved, he would have referred the matter to the OAG in the first instance. Also, in his letter of May 29, 2014, he specifically states that the appointment was "to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General's Office."

were alleged to have engaged in criminal conduct." (Id. at 49.) Mr. Carluccio offers pages of argument providing examples of prior Attorneys General appointing Special Prosecutors, and strenuously asserting that Attorney General Kane's position is therefore "disingenuous, hypocritical and wrong." (Id. at 50.) Attorney General Kane, he argues, has contradicted "the historical positions of the Office of the Attorney General," and her arguments about the significance of the Act should be disregarded. (Id. at 52.)

Attorney General Kane has never argued that the Office of Attorney General lacks the power to delegate ***its own*** statutory authority to a Special Prosecutor. It has been done in the past, and it will continue to be done as necessitated by the facts of an individual case. Attorney General Kane does not take the position that there can never be a special prosecutor. The Attorney General's Office, which possesses the authority to conduct a criminal investigation, may share its power with a special prosecutor that it designates. However, ***the judiciary*** cannot appoint a Special Prosecutor to conduct an investigating grand jury into allegations against the Office of Attorney General, absent the authority granted by the Act. It does not possess the power of conducting a criminal investigation and, thus, cannot share that power with a special prosecutor. For the judiciary to purport to appoint a special prosecutor with full investigatory and prosecutorial powers would be an implicit claim to share in the powers of the executive branch. There is no constitutional or statutory authority to support such a claim.[5]

Finally, Mr. Carluccio attempts to draw a negative inference from the fact that Attorney General Kane, as an individual, has brought this *quo warranto* action, rather than the Office of

[5] Attorney General Kane has never argued that she or her office are beyond the law. She has maintained, from the start, that she never authorized the disclosure of protected grand jury material, and that she testified truthfully before the grand jury. (See Exhibit B, Opinion dated April 19, 2012.)

Attorney General. (Id. at 53.) This argument is without merit. Attorney General Kane clearly 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 this case, Attorney General Kane, as an individual, has a special interest in this matter, and has been specially damaged. Two former Office of Attorney General employees with particular enmity toward her initiated this investigation. (See Exhibit F to Carluccio Opp., Letter of E. Marc Costanzo and Frank G. Fina.)[6] The investigation was taken up by a judge who has issued a partisan appellate brief in the guise of a judicial opinion.[7] That judge exceeded his lawful power in appointing a Special Prosecutor who correspondingly had no lawful authority to

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[6] Contrast this to the situation in In Re Dauphin County, where the issue was presented to the court in motions filed by targets of the grand jury.

[7] Contrary to Judge Carpenter's view that "...[he] was a Judge on a high and windy place in his thin judicial robes" (Carpenter Supp. at 27), he could have referred the matter to any of a number of district attorneys, and to suggest that they could not have resolved the jurisdictional issues is preposterous. District attorneys have always resolved venue questions.

act. The end result was an illegal Presentment that unjustly attacks Attorney General Kane – as an individual – and threatens imminent and unwarranted harm to her personal and professional reputation. Attorney General Kane is in fact the most appropriate party to bring this *quo warranto* action.

II. JUDGE CARPENTER'S ARGUMENTS REGARDING STATUTORY LAW ARE MERITLESS.

Judge Carpenter argues in his Supplemental Opinion/Brief that judges possess an "inherent authority" and "implied power" to enforce the law as they see fit in order to protect the sanctity of grand jury proceedings. (Carpenter Supp. at 6-7.) He argues that this "inherent authority" includes the power to appoint a Special Prosecutor to conduct an investigating grand jury into the conduct of the Office of Attorney General. (Id. at 7.) In support, he cites 42 Pa. C.S. § 323. (Id.) Judge Carpenter's interpretation of Section 323 is invalid.

A plain reading of Section 323 demonstrates that it confers upon a court only the powers needed to administer matters in its own jurisdiction and to fully exercise its jurisdiction as a court. It does not serve as a grant of additional substantive authority. It surely does not give the Court discretion to do whatever it sees fit to effectuate justice. No language of Section 323 can reasonably be construed as providing a judge with the right to initiate an investigation and prosecution into alleged crimes which (although they may have involved prior judicial proceedings) do not involve the proceedings pending before the judge.

Nor is Section 323 a grant of absolute, overriding authority to supersede other statutes. As previously discussed, the plain language of the Commonwealth Attorneys Act and the Investigating Grand Jury Act vest the power to conduct a statewide investigating grand jury

exclusively in the Office of Attorney General. Section 323 cannot, under any fair reading, permit a judge to disregard the mandate of those statutes, at his own discretion.[8]

Judge Carpenter cites no case where Section 323 has been interpreted to permit a court to engage in the sort of overreaching that occurred here. No such case exists. A survey of cases applying Section 323 demonstrate that it provides the court with only what the plain language of the statute says – the necessary power to issue orders and writs to exercise jurisdiction over matters properly pending before it and to effectively administer the proceedings in those cases. Section 323 gives a court the power to issue rules or otherwise direct proceedings before it, but only to the extent that those rules do not contradict enactments of the legislature or general rules of this Court. See City of Philadelphia v. Percival, 346 A.2d 754, 756 (Pa. 1975) (holding that a predecessor statute does not permit a court to alter procedures set by the Legislature or this Court); Miller v. Hild, 449 A.2d 714 (Pa. Super. 1982) (Local rules are invalid to the extent that they abridge, enlarge or modify substantive rights of litigants.)

42 Pa. C.S. § 323 did not empower Judge Carpenter to deputize Thomas Carluccio with the full power of the Office of Attorney General and the executive branch, as a Commonwealth Attorney who could investigate, prosecute, and conduct an investigating grand jury at his discretion. Nor did any other statute of this Commonwealth. As a result, Judge Carpenter's actions were contrary to law and any authority that he purported to confer upon Mr. Carluccio is a legal nullity.

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[8] Even this Court's supervisory King's Bench powers are not as broad as those that Judge Carpenter claims are conferred upon the Courts of Common Pleas by 42 Pa.C.S. § 323. Although this Court has broad supervisory powers over the judiciary, and the ability to exercise immediate jurisdiction over cases of public importance, even this Court lacks the authority to *sua sponte* determine that the coordinate branches of government are not effectively and efficiently working in the interest of justice, and to take upon itself the authority to stand in the shoes of the coordinate branch. Judge Carpenter and the Court of Common Pleas surely lack that authority.

III. THE FACTS OF IN RE DAUPHIN COUNTY FOURTH INVESTIGATING GRAND JURY ARE CLEARLY DISTINGUISHABLE.

Mr. Carluccio argues that there is no meaningful distinction between In re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011), and the present case. Mr. Carluccio is wrong. There are two clear and highly significant points on which the cases diverge. As a result, In re Dauphin County is readily distinguishable from this matter.

First, the powers granted to the Special Prosecutor in In re Dauphin County were expressly limited. The Special Prosecutor in that case was not deputized with the full power and authority of a prosecutor to conduct an investigating grand jury, subpoenas witnesses, and initiate a prosecution at his discretion. In In re Dauphin County, the Special Prosecutor was granted the authority *only* "to conduct inquiry," and "to retain reasonable investigative, clerical and secretarial services to facilitate the discharge of his duties." Id. at 499. By express order, he was *not* granted the power to call witnesses and compel testimony, or conduct a hearing, without petitioning the court for additional authorization. Id. And, nothing in his grant of authority would permit his involvement in the issuing of a presentment, or to otherwise initiate a criminal prosecution. Id.

The Special Prosecutor in In re Dauphin County was charged only with the task of investigating the possibility of leaks from the pending grand jury and making a report to the court about his findings. In this light, the term "special prosecutor" may have been imprecise.

The role that was assigned in In re Dauphin County could actually be more accurately characterized as that of a special master.[9]

In contrast, in this case Mr. Carluccio was endowed with the full power of the executive branch – he was for all intents and purposes deputized as a Commonwealth Attorney, and allowed to conduct a full grand jury proceeding with all of the ancillary powers that entails. Judge Carpenter expressly granted Mr. Carluccio "full power, independent authority and jurisdiction to investigate and prosecute to the maximum extent authorized by law." Perhaps nothing is more telling on this point than the fact that the Subpoena signed by Judge Carpenter on September 11, 2014, ordering Attorney General Kane to appear and testify before the investigating grand jury, states in closing: "If you have any questions about your appearance, ***contact Deputy Attorney General Thomas Carluccio***[.]" (Exhibit A, Subpoena, dated September 11, 2014.) Judge Carpenter's grant of power could not have been more clear – in a subpoena issued to the elected Attorney General herself, he states that he has, on his own, appointed a private lawyer as a Deputy Attorney General, and endowed him with all of the powers of that office. This could not be further from the facts of In re Dauphin County, and its limited investigatory mandate.[10]

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[9] A special master is defined as "a master appointed to assist the court with a particular matter or case." Black's Law Dictionary, 7th Ed. 2000. The appointment of a special master is directed at aiding the appointing court in fulfilling its *judicial* functions. That is the role that the Special Prosecutor filled in In re Dauphin County. Mr. Carluccio's function was not judicial, but rather prosecutorial.

[10] Mr. Carluccio's Supplemental Brief attempts to downplay the breadth of authority that Judge Carpenter conferred upon him. Indeed, while he attaches Judge Carpenter's May 29, 2014 appointing Order as an exhibit to his Supplemental Brief, he conveniently omits pages 2 and 3 of that Order, where Judge Carpenter described the vast powers that were being conferred upon him. The full Order of Judge Carpenter is attached as Exhibit A to Attorney General Kane's December 18, 2014 Memorandum of Law.

Mr. Carluccio now argues that "[w]hether or not" he had the authority to initiate a prosecution is "irrelevant," because he never did so. (Carluccio Opp. at 25.) There is no "whether or not" in this case: Judge Carpenter's Order appointing Mr. Carluccio expressly stated that he was granted "full power, independent authority and jurisdiction to ... prosecute to the maximum extent authorized by law." By the terms of Judge Carpenter's Order, Mr. Carluccio was granted the power "to exercise independent prosecutorial discretion ... whether, which and when charges should be brought[.]" Of course this is not irrelevant, because Attorney General Kane's *quo warranto* action challenges Mr. Carluccio's appointment to a statewide office, and the terms of that appointment.

Further, Mr. Carluccio, through the investigating grand jury he conducted, ultimately participated in the issuance of a Presentment in this case, which Judge Carpenter then referred to the Montgomery County District Attorney. Mr. Carluccio's power to effectuate the issuance of a Presentment – and have the very judge that appointed him refer that Presentment to a District Attorney – is a power far beyond those granted to the Special Prosecutor in In re Dauphin County.

Mr. Carluccio also argues that he was not granted "the right to subpoena witnesses," rather he "merely acted as a vehicle through which the Grand Jury was able to exercise its own investigative powers." (Carluccio Opp. at 25-26.) This is also inaccurate. Mr. Carluccio was granted the power to compel witness appearance and testimony. Judge Carpenter's Order specifically granted him the power "to exercise independent prosecutorial discretion whether, which and when any potential witnesses should be brought before the Grand Jury." Mr. Carluccio exercised that power when he subpoenaed the appearance of Attorney General Kane, and numerous others. The facts of In re Dauphin County, where the Order appointing a Special

Prosecutor specifically forbade him the power to call witnesses and compel testimony, or conduct a hearing, without petitioning the court for additional authorization, are therefore clearly distinguishable.

Second, it is highly significant that In re Dauphin County involved an inquiry initiated by the Supervising Judge of a currently-sitting grand jury, with regard to alleged leaks from that grand jury proceeding. In contrast, in the present case Judge Carpenter granted Mr. Carluccio the authority to investigate and prosecute an alleged *historical* breach, involving a completely different underlying grand jury proceeding. There is a tremendous conceptual difference distinguishing these two situations. The former situation involves the court protecting the integrity of the proceeding before it. The latter involves classic prosecutorial action, an investigation of prior conduct unrelated to the current proceedings.

This distinction holds true for each of the cases cited by Mr. Carluccio. In In re Dauphin County, Castellani v. The Scranton Times, 956 A.2d 937 (Pa. 2008) and In re County Investigating Grand Jury VIII, 2003, 2005 WL 3985351 (Lackawanna County, October 25, 2005), the authority of the Special Prosecutor was limited to an investigation of leaks emanating from the *pending* grand jury. Appointing a Special Prosecutor to investigate and prosecute an allegation involving a grand jury proceeding that occurred a full five years earlier simply does not fall within the supervisory powers of the court. Mr. Carluccio and Judge Carpenter are attempting to create a carve-out in the law where none exists: historical crimes must be investigated and prosecuted by a Commonwealth Attorney, *except* for contempt stemming from an alleged breach of grand jury secrecy, which can be investigated and prosecuted by the judiciary and its appointees at any time. This is not the law.

IV. ATTORNEY GENERAL KANE DID NOT WAIVE HER RIGHT TO BRING THIS *QUO WARRANTO* ACTION

Finally, Mr. Carluccio argues that Attorney General Kane waived her right to bring this *quo warranto* action because she did not challenge his appointment – in his opinion – at a sufficiently early date. (Carluccio Opp. at 55.) Mr. Carluccio cites no case law in support of this argument. It is meritless.

A *quo warranto* challenge applies to the appointment of a Special Prosecutor who unlawfully holds statewide office. See Gwinn v. Kane, 339 A.2d 838, 840-41 (Pa. Cmnwlth 1975). "[W]here 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, 22 A. 820 (1891); Snyder v. Boyd, 26 Dauph. 375 (1923)). As long as that individual remains in office, there is 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.

Here, Mr. Carluccio held the position of Special Prosecutor at the time Attorney General Kane brought her *quo warranto* motion to quash his appointment. We now move, in addition, to vacate the Presentment that Mr. Carluccio's involvement in the grand jury generated. This *quo warranto* action was never waived. Mr. Carluccio's unlawful assumption of executive power was an ongoing wrong. Attorney General Kane's *quo warranto* action was appropriate and timely to challenge the legality of Mr. Carluccio's public office of Special Prosecutor as unlawful and unconstitutional.

On a more fundamental level, like subject matter jurisdiction—which refers to a tribunal's authority to act in a certain case – this *quo warranto* action ***cannot*** be waived because it goes directly to whether Mr. Carluccio had any legal mandate to conduct any investigation. To

the extent that Judge Carpenter did not have the authority to appoint a special prosecutor (he did not) then Mr. Carluccio was vested with no actual prosecutorial authority. His actions, therefore, were and remain a legal nullity. The Attorney General did not, and could not, confer legal authority upon Mr. Carluccio by implication or acquiescence. Mr. Carluccio's appointment was utterly without legal effect – as are all the results of his unlawful appointment.

CONCLUSION

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

Dated: February 23, 2015

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CONCLUSION

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

Dated: February 23, 2015

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Exhibit A

Commonwealth of Pennsylvania

STATEWIDE INVESTIGATING GRAND JURY

SUBPOENA

TO: ATTORNEY GENERAL
KATHLEEN KANE

:SUPREME COURT OF PENNSYLVANIA
:NO. 176 M.D. MISC. DKT. 2012
:MONTGOMERY COUNTY COMMON PLEAS
:M.D. 2644-2012

1. YOU are ORDERED to appear as a witness before the PENNSYLVANIA STATEWIDE INVESTIGATING GRAND JURY, 1000 Madison Avenue (corner of Trooper and Van Buren Roads), Third Floor, Norristown, Pennsylvania, on Thursday, September 18, 2014, at 8:00 O'clock A.M. to testify and give evidence regarding alleged violations of the laws of the Commonwealth of Pennsylvania and to remain until excused.

2. YOU are further ORDERED:

FAILURE to attend may cause a warrant to be issued for your arrest and will make you liable under penalty of law for contempt of Court.

DATED: September 11, 2014

William R. Carpenter

Hon. William R. Carpenter
Supervising Judge

If you have any questions about your appearance, contact Deputy Attorney General Thomas Carluccio, at 484.674.2899.

Notice: 123 Subpoena: 1388

Exhibit B

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

IN RE:	:	SUPREME COURT OF PENNSYLVANIA
	:	6 M.D. MISC. DKT. 2008
	:	
	:	DAUPHIN COUNTY
THE TWENTY-EIGHTH STATEWIDE	:	NO. 10 M.D. 2008
	:	
INVESTIGATING GRAND JURY	:	NOTICE NO. 4

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:	:	SUPREME COURT OF PENNSYLVANIA
	:	95 W.D. MISC. DKT. 2006
	:	
	:	ALLEGHENY COUNTY
THE TWENTY-SIXTH STATEWIDE	:	NO. CP-02-MD-34066-2006
	:	
INVESTIGATING GRAND JURY	:	NOTICE NO. 25

ORDER

AND NOW, this 19th day of April, 2012, it is hereby ORDERED that the Sealing Order entered by this Court at the above-listed docket numbers on November 4, 2009, concerning an Opinion and Order of this Court issued that same day, shall be and hereby is VACATED.

By the Court:

Barry H. Feudale,
Supervising Judge of the Grand Jury

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

IN RE:	: SUPREME COURT OF PENNSYLVANIA : 6 M.D. MISC. DKT. 2008
	: DAUPHIN COUNTY
THE TWENTY-EIGHTH STATEWIDE	: NO. 10 M.D. 2008
INVESTIGATING GRAND JURY	: NOTICE NO. 4

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:	: SUPREME COURT OF PENNSYLVANIA : 95 W.D. MISC. DKT. 2006
	: ALLEGHENY COUNTY
THE TWENTY-SIXTH STATEWIDE	: NO. CP-02-MD-34066-2006
INVESTIGATING GRAND JURY	: NOTICE NO. 25

ORDER

AND NOW, this 4th day of November, 2009, upon consideration of the Motions filed by Defendants in the above-captioned matters, for the reasons set forth in the attached Opinion, IT IS HEREBY ORDERED:

1. The Motion to Compel Discovery of the computer hard drives is GRANTED IN PART and DENIED IN PART. The hard drives in the possession of third parties and the hard drives held by OAG for safekeeping are not discoverable on the basis of Defendants' Motions. The hard drives in OAG's possession from which the Commonwealth has already disclosed some information shall be disclosed in their entirety within ten (10) days of this Order;
2. The Motion to Compel Discovery of the proffer statements is REMANDED with guidance to the Trial Judge for final disposition; and

3. The Motion to Compel the early release of non-exculpatory grand jury testimony is GRANTED IN PART and REMANDED to the Trial Judge for a determination for a date of early release to occur not less than ten (10) days prior to commencement of trial.

BY THE COURT:

Barry F. Feudale

BARRY F. FEUDALE
Supervising Judge

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

IN RE:	: SUPREME COURT OF PENNSYLVANIA : 6 M.D. MISC. DKT. 2008
	:
	: DAUPHIN COUNTY
THE TWENTY-EIGHTH STATEWIDE	: NO. 10 M.D. 2008
	:
INVESTIGATING GRAND JURY	: NOTICE NO. 4

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:	: SUPREME COURT OF PENNSYLVANIA : 95 W.D. MISC. DKT. 2006
	:
	: ALLEGHENY COUNTY
THE TWENTY-SIXTH STATEWIDE	: NO. CP-02-MD-34066-2006
	:
INVESTIGATING GRAND JURY	: NOTICE NO. 25

OPINION

Before this Court are Joint Motions by Counsel for five criminal cases joined for trial in the Dauphin County Court of Common Pleas. The Joint Motions are for the discovery of witness statements pursuant to Pa.R.Crim.P. 573(B)(2) and the early release of grand jury testimony pursuant to Pa.R.Crim.P. 230. The five cases include Michael Veon, No. CP-22-CR-4656-2008, Annmarie Perretta-Rosepink, No. CP-22-CR-4663-2008, Brett Cott, No. CP-22-CR-4665-2008, Stephen Keefer, No. CP-22-CR-4653-2008 and Earl J. Mosely, No. CP-22-CR-4654-2008.

Also before this Court is a Motion to Compel Discovery filed by Counsel for Defendant Sean Ramaley, No. 4664 CR 2008, a sixth Defendant whose trial was severed from the trial of his five co-Defendants. Defendant Ramaley's Motion to Compel Discovery seeks the discovery of witness statements pursuant to Pa.R.Crim.P. 573(B)(2), seeks to compel the early production of grand jury testimony pursuant to Pa.R.Crim.P. 230 and requests production of certain

computer hard drives and/or back-up tapes that relate to the documents previously disclosed by the Commonwealth.

I. Procedural History

Beginning in January 2007, the Twenty-Eighth Statewide Investigating Grand Jury conducted an investigation that resulted in the issue of Presentment No. 1 on June 27, 2008. Presentment No. 1 set forth allegations against certain individuals, including Defendants Michael Veon, Annmarie Perretta-Rosepink, Brett Cott, Stephen Keefer, Earl J. Mosely and Sean Ramaley. Similarly, the Twenty-Sixth Statewide Investigating Grand Jury conducted an investigation that began in June 2007. The Twenty-Sixth Statewide Investigating Grand Jury issued Presentment No. 28 on June 20, 2008, which set forth allegations against various individuals, including Defendant Sean Ramaley.

As a result of the presentments by the grand juries, on July 10, 2008 the Office of Pennsylvania Attorney General ("OAG") charged Defendants Michael Veon, Annmarie Perretta-Rosepink, Brett Cott, Steven Keefer, Earl J. Mosely and Sean Ramaley in the Dauphin County Court of Common Pleas ("Trial Court") with conflict of interest, theft by unlawful taking or disposition, theft of services, theft by deception, theft by failure to make required disposition of funds received, and criminal conspiracy. The Defendants filed several omnibus pretrial motions in the Trial Court seeking, *inter alia*, the discovery of the following items: (1) forensic copies of computer hard drives obtained during the grand jury's investigation; (2) witness statements pursuant to Pa.R.Crim.P. 573; and (3) the early release of grand jury testimony pursuant to Pa.R.Crim.P. 230.

On July 7, 2009, a hearing was conducted before the Honorable Richard A. Lewis on the pretrial motions, as well as motions filed by the House Democratic Caucus and House

Republican Caucus. On July 14, 2009, the Defendants filed a joint motion and brief with the Grand Jury Supervising Judge, the Honorable Barry F. Feudale, seeking: (1) discovery of witness statements pursuant to Pa.R.Crim.P. 573(B)(2); and (2) early release of grand jury testimony pursuant to Pa.R.Crim.230. On July 22, 2009, the Trial Court ruled, *inter alia*, that: (1) the motion for the production of the computer hard drives was within the scope of the defendants' July 14, 2009 motion filed with the supervising judge; (2) final resolution of the motion for witness statements was to be held in abeyance pending review by the supervising judge; and (3) final resolution of the motion for early release of grand jury testimony was to be held in abeyance pending review by the supervising judge.

Additional motions and briefs were filed before the Grand Jury Supervising Judge following Judge Lewis' July 22, 2009 Order. A hearing was held before the Grand Jury Supervising Judge on August 21, 2009, where the Court heard oral argument from the parties and requested briefs on the issues.

II. Factual Background

After hearing oral argument from the parties and reviewing the briefs submitted, this Court has identified the following foundational information:

a. Computer Hard drives

The data contained on computer hard drives sought by Defendants falls into three categories. The first category includes computer hard drives that are in the possession of third parties (e.g. LDiscovery) for safekeeping and are not in the possession of the OAG. The second category includes the computer hard drives that are in the physical possession of the OAG for safekeeping purposes only. The OAG does not have access to this category of data. The Democratic Caucus has made claims of legislative privilege as to these first two categories of

hard drives. The final category consists of the computer hard drives that are in the physical possession of the OAG. The OAG has open access to this category of data, some of which has already been turned over to Defendants in discovery.

b. Witness Statements

During the course of the grand jury investigations, transcripts were generated of witness testimony before the grand jury. Additionally, some witnesses made off-the-record proffers, or witness statements. Witnesses in this matter include eyewitnesses, former co-defendants, co-conspirators, accomplices (charged and uncharged), and witnesses in other capacities who have provided statements to agents of the Office of Attorney General or other law enforcement agencies. As part of discovery, OAG has provided Defendants the on-record statements of witnesses that the Commonwealth intends to call at trial, but has withheld the notes of proffers given by those witnesses who spoke off-the-record. Defendants seek discovery of those proffers, which have been interchangeably referred to as "witness statements," "proffer interviews" or "proffer statements" by Counsel. *See, e.g.*, Tr. 21:9, Aug. 21, 2009; Tr. 36:24, Aug. 21, 2009.

c. Grand Jury Testimony

As required by the Pennsylvania Rules of Criminal Procedure, OAG has disclosed exculpatory grand jury testimony and evidence, as well as transcripts of grand jury testimony that has been given by those defendants who have appeared before the grand jury. However, OAG has not turned over non-exculpatory grand jury testimony of the witnesses it intends to call at trial. Due to the large amount of information that would not otherwise be turned over until after the witnesses have testified at trial, Defendants seek early release of this non-exculpatory information.

III. Jurisdiction

In his January 16, 2008 Empanelment Order, Chief Justice Ronald D. Castille designated Judge Barry F. Feudale the Supervising Judge of the Twenty-Eighth Statewide Investigating Grand Jury. The Order states that "[a]ll applications and motions relating to the work of the Twenty-Eighth 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 Twenty-Eighth Statewide Investigating Grand Jury. Senior Judge Feudale, as Supervising Judge, shall have jurisdiction over all counties throughout the Commonwealth of Pennsylvania." *See* Chief Justice Castille Order, January 16, 2008; *See also* Pa.R.Crim.P. 229 and Comment ("Reference to the court in this rule and in Rule 230 is intended to be the supervising judge of the grand jury.") The Investigative Grand Jury Act, 42 Pa. C.S. § 4541, *et seq.*, and the procedural rules which follow place the responsibility upon the Supervising Judge to maintain the secrecy of the Grand Jury, specifically defining the Supervising Judge as "[t]he common pleas judge designated by the president judge to supervise the activities of the county investigating grand jury, or the common pleas judge designated by the Supreme Court to supervise the activities of the multi-county investigating grand jury." 42 Pa. C.S. § 4542. Furthermore, it is well established that "[t]he supervising judge of the grand jury is responsible for upholding the rule of secrecy and deciding issues related to the disclosure of grand jury information." *Pennsylvania Grand Jury Practice* at 65. The Supervising Judge is therefore charged to act as a guardian of secrecy over all "matters occurring before the grand jury." 42 Pa.C.S. § 4549(b).

During Argument held on August 21, 2009, Defendants raised the issue of whether jurisdiction properly lies with this Court to decide the aforementioned issue of the discoverability

of the proffer statements in this case. It is undisputed that this Court has initial jurisdiction over the issues related to the discoverability of the computer hard drives and early disclosure of non-exculpatory grand jury testimony.

The Court recognizes that the sole disputed jurisdictional issue involves the Defendants' discovery request of witness statements, or "proffer interviews," pursuant to Pennsylvania Rule of Criminal Procedure 573. Defendants argue that "proffer interviews" lie outside the scope of grand jury secrecy and therefore the issue concerning their disclosure should be remanded to the Trial Court for disposition. Defendants aver that the "proffer interviews" are witness statements that are not governed by the Investigating Grand Jury Act or Pennsylvania Rules of Criminal Procedure 229 and 230 because these rules specifically reference transcripts and evidence obtained as a result of proceedings "in the presence of" or "before the investigating grand jury." The Investigating Grand Jury Act provides as follows:

> Documents and *transcript* – Any document produced before an investigating grand jury may be copied or reproduced. Each statement, question, comment or response of the supervising judge, the attorney for the Commonwealth, any witness, any grand juror or any other person, which is made *in the presence of the grand jury*, except its deliberations and the vote of any juror, shall be stenographically recorded or transcribed or both.

See 42 Pa. C.S. § 4549(a)(emphasis added). Additionally, Pennsylvania Rules of Criminal Procedure 229 and 230 provide the following:

> Rule 229. Control of the Investigating Grand Jury Transcript/Evidence.
>
> Except as otherwise set forth in these rules, the court shall control the original and all copies of the *transcript* and shall maintain their secrecy. When physical evidence is presented before the investigating grand jury, the court shall establish procedures for supervising custody.
>
> Rule 230. Disclosure of Testimony Before Investigating Grand Jury.
>
> (A) Attorney for the Commonwealth: Upon receipt of the *certified transcript of the proceedings before the investigating grand jury*, the court shall furnish a copy

of the *transcript* to the attorney for the Commonwealth for use in the performance of official duties.

(B) Defendant in a Criminal Case:

(1) When a defendant in a criminal case *has testified before an investigating grand jury* concerning the subject matter of the charges against him, upon application of such defendant the court shall order that the defendant be furnished with *a copy of the transcript of such testimony*.

(2) When a witness in a criminal case has previously *testified before an investigating grand jury* concerning the subject matter of the charges against the defendant, upon application of such defendant the court shall order that the defendant be furnished with *a copy of the transcript of such testimony*; however, such testimony may be made available only after the direct testimony of that witness at trial.

(3) Upon appropriate motion of a defendant in a criminal case, the court shall order that the *transcript of any testimony* before an investigating grand jury that is exculpatory to the defendant, or any physical evidence presented to the grand jury that is exculpatory to the defendant, be made available to such defendant.

(C) Other Disclosures: Upon appropriate motion, and after a hearing on relevancy, the court may order that a *transcript of testimony before an investigating grand jury*, or physical evidence before the investigating grand jury, may be released to another investigative agency, under such conditions as the court may impose.

See Pa.R.Crim.P. 229, 230 (emphasis added). A plain language reading of the Investigating Grand Jury Act and Pennsylvania Rules of Criminal Procedure 229 and 230 reveal a clear recurring reference to transcripts and evidence presented "before an investigating grand jury," suggesting that the statute and the rules are constrained to those proceedings that occur in fact before an investigating grand jury.

Further, because of the lack of Pennsylvania case law on this topic, Defendants rely upon a Texas case, *U.S. v. International Paper Co.*, 457 F.Supp. 571 (S.D. Tex. 1978), in which an investigation of an alleged price fixing scheme led to numerous individuals being examined pursuant to a grand jury subpoena, either in front of the grand jury, by interview or both. *See id.*

at 573. Those witnesses that were interviewed were allowed to have their attorneys present, were in some cases granted immunity and were assured by government attorneys that their testimony would remain secret as if given before the grand jury. *See id.* Several witnesses testified before the grand jury and later were also interviewed. *See id.* Some interviewed witnesses were sworn in and their testimonies were transcribed by a court reporter; however, the majority of interviews were tape-recorded and the interview transcript was later to be given to the grand jury. *See id.* The court addressed the issue of whether these interviews conducted outside the presence of the grand jury were to be grand jury proceedings and granted the veil of grand jury secrecy. *See id.* at 574. The court stated that:

> The reasons for excluding unauthorized persons from the grand jury protection of witnesses and grand jurors from intimidation, coercion, or retribution; preventing the flight of the guilty; and preserving the reputation of the innocent do not apply to interviews such as these. No grand juror was present to be intimidated or coerced; the witnesses enjoyed as much secrecy as they would had they been before the grand jury; and the unauthorized persons present were those to whom the proceedings could and would naturally be disclosed, the witnesses' attorneys and government investigators. The defendants contend that the "trappings" of the grand jury subpoenas, immunity, secrecy and sworn testimony render the interviews the equivalent of actual grand jury proceedings. The court finds this reasoning unpersuasive. No witness was compelled to testify at an interview by subpoena, though apparently many were given a choice. Witnesses could schedule interviews at more convenient times and places and could have their attorneys present to advise them.
>
> The other similarities between the interviews and grand jury proceedings seem adequately explained as well. Informal letter grants of immunity were necessary to get information in the interviews. They were not pursuant to court order. Since the transcripts or tapes were presented to the grand jury, they fell at least within the penumbra of the secrecy covering its proceedings. The requirement that interview witnesses swear to the truth of their statements is a common one in all investigative work. The court finds that neither singly nor together do these similarities render the interviews proceedings before the grand jury.

Id. at 574-75. Furthermore, the court stated, "this court's independent research has discovered [no case] holding an interview at which no grand juror was present to be a grand jury

proceeding." *Id.* at 574. Thus, the court in *International Paper Co.* found that a critical factor in evaluating whether a grand jury proceeding took place was if the witness was interviewed in the actual presence of the grand jurors.

More recently, in *Adrion v. Knight*, 2009 U.S. Dist. LEXIS 91968 (September 28, 2009), the U.S. District Court for the District of Massachusetts followed *International Paper Co.'s* analysis, recognizing that "[a]ssuming that the interviews are conducted for a proper purpose, courts have recognized that witness interviews conducted by the prosecution instead of bringing the witness before the grand jury are not tantamount to 'actual grand jury proceedings,' even if such interviews have the 'trappings' of the grand jury." *Id.* at *12.

In contrast, the Commonwealth argues that the Investigating Grand Jury Act empowers the Supervising Judge to guard the secrecy of all "matters occurring before the grand jury." 42 Pa.C.S. § 4549. Commonwealth relies on a federal case from Michigan, *Matter of Grand Jury Investigation (90-3-2)*, 748 F.Supp. 1188 (E.D. Mich. 1990), to argue that federal law has extended the phrase "matters occurring before the grand jury" to include witness interviews. In *Matter of Grand Jury Investigation*, the Court addressed allegations of governmental misconduct and unauthorized disclosure to the news media of information and materials integral to a federal grand jury investigation in violation of Federal Rule of Criminal Procedure 6(e)(2). *See id.* at 1192. In its discussion, the Court identified examples of "matters occurring before the grand jury," listing

> (1) transcripts of the testimony of witnesses and statements made before the grand jury; (2) internal governmental memoranda that reflect what transpired before the grand jury; (3) *witness interviews* and auditor's analysis that have been prepared for grand jury use; and (4) information which reveals the identities of witnesses or jurors, the substance of the testimony or evidence, and the deliberations or questions of the grand jury.

Id. at 1207 (citations omitted)(emphasis added); *but see In Re: Grand Jury Matter Garden Court Nursing Home, Inc.*, 697 F.2d 511 (3rd Cir. 1982)(finding that witness interviews do not "exist independently of the grand jury process.").

This Court finds Defendants' Yeon *et al* argument and cited case law to be more persuasive than Commonwealth's argument and case law. The authority cited by both sides is not mandatory upon this Court; however, the cases cited by Defendants mesh with the plain language reading of the Investigating Grand Jury Act and Pennsylvania Rules of Criminal Procedure 229 and 230. In the instant case, attorneys from OAG and investigative agents interviewed witnesses outside the presence of the grand jury; many of these "proffer interviews" took place in private law offices, at the Attorney General's Office and even in parking lots. *See Brief of Defendants* at 8. These interviews were not compelled nor were the individuals placed under oath. *See id.* Further, the interviews were prompted by the issuance of a grand jury subpoena and the interviewed witnesses were allowed to have counsel present. *See Brief of Commonwealth* at 6. Comparing these "proffer interviews" to those interviews taken in *International Paper Co.*, this Court recognizes that the facts are aligned to suggest that the "proffer interviews" at issue in the instant case are not "proceedings before a grand jury." Thus, these witness statements fall outside the realm of the Investigating Grand Jury Act and the Pennsylvania Rules of Criminal Procedure 229 and 230.

Defendants Veon *et al* put forth the argument that "proffer interviews" are in reality "witness statements" that fall under the Pennsylvania Rule of Criminal Procedure 573(B)(2). Rule 573(B)(2) provides, in part, the following:

> (2) Discretionary With the Court.
> (a) In all court cases, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the

> defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:
>
> ...
>
> (ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;
>
> (iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not.
>
> ...

See Pa.R.Crim.P. 573(B)(2). Because we have determined that discovery of the proffer interviews is not covered by the penumbra of secrecy of grand jury proceedings, it is properly analyzed under Pennsylvania Rule of Criminal Procedure 573(B)(2), and the decision regarding this issue falls within the ambit of the Trial Court. The Trial Judge could be petitioned to safeguard the secrecy concerns of the OAG or at least narrow the scope of discovery based on the Trial Judge's trial perspective. Alternatively, the Trial Judge might remand a more narrow and focused issue to the Supervising Grand Jury Judge. We emphasize again that it is undisputed that this Court has jurisdiction over the issues of the computer hard drives and the early release of non-exculpatory grand jury testimony.[1]

IV. Defendant's Discovery Request for Computer Hard Drives

As stated above, the Defendants and the Commonwealth are in agreement that there are three categories of hard drives: a) hard drives that are in the possession of a third party for

[1] Having determined above that the issue of the discoverability of the proffer statements is not a question that falls under the Supervising Grand Jury Judge's jurisdiction and that the issue is best left to the Trial Court, this Court nevertheless maintains jurisdiction over the remaining issues. Accordingly, this Court relies on the law of the case and coordinate jurisdiction doctrines. "The law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Pursuant to the coordinate jurisdiction doctrine, judges of equal jurisdiction sitting in the same case should not overrule each others' decisions." *Ario v. Reliance Ins. Co.*, --- A.2d ---, 2009 WL 3165391 (Pa. 2009), *citing Commw. v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995).

safekeeping; b) hard drives that are in the possession of OAG for safekeeping and from which no information has been turned over; and c) hard drives in the possession of OAG from which the Commonwealth has turned over some, but not all, emails and other files to Defendants in discovery. As to the first two categories, the Democratic Caucus claims legislative privilege, and the Commonwealth asserts that it cannot turn over those hard drives in discovery because those hard drives are not actually within the Commonwealth's possession or control. As to the third category, there is dispute over whether OAG should turn over the remainder of the data from the hard drives.

Commonwealth argues that under *Commw. v. Dent*, 837 A.2d 571 (Pa. Super. 2003), it cannot be forced to turn over discovery materials not in its possession. In *Dent*, the defendant/appellant suggested that the trial court erred when it permitted testimony regarding security camera footage where the footage itself was unavailable to either party because the security system automatically deleted and overwrote the footage. *See id.* at 584. The Superior Court agreed with the Commonwealth that in a situation where evidence is "equally accessible or inaccessible to both the Commonwealth and the defense, the defense cannot use the discovery rules against the Commonwealth for its failure to produce the evidence." *Id.* at 585. In so holding, the Superior Court relied on its prior decision in *Commw. v. McElroy*, 665 A.2d 813 (Pa. Super. 1995), *appeal denied*, 674 A.2d 1073 (1996), explaining in a parenthetical citation that the *McElroy* court "declin[ed] to hold prosecution responsible for tape recordings that were not in possession of prosecution, and suggest[ed] proper procedure for defendant was service of subpoena *duces tecum* upon proper custodian of record." *Dent*, 837 A.2d at 585.

In the present case, this Court agrees with the Commonwealth that *Dent* is controlling. Because the first two categories of hard drives are not in the Commonwealth's possession, either

because they are in the possession of a third party or because the Democratic Caucus has asserted legislative privilege to block Commonwealth's access to the second category of drives, this Court sees no reason not to follow the Superior Court's decisions in *McElroy* and *Dent*. It is clear that the Commonwealth cannot be required to produce in discovery items that it does not actually have in its possession. Therefore, to the extent that Defendants in the present case request that the hard drives falling under the first two categories be turned over, Defendants' motion must be denied.

Having determined the first two categories of hard drives to be inaccessible to the Commonwealth, and therefore not required to be turned over to Defendants in discovery, we now address the third category: the hard drives in OAG's possession. Commonwealth has already disclosed some emails and documents from these hard drives but Defendants seek full discovery of the hard drives' contents.

Defendant Veon argues that the case of *Law Offices of Harris v. Phila. Waterfront Partners*, 957 A.2d 1223 (Pa. Super. 2008) requires that the Commonwealth turn over the hard drives because "... there is no meaningful distinction between producing 'all emails and other documents' from a computer and producing the computer itself." *Id.* at 1226, *fn.* 1. It is important to note that in *Phila. Waterfront Partners*, the discovery of the emails and documents on the hard drives in question was consented to by counsel. In fact, the Superior Court's opinion reproduces a portion of the transcript of a hearing on a motion to compel where counsel volunteered to produce the computers themselves. *Phila. Waterfront Partners*, 957 A.2d at 1227.

In the instant case, Commonwealth has not consented to turn over the computer hard drives or even "all documents and emails" contained thereon. Thus, Defendant Veon's argument

is not relevant to the fact that Commonwealth contests the discoverability of the remaining undisclosed data. What is at issue is whether the Commonwealth should turn over the remaining contents of the hard drives, an issue that *Phila. Waterfront Partners* does not address. *Phila. Waterfront Partners* provides no guidance to this Court in the instant case as to whether Commonwealth should be compelled to turn over the rest of the contents of the hard drives.

Defendant Ramaley cites a case from Washington state that, if controlling on this Court, would have us determine that because "[a] computer hard drive is a tangible object," it should simply be turned over in discovery, presumably just as any piece of physical evidence might be similarly discoverable. *State v. Dingman*, 202 P.3d 388, 394 (Wash. Ct. App. 2009). But under Washington law, the state is specifically required to turn over items that were obtained from a defendant. Because the computer hard drives in *Dingman* were from the defendant's own computers, "CrR 4.7(a)(1)(v), therefore, requires that defense counsel be able to examine the drives absent an established State need for restrictions." *Id.* at 394, *citing State v. Boyd*, 158 P.3d 54 (Wash. 2007). Under Washington law, the burden is on the prosecution to establish the need for restrictions on discovery of materials, particularly if the items "were obtained from or belonged to the defendant." Wash. CrR 4.7(a)(1)(v).

The Pennsylvania Rule that is analogous to the Washington Rule is Pennsylvania Rule of Criminal Procedure 573(B)(1)(f), which requires the Commonwealth to disclose, subject to the provisions of (B)(1), "any tangible objects, including documents, photographs, fingerprints, or other tangible evidence..." Pa.R.Crim.P. 573(B)(1)(f). In Pennsylvania, Rule 573(B)(1)(f) does not specify that tangible objects subject to mandatory disclosure be obtained from or belong to the Defendant. Further, under subsection (B)(1), the Commonwealth may obtain a protective

order and the items or information must be material to the instant case. *See* Pa.R.Crim.P. 573(B)(1).

Yet the Commonwealth's argument points to a different subsection of Pennsylvania Rule of Criminal Procedure 573, and urges that the defendant has the burden to specifically identify evidence and "establish that its disclosure would be in the interests of justice." Pa.R.Crim.P. 573(B)(2)(a)(iv). Commonwealth argues that because Defendants have not shown that the disclosure of the entire contents of the hard drives would be in the interests of justice and material to the instant case, Commonwealth need not turn over the full contents of the hard drives. Notwithstanding Defendants' argument that the hard drives are material to the instant case without showing any evidence that they are indeed material, nonetheless we find Commonwealth's reliance on Rule 573(B)(2) to be misplaced.

The Commonwealth uses an analogy to illustrate that Defendants' request for the hard drives is not reasonable, nor would it be in the interests of justice. Commonwealth takes the position that "the Defendants are arguing that before the government may introduce into evidence a letter found in an office, the government must first produce the entire office in discovery," and assert that Defendants have shown no authority to support that position. *Brief of Commonwealth* at 8. Commonwealth likens a computer hard drive to an office in that a hard drive contains, in a digital form, many of the same documents, letters, financial information, photographs, etc. that one might find in physical form in an office. Taking Commonwealth's analogy to its logical end, a hard drive's partition table, operating system files, hardware drivers, and executable programs also found on that hard drive are the digital infrastructure that is analogous to a physical office building's walls, roof, wiring, and plumbing. Under this analogy, where the contents of a hard drive are a digital representation of a physical office, it would be

absurd to require Commonwealth to produce an office building and all its contents in discovery before Commonwealth is permitted to introduce a single document into evidence. To photocopy *all* the papers found in the office alone would be a Herculean task, let alone sourcing and assembling the appropriate materials to duplicate the physical structure of the building itself. Thus, at first blush, it is logical under the Commonwealth's analogy that if the Commonwealth has disclosed a letter in discovery that will be later put into evidence, Commonwealth does not need to reconstruct the office where the letter was found.

But a computer hard drive is not an office. A computer hard drive is a physical object that is made up of various pieces of metal, circuitry, plastic, electromagnets, and platters upon which data is magnetically stored. In the context of the instant case, the subject at issue is the data that is recorded on the hard drives in the Commonwealth's possession. To produce that data in discovery does not require the pouring of a foundation, running wires and plumbing, installing a roof, and photocopying thousands or millions of documents; it merely requires the production of a clone or mirror image of the data contained on the drive. Clones or mirrors of the hard drives at issue could easily be turned over to the Defendants in this case; an act that would be very similar to making color photocopies of crime scene photographs. Therefore, this Court does not find Commonwealth's argument by way of analogy to be persuasive.

There is Pennsylvania case law (no mention of which is found in the parties' briefs) that does discuss the method by which data on computer hard drives has been viewed by Pennsylvania's highest court. In the Supreme Court decision *In re: The Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, (Pa. 2006), the High Court recognized an analogy comparing the contents of computer hard drives to the contents of "entire media file cabinets." *Id.* at 513. In that case, the subject hard drives belonged to a newspaper that had been

served a grand jury subpoena. *See id.* The newspaper argued that disclosure of the total contents of the hard drives was analogous to disclosure of the entire contents of media file cabinets, which in turn would have a chilling effect on the media's First Amendment rights and the ability to "utilize confidential sources and to gather news information." *Id.* The Pennsylvania Supreme Court recognized that

> [a] similar analogy was embraced by a federal district court in *In re Grand Jury Subpoena Duces Tecum*, 846 F.Supp. 11 (S.D.N.Y 1993), albeit outside the context of a subpoena to a member of the print media ... Applying the file-cabinet analogy, the court found the subpoena to be overbroad, as it could have been narrowed to require only the production of information that was actually pertinent to the investigation. To the extent that there was reason to believe that such information was being withheld, the court noted that a neutral expert could be appointed by the court to examine the hard drives and floppy disks. *See id.* at 13.

Id. The court went on to state that the case before it was distinguishable from the federal district court "in several material respects," the most important being the heightened First Amendment concerns regarding the news media. *Id.* at 514. The Supreme Court was critical of the fact that the hard drives remained in the hands of the Attorney General's forensic unit, despite the supervising judge's focused attempt to address the First Amendment and privilege concerns by authorizing specific and narrow computer forensic analysis and requiring the results to be turned over to the supervising judge to assure the implicated rights were not infringed before release to the prosecution. *See id.*[2] Ultimately, the Supreme Court concluded that "any direct and compelled transfer to the executive branch of general-use media computer hardware should be pursuant to a due and proper warrant, issued upon probable cause," but in a footnote permitted the supervising judge to use "a neutral court-appointed expert to accomplish the forensic analysis

[2] The Honorable Barry F. Feudale was the supervising judge referred to by the Pennsylvania Supreme Court in *In re: The Twenty-Fourth Statewide Investigating Grand Jury*.

and report specific, relevant results, as suggested in the *In re Grand Jury Subpoena Duces Tecum* decision." *Id.*

The instant case is factually distinguishable from *In re: The Twenty-Fourth Statewide Investigating Grand Jury* decided by the Pennsylvania Supreme Court. The instant case does not implicate First Amendment freedom of the press. The hard drives in the instant case are not requested by a subpoena directed to a third party, but requested in discovery from the Commonwealth under the Pennsylvania Rules of Criminal Procedure. Finally, in the instant case, the hard drives are already in the hands of the OAG. However, it is still helpful to follow the analogy that the contents of the hard drives are like the contents of file cabinets.

In *In re: The Twenty-Fourth Statewide Investigating Grand Jury*, it was improper for the supervising judge to permit the prosecution from seizing all the "file cabinets" when a neutral third-party expert could in effect isolate the relevant "documents" contained within the drawers. But in this case, the prosecution has already obtained and currently possesses entire "file cabinets" of documents and emails. The Commonwealth has had the opportunity to scrutinize the entire contents of the "file cabinets" and has turned over certain files from the hard drives. Yet the Commonwealth still retains "drawers and cabinets" full of undisclosed contents that have not been turned over to the Defendants in discovery.

Under the facts of this case therefore, where the Commonwealth has in its possession entire "file cabinets" of information obtained in the course of the investigation, and the "file cabinets" exist in the form of tangible objects known as computer hard drives that can be easily cloned or mirrored and provided to Defendants in discovery so that Defendants may defend themselves utilizing the same information that is openly available to the Commonwealth for purposes of prosecution, this Court sees no reason why the contents of the computer hard drives

in possession of the OAG should not be discoverable under Pennsylvania Rule of Criminal Procedure 573.

V. Defendant's Discovery Request for Proffer Interviews

As discussed above, this Court recognizes that final disposition on the issue of the discoverability of proffer statements rests with the Trial Court because these proffer statements were made outside the penumbra of secrecy veiling matters before the grand jury. However, because the Trial Court has held its final disposition of this issue in abeyance pending review by this Court, we offer the following by way of guidance to the learned Trial Judge.

In the Motion before this Court, the Defendants request the full disclosure of all witness statements, or proffer interviews, within the scope of Pennsylvania Rule of Criminal Procedure 573(B)(2). Rule 573(B)(2), provided in part above, states that "the court *may* order the Commonwealth to allow defendant's attorney to inspect and copy... all written or recorded statements, and substantially verbatim oral statements" made by eyewitnesses, co-defendants, co-conspirators or accomplices, whether such individuals have been charged or not. *See* Pa.R.Crim.P. 573(B)(2)(emphasis added). Defendants argue that the proffer interview notes or witness statements fall within the ambit of Rule 573(B)(2) and the witnesses in this matter include eye-witnesses, former co-defendants, co-conspirators, accomplices (charged and uncharged), and witnesses in other capacities who provided statements to attorneys and agents for the OAG or other law enforcement agencies. Defendants take the position that without disclosure of such statements, they will not be able to adequately prepare for trial. In *Commw. v. Shelton*, 640 A.2d 892 (Pa. 1994), the Pennsylvania Supreme Court recognized that "[i]t is well established in this Commonwealth that the purpose of the discovery rules is to permit the parties in a criminal matter to be prepared for trial. Trial by ambush is contrary to the spirit and letter of

those rules and cannot be condoned." *Id.* at 895; *Commw. v. Moose*, 602 A.2d 1265, 1274 (Pa. 1992); *Commw. v. Hanford*, 937 A.2d 1194, 1100 (Pa.Super. 2007).

Further, in a series of cases, the Pennsylvania Supreme Court has addressed whether summaries or notes resulting from witness interviews conducted by the prosecution should be discoverable when the interview notes are extensive and constitute a substantially verbatim statement of the interview. *See Commw. v. Alston*, 864 A.2d 539, 546-47 (Pa.Super. 2004). In *Commw. v. French*, 611 A.2d 175 (1992), the Court dictated that "[r]elevant, pre-trial statements of witnesses in the possession of the Commonwealth must be made available to the accused, upon request, during trial." *Id.* at 179-80; *see also Commw. v. Morris*, 281 A.2d 851 (Pa. 1971). In addition, the Court stated in *Commw. v. Grayson*, 353 A.2d 428 (Pa. 1976) that the prosecution is not the proper party to determine whether such witness statements would be helpful to the defense; rather, the Court recognized that "[m]atters contained in a witness' statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness." *Id.* at 429. Finally, the Court also held that the defense "is entitled to examine pre-trial statements of prosecution witnesses in order to have a fair opportunity to cross-examine those witnesses." *French*, 611 A.2d at 179-80; *See Grayson, supra.*

In *Commw. v. Appel*, 689 A.2d 891, 907 (Pa. 1997), the Pennsylvania Supreme Court described the relevant three-prong test, stating that "we have held that where the Commonwealth has in its possession pretrial statements of its witnesses which: (1) have been reduced to writing, (2) relate to the witness' testimony at trial, and (3) are signed, adopted or otherwise shown to be substantially verbatim statements of that witness, the Commonwealth must, if requested, furnish copies of the statements to the defense to allow the defense to prepare for cross-examination."

Id. at 907; *Commw. v. Brinkley*, 480 A.2d 980 (Pa. 1984). Defendants explain that two of the three requirements are met and the third requirement is not at issue "since the Commonwealth would be hard-pressed to deny that the written interview summaries prepared by investigating agents are accurate renderings of the actual interview." *Brief of Defendants* at 6. Thus, Defendants argue that the proffer interviews at issue should be disclosed to the defense because they are exactly the witness statements contemplated by Pennsylvania Rule of Criminal Procedure 573(B)(2) and *Commw. v. Appel*, 689 A.2d 891 (Pa. 1997).

Comparatively, the Commonwealth bases its argument on the theory that proffered statements or proffer interviews are unique situations that are an integral part of the grand jury process. Counsel for the OAG explained that "[m]any, if not all, of those witness statements and proffers were done as a precursor to a person appearing in front of the Grand Jury. It's really impossible to separate the proffers and the statements from the actual Grand Jury testimony of the witnesses." Tr. 35:1-6, Aug. 21, 2009. Further speaking to the uniqueness of the proffer interviews, Counsel for the OAG compared a proffer to plea negotiations, stating, "a proffer is unique for a reason. It's unique because its part of the prosecutorial discretion, much like plea negotiations. Plea negotiations are not admissible by either side. Why? Because the process has been recognized by the courts as that which should be encouraged, as that which should be within the province of the parties and stay within the province of the parties. That's what a proffer is." Tr. 37:12-22, Aug. 21, 2009. Counsel emphasized that a proffer is a unique chance for a witness in anticipation of grand jury testimony to sit down with his or her lawyer and the agents involved and sort out whether a fifth amendment right or immunity right exists. *See* Tr. 37:23 – 38:10, Aug. 21, 2009. The key to the proffer interview is that the whole proceeding is an off the record event. *See* Tr. 38:5-6, Aug. 21, 2009. Counsel stressed that "Off the record has to

mean off the record." Tr. 39:18, Aug. 21, 2009. Therefore, "[y]ou don't find a case that says proffer notes are discoverable because its such a unique animal." Tr. 39:13, Aug. 21, 2009.

While this Court recognizes that proffer interviews facilitate discussion between attorneys and agents for the OAG, the witness and his/her attorney, this Court does not agree with the Commonwealth that case law has not addressed such witness statements. This Court is persuaded that the witness statements that result from an interview conducted separate and apart from actual grand jury testimony, so long as the statements are extensive and substantially verbatim of the interview, are necessary for the defense and material and reasonable to a defendant's preparation for trial.

The Commonwealth, in its brief, suggests that if the proffer interviews are found to be discoverable, then such disclosure to defense should be limited to those notes: (a) that reflect a substantially verbatim account of the witnesses' statements; (b) that do not contain information pertaining to other investigations being conducted by the grand jury; and (c) that do not reflect the opinions, theories, or conclusions of the attorney for the Commonwealth or his legal staff. *See Brief of Commonwealth* at 10. This Court notes that Pennsylvania Rule of Criminal Procedure 573(G) provides that "[d]isclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs." Pa.R.Crim.P. 573(G). The Commonwealth relies on a Pennsylvania Superior Court case, *Commw. v. Howard*, 543 A.2d 1169 (Pa. Super. 1988), to argue that it is within the discretion of the Trial Court to edit the proffer interview statements in order to assure the necessary amount of secrecy is maintained to avoid leaking sensitive grand jury information. In *Howard*, the Pennsylvania Superior Court held that no trial error occurred when the Trial Court

edited portions of testimony given by grand jury witnesses, omitting language relating to other grand jury investigations but disclosing all portions relevant to Appellant's case. *See id.* at 1172.

This Court concurs that it is logical and reasonable to apply the same limitations to proffer statements. Therefore, if the proffer statements are to be disclosed, the provisions of Pennsylvania Rule of Criminal Procedure 573(G) should limit the statements and appropriate editing should be permitted to remove language relating to other grand jury investigations not part of the present case. This Court also notes that it would not entertain any request to secure proffer statements that fall within the ambit of any grand jury proceedings prior to the grand jury's issuance of a presentment.

VI. Defendant's Discovery Request for Early Disclosure of Grand Jury Testimony

Due to the complexity and voluminous nature of this case, Defendants request that this Court require the early disclosure of grand jury testimonies. As quoted above, Pennsylvania Rule of Criminal Procedure 230, in relevant part, provides that a copy of the transcript of the testimony of a witness in a criminal case who has previously testified before an investigating grand jury "may be made available (to the defendant) only after the direct testimony of that witness at trial." Pa.R.Crim.P. 230(B)(2). On its face, this rule is narrow and provides specifically for transcripts of Grand Jury testimony to be disclosed only *after* the particular witness has testified at trial. However, the Investigating Grand Jury Act and the procedural rules that follow it preserve the discretion of the Supervising Judge to disclose a transcript of testimony. *See* 42 Pa.C.S. § 4541, *et seq*; Pa.R.Crim.P. 250 to 274. The *Pennsylvania Grand Jury Practice* explains

> Although the rules set forth criteria for the court to allow disclosure of a transcript of testimony, this should not preclude the court from permitting disclosure in other circumstances where justice requires. To strictly limit the discretion of the supervising judge in disclosing grand jury testimony would prevent the court from

> meeting its obligation to monitor the operations of the grand jury and ensure fundamental fairness.
>
> The supervising judge should weigh various factors to determine whether or not testimony should be impounded, including the nature of the proceeding and the competing interests of the parties. Where no necessity for secrecy exists and circumstances warrant disclosure, the supervising judge may order disclosure.

Pennsylvania Grand Jury Practice at 182-83. Finally, Defendants argue in their brief that "early disclosure of so-called Jencks Act material is strongly encouraged by the Third Circuit Court of Appeals, under the standard of 18 U.S.C. §3500(b), setting forth the same rule in the same terms as Pa.R.Crim.P. 230." *See, e.g., U.S. v. Cyril H. Wecht*, 2007 U.S. Dist. Lexis 59870 (W.D.Pa. Crim. No. 06-26, decided August 15, 2007).

The Court recognizes that the investigation related to this matter has been ongoing for more than 30 months. During this investigation, one hundred or more witnesses have testified at least once, if not multiple times, before the grand jury. Both the Defendants and Commonwealth have stated that many of these witnesses will likely be called at trial. If the transcripts of grand jury testimony are not released until after a particular witness testifies at trial, the trial will be repeatedly interrupted for extended periods of time to allow lengthy and multiple transcripts to be provided to the defense. The nature of this proceeding is quite different from a routine criminal case and has already shown signs of being bogged down in thousands of pages of paperwork.

The Commonwealth has conceded, "we're not asking that this Court strictly enforce Rule 230... Quite frankly, we don't want that kind of procedural headache any more than any Court would. So we're not opposed to an early release of that, but we think the ten day suggestion of Judge Lewis is certainly reasonable." Tr. 40-41, Aug. 21, 2009. Defendants have made further time frame requests, varying from thirty (30) days to ninety (90) days. Thus, the question before

the Court is when should transcripts of grand jury testimony be released to defense counsel in order to facilitate adequate preparation time for trial.

The Transcript of oral argument clearly shows Judge Lewis' position on the matter of early release. "I believe that for whatever it is worth to Judge Feudale, that a ten-day release period would not be inappropriate." Tr. 159, July 7, 2009. Furthermore, the OAG stated in their brief that they have no objection to the early release of the grand jury testimony of the witnesses that the Commonwealth plans to call at trial. *See Brief of Commonwealth* at 11. However, OAG requests that they be permitted to redact portions of the transcript that relate to other investigations and be afforded adequate time to comply with the Court's order, should it vary from the trial court's ten day suggestion. *See id.*

It is clear to this Court that the Trial Court, the Defendants, and the Commonwealth agree that under the circumstances the grand jury testimony should be released early. Judge Lewis, as the Trial Judge, is in the best position to determine a timeframe that is workable and appropriate. This Court therefore, based on the Defendants' requests and Commonwealth's concession, concludes that the Trial Court shall determine a date for early release of the non-exculpatory grand jury testimony, and that date be not less than ten (10) days prior to the commencement of trial. Furthermore, it is reasonable and in the interests of the secrecy of the investigating grand jury that the Commonwealth shall be permitted to redact the portions of the testimony concerning other investigations not related to the case at hand.

VII. Conclusion

This Court, having decided the issues before it, now summarizes its determination of each issue. It was undisputed that this Court has jurisdiction over the computer hard drives and early disclosure of non-exculpatory grand jury testimony, but we recognized that the release of

proffer statements falls outside the penumbra of secrecy of grand jury proceedings. Therefore, this Court enters an Order attached to this Opinion that fully addresses the motions regarding the hard drives and early release of grand jury transcripts, while our discussion of the proffer statements is offered purely for the guidance and benefit of the Trial Judge.

With regard to the computer hard drives: those drives to which the Democratic Caucus claims legislative privilege and are in the possession of third parties or held for safekeeping by OAG are inaccessible to the Commonwealth and need not be turned over in discovery. However, the hard drives in OAG's possession from which the Commonwealth has already disclosed some data must be disclosed in their entirety. We offer guidance to the Trial Court that supports the discovery of the proffer notes with certain limitations pursuant to Pennsylvania law. Finally, we grant the motion for early disclosure of non-exculpatory grand jury testimony subject to a timeframe to be imposed by the Trial Judge with the restriction that it be no less than ten (10) days prior to trial. Accordingly, an Order of Court is attached, and the case is remanded to the Trial Judge for further proceedings not inconsistent with this Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

IN RE:	***QUO WARRANTO* ACTION**
THE THIRTY-FIVE STATEWIDE INVESTIGATING GRAND JURY	**197 MM 2014**
SUPREME COURT OF PENNSYLVANIA NO. 176 M.D. MISC. DKT. 2012	**PROOF OF SERVICE**
MONTGOMERY COUNTY COMMON PLEAS M.D. 2644-2012	

I hereby certify that on February 23, 2015, I caused the service of a Supplemental Reply Memorandum of Law in Support of Attorney General Kathleen G. Kane's *Quo Warranto* Action in a the above-captioned *Quo Warranto* Action upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

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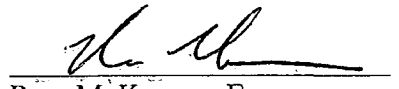

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