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DAUPHIN COUNTY  
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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY  
v. :  
: No. CP-22-CR-5164-2011  
GARY CHARLES SCHULTZ, : No. CP-22-CR-3616-2013  
Defendant :  
: 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 : IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY  
v. :  
: No. CP-22-CR-5165-2011  
TIMOTHY M. CURLEY, : No. CP-22-CR-3614-2013  
Defendant :  
: 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 : IN THE COURT OF COMMON PLEAS  
: OF DAUPHIN COUNTY  
v. :  
: No. CP-22-CR-3615-2013  
GRAHAM B. SPANIER, :  
Defendant :  
: 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 MEMORANDUM OF LAW SUPPORTING  
ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TO THE HONORABLE TODD A. HOOVER, PRESIDENT JUDGE:

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Kathleen G. Kane, Attorney General, Bruce R. Beemer, Chief of Staff, Laura A. Ditka, Senior Deputy Attorney General, and James P. Barker, Chief Deputy Attorney General, who files this Commonwealth's Memorandum of Law Supporting Its Findings of Fact and Conclusions of Law, and in support thereof represents as follows:

**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 them at the time of their Grand

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<sup>1</sup> Baldwin is a former Justice of the Supreme Court of Pennsylvania and so is properly addressed as the Honorable Cynthia A. Baldwin. At the time of the testimony by Spanier, Schultz, and

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.

Following a hearing on the defendants' motions, the Court directed the filing of findings of fact and conclusions of law. This Memorandum is submitted in support of the Commonwealth's proposed findings and conclusions.

I. ANY ISSUE RELATING TO THE PRESENTMENTS RETURNED  
BY THE STATEWIDE INVESTIGATING GRAND JURY IS MOOT

The defendants argue that the Presentments returned by the Thirty-Third Statewide Investigating Grand Jury should be quashed and the charges against them dismissed. However, based on the fact that all of the charges have been held for court after preliminary hearings, any such argument is moot. In *Commonwealth v. Chamberlain*, 612 Pa. 107, 178, 30 A.3d 381, 423

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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.

(2011), our Supreme Court held that, because Commonwealth established a *prima facie* case at the preliminary hearing, a challenge to the affidavit of probable cause supporting a criminal complaint was rendered moot. The defendant in *Chamberlain* was charged after a grand jury investigation and recommendation of charges. *Id.* at 124-125, 30 A.3d at 391. Importantly, the evidence presented during the preliminary hearings did not include evidence in the form of testimony by Attorney Baldwin, either Grand Jury testimony or otherwise. Thus, there has been a subsequent judicial determination of a *prima facie* case that renders any challenge to the presentments moot. *See also generally Commonwealth v. Walter*, 600 Pa. 392,401, 966 A.2d 560, 566 (2009) (in capital case, denial of pretrial challenge to sufficiency of evidence to support an aggravating circumstance rendered moot by subsequent finding by jury of guilt beyond a reasonable doubt as to that aggravating circumstance); *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).

## II. ATTORNEY BALDWIN'S ALLEGED CONFLICT OF INTEREST DOES NOT WARRANT DISMISSAL OF THE CHARGES.

All of the defendants claim that Attorney Baldwin, as General Counsel for PSU, had a conflict of interest in representing the defendants before the Grand Jury. The specific conflict is not made clear on the record, however. In fact, the interests of PSU and the defendants were alike at the time of the testimony. That is, if the defendants were aware of likely abuse and failed to report it, despite being persons required to do so, they would be guilty of failure to report. Theoretically, based on the defendants' positions, PSU could be guilty of the same

violation and might have violated federal law as well. *See* 20 U.S.C. § 1092(f) (“Clery Act”). Thus, the defendants’ and PSU’s interests in avoiding criminal and civil liability were alike at the time of the defendants’ Grand Jury testimony.

Even assuming that a conflict of interest existed, the defendants have failed to point to any authority indicating that they are entitled to have the presentments quashed or the charges dismissed. Rather, 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. 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.

The defendants have never pointed to any such evidence. Rather, they claim that Attorney Baldwin should have advised them not to testify before the Grand Jury. It is not clear exactly why she would have done so, given their claims that they were unaware of Sandusky’s predation on underage boys. Further, the defendants have not alleged that Attorney Baldwin instructed them to lie before the Grand Jury, and the colloquies by the Supervising Judge are very clear that a witness who lies before the Grand Jury is subject to perjury charges. Finally, the basis for any advice *not* to testify before the Grand Jury is unclear. The defendants were served with Grand Jury subpoenas and point to no basis for quashing those subpoenas. Each was advised by the Supervising Judge regarding his right to assert the privilege against self-incrimination.

In the end, the defendants’ arguments amount to nothing more than claims of ineffective assistance of counsel. They fail to demonstrate that such claims are ripe for consideration at this

time. Generally, a claim of ineffective assistance must await collateral review under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002). Recently, our Supreme Court held that there are only two exceptions to the *Grant* rule: extraordinary circumstances where a claim or claims of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice; and where the defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, on post-sentence motions and direct appeal, (1) there is good cause shown, and (2) the defendant waives his entitlement to seek PCRA review.

The mere fact that the defendants sought a hearing on the issue of Attorney Baldwin's alleged ineffectiveness demonstrates that that the claim is not apparent from the record, and the defendants have shown neither good cause nor a waiver of their right to PCRA review. Because the exceptions do not apply, any claim of ineffective assistance of counsel must await PCRA review.

Even if considered on the merits, the defendants cannot establish a claim of ineffective assistance of counsel because they cannot show prejudice. They were advised by the Supervising Judge that they could be charged with perjury if they lied to the Grand Jury. Their failure to report was established by the testimony of Michael McQueary and the absence of any report of what McQueary told Schultz and Curley, along with emails reflecting that the information had been shared with Spanier. The obstruction charges were established by the lying to the Grand Jury and the refusal to cooperate with the investigation. The concerted activity established the conspiracy charges. Any advice on the part of Attorney Baldwin would not have changed the outcome of the Grand Jury proceedings, and so there was no prejudice.

III. THE SUPERVISING JUDGE PROPERLY OUTLINED THE PARAMETERS OF ATTORNEY BALDWIN'S TESTIMONY AND HER TESTIMONY BEFORE THE GRAND JURY DID NOT EXCEED THOSE PARAMETERS.

Spanier, as President of PSU, directed Attorney Baldwin, as General Counsel for PSU, to accompany Schultz and Curley, and later himself, to the Grand Jury. Given the status of the defendants and Attorney Baldwin, the Commonwealth respectfully submits that the defendants do not have the right to assert privilege. Each chose to use PSU's counsel as his representative. Regardless of how the defendants or Attorney Baldwin choose to characterize the relationship (and whether each defendant was represented by Attorney Baldwin is a legal conclusion), their claim of privilege fails. First, assuming that Attorney Baldwin did not represent the defendants, by using PSU's counsel in the manner that they did, the defendants knew that it was PSU who ultimately controlled the information that was communicated and cannot now claim that information as protected. *See Maleski v. Corporate Life Insurance Co.*, 165 Pa. Commw. 72, 76-77, 646 A.2d 1, 3 (1994) (corporate officer who claims individual privilege has burden of showing, *inter alia*, that officer sought legal advice in individual, as opposed to corporate, capacity).

Assuming that Attorney Baldwin represented the defendants individually, the defendants' assertions of the attorney-client privilege still fail. The Superior Court has described the attorney-client privilege, and outlined the requirements for asserting the privilege, as follows:

The attorney-client privilege is "the most revered of our common law privileges, and, as it relates to criminal proceedings, it has been codified in this Commonwealth at 42 Pa.C.S. § 5916." *Commonwealth v. Maguigan*, 511 Pa. 112, 511 A.2d 1327, 1333 (1986). Section 5916 provides that "[i]n a criminal proceeding, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."

The generally recited requirements for assertion of the attorney-client privilege are:

- (1) The asserted holder of the privilege is or sought to become a client.
- (2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- (3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- (4) The privilege has been claimed and is not waived by the client.

*Commonwealth v. Mrozek*, 441 Pa. Super. 425, 657 A.2d 997, 998 (1995) (citation omitted).

*Commonwealth v. Boggs*, 695 A.2d 839, 843 (Pa. Super. 1997).

In *Boggs*, a corporal with the Pennsylvania State Police posed as an attorney and met with the defendant, who was facing theft charges and wanted two witnesses against him murdered. *Id.* at 840. He later claimed that his discussions with the “attorney” were protected by the attorney-client privilege. The Superior Court presumed that the privilege would apply under circumstances in which a person posed as an attorney but was not actually licensed to practice law and concluded that, because the advice was sought for the sole purpose of committing a crime, the defendant’s statements were admissible. *Id.* at 843. *See also Boggs* at 843 (quoted above, noting that communication may not be for the purpose of committing a crime or tort); *Commonwealth v. Maguigan*, 511 Pa. 112, 124-132, 511 A.2d 1327, 1333-1337 (1986) (attorney-client privilege does not apply to defense attorney’s knowledge of whereabouts of fugitive defendant who fails to appear for trial because attorney may not participate in the client’s wrongdoing).

When the client uses counsel’s advice to commit a crime or otherwise to frustrate the ends of justice (requirement (3), above), the crime-fraud exception applies:



Protection under attorney-client privilege is subject to limits, exceptions, and waiver. For example, the crime-fraud exception results in loss of the privilege's protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity. *In re Investigating Grand Jury of Philadelphia County No. 88-00-3503*, 527 Pa. 432, 441-42, 593 A.2d 402, 406-07 (1991); *Brennan v. Brennan*, 281 Pa. Super. 362, 422 A.2d 510, 515 (1980). Furthermore, the privilege may be forfeited if its exercise will only frustrate the interests of justice. *Brennan, supra* at 515.

*Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007).

As the Court can see from the transcript of the testimony of Attorney Baldwin before the Grand Jury, the attorney for the Commonwealth scrupulously avoided any questions relating to topics protected by the attorney-client privilege or the work-product doctrine. To the extent that any communication between a defendant and Attorney Baldwin may have been introduced, that communication was not subject to either the attorney-client privilege or the work-product doctrine because the communication was not confidential and/or the crime-fraud exception applied.

For example, the Presentment indicates that Attorney Baldwin testified regarding Spanier's knowledge of the investigation. In an interview with law enforcement prior to his testimony before the Grand Jury, Spanier indicated that he was unaware of a 1998 incident involving Sandusky. However, Attorney Baldwin's prior contact with Spanier indicated that he was "well versed" with those allegations. Spanier also claimed to have learned shortly before the interview that Michael McQueary had reported a 2001 incident, but had shown knowledge of that fact previously. Presentment at 25-26. Plainly, the crime-fraud exception applies to this testimony by Attorney Baldwin.

Attorney Baldwin also testified regarding her attempts to comply with subpoenas issued by the Grand Jury. Presentment at 21-22. This testimony plainly related to her representation of PSU, not the defendants. That is, it was PSU that was ultimately responsible for compliance;

Spanier was responsible only in his position as a Penn State employee and custodian of the records sought by the Grand Jury. Regardless, the communication between Attorney Baldwin and Spanier would not be protected by the attorney-client privilege because the communication was not confidential (the existence of the subpoena and the duty to comply were not matters between Spanier and Attorney Baldwin). Also, Spanier and his codefendants acted so as to avoid compliance with a known legal duty, thereby frustrating the interests of justice and committing additional offenses, and so their conduct falls within the crime-fraud exception.

Thus, contrary to the defendants' allegations that Attorney Baldwin testified in violation of the attorney-client privilege, the record would show that the privilege does not apply; if a privilege is implicated, the crime-fraud exception applies.

During the in-chambers conference relating to their motions to dismiss/quash, the defendants argued that the Commonwealth waived the application of the crime-fraud exception by not raising it before Judge Feudale. This argument ignores the fact that Judge Feudale had ruled that the attorney-client privilege did not apply to the areas into which the Commonwealth sought to inquire. There is no reason to argue for an exception to an inapplicable rule. There was no waiver.

#### IV. DEFENDANTS HAVE FAILED TO DEMONSTRATE A PROPER REMEDY.

In all of their many filings, the defendants have failed to show that dismissing the charges or quashing the presentments is a proper remedy. *See* Pa.R.Crim.P. 575(A)(2)(c), (A)(3) (requiring a motion to include a request for relief and noting that any form of relief that is not requested is waived). They cite no authority for the proposition that, despite the Commonwealth's establishing of a *prima facie* case at a preliminary hearing, a defendant is entitled to dismissal based on purported irregularities before a grand jury that returned a

presentment. The defendants appear to be of the view that, if they appear before a grand jury with conflicted or ineffective counsel, they have a “get out of jail free” card to play at a later date, including after a preliminary hearing. As recited at length above, there simply is no basis in law for this assertion, and the defendants are not entitled to the remedy that they seek.

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

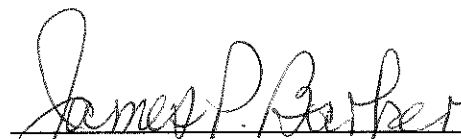
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Date: February 18, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that, in addition to emailing copies to defense counsel, I am this day serving one copy of the foregoing Commonwealth's Memorandum of Law Supporting Its Findings of Fact and Conclusions of Law upon the persons and in the manner indicated below:

*Via U.S. First-Class Mail,  
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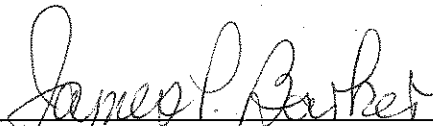
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**Date: February 18, 2014**