2018 PA Super 137

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KATHLEEN GRANAHAN KANE	:	No. 3575 EDA 2016
Appellant		

Appeal from the Judgment of Sentence October 24, 2016
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0006239-2015,
CP-46-CR-0008423-2015

BEFORE: LAZARUS, J., OTT, J., and PLATT*, J.

OPINION BY LAZARUS, J.: **FILED MAY 25, 2018**

Kathleen Granahan Kane appeals from the judgment of sentence, entered in the Court of Common Pleas of Montgomery County, imposed following her conviction for perjury,[1] false swearing in an official proceeding,[2] obstructing the administration of law,[3] official oppression,[4] and criminal conspiracy.[5] After careful review, we affirm, in part, on the basis of the trial court's well-reasoned opinion.

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[1] 18 Pa.C.S.A. § 4902.

[2] 18 Pa.C.S.A. § 4903.

[3] 18 Pa.C.S.A. § 5101.

[4] 18 Pa.C.S.A. § 5301.

[5] 18 Pa.C.S.A. § 903.

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* Retired Senior Judge assigned to the Superior Court.

This matter implicates constitutional issues, the rule of law, and a fundamental tenet underlying our legal system – the truth and sanctity of testimony under oath.[6]

In 2016, Montgomery County District Attorney Risa V. Ferman charged former Attorney General Kane with breaking the laws she swore to uphold. Kane denied that she committed any unlawful transgressions and denounced her accusers' allegations and the subsequent investigation into her wrongdoing as infringements upon her constitutional rights. On August 17, 2016, Kane resigned the Office of the Attorney General ("OAG").

Kane's charges stem from her indiscretions in an investigation of corruption allegations against Philadelphia politicians and her futile attempt to retaliate against a perceived political foe, former Deputy Attorney General ("DAG") Frank Fina, Esquire. The trial court ably chronicled the complex facts of Kane's case, and we hereby incorporate its recitation herein by reference. ***See*** Trial Court Opinion, 3/2/17, at 4-37. For context, we include a brief summary of the facts, which follows.

On March 16, 2014, the Philadelphia Inquirer ("Inquirer") published a story entitled "Kane shut down sting that snared [Philadelphia] officials."[7] The

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[6] The secrecy of grand jury proceedings is indispensable to the effective functioning of a grand jury. ***In re Dauphin County Fourth Investigating Grand Jury***, 19 A.3d 491, 502-503 (Pa. 2011).

story detailed the OAG's three-year investigation of Philadelphia Democrats, including four members of the City of Philadelphia state house delegation,[8] and a little-known lobbyist, Tyron B. Ali. The story, which chronicled the Ali investigation led by then DAG Fina, detailed the OAG's decision to drop fraud charges against the investigation's targets, secretly, under seal in Fall 2013. Kane regarded the Inquirer story as an attack on her and the OAG's integrity, and she suspected that Attorney Fina leaked the story to the Inquirer as retaliation for opening an internal review into his handling of the Jerry Sandusky child sexual abuse investigation. Concerned that the Criminal History Record Information Act ("CHRIA") might prohibit the OAG from publicly discussing details of the Ali investigation, Kane obtained a judicial order giving her permission to discuss limited facts about the investigation in anticipation of press inquiries.

Only three days later, on March 19, 2014, Kane learned of a long-discontinued investigation into the alleged criminal activities of Jerome Mondesire, who led the Philadelphia branch of the NAACP for 17 years. Agent Michael Miletto and DAG William Davis worked with Attorney Fina on the

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[7] Philadelphia Inquirer, *Kane shut down sting that snared Phila. officials*, March 16, 2014, http://www.philly.com/philly/news/20140316_Kane_shut_down_sting_that_snared_Phila__officials.html (last accessed May 6, 2018).

[8] The OAG ran a three-year undercover sting operation that captured Philadelphia Democrats, including four members of the Pennsylvania House of Representatives, on tape accepting money. At the time of the publication of the March 16, 2014 Inquirer story, the OAG had not brought charges against any of the individuals implicated in the investigation. *Kane shut down sting that snared Phila. Officials*, ***supra***.

Mondesire investigation, which began in 2008. At some point in 2009, DAG Davis sought Attorney Fina's permission to use an existing grand jury investigating a related matter to investigate Mondesire. DAG Davis prepared a legal memorandum summarizing the allegations against Mondesire ("Davis Memo"), which Attorney Fina later reviewed; the Davis Memo contained information learned from the aforementioned grand jury proceeding. DAG Davis and Attorney Fina memorialized correspondence discussing the Davis Memo in OAG emails, and Attorney Fina endorsed DAG Davis' findings. The OAG, however, never filed charges against Mondesire.

The OAG based its allegations against Mondesire on events that occurred as early as 2004, and thus, there was a consensus among several OAG agents and attorneys that any subsequent prosecution of Mondesire was likely time-barred. However, Kane still feared that revelation of the discontinued Mondesire investigation would appear unseemly in light of the March 16, 2014 Inquirer story, and on March 22, 2014, she instructed then DAG Bruce Beemer to interview Agent Miletto to learn why the Mondesire investigation was discontinued. DAG Beemer quickly formed the legal opinion that the allegations against Mondesire were likely time barred. The time and circumstances of DAG Beemer's meeting with Agent Miletto led him to conclude the purpose of the meeting was not to determine if the OAG could still prosecute Mondesire, but to ascertain whether incompetence or corruption lay at the root of Attorney Fina's decision not to prosecute.

Following Agent Miletto's meeting with DAG Beemer, an OAG agent demanded Agent Miletto provide yet another statement regarding the Mondesire investigation. The OAG agent audio recorded Agent Miletto's statement, over his objection, and an administrative assistant transcribed it in its entirety. The OAG agent delivered the sole copy of the Miletto transcript to Kane.

The same day, Kane arranged for First Assistant Attorney General Adrian King to deliver the Davis Memo, copies of emails between Attorney Fina and Agent Miletto regarding the Davis Memo, and the Miletto transcript, to a friend and political consultant, Joshua Morrow. Kane intended for Morrow to leak the documents to the press. Eventually, Morrow redacted the documents to obscure most named persons, except Attorney Fina, and delivered them to Christopher Brennan, a reporter for the Philadelphia Daily News ("Daily News").

On June 6, 2014, the Daily News published a story entitled "A.G. Kane examining '09 review of ousted NAACP leader's finances,"[9] which named Attorney Fina as the lead investigator. The Daily News story included content from the Miletto transcript and information derived from the grand jury investigation that uncovered the Mondesire allegations. Despite internal concern that the Daily News story was problematic and warranted an internal

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[9] Christopher Brennan, *Probing a Probe: A.G. Kane examining '09 review of ousted NAACP leader's finances*, Phila. Daily News, June 6, 2014, at 3.

response, Kane declined to initiate an internal investigation or grand jury investigation to identify the source of the leak.

On May 8, 2014, Attorney Fina, then working as a Philadelphia Assistant District Attorney, contacted the Honorable William R. Carpenter, who was presiding over the Thirty-Fifth Statewide Grand Jury. Attorney Fina told Judge Carpenter that he received information that someone had leaked confidential grand jury information to the press and that he wished to share information relevant to the leak. Attorney Fina also suggested Judge Carpenter appoint a special prosecutor to investigate the leak. In spring 2014, Judge Carpenter determined that reasonable grounds existed to believe that an investigation was necessary to corroborate allegations that grand jury secrecy had been compromised, and appointed Thomas E. Carluccio, Esquire, to investigate and prosecute any illegal disclosures of grand jury matters.

Kane attempted to frustrate the grand jurying investigation by filing a *quo warranto* action[10] challenging: (1) Judge Carpenter's statutory authority to appoint Attorney Carluccio as Special Prosecutor for an investigating grand jury; and (2) whether the power to investigate and prosecute was reposed solely in the executive branch. Judge Carpenter denied Kane's *quo warranto* action by court order dated May 29, 2014. Our Supreme Court affirmed Judge Carpenter's order denying Kane *quo warranto* relief on March 31, 2015. ***In***

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[10] A writ of *quo warranto* is a means by which to test title or right to public office. ***Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia***, 4 A.3d 610, 627 (Pa. 2010).

re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 637 (Pa. 2015) (supervising judge of grand jury has inherent authority to appoint special prosecutor where there are colorable allegations that sanctity of grand jury has been breached by attorney for Commonwealth and that allegations warrant investigation). ***See also In re Dauphin County Fourth Investigating Grand Jury***, 19 A.3d 491, 503-504 (Pa. 2011) (when colorable allegations or indications that sanctity of grand jury process has been breached and those allegations warrant investigation, appointment of special prosecutor to conduct such investigation is appropriate).

In August 2014, in the midst of Special Prosecutor Carluccio's probe, Kane met with Morrow to discuss the grand jury investigation into the Mondesire leak. Morrow assured Kane that if subpoenaed by the grand jury, he would testify that he leaked the documents to the Daily News on his own initiative, and not at Kane's direction. Kane and Morrow met again in October 2014, at which time Morrow reiterated this assurance.

On November 17, 2014, Kane testified before the Thirty-Fifth Statewide Investigating Grand Jury. Kane falsely denied, numerous times, having facilitated the leak of the Mondesire investigation to the Daily News. Kane also denied knowing whether the June 6, 2014 Daily News Mondesire story was in any way related to or a response to the March 16, 2014 Inquirer story chronicling the Ali investigation. When shown the Davis Memo and accompanying documents, Kane denied having ever seen them before and denied having discussed the Mondesire investigation with Morrow. Kane also

stated she had not sworn an oath of secrecy regarding the grand jury investigation that uncovered the Mondesire allegations. In response, the Commonwealth produced, among other evidence, a copy of the notarized secrecy oath she signed on her first day in office, regarding the first through thirty-second statewide investigative grand juries, including the Mondesire grand jury.

On December 19, 2014, the Thirty-Fifth Statewide Investigating Grand Jury issued a presentment recommending that the Commonwealth charge Kane with perjury, false swearing, abuse of office/official oppression, obstructing the administration of law or other governmental function, and contempt of court. The same day, Judge Carpenter, by court order, accepted the presentment. On August 6, 2015, following an investigation conducted by the Montgomery County District Attorney's Office, then-District Attorney Ferman filed a criminal complaint charging Kane with perjury, false swearing, two counts of obstructing administration of law or other governmental functions, additional counts of perjury, and two counts of criminal conspiracy. On October 1, 2015, District Attorney Ferman filed additional counts of perjury, false swearing, and obstructing administration of law or other governmental function.[11]

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[11] The Montgomery County District Attorney filed the foregoing charges following the execution of a search warrant that uncovered additional evidence.

Following a seven-day trial, a jury found Kane guilty of all counts. On October 24, 2016, the Honorable Wendy Demchick-Alloy sentenced Kane to an aggregate sentence of 10 to 23 months' incarceration followed by eight years' probation. This timely appeal followed. Both Kane and the trial court have complied with Pa.R.A.P. 1925. On appeal, Kane raises the following issues for our review:

> 1. Whether the lower court erred in denying [Kane's] motion asking that all judges on the Montgomery Court of Common Pleas be recused from participation in her case.
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> 2. Whether the lower court erred in denying the motion filed by [Kane] to suppress testimony and other evidence presented against her to the[T]hirty-[F]fth statewide investigating grand jury, and to quash the charges filed against her as recommended in the presentment of that grand jury since the challenged evidence was illegally and unconstitutionally obtained.
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> 3. Whether the lower court erred in limiting [Kane's] right to present a defense when it granted the Commonwealth's motion *in limine* to exclude any reference at trial to pornography found in the office of attorney general [OAG] emails of former OAG attorneys Frank Fina and Marc Costanzo, and when, in sustaining a Commonwealth objection to the defense opening address to the jury, it precluded reliance by the defense upon "other issues involving other cases[.]"
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> 4. Whether the lower court erred in denying [Kane's] motion to quash for selective and vindictive prosecution.
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> 5. Whether the lower court erred in denying [] Kane's request that the jury in her case be instructed that grand jury secrecy applies only to matters actually occurring before the grand jury.

Brief of Appellant, at 1-3.

Kane first claims that the trial court erred in denying her motion to recuse all judges of the Montgomery Court of Common Pleas. Specifically,

Kane argues that three judges of the Montgomery County Court of Common Pleas[12] had significant connections with the investigation and prosecution of her case, which constituted conflicts, and that the trial court should have imputed said conflicts to all of the judges sitting on the Montgomery County Court of Common Pleas.

As a general rule, when circumstances arise during the course of trial raising questions of the trial judge's bias or impartiality, it is the duty of the party, who asserts that a judge should be disqualified, to allege by petition the bias, prejudice, or unfairness necessitating recusal. ***Commonwealth v. Perry***, 551 A.2d 1080, 1082 (Pa. Super. 1988) (citations omitted).

> There is a presumption that judges of this Commonwealth are "honorable, fair and competent," ***In re Lokuta***, 11 A.3d [427, 453 (Pa. 2011)] (citation omitted), and, when confronted with a recusal demand, are able to determine whether they can rule "in an impartial manner, free of personal bias or interest in the outcome." ***Arnold v. Arnold***, 847 A.2d 674, 680 (Pa. Super. 2004) (citation omitted). If the judge determines he or she can be impartial, "the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make." ***Id.*** at 680-81 (citation omitted). ***A judge's decision to deny a recusal motion will not be disturbed absent an abuse of discretion***. ***See In re Lokuta***, 11 A.3d at 435.

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[12] In her brief, Kane identifies Judge Carpenter, the Honorable Risa Vetri Ferman (formerly the Montgomery County District Attorney), and the Honorable Carolyn T. Carluccio (spouse of Special Prosecutor Carluccio) as the judges she claims have connections to the investigation and prosecution of the instant case.

Lomas v. Kravitz, 130 A.3d 107, 122 (Pa. Super. 2015), ***aff'd*** 170 A.3d 380 (Pa. 2017) (emphasis added). Furthermore, our Supreme Court has held that it

> would be an unworkable rule[,] which demanded that a trial judge recuse whenever an acquaintance was a party to or had an interest in the controversy. Such a rule ignores that judges throughout the Commonwealth know and are known by many people, . . . and assumes that no judge can remain impartial when presiding in such a case.

Id. at 122-23. "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." ***Id.*** at 144.

Kane baldly asserts that Judges Carpenter, Ferman, and Carluccio were intimately familiar with the facts of her case presented to the grand jury, believed she was guilty, and thus, developed a bias against her that they collectively imputed to Judge Demchick-Alloy and the other judges sitting on the Montgomery Court of Common Pleas. The trial court determined that Kane's failure to cite to any authority supporting her argument that the trial court should impute the alleged bias of Judges Carpenter, Ferman, and Carluccio to the other judges sitting on the Montgomery County Court of Common Pleas strongly suggested her argument was without merit. We agree.

The mere fact that some judges of a particular court may have some familiarity with a particular case has not been held to be a basis for recusal of an entire bench of judges. There is no evidence of record that the majority of

judges of the Montgomery Court of Common Pleas have a relationship with Judge Demchik-Alloy or Special Prosecutor Carluccio. Nor is there any evidence that Judges Carluccio or Ferman were involved in this matter or that Judge Carpenter wielded special influence over Special Prosecutor Carluccio. Without some evidentiary showing of an interest, Kane's allegations merit no relief.

Kane's argument that "the involvement of one judge in a grand jury proceeding disqualifies the rest of the bench from presiding over the resulting charges" is also meritless. Trial Court Opinion, 3/22/17, at 44. The standard of proof of a crime necessary to support a presentment or indictment by a grand jury is much lower than that necessary to support a verdict of guilty at trial. ***See Commonwealth v. Weston***, 749 A.2d 458, 461 (Pa. 2000). Generally, judges understand the evidence presented to a grand jury that supports an indictment may not be sufficient to establish guilt at trial; thus, it is not necessary to impute bias to them. Accordingly, the trial court did not err in denying Kane's motion to recuse all of the judges of the Montgomery County Court of Common Pleas.

Kane next claims that the trial court erred in denying her motions to suppress evidence gathered by the grand jury and failing to quash the charges filed against her. Kane avers that Special Prosecutor Carluccio's use of the grand jury was unauthorized by statute, rule, or judicial precedent and the separation of powers doctrine prohibited it.

Kane first avers that the trial court erred in not suppressing evidence gathered during the course of Special Prosecutor Carluccio's investigation. In support of Kane's claim, she cites ***In re The Thirty-Fifth Statewide Investigating Grand Jury***, ***supra***, in which five of our Supreme Court's Justices filed four opinions in the disposition of her aforementioned *quo warranto* action.

A decision of [our Supreme Court] has binding effect if a majority of the participating Justices joined the opinion. ***Commonwealth v. Holmes***, 79 A.3d 562, n. 8 (Pa. 2013) (citation omitted).

In order to reconcile precedent out of a fragmented decision,

> a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent.

Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998).

Our Supreme Court's holding ***In re The Thirty-Fifth Statewide Investigative Grand Jury*** contradicts Kane's position that Special Prosecutor Carluccio's use of the grand jury was unauthorized by judicial precedent. Accordingly, Kane's claim is meritless.

In ***In re The Thirty-Fifth Statewide Investigative Grand Jury***, our Supreme Court specifically determined that Judge Carpenter did not exceed

the powers lawfully vested in his judicial office to grant Special Prosecutor Carluccio the authority to compel testimony and production of documents and to issue a report on his findings based on that evidence. This is the law of the case, and as such, our Supreme Court's finding in ***In re The Thirty-Fifth Statewide Investigative Grand Jury*** is final and binding on this Court. Therefore, Kane's argument is meritless. Furthermore, Kane's citation to ***In re The Thirty-Fifth Statewide Investigative Grand Jury*** is inapposite to the argument presented in her motion to suppress evidence and is of no support to her position.

Kane next argues that the trial court improperly denied her motion to quash charges because the grand jury investigation was unlawful and unconstitutional. "A motion to quash a criminal information or indictment is [addressed] within the sound discretion of the trial judge[.]" ***Commonwealth v. Lebron***, 765 A.2d 293, 294 (Pa. Super. 2000) (quotation omitted). "Discretion is abused when the course pursued by the trial court represents not merely an error in judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." ***Id.*** at 294-95 (citation omitted).

Additionally, we note:

> A motion to quash is an appropriate means for raising defects apparent on the face of the information or other defects which would prevent prosecution. It is neither a guilt determining procedure nor a pre-trial means for determining the sufficiency of the Commonwealth's evidence. Neither the adequacy nor

> competency of the Commonwealth's evidence can be tested by a motion to quash the information.

Commonwealth v. Finley, 860 A.2d 132, 135 (Pa. Super. 2004), quoting ***Commonwealth v. Schaffer***, 557 A.2d 1106, 1106-1107 (Pa. Super. 1989).

Again, our Supreme Court's decision in ***In re The Thirty-Fifth Statewide Investigative Grand Jury*** belies Kane's claim that Special Prosecutor Carluccio's investigation was unlawful and violated Kane's constitutional rights. The basis for Kane's motion for quashal is that Mr. Carluccio lacked lawful authority to obtain the presentment that led the district attorney to file the charges in these actions. However, to warrant quashal, appellant would have to demonstrate that no other alternative would be adequate to vindicate her rights. The matter ***of In re Thirty-fifth Statewide Investigating Grand Jury*** is again instructive. Despite there being various opinions by the various Justices of the Court, collectively, they do not establish that Kane has a right to any form of relief, assuming arguendo that Mr. Carluccio lacked lawful authority to draft and issue a presentment. The Chief Justice and Justice Eakin expressly concluded that the judiciary has an implied power to authorize an appointee to issue a presentment. Justices Todd and Stevens were somewhat less authoritative on this issue. Justice Baer was willing to assume, without deciding, that such proceedings violated appellant's due process of law rights but he concurred in the judgment denying relief because he concluded that any infringements of appellant's rights would be "rendered harmless" as long as appellant's right to due process of law was honored in the proceedings following the filing of charges. Therefore, a

majority of the justices deciding this issue determined that no relief was due appellant since either there was authority to draft and issue a presentment or at worst, the lack of authority was rendered harmless by the factual circumstances in this specific case, by the proceedings which followed the presentment and charges.[13] Judge Demchick-Alloy did not abuse her discretion in denying Kane's motion to quash all charges. This argument is meritless.

Fourth, Kane argues, for a plethora of specious reasons, that the trial court erred in not permitting her to introduce evidence of pornographic emails and the Jerry Sandusky case. Kane claims that the trial court erred when it granted the Commonwealth's motions *in limine* to prohibit any reference at trial to pornography discovered in the OAG emails of Former Assistant Attorney Generals Frank Fina, Esquire, and Marc Costanzo, Esquire.[14] Kane also argues that the trial court prohibited her from introducing evidence material to her defense when it sustained the Commonwealth's objection to

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[13] We note that many of the issues raised by the appellant would be rendered moot if there were statutory direction, or revised rules, with regards to practice and procedure before a statewide grand jury. Since that is not yet the case in Pennsylvania, we are left to glean our response to appellant's appeal by parsing together the various opinions provided by our Supreme Court. We agree with the trial court's analysis of the various opinions stated and conclude, as she does, that no relief is either due or available to appellant.

[14] On July 28, 2016, the Commonwealth filed a motion *in limine* to exclude evidence of selective and vindictive prosecution, which the trial court granted by order dated July 28, 2016. Judge Carpenter's order barred Kane from producing at trial evidence of pornographic email messages.

her discussion of Attorney Fina's investigation of crimes related to child abuse by Jerry Sandusky.

"Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence[,] and the fact is of consequence in determining the action." Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. "The court may exclude relevant evidence if its probative value is outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury[.]" Pa.R.E. 403.

"'[U]nfair prejudice' means 'a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.'" ***Castellani v. Scranton Times, L.P.***, 124 A.3d 1229, 1245 (Pa. 2015), citing Pa.R.E. 403 (comment). Furthermore,

> [c]ourts may properly restrict counsel, in opening, by refusing to permit questionable features of evidence to be referred to, holding counsel to a narrative of the defense, reserving further consideration of the matter until it is offered in evidence. The court may then determine its admissibility, and, if it may be received, no harm is done to the accused in refusing to permit reference to be made to it in the opening, as the jury later will be fully aware of the facts.

Commonwealth v. Quaranta, 145 A. 89, 91 (Pa. 1928).

Our standard of review in reviewing the grant of a motion *in limine* is well settled:

> When reviewing the denial of a motion *in limine*, we apply an evidentiary abuse of discretion standard of review. ***See Commonwealth v. Zugay***, 745 A.2d 639 (Pa. 2000) (explaining

> that because a motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to trial, which is similar to ruling on a motion to suppress evidence, our standard of review of a motion *in limine* is the same of that of a motion to suppress). The admission of evidence is committed to the sound discretion of the trial court and our review is for an abuse of discretion.

Commonwealth v. Stokes, 78 A.3d 644, 654 (Pa. Super. 2013) (some citations omitted).

Regarding evidence of the Sandusky investigation, Kane's review of Attorney Fina's handling of the Sandusky case began in August 2013, well before the Inquirer story. Therefore, the trial court and jury could infer revenge was not the motivation for Kane's review. The trial court also concluded that Kane's attempt to introduce evidence of pornographic emails sent or received from Attorney Fina's OAG email account was primarily to obfuscate legal and evidentiary issues, mislead the jury, and suggest a "decision on an improper basis[.]" Trial Court Opinion, 3/2/17, at 97, citing ***Castellani***, 124 A.3d at 1245. We are inclined to agree.

The trial court properly concluded that: (1) the probative value of evidence of pornographic materials discovered in Attorney Fina's and Attorney Costanzo's OAG email accounts was speculative and inadmissible, and thus, the trial court properly barred Kane from discussing it during her opening argument; and (2) evidence of the Sandusky investigation was irrelevant to Kane's defense. Accordingly, Kane's fourth claim on appeal is meritless.

Kane next claims that the trial court erred in denying her motion to quash the charges filed against her "based upon the selective and vindictive nature of the prosecution." Brief of Appellant, at 52. Preliminarily, we note

that Kane has conflated the two very distinct concepts of selective and vindictive prosecution.

A vindictive prosecution claim is not a defense on the merits and not a matter for presentation to the jury. ***Commonwealth v. Stetler***, 95 A.3d 864, 892 (Pa. 2014). A presumption of prosecutorial vindictiveness arises if a defendant establishes facts that demonstrate a probability that an adverse action by the prosecution or court has been motivated by vindictiveness in retaliation for successful exercise of a defendant's legal rights rather than for some other legitimate cause. ***Commonwealth v. Rocco***, 544 A.2d 496, 498 (Pa. Super. 1988). The key to whether a presumption of vindictiveness arises in a given case would be the factual circumstance in which the challenged action occurred. ***Id.*** However, "due process does not forbid enhanced sentence or charges; rather, only enhancement motivated by actual vindictiveness toward the defendant for having exercised his [or her] legal rights is forbidden." ***Id.*** at 499. A pre-trial decision to enhance sentence or charges "is less likely to be improperly motivated than a decision made after trial." ***Commonwealth v. Chamberlain***, 30 A.3d 381, 419 (Pa. 2011).

On the other hand, selective prosecution is a complete defense to a charge of criminal conduct, in which the accused bears the burden of pleading the existence of the elements of the events. ***See Goodman v. Kennedy***, 329 A.2d 224, 232 (Pa. 1974) ("A purposeful discrimination must be shown [by the defendant] and we cannot presume such discrimination.").

> In order to establish a *prima facie* case of selective prosecution, [an a]ppellant must establish, first, that others similarly situated were not prosecuted for similar conduct, and, second, that the Commonwealth's discriminatory prosecutorial selection was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification. The burden is on the defense to establish the claim; it is error to shift the burden to the prosecution to establish or refute the claim. Because of the doctrine of separation of power, the courts will not lightly interfere with an executive's decision of whom to prosecute.

Commonwealth v. Murphy, 795 A.2d 997, 1000 (Pa. Super. 2002) (internal citations omitted).

Instantly, the facts of record do not support Kane's claim of vindictive prosecution. The prosecutors in Kane's case made no changes to the charges initially filed against her until after the execution of a search warrant unveiled new facts that warranted the filling of additional charges. Nor has Kane pled facts proving either of the elements necessary to establish a claim of selective prosecution. Kane has not shown that others similarly situated were not prosecuted for similar conduct, nor has she provided evidence of impermissible conduct by the Montgomery County District Attorney's Office. Therefore, Kane's claim that the Commonwealth vindictively and/or selectively prosecuted her for the foregoing charges is meritless and no relief is due.

Next, Kane claims that the trial court erred in not delivering her requested jury instruction.[15] Specifically, Kane objected to the court's

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[15] Kane's proposed jury instruction was as follows:

instructions to the jury as to what constitutes grand jury information and that not all information relating to grand jury proceedings is secret. Kane's jury instruction claim pertains to Judge Demchick-Alloy's jury instruction regarding obstructing administration of law or other governmental function. ***See*** N.T. Trial, 8/15/16, at 204-208.[16]

> In case number 6239-2015, count 8, the Commonwealth has charged that the defendant impeded Mr. Mondesire in the exercise of his right to reputation by directing the release of secret Grand Jury information, in violation of the Grand Jury Act. In that regard, I instruct you that not all information relating to grand jury proceedings is secret. Grand Jury secrecy applies only to prevent the unauthorized disclosure of matters occurring before the grand jury, such as the testimony of grand jury witnesses or other matters that took place within the secret confines of the Grand Jury hearing room.

Brief of Appellant, at 65.

[16] The trial court's jury instruction, in relevant part, was stated as follows:

> [Kane] has been charged with obstructing a governmental function. To find the defendant guilty of this offense, you must find the following elements have been proven beyond a reasonable doubt[.] First element, that the defendant obstructed or impaired the administration of law or a government function. . . . [A] person cannot commit this crime unless he or she uses means that affirmatively interfere with governmental functions. . . . The second elements of obstruction is that the defendant did so by breach of official duty or an act otherwise in violation of the law. . . . The Commonwealth avers that [Kane] violated the Criminal History Records Information Act [("CHRIA")]. . . . Second, the Commonwealth alleges [Kane] violated the Investigating Grand Jury Act[.] . . . Third, the Commonwealth alleges that [Kane] violated the law by testifying falsely before the grand jury. . . . The third element of obstruction is that the defendant did so intentionally[.]

N.T. Trial, 8/15/16, at 204-208.

Our standard of review in assessing a trial court's jury instructions is as follows:

> It is axiomatic that, in reviewing a challenged jury instruction, an appellate court must consider the entire charge as [a] whole, not merely isolated fragments, to ascertain whether the instruction fairly conveys the legal principles at issue. An instruction will be upheld if it clearly, adequately and accurately reflects the law. ***The trial court may use its own form of expression to explain difficult legal concepts to the jury, as long as the trial court's instruction accurately conveys the law.***

Commonwealth v. Barnett, 121 A.3d 534, 545 (Pa. Super. 2015) (emphasis added), quoting ***Commonwealth v. Cook***, 952 A.2d 594, 626–27 (Pa. 2008). There is error in jury instructions only when the trial court abuses its discretion and inaccurately states the law. ***Commonwealth v. Williams***, 980 A.2d 510, 523 (Pa. 2009).

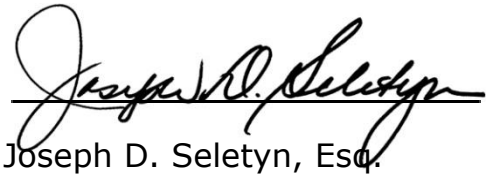
Instantly, the trial court correctly determined that Kane's proposed jury instruction implied that she could have legally disclosed grand jury information that the law forbade her from publishing. Therefore, the trial court properly concluded that "[i]nstructions to the jury are to be fair and accurate; they are not required to embody points that a party more properly should make in argument." Trial Court Opinion, 3/2/17, at 102, quoting ***Commonwealth v. Lesko***, 15 A.3d 345, 397 (Pa. 2011). We discern no abuse of discretion or error of law in the trial court's decision to refuse a legally incorrect charge to the jury.

Based on our review of the parties' briefs, the relevant case law and the certified record on appeal, we dispose of all five of Kane's claims based on the

Honorable Wendy Demchick-Alloy's opinion. We direct the parties to attach a copy of that decision in the event of further proceedings in the matter.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/25/18

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	Nos. CP-46-CR-0006239-2015
	:	CP-46-CR-0008423-2015
v.	:	
	:	
KATHLEEN GRANAHAN KANE	:	

OPINION

DEMCHICK ALLOY, J. MARCH 2, 2017

This case poses important issues of constitutional law and, more fundamentally, the rule of law itself.[1] The prosecutors charged the defendant, former Attorney General Kathleen G. Kane (hereinafter "appellant"), with breaking the laws she was sworn to uphold. She, in turn, alleged that the prosecutors and court infringed her exercise of constitutional rights, and exercised powers not lawfully vested in them when investigating and prosecuting her. The resolution of these competing allegations is a matter of great importance, both to the persons directly involved and the public.

Appellant has filed the instant direct appeal from the judgments of sentence. In the action indexed at no. 6239-2015, appellant was tried before a jury and convicted of perjury,[2] false swearing in official matters,[3] obstructing

[1] "Like the forces governing the individual mind, the forces making for social order are a multilevel affair; and even constitutions are based on, or presuppose, an underlying agreement on more fundamental principles--principles which may never have been explicitly expressed, yet which make possible and precede the consent and the written fundamental laws." FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 267-68 (Ronald Hamowy, ed. 2011).

[2] 18 Pa.C.S. § 4902.

[3] *Id.* § 4903.

the administration of law,[4] official oppression,[5] criminal conspiracy to obstruct the administration of law[6] and criminal conspiracy to commit official oppression.[7] In the action indexed at no. 8423-2015, appellant was convicted of perjury, false swearing, obstructing the administration of law and official oppression. On October 24, 2016 she was sentenced to serve a term of total confinement of five to twelve months, with two concurrent terms of probation and a term of five years' probation consecutive to parole in the action indexed at no. 6239-2015; and in the action indexed at no. 8423-2015, a term of total confinement of five to eleven months consecutive to all sentences imposed in no. 6239-2015, plus a concurrent term of probation and a term of three years' probation consecutive to parole. She remains on bail pending disposition of her direct appeal.

This opinion will begin, in Part I, by listing the claims of error appellant has raised on appeal. In Part II, this opinion will recount facts of record material to the disposition of those claims. Part III will provide argument with citations to authority to show that appellant's claims fail.

I. Claims of Error Raised on Appeal

By order filed November 23, 2016 the undersigned judge directed appellant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On January 4, 2017, appellant filed her statement of errors

[4] *Id.* § 5101.
[5] *Id.* § 5301.
[6] *Id.* § 903.
[7] *Id.*

(hereinafter, the "Statement"), which consisted of nine allegations of error. Notably, appellant has not claimed that the evidence was insufficient to support the guilty verdicts, nor that the verdicts were against the weight of the evidence, nor that the sentences were illegal or an abuse of judicial discretion, and therefore she concedes that the verdict was supported by sufficient and weighty evidence and that the sentence was legal and just given the facts of record.[8] Appellant's lawyer drafted each allegation of error in the form of a heading supplemented with explanatory text. For the sake of brevity, this opinion will omit almost all of the explanatory text here, but will recite its material parts in the discussion of each allegation of error, in order to ensure that only those issues raised in the court below will be decided on appeal.

The Statement alleges these errors in the following order:

1. Denial of appellant's pretrial motion to recuse all judges of the Montgomery County Court of Common Pleas;
2. Denial of appellant's pretrial motion to suppress evidence gathered by or derived from the Thirty-Fifth Statewide Investigating Grand Jury;
3. Denial of appellant's pretrial motion for a bill of particulars;
4. Denial of appellant's pretrial motion to dismiss perjury and false swearing charges as duplicative;
5. Denial of appellant's pretrial motion to dismiss obstruction of administration of law charges as duplicative or multiplicitous, or both;

[8] See Pa.R.A.P. 302(a) (stating that an appellant may not raise an issue not raised in the court below).

6. Denial of appellant's pretrial motion to dismiss official oppression charges as multiplicitous;
7. Denial of appellant's pretrial motion to dismiss all charges due to selective and vindictive prosecution;
8. Preclusion of appellant from producing evidence of pornographic emails and the Sandusky trial to oppose the Commonwealth's evidence of motive;
9. Denial of appellant's objection to jury instruction defining scope of secret grand jury information.

For the sake of clarity, the discussion of each claim of error will recite a small number of supplemental facts material only to that claim.

II. FACTS

This section recites the facts material to the discussion of the merits of the claims of error appellant has raised on appeal. Facts are "material" if they are essential to the evaluation of a legal argument or disposition of an application for relief.[9] In order to help readers anticipate how certain facts will become essential to certain claims of error, this recitation of facts will also include several brief statements of applicable law.

[9] See BLACK'S LAW DICTIONARY p. 611 (7th ed. 1999) (defining "material fact" as "a fact that is significant or essential to the issue at hand").

A. The initial leak of confidential grand jury information in the *Philadelphia Inquirer*, March 16, 2014

On March 16, 2014, while appellant was serving as the Attorney General, the *Philadelphia Inquirer* published an account of a particular investigation into criminal political corruption, the "Ali investigation," begun by the Office of Attorney General (OAG) before appellant took office. Appellant was "extremely upset" because information in the article appeared to have been disclosed by former employees of the OAG notwithstanding that such disclosure was a criminal act prohibited by multiple statutes and a judicial order, as it constituted "investigative information"[10] obtained through the use of wiretaps and a statewide investigative grand jury.[11] The article stated that when appellant took office and became aware that the investigators of the Ali "sting operation" had uncovered evidence sufficient to support the filing of criminal charges against Philadelphia politicians, she decided not to file charges.[12]

Appellant perceived the article as an attack on her personal integrity and the integrity of the OAG as an institution.[13] She believed that a former Deputy

[10] 18 Pa.C.S. § 9102 (defining "Investigative information" as "Information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing....")
[11] N.T. 8-10-16, afternoon session p. 99, 110-14 (testimony of former First Assistant Attorney General King); see also N.T. 8-9-16, afternoon session, p. 103 (testimony of former Chief Deputy Attorney General Bruce Beemer).
[12] N.T. 8-10-16, afternoon session, pp. 97-98 (testimony of former First Assistant Attorney General King); see also N.T. 8-11-16, morning session, pp. 125-26, 128 (testimony of Joshua Morrow).
[13] N.T. 8-10-16, afternoon session, pp. 99 (testimony of former First Assistant Attorney General King).

Attorney General, Frank Fina, had leaked the information to the *Inquirer*.[14] Appellant had publicly stated her intention to conduct an internal review of Fina's handling of the Sandusky investigation during her campaign for the office of Attorney General, and the investigation was well under way by February of 2013.[15] In an email to a public relations consultant in reaction to the *Inquirer* article, she expressed her anger and indignation, not just on a personal level, but on behalf of the OAG as an institution, by declaring, "I will not allow them to discredit me or this office. ... This is war."[16]

Appellant undertook prompt, extensive action in anticipation of, and in reaction to, the *Inquirer's* reporting of the Ali investigation. First, knowing ahead of time that the *Inquirer* was going to report the investigation, and knowing that she and her office would ordinarily be prohibited by the Criminal History Record Information Act (CHRIA)[17] and the Investigating Grand Jury

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[14] N.T. 8-9-16, afternoon session, p. 103 (testimony of former Chief Deputy Attorney General Bruce Beemer); N.T. 8 10-16, afternoon session, p. 116 (testimony of former First Assistant Attorney General King); N.T. 8-11-16, morning session, p. 129 (testimony of Joshua Morrow).

[15] Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, ¶ 5 & n.3.

[16] N.T. 8-9-16, morning session, p. 42 (Montgomery County Detective Paul Bradbury, reading Commonwealth's exhibit 11-A in response to question during cross-examination).

[17] 18 Pa.C.S. §§ 9101-9183. Subject to exceptions not applicable to the facts of this case, CHRIA forbids disclosure of "protected information," such as investigative information, by any "criminal justice agency," which, as defined in CHRIA, includes the Attorney General. See 18 Pa.C.S. § 9102 (defining "criminal justice agency"); *id.* § 9106(a), (b) (listing investigative information in category of "protected information" and obligating criminal justice agency to keep investigative information in a manner that restricts access to authorized employees of agency); *id.* § 9106(c) (listing circumstances under which agency may disclose protected information); and *id.* § 9106(d) (prohibiting dissemination of protected information).

Act[18] from publicly discussing it, she obtained a judicial order giving her permission to disclose limited facts about the investigation in anticipation of inquiries from the press.[19]

Next, although the *Inquirer* published the story on a Sunday, she called most of her senior staff to a meeting in Harrisburg that very day.[20] She sought additional advice, by email, from a public relations consultant Sunday evening.[21] The next day, Monday, March 17, 2014, appellant, with her senior staff, held a press conference to answer questions about the Ali investigation.[22] In addition, within a day or two, then-First-Assistant-AG Adrian King[23] arranged a meeting between appellant and the *Inquirer* editorial board for March 20th. By the time of that meeting, appellant had retained a lawyer to represent her personal interests and answer questions the members of the board might ask her.[24] Weeks later, on April 10, 2014, she held another press

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[18] 42 Pa.C.S. §§ 4541-4553. The Act includes the Attorney General or her designee in its definition of "attorney for the Commonwealth," *id.* § 4542, and prohibits an attorney for the Commonwealth from disclosing matters occurring before an investigating grand jury absent permission or direction of the supervising judge, *id.* § 4549(b).

[19] N.T. 8-10-16, afternoon session, pp. 112-13 (testimony of former First Assistant Attorney General King).

[20] *Id.* at 99-100 (testimony of former First Assistant Attorney General King).

[21] N.T. 8-9-16, morning session, pp. 42-44 (Montgomery County Detective Paul Bradbury, reading and discussing Commonwealth's exhibit 11-A in response to cross-examination).

[22] N.T. 8-10-16, morning session, p. 52 (testimony of former Chief Deputy Attorney General Beemer); N.T. 8-10-16, afternoon session, p. 82 (testimony of Special Agent David Peifer); N.T. 8-10-16, afternoon session, p. 114 (testimony of former First Assistant Attorney General King).

[23] N.T. 8-10-16, afternoon session, p. 95 (testimony of former First Assistant Attorney General King).

[24] *Id.* at 100-102 (testimony of former First Assistant Attorney General King).

conference.[25]

B. The Mondesire investigation

On March 19, 2014, only days after the *Inquirer* published the article on the Ali investigation, Agent Michael Miletto of the Norristown office of the OAG contacted one of his supervisors, Special Agent David Peifer, to alert him about what Miletto feared would be the next news story to reflect adversely on the Attorney General's Office.[26] Miletto told Peifer about a long-discontinued investigation that had unexpectedly revealed allegations of illegal activities by someone other than the target: Jerome Mondesire, now deceased.[27] Mr. Mondesire was well known in the greater Philadelphia area: for 23 years he served as the publisher of the *Philadelphia Sun* newspaper; for nineteen years he hosted "Freedom Quest," a weekly public-affairs program on a Philadelphia-area radio station; for six years he had been a bi-weekly or monthly guest on "Inside Story," a weekly Philadelphia-area television show on local politics; he sat on the Pennsylvania Human Relations Commission;[28] and he served as the head of the local and state chapters of the NAACP.[29]

In 2008, Agent Miletto began receiving information that a woman named Harriet Garret, the director of "CUES," a philanthropic firm that operated a

[25] N.T. 8-10-16, morning session, p. 52 (testimony of former Chief Deputy Attorney General Beemer).
[26] N.T. 8-10-16, morning session, p. 147 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, pp. 44-45, 76 (testimony of Special Agent David Peifer).
[27] N.T. 8-10-16, afternoon session, p. 45 (testimony of Special Agent Peifer)
[28] N.T. 8-12-16, pp. 57-59 (testimony of Catherine Hicks).
[29] N.T. 8-10-16, afternoon session, p. 7 (testimony of former Deputy Attorney General William Davis); N.T. 8-12-16, p. 57 (testimony of Catherine Hicks).

"welfare-to work program," had taken state funds granted to CUES and spent them on herself on several occasions.[31] In that investigation, Miletto worked with former Deputy Attorney General William Davis.[31] Eventually, Agent Miletto and DAG Davis used a grand jury to investigate the suspected crimes.[32] Judge Barry Feudale presided over that grand jury,[33] which he had convened in Norristown, Montgomery County, Pennsylvania.[34]

Miletto testified that from the beginning, he and Davis found information that numerous other persons associated with Garrett were engaged in illegal activities.[35] Davis testified, "an individual named Jerry Mondesire, Jerome Mondesire, came to our attention" because he had employed Garrett at a newspaper and had run a corporate predecessor to CUES.[36] As Davis put it, a witness who appeared before the CUES grand jury accused Mr. Mondesire of making "questionable" uses of state grant funds.[37]

Davis lacked authority to use the CUES grand jury to investigate the

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[30] N.T. 8-10-16, morning session, p. 123 (testimony of Agent Miletto), N.T. 8-10-16, afternoon session, pp. 6-7 (testimony of former Deputy Attorney General Davis).
[31] N.T. 8-10-16, morning session, p. 126-27 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, pp. 6-7 (testimony of former DAG Davis).
[32] N.T. 8-10-16, morning session, p. 123-24 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, p. 7 (testimony of former DAG Davis).
[33] In re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 632–33 (Pa. 2015) (plurality decision) (opinion of Baer, J., concurring in the judgment) (footnote omitted).
[34] See Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, Exhibit "A," p. 1 (transcript of statement of former D.A.G. Frank Fina to Judge William R. Carpenter).
[35] N.T. 8-10-16, morning session, p. 125 (Agent Miletto testifying, "From the starting point, it shot off into different directions.").
[36] N.T. 8-10-16, afternoon session, pp. 7-8 (testimony of former DAG Davis).
[37] *Id.* at 9 (testimony of former DAG Davis) ; *id.* at 25.

accusations against Mr. Mondesire, so he sought permission to do so from his supervisor, Fina, who served at that time as the Chief of the Criminal Investigation Unit.[38] Davis emailed a legal memorandum (hereinafter, the "Davis memo") to Fina summarizing the accusations against Mr. Mondesire in the context of the CUES investigation.[39] In the memo, Davis expressly referred to facts obtained from grand jury testimony by Celestine Roger, Carol Lawrence, M.L. Werrecke and un-named former employees of CUES,[40] which supports Davis's trial testimony that his memo contained information he had learned from the grand jury proceeding.[41] After reviewing the Davis memo, Fina replied by email, "I like it. Thanks."[42]

At the time he drafted the memo, Davis was certain that if Mr. Mondesire had committed the acts of which he had been accused, the statute of limitations barred prosecution.[43] Davis's memo recommended several investigative methods for trying to discover whether Mr. Mondesire had committed more recent illegal acts for which he could be prosecuted. They included interviewing Mr. Mondesire and subpoenaing him to testify before the

[38] *Id.* at 9 (testimony of former DAG Davis).
[39] *Id.* at 9-10; N.T. 8-10-16, morning session, p. 127 (testimony of Agent Miletto). The Davis memo was admitted into evidence at trial as Exhibit C-6.
[40] Exhibit C-6, pp. 2-3.
[41] N.T. 8-10-16, afternoon session, pp. 9-10 (former DAG Davis answering "Absolutely, yes" when asked on direct examination, "And in terms of what is contained in this memo, does it contain information that you learned from the Grand Jury?").
[42] *Id.* at 11 (testimony of former DAG Davis).
[43] *Id.* at 22-23 (testimony of former DAG Davis) (stating, in regard to the barring of prosecution pursuant to the statute of limitations, "There definitely were issues. . .").

CUES grand jury,[44] but Fina never gave Davis permission to use those two particular methods.[45] Instead, he advised Davis to stay focused on the "original target" of the grand jury investigation,[46] Ms. Garrett. Davis himself emphasized that Mr. Mondesire "was not the subject of the investigation,"[47] and that by following Fina's advice, he succeeded in obtaining sufficient information to file charges and obtain convictions against Garrett and her daughter.[48]

Davis implied that the denial of authority to interview Mr. Mondesire or call him as a grand jury witness did not significantly impede his ability to investigate, because he anticipated that Mr. Mondesire would have been able to avoid being compelled to testify before the grand jury by invoking the Fifth Amendment of the United States Constitution.[49] Davis continued to investigate Mondesire by other means, such as subpoenaing documents,[50] interviewing other grand jury witnesses[51] and negotiating for information from Garrett after she was arrested, "but nothing ever came in terms of more evidence with Mr. Mondesire."[52] As Davis put it, "we were sort of at an impasse in terms of Mr.

[44] *Id.* at 22-23 (testimony of former DAG Davis).
[45] *Id.* at 26-27 (testimony of former DAG Davis).
[46] *Id.* at 26 (testimony of former DAG Davis).
[47] *Id.* at 31 (testimony of former DAG Davis).
[48] *Id.* at 17 (testimony of former DAG Davis).
[49] *Id.* at 27 (testimony of former DAG Davis).
[50] *Id.* at 8 (testimony of former DAG Davis).
[51] *Id.* at 26 (testimony of former DAG Davis).
[52] *Id.* at 27-28 (testimony of former DAG Davis).

Mondesire," and charges were never filed against him.[53]

C. Appellant learns of the Mondesire investigation

Agent Miletto had no personal knowledge of how the later stages of the Mondesire investigation unfolded because he had been transferred from the Norristown office of the Attorney General, and all of his cases, including the CUES and Mondesire investigations, were transferred to another agent.[54] Despite this lack of knowledge, Miletto assumed that, in the wake of the *Inquirer* story about the Ali investigation, the failure to charge Mondesire would reflect poorly on the Attorney General if reported in the press.[55] On March 19th or 20th of 2014, Agent Miletto gave Special Agent Peifer a copy of the Davis memo and other documents pertaining to the Mondesire investigation, "a stack of papers about a quarter-inch thick...."[56]

Special Agent Peifer then sought out appellant and told her that he had spoken by telephone with Agent Miletto, who "was concerned that the Mondesire case could be the next case that would be in the news...."[57] Special Agent Peifer then told appellant what he had learned. He explained, during direct examination,

> A. "I had talked to the Attorney General.
> Q. Okay.

[53] *Id.* at 27-28 (testimony of former DAG Davis)
[54] *Id.* at 8 (testimony of former DAG Davis).
[55] N.T. 8-10-16, morning session, p 147 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, pp. 44-45, 76 (testimony of Special Agent Peifer).
[56] N.T. 8-10-16, morning session, p. 131 (testimony of Agent Michael Miletto); N.T. 8-10-16, afternoon session, p 46 (testimony of Special Agent Peifer).
[57] N.T. 8-10-16, afternoon session, pp. 76-77 (testimony of Special Agent Peifer).

A. And made her aware of the concerns about that case becoming public. They were the concerns raised to me and the fact that the case was shut down by Frank Fina and no charges were ever filed. We weren't sure -- I wasn't really sure how that would have affected our office or this administration.
Q Did you get any direction from her?
A Just to find out what the details of that case were and to report back.[58]

More specifically, Peifer admitted on re-direct examination that he had been recorded while telling former Senior Deputy Attorney General Linda Dale Hoffa that appellant instructed him to interview Miletto in the presence of then-Chief Deputy Attorney General Bruce Beemer in order to "find out if Frank Fina shut this investigation down."[59]

Peifer ordered Miletto to come to the main office of the Attorney General in Harrisburg to meet with Peifer and Bruce Beemer,[60] who was then Chief of the Criminal Prosecution Section of the Attorney General's Office.[61] One may infer that the true purpose of the meeting was a secret between appellant and Peifer because Beemer had no more than a moment's notice of it. Peifer entered Beemer's office unannounced and asked him to accompany Peifer to a nearby conference room, to interview an agent he had never met before (Agent

[58] *Id.* at 47 (testimony of Special Agent Peifer).
[59] *Id.* at 86 (testimony of Special Agent Peifer). The prosecutor was able to ask that specific question on re-direct examination because defense counsel had asked, on cross-examination, "Agent Peifer, [appellant] didn't tell you go focus on Frank Fina, did she?" to which Special Agent Peifer replied, "Not specifically, no." *Id.* at 77.
[60] N.T. 8-10-16, morning session, pp. 131-32 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, pp. 46-47 (testimony of Special Agent Peifer).
[61] N.T. 8-9-16, afternoon session, p. 92 (testimony of former Chief DAG Beemer).

Miletto),[62] regarding an investigation about which he knew nothing (the CUES investigation),[63] a legal memorandum he had never seen before (the Davis memo),[64] and a person previously unknown to him (Mr. Mondesire).[65] Beemer stated, "At the time I didn't know anything. I didn't know who had been charged or what was going on."[66]

The meeting was brief[67]--the accusations against Mr. Mondesire were based upon events that occurred in 2004 and 2005,[68] Miletto told Beemer he believed that the statute of limitations would have barred the prosecution of Mr. Mondesire for his alleged conduct,[69] and Beemer quickly formed the same legal opinion.[70] Beemer began to surmise, however, that the point of the meeting was not to determine whether Mr. Mondesire could still be prosecuted, but whether incompetence or corruption lay at the root of the decision not to prosecute. He testified, "At the conclusion of the meeting it was clear that one of the purposes...was to let me know that certain individuals had not been charged and certain steps had not been taken with that case."[71] He did not enlist in the covert purpose underlying the meeting. Beemer testified, "there

[62] *Id.* at 105-06 (testimony of former Chief DAG Beemer).
[63] *Id.* at 109 (testimony of former Chief DAG Beemer).
[64] *Id.* at 108-09 (testimony of former Chief DAG Beemer).
[65] *Id.* at 110 (testimony of former Chief DAG Beemer).
[66] *Id.* at 109 (testimony of former Chief DAG Beemer).
[67] N.T. 8-10-16, morning session, p. 132 (Agent Miletto testifying, "Mr. Peifer brought me in to see Mr. Beemer regarding this case, and the discussion we had was rather brief. It wasn't long.").
[68] N.T. 8-9-16, afternoon session, p. 110 (testimony of former Chief DAG Beemer).
[69] N.T. 8-10-16, morning session, pp. 132 (testimony of Agent Miletto).
[70] N.T. 8-9-16, afternoon session, p. 110 (testimony of former Chief DAG Beemer).
[71] *Id.* at 109 (testimony of former Chief DAG Beemer).

was evidence that people in the office were well aware of the conduct" but "whether it was right for them to do nothing about it or not was immaterial to the fact that the statute of limitations would have long since expired on the actual conduct."[72] He ended the meeting by telling Peifer, "I just don't see where we're going to go with this, moving forward...."[73]

"Moving forward" apparently did not include public relations planning in anticipation that news of the Mondesire investigation would be leaked, in contrast to the way appellant and the OAG had handled the leak of the Ali investigation. The information gained from the investigation into the accusations against Mondesire, and even the fact that such an investigation existed, constituted "investigative information,"[74] the disclosure of which would have been unlawful under CHRIA[75] and the Investigative Grand Jury Act,[76] Nonetheless, appellant never asked Beemer to prepare a memo[77] to facilitate the preparation of a press release or public relations plan. Instead, unbeknownst to Chief DAG Beemer, Special Agent Peifer took another

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[72] *Id.* at 111 (testimony of former Chief DAG Beemer).
[73] *Id.* at 110 (testimony of former Chief DAG Beemer).
[74] See nn. 10, 11 *supra* and text accompanying notes.
[75] See N.T. 8-9-16, afternoon session, pp. 114, 118 and N.T. 8-10-16, morning session, p. 10-11 (Former Chief DAG Beemer opining that CHRIA prohibited disclosure of information in Davis memo and transcribed interview of Agent Miletto to press); see also n.17, *supra* and text accompanying note.
[76] See N.T. 8-9-16, afternoon session, pp. 113, 118 and N.T. 8-10-16, morning session, pp. 9-11, 27, 42 (former Chief DAG Beemer opining that Investigative Grand Jury Act prohibited disclosure of information in Davis memo and transcribed interview of Agent Miletto to press); see also n. 18, *supra*, and text accompanying note.
[77] N.T. 8-9-16, afternoon session, p. 113 (testimony of former Chief DAG Beemer).

statement from Agent Miletto,[78] this time audio-recording the statement over Miletto's objection.[79] Peifer had the recording transcribed by an administrative assistant, Wanda Scheib, using word-processing software.[80] Dissatisfied by the first draft, he had Ms. Scheib "eliminate the ahs and ums,"[81] ostensibly to make the transcript easier to read. Ms. Scheib made only one printed copy, which she gave to Peifer, and she did not distribute an electronic copy to anyone.[82]

Special Agent Peifer never gave Agent Miletto an opportunity to review the transcript (hereinafter, the "Miletto transcript") to confirm it was accurate.[83] In fact, Agent Miletto did not even learn his recorded statement had been transcribed until early June, when he was surprised and alarmed to read about it in a news story,[84] which will be discussed shortly. Miletto was surprised to see his statement disclosed to the public because it included information obtained during grand jury proceedings.[85]

Peifer delivered the sole copy of the transcript to appellant, who "paged through it" while Peifer orally briefed her on it following a senior staff meeting

[78] N.T. 8-10-16, afternoon session, pp. 47-48 (testimony of Special Agent Peifer); N.T. 8-10-16, morning session, pp. 133-34 (testimony of Agent Miletto).
[79] N.T. 8-10-16, morning session, pp. 134 (testimony of Agent Miletto).
[80] N.T. 8-10-16, afternoon session, pp. 48-49 (testimony of Special Agent Peifer); N.T 8-11-16, morning session, pp 50-52, 54 (testimony of Wanda Scheib). Copies of the transcribed interview were admitted into evidence at trial as the Commonwealth's Exhibits C-3 and C-4.
[81] N.T. 8-10-16, afternoon session, p. 49 (testimony of Special Agent Peifer).
[82] N.T. 8-11-16, morning session, pp. 50-52, 54 (testimony of Wanda Scheib).
[83] N.T. 8-10-16, morning session, pp. 136 (testimony of Agent Miletto).
[84] *Id.* at 137 (testimony of Agent Miletto).
[85] See Exhibits C-3 and C-4, pp. 2, 9, 23 and 24.

on March 22, 2014.[86] Later the same day, appellant asked her First Assistant AG Adrian King to deliver an envelope containing the Miletto transcript, the Davis memo and the emails between Davis and Fina regarding the memo, to a political consultant and friend of appellant, Joshua Morrow.[87] Appellant did not hand the envelope to King at that time; instead, shortly afterward, when King left his office for the day, he found what he assumed to be the envelope on the desk or on the table in his conference room.[88]

D. Appellant knew that disclosing the investigative information regarding Mondesire would violate CHRIA and the Grand Jury Act

Circumstantial evidence strongly suggests appellant knew that she could not lawfully disclose the information in the Davis memo and the two emails. Special Agent Peifer, who is not a lawyer, testified that he understood that CHRIA made it unlawful to disclose the information in the Davis memo and the two emails. Bruce Beemer, the former DAG who had previously served as an assistant district attorney, testified that among prosecutors, "[e]veryone was

[86] N.T. 8-10-16, afternoon session, pp. 49-51 (testimony of Special Agent Peifer); see also *id.* at 124 (former First Assistant Attorney General King testifying that the senior staff meeting in question was held March 22, 2014).

[87] See *id.* at 124-25 (former First Assistant Attorney General King testifying that appellant asked him after the senior staff meeting on March 22, 2014 to deliver a package to Joshua Morrow, and describing appearance of the package, which he found had been placed on his desk in his office by a person or persons unknown); see also N.T. 8-11-16, morning session, pp. 106-112 (Joshua Morrow testifying as to his occupation, his role as a political consultant for appellant during her campaign for office of attorney general and his personal friendship with appellant); *id.* at 154-61 (Joshua Morrow describing appearance of package and describing contents of package); N.T. 8-11-16, afternoon session, pp. 13-16 (Joshua Morrow describing contents of package).

[88] See N.T. 8-10-16, afternoon session, p. 125 (testimony of former First Assistant Attorney General King).

aware of this particular Act."[89] Appellant had served as an Assistant District Attorney in Lackawanna County before she was elected Attorney General of Pennsylvania, the top law enforcement officer of the state,[90] and her name appeared first on the frontispiece of the CHRIA handbook published by the OAG during her tenure.[91] When First-Assistant AG King objected that she had unlawfully disclosed information regarding the Ali investigation to her personal attorney, she replied, "I am well aware of the limitations of disclosing criminal files and the Wiretap Act. I have been in this business for quite some time."[92] Appellant was also aware of the legal prohibition against disclosure of grand jury information, having conducted a grand jury investigation as an assistant district attorney.[93] When her investigation ripened into a trial, she appeared as a witness and testified under oath, "for me to give out any information to somebody, who is not going into the grand jury, is actually a criminal offense."[94]

Having paged through the transcript while Special Agent Peifer briefed

[89] N.T. 8-9-16, afternoon session, p. 95 (testimony of former Chief DAG Beemer).
[90] N.T. 8-10-16, afternoon session, pp. 116 (testimony of former First Assistant Attorney General King).
[91] N.T. 8-9-16, afternoon session, pp. 30-31 (Montgomery County Detective Paul Bradbury answering questions about Commonwealth's Exhibit C 31).
[92] N.T. 8-10-16, afternoon session, pp. 110-12, 114-16 (former First Assistant Attorney General King reading Commonwealth's exhibit C-43 and answering questions regarding exhibit on direct examination).
[93] N.T. 8-12-16 p. 99 (testimony of William C. Costopoulos, Esquire reading from Commonwealth's Exhibit C-83, notes of appellant's testimony as a witness in the case of Commonwealth of Pennsylvania versus Judge Francis Eagen).
[94] *Id.* (testimony of William C. Costopoulos, Esquire reading from Commonwealth's Exhibit C-83, notes of appellant's testimony as a witness in the case of Commonwealth of Pennsylvania versus Judge Francis Eagen).

her on it,[95] appellant knew that its substance pertained to investigative information, some of it derived from a grand jury proceeding. Every fact in the Miletto interview and the Davis memo that could have been related to corruption or incompetence in the investigation of Mr. Mondesire was barred from disclosure by CHRIA and the Grand Jury Act. Nevertheless, appellant asked King to deliver the envelope containing the transcript and memo to Morrow.

Appellant's lawyer, during closing argument, drew a factual distinction between leaking the documents, which appellant denied, and leaking the information they conveyed:

> What she told Adrian King is, "we should put it out to the press, get the story out," *not leaking documents*, [but] ensuring that the press and the public understand that the decision not to pursue this investigation was made by the prior administration, and that the statute of limitations had now run.[96]

Her lawyer conceded only that appellant "told Adrian King to talk to Josh Morrow so they could get their story out. There's no dispute about that fact."[97] Her lawyer's interpretation of the evidence, even if believed, does not change the legal conclusion to be drawn: that appellant knowingly violated CHRIA and

[95] N.T. 8-10-16, afternoon session, pp. 49-51 (testimony of Special Agent Peifer); see also *id.* at 124 (former First Assistant Attorney General King testifying that the senior staff meeting in question was held March 22, 2014).
[96] N.T. 8-15-16, p. 53 (italics added). See also *id.* at 51-52 (defense counsel reading appellant's grand jury testimony in which she recounted telling King that "it's the public's right to know" about what Miletto had told Peifer about the Mondesire investigation); *id.* at 52 (defense counsel quoting appellant's grand jury testimony, "I then said, well, let's then put it out into the press, and we did.").
[97] N.T. 8-15-16, p. 22; at 51-52 (defense counsel reading, in closing statement, appellant's grand jury testimony that she told King that they should inform the public about the information Peifer gave her about the Mondesire investigation).

the Grand Jury Act. In her testimony before the Thirty-Fifth Statewide Investigating Grand Jury, appellant stated, "This is a pattern of non-prosecutions, and *this was somebody who could have been prosecuted* except for the lapse of time that had occurred. And we said that it's the public's right to know what is happening in the office...."[98] In this context, "somebody who could have been prosecuted" referred indirectly but specifically to only one person: Jerome Mondesire. Likewise, her lawyer's argument that appellant instructed King to publicize "the decision not to pursue *this investigation*" referred indirectly but specifically to the OAG's criminal investigation of Mr. Mondesire.

Appellant certainly did not intend to inform the public that former OAG lawyers, upon concluding "this investigation," either made a valid exercise of prosecutorial discretion in declining to prosecute, or properly declined to prosecute a person who could not have been lawfully prosecuted at all. The jury could reasonably infer that appellant chose the phrase "the public's right to know what's happening in the office" to refer to a right to information that suggested Mondesire had committed crimes but was not prosecuted by the preceding administration because of incompetence or corruption. Thus, even under her preferred interpretation, appellant admitted in her sworn testimony

[98] N.T. 8-9-16, afternoon session, pp. 15-16 (Detective Paul Bradbury reading from Commonwealth's exhibit C-29, notes of testimony of grand jury hearing before Judge William J. Carpenter, November 17, 2016) (italics added); N.T. 8-15-16 (defense counsel reading from Commonwealth's exhibit C-29, notes of testimony of grand jury hearing before Judge William J. Carpenter, November 17, 2016) (italics added).

before the Thirty-Fifth Statewide Investigating Grand Jury that she intended to disclose investigative information derived in part from a grand jury proceeding, in violation of CHRIA and the Grand Jury Act.

E. With the aid of King and Morrow, appellant carried out a plan to unlawfully disclose investigative grand jury information to the press

At approximately 5:00 p.m. on March 22, 2014, appellant contacted Morrow by telephone and, according to Morrow, "said that she wanted me to do her a favor, to give Adrian King a call, he had some documents that they wanted to get to a reporter."[99] Morrow continued,

> then I asked her what it was that I was getting, and she described a transcript from one of [the] agents...to another agent about an investigation into Jerry Mondesire and into his finances, and that Frank Fina...did the investigation, and that he then shut it down.[100]

Morrow was not surprised by appellant's request.[101] As with appellant, the March 16th *Inquirer* article portrayed Morrow as having participated in political corruption, and although it did not identify him by name,[102] he was upset because it identified him indirectly.[103] Appellant and Morrow had often commiserated over their negative portrayal in the *Inquirer* article,[104] and the two shared a strong animosity toward Fina, whom they regarded as its

[99] N.T. 8-11-16, morning session, pp. 133-34 (testimony of Joshua Morrow).
[100] *Id.* at 134-35 (testimony of Joshua Morrow).
[101] *Id.* at 135 (testimony of Joshua Morrow).
[102] *Id.* at 126-27 (testimony of Joshua Morrow).
[103] *Id.* at 128-29 (testimony of Joshua Morrow).
[104] *Id.* at 135 (testimony of Joshua Morrow).

source.[105] Morrow's testimony suggested that fate had provided them a unique opportunity to achieve a rough parity with Fina by leaking the documents to the press "to show that Frank Fina shut down [the Mondesire] investigation, the same way Kathleen shut down the investigation with the [Ali] sting."

Although Morrow was not surprised by appellant's request,[106] he was distressed by it because she was asking him to leak the information about the Mondesire investigation before they had given sufficient forethought to integrating the leak into a strategic public relations plan.[107] Nonetheless, he agreed to do as she asked.[108] He telephoned King, arranged to retrieve the envelope from King's home,[109] and then retrieved it the next morning, March 23, 2014, as planned.[110] After reading the documents that day, Morrow communicated with appellant by text message to subtly acknowledge their receipt.[111]

At appellant's suggestion, Morrow redacted the documents to obscure most names except Fina's,[112] but he delayed delivering them to a newspaper

[105] *Id.* at 128-29 (testimony of Joshua Morrow); N.T. 8-11-16, afternoon session, p. 17 (testimony of Joshua Morrow).
[106] *Id.* at 135 (testimony of Joshua Morrow).
[107] *Id.* at 148 (testimony of Joshua Morrow); see also Exhibit C-57, pp. 3, 4-5, 6 (transcript of wiretapped recording of Morrow speaking to friend by telephone in evening of March 22, 2014)
[108] N.T. 8-11-16, morning session, p. 135 (testimony of Joshua Morrow).
[109] *Id.* at 135-38, 152-53 (testimony of Joshua Morrow); see also N.T. 8-10-16, afternoon session, pp. 126-28, 152-53 (testimony of former First Assistant Attorney General King).
[110] *Id.* at 153-54 (testimony of Joshua Morrow).
[111] *Id.* at 161 (testimony of Joshua Morrow); N.T. 8-11-16, afternoon session, pp. 7-9 (testimony of Joshua Morrow).
[112] N.T. 8-11-16, afternoon session, pp. 16-19 (testimony of Joshua Morrow). Adrian

reporter because he was busy working as a consultant on a political campaign.[113] On Sunday, May 4, 2014, he gave the documents to Christopher Brennan, a reporter for the Philadelphia *Daily News*.[114] The next day, Morrow and appellant texted in a thinly-disguised manner about his delivery of the package to a reporter for the *Daily News*, about now they would soon enjoy revenge because it was "time for Frank to feel the [heat]."[115] "Best be able to deny," he wrote, "Just keep this between us," to which appellant replied, "I won't tell anyone."[116] Morrow and appellant texted each other frequently in impatient anticipation of the article[117] until it was published Friday, June 6, 2014.[118]

F. Appellant's immediate reaction to the publication of the Mondesire information shows consciousness of guilt

Among the most inculpating evidence in this case is the inference to be drawn from the contrast between appellant's reaction to the publication of the Mondesire information when compared to the reactions of Agent Miletto, Special Agent Peifer and Chief DAO Beemer. Miletto, Peifer and Beemer

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King steadfastly denied knowing the envelope contained the Davis memo, and denied that he knowingly participated in the leak, but on the same night King agreed with appellant to give an envelope to Morrow, Morrow told a friend during a telephone conversation that was fortuitously recorded as part of an unrelated criminal investigation--that King told him to redact names from the documents inside the envelope. See Exhibit C-57, p. 3 (transcript of wiretapped recording of Morrow speaking to friend by telephone in evening of March 22, 2014).

[113] N.T. 8-11-16, afternoon session, pp. 9, 40 (testimony of Joshua Morrow).

[114] *Id.* at 12-13 (testimony of Joshua Morrow).

[115] *Id.* at 22-25 (testimony of Joshua Morrow).

[116] *Id.* at 24-25 (testimony of Joshua Morrow).

[117] *Id.* at 30-34, 39-41, 43-44 (testimony of Joshua Morrow).

[118] *Id.* at 40 (testimony of Joshua Morrow).

regarded the *Daily News* article as evidence of a "leak" by someone in the OAG.[119] Miletto was angry that a transcript of his interview had been leaked; Peifer was anxious that he would be suspected of being the source of the leak; and Beemer supported internal and external investigations of the leak. In contrast, appellant did not express anger or indignation like Miletto; she did not express suspicion of Peifer or anyone else; nor did she support any investigation like Beemer. Appellant's reaction to the leak of the Mondesire investigation was the opposite of her angry, indignant, suspicious reaction to the Ali investigation.

When the investigative information regarding Mondesire was published in the *Daily News* on Friday, June 6, 2014, Agent Miletto was so "angry that this taped statement, that was supposed to be used for notes, wound up in the newspaper " and so "very concerned" about the publication of grand jury information, that he confronted Special Agent Peifer about it that morning.[120] Special Agent Peifer was also quite unhappy that portions of Miletto's statement had been published in the *Daily News* because it included information derived from a grand jury proceeding.[121] One may infer his

[119] See N.T. 8-10-16, morning session, pp. 24, 25 (testimony of former Chief DAG Beemer); *id.* at 138 (testimony of Agent Miletto); N.T. 8-10-16, afternoon session, pp. 58, 60 (testimony of Special Agent Peifer).
[120] N.T. 8-10-16, morning session, p. 135 (testimony of Agent Miletto); see also N.T. 8-10-16, afternoon session, p. 57 (Special Agent Peifer testifying that Agent Miletto was unhappy with the publication of "the statement I took from Miletto.").
[121] N.T. 8-10-16, afternoon session, pp. 57-58 (Special Agent Peifer testifying, "I was pissed, to say the least."); see also *id.* at 129-130 (former First Assistant Attorney General King testifying that Special Agent Peifer came to see him June 9th or 10th,

perception of the gravity of the situation from the fact that he immediately contacted both appellant and Senior DAG Linda Dale Hoffa to tell them, "I didn't leak that statement."[122] Significantly, having already testified that he left the sole printed copy of the statement in front of appellant, Peifer testified that he told Hoffa, "Linda, I only left that statement in one location."[123]

When Peifer reached appellant by telephone later that day, her response was very revealing. He testified,

> I wanted her to know that I didn't leak that document. That, you know, I don't know how it got there, but I did not leak it. I wanted to make sure she was aware of that. It's attributed to me, I had control of that. You know, I explained to her that that had Grand Jury information in it, it shouldn't have been in the paper, that kind of thing. And her response was that "I would never suspect you of leaking that document. Don't worry about it."[124]

More revealing still was the series of conversations about the article between Chief DAG Bruce Beemer and appellant. On the day the *Daily News* ran the story of the Mondesire investigation, Beemer called appellant around noon, told her the situation was "a problem" and asked permission to begin an internal investigation into the leak.[125] Beemer explained at length why he believed the leak could only have come from within the OAG.[126] That being the case, he thought "it was incumbent upon" the OAG to undertake either an

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2014, because he was "confused" and "upset" about the publication of the Mondesire investigation in the *Daily News* article).

[122] N.T. 8-10-16, afternoon session, p. 58 (testimony of Special Agent Peifer).

[123] *Id.* (testimony of Special Agent Peifer).

[124] *Id.* at 60 (testimony of Special Agent Peifer).

[125] N.T. 8-10-16, morning session, pp. 18, 31-32 (testimony of former Chief DAG Beemer).

[126] *Id.* at 18-25 (testimony of former Chief DAG Beemer).

internal investigation or a grand jury investigation.[127] Beemer was surprised by appellant's response: "don't worry about it, it's not a big deal, we have more important things to do."[128]

Not long after, Beemer learned that Judge William R. Carpenter of the Montgomery County Court of Common Pleas had convened the Thirty-Fifth Statewide Investigating Grand Jury to investigate the leak.[129] The news left him feeling "relieved" because he "thought it would have been difficult for us to conduct our own inquiry," given that the leak had come from within the OAG.[130] He believed that the grand jury information would "send message to our office...that this stuff gets taken seriously, if you're going to release information out of the office, that someone is going to do something about it."[131] Before the month of June was out, Beemer spoke to Judge Carpenter by telephone and assured him that "he would have the complete cooperation of the Attorney General's Office" and that the members of the leadership team "understood that this was a serious issue...."[132]

In contrast, appellant wished to frustrate the grand jury investigation: in a telephone conversation with Beemer on July 28th, she told him she wanted him to file a motion, either with Judge Carpenter or the Supreme Court of Pennsylvania, challenging the lawfulness of Judge Carpenter's decision to

[127] *Id.* at 19 (testimony of former Chief DAG Beemer).
[128] *Id.* at 18-19 (testimony of former Chief DAG Beemer).
[129] *Id.* at 29-30 (testimony of former Chief DAG Beemer).
[130] *Id.* at 30 (testimony of former Chief DAG Beemer).
[131] *Id.* at 30 (testimony of former Chief DAG Beemer).
[132] *Id.* at 31, 33 (testimony of former Chief DAG Beemer).

appoint a special prosecutor to conduct the grand jury investigation of the leak.[133] Appellant then argued that the leak did not include grand jury information, making so many specific references to the Davis memo that Beemer believed she was reading directly from it.[134] It was entirely possible that she was reading the memo at the time, as Special Agent Peifer testified that only three days before, on July 25th, appellant had ordered him to email her another copy of the Davis memo, and he and another employee, Gabriel Stahl, testified that they did so.[135]

After Beemer voiced disagreement that the leak did not include grand jury information, appellant argued that the special prosecutor lacked lawful authority to investigate because it was still unknown whether the person who leaked the information had taken an oath to keep the grand jury information secret.[136] Beemer explained to her that whether that person had taken such an oath did not affect whether the Grand Jury Act forbade him or her from disclosing the information, and that in any event, one could not know whether that person was sworn to secrecy without conducting the very investigation she wanted to thwart.[137] During another conversation with appellant in October, Beemer expressed disagreement when appellant objected to having some of the

[133] *Id.* at 35-39, 67 (testimony of former Chief DAG Beemer).
[134] *Id.* at 40-42 (testimony of former Chief DAG Beemer).
[135] N.T. 8-10-16, afternoon session, pp. 63-66 (testimony of Special Agent Peifer); N.T 8-12-16, pp. 42-44, 46 (testimony of Gabriel Stahl).
[136] N.T. 8-10-16, morning session, pp. 42-43 (testimony of former Chief DAG Beemer).
[137] *Id.* at 43-44 (testimony of former Chief DAG Beemer).

Deputy Attorneys General serving grand jury subpoenas on others.[138] He testified that she replied, "Bruce, if I get taken out of here in handcuffs, what do you think my last act will be?"[139]

Appellant's lack of public relations management of the Mondesire article in the *Daily News* contrasts sharply with her management of the *Inquirer* article about the Ali investigation. As with the article about the Ali investigation, appellant knew in advance that an article on the Mondesire investigation would appear in the press.[140] Appellant's senior communications staff, First Assistant AG King and Special Agent Peifer had also received advance notice of the news story, either from the author himself or indirectly.[141] Despite this notice, the record includes no evidence that appellant obtained a judicial order to allow anyone in the office to discuss investigative grand jury information with the press, retained a public relations consultant, met with the editorial board of the *Daily News*, hired a lawyer to mediate between herself and the board, or instructed her communications staff how to respond to press inquiries regarding the Mondesire investigation. In the

[138] *Id.* at 46, 70 (testimony of former Chief DAG Beemer).
[139] *Id.* at 46-47 (testimony of former Chief DAG Beemer).
[140] In addition to Morrow's testimony about his conversations with appellant regarding the publication of the article, see N.T. 8-15-16, pp. 51-52 (defense counsel, in closing argument, reading appellant's grand jury testimony in which she recounted telling King that "it's the public's right to know" about what Miletto had told Peifer about the Mondesire investigation); *id.* at 52 (defense counsel quoting appellant's grand jury testimony, "I then said, well, let's then put it out into the press, and we did.").
[141] See Commonwealth's trial exhibit C-11-b (copies of emails between author, Chris Brennan and Special Agent Peifer, and among Peifer and communications staff); see also N.T. 8-15-16, pp. 72-73 (defense counsel, in closing argument, referring to hearsay evidence in exhibit C-11-b, indicating King had advance notice of article).

absence of any guidance from appellant, her communications director sought advice from Beemer, King and Peifer instead.[142] The reason for the sharp contrast in appellant's handling of the *Daily News* article as compared with the *Inquirer* article is readily inferable from the evidence of record. Appellant was, in her own words, "well aware of the limitations of disclosing criminal files,"[143] hence she would have realized that CHRIA and the Grand Jury Act prohibited her from disclosing each of the facts contained in the Miletto interview and the Davis memo, or even revealing the existence of the CUES grand jury or the investigation into Mondesire.

G. Appellant and Morrow conspire to give false grand jury testimony

After the publication of the *Daily News* article on June 6, 2015, Morrow did not see appellant until August, when they met for lunch in Philadelphia.[144] On previous occasions, Morrow would simply meet appellant at a restaurant, so he thought it "a little odd" when her personal security chief, Special Agent Patrick Reese, telephoned and told Morrow to meet him at the corner of 16th and Locust Streets at noon.[145] Reese arrived at noon in a vehicle driven by another man.[146] They did not drive Morrow to a restaurant, but to a parking

[142] See N.T. 8-10-16, morning session, pp. 12-14, 26-28 (testimony of former Chief DAG Beemer); N.T. 8-10-16, afternoon session, p. 59 (testimony of Special Agent Peifer); *id.* at 129 (testimony of former First Assistant Attorney General King).
[143] *Id.* at 110-12, 114-16 (former First Assistant Attorney General King reading Commonwealth's exhibit C-43 and answering questions regarding exhibit on direct examination).
[144] N.T. 8-11-16, afternoon session, pp.46-47 (testimony of Joshua Morrow).
[145] *Id.* at 47 (testimony of Joshua Morrow).
[146] *Id.* at 47-48 (testimony of Joshua Morrow).

garage.[147] Having thus outnumbered and isolated Morrow, Reese demanded his cell phone, keys and wallet[148] and ordered Morrow out of the vehicle.[149] Reese "wanded" Morrow to confirm he was not wearing a microphone and a recording or transmitting device.[150] The three then drove to the Bellevue Hotel, where Morrow had lunch with appellant while Reese lurked at another table.[151] Although Reese's actions had the immediate objective of preventing electronic eavesdropping, the jury could infer that they also served to set the tone for the luncheon by intimidating Morrow, revealing to him his physical vulnerability.

Appellant apologized for "the security detail," explaining that it was "a new security protocol."[152] Morrow soon learned why appellant would have instituted a new protocol that involved searching persons for hidden microphones: appellant told Morrow "there was a grand jury investigation into the Mondesire leak."[153] She tried to reassure him that he would not be subpoenaed to testify before the grand jury, telling him, "They're after me."[154] Nonetheless, Morrow was concerned that he would be required to testify, and he told her indirectly that if subpoenaed, he would testify that when King had given him the documents, he had been acting on his own, without any

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[147] *Id.* (testimony of Joshua Morrow).
[148] *Id.* (testimony of Joshua Morrow).
[149] *Id.* at 48-49 (testimony of Joshua Morrow).
[150] *Id.* (testimony of Joshua Morrow).
[151] *Id.* at 49-50 (testimony of Joshua Morrow).
[152] *Id.* at 50 (testimony of Joshua Morrow).
[153] *Id.* (testimony of Joshua Morrow).
[154] *Id.* (testimony of Joshua Morrow).

involvement by appellant.[155]

Morrow next met appellant near her home in Dunmore, Pennsylvania in October.[156] The two arranged to meet in a public park, but when he arrived, no one was there.[157] Reese arrived, drove Morrow to Reese's home, took his wallet, cell phone and keys, and "wanded" him.[158] As before, the jury could infer that Reese's actions served to isolate and intimidate Morrow. When Morrow finally met appellant at the park, she appeared "kind of frantic" and pleaded, "I need help, I need help, I need someone to help me."[159] Morrow arranged for appellant to meet a lawyer, Dion Rassias, Esquire, in Philadelphia later in October.[160] Morrow was present at the meeting, as was Reese, who "wanded" Rassias's office to confirm the absence of concealed microphones.[161] Notably, on this occasion, with appellant and Rassias present, Reese did not demand the wallets, keys or cell phones of anyone, including Morrow.[162] In a number of conversations afterward, Morrow and appellant "reiterated the lie" (i.e., that appellant had never seen the documents, but had merely told Morrow to call King)[163] and discussed their testimony before the grand jury.[164]

[155] *Id.* at 50-52 (testimony of Joshua Morrow).
[156] *Id.* at 52-53 (testimony of Joshua Morrow).
[157] *Id.* at 54 (testimony of Joshua Morrow).
[158] *Id.* (testimony of Joshua Morrow).
[159] *Id.* (testimony of Joshua Morrow).
[160] *Id.* at 56 (testimony of Joshua Morrow).
[161] *Id.* at 57 (testimony of Joshua Morrow).
[162] *Id.* (testimony of Joshua Morrow).
[163] *Id.* at 63-64 (testimony of Joshua Morrow).
[164] *Id.* at 68-81 (testimony of Joshua Morrow).

H. Appellant gives false testimony before the grand jury

On November 17, 2014, appellant testified before the Thirty-Fifth Statewide Investigating Grand Jury. The purpose of the grand jury was to investigate an unlawful leak of investigative information from the OAG. During the course of her testimony, appellant falsely denied, multiple times, having intentionally participated in causing the leak of the Mondesire investigation. When asked whether she gave King a package to give to Morrow, and whether she had anyone else prepare such a package, appellant answered "no" to each question, even though the circumstantial evidence of record is sufficient to prove the answer to all of those questions should have been "yes."[165] Similarly, when asked how King got the documents, she testified that she did not know,[166] and when asked whether she had talked with Josh Morrow about the supposed plan she made with King to publicize the "pattern of nonprosecutions," she admitted only that she had said, "Josh, Adrian wants you to call him."[167] When appellant was shown a copy of the Davis memo, she stated under oath five times that she was not familiar with it and had never seen it before.[168] When asked whether she read the *Daily News* article, she stated that she had not read it until August, 2014. When asked whether "the

[165] Commonwealth's Exhibit C-30, p. 37; N.T. 8-9-16, afternoon session, pp. 14-15 (Detective Paul Bradbury reading exhibit).
[166] Commonwealth's Exhibit C-30, p. 31; N.T. 8-9-16, afternoon session, p. 17 (Detective Paul Bradbury reading exhibit).
[167] Commonwealth's Exhibit C-30, p. 29; N.T. 8-9-16, afternoon session, p. 17 (Detective Paul Bradbury reading exhibit).
[168] Commonwealth's Exhibit C-30, pp. 13, 14, 35; N.T. 8-9-16, afternoon session, pp. 12-14 (Detective Paul Bradbury reading exhibit).

release of this information to the press had nothing to do with the release of any information that went out on Ali around the same time" she answered, "Not from me, no."[169]

Appellant stated four times that she had not sworn an oath of secrecy regarding the grand jury investigating Harriet Garret and CUES.[170] The Commonwealth produced a copy of a secrecy oath she signed, on her first day in office, regarding the first through the thirty-second statewide investigative grand juries, which included the one at issue.[171] The Commonwealth also produced a plethora of circumstantial evidence that appellant would have remembered signing the oath when she testified. First, the Commonwealth produced copies of four other statewide investigative grand jury secrecy oaths she signed on the same day, at the same time.[172] Next, the Commonwealth produced the sworn testimony of Wanda Scheib, who described her detailed memory of appellant signing the oaths, which Scheib had notarized.[173] Special Agent Peifer and former First Assistant AG King gave similar testimony.[174] Finally, the Commonwealth produced the sworn testimony of Senior Supervisory Special Agent Robert Speicher, who also described his detailed

[169] Commonwealth's Exhibit C-30, p. 84; N.T. 8-9-16, afternoon session, p. 19 (Detective Paul Bradbury reading exhibit).
[170] Commonwealth's Exhibit C-30, pp. 8-9, 44 and 56; N.T. 8-9-16, afternoon session, pp. 21-23 (Detective Paul Bradbury reading exhibit).
[171] Commonwealth's Exhibit C-18-A.
[172] Commonwealth's Exhibits C-18-B, C and D.
[173] N.T. 8-11 16, morning session, pp. 61-64 (testimony of Wanda Scheib).
[174] N.T. 8-10-16, afternoon session, p. 40 (testimony of Special Agent Peifer); *id.* at 97-98 (testimony of former First Assistant Attorney General King).

memory of the event.[175] In response to this evidence, defense counsel cross-examined former Chief DAG Beemer, who admitted that he did not recall having signed any of the foregoing secrecy oaths, and that he had signed a second secrecy oath for the Thirty-Fifth Statewide Investigating Grand Jury, possibly because he had forgotten he had already signed one.[176]

J. Mondesire sustains damage to his reputation and ability to pursue happiness

Catherine Hicks had been engaged to marry Mr. Mondesire when the *Daily News* publicized the accusations that had been made against him during the CUES grand jury investigation.[177] She had known him for fifteen years by that time.[178] On the morning of June 6, 2014, when the *Daily News* broke the story, Mr. Mondesire telephoned Ms. Hicks to tell her the news.[179] She described him as "very, very upset."[180] He had never been arrested based on the accusations made during the CUES investigation; in fact, he had never been arrested in his life, so he "didn't understand why his name was included in that."[181]

Because of his outgoing personality and service to the community by way of the NAACP and the Pennsylvania Human Relations Commission, and by

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[175] N.T. 8-11-16, morning session, pp. 79-83 (testimony of Senior Supervisory Special Agent Robert Speicher).
[176] N.T. 8-10-16, morning session, pp. 72-77, 95-101 (testimony of former Chief DAG Beemer).
[177] N.T. 8-12-16, p. 54 (testimony of Catherine Hicks).
[178] *Id.* (testimony of Catherine Hicks).
[179] *Id.* at 61 (testimony of Catherine Hicks).
[180] *Id.* at 62 (testimony of Catherine Hicks).
[181] *Id.* (testimony of Catherine Hicks).

reason of his role as publisher of the *Sun* and as a television and radio personality, Mr. Mondesire was frequently invited to civic, community and social events in the Philadelphia area, and he wholeheartedly enjoyed attending them.[182] That changed after the *Daily News* publicized the accusations made during the CUES investigation. Ms. Hicks recounted, "a lot of the things that he had been doing, he was not able to do anymore, because this story made it seem like he had some type of cloud of impropriety...over him."[183] For example, before the *Daily News* published the story, Mr. Mondesire had been a regular guest on "Inside Story," a weekly television show on Philadelphia politics.[184] Mr. Mondesire "absolutely loved" appearing on the show because he believed "it made a difference."[185] After the story ran, Ms. Hicks explained, "he was asked not to be on 'Inside Story' anymore, because...once *you* are the story, it's hard for you to be on programs...because then *you* become the subject. Everybody is looking at you, and it takes away from what you may be trying to cover."[186] Regarding civic and social events, she testified,

> We didn't go out like we had previously done, because it -- he wasn't comfortable. It was -- he just was a different person. This figure that was always outgoing, outspoken, fighting for everybody...all of the places that he would go and usually be the voice, he would -- he wasn't doing that anymore, and I think it took a toll on him physically, because he internalized a lot of the hurt and the embarrassment, and it just took a toll.

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[182] *Id.* at 60-61 (testimony of Catherine Hicks).
[183] *Id.* at 65 (testimony of Catherine Hicks).
[184] *Id.* at 57-58 (testimony of Catherine Hicks).
[185] *Id.* at 65 (testimony of Catherine Hicks).
[186] *Id.* at 63-64 (testimony of Catherine Hicks) (italics added to indicate witness's tone of voice during testimony).

Before the *Daily News* story ran, Mr. Mondesire had successfully coped with chronic high blood pressure and kidney problems[187] while maintaining an extended daily schedule: he awoke at 5:30 a.m.; was at his desk at the *Sun* by 7:00 a.m.; and remained "extremely busy" until 11:00 p.m. or midnight most days.[188] After the story ran, Ms. Hicks said, "he had been hospitalized a couple of times. He had a heart attack, a mild heart attack, and then his kidneys started failing.[189] On October 4, 2015, Mr. Mondesire died.[190] He and Ms. Hicks had been engaged to be married in May of 2016.[191]

J. Fina reports the leak of the Mondesire investigative information to supervising judge of the Thirty-fifth Statewide Investigating Grand Jury and the Montgomery County District Attorney charges appellant

By letter dated May 8, 2014, Fina contacted Judge Carpenter,[192] who presided over the Thirty-Fifth Statewide Investigative Grand Jury in Norristown, Montgomery County, Pennsylvania.[193] In the letter, Fina stated he had received information that confidential grand jury information had been leaked, and asked to meet with Judge Carpenter to give him more detailed information about the leak.[194] On May 12, 2014, Fina met Judge Carpenter,

[187] *Id.* at 65 (testimony of Catherine Hicks).
[188] *Id.* at 60 (testimony of Catherine Hicks).
[189] *Id.* at 65-66 (testimony of Catherine Hicks).
[190] *Id.* at 54-55 (testimony of Catherine Hicks).
[191] *Id.* at 56 (testimony of Catherine Hicks).
[192] Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, ¶ 14 & Exhibit "B."
[193] In re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 633 (Pa. 2015) (plurality decision) (opinion of Baer, J., concurring in the judgment).
[194] *Id.*

told him he suspected someone within the OAG had leaked investigative information obtained by the 2009 grand jury, and suggested that Judge Carpenter appoint a special prosecutor to investigate the leak.[195] Judge Carpenter

> determined that there were reasonable grounds to believe an investigation should be conducted to determine the source of the 2014 leaks of the secret testimony from the 2009 Feudale grand jury. To this end, he appointed Thomas E. Carluccio as a "special prosecutor" to conduct an investigation into contempt incident to any grand jury secrecy leak and crimes related thereto, and provided Mr. Carluccio with expansive prosecutorial powers.[196]

"The work of the Special Prosecutor culminated in a grand jury presentment recommending the filing of criminal charges against Attorney General Kane."[197] Months later, the Montgomery County District Attorney commenced these actions by filing charges against appellant.[198] The District Attorney tried appellant before a jury and obtained guilty verdicts. After appellant was sentenced, she filed the instant appeal.

III. DISCUSSION

This opinion will address the claims of error in the order raised by appellant in her Statement of Errors. Because claims four, five and six are based upon common concepts, they will be addressed as a group. The

[195] Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, ¶¶ 15-17 & Exhibit "A."
[196] *In re Thirty-Fifth Statewide Investigating Grand Jury* at 633 (opinion of Baer, J., concurring in the judgment).
[197] *Id.* at 625 (Opinion Announcing the Judgment of the Court).
[198] Motion of Attorney General Kathleen G. Kane to Quash Based on Selective and Vindictive Prosecution, ¶ 23.

discussion of each claim or group of claims will summarize the allegation of error in the Statement and recite such supplemental facts as are material to its disposition on appeal.

A. Claim one, Denial of appellant's pretrial motion to recuse all judges of the Montgomery County Court of Common Pleas

The explanatory text in appellant's Statement is substantially similar to the issue raised in her omnibus pretrial motion. Appellant's statement alleges, "The motion requested recusal of all judges of the Montgomery County Court of Common Pleas, based on the fact that Judges William R. Carpenter, Carolyn T. Carluccio and Risa Vetri Ferman were all directly or closely connected to the case."[199] In her memorandum in support of this pretrial motion, appellant alleged, "***Three*** judges on the Montgomery County bench--Judge William R. Carpenter, Judge Carolyn Tornetta Carluccio (through her husband) and Judge Risa Vetri Ferman--have close ties to the investigation and prosecution of Attorney General Kane, and a clear interest in the outcome of this case."[200] No facts of record indicate that Judges Carpenter, Carluccio or Ferman had a financial interest in the case. Appellant's argument seems to be based upon the notion of a purely emotional bias or partiality.

In her pretrial motion, appellant did not claim that the undersigned judge was disqualified from deciding her motion for recusal, and her Statement does not raise that claim. Because her failure to raise that as an issue in the

[199] Statement, p. 1, claim one.
[200] Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 2 (bold and italic typeface in original).

court below bars her from arguing it on appeal,[201] the undersigned will refrain from addressing it. This section will focus exclusively on the issue raised: whether the undersigned erred by denying appellant's motion for an order recusing the entire bench of the Montgomery County Court of Common Pleas.

1. Supplemental facts

The Montgomery County District Attorney filed criminal charges against appellant, Attorney General Kathleen G. Kane, after the Thirty-Fifth Statewide Investigating Grand Jury returned a presentment recommending that charges be filed against her.[202] The District Attorney who filed those charges was Risa Vetri Ferman, who only months later was elected a judge of the Montgomery County Court of Common Pleas, and was inaugurated in that office approximately eight months before these actions went to trial.[203] After charges were filed, then-D.A. Ferman stated at a press conference that "Attorney General Kathleen Kane devised a scheme to secretly leak confidential investigative information and secret grand jury materials...."[204]

Shortly after charges were filed against appellant in these actions, she filed a *quo warranto* action in the Supreme Court of Pennsylvania, asking the Court to quash the appointment of a special prosecutor by Judge Carpenter,[205]

[201] Pa.R.A.P. 302(a).
[202] Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 5.
[203] *Id.*
[204] *Id.*
[205] In re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 625 (Pa. 2015) (plurality decision) (opinion announcing the judgment of the court) ("Through the filing

who presided over the Thirty-Fifth Statewide Investigating Grand Jury. Judge Carpenter filed an opinion and a supplemental opinion, which the justices considered as part of the record in that action.[206] Appellant alleged, "Judge Carpenter's Supplemental Opinion, dated February 18, 2015"--a date that had passed before the District Attorney made an independent decision to file criminal charges against appellant--"exposed his emotionally-charged partisan support of Attorney General Kane's prosecution, and his personal animus toward her."[207] Appellant did not explain how Judge Carpenter's support was "partisan," and given the lack of any evidence of record suggesting that political party affiliations had anything to do with the filing of the charges in these cases, the context suggests she meant to state Judge Carpenter was not acting impartially. In support of her claim of personal animus, she quotes a paragraph from Judge Carpenter's supplemental opinion, the last sentence of which states, "Frankly, these crimes and criminal contempt would not have been uncovered in any way other than the path that I took."[208] That sentence, even the entire quotation, does not establish personal animosity, although they suggest that Judge Carpenter concluded, based upon the evidence known to

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of an action in *quo warranto*, Pennsylvania Attorney General Kathleen G. Kane has asked this Court to quash the appointment of a special prosecutor investigating violations of grand jury secrecy requirements"].

[206] See *id.* at 627 (opinion announcing the judgment of the court) (discussing supplemental opinion of supervising judge).

[207] Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 4.

[208] *Id.* at 5.

him by way of the grand jury proceeding, that the Attorney General committed criminal and contumacious acts.

Judge Carpenter had appointed Thomas E. Carluccio, Esquire, to serve as "special prosecutor" in the Thirty-Fifth Statewide Investigating Grand Jury proceeding. At that time Mr. Carluccio was (and remains) the husband of Judge Carolyn T. Carluccio of the Montgomery County Court of Common Pleas. Appellant characterized Mr. Carluccio's attitude toward her as "staunchly adversarial."[209]

2. Conclusions of law

In terms of the rule or standard applicable to a demand for recusal, the Supreme Court of Pennsylvania has explained,

> It has often been stated that a trial judge should avoid not only impropriety but also the appearance of impropriety. However, in the cases wherein the issue has been considered, the trial judge has had either a pecuniary interest in the controversy or a consanguineal relationship with a party to the litigation.[210]

In these actions, none of the judges of the Montgomery County Court of Common Pleas had a financial interest in the outcome of these actions or consanguinity with a party. Therefore, the undersigned judge correctly denied appellant's motion for recusal.

[209] *Id.* at 3.

[210] Commonwealth v. Perry, 364 A.2d 312, 317 (Pa. 1976). *Cf.* Commonwealth v. Orie-Melvin, 103 A.3d 1 (Pa. Super. Ct. 2014) (affirming order denying appellant's motion for recusal of entire bench of Allegheny County Court of Common Pleas on grounds that: (a) defendant was former judge of same court; and (b) colleague of judge trying appellant's case was married to appellant's former judicial law clerk).

In support of her claim that the entire Montgomery County bench is disqualified from presiding over her criminal charges, appellant cited *Lomas v. Kravitz*[211] and *Commonwealth ex rel. Armor v. Armor*.[212] Besides being non-binding plurality decisions, both are inapposite. In *Lomas*, the defendant demanded the recusal of all of the judges of the Montgomery County Court of Common Pleas because one of the judges held a direct financial interest in the size of the judgment.[213] In *Armor* the defendant made the same demand because one of the judges was married to the plaintiff, who was suing the defendant for child support, thus giving that judge a financial and familial interest in the outcome.[214] In these actions, neither Judges Carpenter, Carluccio and Ferman, nor their spouses, held any interest in the outcome, financial or otherwise.

When the district attorney filed the instant charges against appellant, Judge Carpenter's role as the judge presiding over the investigative grand jury ended. The four opinions of the Supreme Court in the *quo warranto* action are the final word on whether existing law allowed Judge Carpenter to appoint a special prosecutor and oversee a grand jury investigation. None of the justices opined that Judge Carpenter's course of action would become retroactively more or less proper depending on the disposition of criminal charges originating from the grand jury investigation. If appellant had been acquitted

[211] 130 A.3d 107 (Pa. Super. Ct. 2015) (plurality decision).
[212] 398 A.2d 173 (Pa. Super. Ct. 1978) (plurality decision).
[213] *Lomas* at 116.
[214] *Armor* at 174.

at trial, Judge Carpenter's appointment of a special prosecutor would not have appeared less in conformity with the law, and her conviction did not make it appear more so. Given the lack of a reason for Judge Carpenter to have a significant interest in the outcome of these actions, no significant interest can be imputed to the other judges of Montgomery County.

Although Judge Carluccio is married to the former special prosecutor, that office terminated before charges were filed against appellant, and Mr. Carluccio's exercise of discretion in that office was approved by a majority of the five justices who participated in appellant's *quo warranto* action before the Supreme Court of Pennsylvania.[215] The Court's opinions in the *quo warranto* action were the last word on his exercise of discretion, and none of the justices opined that it would retroactively become more or less sound depending on the disposition of criminal charges following his presentment. The facts of record do not support a conclusion that Mr. Carluccio had any significant interest in the outcome of the above-captioned actions, hence no such interest can be imputed to Judge Carluccio, and by extension, none can be imputed to the rest of the Montgomery County bench.

The fact that Judge Ferman, in her former capacity as the district attorney, filed criminal charges against appellant does not prove that she

[215] See In re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 630 n.7 and 638 (Pa. 2015) (plurality decision) (Pa. 2015) (opinion announcing judgment of the court by Saylor, P.J., joined by Eakin, J.) (approving Mr. Carluccio's exercise of discretion in refraining from purporting to file criminal charges); *id.* at 636 (Baer, J., concurring) (endorsing Mr. Carluccio's exercise of discretion in refraining from exercising prosecutorial, rather than investigative, powers).

believed appellant to be guilty beyond a reasonable doubt. A prosecutor may file criminal charges if she believes the evidence only proves guilt by a preponderance of the evidence, *see* Pa.R.P.C. 8(a), hence the only conclusion one can draw for certain is that she believed it more probable than not that appellant was guilty. A jury may believe it probable that the accused is guilty, yet it must acquit unless the prosecutor has persuaded it that the accused is guilty beyond a reasonable doubt. Therefore Judge Ferman's competence and discretion as a district attorney or jurist would not have been called into question if the trier of fact in these actions had found appellant not guilty. Judge Ferman thus had no significant interest in the outcome of these actions. Since she had no significant interest, none can be imputed to the other members of this bench.

To the extent that Judges Carpenter, Ferman and Carluccio were familiar with the facts of the case, that alone is insufficient grounds for recusal of the entire bench.[216] As to Judge Carpenter, no legal authority supports a claim that the involvement of one judge in a grand jury proceeding disqualifies the rest of the bench from presiding over the resulting charges. The passages appellant quoted from Judge Carpenter's supplemental opinion do not establish personal animosity, although they suggest that he concluded that the Attorney General has committed criminal and contumacious acts, based upon

[216] *See* Commonwealth v. Boyle, 447 A.2d 250, 252 (Pa. 1982) (affirming order of judge presiding over defendant's second trial denying motion for recusal on grounds that same judge had presided over the first trial).

facts known to him as the judge who presided over the Thirty-Fifth Statewide Investigating Grand Jury. Such a conclusion, without more, does not establish an adversarial, much less "staunchly adversarial," relationship between Judge Carpenter and appellant. If it did, then every judge who presided over a contempt proceeding or criminal trial would be deemed to hold an adversarial relationship with the contemnor, or with the accused in post-sentencing or post-conviction collateral proceedings, but no authority supports such a conclusion.[217]

Insofar as appellant relies on the relationship between Mr. Carluccio and Judge Carluccio, appellant's claim that the entire bench is disqualified is no stronger than a claim that an entire bench must be disqualified because an assistant district attorney who led a grand jury investigation is married to one of the judges of that bench, other than the judge presiding over the criminal trial resulting from the grand jury presentment. No authority supports such a claim.

[217] To the contrary, the Supreme Court of Pennsylvania has explained, "A judge before whom the contumacious conduct has occurred has the power to immediately vindicate the authority of the court and punish the offender without recusing himself." Commonwealth v. Reid, 431 A.2d 218, 223 (Pa. 1981). *Accord* In re Adams, 645 A.2d 269, 272–73 (Pa. Super. Ct. 1994) (opining that a judge before whom contumacious conduct occurs has the power to impose punishment without recusing himself unless "there is a running, bitter controversy between the judge and offender."). As to adjudication of petitions for post-conviction collateral relief, the judge who tried the petitioner must dispose of the petition Pa.R.Crim.P. 903(C) unless that judge is unavailable or disqualified, Pa.R.Crim.P. 903(D). *See also* Commonwealth v. Abu-Jamal, 720 A.2d 79, 90 (Pa. 1998) ("Generally, it is deemed preferable for the same judge who presided at trial to preside over the post-conviction proceedings since familiarity with the case will likely assist the proper administration of justice. It is only where it is shown that the interests of justice warrant recusal that a matter will be assigned to a different judge.").

Assuming, *arguendo*, that Judges Carpenter, Carluccio and Ferman believed appellant was guilty beyond a reasonable doubt, there was no basis for imputing that belief to the other judges on this bench. Judges sitting in the same judicial district may believe the same facts to be true, yet weigh them differently and draw different legal conclusions. Were it otherwise, there would be no coordinate jurisdiction rule forbidding a judge from altering the resolution of a legal question previously decided by a judge of coordinate jurisdiction, absent exceptional circumstances.[218] It is thus immaterial whether Judges Carpenter, Carluccio and Ferman may have believed appellant to be guilty beyond a reasonable doubt.

The beliefs of the other judges, as expressly alleged and insinuated by appellant, could not have been imputed to the undersigned judge, who did not know the evidence that was produced in the grand jury proceeding. At the time appellant filed her motion for recusal, and continuing through the trial to the present, the evidence known to undersigned judge at any given moment was only that which was then in the record in these actions. If bias could be imputed to the undersigned judge under these circumstances, then it could be imputed to every judge in every case in which a prosecutor has filed charges based upon a grand jury presentment. Imputing bias under such

[218] Commonwealth v. Starr, 664 A.2d 1326, 1331-32 (Pa. 1995) (stating that a judge may not alter resolution of a legal question previously decided by a judge of coordinate jurisdiction, absent "exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence...or where the prior holding was clearly erroneous and would create a manifest injustice if followed.").

circumstances would be unwarranted because judges know that even when evidence presented to the grand jury supports indictment, it may not be sufficient to establish guilt at trial.[219]

Appellant's reply memorandum of law cited several opinions in addition to *Lomas* and *Armor*, but failed to show how they could have advanced her cause.[220] In *Commonwealth v. Williams*,[221] all of the judges of the Lehigh County Court of Common Pleas recused themselves, but whether they should have done so was not an issue raised on appeal. In *Matter of Larsen*,[222] a *per curiam* opinion accepting the recommendation of the Judicial Inquiry Review Board, the appellant cited the recommendation of the Board, which had

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[219] The standard of proof of a crime necessary to support a presentment or indictment by a grand jury is much lower than that necessary to support a verdict of guilty at trial. A trial jury may not return a verdict of guilty unless it finds that the evidence proves guilty beyond a reasonable doubt. *See, e.g.*, Commonwealth v. Weston, 749 A.2d 458, 461 (Pa. 2000) (stating that evidence will be deemed sufficient to support a guilty verdict when it establishes each material element of the crime charged and the commission thereof by the accused beyond a reasonable doubt). A grand jury may issue a presentment if "the Commonwealth's evidence makes out a prima facie case of the defendant's guilt." *See* Commonwealth v. Webster, 337 A.2d 914, 917 (Pa. 1975) ("It has been said that the grand jury must ascertain whether the Commonwealth's evidence makes out a prima facie case of the defendant's guilt.") (citing Commonwealth v. Rhodes, 34 Pa.D. & C. 237, 241 (Q.S. Delaware County, 1937) (dictum) and Commonwealth v. McIlvaine, 28 Pa.D. & C. 133, 135 (Q.S. Delaware County, 1936) (dictum)). "[T]o satisfy the burden of setting forth a *prima facie* case, the Commonwealth is not required to prove its case beyond a reasonable doubt; it must, however, set forth evidence of the existence of each element of the crime." Commonwealth v. Ludwig, 874 A.2d 623, 632 (Pa. 2005). Moreover, "the inadequacy, incompetency, or even illegality of the evidence presented to the grand jury do not constitute grounds for the quashing of an indictment returned on the basis of such evidence." *Webster* at 917.

[220] See Reply Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, pp. 7-9 (citing cases).

[221] 86 A.3d 771, 775 (Pa. 2014).

[222] 616 A.2d 529, 585 (Pa. 1992) (per curiam).

refrained from addressing the merits of a motion for recusal on the ground that it believed it lacked authority to do so. Appellant also cited *Evans v. Gavin*, 2013 WL 810299 (W.D. Pa. 2013), the opinion of a master on a federal habeas corpus petition. The charges in the state criminal proceeding underlying *Evans* pertained to crimes committed against a judge of the Erie County Court of Common Pleas. All of the judges of that court had recused themselves from the trial of the charges, but whether they should have done so was not an issue raised in the petition for habeas corpus. Appellant also cited numerous opinions from other states, but merely made parenthetical statements that the "entire bench" recused itself without discussing the facts or issues raised, and relating them to the facts and issue in these actions.[223] Appellant's failure to cite any legal authority supporting her argument suggests that it lacks even arguable merit.

B. Claim two, Denial of Motion to suppress evidence or quash charges because the investigating grand jury proceeding was unlawful

Appellant claims the undersigned judge erred by denying the second motion within her omnibus pretrial motion, in which she asked for an order "Suppressing the evidence and testimony gathered by the Investigating Grand Jury and quashing the charges, because the Investigating Grand Jury Proceedings were unlawful and unconstitutional."[224] As grounds for such relief, she stated, "The evidence gathered through the investigating grand jury

[223] See Reply Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, pp. 7-8 (citing cases).
[224] Omnibus Pretrial Motions of Attorney General Kathleen G. Kane, item two

must be suppressed, and the charges against Attorney General Kane must be quashed, because the investigating grand jury proceeding was unlawful and unconstitutional."[225] She supported that statement with a syllogistic argument. Appellant stated her major premise as, "the appropriate remedy when criminal charges rely extensively on evidence and testimony gathered through tainted grand jury proceedings is suppression of the testimony and quashal of the charges,"[226] citing *Commonwealth v. McCloskey*,[227] *Commonwealth v. Schultz*,[228]; *Commonwealth v. Curley*,[229] *Commonwealth v. Spanier*,[230] and *Commonwealth v. Cohen*[231] as authority.[232] She stated her minor premise as, "there was a person without any lawful authority to do so running an investigating grand jury in this case, subpoenaing witnesses, questioning witnesses, gathering evidence, drafting a presentment, and regularly and improperly colluding with the supervising judge through *ex parte* hearings and communications,"[233] citing *In re The Thirty-Fifth Statewide*

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[225] Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 9
[226] *Id.* at 24.
[227] 277 A.2d 764 (Pa. 1971).
[228] 133 A.3d 294 (Pa. Super. Ct. 2016).
[229] 131 A.3d 994 (Pa. Super. Ct. 2016).
[230] 132 A.2d 481 (Pa. Super. Ct. 2016)
[231] 289 A.2d 96 (Pa. Super. Ct. 1972) (plurality decision).
[232] See Memorandum in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 24 (citing the foregoing cases in support of statement, "Grand jury testimony unlawfully or unconstitutionally obtained must be suppressed."); *see also id.* (citing *McCloskey, Schultz, Spanier, Curley* and *Cohen* in support of statement, "And, charges that rely extensively on evidence gathered through tainted grand jury proceedings must be quashed.").
[233] *Id.* at 9 (italic and bold typeface omitted).

Investigating Grand Jury,[234] a plurality decision that generated four opinions filed by the five justices of the Supreme Court of Pennsylvania who participated in the disposition of the *quo warranto* action she filed.

The discussion below will show that appellant's major and minor premises are incorrect. Her major premise is incorrect because the decisional law does not require her proposed remedies in every case in which the rights of the accused were infringed during a grand jury proceeding. Her minor premise is incorrect because the decisional law does not support the conclusion that Mr. Carluccio lacked lawful authority to use compulsory process to interrogate witnesses and obtain documents.

1. Supplemental facts

The Opinion Announcing the Judgment of the Court in the *quo warranto* action recited most of the facts material to the resolution of this claim of error on appeal.

> In the Spring of 2014, the supervising judge for the Thirty–Fifth Statewide Investigating Grand Jury found that there were reasonable grounds to believe that an investigation should be conducted into allegations that grand jury secrecy had been compromised. The supervising judge proceeded to appoint Thomas E. Carluccio, Esquire (the "Special Prosecutor"), to investigate and prosecute any illegal disclosures. The work of the Special Prosecutor culminated in a grand jury presentment recommending the filing of criminal charges against Attorney General Kane.
>
> Attorney General Kane, represented by private counsel, commenced the instant *quo warranto* action in December 2014.... * * * In her initial submission, Attorney General Kane highlighted that no statute on record in the Commonwealth authorizes the appointment of a special prosecutor for an

[234] 112 A.3d 624 (Pa. 2015) (plurality decision).

> investigating grand jury. Further, she observed that the power to investigate and prosecute is reposed in the executive branch. In particular, Attorney General Kane noted that, under the Investigating Grand Jury Act,[1] local district attorneys and the Attorney General or her designee are the only officials authorized to serve as an "Attorney for the Commonwealth." Additionally, she explained that, per the Commonwealth Attorneys Act,[2] the authority to convene and conduct statewide investigating grand juries is reposed exclusively in the elected office which she holds.
>
> For the above reasons, Attorney General Kane asserted that the appointment by the judicial branch of a private attorney to serve as a "special prosecutor" violated the separation-of-powers doctrine.
>
> [1] Act of October 5, 1980, P.L. 693, No. 142 (as amended 42 Pa.C.S. §§ 4541-4553).
> [2] Act of October 8, 1908, P.L. 950, No. 164 (as amended 71 P.S. §§ 732-101 [through] 732-506).[235]

The Opinion Announcing the Judgment of the Court briefly stated the issue before the Court: "Presently, our review is confined to the...*challenge to the supervising judge's power to appoint a special prosecutor*, which has been put before us."[236] Justice Baer elaborated in his concurring opinion, explaining that the "narrow legal issue" before the Court was "*whether this Court should quash the appointment of the special prosecutor ...and*, in accord with that quashal, *suppress the proceedings as void* ab initio."[237] Justice Stevens did not state the issue before the Court in his concurring opinion, but Justice Todd wrote, in her dissenting opinion, "Currently before our Court...is the discrete question of *whether a judge overseeing a grand jury may authorize*

[235] *Id.* at 625 (opinion announcing the judgment of the court) (some citations omitted).
[236] *Id.* at 632 n.11 (opinion announcing the judgment of the court) (italics supplied).
[237] *Id.* at 633 (Pa. 2015) (Baer, J. concurring in judgment) (italics supplied).

a "special prosecutor" to...use the grand jury process both to obtain a presentment and to prosecute."[238]

2. Conclusions of law

A review of the precedential opinions of Pennsylvania's appellate courts yields no support for appellant's major premise, *i.e.*, that charges must always be quashed and the evidence must always be suppressed if they derived from a grand jury proceeding in which any of appellant's rights were infringed. Rather, the Supreme Court of Pennsylvania has created a general rule "that *in certain circumstances*, a constitutional violation in securing [an] indictment will necessitate that the indictment be quashed."[239] Furthermore, the decisional law supports the conclusion that the accused is only entitled to an order that serves as a remedy for a specific infringement. If it were otherwise, the decisional law would not require the accused to plead a reason why the proceeding was unlawful and produce evidence in support of the pleading.[240] If the accused asks for an order suppressing evidence, then the accused should show the reason suppression would serve as a remedy for the specific right that was allegedly violated. If the accused asks for an order quashing charges altogether, then the accused should show why none of the alternatives would

[238] *Id.* at 639 (Pa. 2015) (plurality decision) (Todd, J., dissenting) (italics supplied).
[239] Commonwealth v. McCloskey, 277 A.2d 764, 779 (Pa. 1971) (citing Commonwealth v. Kilgallen, 108 A.2d 780 (Pa. 1959)) (italics supplied).
[240] *See* Commonwealth v. Lupinson, 231 A.2d 552, 558 (Pa. 1967) ("the burden was upon the complaining party to establish the facts to support the challenge[ ]" to the composition of a grand jury), *vacated on other grounds sub nom. Lupinson v. Pennsylvania*, 392 U.S. 647 (1968).

place her in the position she would have been, absent the alleged violation. For these reasons, the specific rights allegedly violated and the nexus between the right and the proposed remedy are material to the disposition of appellant's claim.

Appellant has not satisfied her obligations to plead grounds for the relief she seeks and produce evidence in support thereof. First, in terms of pleading a reason why the proceeding was unlawful, the cases cited by appellant are inapposite. Second, prejudice is one of the elements to be pled and supported with evidence,[241] but the opinions of the Supreme Court of Pennsylvania in the *quo warranto* action do not establish a rule under which appellant can prove the element of prejudice under these specific circumstances.

a. *McCloskey, Schultz, Curley, Spanier* and *Cohen* are inapposite

In *McCloskey* and *Cohen*, the respective appellate courts ruled criminal charges should be quashed if they derived from grand jury testimony by the accused, and the presiding judge did not instruct the accused of the right to remain silent.[242] In contrast, appellant was informed of her right to remain silent, yet she chose to give false testimony with the intention to conceal her part in publicly disclosing investigative information in violation of several

[241] *See* Commonwealth v. Columbia Inv. Corp., 325 A.2d 289, 297 (Pa. 1974) (ruling that trial judge erred by quashing indictments because accused failed to prove prejudice caused by alleged violation of constitutional rights during grand jury proceeding).

[242] *McCloskey*, 277 A.2d at 779; Commonwealth v. Cohen, 289 A.2d 96, 98, 100 (Pa. Super. Ct. 1972) (plurality decision).

statutes. Therefore, *McCloskey* and *Cohen* are inapposite to the specific factual circumstances of these actions.

In *Schultz, Curley* and *Spanier*, three consolidated criminal actions,[243] the defendants were charged with crimes based upon a presentment from an investigating grand jury that relied on privileged communications between the accused and their counsel; and on review of an interlocutory order the Superior Court of Pennsylvania quashed certain charges, but not others.[244] In these actions, appellant has failed to plead that the grand jury knew of any privileged communications between appellant and her lawyers, and the record does not indicate that her attorney-client privilege was violated. Therefore, *Schultz, Curley* and *Spanier* are inapposite to the specific factual circumstances of these actions.

Appellant may argue on appeal that the opinions she cited establish a general rule that evidence must be suppressed and charges quashed whenever the evidence supporting the charges was gathered in violation of any right held by the accused. Such an argument would be faulty question-begging, as appellant has not established that the means Mr. Carluccio employed to obtain evidence violated any of her rights. The opinions of our Supreme Court in appellant's *quo warranto* action indicate that she cannot establish such a violation.

[243] Commonwealth v. Schultz, 133 A.3d 294, 307 (Pa. Super. Ct. 2016).
[244] *Schultz* at 328; Commonwealth v. Curley, 131 A.3d 994, 995 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A 2d 481, 498 (Pa. Super. Ct. 2016).

b. The opinions of the Supreme Court of Pennsylvania in *In re The Thirty-Fifth Statewide Investigating Grand Jury* do not establish a rule under which appellant can prove she was prejudiced by a violation of her rights

Appellant argued that the precedential effect of the Court's opinions in her *quo warranto* action required the undersigned to quash the charges and suppress the evidence obtained by Judge Carpenter's grand jury.[245] The undersigned will first discuss the extent to which the opinions of the Court are precedential before explaining why they did not require the undersigned to grant her pretrial motion asking for an order quashing the charges and suppressing the evidence.

A *quo warranto* action is the designated procedure for challenging the title or right of another to a public office.[246] Appellant filed her *quo warranto* action "to challenge the appointment of the special prosecutor and the grand jury presentment."[247] The *quo warranto* action was discrete from the instant criminal action, but *stare decisis* certainly requires any precedent established in that action to apply to these criminal actions, given the fact that appellant was involved in the former and the latter, and the material facts in former are material to the disposition of appellant's motion to quash the charges and

[245] Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pretrial Motions, p. 22-23.
[246] In re Thirty-Fifth Statewide Investigating Grand Jury, 112 A.3d 624, 625 (Pa. 2015) (plurality decision) (opinion announcing the judgment of the court) (citing In re One Hundred or More Qualified Electors of the Municipality of Clairton, 683 A.2d 283, 286 (Pa. 1996)).
[247] *Id.* at 645 (Todd, J., dissenting).

suppress the evidence.[248] Because *stare decisis* requires that rules established in the *quo warranto* action must be applied to this action, it is only of marginal importance whether those rules also apply because of the doctrine of collateral estoppel or issue preclusion,[249] or whether they are the "law of the case."[250] This discussion will now consider whether the opinions in the *quo warranto* action created binding rules to be applied to future proceedings, and if so, what those rules are.

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[248] "The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." Commonwealth v. Tilghman, 673 A.2d 898, 903 (Pa. 1996) (citing Burke v. Pittsburgh Limestone Corp., 100 A.2d 595 (Pa. 1953)).

[249] Appellant did not support her conclusory assertion as to the binding nature of the opinions in the *quo warranto* action with argument, hence it is unclear whether she believes the doctrine of issue preclusion or collateral estoppel applies. "[C]ollateral estoppel, or issue preclusion, 'forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment.'" Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 512 n.20 (Pa. 2016) (quoting Hebden v. W.C.A.B. (Bethenergy Mines, Inc.), 632 A.2d 1302, 1304 (Pa. 1993). The doctrine applies only if, *inter alia*, "the party against whom the plea is asserted was a party or in privity with a party in the prior case...." *Id.* Appellant did not argue the District Attorney must be considered to be in privity with the special prosecutor, but legal authority for such an assertion may exist. *See* Com. ex rel. McClintock v. Kelly, 134 A. 514, 516 (1926) (deciding party in *quo warranto* action was in privity with party in previous extrajurisdictional *quo warranto* action, stating, "identity of persons or parties must not always be viewed as referring to individuals, inasmuch as a judgment is binding not only on parties, but on all who are in privity with the actual parties on the record, and who have a mutual or successive relationship to the same rights of property.").

[250] These criminal actions are distinct from the *quo warranto* action. "The core of the doctrine [of the law of the case] is that a court acting at a later stage of a case should not reopen questions decided at an earlier stage by another judge of the same court or by a higher court." Commonwealth v. Paddy, 800 A.2d 294, 311 (Pa. 2002). "'It is hornbook law that issues decided by an appellate court on a prior appeal between the same parties become the law of the case and will not be reconsidered upon a subsequent appeal on another phase of the same case.'" *Tilghman* at 905 n.8 (Pa. 1996) (quoting *Burke*).