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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CP-22-CR-5164-2011
	:	No. CP-22-CR-3616-2013
	:	
GARY CHARLES SCHULTZ	:	

DEFENDANT SCHULTZ'S POST-HEARING MEMORANDUM

AND NOW, comes the Defendant, Gary Charles Schultz, by and through counsel, Thomas J. Farrell, Esq., and hereby submits this Post Hearing Memorandum as ordered by the Court on January 17, 2014.

Introduction

After hearing argument on December 16 and 17, 2013, on the defendants' various motions relating to Cynthia Baldwin's representation of them as grand jury witnesses and her own grand jury testimony, [1] the Court decided that the transcripts of record from the grand jury proceedings, along with certain exhibits relating to that testimony which were made part of the record on December 17, would be sufficient to decide the issues before the Court and denied the defendants' request to present additional testimony and exhibits. The Commonwealth chose not to offer any testimony. On January 17, the Court issued an Order deferring until

[1] An ineffectiveness claim should not be taken as an attack on Ms. Baldwin's competence or integrity as an attorney. *See* Richard Gazarick, "LeNature's Appeal Tied to Attorney," PITTSBURGH TRIBUNE REVIEW (December 3, 2013; available at www.triblive.com/news/westmoreland/5182611-74/lynn-farrell-serving#axzz2t2pXRq5i) (describing the undersigned's letter to a former client advising him how to raise a claim of ineffective assistance of counsel against me). As the saying goes, even Homer nods.

trial a decision as to whether Ms. Baldwin will be permitted to testify and another Order requiring the parties to file Post Hearing Memoranda (1) identifying the pleadings at issue and the relief requested, (2) submitting Proposed Findings of Fact on the issues, and (3) briefing the issue of relief, but only on the Motions to Quash the Presentment and Complaint. This is Gary Schultz' responsive Post Hearing Memorandum.

Identification Of Pleadings And Relief Requested.

We group our pleadings into (1) those relating to the defendants' own grand jury testimony; and (2) those relating to Ms. Baldwin's grand jury testimony.

A. The Defendant's Grand Jury Testimony.

1. Schultz' Omnibus Pretrial Motion and Supporting Memorandum of Law.

   - Filed October 31, 2012, at CP-22-CR-5164-2011.

   - Relief requested: This motion requests that either the charges in the 5164 CR 2011 Information be dismissed or Mr. Schultz's testimony be suppressed. *See* Omnibus Pretrial Motion at 14-15; Memorandum Of Law at 15-16. It also requested an evidentiary hearing. Motion at 19.

2. Reply by Defendant Gary C. Schultz to Commonwealth's Answer to Defendants' Omnibus Pre-Trial Motion

   - Filed January 4, 2013, at CP-22-CR-5164-2011.

   - Relief requested: This Reply requested an evidentiary hearing.

3. Defendant Schultz' Motion to Join Co-Defendant Curley's Reply to the Commonwealth's Answer to Defendant's Omnibus Pretrial Motions.

   - Filed January 10, 2013, at Docket No.CP-22-CR-5164-2011.

   - Relief requested: Mr. Schultz moved to join Mr. Curley's motion, which raised issues of prosecutorial misconduct and the deprivation of counsel.

4. Defendant Gary C. Schultz' Reply to Commonwealth's Answer to Defendants' Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product.

   - Filed January 18, 2013, at No. 217 M.D. Misc. Dkt. 2010 and 5165-CR-2011.

   - Relief Requested: Dismissal of the case or suppression of Mr. Schultz's grand jury testimony. Reply at 12.

B. Cynthia Baldwin's Grand Jury Testimony.

5. Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product.

   - Filed November 27, 2012, at 2010 and CP-22-CR-5165-2011.

   - Relief requested: Quashal of Presentment No. 29.

6. Defendant Schultz' Motion to Join Co-Defendant Spanier's Motion and Memorandum of Law in Support of Motion to Quash Criminal Complaint and Presentment.

   - Filed June 20, 2013 at CP-22-MD-1386-2012.

   - Relief requested: Quashal of Presentment No. 29 and the Criminal Complaint based upon it.

7. Defendant Gary C. Schultz' Motion to Suppress His Grand Jury Testimony, to Dismiss and to Incorporate Prior Motions.

   - Filed October 18, 2013, at 5164 CR 2011 and 3616 CR 2013.

   - Relief requested: This Motion incorporates all the motions and pleadings otherwise listed in this Memorandum and re-filed them at the Common Please docket numbers, 5164 CR 2011 and 3616 CR 2013. It briefly summarizes them and lists as the relief we seek:
     1) Suppress Mr. Schultz' grand jury testimony;
     2) Dismiss the *Informations* at 5164 CR 2011 and 3616 CR 2013;
     3) Preclude Cynthia Baldwin's testimony at trial;
     4) Permit Mr. Schultz to join Mr. Spanier's Motion to Quash; and
     5) Admit expert testimony on the effective assistance of counsel.

Proposed Findings Of Fact

A. Attorney-Client Privilege and Work-Product Privilege.

1. Gary Schultz worked for Pennsylvania State University ("PSU") as its Senior Vice President for Finance and Business from approximately 1995 to June 2009, when he retired.[2] He returned on a temporary basis in September 2011, while PSU searched for a replacement to his successor, Albert Horvath.[3]

2. Cynthia Baldwin became General Counsel for PSU on February 15, 2010, after Mr. Schultz retired.[4]

3. On December 28, 2010, Ms. Baldwin received grand jury subpoenas from the Office of Attorney General ("OAG") for Gary Schultz, as well as for Timothy Curley and Joseph Paterno.[5] Messrs. Curley and Paterno were employed by PSU at the time; Mr. Schultz was not. The Commonwealth has not made those subpoenas part of the record.[6]

4. Ms. Baldwin also received a subpoena to PSU for "documents," subpoena 1179. [7] That "was a subpoena requesting basically any information about Jerry Sandusky and allegations of misconduct."[8] (The record before the Court does not describe the subpoena in any more detail, and the Commonwealth did not offer

---

2 December 16, 2013, Tr. at 110 (Commonwealth offered to stipulate to this fact.) *See also* July 29, 2013, Preliminary Hearing Vol. 2 at 69 (testimony of Kim Belcher, secretary in the Office of Finance & Business)(hereafter, "PH V2").

3 PH V2 at 69, 71.

4 Def. Ex. Q (Baldwin October 26, 2012, GJ Tr. At 6).

5 *Id.* at 11.

6 The OAG also has not produced those subpoenas in discovery yet.

7 Oct. 26 GJ Tr. at 12. (Def. Ex. Q)

8 *Id.*

it as an exhibit.[9])

5. At President Spanier's request, Ms. Baldwin agreed to represent Mr. Schultz, as well as Messrs. Curley and Paterno, as grand jury witnesses.[10] Mr. Paterno later obtained separate counsel.[11]

6. Ms. Baldwin testified that sometime before the January 12, 2011, testimony, she generally had conversations with Messrs. Curley, Schultz and Spanier in which Ms. Baldwin told them they would have to "turn all of the information over."[12]

7. Ms. Baldwin did not testify that she told Mr. Schultz that there was a subpoena to PSU for that information or that law enforcement had requested it. Instead, when the grand jury testimony turned to Ms. Baldwin's specific conversation with Mr. Schultz, it became clear that their conversation occurred in the context of preparing him for his own grand jury testimony:

> Q. And now, tell us about Mr. Schultz, what he told you he would do and then what response he gave you ultimately?
> A. He also indicated that he would – he would look. In fact, he told me that he would look for anything that he had; and especially, he was going to look for documents that would help his recollection and he got back to me specifically and said that he didn't have anything.[13]

8. The record lacks any more detail on that conversation and its circumstances, but from the lack of evidence on this record, created in a grand jury proceeding over which the OAG had sole control, the Court concludes:

---

9 December 17, 2013, Tr. At 14.
10 Oct. 26 GJ Tr. At 14.
11 *Id.* at 14-15.
12 *Id.* At 16.
13 *Id.* At 18-19.

- Ms. Baldwin never gave or showed Subpoena 1179 to Mr. Schultz.[14]
- Since Mr. Schultz had not been employed by PSU for a year and a half by this time, he was not sent or given any notice to preserve documents.[15]
- Since Mr. Schultz was no longer employed by PSU, there is no reason to believe that he had access to the records of PSU, including any that may have been in the Finance and Business Offices.

9. The record is silent on where the retired Mr. Schultz was supposed to have looked. There is no evidence that at the time of his grand jury testimony, or at any time from the issuance of the December 2010 subpoenas until being charged in November 2011, Mr. Schultz had in his personal possession any records relating to Mr. Sandusky.[16] Later in her testimony, Ms. Baldwin clarified that any request or search for documents responsive to subpoenas to the University would have gone to the various offices involved, including that of the Senior Vice President.[17] Mr. Schultz had no connection with, much less control, over that office and its records at

---

14 If she had discussed the subpoena with him, she would have been obligated to explain to him that he had a Fifth Amendment right to refuse to respond to it. *United States v. Hubbell*, 530 U.S. 27 (2000)(an individual's act of selecting, producing and authenticating documents to respond to a grand jury subpoena duces tecum is protected by the Fifth Amendment privilege against self-incrimination and may not be compelled absent a grant of immunity).

15 It is undisputed that the Office of General Counsel first sent a litigation hold notice to PSU staff on April 1, 2011. It went to Messrs. Curley, Spanier, and Paterno and their offices. No notice was sent to Mr. Schultz, still retired, nor to the Office of the Senior Vice President for Finance and Business, occupied at the time by Albert Horvath. *See* July 29, 2013, Prelim. Hearing at 71-72 (Ms. Belcher, secretary in the Office of Finance & Business, had no notice of any subpoena for Sandusky documents until sometime after November 2011).

16 The Preliminary Hearing testimony indicates that Kim Belcher, a secretary in the Office of Finance and Business, found records in that office after Mr. Schultz was charged and gave them to Mr. Schultz. July 29, 2013, PH at 58-62. 71-72.

17 Def. Ex. Q, Oct. 26 Tr. At 72-73.

the time periods relevant to the motions before the Court and these Findings.[18]

10. The requirements for assertion of the attorney-client privilege are:

a. The asserted holder of the privilege is or sought to become a client.
b. The person to whom the communication was made is a member of the bar of a court, or his subordinate.
c. 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.
d. The privilege has been claimed and is not waived by the client.[19]

All these requirements are met here.

11. First, the Court finds that Mr. Schultz reasonably believed that Ms. Baldwin represented him as a grand jury witness, a belief shared by the OAG, and the grand jury supervising judge.[20] The representation included his testimony on January 12, 2011, preparation for his testimony, and any discussions about his testimony. The reasons for this finding are as follow.

12. In Mr. Schultz' presence, Ms. Baldwin identified herself to grand jury supervising Judge Feudale and the Deputies Attorneys General as counsel for Mr. Schultz when he was sworn as a witness.[21] Judge Feudale evidenced his understanding that Ms. Baldwin was Mr. Schultz' personal counsel by six times explaining to Mr. Schultz that he had the right to consult with Ms. Baldwin as his

---

18 Mr. Schultz came out of retirement in September 2011, when Mr. Horvath left PSU, but the record does not report any communications about the investigation with Ms. Baldwin at this time or any efforts to find documents. *See* Def. Ex.Q, Baldwin Oct. 26 Tr. At 20-74.

19 *Commonwealth v. Mrozek*, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (Pa. Super. 1995).

20 Even after hearing Ms. Baldwin's testimony, the Commonwealth admitted in a pleading filed with this Court that she was Mr. Schultz' counsel. Commonwealth to Defendants' Omnibus Pretrial Motions at 10 ¶ 13; 21 ("Attorney Baldwin represented the Defendants.") (filed at 5164 and 5165 CR 2011, Nov. 14, 2012).

21 January 12, 2011, colloquy at 8-9 (Def. Ex. L).

counsel should he need advice during the grand jury proceeding.[22]

13. By permitting Ms. Baldwin to attend the otherwise secret grand jury proceedings, Judge Feudale had to have believed that Ms. Baldwin was personal counsel to Mr. Schultz. Otherwise, the Grand Jury Act would have forbidden him from admitting Ms. Baldwin into the grand jury.[23]

14. The OAG did not object to Ms. Baldwin's presence in the grand jury during the testimony. This, too, demonstrates that Ms. Baldwin held herself out as counsel for the individual witness and that the deputies reasonably believed she was such. Had they any inkling that Ms. Baldwin was not the witness' attorney, the experienced deputies would have barred her from the grand jury.[24] Both Judge Feudale and the deputies would have been obligated to afford Mr. Schultz an opportunity to retain counsel or would have assured themselves that he knowingly waived his right to counsel.[25]

15. At the start of his testimony, Mr. Schultz was asked if he had counsel, and he identified Ms. Baldwin as his counsel.[26] Later on during the testimony, they consulted off the record, a right afforded only to a witness and his counsel.[27]

16. Nearly identical colloquies and testimony took place during the testimony of Mr. Curley on January 12, 2011, and that of Mr. Spanier on April 13,

---

22 *Id.* at 9-10.

23 *See* 42 Pa. C.S.A. §4549(b); Pa. R. Crim. P. 231(A), (C)(limiting persons permitted in grand jury).

24 *See* 42 Pa. C.S.A. §4549(b); Pa. R. Crim. P. 231(A), (C)(limiting persons permitted in grand jury).

25 42 Pa. C.S.A. §4549(c)(1)(2); *Commonwealth v. Spotz,* 610 Pa. 17, 49-50, 18 A.3d 244, 263 (2011)(to ensure that a defendant's waiver of counsel is knowing, the trial court must conduct a "probing inquiry" into whether the defendant is aware of the right to counsel and the significance of waiving that right).

26 Def. Ex. N, Schultz GJ Tr. At 3.

27 *Id.* at 33 ("Witness consults with counsel."); *see* 41 Pa. C.S.A. § 4549(c)(3).

2011.[28] These similarities strongly suggest that Ms. Baldwin made similar representations to each of those individuals. Moreover, the similarities of response – of the witnesses, of the Grand Jury Supervising Judge in permitting Ms. Baldwin to attend each witness' testimony, and of the OAG in eliciting from each witness a statement under oath to the effect that Ms. Baldwin was his attorney – render inescapable the conclusion that Ms. Baldwin led all parties to believe that she represented each witness as the kind of personal counsel required by the Grand Jury Act and that everyone's belief to that effect was reasonable.

17. Under these circumstances, it was reasonable for Mr. Schultz to believe that Ms. Baldwin personally represented him, regardless of who or what else Ms. Baldwin represented. There is no evidence that Ms. Baldwin explained to Mr. Schultz – before, during, or after his grand jury appearance - any limitation on her representation of him or that his interests had diverged from PSU's. There is no evidence that she told him that his conversations would not be confidential and privileged. The first *Mrozek* requirement is met.

18. It is undisputed that Ms. Baldwin was a member of the bar, satisfying the second *Mrozek* factor.

19. The Court finds that Ms. Baldwin's conversations with Mr. Schultz occurred in the context of preparing him to testify at his January 12, 2011, grand jury appearance.[29] Thus, the third *Mrozek* requirement is met: Mr. Schultz communicated facts "for the purpose of receiving . . . assistance in a legal matter,"

---

28 Def. Ex. M at 3 (Curley Tr.); GBS-6 at 3 (Spanier Tr.)

29 *See* paragraphs 7-8, supra.

his grand jury appearance. The conversation with Mr. Schultz was "one-on-one," without the presence of strangers.[30]

20. Finally, as to the fourth *Mrozek* requirement, Mr. Schultz, through present counsel, asserted the privilege in timely fashion.[31]

21. Thus, both the attorney-client privilege and work-product doctrine render Mr. Schultz' communications with Ms. Baldwin leading to his grand jury appearance confidential and inadmissible in any proceeding.[32] Therefore, Ms. Baldwin's testimony at pages 16 and 18-19 and her subsequent testimony about conversations with Mr. Schultz should not have been admitted at the grand jury proceeding. To quote that testimony:

1) Q. . . . Again, same question, did he [Mr. Schultz] ever reveal to you the existence of that Sandusky file or any of its contents?
A. Never. He told me he didn't have anything.[33]

2) Q. And who was it that informed you about that [the 2001/2002 Sandusky shower incident]?
A. The 2002 incident?
Q. Yeah.
A. OAG, Office of Attorney General.
Q. Right. So it wasn't – it wasn't Curley, Schultz, or Spanier that ever told you about it –
A. No.
Q. – initially –
A. No.
Q. – it was you heard it from the authorities?
A. Right.[34]

---

30 Def. Ex. Q at 17 (Baldwin Oct. 26 Tr.)

31 June 1, 2012, Letter from T. Farrell to C. De Monaco (Def. Ex. C) (asserting attorney-client and work product privileges); Oct. 11, 2012, Letter from T. Farrell to J. Feudale (Def. Ex. H). (Same)

32 42 Pa.C.S.A. § 5916; *Sporck v. Peil,* 759 F.2d 312, 315-17 (3d Cir. 1985)(counsel's selection of documents to prepare witness and review of those documents with the witness are highly protected attorney opinion work product).

33 Def. Ex. Q, Oct. 26 Tr. At 20.

34 *Id.* at 72.

22. The Commonwealth has the burden of showing any exception to the privilege, such as waiver or the crime fraud exception.[35] There is no evidence before the Court that Mr. Schultz knowingly waived his right to counsel, the confidentiality of his communications with Ms. Baldwin and the work-product she created on his behalf. The Commonwealth chose to forego presentation of any evidence to that effect. In fact, the Commonwealth acknowledged in its October 22, 2013, conference with Judge Feudale that Mr. Schultz had preserved his privilege claim.[36] PSU also did not waive the privilege so far as it related to communications between Ms. Baldwin and Messrs. Curley and Schultz.[37]

23. To prove the crime-fraud exception, the Commonwealth "must make a *prima facie* showing that (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."[38] This exception permits admission only of those particular communications that were made to further the crime or fraud; all other communications remain privileged.[39]

24. The Commonwealth chose not to argue the crime-fraud privilege before

---

35 *In re Investigating Grand Jury of Philadelphia C. No. 88-00-3503,* 527 Pa. 432, 593 A.2d 402, 406 (1991) ("To preserve the integrity of the privilege, the burden of proof is on the party asserting that disclosure of the information would not violate the attorney-client privilege."); *Nationwide Mutual Insurance Co., v. Fleming*, 2007 Pa. Super 145, 924 A.2d 1259, 1266 (2007), *aff'd,* 605 Pa. 468 992 A.2d 65 (2010).

36 Oct. 22 Tr at 6-8, 10 (Def. Ex. GBS-8).

37 Oct. 22 Tr at 6-8 (Def. Ex. GBS-8); Oct. 19, 2012, Letter from M. Mustokoff to F. Fina (Def. Ex. K).

38 *In re: Grand Jury Subpoena,* No. 13-1237, slip op. at 8 (3d Cir. Feb. 12, 2014); *see also King Drug Co. v. Cephalon, Inc.,* 2014 U.S. Dist. LEXIS 2344 (E.D. Pa. Jan. 9, 2014) (thorough review of crime-fraud exception).

39 *King Drug,* 2014 U.S. Dist. LEXIS 2344, *15. *See also* Schultz' Reply to Commonwealth's Answer to Defendants' Joint Motion to Quash Presentment at 18-19 (filed at 217 M.D. Dkt. 2010 and in this case as Ex. 7 to Schultz' Motion to Suppress and Incorporate).

it elicited Ms. Baldwin's October 26 grand jury testimony. In the October 22, 2012, conference, it promised Judge Feudale that it would not elicit testimony about her communications with Mr. Schultz, but then did, as described in paragraphs 7 and 21, *supra.*[40] The Commonwealth's failure to argue the crime-fraud exception before eliciting testimony about these communications and the failure on December 16 and 17 to offer any evidence of the exception's applicability bar consideration of it now.[41]

25. A crime fraud analysis is fact intensive and involves difficult questions of timing – it must be "show[n] that the wrong-doer had set upon a criminal course *before* consulting counsel" – and of connection – "the legal advice must be used 'in furtherance' of the alleged crime or fraud"; the advice cannot "merely relate to the crime or fraud."[42] The Commonwealth has failed to answer these questions or prove either element of the crime fraud exception. We cannot determine on this record if Mr. Schultz communicated with Ms. Baldwin with intent to further any fraud.[43] To the contrary, at the January 12 grand jury Mr. Schultz testified, in Ms. Baldwin's presence, that he believed he did have notes about the Sandusky 2001 incident. While he believed they had been destroyed when he retired, he suggested that they might still exist in the Office of the Senior Vice President for Finance & Business, but he did not know for certain:

---

40 Oct. 22 Tr. at 6, 8 (Ex. GBS-8).

41 *See* Schultz' Reply to Commonwealth's Answer to Defendants' Joint Motion to Quash Presentment at Point III (filed at 217 M.D. Dkt. 2010 and in this case as Ex. 7 to Schultz' Motion to Suppress and Incorporate). *See also In re: Grand Jury Subpoena,* No. 13-1237 (recommending procedure whereby the grand jury judge questions the attorney-witness *in camera* before she may testify).

42 *In re: Grand Jury Subpoena,* slip op. at 17, 19.

43 *See* Paragraphs 7-9, *supra.*

Q: Do you believe that you may be in possession of any notes regarding the 2002 incident that you may have written memorializing what occurred?

A: I have none of those in my possession. I believe that there were probably notes taken at the time. Given my retirement in 2009, if I even had them at that time, something that old *would have probably* been destroyed. I had quite a number of files that I considered confidential matters that go back years that didn't any longer seem pertinent. I wouldn't be surprised. In fact, *I would guess* if there were any notes, they were destroyed on or before 2009.[44]

This answer and the paucity of evidence prevent the Court from finding that Mr. Schultz "intended to deceive," as required for the fraud element of the exception,[45] or that Mr. Schultz' conversation with his attorney, Ms. Baldwin, was "meant to facilitate future wrongdoing," as required by the in-furtherance element.[46]

26. Rather than defraud the Commonwealth, these answers led the prosecutor to believe that the notes might exist:

Q: Are you aware of any memorandums or any written documents *other than your own notes* that existed either at the time of this incident or after this incident about the 2002 events?

A: No.[47]

As far as this record shows, though, no one inquired further. Thus this record also does not demonstrate the justifiable reliance required to prove fraud.[48]

B. Ineffective Assistance of Counsel

27. Contrary to her representations to Mr. Schultz, the OAG and Judge Feudale, Ms. Baldwin did not act as attorney for Mr. Schultz as required by the

44 Def. Ex. N, Schultz GJ Tr. at 16 (emphasis added).
45 *King Drug*, 2014 U.S. Dist. LEXIS at *18.
46 *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992).
47 Def. Ex. N at 27-28 (emphasis added).
48 *King Drug, supra.*

Grand Jury Act.[49] Her role, as she subsequently admitted through counsel, was *not* to represent and protect Mr. Schultz' individual interests, nor to exercise her professional judgment on his behalf, the *sine qua non* of attorney representation. She believed she "did not represent [Mr. Schultz] in an individual capacity"; therefore, she acted to represent and protect the interests of PSU "solely."[50]

28. There is no evidence that she advised Mr. Schultz, the OAG, or the Grand Jury supervising judge of the limitations on her representation. There is no evidence that she represented Mr. Schultz as would have reasonably competent counsel for a grand jury witness: There is no evidence that she ascertained his status or the risk that he might be prosecuted; that she advised him of his Fifth Amendment privilege to refuse to answer questions in the grand jury or to refuse to participate in responding to a grand jury subpoena *duces tecum*;[51] or that she attempted, after his testimony, to inquire of the prosecution whether the testimony implicated him in any crime, whether it was inconsistent with the prosecution's investigation, or whether it changed his status to make him a target of investigation. In fact, the record before the Court indicates that after January 12, 2011, she had no contact with Mr. Schultz or the OAG about Mr. Schultz' testimony or his standing in the investigation until days before he was charged in November

---

49 *In re: Fifth Pennsylvania Statewide Investigating Grand Jury [No 2]*, 50 Pa. D&C. 3d 617, 622 (Dauphin Co., CCP 1987) ("Adequate 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.") *See* Schultz Memorandum of Law in Support of Omnibus Pretrial Motion at 2-6 (5164 CR 2011).

50 April 13, 2012, Spanier Grand Jury Colloquy at 28 (Def.' Ex. O); *See also* Charles De Monaco June 22, 2012, letter to Thomas Farrell. (Def. Ex. F). *See* Pa. R. Evid. 803(25)(C) (agent admissions attributable to party); 104(a) (rules of evidence do not strictly apply to preliminary determinations of fact and admissibility, as are the present motions).

51 *See* n. 13, *supra*.

2011.[52] Instead, as far as this record shows, after Mr. Schultz' testimony, Ms. Baldwin did nothing to protect or advocate for Mr. Schultz.

29. Ms. Baldwin's accompaniment of Mr. Schultz was not the sort of representation that the Grand Jury Act requires. Thus, Mr. Schultz effectively was unrepresented when he testified, in violation of 42 Pa. C.S.A. § 4549(c).

30. The Court need not decide if Ms. Baldwin operated under a conflict of interest, whether the OAG knew it, or whether specific prejudice resulted from specific deficiencies in Ms. Baldwin's representation of Mr. Schultz. These issues would require a hearing and evidence beyond that before the Court.[53] Since Mr. Schultz had no counsel, however, there is no need to inquire into actual prejudice.[54]

LEGAL DISCUSSION ON COGNIZABLE RELIEF FOR VIOLATIONS OF ATTORNEY CLIENT PRIVILEGE[55]

Privileged communications are inadmissible. 42 Pa. C. S. A. §5916. The client holds the privilege, and only the client may waive it.[56] The attorney also has an obligation to maintain as confidential both communications with her client and

---

52 Def. Ex. Q at 20-74 (Oct. 26 GJ Tr.).

53 *See* Dec. 17 Tr at 10-13, 34-36; Dec. 16 Tr at 14-15, 104.

54 *United States v. Cronic*, 466 U.S. 648, 654, n.11 (1984); *Commonwealth v. Jones*, 2005 Pa. Super. 115, 871 A2d 1258 (Pa.Super. 2005). The Commonwealth admits that the proposition that "where counsel fails to exercise any professional judgment on the client's behalf, it is as if the witness had no counsel, and no specific showing of prejudice is required," Schultz Omnibus Pretrial Motion, No. 5614 CR 2011, at ¶ 34, "is an accurate statement of law," Commonwealth Answer to Defendants' Omnibus Pretrial Motions at p.13 , ¶34 (No. 5614 CR 2011).

55 I read the Court's January 17, 2014, Order to invite discussion only on this issue, not on the relief for any other claim, specifically, the assistance of counsel claims raised by the pleadings numbered 1-4 and on 2 pages 2 and 3, *supra*. As the Order likely recognizes, we discussed the remedy issue in Defendant Schultz' Memorandum of Law in Support of Omnibus Pretrial Motion at 14-15, filed October 31, 2012, at 5614 CR 2011, and re-filed as Ex. 1 to Defendant Schultz' Motion to Suppress, to Dismiss and to Incorporate, filed October 21, 2013, at 5614 CR 2011 and 3616 CR 2013.

56 *Commonwealth v. Scott*, 503 Pa. 624, 631, 470 A.2d 91, 94-95 (1983).

any information gained during the course of the representation.[57] If admitted into a trial in error, the verdict must be vacated.[58]

Grand jury errors warrant dismissal, however, only if substantial prejudice results.[59] Prejudice occurs where the defendant can establish that the prosecution's acts of misconduct "'substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." [60] Pennsylvania courts follow the *Bank of Nova Scotia* "substantial influence" test even where the grand jury only recommends charges in a Presentment and the prosecutor charges in an Information,[61] but recognize that the showing of prejudice is more difficult where a preliminary hearing binds over the charges.[62] Still, nothing in the caselaw undermines the propriety of the remedy of dismissal for substantial error or misconduct in the grand jury.

Here, Presentment Number 29 recites at some length privileged communications as the grand jury's basis to recommend the charges of conspiracy and obstruction of justice against Mr. Schultz.[63]

---

57 Pa. R. Prof. C. 1.6(a) & Comment [3].

58 *E.g., Commonwealth v. Mrozek,* 441 Pa. Super. 425, 657 A.2d 997 (Pa. Super. 1995).

59 *Commonwealth v. Williams,* 388 Pa. Super. 153, 160, 565 A.2d 160, 164 (1989); *Commonwealth v. Levinson,* 480 Pa. 273, 286-90, 389 A.2d 1062, 1068-70 (1978)(applying prejudice test to error in allowing unauthorized persons to attend grand jury proceedings) . *See also Commonwealth v. Bradfield,* 352 Pa. Super. 466, 477-78, 508 A.2d 568, 573-74 (1986) (error does not require quashal or dismissal so long as there is "ample credible evidence" to issue Presentment, aside from challenged conduct).

60 *Williams,* 388 Pa. Super. at 160, 565 A.2d 160 at 164 (citing *The Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988)).

61 *See, e.g., Williams,* 388 Pa. Super. at 158.

62 *In re: County Investigating Grand Jury VIII,* 2003, 2005 WL 3985351 (Lackawanna CP 2005)(extensive discussion of how the substantial prejudice test works in Pennsylvania practice; suggests that quashal is appropriate where the challenged conduct substantially influenced grand jury's decision "to issue a Presentment and recommend criminal charges." 2005 WL 3985351, *18.

63 Presentment No. 29 at 21, 38.

The Commonwealth argues that District Justice Wenner's decision to bind over the charges after a Preliminary Hearing which lacked Ms. Baldwin's testimony cured, or at least rendered irrelevant, any alleged error.

Two errors infect this position. First, it would eliminate any remedy for grand jury error or misconduct in Pennsylvania. Preliminary hearings follow Presentments and Complaints quickly, and courts always may avoid the grand jury issues by deferring them until after the preliminary hearing. The caselaw indicates that even after a Preliminary Hearing, the question is whether the challenged conduct substantially influenced the *grand jury's* decision to recommend charges. Otherwise, there would be no remedy for errors in the grand jury, no matter how serious. They would be irrelevant; all that matters would be what happened at the Preliminary Hearing.

Second, here we will challenge the probable cause determination in a habeas petition filed with our Omnibus Pretrial Motion, and those challenges will demonstrate the indispensability of Ms. Baldwin's testimony to the charges in the Information at 3616 CR 2013. (We acknowledge that the Court's evaluation of the remedy might be more rounded if deferred to when considering the other Omnibus Motions.) The Preliminary Hearing lacked any evidence to show any joint activity by the defendants after March 2001; therefore, the conspiracy charge at Count Three of the 2013 Information must fail. Further, the obstruction charge at Count Two of that Information alleges that one means by which Mr. Schultz committed obstruction is that he "informed the Pennsylvania State University that he had no

knowledge of any information or documentation relating to inappropriate conduct between Jerry Sandusky and minor boys when the Defendant was in possession of relevant documents and information that were being sought by law enforcement. . . ." This allegation rests entirely on Ms. Baldwin's grand jury testimony.[64]

CONCLUSION

For the foregoing reasons and those stated in Mr. Schultz' previously filed pleadings, (1) Mr. Schultz' January 12, 2011, grand jury testimony must be suppressed; and (2) Counts Two and Three at the Information filed against him at 3616 CR 2013 must be dismissed.

Respectfully submitted,

Thomas J. Farrell /s/

Thomas J. Farrell, Esquire
Attorney for Defendant, Gary Schultz
Pa.I.D. No. 48976
200 Koppers Building, 436 Seventh Avenue
Pittsburgh, PA 15219
(412) 894-1380
tfarrell@farrellreisinger.com

64 Presentment No. 29 at 21. *See also* July 29, 2013, PH V2, at 51-77 (testimony of Kim Belcher showing that Mr. Schultz did not possess such documents when they were sought by law enforcement).

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
v.	:	No. 5165 CR 2011; 3614 CR 2013
	:	
	:	
GARY CHARLES SCHULTZ	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Post-Hearing Memorandum was delivered by email and U.S. Mail, this 18th day of February, 2014, to the following:

The Honorable Todd A. Hoover
President Judge
Dauphin County Courthouse
101 Market Street
Harrisburg, PA 17101

District Court Administrator
Dauphin County Courthouse
Court Administrator's Office
101 Market Street, Suite 300
Harrisburg, PA 17101

Bruce Beemer
Deputy Attorney General
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120
bbeemer@attorneygeneral.gov

Elizabeth Ainslie, Esquire
Schnader Harrison Segal & Lewis LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103-7286
EAinslie@schnader.com

Caroline C. Roberto, Esquire
429 4th Avenue, Suite 500
Pittsburgh, PA 15219
croberto@choiceonemail.com

Thomas J. Farrell /s/
Thomas J. Farrell, Esquire
Attorney for Defendant, Gary Charles Schultz

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1237

IN RE: GRAND JURY SUBPOENA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-10-gj-00127-002)
District Judge: Honorable Gene E. K. Pratter

Argued September 25, 2013
Before: AMBRO, FISHER and HARDIMAN, *Circuit Judges.*

(Filed: February 12, 2014)

Ian M. Comisky (ARGUED)
Matthew D. Lee
Blank Rome
130 North 18th Street
One Logan Square
Philadelphia, PA 19103

Stephen R. LaCheen (ARGUED)
LaCheen Wittels & Greenberg
1429 Walnut Street, Suite 1301
Philadelphia, PA 19102
Counsel for Appellant, John Doe

Michelle Morgan (ARGUED)
Peter F. Schenck
Office of United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
Counsel for Appellee, United States

OPINION OF THE COURT

FISHER, *Circuit Judge*.

Corporation and Client (together, "Intervenors") are targets of an ongoing grand jury investigation into alleged violations of the Foreign Corrupt Practices Act ("FCPA"). The grand jury served a subpoena on Intervenors' former attorney ("Attorney") and the Government moved to enforce this subpoena and compel Attorney's testimony, based upon the crime-fraud exception to the attorney-client privilege. Intervenors sought to quash the subpoena by asserting the attorney-client privilege and work product protection. After questioning Attorney *in camera*, the District Court found that the crime-fraud exception applied and compelled Attorney to testify before the grand jury.

Intervenors appeal, challenging the District Court's decision to conduct an *in camera* examination, the procedures it fashioned for the examination, and the court's ultimate finding that the crime-fraud exception applies. We hold that the standard announced in *United States v. Zolin*, 491 U.S. 554, 572 (1989), applies to determine whether to conduct an *in camera* examination of a witness. We also find that the District Court did not abuse its discretion in applying this standard, in determining procedures for the examination, or in ultimately finding that the crime-fraud exception applies. We therefore affirm the District Court's order enforcing the grand jury subpoena.

I.

A.

This matter is before us in the context of an ongoing grand jury investigation. To maintain confidentiality, we will refer only to the facts that have been made public and will refer to those involved as "Corporation," "Client," and "Attorney" in order to maintain their anonymity. We also note that we and the District Court had access to information pertaining to the alleged criminal violations via the Government's *Ex Parte* Affidavit, which set forth the basis for the Government's belief that the Intervenors committed FCPA violations. Intervenors were not apprised of this information. Additionally, we were informed by Attorney's account of the communications at issue, which were divulged to the District Court during the *in camera* examination. Neither the Government nor the Intervenors were privy to this account. As such, we are hampered in our ability to articulate the background information underlying our conclusions.

Intervenors are the targets of an ongoing grand jury investigation in the Eastern District of Pennsylvania seeking to determine whether they made corrupt payments to obtain business in violation of the FCPA. Corporation is a consulting firm headquartered in Pennsylvania and Client is Corporation's President and Managing Director. The grand jury investigation stems from Intervenors' business transactions with a financial institution ("the Bank") headquartered in the United Kingdom and owned by a number of foreign countries. Between 2007 and 2009, Corporation was retained as a financial advisor by five companies to provide assistance in obtaining financing from the Bank for

oil and gas projects. Two of the five projects were approved and financed by the Bank, resulting in the payment of nearly $8 million in success fees to Corporation. For all five projects, "Banker," an official and banker at the Bank, was the operation leader responsible for overseeing the financing process. In 2008 and 2009, Corporation made payments totaling more than $3.5 million to Banker's sister. The payments occurred within months of the success-fee payments to Corporation. No evidence showed that Banker's sister worked on or was involved in any of the projects or meaningfully contributed to any of Corporation's other ventures.

Attorney worked out of Corporation's office but practiced law independently. In exchange for permitting Attorney to work out of the office rent-free, Client would periodically consult Attorney on ordinary legal matters. Attorney had several brief interactions with Client regarding one of the successful financing projects. In April 2008, Client approached Attorney to discuss issues he was having with the project. Client explained that he planned on paying Banker in order to ensure that the project progressed swiftly, as Banker was threatening to slow down the approval process. Attorney did some preliminary research, found the FCPA, and asked Client whether the Bank was a government entity and whether Banker was a government official. Although Attorney could not ascertain given his limited research whether the planned action was legal or illegal, he advised Client not to make the payment. Despite this advice, Client insisted that his proposed payment did not violate the FCPA, and informed Attorney that he

would go ahead with the payment. Attorney gave Client a copy of the FCPA. After this communication, Attorney and Client ended their relationship.[1]

In February of 2010, the Bank began an internal investigation into the transactions between Intervenors and Banker's sister. The Overseas Anti-Corruption Unit ("the Unit") in the United Kingdom was informed of the situation, and the Unit informed the Federal Bureau of Investigation ("FBI"). The Unit arrested Banker and Banker's sister in the United Kingdom; their prosecution is ongoing. The FBI began its investigation into Intervenors in February 2010. Due to the parallel prosecution of Banker and Banker's sister in the United Kingdom, Intervenors have some knowledge of the nature of the grand jury investigation of which they are subjects.

B.

The grand jury served Attorney with a subpoena. On June 18, 2012, the Government moved to enforce the subpoena, seeking an order directing Attorney to appear and testify before the grand jury. On September 4, 2012, Corporation and Client moved to intervene, and the District Court granted this request. After briefing, the District Court determined that it would conduct an *in camera* examination of Attorney outside the presence of Intervenors and the Government to determine the applicability of the crime-fraud exception to the communications between Attorney and Client. The

[1] We recognize that even this vague recitation of the communications between Attorney and Client would ordinarily be covered by the attorney-client privilege. We reveal this account of the communications only because we have found that the crime-fraud exception applies.

District Court invited Intervenors and the Government to submit questions for the District Court to ask Attorney, which both did.

On January 8, 2013, the District Court questioned Attorney *in camera*, with only Attorney's own counsel present. After this examination, Intervenors requested that the District Court release a transcript of Attorney's testimony so that they could argue that the communications were not subject to the crime-fraud exception. On January 18, 2012, the District Court issued a memorandum and order granting the Government's motion to enforce the subpoena and directing Attorney to testify before the grand jury. Based upon its review of the Government's *Ex Parte* Affidavit and Attorney's *in camera* testimony, the District Court found a reasonable basis to suspect that Intervenors intended to commit a crime when Client consulted Attorney and could have used the information gleaned from the consultation in furtherance of the crime. The District Court also declined to release a transcript of the testimony. Intervenors timely appealed and the District Court granted a stay of its order compelling Attorney's grand jury testimony pending resolution of this appeal.

II.

The District Court had jurisdiction under 18 U.S.C. § 3231. Ordinarily, this Court has jurisdiction only over final decisions of district courts. 28 U.S.C. § 1291. When a district court orders a witness to testify or produce documents, the order is generally not immediately appealable; rather, the witness who wishes to object "must refuse compliance, be held in contempt, and then appeal the contempt order." *In re Grand Jury*,

705 F.3d 133, 143 (3d Cir. 2012) (internal quotation marks and citation omitted). However, under *Perlman v. United States*, 247 U.S. 7 (1918), a privilege holder may immediately appeal an adverse disclosure order when the privileged information is controlled by a "disinterested third party who is likely to disclose that information rather than be held in contempt for the sake of an immediate appeal." *In re Grand Jury*, 705 F.3d at 138. Attorney is a disinterested third party controlling allegedly privileged information. As such, this Court has jurisdiction to hear the appeal brought by Intervenors, the privilege holders.

"We exercise de novo review over the legal issues underlying the application of the crime-fraud exception to the attorney-client privilege." *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001). "Once the court determines there is sufficient evidence of a crime or fraud to waive the attorney-client privilege, we review its judgment for abuse of discretion." *Id.* at 318. We review procedures used by the district court for abuse of discretion. *See In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000) ("We conclude that the District Court did not abuse its discretion in denying Appellant and/or his attorney access to this information to protect grand jury secrecy.").

III.

Central to the issues in this case is the attorney-client privilege, the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The "privilege protects from disclosure confidential communications made between attorneys and clients for the purpose of

obtaining or providing legal assistance to the client." *In re Grand Jury*, 705 F.3d at 151. Although the communications are often relevant and highly probative of the truth, they are protected in order "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389.

Despite their importance, the protections afforded by the privilege are not absolute. "[T]he reason for that protection . . . ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *Zolin*, 491 U.S. at 562-63 (internal quotation marks, alterations, and citations omitted). "To circumvent [the attorney-client] privilege[] under the crime-fraud exception, the party seeking to overcome the privilege . . . must make a *prima facie* showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud." *In re Grand Jury*, 705 F.3d at 151 (quoting *In re Grand Jury Subpoena*, 223 F.3d at 217) (internal quotation marks omitted). Because it is often difficult or impossible to prove that the exception applies without delving into the communications themselves, the Supreme Court has held that courts may use *in camera* review to establish the applicability of the exception. *Zolin*, 491 U.S. at 568-69. We explore the contours of *in camera* review and the ultimate crime-fraud finding in this appeal.

A.

Intervenors raise issues with: the standard that the District Court applied to determine whether to conduct an *in camera* examination, its decision to hold an examination in this case, and the procedures that it used in that examination.[2] We hold that the District Court applied the proper standard and did not abuse its discretion in finding that the standard applied or in fashioning procedures for the examination.

1.

In *Zolin*, the Supreme Court announced the inquiry that should precede an *in camera* review of documents to determine the applicability of the crime-fraud exception. 491 U.S. at 572. The Court stated that a district court "should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* (internal quotation marks and citation omitted). In *Zolin*, the government sought to compel the production of tapes of communications and documents covered by the attorney-client privilege under the exception. *Id.* at 557.

[2] Intervenors also argue that the District Court's examination of the Attorney violated the separation of powers doctrine. This claim plainly misunderstands the roles of the grand jury in investigating independently from any branch of government and of the district court in ensuring that the grand jury does not infringe upon common law privileges. The grand jury belongs to no branch of the government, instead "serving as a kind of buffer or referee between the Government and the people." *In re Impounded*, 241 F.3d at 312 (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)) (internal quotation marks omitted). The District Court was fulfilling its obligation to check the grand jury's investigative power by reviewing the grand jury subpoena in order to protect the attorney-client privilege. *See id.* at 313.

Intervenors assert that due to key differences between documented materials and the oral examination of an attorney, the latter should be subject to a more stringent standard than that announced for the former in *Zolin*.

In determining the standard that should apply to *in camera* examination of a witness about oral communications, we first note that the Supreme Court did not exclude oral communications from the ambit of its holding. *Id.* at 574. Nevertheless, *in camera* examination of a witness implicates different concerns than examination of documents or recordings, so we must determine whether we should adopt the *Zolin* standard where unmemorialized oral communications are at issue.

In determining whether there ought to be a threshold showing for *in camera* review, the Supreme Court articulated three concerns with the use of *in camera* examinations: erosion of the privilege that is aimed at fostering disclosure between attorney and client, due process implications, and additional burdens on the district courts. *Id.* at 571. Intervenors present an additional concern – the malleability of witness recollections. We will weigh these concerns against the need to prove the applicability of the crime-fraud exception.

While the "policy of protecting open and legitimate disclosure between attorneys and clients" is of the utmost importance, *id.* at 571, a district court's examination of a witness does no more to erode the protection than examination of written or recorded communications. Applying the same standard in both situations allows for equal accountability when the communications, whether at the behest of the client or not, were

never chronicled. If we were to apply a heightened standard to oral communications, would-be criminals could use the differing standards to avoid the proper application of the crime-fraud exception. A client could seek to take advantage of the higher showing necessary to delve into oral communications by instructing the attorney not to record the communications in any way. We do not want to incentivize circumventing the proper application of the crime-fraud exception. As for the due process implications, we believe that a district court can properly be entrusted to consider the due process interests and circumstances in each case, and use its discretion to fashion a proper procedure for the *in camera* examination. With respect to the third concern, an *in camera* examination of a witness is more burdensome on the district court than examination of documents. The district court must fashion procedures for the examination, bring the witness into court, and conduct the hearing. However, the concern that the examination may be more burdensome does not indicate to us that such an examination should only be undertaken on a higher showing. This would serve to insulate some oral communications from the crime-fraud exception – an "intolerably high" cost. *Id.* at 569.

Intervenors' concern about the pliability of a witness's memory is a substantial one. An attorney's memory about the interaction with the client could be influenced by the mere fact that the crime-fraud exception is implicated, and the circumstances of how a question is asked can affect how the information is remembered and reported. There are also "dangers of inaccuracy and untrustworthiness" in probing into the memory of an attorney regarding past communications that do not occur with documented

communications. *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947) ("Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness."). Despite these concerns, we are confident that district courts will be able to question an attorney-witness in a way that ensures that the attorney accurately recounts the communications with the client. The risk of inaccuracies is mitigated by the fact that the attorney will be under oath and face questioning from a judge rather than an adversary. The concern over the malleability of witness memory does not outweigh the importance of ensuring that abuses of the privilege are exposed. Some abuses of the privilege cannot be demonstrated by extrinsic evidence, so forbidding consideration of the communications would be "too great an impediment to the proper functioning of the adversary process." *Zolin*, 491 U.S. at 569.

For these reasons, we hold that district courts should use the *Zolin* standard to determine whether to examine a witness *in camera*. Before a district court can undertake an *in camera* examination of an attorney-witness to determine the applicability of the crime-fraud exception, the party seeking to overcome the privilege must make a "showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* at 572 (internal quotation marks and citation omitted).

This conclusion is not inconsistent with previous decisions of this Court. *See In re Grand Jury Investigation*, 445 F.3d 266, 280 (3d Cir. 2006) (affirming the district court's finding that the crime-fraud exception applied where the district court had examined attorneys *in camera*); *In re Grand Jury Subpoena*, 223 F.3d at 216 (observing that use of *in camera* proceedings or *ex parte* affidavits is a procedure consistently endorsed to preserve grand jury secrecy). Nor is it inconsistent with decisions from other courts of appeals. *See, e.g., In re John Doe, Inc.*, 13 F.3d 633, 637 (2d Cir. 1994) (finding that a district court's *in camera* examination of an attorney after the threshold *Zolin* showing was made comported with due process).

The District Court properly applied the *Zolin* standard and the Government's *Ex Parte* Affidavit sufficiently fulfilled this standard. The *Ex Parte* Affidavit contained details from the FBI investigation into the projects involving the Bank for which Corporation served as an advisor. The Affidavit also contained Attorney's statement to the FBI that Attorney was consulted about a financing project, although Attorney did not reveal the details of this communication. For these reasons, the District Court did not err in concluding that there was a factual basis to support a good faith belief that *in camera* examination of Attorney might reveal evidence establishing the applicability of the crime-fraud exception and in conducting an *in camera* examination of Attorney.

2.

Intervenors contest the District Court's decision to exclude them from the *in camera* examination of Attorney and its refusal to release a transcript or summary of the

examination. In considering Intervenors' request to attend the *in camera* examination, the District Court concluded that the balance between the need for grand jury secrecy and protection of the attorney-client privilege could only be met if neither Intervenors nor the Government were present during the examination of Attorney. The District Court denied Intervenors' request for a transcript, redacted transcript, or summary of the examination testimony for similar reasons. The District Court explained, "[b]ecause the grand jury proceeding here is ongoing and because the transcript almost certainly reflects a preview of [Attorney's] eventual grand jury testimony, . . . secrecy concerns outweigh any need for Intervenors to review the transcript of [Attorney's] *in camera* interview."

Intervenors argue that what transpired *in camera* is not a grand jury secret, because Attorney's recollections exist separate and apart from the grand jury investigation. The Government responds that Intervenors are not precluded from interviewing Attorney about his conversation with Client, if Attorney is willing. In this way, Attorney's recollections are not grand jury secrets.

The Government argues, on the other hand, that the questions posed by the District Court, some of which were submitted by the Government, do constitute grand jury secrets. The Government maintains that the Intervenors should be prevented from uncovering what the Government wished to ask Attorney. Intervenors respond that they already know what the grand jury is investigating due to the parallel prosecution in the United Kingdom.

The District Court did not abuse its discretion in excluding the Intervenors from the interview or declining to release a transcript or summary of the testimony. The District Court noted that even though secrecy concerns are minimized by the parallel case in the United Kingdom, "there appears to be a significant amount of information before the grand jury that is not known to the Intervenors." The District Court did not err in so concluding. Intervenors are not aware of how much the Government knows. But if they were privy to the *in camera* examination, they could preview not only Attorney's grand jury testimony, but also evidence already submitted to the grand jury, as reflected in the Government's questions, and the Government's eventual trial evidence and strategy. Even though some information regarding the investigation is public, the content of this interview is entitled to protection as a grand jury secret. *See In re Grand Jury Subpoena*, 233 F.3d at 219 ("Given the acknowledged need for secrecy in grand jury proceedings, we reject Appellant's argument that the 'unique facts and circumstances in this case,' including . . . the fact that the nature of the investigation has already been made public in several contexts, required the District Court to order disclosure of the government's *ex parte* affidavit."). We therefore conclude that the District Court did not abuse its discretion in adopting these procedures for the *in camera* proceeding.

B.

Intervenors challenge the District Court's determination that the crime-fraud exception applies to their communications with Attorney. In this circuit, the crime-fraud exception to the attorney-client privilege applies "[w]here there is a reasonable basis to

suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud . . . ." *In re Grand Jury*, 705 F.3d at 153.[3]

We review the District Court's determination that there is sufficient evidence for the crime-fraud exception to apply for an abuse of discretion. *In re Impounded*, 241 F.3d at 318. We begin by acknowledging that this was a close case. The communication between Attorney and Client was brief, and consisted mainly of informing Client of the applicable law and advising that he not make the payment. However, we believe that the questions posed by Attorney to Client and the information that Client could gain from

---

[3] Intervenors argue on appeal that the District Court erred in applying this standard for the crime-fraud exception. They maintain that the panel in *In re Grand Jury* improperly overruled prior precedent to create this standard. In *In re Grand Jury Subpoena*, we held that "to invoke the exception, the government must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud." 223 F.3d at 217 (internal citations omitted). We then clarified that "[a] 'prima facie showing' requires presentation of 'evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met.'" *Id.* (quoting *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992)).

The *In re Grand Jury* panel observed that "sufficient to support" was "not particularly helpful," as it "begs the quantum-of-proof question because it does not quantify what evidence is sufficient." 705 F.3d at 152. The Court sought to clarify the standard, and examined Third Circuit precedent to conclude "that our precedent is properly captured by the reasonable basis standard." *Id.* at 153.

The *In re Grand Jury* panel followed what was "binding," *see* IOP 9.1; "sufficient to support" was not a holding, but part of a standard that we clarified. The panel further clarified that for a presentation of evidence to be "sufficient," there must be a "reasonable basis to suspect" that the elements of the crime-fraud exception are fulfilled. The *In re Grand Jury* Court did not improperly overrule the holding from a prior opinion; rather, it clarified an applicable precedent to delineate a more specific standard. Therefore, we adhere to the "reasonable basis to suspect" standard.

those questions are sufficient for us to conclude that the District Court did not abuse its discretion in determining that the advice was used in furtherance of a crime or fraud.

For the crime-fraud exception to apply, the client must be "committing or intending to commit a crime or fraud" at the time he or she consults the attorney. *In re Grand Jury*, 705 F.3d at 153. This requirement is stated in the present tense, and does not by its terms apply to a situation where a client consults an attorney about a possible course of action and later forms the intent to undertake that action. We have also observed that the attorney-client privilege "is not lost if the client innocently proposes an illegal course of conduct to explore with his counsel what he may or may not do." *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005). The exception does not apply where the client forms the intent to engage in criminal or fraudulent activity after the consultation.

Other courts of appeals have specifically clarified when the client must have developed the requisite intent. The Second Circuit explained that because the exception only applies where the communications "were intended in some way to facilitate or to conceal the criminal activity," *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (quoting *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986)) (internal quotation marks omitted), it is required "to show that the wrong-doer had set upon a criminal course *before* consulting counsel." *Id.* (emphasis in original). *See also In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) ("The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel . . . ."); *In re Grand Jury Proceedings*, 87 F.3d

377, 381 (9th Cir. 1996) ("To trigger the crime-fraud exception, the government must establish that 'the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.'" (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)).

A hypothetical question posed by Judge Ambro at oral argument highlights the importance of the timing of intent. A client consults with an attorney, intending at the time to go as close to the line of illegality as possible but to remain within the realm of legal conduct. The client tells the attorney of a possible course of conduct and asks for advice on the applicable law. The attorney gives advice, explaining which actions would be legal and which actions would be illegal. A year later, the client decides that he or she will cross the line from legal to illegal. Here, the crime-fraud exception would not apply, because the client was not committing a crime or fraud or intending to commit a crime or fraud at the time he or she consulted the attorney. Even if the client clearly used the advice obtained a year earlier in furtherance of the crime or fraud, the exception would not apply because the client did not have the requisite intent at the time of the consultation.

In this case, the District Court did not abuse its discretion in determining that Client intended to commit a crime at the time he consulted with Attorney in April 2008. The evidence shows Client's intent to make a payment to Banker in order to ensure that the project was approved in a timely manner. We can infer Client's pre-existing intent to make the payment in part from his statement to Attorney that he was going to make the

payment anyway, after Attorney advised him that he should not do so. This suggests that Client had already considered the advisability of making the payment, and determined that it was in his best interest to do so. The fact that the payment occurred in the same month that the Bank approved the project financing also indicates that Client planned on making the payment when he consulted with Attorney. Given the information available to the District Court, we cannot say that it abused its discretion in concluding that Client "set upon an illegal course before seeking [Attorney's] advice about the scheme's legality." *Jacobs*, 117 F.3d at 89.

In delineating the connection required between the advice sought and the crime or fraud, we have repeatedly stated that the legal advice must be used "in furtherance" of the alleged crime or fraud. We have rejected a more relaxed "related to" standard, *In re Grand Jury Investigation*, 445 F.3d at 277, and explained that the legal advice must "'give[] direction for the commission of future fraud or crime,'" *In re Grand Jury Subpoena*, 223 F.3d at 217 (quoting *Haines*, 975 F.2d at 90). Most recently, in *In re Grand Jury*, we observed, "[a]ll that is necessary is that the client misuse or intend to misuse the attorney's advice in furtherance of an improper purpose." 705 F.3d at 157. It is therefore clear from prior precedent that for advice to be used "in furtherance" of a crime or fraud, the advice must advance, or the client must intend the advice to advance, the client's criminal or fraudulent purpose. The advice cannot merely relate to the crime or fraud.

If the attorney merely informs the client of the criminality of a proposed action, the crime-fraud exception does not apply. For example, consider the situation where a client, intending to undertake an illegal course of action, consults a first attorney, tells the attorney the proposed course of action, and the attorney advises that the course of action is illegal. The client, dissatisfied with the first attorney's answer, then consults a second attorney. The client tells the attorney the same proposed course of action, but this attorney says yes, that course of action is legal. Both of these consultations would remain privileged, because the attorneys merely opined on the lawfulness of a particular course of conduct, and this advice cannot be used "in furtherance" of the crime.

The situation here is different. In addition to the advice Attorney provided to Client that he should not make a payment, Attorney also provided information about the types of conduct that violate the law. We cannot say that the District Court abused its discretion in determining "that there is a reasonable basis to conclude that [Attorney's] advice was used by [Intervenors] to fashion conduct in furtherance of [their] crime." Specifically, Attorney's questions about whether or not the Bank was a governmental entity and whether Banker was a government official would have informed Client that the governmental connection was key to violating the FCPA. This would lead logically to the idea of routing the payment through Banker's sister, who was not connected to the Bank, in order to avoid the reaches of the FCPA or detection of the violation. Of course, it is impossible to know what Client thought or how he processed the information gained from Attorney. But the District Court did not abuse its discretion in determining that

Client "could easily have used [the advice] to shape the contours of conduct intended to escape the reaches of the law." For these reason, we affirm the District Court's finding that the crime-fraud exception applies and its order compelling Attorney to testify before the grand jury.

C.

Intervenors assert that Attorney's testimony is protected by the work product doctrine. The District Court did not address this issue; however, it was fully briefed before the District Court. "The work-product doctrine . . . protects from discovery materials prepared or collected by an attorney 'in the course of preparation for possible litigation.'" *In re Grand Jury Investigation*, 599 F.2d 1224, 1228 (3d Cir. 1979) (quoting *Hickman*, 329 U.S. at 505). The burden of proving the applicability of the work product privilege rests upon the party asserting the privilege. *Haines*, 975 F.2d at 94. A lawyer "may assert the work product privilege," and "[t]o the extent a client's interest may be affected, he, too, may assert the work product privilege." *In re Grand Jury Proceedings*, 604 F.2d 798, 801 (3d Cir. 1979). Intervenors have attempted to assert the work product privilege on their own behalf and on Attorney's behalf, arguing that an innocent attorney can prevent disclosure of work product even if the client used it to further a crime or fraud. Attorney did not raise the work product issue before the District Court and Intervenors cannot assert the privilege on his behalf. Therefore, we need not address whether an innocent attorney may raise the privilege when there is a crime-fraud finding.

A crime-fraud finding overcomes the work product privilege. "Where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the . . . attorney work product w[as] used in furtherance of the alleged crime or fraud, this is enough to break the privilege." *In re Grand Jury*, 705 F.3d at 153. Because, as discussed *supra*, we affirm the District Court's crime-fraud finding, the work product privilege does not apply. Nevertheless, even without the crime-fraud finding, the communications between Intervenors and Attorney do not qualify as protected work product because they were not made "in the course of preparation for possible litigation." *In re Grand Jury Investigation*, 599 F.2d at 1228 (quoting *Hickman*, 329 U.S. at 505). "Work product prepared in the course of business is not immune from discovery." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000). Although the "legal theories, research, and fact material gathered" here could be considered intangible work product, *In re Grand Jury Proceedings*, 604 F.2d at 801, Attorney's recollections and research are not protected because they were not made in preparation for possible litigation. When Intervenors consulted Attorney in April 2008, there was no litigation on the horizon. Investigation into the transactions that led to the grand jury investigation began nearly two years later. The consultation was made in the ordinary course of a business transaction; therefore, Attorney's recollections are not protected work product.

IV.

For the foregoing reasons, we affirm the order of the District Court enforcing the grand jury subpoena.

1 of 1 DOCUMENT

KING DRUG COMPANY OF FLORENCE, INC., et al., Plaintiffs, v. CEPHALON, INC., et al., Defendants.

CIVIL ACTION No. 2:06-cv-1797

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2014 U.S. Dist. LEXIS 2344

January 9, 2014, Decided
January 9, 2014, Filed

PRIOR HISTORY: *King Drug Co. of Florence v. Cephalon, Inc., 702 F. Supp. 2d 514, 2010 U.S. Dist. LEXIS 29905 (E.D. Pa., 2010)*

COUNSEL: [*1] For KING DRUG COMPANY OF FLORENCE, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, LEAD ATTORNEY, DANIEL C. SIMONS, DAVID F. SORENSEN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., LEAD ATTORNEY, PRO HAC VICE, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DAVID P. SMITH, SUSAN C. SEGURA, LEAD ATTORNEYS, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; BRIAN D. BROOKS, SMITH SEGURA & RAPHAEL LLP, NEW YORK, NY; CHRIS LETTER, ODOM & DESROCHES, NEW ORLEANS, LA; DOUGLAS R. WILSON, PRO HAC VICE, HEIM PAYNE & CHORUSH LLP, AUSTIN, TX; KIMBERLY HENNINGS, PRO HAC VICE, GARWIN GERSTEIN FISHER LLP, NEW YORK, NY; MIRANDA Y. JONES, RUSSELL A. CHORUSH, PRO HAC VICE, HEIM PAYNE & CHORUSH LLP, HOUSTON, TX; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For J M SMITH CORPORATION, ON BEHALF OF ITSELF [*2] AND ALL OTHERS SIMILARLY SITUATED doing business as SMITH DRUG COMPANY, Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DANIEL C. SIMONS, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., PRO HAC VICE, LEAD ATTORNEY, DAVID P. SMITH, SUSAN C. SEGURA, LEAD ATTORNEYS, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; BRIAN D. BROOKS, SMITH SEGURA & RAPHAEL LLP, NEW YORK, NY; CHRIS LETTER, ODOM & DESROCHES, NEW ORLEANS, LA; KIMBERLY HENNINGS, PRO HAC VICE, GARWIN GERSTEIN FISHER LLP, NEW YORK, NY; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For MEIJER, INC., MEIJER DISTRIBUTION, INC., Plaintiffs: ALLEN D. BLACK, LEAD ATTORNEY, FINE, KAPLAN & BLACK, PHILADELPHIA, PA; ANDREW WILLIAM KELLY, STUART E.

DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, JOSEPH OPPER, LEAD ATTORNEYS, [*3] GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DANIEL C. SIMONS, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID P. GERMAINE, LEAD ATTORNEY, JOHN PAUL BJORK, VANEK VICKERS & MASINI PC, CHICAGO, IL; DAVID P. SMITH, LEAD ATTORNEY, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; JOSEPH M. VANEK, PRO HAC VICE, VANEK VICKERS & MASINI PC, CHICAGO, IL; LINDA P. NUSSBAUM, GRANT & EISENHOFER PA, NEW YORK, NY; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA; RICHARD J. KILSHEIMER, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY.

For ROCHESTER DRUG CO-OPERATIVE, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, ERIC L. CRAMER, LEAD ATTORNEYS, ANDREW COYNE CURLEY, DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID P. SMITH, LEAD ATTORNEY, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD [*4] ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; PETER R. KOHN, LEAD ATTORNEY, FARUQI & FARUQI, LLP, JENKINTOWN, PA; SARAH SCHALMAN-BERGEN, LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILADELPHIA, PA; W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA; STEPHEN EDWARD CONNOLLY, FARUQI & FARUQI, JENKINTOWN, PA.

For STEPHEN L. LAFRANCE HOLDINGS, INC., Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID P. SMITH, LEAD ATTORNEY, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; ERIN C. BURNS, LEAD ATTORNEY, DIANNE M. NAST, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR; W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, [*5] PA.

For BURLINGTON DRUG COMPANY, INC., Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., LEAD ATTORNEY, PRO HAC VICE, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DAVID P. SMITH, SUSAN C. SEGURA, LEAD ATTORNEYS, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; BRIAN D. BROOKS, SMITH SEGURA & RAPHAEL LLP, NEW YORK, NY; CHRIS LETTER, ODOM & DESROCHES, NEW ORLEANS, LA; KIMBERLY HENNINGS, PRO HAC VICE, GARWIN GERSTEIN FISHER LLP, NEW YORK, NY; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For STEPHEN L. LAFRANCE PHARMACY, D/B/A SAJ DISTRIBUTORS, INC., Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, [*6] NY; DANIEL BERGER, DANIEL C. SIMONS, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID P. SMITH, LEAD ATTORNEY, SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DIANNE M. NAST, ERIN C. BURNS, LEAD ATTORNEYS, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, GRANT & EISENHOFER PA, NEW YORK, NY; MICHAEL L.

ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR; W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For WALGREEN CO., Plaintiff: MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL PUDLIN & SCHILLER, HARRISBURG, PA; SCOTT E. PERWIN, LEAD ATTORNEY, KENNY NACHWALTER, P.A., MIAMI, FL; DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; JOSEPH OPPER, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For THE KROGER CO., SAFEWAY INC., AMERICAN SALES CO., INC., HEB GROCERY COMPANY, LP, Plaintiffs: MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL PUDLIN & SCHILLER, HARRISBURG, PA; SCOTT E. PERWIN, LEAD ATTORNEY, KENNY NACHWALTER, P.A., MIAMI, FL; DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, [*7] PA; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA.

For RITE AID CORPORATION, RITE AID HDQTRS. CORP., JCG (PJC) USA, LLC, ECKERD CORPORATION, MAXI DRUG, INC., D/B/A BROOKS PHARMACY, CVS CAREMARK CORPORATION, Plaintiffs: MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL PUDLIN & SCHILLER, HARRISBURG, PA; BARRY L. REFSIN, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DANIEL C. SIMONS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; JOSEPH OPPER, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; NEILL WILSON CLARK, FARUQI & FARUQI, JENKINTOWN, PA; SCOTT E. PERWIN, KENNY NACHWALTER, P.A., MIAMI, FL.

For GIANT EAGLE, INC., Plaintiff: ARCHANA TAMOSHUNAS, TAUS CEBULASH & LANDAU LLP, NEW YORK, NY; BERNARD D. MARCUS, MOIRA E. CAIN-MANNIX, MARCUS & SHAPIRA, PITTSBURGH, PA; BRIAN C. HILL, PRO HAC VICE, MARCUS & SHAPIRA LLP, PITTSBURGH, PA; JOSEPH OPPER, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; KEVIN LANDAU, TAUS, CEBULASH & LANDAU, LLP., NEW YORK, NY; SCOTT E. PERWIN, KENNY NACHWALTER, P.A., MIAMI, FL.

For JABO'S PHARMACY, INC., individually, and on behalf of all persons similarly situated, Plaintiff: GORDON BALL, PRO HAC VICE, BALL & SCOTT, KNOXVILLE, TN; KRISHNA B. NARINE, MEREDITH & NARINE, [*8] PHILADELPHIA, PA.

For CEPHALON, INC., Defendant: EMILY R. WHELAN, MARY J. EDWARDS, PRO HAC VICE, WILMER HALE, BOSTON, MA; FRANK R. EMMERICH, JR., JOHN A. GUERNSEY, NANCY J. GELLMAN, CONRAD O'BRIEN, PHILADELPHIA, PA; GREGORY P. TERAN, MARK A. FORD, MICHELLE D. MILLER, PETER J. KOLOVOS, PETER A. SPAETH, WILMER CUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; JAMES C. BURLING, WILMER CUTLER PICKERING HALE & DORR, BOSTON, MA; MELINDA MEADOR, WINCHESTER SELLERS FOSTER & STEELE PC, KNOXVILLE, TN; ROBERT J. GUNTHER, JR., WILMER CUTLER PICKERING HALE DORR LLP, NEW YORK, NY; YIN ZHOU, PRO HAC VICE, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA.

For MYLAN LABORATORIES, INC., Defendant: C. FAIRLEY SPILLMAN, PAUL B. HEWITT, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, DC; DAVID L. COMERFORD, LEAD ATTORNEY, MATTHEW RYAN VARZALLY, AKIN GUMP STRAUSS HAUER & FELD LLP, PHILADELPHIA, PA; KATHERINE M. KATCHEN, LEAD ATTORNEY, AKIN GUMP STRAUSS HAUER & FELD, LLP, PHILADELPHIA, PA; DIANA L. GILLIS, AKIN GUMP STRAUSS HAUER & FDELD LLP, WASHINGTON, DC.

For TEVA PHARMACEUTICAL INDUSTRIES, LTD., Defendant: JEFFREY B. KORN, WILLIAM H. ROONEY, WILLKIE FARR GALLAGHER LLP, NEW YORK, NY; JOSEPH [*9] E. WOLFSON, STEVENS & LEE, KING OF PRUSSIA, PA.

For TEVA PHARMACEUTICALS USA, INC., Defendant: JEFFREY B. KORN, WILLIAM H. ROONEY, WILLKIE FARR GALLAGHER LLP, NEW YORK, NY; JOSEPH E. WOLFSON, STEVENS & LEE, KING OF PRUSSIA, PA.

For RANBAXY LABORATORIES, LTD., Defendant: CHRISTOPHER K. DIAMOND, MOLLY GEISSENHAINER, PRO HAC VICE, LEAD ATTORNEYS, DANIELLE R. FOLEY, J. DOUGLAS BALDRIDGE, LISA JOSE FALES, VINCENT E. VERROCCHIO, LEAD ATTORNEYS, SARAH CHOI, PRO HAC VICE, VENABLE LLP, WASHINGTON, DC; AN-

THONY S. VOLPE, JOHN J. O'MALLEY, VOLPE & KOENIG PC, PHILADELPHIA, PA.

For RANBAXY PHARMACEUTICALS, INC., Defendant: CHRISTOPHER K. DIAMOND, MOLLY GEISSENHAINER, PRO HAC VICE, LEAD ATTORNEYS, DANIELLE R. FOLEY, J. DOUGLAS BALDRIDGE, LISA JOSE FALES, VINCENT E. VERROCCHIO, LEAD ATTORNEYS, SARAH CHOI, PRO HAC VICE, VENABLE LLP, WASHINGTON, DC; ANTHONY S. VOLPE, JOHN J. O'MALLEY, VOLPE & KOENIG PC, PHILADELPHIA, PA.

For MYLAN PHARMACEUTICALS, INC., Defendant: C. FAIRLEY SPILLMAN, LEAD ATTORNEY, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, DC; DIANA L. GILLIS, AKIN GUMP STRAUSS HAUER & FDELD LLP, WASHINGTON, DC; MATTHEW RYAN VARZALLY, AKIN GUMP STRAUSS HAUER & FELD LLP, PHILADELPHIA, PA.

For BARR [*10] PHARMACEUTICALS, INC. (Formerly known as Barr Laboratories, Inc.), Defendant: ERIN C. DOUGHERTY, MONTGOMERY MCCRACKEN WALKER & RHOADS, LLP, PHILADELPHIA, PA; GREGORY L. SKIDMORE, JOHN C. O'QUINN, KIRKLAND ELLIS LLP, WASHINGTON, DC; JAY P. LEFKOWITZ, KIRKLAND & ELLIS, NEW YORK, NY; JOSEPH R. OLIVERI, KATHERINE R. KATZ, PRO HAC VICE, KIRKLAND & ELLIS LLP, WASHINGTON, DC; KAREN N. WALKER, KIRKLAND & ELLIS, WASHINGTON, DC; LATHROP B. NELSON, III, MONTGOMERY MCCRACKEN WALKER AND RHOADS, L.L.P., PHILADELPHIA, PA; LAURA M. ALEXANDER, PRO HAC VICE, KIRKLAND & ELLIS, WASHINGTON, DC; RICHARD L. SCHEFF, MONTGOMERY MCCRACKEN WALKER & RHOADS LLP, PHILADELPHIA, PA.

For TADEKA PHARMACEUTICAL NORTH AMERICA, INC., Movant: NATALIE GRILL EINSIG, PEPPER HAMILTON LLP, HARRISBURG, PA.

JUDGES: Mitchell S. Goldberg, J.

OPINION BY: Mitchell S. Goldberg

OPINION

Goldberg, J.

Memorandum Opinion

The issue before us is whether a finding of fraud on the Patent Office implicates the crime-fraud exception to the attorney-client privilege.

Plaintiffs, the Direct Purchasers, are a putative class of companies that purchased the wakefulness drug Provigil directly from Defendant Cephalon for redistribution. In an opinion dated October 31, 2011, in the related [*11] case of *Apotex, Inc. v. Cephalon, Inc., No. 06-2768, 2011 U.S. Dist. LEXIS 125859*, we concluded that Cephalon had committed inequitable conduct (sometimes called fraud on the Patent Office) in the prosecution of its patent for Provigil (the *RE '516 patent*) through its "complete concealment of another company's extensive involvement in the product which is the subject of the claimed invention." *Apotex, Inc. v. Cephalon, Inc., 2011 U.S. Dist. LEXIS 125859, 2011 WL 6090696, at *27 (E.D. Pa. Nov. 7, 2011)*, aff'd *500 Fed. Appx. 959 (Fed. Cir. 2013)*, cert. denied, *2013 U.S. LEXIS 9121, 2013 WL 5565876 (Dec. 16, 2013)*. Direct Purchasers' motion to compel asserts that the findings in that opinion establish the applicability of the crime-fraud exception to the attorney-client privilege, rendering discoverable thousands of communications between Cephalon and its attorneys relating to the patent prosecution and other events in the years that followed.

Having heard oral argument and after careful review of the written submissions, we conclude that the Direct Purchasers have failed to show that a reasonable basis exists to believe that the communications they identify were made in furtherance of the alleged fraud. In so finding, we also decline to review in camera any of the [*12] documents at issue.

I. Factual Background

This is one of numerous consolidated antitrust cases alleging, among other things, that Cephalon and several generic manufacturers of Provigil violated the Sherman Act when they agreed to settle infringement litigation on terms that provided for significant payments from Cephalon to the generics. The facts relevant to this motion are primarily those relating to the prosecution of Cephalon's Provigil patent, and are recounted at length in our Apotex opinions.

In deciding the questions of invalidity and unenforceability, we made several determinations regarding Cephalon's conduct in the prosecution of the patent. The patent claimed, most relevantly, a "pharmaceutical composition comprising a substantially homogenous mixture of modafinil [the active ingredient in Provigil] particles, wherein at least 95% of the cumulative total of modafinil particles in said composition have a diameter less than about 200 microns." We concluded that Cephalon did not invent that pharmaceutical composition. In fact, a French

company, Laboratoire L. Lafon, manufactured and shipped to Cephalon several modafinil batches between 1989 and 1993 that fell within the patent [*13] claims. Nevertheless, Cephalon filed its initial patent application in October 1994, and filed the application that resulted in the *RE '516 patent* in 1999. In prosecuting the *RE '516 patent* (and its predecessor), Cephalon did not disclose to the Patent Office that another company was the inventor of the drug, or that Cephalon had done nothing to alter the modafinil it received. To the contrary, Cephalon falsely suggested that it had "manipulate[d] the particle size of the drug substance" to reach the levels described by the patent claims. Our opinion determined that Cephalon acted with "specific intent to deceive the PTO," and that its misrepresentations and omissions were material. We found that Apotex proved these allegations by clear and convincing evidence.

Direct Purchasers' ask us to conclude that these findings are sufficient to establish the crime-fraud exception to the attorney-client privilege, and seek an order directing Cephalon to produce all attorney-client communications related to: (1) the prosecution, issuance, and reissuance of the *RE '516 patent*; (2) the listing of the patent in the FDA's Orange Book; (3) the filing and maintaining of patent infringement litigation [*14] against the generics; and (4) the negotiation and making of reverse-payment settlement agreements with the generics. Cephalon responds that, even if its prior misrepresentations and omissions establish fraud with respect to the patent prosecution, there is no justification for concluding that the fraud extended through the other events identified by the Direct Purchasers. Cephalon further contends that the Direct Purchasers have failed to meet their burden to show that any of its communications with its attorneys were made "in furtherance" of the alleged fraud. Because we agree with Cephalon, we will deny the Direct Purchasers' motion.

II. Discussion

The attorney-client privilege is the oldest confidential communications privilege known to the common law, and one that has long been regarded as "worthy of maximum legal protection." *Haines v. Ligget Grp., 975 F.2d 81, 89 (3d Cir. 1992)*. For that reason, the decision to pierce the privilege is regarded as an "extreme remedy," to be made only after due consideration and caution. *Unigene Labs. v. Apotex, Inc., 655 F.3d 1352, 1359 (Fed. Cir. 2011)*. The United States Court of Appeals for the Third Circuit has emphasized that "where a fact finder [*15] undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument." *Haines, 975 F.2d at 97* (emphasis added).

The privilege is subject to several exceptions. Importantly, as it relates to this case, the privilege does not protect communications made between an attorney and a client in furtherance of a future crime or fraud. As aptly explained by Justice Benjamin Cardozo: "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933)*. To pierce the privilege, the movant "must demonstrate that there is a reasonable basis to suspect (1) that the privilege holder was committing or intending to commit a crime or fraud, and (2) that the attorney-client communication or attorney work product was used in furtherance of that alleged crime or fraud." *In re Grand Jury, 705 F.3d 133, 155 (3d Cir. 2012)*.

A. Level of Proof Required

The precise level of proof required to succeed on a motion to compel based on the crime-fraud exception is subject to some [*16] debate. The traditional definition requires the party invoking the exception to provide "prima facie evidence that it has some foundation in fact." *Clark, 289 U.S. at 15*. But "prima facie" is a slippery standard, and the Supreme Court has since recognized that it has resulted in "some confusion" among the lower courts. *United States v. Zolin, 491 U.S. 554, 563 n.7, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)*.

In the civil context, the United States Court of Appeals for the Third Circuit has concluded that the prima facie case requires the movant to "present evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *Haines, 975 F.2d at 95-96*. The Haines court also quoted opinions from other circuits interpreting prima facie to mean "probable cause" or a "reasonable basis" to believe that the elements of the exception were met. *Id. at 95*. The court suggested that these formulations amounted to the "same basic proposition," id., and more recent Third Circuit law has adopted the "reasonable basis" language, albeit in the grand-jury context, *In re Grand Jury, 705 F.3d at 153-54*. Under that formulation, the privilege is destroyed "[w]here [*17] there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud" *Id. at 153*. We use the reasonable basis language here, with the understanding that each of the terms mentioned above amount to essentially the same level of proof in this context. See *Haines, 975 F.2d at 95-96*.

In recognition of the reality that many abuses of the privilege would be impossible to prove without examina-

tion of the communications at issue, a "lesser evidentiary showing is needed" to permit a judge to exercise his discretion to review the documents in camera. *Zolin, 491 U.S. at 569-70*. To make in camera review permissible, the movant must produce sufficient evidence to "support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." *Id. at 574-75*; see also *In re Chevron Corp., 633 F.3d 153, 167 (3d Cir. 2011)* (holding that movant had not met burden to establish crime-fraud exception's applicability, but had met the burden to justify in camera review). However, even if this threshold [*18] showing is made, in camera review is not required. A judge has discretion to conclude that prudential concerns, such as the "volume of materials the district court has been asked to review," the "relative importance to the case of the alleged privileged information," and the "likelihood that evidence produced through in camera review . . . will establish that the crime-fraud exception does apply," render in camera review unwise. *Zolin, 491 U.S. at 572*.

B. Fraud Element

To satisfy the first element of the exception, the movant must show common law fraud. *Unigene Labs., 655 F.3d at 1358-59*. This requires (1) misrepresentation or omission of a material fact, (2) an intent to deceive, (3) justifiable reliance by the party deceived, and (4) injury to the party deceived. Id.

Until recently, it was clear that a finding of inequitable conduct (as was found in Apotex) was insufficient by itself to establish common law fraud. See *In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 807 (Fed. Cir. 2000)* (distinguishing inequitable conduct as requiring a lesser showing of intent than fraud). Courts routinely denied crime-fraud motions to compel on this basis. See, e.g., *WebXChange Inc. v. Dell, Inc., 264 F.R.D. 123, 129 (D. Del. 2010)* [*19] (noting that movant's arguments were "little more than a restatement of their inequitable conduct allegations, which are insufficient for a prima facie showing of fraud"); *Rowe Int'l Corp. v. Ecast, Inc., 241 F.R.D. 296, 303-04 (N.D. Ill. 2007)*.

The Direct Purchasers argue that this changed in *Therasense, Inc. v. Becton, Dickinson and Co., 649 F.3d 1276 (Fed. Cir. 2011)*, where the Federal Circuit reassessed the standards for a finding of inequitable conduct. Specifically, the court concluded that, to establish inequitable conduct, the "accused infringer must prove [by clear and convincing evidence] that the patentee acted with the specific intent to deceive the PTO," and that the patent would not have issued "but-for" the deception. *Id. at 1290-91*. We applied this heightened standard in Apotex v. Cephalon, and concluded that Cephalon committed inequitable conduct in prosecuting the *RE '516 patent*. The Direct Purchasers' posit that Therasense aligned the inequitable conduct standard with the common law fraud standard, and thus our findings in Apotex suffice to establish the fraud element of the crime-fraud exception.

While Cephalon disputes this point, it focuses most of its opposition [*20] on the second, "in furtherance" element of the crime-fraud exception. (See Resp. 7 ("[E]ven assuming arguendo the Court's inequitable conduct finding could establish a prima facie case of fraud as to the patent prosecution . . . .").) Because we conclude that the second "in furtherance" element has not been met, we need not decide the meaning and import of Therasense here, and leave that for another day. Cf. *In re Chevron Corp., 633 F.3d at 167* ("[E]vidence of a crime or fraud, no matter how compelling, does not by itself satisfy both elements of the crime-fraud exception.").

C. In Furtherance Element

The "in furtherance" element requires the movant to show that a given communication was "meant to facilitate future wrongdoing by the client." *Haines, 975 F.2d at 90* (emphasis added). It is only those communications that the exception renders discoverable. Evidence tending only to show that a communication "relates to" or would provide "relevant evidence" of fraudulent conduct is insufficient. See *In re Richard Roe, 68 F.3d 38, 40 (2d Cir. 1995)* (holding that "relevant evidence" test was insufficient to show that the communications were "intended in some way to facilitate or conceal the [*21] criminal activity"); *LRC Elecs., Inc. v. John Mezzalingua Assocs., Inc., 974 F. Supp. 171, 180 (N.D.N.Y. 1997)* (rejecting crime-fraud argument after in camera review where communications "d[id] not mention" the material prior art alleged to be fraudulently concealed from the PTO).

In urging that the thousands of communications made between Cephalon and its attorneys were in furtherance of a fraud, the Direct Purchasers have offered nothing more than a broad categorical approach. They identify four events--the patent prosecution, the listing of the patent in the Orange Book, the bringing and maintaining of the infringement litigation, and the settlements with the generic defendants--and assert that "all the attorney client communications relating to" these categories were necessarily made "in furtherance" of fraud. (Br. 17.)

We are not prepared, based upon such an over-broad and general approach, to override the attorney-client privilege. The Direct Purchasers are not entitled to every attorney-client communication made during the patent prosecution, or even every attorney-client communication related to the patentability of the modafinil composition that is the subject of the *RE '516 patent* [*22] (to take just one category of documents). Rather, they must

establish that Cephalon sought the advice of its attorneys intending that the resulting advice would be used to facilitate a future fraud. *Haines, 975 F.2d at 90.* Despite the fact that thousands of discoverable documents have been exchanged and numerous depositions have been taken, the Direct Purchasers have been unable to patch together any type of record to establish that the communications at issue were in furtherance of future fraud. Moreover, the Direct Purchasers' categorical approach offers no way of distinguishing between communications made in furtherance of future fraud (if they exist), and those that legitimately relate to the patent prosecution. Accordingly, we conclude that the Direct Purchasers have fallen far short of meeting their burden of demonstrating a reasonable basis to conclude that particular communications were made in furtherance of the fraud they allege.

D. In Camera Review

Based upon the record before us, we also conclude that in camera review would be inappropriate. The Direct Purchasers invite the Court to conduct an in camera review of a "limited selection" of documents--more than 800--that they [*23] claim "appear to relate to the challenged conduct." (Br. 17-18.) As we have already discussed, mere relation to the fraudulent conduct does not meet the reasonable basis test. But even on the lower standard for obtaining in camera review, the Direct Purchasers' motion falls short. Many of the documents at issue are sure to remain privileged given the motion's broad request, making even the more limited intrusion on the privilege occasioned by in camera review quite substantial for Cephalon.

Moreover, the prudential concerns mentioned in *Zolin* make this motion an impractical prospect for in camera review. Review of even the selection of documents identified by the Direct Purchasers would consume considerable Court resources. While the evidence obtained, even if determined to be unprotected, might be useful in some respects, the breadth of the request reduces the likelihood that any given communication will be found to fall within the exception, and increases the harm to Cephalon from having a third-party, even if it is the Court, comb through its privileged communications. We thus decline to require Cephalon to produce any of the challenged communications for in camera review.

III. [*24] Conclusion

We conclude that the Direct Purchasers have failed to meet their burden of showing a "reasonable basis" that the attorney-client communications identified were made "in furtherance" of the alleged fraud, and further determine that in camera review would be inappropriate on this record. We acknowledge that Direct Purchasers may not have access to the evidence required to overcome the privilege, or to justify in camera review. But erring on the side of caution is part of the system that provides attorney-client communications with "maximum legal protection." *Haines, 975 F.2d at 89.*

An appropriate order follows.

ORDER

AND NOW, this 9th day of January, 2014, upon consideration of Direct Purchaser Plaintiffs' motion to compel (Doc. No. 506), and for the reasons set forth in the Court's accompanying Memorandum Opinion, it is **ORDERED** that the Motion is **DENIED.**

BY THE COURT:

/s/ Mitchell S. Goldberg

Mitchell S. Goldberg, J.

2005 WL 3985351
Only the Westlaw citation is currently available.
Court of Common Pleas of Pennsylvania,
Lackawanna County.

In re: COUNTY INVESTIGATING GRAND JURY VIII, 2003.

No. 03 MISC 140. | Oct. 25, 2005.

Attorneys and Law Firms

Amil M. Minora, Esquire, Asst. District Attorney, Lackawanna County Courthouse, Scranton, PA, Attorney for the Commonwealth.

Gerard M. Karam, Esquire, Scranton, PA, Attorney for Defendant Barry Craven.

Frank Ruggiero, Esquire, Archbald, PA, Attorney for Defendant Fred Robert Jones.

Scott O'Keefe, Esquire, Philadelphia, PA, Attorney for Defendant James Tolan.

Thomas J. Munley, Esquire, Scranton, PA, Attorney for Defendant Lee Scarabotti.

Opinion

MEMORANDUM AND ORDER

NEALON, J.

*1 In response to an amended motion that was filed by James Tolan seeking to quash the Lackawanna County Investigating Grand Jury Presentment dated March 25, 2004, on the grounds that the Lackawanna County District Attorney's Office had allegedly disseminated secret Grand Jury information to Jennifer Henn, a reporter formerly employed by *The Scranton Times•Tribune,* a special prosecutor was appointed to investigate the allegation of a Grand Jury leak. The special prosecutor has now submitted a report which, including attachments, spans 115 pages. Based upon our review of the special prosecutor's report and recommendation, the amended motion to quash the Grand Jury Presentment will be denied.

I. *PROCEDURAL HISTORY*

On March 25, 2004, the Lackawanna County Investigating Grand Jury VIII, 2003 issued a Presentment which, *inter alia,* recommended that criminal charges be filed against four Lackawanna County prison guards, James Tolan, Robert Jones, Barry Craven and Lee Scarabotti, for conduct related to alleged abuse of inmates. Those four guards were charged with various criminal offenses on March 26, 2004, and their preliminary hearings were scheduled for July 13, 2004. Prior to that time, counsel for the Commonwealth and the defendants stipulated that the defendants' challenges to the Presentment should be decided prior to their preliminary hearings. On July 9, 2004, Craven and Jones filed motions to quash the Presentment on the bases that the District Attorney allegedly has a conflict of interest in prosecuting these cases and that the prosecutors erroneously allowed alternate jurors to deliberate and vote on the Presentment in contravention of Pa. R.Crim.P. 222(C). On July 13, 2004, Scarabotti joined in the motions to quash that had been filed by Craven and Jones, and on September 3, 2004, Tolan submitted his own motion to quash which incorporated the other defendants' arguments and also asserted additional grounds for the alleged disqualification of the District Attorney's office. (*See* Dkt. Entries Nos. 6, 8, 15.) Tolan later filed an amended motion to quash asserting that the District Attorney's office purportedly violated 42 Pa.C.S. § 4549(b) and Pa. R.Crim.P. 231(C) by disclosing secret Grand Jury information to Jennifer Henn while she was a reporter with *The Scranton Times•Tribune.* (*Id.,* No. 24.)

The gravamen of Tolan's amended motion to quash is that numerous e-mail communications were allegedly exchanged between Henn and a member of the District Attorney's office which ostensibly divulged Grand Jury information. Tolan also asserts that although Henn was not present in the courthouse on the date of his Grand Jury testimony on February 27, 2004, within a few hours of Tolan's Grand Jury appearance, his former counsel observed Henn and that same member of the District Attorney's office as they were seated alone at a back table in a local bar, Farley's, and engaged in a private conversation there. Tolan maintains that Henn contacted him shortly thereafter and questioned him about his confidential appearance and testimony before the Grand Jury. Tolan contends that Henn questioned him about

private matters that he had disclosed only to the Grand Jury. On March 14, 2004, Henn authored an article which appeared in *The Scranton Times•Tribune* and discussed her interview of Tolan regarding his Grand Jury testimony. *See* "Grand Jury Hears Tolan", *The Scranton Times•Tribune* (March 14, 2004).

***2** The undersigned's preliminary investigation confirmed the existence, but not the substance, of the e-mails that were exchanged between Henn and that member of the District Attorney's office during the time period that the Grand Jury was investigating the County prison. The undersigned further confirmed the personal observations that were made by Tolan's former counsel at Farley's on the evening of Tolan's Grand Jury appearance. Moreover, a review of Henn's Grand Jury articles dated December 19, 2003, December 20, 2003, January 17, 2004 and March 14, 2004 reference testimony that was supposedly provided by Grand Jury witnesses. In addition, two Grand Jury witnesses had previously complained to the undersigned that Henn was conveniently appearing at the County Courthouse on those dates that the Grand Jury was considering the County prison investigation. According to one Grand Jury witness, he was contacted at home by Henn even before he was subpoenaed to testify before the Grand Jury. Based upon the totality of the foregoing circumstances, an order was entered on February 16, 2005, appointing former U.S. Attorney James J. West, Esquire, as a Special Prosecutor to investigate Tolan's allegation of a Grand Jury leak. (Dkt. Entry No. 29.)

By Memorandum and Order dated February 17, 2005, the original motions to quash which were presented by Craven, Jones, Scarabotti and Tolan were denied. *See In re County Investigating Grand Jury VIII, 2003,* 106 Lacka. Jur. 55, 67 (2005). Any ruling on Tolan's amended motion to quash was deferred pending receipt and review of the special prosecutor's report and recommendation. *Id.,* at 61 n. 6, and 67. The District Attorney's office appealed the appointment of a special prosecutor, but by Order dated April 15, 2005, the Supreme Court of Pennsylvania affirmed the Order of February 16, 2005, appointing a special prosecutor. *See In re County Investigating Grand Jury VIII, 2003,* No. 29 MM 2005 (Pa. April 15, 2005).

During the course of his four month investigation, the Special Prosecutor secured copies of the subject e-mails and each Grand Jury article that was authored by Henn, as well as relevant discovery materials that have been produced by the parties in *Castellani v. The Scranton Times, L.P. and Henn,* No. 05 CV 69 (Lacka.Co.). Between May 23, 2005 and September 9, 2005, the Special Prosecutor conducted at least ten separate interviews at which time he questioned Henn, attorneys and staff employed by the District Attorney's office, Tolan's former counsel, and various witnesses who had appeared before the Grand Jury. The Special Prosecutor also obtained two letters from Tolan's current counsel containing Tolan's specific allegations of possible Grand Jury leaks and conducted supplemental interviews of various individuals with regard to those allegations. The Special Prosecutor has authored a comprehensive report and recommendation which were filed under seal on October 12, 2005. Hence, Tolan's amended motion to quash is now ripe for disposition.

II. *FACTUAL BACKGROUND*

***3** Under the direction of the Office of Attorney General (OAG), the Twentieth Statewide Investigating Grand Jury initiated an investigation into alleged narcotics use and trafficking within the Lackawanna County prison. During that investigation, the OAG discovered in the Spring of 2003 that the County Prison Warden, Deputy Warden and two maintenance officers were reportedly involved with the use of inmate labor for personal matters, and the OAG exercised concurrent jurisdiction over this newly discovered criminal conduct. *See County Investigating Grand Jury,* 106 Lacka. Jur. at 57-58. On September 18, 2003, Lackawanna County President Judge Chester T. Harhut approved the Lackawanna County District Attorney's application for an order to empanel a county investigating grand jury for the express purpose of investigating unsolved homicides, narcotics operations, prostitution, elder abuse and public corruption. (*See* Dkt Entry No. 1, pp. 4-7.) Although the alleged abuse of county prisoners by prison guards was not identified as a potential subject of inquiry, the initial focus of the County Investigating Grand Jury's investigation in December 2003, January 2004, February 2004 and March 2004 related to reports of physical abuse of inmates by certain guards at the Lackawanna County prison.

The Statewide Investigating Grand Jury issued a Presentment on March 4, 2004, and the OAG filed criminal charges against the former Warden, Deputy Warden and two supervisors for theft of services and various ethics violations. *See* Order Accepting Presentment No. 11, *In re the Twentieth Statewide Investigating Grand Jury,* No. 277 M.D. Misc. Dkt.2002, Garb, S.J. (Dauph.Co. Mar. 4, 2004). As stated above, the

County Investigating Grand Jury issued a Presentment three weeks later, and the District Attorney filed criminal charges against Tolan, Jones, Craven and Scarabotti. *See* Order Accepting Report and Recommendation, *In re County Investigating Grand Jury VIII, 2003,* No. 03 Misc. 140, Nealon, J. (Lacka.Co. Mar. 25, 2004). Since the actions of Jennifer Henn relative to the state Grand Jury proceedings resulted in the appointment of Mr. West as a special prosecutor, rather than the referral of this issue to the OAG, it is necessary to first review the alleged disclosure of state Grand Jury information to Ms. Henn and *The Scranton Times•Tribune.*

(A) STATEWIDE GRAND JURY

On July 30, 2003, *The Scranton Times•Tribune* published an article of an interview with the Lackawanna County Prison Warden, Thomas P. Gilhooley, during which he reportedly acknowledged that prison personnel and inmates "may have" performed minor work at his home. *See* "Warden: Some Work Done", *The Scranton Times•Tribune* (July 30, 2003). After Warden Gilhooley admitted to the then Majority Lackawanna County Commissioners Randy Castellani and Joseph Corcoran on July 31, 2003, that prison maintenance officials had performed personal chores for him, he was fired by the County Commissioners. *See* "Warden Fired", *The Scranton Times•Tribune* (July 31, 2003). Commissioners Castellani and Corcoran were later subpoenaed to appear before the statewide grand jury, and on December 2, 2003, Castellani and Corcoran provided testimony with respect to the Warden's admissions to them on July 31, 2003.[1] (*See* Transcript of Proceedings (T.P.) before S.J. Garb dated 4/7/04, In re Notice No. 16, pp. 6-8.)

*4 On January 12, 2004, Henn authored an article concerning the County Commissioners' appearance before the statewide grand jury. Under a front page, upper banner headline entitled "Dems Stonewall Grand Jury", Henn reported that the Commissioners "were 'considerably less than cooperative' with the jurors, often responding with vague, evasive answers including 'I don't recall' and 'not that I am aware of,' a source close to the investigation said." *See Castellani v. The Scranton Times, L.P. and Henn,* No. 05 CV 69, Mazzoni, J., at pp. 3-4 (Lacka. Co. June 3, 2005). Henn quoted "the source" as stating "[t]heir testimony really irritated the jurors", "[t]hey were ready to throw both of them out", and "[t]hey were ready to take out the big hook and yank each of them out of the witness chair." *Id.* In the article Henn further stated that "[i]n addition to more witnesses, the Grand Jury recently subpoenaed another crop of prison financial records." *Id.* Any details pertaining to the Commissioners' appearances before the grand jury, what supposedly transpired within the grand jury room, the grand jurors' alleged reaction to the testimony, and what records may have been subpoenaed by the grand jury are not subject to disclosure under The Investigating Grand Jury Act, 42 Pa.C.S. § 4549(b), and Pa. R.Crim.P. 231(C).

Castellani and Corcoran filed a petition with the Supervising Judge for the statewide grand jury, Senior Judge Isaac S. Garb, seeking to have contempt proceedings initiated against the OAG for apparently disclosing grand jury details to Henn. During an in chambers hearing on the Commissioners' request, the OAG acknowledged that the Supervising Judge for an investigating grand jury has the "sole and ultimate authority to review these matters and direct any investigation that might occur" and "to determine ... where that should go and what, if any, investigative agencies or efforts need to be made to verify these allegations." (*See* T.P. on 4/7/04, *supra,* pp. 15-16.) However, the OAG asserted "profound objections to the standing of commissioners" to initiate or conduct a grand jury inquiry or contempt proceeding. (*Id.,* pp. 15-16, 20). Judge Garb agreed that the Commissioners lacked standing to institute such a proceeding and dismissed their petition on that basis. (*Id.,* pp. 28, 30.) Counsel for the OAG concluded that in-chambers proceeding by representing:

> Just for the record, the Office of Attorney General completely concurs with [the Supervising Judge's] authority and really virtually unlimited authority to take a look into this and appoint whoever you desire to do so. We will not stand in your way.

(*Id.,* p. 29.)

Once the Warden and Deputy Warden were charged with criminal offenses based upon the statewide grand jury presentment, they filed petitions with Judge Garb seeking to hold the OAG or its agents in contempt for purportedly revealing grand jury information to Henn and *The Scranton Times•Tribune.* In response to those petitions, Judge Garb filed an order stating:

*5 AND NOW, to wit, this 13th day of April, 2004, it is hereby ORDERED that Terrence P. Houck, Esquire, is appointed special prosecutor to investigate, inquire, and determine if any person or persons unlawfully disclosed matters occurring before the twentieth statewide investigating grand jury regarding allegations of illegal conduct at the Lackawanna County Prison. For purposes of conducting the foregoing investigation, the said special prosecutor shall have all powers and authority necessary to conduct that investigation including, but not limited to, the use of the grand jury and subpoena powers.

It is further ORDERED that the said special prosecutor shall keep secret all matters occurring before the grand jury to which he should become privy in the course of this investigation.

At the termination of this investigation and inquiry, the special prosecutor shall submit a written report to the undersigned, the supervising judge of the said grand jury, setting forth his findings.

BY THE COURT:

/s/ Isaac S. Garb

In re Twentieth Statewide Investigating Grand Jury, No. 277 M.D. Misc. Dkt.2002, Garb, S.J. (Dauph.Co. Apr. 13, 2004).

Mr. Houck proceeded to conduct an investigation and thereafter submitted a report to Judge Garb. On September 14, 2004, Judge Garb issued an order addressing the defendants' motions and concluded:

> The special prosecutor has now rendered his investigative report in which he has determined that there was no breach of secrecy by any Agent of the Attorney General's Office. We have reviewed that report, and all of the documents filed with it, including the testimony of each of these witnesses, as well as the newspaper reports, and concur in that conclusion. The reports published in these newspapers are completely at variance with the transcript of the testimony of these witnesses. The newspaper reports provide that the witnesses were evasive in their answers, were non-cooperative, essentially 'stonewalled' the Grand Jury in its inquiry and that the Grand Jurors became irate as a result of that demeanor on the witnesses' part, and demanded that they be 'thrown out' of the Grand Jury courtroom. None of those things happened. Obviously, if someone wished to leak the testimony of a witness to the Grand Jury, that information relayed to the media would have reflected the testimony that actually occurred. The report of the testimony of the witnesses was totally at variance and not borne out by the record of the witnesses' testimony. Obviously, the source of the reporter's information was someone not privy to the Grand Jury proceedings, and therefore, not someone in the Office of the Attorney General.
>
> The reports in these newspapers which purport to be a reflection of the testimony of Randall Castellani and Joseph Corcoran are totally at variance with the transcript of their testimony before the Grand Jury. The characterization of their testimony in the newspaper reports is belied by the record. Each witness testified unhesitatingly and clearly. The witnesses were cooperative. Their testimony was not vague. At no time did the Grand Jurors become irate or indicate a readiness to throw the witnesses out of the Grand Jury room.

*6 *In re Twentieth Statewide Investigating Grand Jury,* No. 277 M.d. Misc. Dkt.2002, Garb, S.J. (Dauph Co. Sept. 14, 2004).[2]

(B) COUNTY GRAND JURY

The County Grand Jury's schedule of sessions and subjects of inquiry were not made available to the press or public by the Court Administrators and were known only to the Supervising Judge, the District Attorney's Office, and the Grand Jurors themselves. The Court Administrators were aware of the dates of the Grand Jury's sessions but were not cognizant of what matters would be investigated by the Grand Jury on those dates. In advance of each Grand Jury session, the District Attorney's office would submit subpoenas to the undersigned for execution in order to compel the appearance of witnesses for a specific date. Therefore, individuals who were served with subpoenas to testify before the Grand Jury on a given date would likewise know that the Grand Jury was in session on that particular date. Otherwise, the Grand Jury's session schedule and topics of review were to be maintained in confidence.[3]

During the relevant time period, Henn acted as the local newspaper's reporter for County government issues, but did not cover the courts nor was she present in the

Lackawanna County Courthouse on a regular basis. Rather, a separate reporter for *The Scranton Times•Tribune* was assigned to the courthouse and covered trials, hearings, sentencings and court matters on a full time basis. Even though the Grand Jury's session schedule was known only to the Supervising Judge, the District Attorney's Office, the Court Administrators, the Grand Jurors, and any witnesses who may have been subpoenaed for a particular session, and notwithstanding the fact that President Judge Harhut's empanelling order of September 18, 2003 did not identify the County prison as a subject of Grand Jury inquiry, Henn appeared at the Lackawanna County Courthouse on December 18, 2003 and December 19, 2003, while the Grand Jury was in session and investigating the County prison.

On December 19, 2003, Henn authored a newspaper report entitled "Second grand jury begins probe of prison." In her article, Henn stated that "[a] second grand jury, this one convened by Lackawanna County District Attorney Andy Jarbola, took on the embattled County prison and its staff [on December 18, 2003]" and that "[n]early 20 prison guards and current and former inmates were subpoenaed to appear before the panel, which will continue questioning witnesses today." *See* "Second Grand Jury Begins Probe of Prison", *The Scranton Times-Tribune* (Dec. 19, 2003). As noted above, none of those reported details concerning the subject of the investigation and the number of witnesses subpoenaed were public knowledge at the time. Ms. Henn mentioned that an inmate, Andy Thomas, and a corrections officer, Robert McPhillips, "were questioned repeatedly" before the Grand Jury, and she reported that "[t]hey offered testimony; the Grand Jury was given time to discuss the testimony; then the witnesses were recalled to answer more questions ." She further stated that "Mr. McPhillips was brought before the panel four times, and Mr. Thomas was called three times" and that "both were questioned, at least in part, about the alleged beating of former prisoner Ronald Knight earlier this year." Additionally, the Henn article claimed that "[p]rosecutors are also looking into a 2002 complaint by former inmate Edward Ware, who said he was assaulted, thrown up against a concrete wall and suffered a detached retina as a result of the attack."[4] (*Id.*)

*7 On December 20, 2003, Ms. Henn authored an article which stated that "Lackawanna County's recently convened Grand Jury worked non stop Friday, investigating at least two specific cases of alleged inmate beatings at the County prison." Henn's report addressed the subject matter of the testimony purportedly presented to the Grand Jury and claimed that the Grand Jurors "also heard testimony suggesting additional, unreported cases" as they were "[l]ed by First Assistant District Attorney Eugene M. Talerico...." She again referenced the non-public fact that "[n]early 20 prison guards and current and former inmates were subpoenaed to appear before the Grand Jury this month." *See* "Witness: 'They Treat Inmates Like Animals' ', *The Scranton Times-Tribune* (Dec. 20, 2003). She further represented that certain witnesses "were questioned, at least in part, about the [Ronald] Knight case."[5] (*Id.*)

When the Grand Jury next met on January 16, 2004 to hear testimony regarding inmate abuse at the County prison, Henn once again appeared at the Lackawanna County Courthouse. (*But see* n. 3, *supra.*) On January 17, 2004, Henn published an article entitled "Grand jury hears tales of attacks" and reported that on January 16, 2004, "[i]n the jury room, Assistant District Attorney Amil Minora led Mr. Knight through the details of both alleged incidents" of beatings by former guard James Tolan. *See* "Grand Jury Hears Tales of Attacks", *The Scranton Times-Tribune* (Jan. 17, 2004). She stated that "[a] handful of other guards and another alleged beating victim also testified" and reported that two additional guards, Barry Craven and Robert Jones, "have been subpoenaed to appear before the grand jury." (*Id.*) Needless to say, any matters that were addressed "[i]n the jury room" could not be disclosed to Henn by any prosecutors or other individuals who were subject to the Grand Jury secrecy oath.[6]

As of the date of the Henn article dated January 17, 2004, no further witnesses had been subpoenaed to appear before the Grand Jury with respect to the prison investigation.[7] In fact, it was not until January 20, 2004 and January 21, 2004 that subpoenas were first submitted to the undersigned for signature to compel the attendance of additional prison witnesses for a Grand Jury session on January 30, 2004. (*See* attached redacted subpoenas marked as Addendum C.) Notwithstanding the fact that subpoenas for prison investigation witnesses were not even presented to the undersigned until January 20-21, 2004, Henn reported several days earlier on January 17, 2004, that "[t]he Grand Jury is expected to convene again on the prison brutality case later this month." *See* "Grand Jury Hears Tales of Attacks", *The Scranton Times-Tribune* (Jan. 17, 2004).

In anticipation of the Grand Jury's February 2004 sessions, the undersigned administered witness oaths to two individuals who were cooperating with the District Attorney's prison investigation. Prior to being

administered their witness oaths, those witnesses expressed concerns about Henn's newspaper reports pertaining to the Grand Jury proceedings and her identification of other witnesses who had appeared before the Grand Jury. The cooperating witnesses remarked that after certian prison guards had testified before the Grand Jury, "it was in the paper that evening or the next morning that they testified and pretty much what they testified about." *See In re Witness Oaths,* No. 03 Misc. 140, Investigating No. C-1 (Feb. 13, 2004) (filed under seal). They indicated that those guards who testified later experienced problems at work with their fellow guards, and in at least one instance, a testifying guard never returned to work at the prison. (*Id.,* pp. 18-19, 23, 29.) *See also Douglas Oil Co. of California v. Petrol Stops N.W.,* 441 U .S. 211, 219 (1979) (stating that if grand jury proceedings "were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony."). One cooperating witness remarked that he had always assumed that Grand Jury proceedings were protected by secrecy and that he "couldn't believe it when [he] saw the paper and some of the articles in there." (*In re Witness Oaths, supra* at p. 30.)

***8** In response to those comments, the undersigned noted on the record that Henn was conveniently present in the courthouse only on those days that the Grand Jury investigated the abuse of inmates at the prison, but did not appear when the Grand Jury investigated other criminal conduct unrelated to the prison probe. (*Id.,* pp. 24-26, 39.) One of the witnesses then expressed concerns that even before he was served with his Grand Jury subpoena, Henn was contacting him at his home and attempting to interview him. (*Id.,* pp. 25, 39.) Based upon the objections that were voiced by those witnesses, the undersigned assured those two prospective witnesses that if Henn appeared in the courthouse again on those days that the Grand Jury was considering the inmate abuse allegations, he would "launch an investigation into it to try to find out who is leaking that information to the press." (*Id.,* pp. 26, 39.) The undersigned also advised the two witnesses "that I don't think that information is being divulged by the District Attorney's Office", that "I have confidence that they would not violate the Grand Jury Act", and that "if they divulge something about this Grand Jury I could hold them in contempt of court...." (*Id.,* pp. 13-14, 30.)

The transcript of that proceeding on February 13, 2004 reflects that the undersigned's statement regarding the prospect of a Grand jury leak investigation was made in the presence of District Attorney's office personnel. Following the foregoing admonition, and even though Henn had previously appeared at the courthouse on every date that the Grand Jury investigated the Lackawanna County prison, Henn never appeared again for another Grand Jury session. Specifically, Ms. Henn did not appear for the Grand Jury sessions on February 19, 2004, February 26, 2004, and February 27, 2004 when the Grand Jury heard testimony pertaining to the abuse of County inmates. Since Henn did not appear at any further Grand Jury sessions, no investigation of a Grand Jury leak was initiated at that time

However, after Tolan's amended motion to quash was filed, the undersigned confirmed that within hours of Tolan's Grand Jury appearance on February 27, 2004, Henn and a member of the District Attorney's office were observed participating in a private conversation at a local bar. Although Henn had never attempted to interview Tolan following the commencement of the Grand Jury's investigation, she coincidentally contacted Tolan shortly after being observed in the company of a prosecutor, and, according to Tolan, questioned him about matters that he had only revealed during his Grand Jury testimony. As stated above, Henn subsequently authored an article on March 14, 2004, addressing Tolan's Grand Jury testimony.

(C) APPOINTMENT OF SPECIAL PROSECUTOR

Following confirmation of certain factual allegations that had been made by Tolan, and inasmuch as the above-quoted newspaper articles discussed secret Grand Jury testimony and information, it became apparent that further investigation was warranted. *See In re June 1979 Allegheny County Investigating Grand Jury,* 490 Pa. 143, 151, 415 A.2d 73, 78 (1980) ("The supervising judge has the continuing responsibility to oversee grand jury proceedings, a responsibility which includes insuring the solemn oath of secrecy is observed by all participants."). *Accord Camiolo v. State Farm Fire and Casualty Co.,* 334 F.3d 345, 356 (3rd Cir.2003) ("As is evident from these [Grand Jury Act] provisions, Pennsylvania's grand jury process is 'strictly regulated,' [citation omitted], and the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings."). For obvious reasons, the District Attorney's office is disqualified from investigating alleged misconduct by members of its own office. Similarly, since the OAG has

likewise been accused of divulging secret grand jury information to Henn, it would be inappropriate for the OAG to investigate the potential leak of Grand Jury information to that same reporter. (*See* n. 2, *supra.*) As a result, the undersigned opted to follow Judge Garb's precedent by appointing special counsel to investigate the County Grand Jury leak allegation and to thereafter submit a report. *See also, Dauphin County Grand Jury Investigation Proceedings (No. 3) (* sub nominee *In re Shelley*), 332 Pa. 358, 366-367, 2 A.2d 809, 814 (1938) (holding that in the context of a county grand jury proceeding, if facts appearing on the face of the record justify the disqualification of the district attorney and the attorney general from conducting a particular investigation, the trial court must "thereupon appoint an attorney at law resident in another county to perform his functions."). *Accord,* Savitt, *Pennsylvania Grand Jury Practice* § 43.04, p. 186 (1983) (stating that "nothing in the existing law abrogates the court's traditional authority to appoint a special prosecutor."). Indeed, the undersigned's Order dated February 16, 2005 is an almost verbatim replicate of Judge Garb's Order of April 13, 2004.[8] To ensure the integrity and objectivity of the investigation, it was necessary to appoint an attorney with prosecutorial and grand jury experience who did not have professional dealings with the District Attorney's Office on a regular basis. To that end, Mr. West is the former U.S. Attorney for the Middle District of Pennsylvania and practices primarily in the central part of the state.

***9** Upon being administered the Grand Jury secrecy oath, the Special Prosecutor commenced his investigation on May 23, 2005, and, in addition to securing documentary evidence, the Special Prosecutor questioned various individuals on May 23, 2005, June 9, 2005, July 7, 2005, August 25, 2005, August 26, 2005, August 27, 2005, September 9, 2005 and September 15, 2005. Among the individuals interviewed were the authors and recipients of the subject e-mails who were questioned in detail regarding the substance of each electronic communication in order to determine whether the e-mails referenced secret Grand Jury information. In his report and recommendation, the Special Prosecutor has also provided legal analysis and research with respect to the prejudice element of the governing standard for a motion to quash a grand jury presentment.

III. *DISCUSSION*

(A) GRAND JURY SECRECY

Tolan's amended motion to quash alleges a compromise of Grand Jury secrecy. "It is well established in numerous court decisions that proceedings before a grand jury are protected by a general rule of secrecy." *In re November 1975 Special Investigating Grand Jury (Appeal of Fitzgerald),* 229 Pa.Super. 539, 544, 445 A.2d 1260, 1262-63 (1982). As the Supreme Court of Pennsylvania has observed, "... there is no need to stress the vital importance of the maintenance of secrecy in regard to the deliberations and proceedings of Grand Juries, for the policy of the law in that respect has been so long established that it is familiar to every student of the law." *Com. v. Smart,* 368 Pa. 630, 633, 84 A.2d 782, 784 (1951). The authority for grand jury secrecy in Pennsylvania dates back to the Frame of Government enacted by the Provincial Assembly in 1696, *see Com. v. Kirk,* 340 Pa. 346, 17 A.2d 195, 199 (1941), and the United States Supreme Court has described this important policy as "... older than our Nation itself." *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399 (1959).

The Pennsylvania Supreme Court has described grand jury secrecy as "indispensable to the effective functioning of a grand jury's investigation." *In re Investigating Grand Jury of Philadelphia Co. (Appeal of Philadelphia Rustproof Co., Inc.),* 496 Pa. 452, 457-458, 437 A.2d 1128, 1130 (1981). The primary reasons articulated by the Supreme Court for ensuring grand jury secrecy are: (1) in order to guarantee the utmost freedom to the grand jury in its deliberations, the grand jurors should be free from apprehension that their opinions and votes may subsequently be disclosed by compulsion; (2) to encourage free and untrammeled disclosures by willing witnesses who have information concerning criminal conduct, witnesses summoned before the grand jury should be free from apprehension that their testimony may be revealed by compulsion; (3) to prevent the guilty accused from being provided with information that might enable the target of the investigation to flee from arrest, suborn false testimony, or tamper with witnesses or grand jurors; and (4) to protect the innocent accused, who is exonerated by the grand jury's refusal to charge, from disclosure of the fact that [s]he has been under investigation. *See Com. v. Columbia Investment Corp.,* 457 Pa. 353, 369 n. 17, 325 A.2d 289, 297 n. 17 (1974); *Philadelphia Rustproof Co., Inc., supra.* Because of the impenetrable secrecy surrounding grand jury proceedings, "the grand jury is a particularly suitable body to investigate misconduct of public officials and public

evils." *In re County Investigating Grand Jury of April 24, 1981 (Appeal of Krakower),* 500 Pa. 557, 563, 459 A.2d 304, 307 (1983).

***10** "The Pennsylvania legislature and Supreme Court have established rules to preserve this secrecy requirement." *Com. v. Mallon,* 356 Pa.Super. 493, 501, 515 A.2d 1, 5 (1986), *app. denied,* 515 Pa. 599, 528 A.2d 956 (1987). *See also Camiolo,* 334 F.3d at 355 ("Through the enactment of the Investigating Grand Jury Act, *see* 42 Pa.C.S. §§ 4541-4553, Pennsylvania's legislature has endeavored to ensure the secrecy of the grand jury proceedings conducted in that state by limiting access to the transcripts of these proceedings.") Pennsylvania Rules of Criminal Procedure 224, 225 and 231(C) require the grand jurors, "[a]ll court personnel who are to be present during any portion of the grand jury proceedings, and all others who assist in the proceedings," and any other "persons who are to be present while the grand jury is in session" to be administered a secrecy oath. The Investigating Grand Jury Act further obligates attorneys for the Commonwealth to first secure the approval of the supervising judge before disclosing any grand jury information "to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction." 42 Pa.C.S. § 4549(b). Any grand juror, attorney, interpreter, stenographer, recording device operator or typist who discloses grand jury matters without express permission from the court "shall be in contempt of court if they reveal any information which they are sworn to keep secret." *Id.* Moreover, although grand jury witnesses are generally permitted to disclose their testimony to others, the supervising judge may prohibit such disclosure "for cause shown." *See* 42 Pa.C.S. § 4549(d).

The Supreme Court of Pennsylvania regards the state interest in grand jury secrecy to be so important as to outweigh other competing constitutional or statutory rights. In *Pirillo v. Takiff,* 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied,* 423 U.S. 1083 (1976), the supervising judge of a grand jury disqualified attorneys in a law firm, who were paid by the Fraternal Order of Police, from representing multiple policemen who had been subpoenaed to testify before a grand jury which was investigating police corruption. The police witnesses argued that the disqualification order violated their Sixth Amendment right to the assistance of counsel of their own choosing, their counsel's right to pursue the practice of law, and the police officers' First Amendment right to collective activity undertaken via the F.O.P. to maintain meaningful access to the courts. *Id.,* at 520-522, 341 A.2d at 900-901. In upholding the supervising judge's disqualification order, the Supreme Court underscored the importance of grand jury secrecy and held:

> The existence of multiple representation jeopardizes the time-honored concept of grand jury secrecy. Such secrecy is designed to protect the Commonwealth, the grand jurors, and the witnesses, [citations omitted]. If 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. Similarly, if, as will be shown, there is an attorney-client relationship between Attorney Pirillo and the F.O.P., then Pirillo might be compelled to advise the F.O.P. as to the testimony of the several petitioners/witnesses. These revelations could be inimical to the interests of not only the Commonwealth and the grand jurors, but also to the individual witnesses themselves, all of whom are intended beneficiaries of the traditional grand jury secrecy.

***11** *Id.,* at 525 n. 5, 341 A.2d at 903 n. 5. The *Pirillo* court specifically concluded that the state interest in grand jury secrecy preempted the competing constitutional and statutory rights asserted by the police officers, and stated:

> Furthermore, the interests of the state are sufficiently compelling to justify appropriately tailored infringements of constitutional rights. We have earlier pointed out that each right asserted by the petitioners is susceptible to curtailment. We have also

> endeavored to demonstrate that the state interests are sufficiently strong to justify some incursion upon the rights invoked by petitioners. The court in its supervisory capacity over the grand jury must be alert to prevent as far as possible any abridgement of that body's function which is to investigate public wrongs and to bring indictments for the protection of society. The secrecy surrounding grand jury proceedings is a mechanism to ensure the safety and reputation of witnesses and grand jurors.

Id., at 530, 341 A.2d at 905. *Accord, In re Investigating Grand Jury of Philadelphia County Petition of Miller,* 527 Pa. 432, 593 A.2d 402 (1991).

More recently, Judge Robert A. Mazzoni had occasion to address the interplay between a news reporter's right under the Pennsylvania Shield Law, 42 Pa.C.S. § 5942, to withhold the identity of a confidential source and the grand jury secrecy mandates set forth in the Pennsylvania Investigating Grand Jury Act, the Pennsylvania Rules of Criminal Procedure, and appellate precedent. In *Castellani, supra,* the plaintiffs filed a motion to compel the newspaper and its former reporter to disclose the identity of the anonymous source for the aforementioned article pertaining to the former Commissioners' appearance before the statewide grand jury. Based upon his thorough analysis of the pertinent statutes and decisional precedent, Judge Mazzoni granted the plaintiffs' motion to compel and concluded:

> After considering the competing and conflicting interests as articulated above, this Court firmly believes that the public interest is better served by maintaining and enforcing the secret and confidential operation of the grand jury system. The obvious purpose of the Shield Law is to promote the free flow of information to the media. *Com. v. Bowden, supra.* When this purpose, however, clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority. Affording the grand jury process its respect will empower the courts to protect the wide variety of interests that are expected to be safeguarded by the process.... By this ruling, we are hopeful that the news media recognizes that grand jury proceedings are confidential and are to remain so. It is the republication of a grand jury "leak" in a newspaper of general circulation which denigrates the process. The news media should not act as a protective vessel into which criminal communications are channeled and later exonerated at the expense of our judicial system. We are not advocating a broad application of this Opinion. We recognize the need for a reporter to rely upon confidential sources in investigating and reporting on criminal activity and on on-going investigations. The public interest is not served, however, when a reporter, through an unnamed source, invades the grand jury process and pierces its recognized veil of confidentiality.

***12** *Castellani, supra* at pp. 27-28. *Accord In re the Twentieth Statewide Investigating Grand Jury,* No. 277 M.D. Misc. Dkt.2002, Feudale, S.J., at pp. 13-14 (Dauph. Co. June 30, 2005) ("Judge Mazzoni in his well reasoned Opinion has held the importance of grand jury secrecy outweighs the protections of the Pennsylvania Shield Law. We concur with that Opinion and incorporate by reference its persuasive, logical and fact based analysis.").

In contrast to the *Castellani* litigation in which Henn and *The Scranton Times Tribune* have refused to reveal the alleged source(s) for the disputed article, Henn submitted to two interviews by the Special Prosecutor in the case *sub judice* and voluntarily disclosed the sources for the information contained in her County Grand Jury articles. As a consequence, the disposition of Tolan's amended motion to quash does not implicate the Shield Law or other comparable considerations. *Compare In re Grand Jury Subpoena, Judith Miller,* 397 F.3d 964

(D.C.Cir.2005) (reporter held in contempt and incarcerated for refusing to divulge confidential source in connection with grand jury investigation), *cert. denied,* 125 S.Ct. 2977 (2005). The Special Prosecutor's investigation focused upon allegations that: (1) Henn was informed in advance of the dates when the Grand Jury would hear testimony concerning the County prison probe; and (2) information as to what transpired within the Grand Jury room was divulged to Henn by the District Attorney's office. We will consider those two principal allegations *seriatim.*

(B) GRAND JURY SCHEDULE

It is undisputed that Henn appeared in the courthouse for each of the Grand Jury's sessions in December 2003 and January 2004 when the Grand Jury heard evidence relating to the County prison probe. During three of those sessions, the Grand Jury heard testimony from inmates who arguably may have advised Henn that they had been subpoenaed which, in turn, may have alerted her to the fact that the Grand Jury was meeting on those dates. However, during at least two of those sessions, the Grand Jury heard testimony from non-inmate witnesses who were not so inclined to apprise Henn of their subpoenas or anticipated appearances. Nonetheless, armed with advance notice of the Grand Jury's sessions relating to the County prison, Henn would position herself in the hallway of the courthouse and would approach Grand Jury witnesses for comment as they exited the Grand Jury hearing room. (*See* Special Prosecutor's Report, Exhibit B dated 6/9/05, p. 3.) As a result, several cooperating witnesses had their identities revealed in newspaper articles.

There is compelling direct and circumstantial evidence that Henn was furnished with advance notice of the dates upon which the Grand Jury would hear testimony pertaining to the County prison. As noted above, Henn reported on January 17, 2004-at least three days before the Grand Jury subpoenas were even presented to the undersigned for approval-that the Grand Jury would meet in late January 2004 to investigate "the prison brutality case." In Henn's annual "Reporter Performance Review" that was conducted by *The Scranton Times•Tribune* in February 2004, the evaluating editor specifically stated that "[a]s the prison scandal evolved, many potential sources put their trust in Jennifer [Henn]" and that "[t]hroughout the past year Jennifer has been ahead of the curve on many events developing in the County-*from when the next grand jury session is,* to what allegedly abused prisoner will be the next to step forward." (*See* Reporter Performance Review 2/03-2/04, pages 3-4.) The Special Prosecutor's investigation confirmed that information relating to the Grand Jury's schedule of sessions was not divulged by court staff or the Court Administrators, and there has never been any allegation that a Grand Juror disclosed this information to Henn.

***13** During her interview by the Special Prosecutor, Henn originally indicated that the former courthouse reporter, Ray Flanagan, was one of her sources for information about the Grand Jury's sessions on December 18, 2003, December 19, 2003, January 16, 2004 and January 30, 2004. (*See* Special Prosecutor's Report, Exhibit B dated 6/9/05, p. 2.) However, Mr. Flanagan died on December 19, 2003 and could not possibly have been the source for that information. *See* "Veteran Scranton Newsman Ray Flanagan Dies at 60", *The Scranton Times•Tribune* (Dec. 20, 2003). When advised of that fact during her second interview, Henn stated that "courthouse gadflies" and other sources had advised her of the Grand Jury's session schedule. (*See* Special Prosecutor's Report, Exhibit J, dated 9/16/05, p. 2.) Members of the District Attorney's office acknowledged during their interviews that if Henn had asked District Attorney's Office staff for the Grand Jury's schedule of sessions, the staff most likely would have provided that information to her. (*Id.,* Exhibit A, dated 5/23/05, p. 3; Exhibit C, dated 7/7/05, p. 2; Exhibit I, dated 9/9/05, p. 1.)

Assuming *arguendo,* that a member of the District Attorney's office intentionally or unwittingly disclosed the Grand Jury's schedule of sessions to Henn, such conduct does not justify dismissal of the Presentment. Section 4549(b) of the Investigating Grand Jury Act prohibits only the disclosure of "matters occurring before the grand jury", 42 Pa.C.S. § 4549(b), whereas Pennsylvania Rule of Criminal Procedure 230 regulates the "transcript[s] of testimony before an investigating grand jury, or physical evidence before the investigating grand jury...." *See* Pa. R.Crim.P. 230(C). The language of the Act and Rule 230 is identical to the terminology employed by Federal Rule of Criminal Procedure 6(e) which likewise bars the disclosure of "matters occurring before the grand jury." Fed. R.Crim.P 6(e). The federal courts have interpreted the phrase "matters occurring before the grand jury" as not precluding the dissemination of "ministerial" records or information relating to the procedural operations of the grand jury. *See* Porto, *What Are "Matters Occurring Before Grand Jury" Within*

Prohibition of Rule 5(e) of Federal Rules of Criminal Procedure, 154 A.L.R. Fed. 385 § 13 (2005). The United States Court of Appeals for the Third Circuit has construed Rule 6(e) as "protect[ing] from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process." *In re Grand Jury Investigation (Appeal of DiLoreto),* 903 F.2d 180, 182 (3rd Cir.1990) (quoting *In re Grand Jury Investigation (Appeal of New Jersey State Commission of Investigation),* 630 F.2d 996, 1000 (3rd Cir.1980), *cert. denied sub nom., Rittenhouse Consulting, Ltd. v. New Jersey State Commission of Investigation,* 449 U.S. 1081 (1981)). Examples of "matters occurring before the grand jury" include: (1) transcripts or accounts of the testimony of grand jury witnesses. *In re Grand Jury Proceedings,* 613 F.2d 501, 505-506 (5th Cir.1980); (2) documentary evidence that was obtained or reviewed by the grand jury. *In re Grand Jury Proceedings,* 851 F.2d 860, 866 (6th Cir.1988); and (3) information which reveals the identities of witnesses or jurors, the deliberations or questions of the grand jury, or any other material that may "reveal what transpired before the grand jury." *In re Grand Jury Investigation,* 748 F.Supp. 1188, 1207 (E.D.Mich.1990).

***14** Although no Pennsylvania case has specifically defined the parameters of what constitutes "matters occurring before the grand jury", at least one trial court has reasoned that 42 Pa.C.S. § 4549(b) and Fed. R.Crim.P. 6(e) utilize "[t]he same terminology" in proscribing the disclosure of "matters occurring before the grand jury." *See Com. v. Wecht,* 20 D. & C.3d 627, 639 (Alleg.Co.1981). In interpreting that language in Rule 6(e), the United States Court of Appeals for the Third Circuit has concluded "that disclosure of the commencement and termination dates of the grand jury does not disclose the essence of what took place in the grand jury room." *Appeal of DiLoreto,* 903 F.2d at 182. While we do not condone the dissemination of the Grand Jury's schedule to Henn, we agree with the Third Circuit Court of Appeals that ministerial information relating to the date of a Grand Jury session does not constitute disclosure of "matters occurring before the grand jury." Therefore, since the apparent distribution of that ministerial data did not reveal testimony, documentary evidence or other matters which ostensibly took place within the secret confines of the Grand Jury hearing room, the disclosure of the Grand Jury's schedule does not warrant quashal of the Presentment. *See Wecht,* 20 D. & C.3d at 640 (noting that if the defendant seeks dismissal of a criminal proceeding due to a grand jury leak, "defendant bears a heavy burden in attempting to justify such relief.").

(C) GRAND JURY TESTIMONY REFLECTED IN NEWSPAPER ARTICLES

Henn's articles of December 19, 2003, December 20, 2003 and January 17, 2004 clearly discuss Grand Jury testimony and other "matters occurring before the grand jury". The report dated December 19, 2003 contains quoted statements from two inmates, Ronald Knight and Andy Thomas, with respect to their testimony. (*See* Special Prosecutor's Report, Exhibit B-3.) The second account on December 20, 2003 similarly includes statements attributed to another inmate, Peter Fuller, as to what transpired in the Grand Jury hearing room. (*Id.,* Exhibit B-2.) That same report reflects, however, that another Grand Jury witness, prison guard Amos Julian, "refused a reporter's request for comment." (*Id.*) The third article dated January 17, 2004 contains a fairly lengthy account of what Ronald Knight allegedly stated to the Grand Jury. (*Id.,* Exhibit B-1.)

During her questioning by the Special Prosecutor, Henn adamantly denied that any member of the District Attorney's office served as a source for any of the Grand Jury testimony or information discussed in her articles. (*Id.,* Exhibit J, pp. 2, 4.) Instead, Henn stated that she would sit in the courthouse hallway during the Grand Jury's sessions in December 2003 and January 2004 and approach Grand Jury witnesses for comment as they exited the Grand Jury hearing room. (*Id.,* p. 5.) Inmates who had been subpoenaed to testify would sit on a hallway bench with County detectives while they waited to be resummoned into the Grand Jury room for further questioning or to be transported back to the County prison. Henn would position herself along side those witnesses who willingly spoke to her about what had transpired within the Grand Jury hearing room. (*Id.,* p. 4.)[9] The articles of December 19, 2003, December 20, 2003 and January 17, 2004 appear to contain information that Henn could have gathered from either (a) those inmates or (b) her own visual observations while situated in the courthouse hallway .[10] *See* 42 Pa.C.S. § 4549(d) ("No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney.").

***15** With respect to Tolan's contention that Henn contacted him by telephone shortly after his Grand Jury appearance, Henn acknowledged to the Special Prosecutor that she frequented Farley's during the course of the prison investigation and would occasionally speak to members of the District Attorney's office there. Henn further indicated that she may have met there with the prosecutor in question on the date of Tolan's Grand Jury appearance. However, Henn denied that the two discussed Tolan's Grand Jury testimony at that time or on any other date. (*Id.*, Exhibit J, p. 2.) Henn advised the Special Prosecutor that her telephone call to Tolan was precipitated by two letters to the editor that Tolan had submitted to *The Scranton Times•Tribune* for publication. (*Id.*, Exhibit N.) Henn stated that her editor instructed her to contact Tolan to inform him that his letters would not be published since the editors did not deem as credible the allegations which Tolan had made in those letters with respect to certain inmates who had testified before the Grand Jury. (*Id.*, Exhibit J, p. 4.) Henn maintains that when she contacted Tolan concerning his letters to the editor, he voluntarily spoke to her about his Grand Jury appearance and she parlayed the telephone call into an interview regarding his Grand Jury testimony. Henn denies that she questioned Tolan concerning those confidential matters which he maintains that she inquired into during their conversation. (*Id.*, pp. 1-2.)

The members of the District Attorney's office who were interviewed by the Special Prosecutor also denied that they ever provided Henn with any information as to what occurred within the Grand Jury room. As for the e-mail messages at issue, the Special Prosecutor questioned the communicating parties extensively concerning the substance of those e-mails. Based upon those interviews, the Special Prosecutor concluded that "their explanations, while not airtight or completely satisfactory in all regards, are adequate to explain away the references to Grand Jury witnesses in the e-mails and establish that the e-mails do not contain clear and unequivocal improper reference to Grand Jury evidence."[11] (*See* Special Prosecutor's Report, p. 10.)

Even if such an improper disclosure had occurred, quashal of the indictment would not be appropriate unless Tolan can demonstrate actual prejudice by establishing that such misconduct substantially influenced the Grand Jury's decision to issue a Presentment and recommend the filing of criminal charges. In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Supreme Court of the United States found that the trial court erred in dismissing the grand jury's indictment based upon the prosecution's misconduct, including grand jury leaks, and stated that "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.*, at 256. Noting that it was "not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment", *Id.*, at 259, the Supreme Court held:

> ***16** We conclude that the district court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Id., at 263.

Pennsylvania has adopted the *Bank of Nova Scotia* standard in deciding whether to dismiss a grand jury presentment due to prosecutorial misconduct. In *Com. v. Williams*, 388 Pa.Super. 153, 565 A.2d 160 (1989), the Superior Court reasoned that dismissal is "proper where the defendant can show that the conduct of the prosecution caused him prejudice", which "will have occurred only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Id.*, at 160, 565 A.2d at 164 (citing *Bank of Nova Scotia*). In the event that no actual prejudice is shown, dismissal may be warranted on alternate grounds only "if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit." *Williams*, 388 Pa.Super. at 160-161, 565 A.2d at 164

(quoting *United States v. Rosenfield,* 780 F.2d 10, 11 (3rd Cir.1985)).

There is no evidence that any purported Grand Jury leak or any information contained in Henn's articles substantially influenced the Grand Jury's decision to issue a Presentment or otherwise caused actual prejudice to Tolan. Once Henn's articles relative to the Grand Jury probe had appeared in *The Scranton Times•Tribune,* the undersigned provided a lengthy cautionary instruction to the Grand Jurors reminding them of their obligation to ignore any media accounts pertaining to the Grand Jury investigations. At the conclusion of that instruction, the Grand Jurors affirmatively assured the undersigned that they had not reviewed or considered any such articles and reaffirmed that they would continue to disregard any comparable media reports in the future. Furthermore, Tolan has not alternatively argued that the prosecution has engaged in "entrenched and flagrant" misconduct that is "so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness" of the County Grand Jury process. *See Bank of Nova Scotia,* 487 U.S. at 259; *Williams,* 388 Pa.Super. at 160-161, 565 A.2d at 164.[12]

In denying Tolan's amended motion to quash due to an absence of cognizable prejudice, we are mindful of the procedural differences between federal grand jury and state grand jury practice. In the federal system, the grand jury indictment itself constitutes probable cause for the initiation of a criminal proceeding without the necessity of an independent judicial review in a preliminary hearing setting. Under state grand jury practice, the issuance of a presentment recommending that certain people be charged with specific crimes does not mandate the filing of criminal charges, and it is within the prosecutorial discretion of the attorney for the Commonwealth to commence a criminal proceeding following a grand jury presentment. *See* Savitt, *Pennsylvania Grand Jury Practice, supra* at § 39.04. Moreover, the Pennsylvania Investigating Grand Jury Act entitles a defendant to a preliminary hearing following the filing of criminal charges based upon the presentment, *see* 42 Pa.C.S. § 4551(e), and as a result, Tolan's criminal charges must withstand an independent review by a Magisterial District Judge. Since Tolan's criminal charges must survive a preliminary hearing, any alleged prejudice suffered by him will be further ameliorated. Consequently, Tolan simply has not established the prejudice required to warrant the dismissal of the Presentment.

IV. *CONCLUSION*

***17** Although the United States Supreme Court has long recognized a First Amendment right of access to most criminal proceedings, *see e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 578 (1980), it has concluded that grand jury proceedings are not subject to that same First Amendment right of free access. *See e,g., Douglas Oil Co.,* 441 U.S. at 218-219. *Accord In re Newark Morning Ledger Co.,* 260 F.3d 217, 222 (3rd Cir.2001) (stating that "public access to grand jury proceedings would hinder, rather than further, the efficient function of the proceedings."). One of the compelling policy reasons advanced for grand jury secrecy is the protection of innocent, cooperating witnesses from the stigma associated with being identified as someone who has appeared before a grand jury. *See Douglas Oil Co.,* 441 U.S. at 222 (remarking that if grand jury proceedings are disclosed to outside parties, "[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties."). Another cited purpose for grand jury secrecy is the protection of individuals who may be unjustly accused of criminal wrongdoing, but later exonerated by the grand jury's refusal to recommend criminal charges.[13] *Id.* at 219 (observing that "by preserving the secrecy of the [grand jury] proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.").

Since Henn was notified in advance of the Grand Jury's schedule of sessions, she was able to appear at the courthouse on those dates that the Grand Jury investigated the County prison and to attempt to question Grand Jury witnesses as they left the hearing room. In the process, Henn was capable of revealing the identities of those witnesses who testified before the Grand Jury and those individuals who were targets of the Grand Jury's probe. Two witnesses who came forward and cooperated with the Commonwealth's investigation expressly objected to Henn's coverage of the Grand Jury's proceedings. Even the Grand Jurors themselves took exception to Henn's presence and stated in their Final Report on May 24, 2005, that "[w]e had significant concerns regarding the fact that news reporters sat in the hallway outside the Grand Jury Room." (*See* Grand Jury's Final Report, *supra* at p. 13.)

Although dissemination of the Grand Jury's meeting dates does not constitute disclosure of "matters occurring before the grand jury", the better practice is to maintain the grand jury's schedule of sessions in strictest

confidence. In order to protect the rights of innocent witnesses, exonerated targets and grand jurors, greater efforts should be made in the future to insure that the grand jury's schedule is not revealed to the press or public. The failure to do so will frustrate the very policies underlying grand jury secrecy and may compromise the progress and integrity of future grand jury investigations.

***18** The Special Prosecutor's investigation has not proved that secret "matters occurring before the grand jury" were divulged to Henn by the prosecution. Nor has it been established that any alleged Grand Jury leaks substantially influenced the Grand Jury's decision to issue a Presentment and recommend criminal charges against Tolan. Absent such prejudice, there is no basis upon which to quash the Grand Jury's Presentment. Accordingly, Tolan's amended motion to quash the Presentment will be denied.

ORDER

AND NOW, this 25th day of October, 2005, upon consideration of the Amended Motion of James Tolan to Quash the Lackawanna County Investigating Grand Jury Presentment (C-1) dated March 25, 2004, and the Report and Recommendation of the Special Prosecutor, James J. West, Esquire, which were filed under seal on October 12, 2005, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that the Amended Motion of James Tolan to Quash the Lackawanna County Investigating Grand Jury Presentment (C-1) dated March 25, 2004 is DENIED.

Footnotes

1 In its subsequent Presentment dated March 4, 2004, the statewide grand jury relied upon the corroborating testimony of Castellani and Corcoran "who testified that, after [the Warden's] conduct became public, Gilhooley had acknowledged to them that he knew that maintenance officials at the prison had performed work duties at his home during their prison shift." *See* Order Accepting Presentment No. 11, *supra,* p. 5.

2 Following Judge Garb's retirement, his successor as the Supervising Judge for the Statewide Investigating Grand Jury also had the opportunity to review the Commissioners' grand jury testimony in considering discovery motions that were presented to him. In referencing the Commissioners' testimony and Judge Garb's conclusion that the newspaper reports of their testimony were inaccurate, Senior Judge Barry F. Feudale stated that "[w]e also concur with the observation of former presiding Judge Garb that their testimony was clearly and perhaps erroneously or egregiously reported and mischaracterized by the articles that are the subject of the defamation action before the Honorable Robert Mazzoni." *In re The Twentieth Statewide Investigating Grand Jury,* No. 277 M.D. Misc. Dkt.2002, Feudale, S.J., at p. 11 (Dauph. Co. June 30, 2005). In the wake of Judge Garb's above-quoted ruling on September 14, 2004, Castellani and Corcoran demanded that *The Scranton Times•Tribune* print a retraction of Henn's article of January 12, 2004. *See* "Judge: Account of Testimony was Incorrect", *The Scranton Times•Tribune* (Sept. 18, 2004). After *The Scranton Times•Tribune* declined to do so, Castellani and Corcoran filed a defamation action against the newspaper. *See Castellani,supra.* On June 3, 2005, Judge Robert A. Mazzoni granted the former Commissioners' motion to compel *The Scranton Times•Tribune* and Henn to identify the anonymous source for the January 12, 2004 article. *Id.,* at pp. 38-39. *The Scranton Times•Tribune* has appealed that ruling to the Superior Court of Pennsylvania. *See Castellani v. The Scranton Times•Tribune, L.P.,* No. 1111 MDA 2005 (Pa.Super.). In connection with that defamation litigation, a member of the District Attorney's office provided a statement indicating that Henn advised him that OAG Agent James J. Kolojejchick was the source for her January 12, 2004 report. *See* "Scranton Reporter Quits Amid Suit Involving Question of Revealing Source", *The Times Leader,* p. 6A (May 3, 2005). However, during his subsequent deposition, Agent Kolojejchick denied being the anonymous source cited in the January 12, 2004 article. *See* "Lawyers in Times Case Want Deputy State AG to Testify", *The Scranton Times•Tribune* (July 1, 2005); "Figure in Libel Case Leaves Post", *The Scranton Times•Tribune* (September 14, 2005); "Investigator in Prison Case Was Fired, Lawyer Says", *The Scranton Times•Tribune* (September 17, 2005). Based upon the foregoing, former Deputy Warden Hilborn recently filed a petition with Judge Feudale seeking to have sanctions imposed against the OAG "for abuse of grand jury process." By Order dated September 29, 2005, Judge Feudale issued a rule to show cause and subsequently conducted a hearing on October 19, 2005. *See In re Twentieth Statewide Investigative Grand Jury,* No. 277 M.D. Misc. Dkt.2002, Feudale, S.J. (Dauph.Co. Sept. 29, 2005). No decision has been issued in that matter as of this date.

3 By way of illustration, although the Grand Jury met on January 16, 2004 to hear testimony concerning the prison investigation, that fact did not appear on the daily court calendar that was distributed by the Court Administrator's office. (*See* attached Addendum A.) On January 16, 2004, the undersigned was acting as an instructor at the New Judge School offered by the Administrative

Office of the Pennsylvania Courts (APOC) in State College, and for that reason, the court calendar does not reflect any proceedings scheduled before the undersigned on that date. Thus, an individual who secured or reviewed an advance copy of the Court Administrator's court calendar for January 16, 2004, would not be able to ascertain that the Grand Jury was scheduled to meet on January 16, 2004, or, more importantly, that the Grand Jury would hear testimony concerning the County prison on that date.

4 It bears noting that Henn's article of December 19, 2003, acknowledges that "[t]he District Attorney's Office and Presiding Judge Terrence Nealon are restricted by law from commenting on the proceedings." (*Id.*)

5 Henn's report also mentioned that "[m]embers of the Grand Jury and the District Attorney's Office are restricted by law from commenting about proceedings." (*Id.*)

6 Every grand juror, prosecutor, detective, court official and law enforcement officer must be administered a secrecy oath before they may participate in any grand jury investigation. *See* Pa. R.Crim.P. 224, 225, 231(c).

7 In January 2004, the Grand Jury also heard evidence in connection with a separate criminal investigation involving the drug related death of a local youth. On December 19, 2003, the undersigned executed 14 subpoenas to be served upon witnesses compelling them to appear before the Grand Jury on January 29, 2004 to provide testimony regarding that drug death investigation. (*See* attached redacted subpoenas marked as Addendum B.) At the time of Henn's article of January 17, 2004, only those drug death investigation witnesses had been subpoenaed to appear before the Grand jury in late January 2004.

8 The undersigned's Order simply added two additional sentences stating that "[t]he special prosecutor shall be compensated by the County of Lackawanna for his professional services rendered in accordance with the current fee schedule utilized by the County for court-appointed counsel" and that "Defendant's Amended Motion to Quash the Grand Jury Presentment on the grounds of an alleged disclosure or leak of secret Grand Jury information will become ripe for disposition following the submission and review of the Special Prosecutor's report."

9 Although one testifying inmate, Andy Thomas, acknowledged during his interview by the Special Prosecutor that he spoke to Henn concerning his testimony, he insisted that he had done so only after being assured by Henn that all of his comments would be "off the record." (*Id.*, Exhibit H dated 9/7/05.)

10 In her first interview on June 9, 2005, Henn assured the Special Prosecutor that she was incapable of hearing what was being said in the Grand Jury hearing room while she was positioned in the courthouse hallway. (*Id.*, Exhibit B, p. 3.)

11 Portions of Andy Thomas' statement dated August 27, 2005 and Henn's statement of September 16, 2005 contain information that, while not directly relevant to the issue of the possible disclosure of "matters occurring before the grand jury", is arguably discoverable by Tolan, Jones, Craven and Scarabotti under *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), *Com. v. Evans*, 511 Pa. 214, 226, 512 A.2d 626, 632 (1986) and Pa. R.E. 613(a).

12 In finding that non-prejudicial disclosure of grand jury information "can be remedied adequately by means other than dismissal", the United States Supreme Court also noted that an aggrieved party may seek to have the culpable prosecutor punished via a petition to have the wrongdoer held in contempt or subject to a disciplinary proceeding before the appropriate licensing authority. *Bank of Nova Scotia*, 487 U.S. at 263.

13 During its 18 month term, the Grand Jury investigated 15 separate matters which were classified as Investigations C-1 through C-15. The Grand Jury issued Presentments at the conclusion of its investigations into the county Prison (C-1), the drug related death of Josh Pelick (C-2), abuse and neglect at Highland Manor Personal Care Home (C-4), and drug activity in the Abington Heights School District (C-10). Although Presentments were not issued in Investigations C-5, C-7, C-8 and C-9, materials subpoenaed in connection with those investigations resulted in the arrests of Susan Wzorek (C-5), Father Albert Liberatore (C-7), Bruce Evans (C-8) and Dr. Nicholas Lisnichy (C-9). In the remaining seven Investigations (C-3, C-6, C-11, C-12, C-13, C-14 and C-15), no Presentments were issued nor were any criminal charges filed. (*See* Final Report of County Investigating Grand Jury VIII, 2003, No. 03 Misc. 140, dated May 24, 2005.)