

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

GRAHAM B. SPANIER,

Defendant.

No. CP-22-CR-3615-2013

DAUPHIN COUNTY
PENNA

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DEFENDANT GRAHAM SPANIER'S POST-HEARING MEMORANDUM

Pursuant to this Court's January 17, 2014 Order, defendant Dr. Graham B. Spanier submits this post-hearing memorandum in support of his motions to dismiss all charges against him.

IDENTIFICATION OF PLEADINGS

Dr. Spanier has submitted to this Court the following pleadings that raise claims related to his representation as a grand jury witness:

1. Motion to Preclude Testimony of Attorney Cynthia Baldwin, filed November 20, 2012, requesting preclusion of Ms. Baldwin's testimony at the preliminary hearing because her testimony would violate the attorney-client privilege. The Motion was denied as premature by the Court's January 17, 2014 Order.
2. Motion to Quash Criminal Complaint, filed May 16, 2013, requesting quashal of the Perjury, Obstruction, and Conspiracy to Commit Perjury and Obstruction charges on four grounds stemming from Ms. Baldwin's conduct: breach of the attorney-client privilege, deprivation of counsel, violation of grand jury secrecy, and violation of the right to effective, conflict-free counsel. The Motion further requested quashal of the remaining charges (Child Endangerment, Failure to Report, and Conspiracy to Commit Child Endangerment) because they

are barred by the applicable statutes of limitation, they violate the Due Process and *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions, and/or because neither the Child Endangerment nor the Failure to Report statute applies to Dr. Spanier as a matter of law. The Motion is currently pending.

3. Supplemental Memorandum in Support of Motion to Quash Criminal Complaint, filed December 4, 2013, supplementing, in light of newly-disclosed evidence, the Motion's arguments for the requested relief based on Ms. Baldwin's and Deputy Attorney General Frank Fina's conduct, and requesting quashal of all of the criminal charges due to prosecutorial misconduct. The Motion is currently pending.

Dr. Spanier has also submitted to the Grand Jury Supervising Judge the following pleadings that raise claims related to his representation as a grand jury witness:

1. Motion to Quash Presentment, filed November 26, 2012, requesting quashal of the Presentment because of the breach of the attorney-client privilege, deprivation of counsel, and violation of grand jury secrecy that resulted from Ms. Baldwin's conduct. The Motion was denied for lack of jurisdiction on April 9, 2013.

2. Supplemental Motion to Quash Presentment, or, in the Alternative, to Strike Defendant's Grand Jury Testimony, filed January 18, 2013, requesting quashal of the Presentment or the striking of Dr. Spanier's grand jury testimony based on the arguments presented in the original Motion and because Dr. Spanier was deprived of effective counsel due to Ms. Baldwin's multiple conflicts of interest. The Supplemental Motion was denied for lack of jurisdiction on April 9, 2013.

3. Reply to Commonwealth's Answer to Motion to Quash Presentment, filed January 18, 2013, responding to the Commonwealth's January 2, 2013 Answer to Motion to Quash Presentment and requesting quashal of the Presentment.

PROPOSED FINDINGS OF FACT

1. Pursuant to Notice of Submission of Investigation No. 1, the Thirtieth Statewide Investigating Grand Jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky over a period of years. The Thirty-Third Statewide Investigating Grand Jury continued the investigation when the Thirtieth's term expired. Presentment at 5.

2. After the testimony of former Penn State University Assistant Football Coach Michael McQueary in December 2010, the grand jury expanded the scope of its investigation beyond the activities of Sandusky, and began to examine the responses of Penn State and its high-level employees, including Dr. Spanier, to the incident Mr. McQueary testified to having witnessed. 4/13/11 Proceedings Trans. at 8-13.¹

3. In late December 2010, Attorney Cynthia Baldwin, then General Counsel to Penn State, advised Dr. Spanier that Gary Schultz (then Penn State's retired Senior Vice President for Business & Finance), Timothy Curley (then Penn State's Athletic Director) and Joe Paterno (then Penn State's Head Football Coach) had been subpoenaed to testify before a grand jury investigating Sandusky. Spanier Aff. ¶ 2; 10/26/12 Trans. at 12-13.

¹ Separate transcripts were prepared of proceedings on April 13, 2011 in the chambers of then-Grand Jury Supervising Judge Barry F. Feudale (beginning at 8:57 a.m.) and of Dr. Spanier's testimony (beginning at 9:53 a.m.). These transcripts are cited as "4/13/11 Proceedings Trans." and "4/13/11 Testimony Trans.," respectively.

4. Ms. Baldwin advised Dr. Spanier that she would represent Messrs. Schultz and Curley in connection with their grand jury appearances, but that Mr. Paterno had retained another attorney. Spanier Aff. ¶ 4.

5. Ms. Baldwin stated that it was Mr. Paterno's right to obtain his own attorney, but attributed his decision to the "interference" of his son, who was a lawyer. *Id.*

6. Messrs. Schultz and Curley testified before the grand jury on January 12, 2011. They were first brought before then-Grand Jury Supervising Judge Barry F. Feudale to be instructed as to their rights and sworn in as grand jury witnesses. The colloquy began with the following exchange:

MR. BARKER [from the Office of Attorney General]: We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.

JUDGE FEUDALE: Represented by?

MS. BALDWIN: My name is Cynthia Baldwin, general counsel for Pennsylvania State University.

JUDGE FEUDALE: Will you be providing representation for both of those identified witnesses?

MS. BALDWIN: Gary is retired but was employed by the university and Tim is still an employee.

1/12/11 Colloquy Trans. at 7-8.²

7. Judge Feudale advised Messrs. Schultz and Curley that "if you're uncertain as to whether you may lawfully refuse to answer any question or if any other problem arises during the course of your appearance before the Grand Jury, you may stop the questioning and appear

² Separate transcripts also were prepared of proceedings on January 12, 2011 in the chambers of Judge Feudale and of the testimony of Messrs. Schultz and Curley. These transcripts are cited as "1/12/11 Colloquy Trans.," "1/12/11 Schultz Trans.," and "1/12/11 Curley Trans."

before me, either alone *or in this case with your counsel*, and I will rule on that matter whatever it may be.” 1/12/11 Colloquy Trans. at 10 (emphasis added).

8. Following the colloquy, Deputy Attorney General Jonelle Eshbach made an oral motion “requesting that both our agent as well as the State Trooper be permitted to be present in the room.” 1/12/11 Colloquy Trans. at 11-12. No other motions were presented.

9. At the outset of Mr. Curley’s grand jury testimony, he was asked by Ms. Eshbach if he was represented by counsel. Mr. Curley identified Ms. Baldwin as his attorney:

Q: You have counsel with you?

A: Yes, I do.

Q: Would you introduce her, please?

A: My counsel is Cynthia Baldwin.

1/12/11 Curley Trans. at 3.

10. Ms. Eshbach referred to Ms. Baldwin as Mr. Curley’s attorney when asking him to step outside to allow the grand jury to confer. 1/12/11 Curley Trans. at 25-26 (“Do you want to step outside, please, with your counsel and we will find out if the Grand Jury has any additional questions for you,” followed by a notation that the witness and counsel left the room).

11. Mr. Schultz likewise was asked by Ms. Eshbach whether he was represented by counsel when he testified before the grand jury and he identified Ms. Baldwin as his attorney:

Q: You are accompanied today by counsel, Cynthia Baldwin; is that correct?

A: That is correct.

1/12/11 Schultz Trans. at 3.

12. Mr. Schultz also consulted with Ms. Baldwin during his testimony. 1/12/11 Schultz Trans. at 33.

13. Ms. Eshbach similarly asked Mr. Schultz to “step out with counsel and we will see if the Grand Jury has any more questions.” 1/12/11 Schultz Trans. at 30-31.

14. Ms. Baldwin later said through counsel that, as to her attendance at Messrs. Schultz and Curley’s grand jury appearances, she did not represent either man, but (1) she attended with them because “[a]s general counsel, she felt a responsibility to represent and understand—for the university’s interests—their testimony”; and (2) “she would not feel it appropriate to speak up and correct [the witnesses’ belief that she represented them] out of deference to the grand jury process.” Sara Ganim, *Penn State counsel Cynthia Baldwin’s role before grand jury could affect Tim Curley and Gary Schultz’s perjury case, experts say*, THE PATRIOT-NEWS, Feb. 2, 2012, http://www.pennlive.com/midstate/index.ssf/2012/02/penn_state_legal_counsel_cynth.html (last visited Feb. 14, 2014) (quoting Attorney Lanny Davis, who was authorized to speak for Ms. Baldwin).

15. Dr. Spanier was interviewed by the Office of the Attorney General in March 2011. Spanier Aff. ¶ 5.

16. Ms. Baldwin, still General Counsel to Penn State, accompanied Dr. Spanier to that meeting and took notes. Spanier Aff. ¶ 5.

17. Shortly thereafter, Dr. Spanier was subpoenaed to testify before the grand jury. 10/26/12 Trans. at 52-54.

18. Ms. Baldwin advised Dr. Spanier that he was entitled to a separate attorney, but she did not encourage him to retain one or explain why he might need one. Spanier Aff. ¶ 7.

19. Based on Ms. Baldwin’s representations, Dr. Spanier believed that Ms. Baldwin could and would represent him and act in his best interests. Spanier Aff. ¶ 7.

20. In proceedings just before Dr. Spanier's April 13, 2011 testimony, Ms. Baldwin and OAG representatives appeared before Judge Feudale in chambers to discuss an objection to the scope of a grand jury subpoena for documents that had been issued to Penn State. 4/13/11 Proceedings Trans. at 2-7.

21. Dr. Spanier was not present during these proceedings. 4/13/11 Proceedings Trans. at 2-28.

22. After hearing Ms. Baldwin's objection to the scope of the subpoena, Judge Feudale ordered Deputy Attorney General Frank Fina to provide an *in camera* proffer of the factual basis for the grand jury's request for all emails from certain Penn State employees, including Dr. Spanier, from 1997 to the present. 4/13/11 Proceedings Trans. at 6-7.

23. During the *in camera* discussion, Mr. Fina explained to Judge Feudale that following Mr. McQueary's testimony, the grand jury began to focus on the University's response to Mr. McQueary's allegations. 4/13/11 Proceedings Trans. at 7-10.

24. Mr. Fina described to Judge Feudale what the OAG believed to be inconsistencies between Mr. McQueary's testimony on one hand, and the testimonies of Gary Schultz and Tim Curley and the interview statements of Dr. Spanier on the other. 4/13/11 Proceedings Trans. at 7-13.

25. Mr. Fina told Judge Feudale that the OAG believed there to be "obvious credibility issues" with the administrators' statements and "believe[d] that there could be a situation here where people are endeavoring to cover up their knowledge of Mr. Sandusky's misconduct" in order to shield themselves and Penn State from embarrassment. 4/13/11 Proceedings Trans. at 10, 13.

26. Although Ms. Baldwin was not present during the *in camera* proffer to Judge Feudale explaining the grand jury's focus on Dr. Spanier and Messrs. Schultz and Curley, she had attended the grand jury testimonies of Messrs. Schultz and Curley in which each was asked about the University's response to Mr. McQueary's allegations. *See* 1/12/11 Schultz Trans. at 1-35; 1/12/11 Curley Trans. at 1-28. Both Mr. Schultz and Mr. Curley were asked about Dr. Spanier's role in the decision-making process after Mr. McQueary's report. 1/12/11 Schultz Trans. at 17-18; 1/12/11 Curley Trans. at 8, 22-23.

27. During the *in camera* discussion, Judge Feudale referred to Ms. Baldwin as "counsel for Mr. Spanier," while Mr. Fina referred to Ms. Baldwin as "Penn State's Counsel[]." 4/13/11 Proceedings Trans. at 17, 20.

28. At the close of the *in camera* discussion, Judge Feudale, satisfied with Mr. Fina's proffer regarding the scope of the subpoena, then invited Ms. Baldwin back into chambers and advised her that the OAG had presented a factual basis for the subpoena and that the University's response would be kept in a secure fashion. 4/13/11 Proceedings Trans. at 21-28.

29. Ms. Baldwin clarified that her objection pertained only to the subpoena for Penn State documents, not to the subpoena for Dr. Spanier's testimony, and therefore his testimony could proceed. 4/13/11 Proceedings Trans. at 23-24.

30. The final statements by Judge Feudale and Ms. Baldwin before Dr. Spanier was brought in to be sworn as a witness were as follows:

JUDGE FEUDALE: Cindy, just for the record, who do you represent?

MS. BALDWIN: The university.

JUDGE FEUDALE: The university solely?

MS. BALDWIN: Yes, I represent the university solely.

Id. at 28.

31. Judge Feudale permitted Ms. Baldwin to remain in the proceedings and be present for Dr. Spanier's grand jury testimony. 4/13/11 Proceedings Trans. at 28-34; 4/13/11 Testimony Trans. at 1-43.

32. Dr. Spanier was then brought into Judge Feudale's chambers and given an instruction on his rights as a grand jury witness. 4/13/11 Proceedings Trans. at 28-34. Judge Feudale instructed Dr. Spanier that:

In other words, if you're uncertain as to whether you may lawfully refuse to answer any question or if any other problem arises during the course of your appearance before the Grand Jury, you have the right to stop the questioning and appear before me, ***either alone or, of course, in this case with your counsel***, and I will rule on that matter whatever it may be.

Id. at 30-31 (emphasis added).

33. No one present during the in-chambers proceedings advised Dr. Spanier that Ms. Baldwin had stated, outside his presence, that she represented only Penn State. 4/13/11 Proceedings Trans. at 28-34.

34. After Dr. Spanier's colloquy, Mr. Fina made an oral motion pursuant to Pennsylvania Rule of Criminal Procedure 231(B) that OAG Agent Anthony Sassano and Pennsylvania State Police Trooper Scott Rossman be permitted to be present in the grand jury session. 4/13/11 Proceedings Trans. at 33-34. Mr. Fina did not make a motion that the attorney for an interested third party, Penn State, be permitted to attend Dr. Spanier's grand jury testimony. *Id.*

35. Dr. Spanier then testified before the grand jury and, after being asked by Mr. Fina whether he was represented by counsel, identified Ms. Baldwin as his counsel:

Q: Sir, you're represented by counsel today?

A: Yes.

Q: Could you just identify counsel?

A: Cynthia Baldwin sitting behind me.

4/13/11 Testimony Trans. at 3.

36. Neither Ms. Baldwin nor OAG representatives corrected Dr. Spanier's identification of Ms. Baldwin as his attorney. 4/13/11 Testimony Trans. at 3.

37. During Dr. Spanier's testimony, Ms. Baldwin interrupted the proceedings to consult with Dr. Spanier and to make clarifications on his behalf. 4/13/11 Testimony Trans. at 9. Neither Mr. Fina nor anyone else challenged Ms. Baldwin's participation during the proceedings. *Id.*

38. Also during Dr. Spanier's testimony, Mr. Fina requested that Dr. Spanier and Ms. Baldwin leave the grand jury room together to give the grand jurors an opportunity to confer. 4/13/11 Testimony Trans. at 37. Neither Agent Sassano nor Trooper Rossman was asked to leave the grand jury room. *Id.*

39. Ms. Baldwin remained Penn State's general counsel until June 30, 2012. 10/22/12 Trans. at 2.

40. Ms. Baldwin was herself subject to potential criminal liability for her conduct in responding to OAG subpoenas in the course of the grand jury investigation. *See* 12/19/11 Letter, F. Fina to C. Baldwin at 2 (warning Ms. Baldwin of the OAG's "intent to pursue contempt and any other appropriate measures applicable to obstruction against the institution and those individuals responsible for [non-compliance with subpoenas]," and noting that Ms. Baldwin "was specifically admonished and warned by the Supervising Judge of the grand jury" about non-compliance with a previous subpoena related to the Sandusky investigation).

41. At some point during the grand jury investigation, Ms. Baldwin obtained her own attorney and began conversing with OAG representatives about providing them a proffer.

10/22/12 Trans. at 2.

42. Ms. Baldwin had the benefit of knowing the content of Dr. Spanier's grand jury testimony when she engaged in proffer discussions with the OAG. 4/13/11 Testimony Trans. at 1-43.

43. On October 22, 2012, OAG representatives appeared before Judge Feudale, along with Ms. Baldwin's attorneys and outside counsel for Penn State, to discuss Ms. Baldwin's anticipated appearance before the grand jury. 10/22/12 Trans. at 1-2.

44. Mr. Fina advised Judge Feudale that the OAG intended to elicit testimony from Ms. Baldwin about her role in the grand jury investigation. 10/22/12 Trans. at 2-6.

45. Mr. Fina stated that Penn State had waived the attorney-client privilege as to its General Counsel's efforts to comply with the grand jury investigation, but that the OAG had received letters from attorneys for Messrs. Schultz and Curley, who by that point had been charged in a November 4, 2011 criminal complaint, claiming that communications between their clients and Ms. Baldwin in preparation for and after their grand jury appearances were privileged. 10/22/12 Trans. at 2-6.

46. Mr. Fina told Judge Feudale that the OAG was "willing to put Miss Baldwin in the grand jury without addressing any of the issues related to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony and put that—put those matters on hold until we get a Court determination regarding the privilege and we can address that later on." 10/22/12 Trans. at 6.

47. Attorney Michael Mustokoff, Penn State's outside counsel, then indicated that "issues have legitimately arisen with regard to the substance and perception of the representation by Justice Baldwin of Mr. Schultz and Curley that have us believing that the most prudent course is for the Court to make an ultimate determination as to whether that aspect of the privilege should be waived. This is something that Mr. Fina and I have discussed at length and believe that the situation is sufficiently murky to require the wisdom of this Court, if not Solomon, to resolve." 10/22/12 Trans. at 6-7. Mr. Fina expressed his agreement with this statement. *Id.* at 7.

48. Penn State's outside counsel thus stated that a judicial determination regarding Ms. Baldwin's representation of Messrs. Schultz and Curley was necessary before Penn State would waive the privilege with respect to Ms. Baldwin's communications with Messrs. Schultz and Curley. 10/22/12 Trans. at 6-7; *see also* 10/19/12 Ltr., M. Mustokoff to F. Fina (stating that Penn State's privilege waiver did not include "any communications between Justice Baldwin and Messrs. Schultz and Curley").

49. Mr. Fina then stated to Judge Feudale that "[t]he Commonwealth, at this point, I think, is going to take a very clear position as does Miss Baldwin that she was University Counsel and she was not individually representing those two gentlemen. . . . There may well be claims down the road by Mr. Farrell, Miss Roberto, and perhaps even counsel for Graham Spanier; but that is, you know, the risk that the Commonwealth is ready to bear because we believe that we are soundly within the waiver." 10/22/12 Trans. at 11.

50. Judge Feudale told Mr. Fina that he was "satisfied based on what you placed on the record that [Ms. Baldwin] is clearly able to proceed on testimony with the stipulation that you communicated that *you're not going to get into an inquiry as to her representation and*

what that meant with regard to Mr. Curley, Mr. Schultz, and perhaps, as you said, also Mr. Spanier.” 10/22/12 Trans. at 11-12 (emphasis added).

51. Judge Feudale further remarked that “[b]ased on the stipulation, I’m satisfied that the testimony can go forward without any inappropriate inferences to be drawn because I don’t think that the concern that they may have impacts the investigative role with regard to Sandusky and *the response of the Office of General Counsel* to the various subpoenas and Orders of Court and that is the narrow focus of the testimony.” 10/22/12 Trans. at 13-14 (emphasis added).

52. Mr. Fina’s and Judge Feudale’s remarks evidenced their understanding that although Dr. Spanier had not been criminally charged as of that date, Dr. Spanier would likely assert the same attorney-client privilege protection that had been asserted by counsel for Messrs. Schultz and Curley. 10/22/12 Trans. at 11-14.

53. Dr. Spanier was not advised that Ms. Baldwin was going to testify before the grand jury, and therefore he had no opportunity to raise the attorney-client privilege prior to her testimony. 10/22/12 Trans. at 11 (Mr. Fina: “the Commonwealth would recommend at this point that her testimony remain secret and that we address this privilege matter at a later date”).

54. At no time did Dr. Spanier waive his attorney-client privilege with respect to his confidential communications with Ms. Baldwin. Spanier Aff. ¶ 12.

55. Ms. Baldwin testified before the grand jury on October 26, 2012. Mr. Fina advised Ms. Baldwin that “[w]e’re going to specifically not talk about your conversations with Mr. Schultz or Mr. Curley in preparation for their testimony before the grand jury or after they appeared in the grand jury to the extent it was about their testimony.” 10/26/12 Trans. at 21. Mr. Fina did not make any similar remarks about avoiding disclosure of Ms. Baldwin’s communications with Dr. Spanier in connection with his grand jury appearance. *Id.*

56. Mr. Fina directly asked Ms. Baldwin to disclose those communications. *See, e.g.*, 10/26/12 Trans. at 60 (“Q: . . . [I]n fact, had you had conversations with him as part of his interview with the authorities and his grand jury testimony that there was a 1998 incident?”).

57. The overwhelming majority of the questions and answers during Ms. Baldwin’s grand jury testimony focused on Ms. Baldwin’s communications with and impressions of Dr. Spanier. 10/26/12 Trans. at 1-74.

58. No one raised the limitation that had been presented to and accepted by Judge Feudale that the OAG would avoid eliciting testimony about Ms. Baldwin’s communications with Messrs. Schultz and Curley and Dr. Spanier. 10/22/12 Trans. at 10-14; 10/26/12 Trans. at 1-74.

59. At no time did Ms. Baldwin invoke the attorney-client privilege on Dr. Spanier’s behalf. 10/26/12 Trans. at 1-74.

60. On November 1, 2012, a criminal complaint was filed against Dr. Spanier charging him with the following counts: (1) Perjury, a violation of 18 PA. C.S. § 4902 and a felony of the third degree; (2) Endangering Welfare of Children, a violation of 18 PA. C.S. § 4304, a felony of the third degree (two counts); (3) Obstructing Administration of Law or Other Governmental Function, a violation of 18 PA. C.S. § 5101 and a misdemeanor of the second degree; (4) Criminal Conspiracy (to Commit Obstructing Administration of Law or Other Governmental Function), a violation of 18 PA. C.S. § 903 and a misdemeanor of the second degree; (5) Failure to Report, a violation of 23 PA. C.S. § 6319, a summary offense; (6) Criminal Conspiracy (to Commit Perjury), a violation of 18 PA. C.S. § 903 and a felony of the third degree; and (7) Criminal Conspiracy (to Commit Endangering Welfare of Children), a violation

of 18 PA. C.S. § 903 and a felony of the third degree. A Presentment issued by the Thirty-Third Statewide Investigating Grand Jury was attached to the criminal complaint.

61. The Presentment indicates that the charges brought against Dr. Spanier are based, in large part, on Ms. Baldwin's testimony before the grand jury regarding attorney-client privileged communications and attorney work-product. Ms. Baldwin's descriptions of these communications and work product are presented as evidence of an alleged conspiracy to make false statements to the grand jury and prevent compliance with the grand jury investigation. Presentment at 21-32.

LEGAL DISCUSSION

I. DEPRIVATION OF COUNSEL

A grand jury witness is placed in a "delicate" position. *Commonwealth v. McCloskey*, 443 Pa. 117, 143-44, 277 A.2d 764, 777 (1971). "[I]f a witness answers incriminating questions he may make certain . . . that he will be indicted. . . . If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. [And] [i]f he refuses to answer questions that are not incriminating, he may be guilty of contempt." *Id.* The purpose of the right to counsel before the grand jury is to ensure that the witness's constitutional rights—most prominently his privilege against self-incrimination—are protected. *See Commonwealth v. Karash*, 513 Pa. 6, 9-10, 518 A.2d 537, 539 (1986) (explaining that the right to counsel under the Fifth Amendment is designed to protect against self-incrimination); *McCloskey*, 443 Pa. at 146, 277 A.2d at 779 (holding that, because defendants were given insufficient warnings regarding the right to counsel during their grand jury testimony, "their indictments must be quashed and their testimony suppressed"). The Pennsylvania legislature viewed a grand jury witness's right to counsel as so fundamental that it

afforded the same right of indigent persons to appointed counsel in the grand jury room that criminal defendants are afforded under the Constitution.³ See 42 PA. C.S. § 4549(c)(2); *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

Here, Judge Feudale was aware from proceedings held outside Dr. Spanier's presence that Dr. Spanier had become a subject of the grand jury investigation, as the OAG was pursuing the theory that Dr. Spanier and Messrs. Schultz and Curley were "endeavoring to cover up their knowledge of Mr. Sandusky's misconduct." 4/13/11 Proceedings Trans. at 7-13. Judge Feudale also was aware from these proceedings that Ms. Baldwin purported not to represent Dr. Spanier, and therefore he would be unrepresented during his grand jury testimony. 4/13/11 Proceedings Trans. at 28. Judge Feudale hid that fact from Dr. Spanier by permitting Ms. Baldwin to be present during Dr. Spanier's grand jury testimony as if she were his lawyer, 4/13/11 Testimony Trans. at 1-43, and by affirmatively misrepresenting to Dr. Spanier that Ms. Baldwin was his attorney and that she would assist him in exercising his rights during his testimony, 4/13/11 Proceedings Trans. at 30-31.

OAG representatives also were aware that Dr. Spanier was a subject of the investigation and that Ms. Baldwin purported to not represent him for purposes of his grand jury appearance. 4/13/11 Proceedings Trans. at 7-13, 28. Rather than raising the fact that Ms. Baldwin would not be providing representation to Dr. Spanier, and therefore that she should not be permitted in the

³ The provision of the Investigating Grand Jury Act that affords a grand jury witness the right to counsel was introduced by former State Representative, now Judge of the United States Court of Appeals for the Third Circuit, Anthony Scirica. Then-Representative Scirica explained that the "inclusion of defense counsel within the grand jur[y] . . . [is] the single most important element to guard against potential abuse. . . . The only way that we can guarantee that any individual who is called before the grand jury will understand what constitutional rights are afforded him is to allow him to have a lawyer present." 44 PA. LEGIS. J. 3097, 3162 (Sept. 21, 1978) (statement of Rep. Anthony Scirica).

grand jury session, OAG representatives remained silent. 4/13/11 Proceedings Trans. at 28-34; 4/13/11 Testimony Trans. at 1-43.

Mr. Fina specifically sought Judge Feudale's permission to have Agent Sassano and Trooper Rossman present during the grand jury session pursuant to Pennsylvania Rule of Criminal Procedure 231(B), which allows the supervising judge to admit persons other than those enumerated in Rule 231(A)—the Commonwealth's attorney, the grand jurors, the witness, the witness's attorney, and a stenographer—into the grand jury session upon request of the Commonwealth or the grand jury where their presence is "necessary to the presentation of evidence." 4/13/11 Proceedings Trans. at 33-34. Yet, Mr. Fina did not make a motion under Rule 231(B) for Ms. Baldwin to be present. 4/13/11 Proceedings Trans. at 33-34.

Finally, when Dr. Spanier identified Ms. Baldwin as his attorney during his testimony, no OAG representative spoke up to correct him. 4/13/11 Testimony Trans. at 3. Nor did any OAG representative attempt to clarify Ms. Baldwin's role when she interrupted the proceedings to consult with Dr. Spanier and raise clarifications on his behalf. *Id.* at 9.

Ms. Baldwin also knew, based on her presence at the grand jury testimony of Messrs. Schultz and Curley, that the grand jury was focusing on Dr. Spanier's conduct and not only on Sandusky. 1/12/11 Schultz Trans. at 17-18; 1/12/11 Curley Trans. at 8, 22-23. Still, Ms. Baldwin led Dr. Spanier to believe she would represent him and look out for his interests during his grand jury testimony, telling only Judge Feudale and OAG representatives, outside Dr. Spanier's presence, that she actually only represented Penn State. Spanier Aff. ¶ 7; 4/13/11 Proceedings Trans. at 28.

In sum, Dr. Spanier was affirmatively misled to believe that he had counsel who would protect his rights and to proceed with his testimony on that understanding, when in fact he did

not have counsel representing him. Judge Feudale, OAG representatives, and Ms. Baldwin all knew that the grand jury was focusing at least in part on Dr. Spanier's conduct and that Ms. Baldwin claimed to not represent Dr. Spanier for purposes of his grand jury testimony. Yet, Judge Feudale's warning to Dr. Spanier about the right to counsel included a false instruction that Dr. Spanier did have counsel who would act on his behalf during his testimony. 4/13/11 Proceedings Trans. at 30-31. And while there was ample opportunity for OAG representatives and Ms. Baldwin to advise Dr. Spanier that he did not actually have counsel, they all stood mute.

The deprivation of counsel that occurred here is far more substantial and prejudicial than that found in prior Pennsylvania cases in which courts have quashed charges and suppressed grand jury testimony because, for example, a witness was given an insufficient warning regarding the right to counsel during the witness's grand jury testimony. *See McCloskey*, 443 Pa. at 146, 277 A.2d at 779; *Commonwealth v. Cohen*, 221 Pa. Super. 244, 253, 289 A.2d 96, 100 (1972). The Pennsylvania Supreme Court has held that "in certain circumstances, a constitutional violation in securing the indictment will necessitate that the indictment be quashed." *McCloskey*, 443 Pa. at 147, 277 A.2d at 779. Specifically addressing the proper remedy for violations of the right against self-incrimination (as protected by the right to counsel) before a grand jury, the court concluded that where defendants "were judicially compelled to testify without sufficient warning or protection concerning their right against self-incrimination[,] [t]he resulting presentment and indictments [that] were based in part on this constitutionally impermissible testimony . . . must be quashed." *Id.*; *accord Cohen*, 221 Pa. Super. at 253, 289 A.2d at 100 (quashing indictments where grand jury witness was given inadequate warning regarding the right to counsel and right against self-incrimination and explaining that the witness's "testimony was received in violation of his constitutional rights and

could not serve . . . as the basis, in whole or in part, of any of the indictments entered against him”).

Thus, the deprivation of Dr. Spanier’s right to counsel in connection with his grand jury appearance mandates quashing the criminal charges against Dr. Spanier.⁴

II. VIOLATION OF GRAND JURY SECRECY

Only the grand jurors, the Commonwealth’s attorney, the witness, the witness’s attorney, alternate grand jurors, and a stenographer may be present while the grand jury is in session, and all persons present during the session are sworn to secrecy. PA. R. CRIM. P. 231(A), (C); 42 PA. C.S. § 4549(b). Additionally, upon request, the supervising judge may permit the presence of “an interpreter, security officers, [or] such other persons as the judge may determine are necessary to the presentation of the evidence.” PA. R. CRIM. P. 231(B). These “other persons” include a lead investigator to assist in witness questioning and experts to assist the grand jury in interpreting complex technical evidence, and they may be present only if permitted by the supervising judge. PA. R. CRIM. P. 231(B), cmt.

Here, because Ms. Baldwin expressly stated to Judge Feudale and OAG representatives that she did not represent Dr. Spanier, there was no basis under Rule 231(A) for her presence in the grand jury session during his testimony. Additionally, no one requested permission for Ms. Baldwin to be present pursuant to Rule 231(B), nor is there any indication that her presence was necessary to the presentation of evidence to the grand jury, as required by that Rule. Rather, Mr.

⁴ Dr. Spanier’s Motion to Quash Criminal Complaint argued that the Perjury, Obstruction, and Conspiracy to Commit Perjury and Obstruction charges should be dismissed in light of the deprivation of counsel, violation of grand jury secrecy, conflicted representation, and violation of attorney-client privilege that took place here. Following the Commonwealth’s disclosure of the grand jury transcripts discussed herein, Dr. Spanier amended his requested relief to encompass dismissal of the entire presentment and resulting criminal charges.

Fina's oral motion pursuant to Rule 231(B) only included Agent Sassano and Trooper Rossman. 4/13/11 Proceedings Trans. at 33-34. Despite Ms. Baldwin's later attempt to justify her improper presence by suggesting that it was warranted to protect Penn State's interests, there is no basis in the law for an attorney not representing a grand jury witness to sit in on that witness's testimony to protect an institution's alleged interests. *See* PA. R. CRIM. P. 231(A)-(C); 42 PA. C.S. § 4549(b).

In *Commonwealth v. Levinson*, 480 Pa. 273, 290, 389 A.2d 1062, 1070 (1978), the court quashed the charges against the defendant because six grand jurors were substituted during the middle of a grand jury term and began to participate in the proceedings, but that substitution was not permitted under Pennsylvania law. Citing *McCloskey, supra*, the court concluded that "an indictment based in part on the presentment of an investigating grand jury which did not function in accordance with law to the prejudice of appellant must be quashed." *Levinson*, 480 Pa. at 290, 389 A.2d at 1070.

The situation here caused even greater prejudice than that in *Levinson*, as the Commonwealth and Supervising Judge knowingly admitted an unauthorized person to the grand jury proceeding, while inducing Dr. Spanier to proceed with his testimony on the understanding that he had legal representation, when in fact, as they knew, he did not. Moreover, Ms. Baldwin's improper presence gave her access to Dr. Spanier's testimony and allowed her to tailor her own later grand jury testimony to avoid potential liability for her own conduct in responding to OAG subpoenas and the grand jury investigation. *See* 12/19/11 Letter, F. Fina to C. Baldwin at 2.

The egregious nature of Ms. Baldwin's conduct, the Supervising Judge and Commonwealth's failure to prevent such conduct, and the resulting prejudice to Dr. Spanier

mandate quashing the charges against Dr. Spanier. *See Levinson*, 480 Pa. at 289-90, 389 A.2d at 1070 (noting that quashing an indictment in its entirety because it was based, at least in part, on an invalid presentment “serves to assure regularity in the formulation and proceeding of the investigatory grand jury [and] serves as a judicial check upon the abuse of power of the investigating grand jury”).

III. CONFLICT OF INTEREST

In Pennsylvania, witnesses subpoenaed to testify before the grand jury “shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury.” 42 PA. C.S. § 4549(c)(1). The right to counsel, whether afforded by statute or by the Constitution, necessarily includes the right to effective assistance of counsel. *Commonwealth v. Liebel*, 573 Pa. 375, 381-82, 825 A.2d 630, 634 (2003). Representation by conflicted counsel interferes with a grand jury witness’s right to effective assistance of counsel. *See Pirillo v. Takiff*, 462 Pa. 511, 524, 341 A.2d 896, 902 (1975) (explaining that the right to counsel “requires the services of a lawyer who is not obliged to serve conflicting interests”); *In re Fifth Pa. Statewide Investigating Grand Jury*, 50 Pa. D. & C.3d 617, 622 (C.P. Dauphin 1987) (“[a]dequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest”). An actual conflict of interest exists where: (1) counsel actively represented conflicting interests, and (2) those conflicting interests adversely affected her performance. *Commonwealth v. Collins*, 598 Pa. 397, 420, 957 A.2d 237, 251 (2008); *see also Commonwealth v. Breaker*, 456 Pa. 341, 346-47, 318 A.2d 354, 356-57 (1974) (finding conflict of interest where counsel induced a guilty plea from one client, against whom the Commonwealth’s case was not very strong, as part of his strategy for the other client).

The Investigating Grand Jury Act prevents an attorney from “multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by h[er] representation of another client.” 42 PA. C.S. § 4549(c)(4). It is common practice for the prosecution to alert the Supervising Judge of situations of representation conflicts. *See In re Phila. County Investigating Grand Jury XII, Petition of Vladimer*, 529 Pa. 471, 472-73, 605 A.2d 318, 318 (1992); *Pirillo*, 462 Pa. at 517, 341 A.2d at 899; *In re Fifth Pa. Statewide Investigating Grand Jury*, 50 Pa. D. & C.3d at 619.

Here, the Commonwealth was aware, prior to the grand jury testimony of Messrs. Schultz and Curley, that Ms. Baldwin’s joint representation of Penn State and multiple grand jury witnesses might create a conflict of interest. *See* 11/14/12 Commw. Answer to Defendants’ Omnibus Pretrial Motions at 7 (“[a]dmitted that representatives of the Office of Attorney General knew Attorney Baldwin’s title [as General Counsel of Penn State] and that she appeared and stated that she was representing the Defendants for purposes of the Grand Jury”). In fact, Deputy Attorney General Frank Fina apparently discussed the conflicts issue with Ms. Baldwin before the testimony of Messrs. Schultz and Curley. *See id.* at 23 (acknowledging that the Commonwealth knew that Ms. Baldwin was aware of the possibility of a conflict).

The possibility of a conflict was also apparent during the *in camera* proceedings before Dr. Spanier’s testimony, when Judge Feudale referred to Ms. Baldwin as “counsel for Mr. Spanier,” while Mr. Fina referred to Ms. Baldwin as “Penn State’s Counsel[].” 4/13/11 Proceedings Trans. at 17, 20. Judge Feudale then explicitly sought clarification of Ms. Baldwin’s role when she was brought back into chambers. Ms. Baldwin then told Judge Feudale

and OAG representatives—outside Dr. Spanier’s presence—that she represented the University solely. *Id.* at 28.

Thus, Ms. Baldwin’s own statements demonstrated that she had an actual and irreconcilable conflict of interest because, unbeknownst to Dr. Spanier, she had completely abandoned Dr. Spanier’s interests in favor of her organizational client. 4/13/11 Proceedings Trans. at 28. As such, Dr. Spanier was denied his right to effective assistance of counsel. *Pirillo*, 462 Pa. at 524, 341 A.2d at 902; *In re Fifth Pa. Statewide Investigating Grand Jury*, 50 Pa. D. & C.3d at 622.

Ms. Baldwin was also conflicted by her representation of Messrs. Schultz and Curley before the grand jury, each of whom was a potential target of criminal investigation when the grand jury shifted its focus to the conduct of Penn State. This joint representation undermined Ms. Baldwin’s ability to represent Dr. Spanier adequately. For example, because she represented Messrs. Schultz and Curley during their grand jury testimonies, she possessed confidential information—the substance of their testimonies—that she could not use to assist Dr. Spanier. As our Supreme Court has explained, “[i]f one of the witnesses reveals his testimony before the grand jury to his attorney, as he has every right to do, certainly the attorney will feel obliged, perhaps even subconsciously, to reveal to his other clients the testimony of the first witness. With the attorney in such a position, either the attorney-client relationship or the grand jury secrecy must suffer.” *Pirillo*, 462 Pa. at 525 n.5, 341 A.2d at 903 n.5; *see also In re Investigating Grand Jury No. 88-00-3505*, 527 Pa. 432, 447, 593 A.2d 402, 409 (1991) (same).

Further, to the extent that Dr. Spanier and Messrs. Schultz and Curley have been charged with conspiring to withhold documents that were responsive to the grand jury subpoena issued to Penn State in December 2010 and other allegedly obstructive acts, Ms. Baldwin, as the chief

legal officer of Penn State and the person responsible for addressing all subpoenas, was a proper subject of any investigation for these alleged crimes. Thus, Ms. Baldwin's own conduct, or lack thereof, likely would have been a focus of the grand jury's attention at the time that she represented Dr. Spanier before the grand jury. Ms. Baldwin's own potential criminal liability also created a conflict of interest that impeded her ability to exercise independent professional judgment on behalf of Dr. Spanier. *See Commonwealth v. Duffy*, 483 Pa. 170, 175-76, 394 A.2d 965, 968 (1978) (finding a conflict of interest between the defendant and his counsel where there was an allegation that counsel might be culpable for playing a part in disposing of stolen property); *United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980) (citing *Duffy* and affirming a decision disqualifying a defendant's attorney based in part on an allegation that the attorney had himself incorporated one of the allegedly sham companies charged in a RICO indictment).

Under the Supreme Court's decision in *Duffy*, when an attorney is herself a possible subject of criminal allegations in connection with the crimes charged against her client, she has a personal interest in avoiding being criminally charged or convicted that clouds her ability to give unbiased counsel and assistance in the criminal process. 483 Pa. at 175, 394 A.2d at 968. As the Pennsylvania ethical rules explain: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." PA. R. PROF. C. 1.7, cmt. [10]. Thus, Ms. Baldwin's personal conflict interfered with Dr. Spanier's right to effective assistance of counsel before the grand jury.

Prejudice is presumed where counsel had an actual conflict of interest or where there is an actual or constructive denial of counsel. *Commonwealth v. Reaves*, 592 Pa. 134, 148-49, 923 A.2d 1119, 1128 (2007). Even if prejudice were not presumed, Ms. Baldwin's multiple representation conflicts resulted in severe prejudice to Dr. Spanier. Ms. Baldwin failed to adequately prepare Dr. Spanier for his grand jury appearance or to aid him during his testimony. Moreover, after purporting to represent multiple clients, learning information from each of them, and listening to their grand jury testimony, Ms. Baldwin turned around and testified against her putative clients before the grand jury. It is hard to envision a situation in which a defendant could be more severely prejudiced by ineffective representation by conflicted counsel than Dr. Spanier was in this case. This fundamental defect in the grand jury proceedings warrants quashing the charges against Dr. Spanier. See *McCloskey*, 443 Pa. at 146-47, 277 A.2d at 779; *Cohen*, 221 Pa. Super. at 253, 289 A.2d at 100; *Levinson*, 480 Pa. at 290, 389 A.2d at 1070.

IV. BREACH OF ATTORNEY-CLIENT PRIVILEGE

Ms. Baldwin and Dr. Spanier had a putative attorney-client relationship because Ms. Baldwin led Dr. Spanier to believe she was representing him in connection with his grand jury proceedings. Spanier Aff. ¶¶ 7, 8. The Pennsylvania Superior Court recently reiterated that, in the absence of an express contract, an implied attorney-client relationship will be found if the putative client sought assistance, the attorney agreed to render that assistance and was competent to do so, and it was reasonable for the putative client to believe that the attorney represented him. *Kirschner v. K&L Gates LLP*, 46 A.3d 737, 748-49 (Pa. Super. 2012), *appeal denied*, 65 A.3d 414 (Pa. 2013). It was more than reasonable for Dr. Spanier to believe that Ms. Baldwin was representing him, as Ms. Baldwin never told Dr. Spanier that she was only representing Penn State and never corrected Dr. Spanier's understanding that she was his attorney when he stated as much to the grand jury. Spanier Aff. ¶¶ 7, 8; 4/13/11 Testimony Trans. at 3.

In the absence of a waiver by Dr. Spanier of the privilege stemming from his putative attorney-client relationship with Ms. Baldwin, Ms. Baldwin was not permitted to testify as part of the criminal investigation regarding statements that Dr. Spanier made to her in confidence or legal advice she provided to Dr. Spanier. 42 PA. C.S. § 5916; *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 88-89, 15 A.3d 44, 59 (2011). Yet Ms. Baldwin, with prompting by OAG representatives, testified extensively about her confidential communications with Dr. Spanier. *See* 10/26/12 Trans. at 22 (“Q: Now, tell us, if you would, about your discussions with Spanier before that interview.”); *id.* at 27 (“Q: [C]an you tell us, did he have the same approach to that testimony as he did to the interview?”); *id.* at 32 (“A: There is no doubt that even before Graham wrote this e-mail that he knew that his testimony was not secret. Not only did I tell him, the Judge told him.”); *id.* at 52 (“Q: [The Judge’s instruction that Dr. Spanier could disclose his grand jury testimony] was just yet another reiteration of what you had been telling him?”); *id.* at 54 (“A: He was interviewed . . . and there is no doubt that—that he had preparation at that time”); *id.* at 60 (“Q: . . . [I]n fact, had you had conversations with him as part of his interview with the authorities and his grand jury testimony that there was a 1998 incident?”).

Ms. Baldwin did not invoke the privilege on Dr. Spanier’s behalf or seek his informed consent to disclose their communications, as she was required to do. “In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client . . . unless . . . this privilege is waived upon the trial by the client.” 42 PA. C.S. § 5916; *see also In re Investigating Grand Jury*, 887 A.2d 257, 260 (Pa. Super. 2005) (attorney properly invoked attorney-client privilege and should not have been held in contempt for refusing to answer questions during his grand jury testimony about his former client’s statements). Pennsylvania’s ethical rules governing attorney conduct reinforce these principles.

“A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent” PA. R. PROF. C. 1.6(a). The commentary to the rules further explains that, where a lawyer is asked or ordered to “reveal information relating to the representation of a client . . . , *the lawyer should assert on behalf of the client* all nonfrivolous claims that the order is not authorized by law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, *the lawyer must consult with the client* about the possibility of appeal to the extent required by Rule 1.4 [relating to keeping the client informed].” PA. R. PROF. C. 1.6, cmt. [19] (emphasis added).

Further, Ms. Baldwin was aware that the OAG had promised to avoid eliciting testimony about her communications with Messrs. Schultz and Curley and “perhaps” Dr. Spanier in light of privilege claims because one of her own lawyers was present at the proceedings where Judge Feudale accepted that promise as a limitation on her testimony. 10/22/12 Trans. at 1, 10-14. Neither Ms. Baldwin nor her lawyers, who were also present during her grand jury testimony, raised this limitation during Ms. Baldwin’s testimony.

Moreover, OAG representatives prompted Ms. Baldwin to breach the attorney-client privilege without obtaining prior judicial approval or offering Dr. Spanier an opportunity to challenge Ms. Baldwin’s testimony. This conduct was directly contrary to Rule 3.10 of the Pennsylvania Rules of Professional Conduct, which provides that “[a] public prosecutor . . . shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury . . . investigating criminal activity in circumstances where the prosecutor . . . seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.” The Comment to Rule 3.10 explains that judicial approval should normally be

withheld unless there has been a hearing at which the court determines that the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege, or the work product doctrine. PA. R. PROF. C. 3.10, cmt. [1]. As one Pennsylvania federal court noted, Rule 3.10 “requires the court to withhold altogether approval of a subpoena directed to an attorney if the information sought relates to representation of the attorney’s client, unless the client consents after consultation or unless one of four exceptions [in Rule 1.6] is applicable.” *Baylson v. Disciplinary Bd. of Supreme Ct.*, 764 F. Supp. 328, 345 (E.D. Pa. 1991) (internal quotation and brackets omitted), *affirmed*, 975 F.2d 102 (3d Cir. 1992).

OAG prosecutors have criticized the strictures of Rule 3.10 and pressed for its removal from the Rules of Professional Conduct. *See, e.g.*, Andrea F. McKenna, *A Prosecutor’s Reconsideration Of Rule 3.10*, 53 U. PITT. L. REV. 489 (1992). Yet, it remains part of the Rules, even after the extensive 2004 amendments to the Rules, and Commonwealth prosecutors remain bound by it. While a Senior Deputy Attorney General claimed that “the practice of the Office of Attorney General has been to make a record satisfying the requirements set forth in the comment to Rule 3.10 during an ex parte hearing before the supervising judge of the grand jury,” *id.* at 513 n.95, the transcripts of the proceedings before Ms. Baldwin’s testimony make clear that the OAG did not demonstrate that her testimony was “not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine.” PA. R. PROF. C. 3.10, cmt. [1]. *See* 10/22/12 Trans. at 5-6, 10-14.

Rather, without following the requirements of Rule 3.10, the OAG elicited testimony that it knew Dr. Spanier would consider privileged. 10/22/12 Trans. at 6-7, 11-12. And it did so after assuring Judge Feudale that there was no need for a prior judicial determination as to the

privilege because Ms. Baldwin's testimony would not include her communications with Dr. Spanier. 10/22/12 Trans. at 5-6, 10-14.

The OAG's actions and Ms. Baldwin's failure to invoke the attorney-client privilege resulted in a violation of Dr. Spanier's rights to assert the privilege and to obtain a judicial determination as to its applicability before his putative attorney testified about confidential matters. *See Commonwealth v. Maguigan*, 511 Pa. 112, 125, 511 A.2d 1327, 1334 (1986) ("To preserve the sanctity of the confidence, this Court has historically held that the burden of proof is upon the party asserting that disclosure of the information would not violate the attorney-client privilege"). Courts may dismiss charges entirely "in flagrant cases in which the grand jury has been overreached or deceived in some significant way." *State v. Wong*, 40 P.3d 914, 928 (Haw. 2002) (dismissing indictment because, among other things, the prosecutor elicited privileged testimony in the grand jury without first notifying the privilege holder or seeking judicial review of the privilege issue); *see also McCloskey*, 443 Pa. at 146-47, 277 A.2d at 779 (quashing indictments in their entirety and suppressing testimony where the presentment and resulting indictments were based on constitutionally impermissible grand jury testimony obtained in violation of the right against self-incrimination). The egregious intrusion into Dr. Spanier's privileged communications warrants quashing the criminal complaint.

The Commonwealth's post hoc reliance on the crime-fraud exception to the attorney-client privilege does not cure the violation of Dr. Spanier's rights here. At the time that Ms. Baldwin testified before the grand jury, OAG representatives were well aware that Dr. Spanier would likely raise the attorney-client privilege with respect to Ms. Baldwin. 10/22/12 Trans. at 11-12. As such, if the Commonwealth intended to rely on the crime-fraud exception, it was required to raise it with Judge Feudale in the proceedings before Ms. Baldwin's testimony. OAG

representatives made no mention of the crime-fraud exception during those proceedings. To permit the Commonwealth's after-the-fact argument would be to allow prosecutors in every instance to breach the privilege, learn the protected communication, and, when challenged, justify the breach with post hoc rationalization. Neither Pennsylvania law nor the due process principles that infuse every criminal prosecution allow such a ploy.

Furthermore, a party asserting the crime-fraud exception to the attorney-client privilege must first make out a *prima facie* case in support of its assertion *without reliance on the privileged material*. See *United States v. Zolin*, 491 U.S. 554, 574-75 (1989); *In re Grand Jury*, 705 F.3d 133, 151-52 (3d Cir. 2012) (applying this requirement in the context of a grand jury investigation). The Commonwealth has never made such a showing, before or after it prompted Ms. Baldwin to breach attorney-client privilege in the grand jury. It has identified no independent evidence indicating that Dr. Spanier sought Ms. Baldwin's advice in furtherance of a crime or fraud, and therefore has failed to meet its burden.⁵

⁵ As a recent Third Circuit case makes clear, the procedure that occurred here violated every well-established principle governing the government's assertion of the crime-fraud exception. See *In re Grand Jury Subpoena*, --- F.3d ---, No. 13-1237 (3d Cir. Feb. 12, 2014). In *Grand Jury Subpoena*, the former client was given an opportunity to object to the attorney's grand jury testimony; the government was required to make a *prima facie* showing of the crime-fraud exception, without reliance on the attorney's testimony; the grand jury judge conducted an *in camera* examination of the attorney, without the government present, to determine if the exception applied; and the attorney's testimony was put on hold until the former client had an opportunity to appeal the judge's ruling allowing the testimony. *Id.*, Slip Op. at 5-6. By contrast here, Dr. Spanier received no notice of the OAG's subpoena of his former attorney (despite the OAG's awareness that he would likely assert the attorney-client privilege as to her testimony); the OAG failed to make a *prima facie* showing of the applicability of the crime-fraud exception (or even raise the issue); the Grand Jury Supervising Judge failed to hold an *in camera* hearing outside the OAG's presence to determine if the exception applied; and Ms. Baldwin's testimony about confidential communications with Dr. Spanier was allowed to go forward without Dr. Spanier being given an opportunity to challenge it in either the trial or appellate courts.

Even if the Commonwealth were permitted to rely on Ms. Baldwin's testimony to demonstrate that the crime-fraud exception applies, it still could not meet its burden. Despite what the Commonwealth appears to believe, the exception does not apply simply because the defendant is alleged to have committed a crime at the time he was represented by counsel. Rather, the exception applies only where the party seeking to overcome the privilege proves that the client sought the advice of counsel "*in furtherance* of the commission of criminal or fraudulent activity." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007) (emphasis added); see *In re Grand Jury*, 705 F.3d at 151 (explaining that the crime-fraud exception has two elements: "(1) the client was committing or intending to commit a crime or fraud, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud"). The burden placed on the Commonwealth is a heavy one, as courts must "resolve all doubts in favor of non-disclosure." *Brennan v. Brennan*, 281 Pa. Super. 362, 372, 422 A.2d 510, 515 (1980).

In prior filings, the Commonwealth identified two examples that supposedly establish the applicability of the crime-fraud exception in this case, but neither one demonstrates that Dr. Spanier sought Ms. Baldwin's advice in furtherance of a crime. First, the Commonwealth claimed that Ms. Baldwin's testimony that Dr. Spanier seemed "well versed" in the allegations against Sandusky contradicts Dr. Spanier's own statements. Even if Ms. Baldwin's testimony were accurate, at most, it shows that Dr. Spanier offered different accounts of his recollection at different times, not that he relied on Ms. Baldwin's advice in furtherance of a crime. Second, the Commonwealth pointed to Ms. Baldwin's testimony regarding her attempts to comply with subpoenas issued by the grand jury. Yet, the Presentment alleges that Dr. Spanier "personally and directly assured [Ms. Baldwin] that [he] knew of no information or documents involving

alleged misconduct or inappropriate contact by Jerry Sandusky.” Presentment at 21. At no point does the Presentment allege that Dr. Spanier sought Ms. Baldwin’s *assistance* in *concealing* documents. Thus, neither of these examples comes close to meeting the Commonwealth’s burden.

Although it failed to make the argument in any of its prior pleadings, the Commonwealth appeared to assert in a January 2, 2014 letter to the Court that Dr. Spanier waived any protection of the attorney-client privilege by speaking about his communications with Ms. Baldwin to third parties. This argument also has no merit.

First, the Commonwealth has failed in the sixteen months since it elicited Ms. Baldwin’s testimony in violation of Dr. Spanier’s attorney-client privilege to point to any specific confidential communications that were allegedly disclosed to third parties. Second, the attorney-client privilege survives the client’s disclosure of confidential attorney-client communications to third parties “because it is the relationship that existed at the moment of the communication which society seeks to protect by the privilege, not the substance of the privilege itself.” *Commonwealth v. Ferri*, 410 Pa. Super. 67, 73, 599 A.2d 208, 211 (1991) (quoting *Commonwealth v. Clark*, 347 Pa. Super. 128, 133, 500 A.2d 440, 443 (1985), *overruled on other grounds by Commonwealth v. McBurrows*, 779 A.2d 509, 515 (Pa. Super. 2001)). In *Ferri*, the Superior Court extended its earlier decision in *Clark*, which addressed the marital privilege, to the context of the attorney-client privilege. *Ferri*, 410 Pa. Super. at 73-74, 599 A.2d at 211-12. The court in *Clark* noted that “the confidentiality that inhered in the initial conversation [cannot] be wiped away when the speaker for whatever reason, talks to the third parties about the same matters.” *Clark*, 347 Pa. Super. at 132-33, 500 A.2d at 442. The court further explained that “[d]espite what a speaker spouse chooses to utter at a later time, his original confidence remains

intact not merely for his benefit, but for the good of marriage as an institution. It is the relationship that existed at the moment of communication which society seeks to protect by the privilege, not the substance of the message itself.” *Id.* at 133, 500 A.2d at 443.

The court in *Ferri* adopted this same reasoning and applied the holding in *Clark* to the attorney-client relationship and attorney-client privilege: “The attorney-client privilege, likewise, seeks to protect a relationship by fostering a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue. The result of a violation of the attorney-client privilege is damage to the administration of justice. Analogous to the marital privilege, it is the relationship between the attorney and client at the moment of the communication that society seeks to protect. Thus, the holding in *Clark* is equally applicable to prevent waiver of the attorney-client privilege.” 410 Pa. Super. at 73-74, 599 A.2d at 211-12 (citation and internal quotation omitted).

Thus, regardless of the purported subsequent disclosures that the Commonwealth has alluded to here, Ms. Baldwin was not permitted to reveal information that Dr. Spanier disclosed to her in confidence without Dr. Spanier’s prior consent. *Ferri*, 410 Pa. Super. at 73-74, 599 A.2d at 211-12; *Clark*, 347 Pa. Super. at 133-34, 500 A.2d at 443. For this reason, the Commonwealth’s apparent argument that Dr. Spanier waived any objection to the testimony of Ms. Baldwin is meritless.

V. PROSECUTORIAL MISCONDUCT

Courts may dismiss charges based on prosecutorial misconduct before a grand jury either because (1) there was actual prejudice, as the prosecutorial misconduct “substantially influenced the grand jury’s decision to indict or there is a grave doubt that the decision to indict was free from the substantial influence of such violations,” or (2) “the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the

presumption of prejudice.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988); *Commonwealth v. Williams*, 388 Pa. Super. 153, 160-61, 565 A.2d 160, 164 (1989).

Dr. Spanier was actually prejudiced by the OAG’s conduct here because it influenced the grand jury’s recommendation of charges against him. By the time Dr. Spanier testified before the grand jury, the OAG was already pursuing the theory that Dr. Spanier had made false statements in his prior interview in order to allegedly cover up his supposed knowledge of allegations against Sandusky. 4/13/11 Proceedings Trans. at 7-13. Thus, there was no reason to have Dr. Spanier testify before the grand jury other than to set up potential perjury or failure to report charges against him. Knowing that Dr. Spanier was not merely a witness for the purposes of moving the Sandusky investigation along, OAG representatives were nonetheless fully complicit in leading Dr. Spanier to believe he had legal representation, even though Ms. Baldwin had told them otherwise outside Dr. Spanier’s presence. 4/13/11 Proceedings Trans. at 7-13, 17, 20, 28, 30-31, 33-34; 4/13/11 Testimony Trans. at 3, 9. Through this subterfuge, they obtained his uncounseled testimony.

These actions deprived Dr. Spanier of counsel that would have, among other things, assisted him in deciding whether to exercise his right against self-incrimination during his grand jury testimony. *See McCloskey*, 443 Pa. at 143-44, 277 A.2d at 777 (explaining that a key purpose of the right to counsel before the grand jury is to ensure that the witness’s constitutional rights, most prominently his privilege against self-incrimination, are protected). Even a completely innocent citizen may assert the privilege if he believes a prosecutor intends to use his testimony against him.

Further compounding the prejudice to Dr. Spanier, OAG representatives then elicited testimony from Ms. Baldwin about her communications with Dr. Spanier without seeking a

judicial determination as to whether those communications were privileged. *See* 10/26/12 Trans. at 22, 27, 32, 52, 54, 60. The OAG did this after leading Judge Feudale to believe that Ms. Baldwin's grand jury testimony would not involve her communications with Messrs. Schultz and Curley "and perhaps [Dr.] Spanier," and instead would be focused on Ms. Baldwin's role in complying with grand jury subpoenas and court orders relating to the Sandusky investigation. 10/22/12 Trans. at 11-14. OAG representatives should have clarified with Judge Feudale that they only intended to avoid questioning Ms. Baldwin on areas involving potentially privileged communications with Messrs. Schultz and Curley, and not those with Dr. Spanier. Instead, the OAG misrepresented its intent with regard to Ms. Baldwin's testimony and then focused almost exclusively on areas that plainly implicated Dr. Spanier's confidential attorney-client communications.

The OAG's conduct here also compromised the structural protections of the grand jury and rendered the proceedings fundamentally unfair. *Bank of Nova Scotia*, 487 U.S. at 257; *cf. United States v. Marshank*, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991) (recognizing that courts may dismiss an indictment where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a valid conviction"). On their face, the transcripts of all the proceedings evidence a pattern of prosecutorial misconduct by OAG representatives that eroded Dr. Spanier's rights before the grand jury, including:

1. failing to advise Dr. Spanier that Ms. Baldwin did not represent him when they learned that she claimed to represent only Penn State, 4/13/11 Proceedings Trans. at 28;
2. failing to object to Judge Feudale's instruction to Dr. Spanier that he had counsel that would assist him in exercising his rights, 4/13/11 Proceedings Trans. at 30-31;

3. failing to object to Ms. Baldwin's presence in the grand jury proceedings while making a special request for other unauthorized persons to be permitted to enter the session, 4/13/11 Proceedings Trans. at 33-34;
4. asking Dr. Spanier to confirm to the grand jury that Ms. Baldwin was his attorney for purposes of his grand jury appearance, when they knew he did not actually have counsel, 4/13/11 Testimony Trans. at 3;
5. allowing Ms. Baldwin to interject in front of the grand jury to confer with Dr. Spanier and make clarifications on his behalf, 4/13/11 Testimony Trans. at 9;
6. leading Judge Feudale to believe that Ms. Baldwin would only testify before the grand jury about Penn State's response to subpoenas and court orders, 10/22/12 Trans. at 5-6, 13-14;
7. leading Judge Feudale to believe that Ms. Baldwin would not testify before the grand jury about her potentially privileged communications with Dr. Spanier, 10/22/12 Trans. at 11-12;
8. failing to advise Dr. Spanier that the OAG planned to elicit testimony from Ms. Baldwin about her communications with Dr. Spanier that he would likely consider privileged, 10/22/12 Trans. at 11; and
9. failing to seek a judicial determination as to the applicability of the privilege in advance of eliciting testimony from Ms. Baldwin about her communications with Dr. Spanier, 10/26/12 Trans. at 22, 27, 32, 52, 54, 60.

In grand jury matters, "the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979). In this context, "dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process." *Id.*; see also *Salvitti Appeal*, 238 Pa. Super. 465, 470, 357 A.2d 622, 625 (1976) (recognizing that investigating grand juries in Pennsylvania are subject to the supervision of a supervising judge


and there is “no reason why an investigating grand jury should be supervised less strictly if it is a state grand jury rather than a federal one”).

As one court explained almost 75 years ago, in words that are still true today and apply directly to the situation here: “Every man, whatever the offenses of which he may be suspected, is as much entitled to the just, impartial, and unbiased judgment of a grand jury as he is to that of a petit jury on his final trial. It is as essential that the one body as the other should be permitted to act free from sway or control from any source, and without fear or favor. The temptation to disregard these safeguards of the rights of persons accused is often great, though, happily, the instances are few where it has been yielded to” *Commonwealth v. Bane*, 39 Pa. D. & C. 664, 674 (C.P. Wash. 1940). The prosecutorial misconduct that occurred here warrants a complete dismissal of the criminal charges against Dr. Spanier.

RELIEF REQUESTED

For all of the foregoing reasons, Dr. Spanier respectfully requests that the Court dismiss the Criminal Complaint in its entirety.

Respectfully submitted,



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Dated: February 18, 2014

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
 : No. CP-22-CR-3615-2013
 v. :
 :
 GRAHAM B. SPANIER, :
 :
 Defendant. :

**RECORD MATERIAL CITED IN DEFENDANT GRAHAM SPANIER'S
POST-HEARING MEMORANDUM**

RECORD MATERIAL

EXHIBIT

1. January 12, 2011 Transcript of Proceedings before Grand Jury Supervising Judge Barry F. Feudale (cited as "1/12/11 Colloquy Trans.") Hearing Exh. GBS-1
2. January 12, 2011 Transcript of Grand Jury Testimony of Timothy M. Curley ("1/12/11 Curley Trans.")..... Hearing Exh. GBS-2
3. January 12, 2011 Transcript of Grand Jury Testimony of Gary C. Schultz ("1/12/11 Schultz Trans.")..... Hearing Exh. GBS-3
4. April 13, 2011 Transcript of Proceedings before Grand Jury Supervising Judge Barry F. Feudale ("4/13/11 Proceedings Trans.") Hearing Exh. GBS-5
5. April 13, 2011 Transcript of Grand Jury Testimony of Graham B. Spanier ("4/13/2011 Testimony Trans.")..... Hearing Exh. GBS-6
6. December 19, 2011 Letter, Frank G. Fina to Cynthia A. Baldwin Supp. Mem. Exh. O
7. October 19, 2012 Letter, Michael M. Mustokoff to Frank G. Fina Hearing Exh. GBS-17
8. October 22, 2012 Transcript of Proceedings before Grand Jury Supervising Judge Barry F. Feudale ("10/22/12 Trans.")..... Hearing Exh. GBS-7
9. October 26, 2012 Transcript of Grand Jury Testimony of Cynthia A. Baldwin ("10/26/12 Trans.")..... Hearing Exh. GBS-9
10. Commonwealth's Answer to Defendants' Omnibus Pretrial Motions (Nov. 14, 2012) (Excerpts)..... Mot. to Quash Exh. F
11. May 13, 2013 Affidavit of Dr. Graham B. Spanier ("Spanier Aff.")..... Mot. to Quash Exh. A

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 v. :
 :
 GRAHAM B. SPANIER, :
 :
 Defendant. :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Hearing
Memorandum was delivered this 18th day of February 2014, to the following:

By Email and First Class Mail

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