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DAUPHIN COUNTY  
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COMMONWEALTH OF PENNSYLVANIA

v.

GARY CHARLES SCHULTZ,  
Defendant

: IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY

:  
: No. CP-22-CR-5164-2011

: No. CP-22-CR-3616-2013

:  
: CHARGES: PERJURY; PENALTIES  
: FOR FAILURE TO REPORT;  
: ENDANGERING THE WELFARE OF  
: CHILDREN; OBSTRUCTING THE  
: ADMINISTRATION OF LAW;  
: CRIMINAL CONSPIRACY

---

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY M. CURLEY,  
Defendant

: IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY

:  
: No. CP-22-CR-5165-2011

: No. CP-22-CR-3614-2013

: CHARGES: PERJURY; PENALTIES  
: FOR FAILURE TO REPORT;  
: ENDANGERING THE WELFARE OF  
: CHILDREN; OBSTRUCTING THE  
: ADMINISTRATION OF LAW;  
: CRIMINAL CONSPIRACY

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COMMONWEALTH OF PENNSYLVANIA

v.

GRAHAM B. SPANIER,  
Defendant

: IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY

:  
: No. CP-22-CR-3615-2013

:  
: CHARGES: PERJURY; PENALTIES  
: FOR FAILURE TO REPORT;  
: ENDANGERING THE WELFARE OF  
: CHILDREN; OBSTRUCTING THE  
: ADMINISTRATION OF LAW;  
: CRIMINAL CONSPIRACY

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COMMONWEALTH'S PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RELATING TO MOTIONS TO QUASH  
PRESENTMENT AND/OR DISMISS CHARGES

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TO THE HONORABLE TODD A. HOOVER, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Kathleen G. Kane, Attorney General, Bruce R. Beemer, Chief Deputy Attorney General, Laura A. Ditka, Senior Deputy Attorney General, and James P. Barker, Chief Deputy Attorney General, who files this Commonwealth's Proposed Findings of Fact and Conclusions of Law Relation to Motions to Quash Presentment and/or Dismiss Charges, and in support thereof represents as follows:

**I. BACKGROUND**

Before the Court are a number of motions filed by the defendants, who are charged with offenses arising from conduct relating to a Grand Jury investigation into the conduct of Gerald A. Sandusky. Sandusky molested a number of pre-teen and teenaged boys over several years. Sandusky was convicted of some 45 charges relating to that conduct. Succinctly stated, the defendants, Gary Charles Schultz, Timothy M. Curley, and Graham B. Spanier, are charged with obstructing the investigation, committing perjury during testimony before the Grand Jury, failing to report known sexual abuse of children, endangering the welfare of children, and conspiracy to commit these offenses.

At various times, the defendants have filed motions to dismiss, to quash the presentments, etc., asserting that, if Cynthia A. Baldwin, Esquire,<sup>1</sup> represented that at the time of their Grand Jury testimony, her later appearance before the Grand Jury necessarily involved violations of the attorney-client privilege and the work-product doctrine. If Attorney Baldwin did not represent the defendants at the time of their appearances before the Grand Jury, their right to counsel was violated.

Previously, the defendants filed similar motions before the Honorable Barry F. Feudale, Supervising Judge of the Thirtieth and Thirty-Third Statewide Investigating Grand Juries. Judge Feudale denied the motions as properly being matters for the trial court and the Supreme Court of Pennsylvania denied petitions for review filed by Curley and Schultz. *See In re: The Thirty-Third Statewide Investigating Grand Jury*, Nos. 61, 62 MM 2013 (Pa. June 7, 2013).<sup>2</sup> The charges were held for court after preliminary hearings on December 16, 2012, and July 29, 2013.

## **II. FINDINDGS OF FACT**

1. In December, 2008, the Pennsylvania State Police received a report alleging sexual contact between a minor male and Gerald A. Sandusky, formerly a football coach at the

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<sup>1</sup> The Honorable Cynthia A. Baldwin is a former Judge of the Court of Common Pleas of Allegheny County and a former Justice of the Supreme Court of Pennsylvania. At the time of the testimony by Spanier, Schultz, and Curley, she was General Counsel for the Pennsylvania State University. For the sake of brevity and to represent her current status, she is referred to herein as "Attorney Baldwin."

<sup>2</sup> The Commonwealth took the position that motions to quash the presentment or otherwise challenging actions taken before the Grand Jury properly are presented to the Supervising Judge and maintains that position. However, as the Supreme Court indicated in its Orders denying the petitions for review that the denial was without prejudice to the right of the defendants "raise the issues in the underlying prosecution," *id.*, it appears that this Court has been granted the authority to address these issues.

Pennsylvania State University (PSU). (Notes of Testimony of Jury Trial in the Court of Common Pleas of Centre County dated June 14, 2012, at 138)

2. Because the District Attorney of Centre County had a conflict of interest, the investigation was referred to the Pennsylvania Office of Attorney General. (*Id.* at 139)

3. In April or May, 2009, the case was submitted to the Thirtieth Statewide Investigating Grand Jury (*Id.* at 139-140), which sat in Harrisburg, Dauphin County. (Notes of Testimony of Grand Jury Proceedings dated January 12, 2011 (testimony of Tim Curley, Gary Schultz) at 1).

4. Due to the expiration of the term of the Thirtieth Statewide Investigating Grand Jury, the investigation was carried over into the Thirty-Third Statewide Investigating Grand Jury, which also sat in Harrisburg. (*See generally* Notes of Testimony of Grand Jury Proceedings dated October 26, 2012 (testimony Cynthia Baldwin) at 1)

5. On January 12, 2011, Defendants Timothy M. Curley and Gary C. Schultz appeared before the Thirtieth Statewide Investigating Grand Jury to testify as to .

6. Before Curley and Schultz testified, they appeared before the Honorable Barry F. Feudale, the Supervising Judge, who advised them of their rights through a colloquy.

7. At the beginning of the colloquy, the following exchange took place:

MR. BARKER: Judge, we're here on Notice 29. 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.

(Notes of Testimony of Grand Jury Proceedings dated January 12, 2011, at 9:04 a.m.)

8. Judge Feudale then reviewed rights of witnesses before a Grand Jury, including the right to counsel for matters pertaining to the Grand Jury, the right to consult with counsel at any time during testimony, and the right to assert privileges, including the right against self-incrimination. (*Id.* at 8-10)

9. Judge Feudale also informed both Curley and Schultz as follows:

JUDGE FEUDALE: Next, a witness before the Grand Jury has the duty to give full, truthful, complete and honest answers to all questions asked except where the witness appropriately refuses to answer on a proper legal ground.

I'm hereby directing both of you to observe and obey this duty. In this regard I must caution you that if a witness answers untruthfully, he may be subjected to prosecution for perjury which is punishable under the Crimes Code of Pennsylvania. It's a very serious offense. It's a felony.

(*Id.* at 10-11)

10. Both Curley and Schultz indicated that they had no questions regarding their rights and obligations before the Grand Jury and were sworn as witnesses by Judge Feudale. (*Id.* at 11)

11. At the start of Curley's testimony before the Grand Jury, the following exchange took place:

Q You have counsel with you?

A Yes, I do.

Q Would you introduce her, please?

A My counsel is Cynthia Baldwin.

(Notes of Testimony of Grand Jury Proceedings dated January 12, 2011, at 11:20 a.m. (testimony of Tim Curley) at 3).

12. When Schultz testified before the Grand Jury, he was asked about counsel and provided the following answer:

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

A That is correct.

(Notes of Testimony of Grand Jury Proceedings dated January 12, 2011, at 12:02 p.m.

(testimony of Gary Schultz) at 3).

13. Neither Curley nor Schultz asked for time to consult with counsel during the time that they were testifying before the Grand Jury.

14. On April 13, 2011, Attorney Baldwin appeared before Judge Feudale for a conference relating to subpoenas issued to PSU relating to the Sandusky investigation. (Notes of Testimony of Grand Jury Proceedings dated April 13, 2011, at 8:57 a.m. at 2)

15. The subpoenas that were discussed during the April 13, 2011, conference were issued to PSU and asked for email records from PSU. (*Id.* at 25)

16. At the close of the April 13, 2011, conference, the following exchange took place:

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)

17. On April 13, 2011, following the conference, Defendant Graham B. Spanier appeared before Judge Feudale and was advised of his rights and obligations related to his testimony before the Grand Jury. (*Id.* at 28-33)

18. During the April 13, 2011, colloquy, Judge Feudale advised Spanier relating to his obligation to tell the truth or face a charge of perjury in the same manner that he advised Curley and Schultz on January 12, 2011. (*Id.* at 31; ¶ 9, above)

19. Following the April 13, 2011, colloquy, Spanier asked two questions relating to grand jury reports that were answered by Judge Feudale (*id.* at 31-33) and then was sworn by Judge Feudale as a witness. (*Id.* at 33)

20. At the start of Spanier's testimony before the Grand Jury, he identified himself and then the following took place:

Q Sir, you're represented by counsel today?

A Yes.

Q Could you just identify counsel?

A Cynthia Baldwin sitting behind me.

(Notes of Testimony of Grand Jury Proceedings dated April 13, 2011, at 9:53 a.m. at 3)

21. At one point during Spanier's testimony, Attorney Baldwin interrupted to suggest that Spanier clarify that PSU's police department is separate from the Borough of State College's police department. (*Id.* at 9)

22. Attorney Baldwin then indicated to the attorney for the Commonwealth that, for purposes of police matters, PSU's main campus is referred to as University Park. (*Id.* at 9-10)

23. Spanier did not ask for time to consult with counsel during his appearance before the Grand Jury.

24. On December 16, 2011, after a preliminary hearing, the charges against Schultz and Curley arising from the first Presentment were held for court.

25. On October 26, 2012, Attorney Baldwin testified before the Grand Jury regarding the following topics:

(a) her professional background and relationship with PSU (Notes of Testimony dated October 26, 2012, at 4-7);

(b) her relationship with Spanier as a member of PSU's Board of Trustees and as Chief Counsel (*id.* at 7-10);

(c) that she did not know of the Grand Jury investigation of Sandusky as a Board member and did not learn of it as Chief Counsel until she was contacted by the Office of Attorney General regarding subpoenas for Curley, Schultz, and then-head football coach Joe Paterno to testify as well as a subpoena *duces tecum* (*id.* at 10-12);

(d) the actions that she took as a result of receiving the subpoenas (*id.* at 12-19);

(e) that there were materials that should have been turned over pursuant to the subpoena *duces tecum* that the defendants denied possessing (*id.* at 19-20);

(f) her preparation of Spanier for an interview with law enforcement and his Grand Jury testimony, along with the publicizing of the Grand Jury investigation (*id.* at 21-23);

(g) Spanier's preparation for an interview with prosecutors and investigators from the Office of Attorney General, his knowledge of the subjects about which he would be questioned, and his reaction to the interview (*id.* at 23-26);

(h) Spanier's reaction to being subpoenaed to appear before the Grand Jury (*id.* at 26-27);

(i) her practice of keeping Spanier informed about everything she learned about the Grand Jury investigation (*id.* at 27-29);

(j) Spanier's handling of inquiries by members of the PSU Board of Trustees once the investigation became public (*id.* at 29-39);

(k) Spanier's explanation regarding his involvement in the incidents involving Sandusky and minor boys that were reported to him in 1998 and 2001 (*id.* at 39-40);



(l) Spanier and the Board's reaction to hearing that the Presentment in November 2011 would include charges against Schultz and Curley, and the Board's lack of knowledge despite Spanier's duty to inform the members (*id.* at 41-45);

(m) the preparation and publication of a press release expressing "unconditional support" for Schultz and Curley prior to the Board of Trustees being fully informed of events (*id.* at 45-47);

(n) Spanier's intent to handle the "crisis" himself, rather than the Board (*id.* at 47-48);

(o) Spanier's explanation that the problem was political and arose from differences with the Governor relating to the state budget (*id.* at 48-49);

(p) Spanier's public statements and Attorney Baldwin's reaction to them (*id.* at 49-70);

(q) questions from the Grand Jurors (*id.* at 70-74).

26. On July 29, 2013, following a preliminary hearing, the charges in the second Presentment against all three Defendants were held for court.

27. Attorney Baldwin did not testify during either preliminary hearing, her Grand Jury testimony was not used during either preliminary hearing, and no evidence gathered as a result of her Grand Jury testimony was used during either preliminary hearing.

28. Attorney Baldwin, while General Counsel for PSU, represented PSU before the Thirtieth Statewide Investigating Grand Jury in responding to the subpoenas *duces tecum* addressed to the University. (*Id.* at 11-12, 16-20)

29. Attorney Baldwin, while General Counsel for PSU, represented Curley as an employee and agent of PSU conducting PSU business.

30. Attorney Baldwin, while General Counsel for PSU, represented Gary Schultz as an employee and agent of PSU conducting PSU business.

31. Attorney Baldwin, while General Counsel for PSU, represented Graham Spanier as an employee and agent of PSU conducting PSU business.

32. At the request of counsel for the Commonwealth, Attorney Baldwin, and PSU, the Supervising Judge of the Grand Jury, following the issuance of the subpoena for Attorney Baldwin's testimony and prior to her testimony, held a hearing on October 22, 2012, to determine the scope of the testimony to be elicited by the Commonwealth from Attorney Baldwin, consistent with the waiver of the attorney-client privilege by PSU.

33. Cynthia A. Baldwin testified before the Grand Jury on October 26, 2012 pursuant to a subpoena and, consistent with the Supervising Judge's ruling of October 22, 2012, Attorney Baldwin did not testify about her communications with Curley or Schultz, aside from those communications that related to the collection of documents in order to respond to subpoenas issued to the University.

34. With regard to the communications described in ¶ 33, above, Attorney Baldwin's testimony was consistent with that of Curley and Schultz, such as the fact that Curley and Schultz told her that they had no responsive documents, as Curley and Schultz testified during their Grand Jury testimony.

35. PSU made no exceptions or "carve-outs" to the overall waiver of privilege regarding Spanier's communications with then-General Counsel Attorney Baldwin.

36. Spanier, Schultz, and Curley had no separate or personal attorney-client relationship with Attorney Baldwin.

37. Spanier, Schultz, and Curley never separately and personally retained Attorney Baldwin.

38. A substantial portion of Attorney Baldwin's Grand Jury testimony relating to Dr. Spanier was with regard to statements that he made in the public domain, including to the media.

39. In Spanier's public statements, he made accusations against Attorney Baldwin, and she properly may defend herself against those accusations under Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct. (Exhibits of December 17, 2013 Pre-Trial Proceedings—Spanier's July 23, 2012, letter to Members of the Board of Trustees and Spanier's interview with ABC Nightline)

40. Examples of the accusations made by Spanier to which Attorney Baldwin properly responded include: a claim that Attorney Baldwin never prepared him for his Grand Jury testimony or understanding of the context (Baldwin Testimony at 51) when in fact he was prepared and the "context" explained, to the point that the room in which Spanier would testify was described (*id.* at 53-54); Spanier was never told that materials had been subpoenaed (*id.* at 50) when he was kept apprised of the entire investigation (*id.* at 54-55); and an allegation that Attorney Baldwin turned over to the Supervising Judge a thumb drive containing emails dating back to 2004 (*id.* at 51) when no such event occurred, and any thumb drive would have been provided to the attorney for the Commonwealth, not the Supervising Judge. (*Id.* at 51-52)

### **III. CONCLUSIONS OF LAW**

1. The finding that the evidence supporting the charges constituted a *prima facie* case renders moot the Defendants' challenges to the Grand Jury proceedings. *Commonwealth v. Chamberlain*, 612 Pa. 107, 178, 30 A.3d 381, 423 (2011) (because Commonwealth established *prima facie* case at preliminary hearing, challenge to affidavit of probable cause supporting criminal complaint rendered moot);<sup>3</sup> *Commonwealth v. Walter*, 600 Pa. 392, 966 A.2d 560 (2009) (citing, *inter alia*, *Commonwealth v. Ballard*, 501 Pa. 230, 233, 460 A.2d 1091, 1092

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<sup>3</sup> The defendant in *Chamberlain* was charged after a grand jury investigation and recommendation of charges. *Id.* at 124-125, 30 A.3d at 391.

(1983), for rule that claims of inadequacy with respect to pretrial matters are rendered moot by a “subsequent independent judicial judgment”); *Commonwealth v. Lee*, 541 Pa. 260, 662 A.2d 645, 650 (1995) (claims that preliminary hearing judge should have recused and that evidence failed to establish probable cause was moot because defendant ultimately was found guilty by a jury); *Commonwealth v. McCullough*, 501 Pa. 423, 461 A.2d 1229, 1231 (1983) (Commonwealth's failure to establish *prima facie* case at preliminary hearing immaterial where Commonwealth subsequently meets burden of proof beyond a reasonable doubt at trial).

2. At the time that each of the Defendants testified, Attorney Baldwin did not have a conflict of interest with respect to her representation of PSU and the Defendants because she was unaware that they had lied and had no reason to believe that they lied when they testified before the Grand Jury, and because the defendants' and PSU's interests in avoiding criminal and civil liability were alike at the time of the Defendants' Grand Jury testimony.

3. A defendant who claims a conflict of interest must demonstrate that an actual conflict of interest, i.e. one that adversely affected counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 170-172 and n. 5 (2002); *Commonwealth v. Padilla*, 80 A.3d 1238, 1248 (Pa. October 31, 2013). It is not sufficient to claim that Attorney Baldwin's representation was subpar; the defendants must show that some interest on the part of PSU actually and adversely affected her representation of the defendants before the Grand Jury. *Id.*

4. The Defendants have failed to show that an interest on the part of PSU actually affected any action or advice on the part of Attorney Baldwin to the detriment of the Defendants.

5. The record reflects that the Commonwealth provided the Supervising Judge with complete information regarding the progress of the investigation prior to the testimony of Spanier before the Grand Jury, including its doubts about the veracity of Spanier, Schultz, and

Curley (Notes of Testimony of Grand Jury Proceedings dated April 13, 2011, at 8:57 a.m., at 7-15).

6. The Commonwealth did not, and could not in good faith, file a motion to disqualify Attorney Baldwin absent evidence of an actual conflict of interest, which did not exist.

7. There was no prosecutorial misconduct relating to any failure to attempt to disqualify Attorney Baldwin from representing the Defendants before the Grand Jury.

8. The Defendants have failed to demonstrate a basis for the remedy that they seek, i.e. quashing of the Presentments and dismissal of the charges, particularly given that the Commonwealth has established a *prima facie* case at a preliminary hearing independent of any purported violation of the Defendants statutory right to counsel before the Grand Jury.

9. Even if an attorney-client privilege survived the waiver by PSU regarding Spanier's communications with then-General Counsel Attorney Baldwin, Spanier waived that privilege by his public dissemination of communications he had with Ms. Baldwin.

10. At all times relevant to these proceedings, Cynthia A. Baldwin represented PSU as its General Counsel.

11. Attorney Baldwin represented Spanier, Schultz, and Curley in their capacities as agents and employees of PSU. See *Maleski v. Corporate Life Ins. Co.*, 165 Pa. Commw. 72, 76-77, 646 A.2d 1, 3 (1994) (corporate officers are represented in that capacity only unless they demonstrate that representation was in individual capacity) (citing *In re: Beville, Bresler & Schulman Asset Mgt.*, 805 F.2d 120, 123 (3d Cir. 1986), which in turn relied on *In re: Grand Jury Investigation, No. 83-30557*, 575 F. Supp. 777 (N.D. Ga. 1983)).

12. At the time that Attorney Baldwin represented Spanier, Schultz, and Curley, their interests were aligned with PSU and, therefore, there was no conflict of interest in Ms. Baldwin's representation of Spanier, Schultz, and Curley before the Grand Jury.

13. Attorney Baldwin did not violate the attorney-client privilege with PSU or its agents, Spanier, Schultz, or Curley.

14. PSU voluntarily waived its attorney-client privilege with Attorney Baldwin as to matters involving Gerald Sandusky.

15. Cynthia A. Baldwin testified before the Grand Jury subject to a valid and legally binding subpoena.

16. During her Grand Jury testimony, Attorney Baldwin did not disclose any confidential or privileged information.

17. Even if confidential information was disclosed, under Rule 1.6(c)(3) of the Pennsylvania Rules of Professional Conduct, a lawyer has the right to disclose confidential information, regardless of the attorney-client privilege, in order to "prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used[.]"

15. Even if confidential information was disclosed, under Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct, a lawyer has the right to disclose confidential information, regardless of the attorney-client privilege, in order to establish a "defense on behalf of the lawyer in a controversy between the lawyer and client" and "to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]"

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying the defendants' various pretrial motions.

**Respectfully submitted,**


**KATHLEEN G. KANE**  
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**Date: February 18, 2014**

**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Proposed Findings of Fact and Conclusions of Law Relation to Motions to Quash Presentment and/or Dismiss Charges upon the persons and in the manner indicated below:

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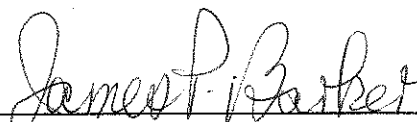
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**Date: February 18, 2014**