COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
v.	:	
	:	
TIMOTHY M. CURLEY	:	NO. 3614 CR 2013
	:	NO. 5165 CR 2011
GARY CHARLES SCHULTZ	:	NO. 3616 CR 2013
	:	NO. 5164 CR 2011
GRAHAM BASIL SPANIER	:	NO. 3615 CR 2013

MEMORANDUM OPINION AND ORDER

Before the court are numerous motions filed by each of the Defendants, Timothy M. Curley, Gary C. Schultz and Graham B. Spanier, which seek relief based upon claims of violations of Defendants' rights relating to representation in connection with grand jury proceedings, out of which arose charges at the above dockets.

With the exception of the requests for an evidentiary hearing which we have granted in part, for the reasons set forth herein, the requests for relief are **DENIED** in accordance with the within **ORDER**.

I. PROCEDURAL BACKGROUND

For ease of reference, we provide this brief chronology of events relevant to the issues before the court:

> December 28, 2010 -January 3, 2011-Contact by the Pennsylvania Office of Attorney General with Cynthia A. Baldwin, Esquire regarding investigation related to Gerald Sandusky and service of subpoenas for testimony of Timothy Curley, Gary Schultz and Joseph Paterno before

the investigating grand jury and subpoena No. 1179 for production of documents directed to Pennsylvania State University

January 12, 2011-Testimony of Timothy Curley and Gary Schultz before the investigating grand jury

April 13, 2011-Conference before the supervising grand jury judge, the Honorable Barry F. Feudale regarding subpoena No. 1179 for production of documents directed to Pennsylvania State University

April 13, 2011-Testimony of Graham B. Spanier before the investigating grand jury

November 7, 2011-Charges filed against Timothy M. Curley and Gary C. Schultz

October 2-19, 2012-Communications among counsel and to the Honorable Barry F. Feudale regarding assertion of the attorney-client privilege and waiver of the attorney-client privilege by the Pennsylvania State University

October 26, 2012-Testimony of Cynthia A. Baldwin before the investigating grand jury

November 1, 2012-Charges filed in a second criminal complaint against Defendants Curley and Schultz containing additional charges, and charges against Graham B. Spanier

Pursuant to Notice of Submission of Investigation No. 1, a statewide investigating grand jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky ("Sandusky") over a period of years. (See, Presentment). On December 14, 2010, Pennsylvania State University Assistant Coach Michael McQueary testified before the grand jury as to his observation of an incident in the Lasch Building shower involving Sandusky and a boy. Defendant Timothy Mark Curley ("Mr. Curley"), Defendant Gary Charles Schultz, ("Mr. Schultz") and Defendant Graham Basil Spanier, ("Mr. Spanier") or collectively, ("Defendants") appeared before the

grand jury for testimony, as well as Cynthia A. Baldwin, then General Counsel to the Pennsylvania State University. Cynthia A. Baldwin is a former Justice of the Supreme Court of Pennsylvania and is properly addressed as the Honorable Cynthia A. Baldwin. For the sake of brevity, in this Opinion, we refer to her as Ms. Baldwin.

Following issuance of the grand jury presentment, Defendants filed motions to quash the presentment before the Honorable Barry F. Feudale, Supervising Judge of the Thirtieth and Thirty-Third Statewide Investigating Grand Juries ("Judge Feudale"). Judge Feudale denied Defendants' motions by Memorandum Opinion and Order filed April 9, 2013, finding that the grand jury judge lacked jurisdiction to consider such claims. Defendants Curley and Schultz appealed. The Pennsylvania Supreme Court denied the petitions for review without prejudice to raise the issues in the underlying criminal prosecution. (See, *Thirty-Third Statewide Investigating Grand Jury*, Nos. 61, 62 MM 2013 (Pa. June 7, 2013)).

Charges

On November 7, 2011, the Commonwealth charged Timothy M. Curley and Gary C. Schultz each with one count of Perjury in violation of 18 Pa.C.S.§ 4902(a), a felony in the third degree and one count of Failure to Report Suspected Child Abuse in violation of 23 Pa.C.S. § 6319, a summary offense.

On December 16, 2011, Magisterial District Judge William C. Wenner conducted a preliminary hearing. After testimony and argument, Judge Wenner bound the cases over to the Court of Common Pleas. Defendants waived their appearance at formal arraignment. The Commonwealth filed a criminal information on January 19, 2012.

Approximately one year later, on November 1, 2012, the Commonwealth filed a second criminal complaint against Defendants Curley and Schultz which contained additional charges, and filed a criminal complaint against Graham B. Spanier. The second criminal complaint charged as follows:

> Timothy Curley: Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, 18 Pa.C.S. § 903

> Gary C. Schultz: Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, 18 Pa.C.S. § 903

> Graham Spanier: Perjury, 18 Pa.C.S. § 4902; Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, (to Commit Obstructing Administration of Law or Other Governmental Function), 18 Pa.C.S. § 903; Penalties for Failure to Report or Refer, 23 Pa.C.S. § 6319; Criminal Conspiracy (to Commit Perjury), 18 Pa.C.S. § 903; Criminal Conspiracy (to Commit Endangering Welfare of Children), 18 Pa.C.S. § 903

After testimony and argument on July 29, 2013 and July 30, 2013, Magisterial District Judge William C. Wenner bound the November 1, 2012 cases against all Defendants over to the Court of Common Pleas. Defendants waived their appearance at formal arraignment.

Ms. Baldwin did not testify at the preliminary hearings on either set of charges against Defendants.

Motions Seeking Relief

Throughout the pendency of these cases, Defendants have filed numerous motions which seek relief based upon assertions that Defendants were denied the right to counsel, including the right to effective and conflict free counsel, that charges arose from violation of the attorney-client privilege, that prosecutorial misconduct interfered with the right to counsel, and that defects occurred in the grand jury proceedings, all of which denied the right to due process under the United States and Pennsylvania Constitutions. Based upon these alleged violations, Defendants seek relief in the form of quashal of the grand jury presentment, dismissal of charges, suppression of Defendants' grand jury testimony and suppression of Ms. Baldwin's grand jury testimony.

On December 17, 2013, we conducted a hearing in order to establish an evidentiary record necessary for disposition of the numerous motions. Defendants issued subpoenas to, and sought to introduce the testimony of, among others, Ms. Baldwin and former Deputy Attorney Generals Frank Fina ("Mr. Fina") and Jonelle Eshbach ("Ms. Eshbach"). The court granted motions to quash subpoenas filed on behalf of Ms. Baldwin, Mr. Fina and Ms. Eshbach, finding that we required no evidence related to those witnesses beyond that contained in transcripts available to the court and the parties. We also denied

Defendants' requests to call expert witnesses in support of claims related to Defendants' representation by counsel.

Based upon those rulings, we established the evidentiary record which we deemed necessary for disposition of the pending motions. We granted the parties' requests to include in the record transcripts of the colloquies of witnesses in advance of their grand jury testimonies, transcripts of conferences with counsel and Judge Feudale, and transcripts of the grand jury testimonies of Defendants Curley, Schultz and Spanier, and of Ms. Baldwin. (See generally, Transcript of Proceedings, December 17, 2013). The then Supervising Grand Jury Judge, the Honorable Norman Krumenaker III, granted the parties and this court permission to disclose those transcripts.

In addition, at the Defendants' request, we admitted a series of letters from Defendant Curley's counsel, Caroline Roberto, Esquire, Defendant Schultz' counsel, Thomas Farrell, Esquire, Ms. Baldwin's counsel, Robert DeMonaco, Esquire and the Pennsylvania State University's ("the University") counsel, Michael Mustokoff. At the request of the Commonwealth, we admitted a July 23, 2012 letter to the members of the Pennsylvania State University Board of Trustees and the transcript of an interview of Spanier by ABC News reporter Josh Elliot in the summer of 2012. For the reasons explained below, we deem it unnecessary to reach the issue for which the Commonwealth submitted such evidence.

Following the December 17, 2013 proceedings, we ordered counsel to submit Post Hearing Memoranda which identified pleadings before the court

which sought relief related to claims based upon representation of Defendants as grand jury witnesses, and to provide proposed findings of fact, conclusions of law, and legal discussion as to bases for the relief sought. (See, Orders of Court, January 17, 2014 and February 4, 2014). All parties timely filed Post Hearing Memoranda on February 18, 2014.

Upon consideration of the parties' Post Hearing Memoranda, we deemed central to disposition of Defendants' claims for relief the issue of the scope of the attorney-client relationship with Ms. Baldwin. However, the record, as established at the December 17, 2013 proceeding, lacked testimony from the Defendants on that central issue. The record included only averments and affidavits not subject to cross examination. Defense counsel had not offered the testimony of Defendants as to the asserted attorney-client relationship. We therefore scheduled a hearing to allow Defendants to supplement the record with testimony on the single issue of the scope of the asserted attorney-client relationship between Defendants and Ms. Baldwin.

We conducted closed hearings on November 20 and 21, 2014. In advance of and during the hearings, we limited testimony and cross examination to facts relevant to determination of the scope of the attorney-client relationship, and disallowed questioning or testimony which might disclose allegedly privileged substantive communications.

We recognize the sensitivity which surrounds the issue of the attorney-client privilege. We also recognize that Defendants may exercise a right of appeal of this decision as to that issue. Therefore, out of an abundance of

caution, in support of our conclusions set forth in this Opinion, we refer only to evidence contained in the open record established in the December 17, 2013 hearing. Although we rely upon evidence presented at the November 20 and 21, 2014 hearings in reaching those conclusions, we do not cite to that evidence in this Opinion.

By the within Order, we rule upon all motions identified in the parties' Post Hearing Memoranda, as well as all earlier filed motions, which seek relief based upon the existence of an alleged attorney-client or work product privilege, an alleged violation thereof, denial of the right to counsel, defects in the grand jury proceedings related to representation or alleged prosecutorial misconduct.

II. FACTUAL BACKGROUND

We set forth testimony provided to the grand jury for purpose of factual background necessary to discussion of the claims at issue. We make no substantive factual or credibility findings as to the testimony with respect to the charges.

On December 28, 2010, in her capacity as general counsel of the University, Ms. Baldwin received a telephone call from the Office of the Attorney General ("OAG") pertaining to four grand jury subpoenas. Three subpoenas required the appearance of individuals, Timothy Curley, Gary Schultz and Joseph Paterno, and one required production of documents pursuant to a subpoena *duces tecum*. (Transcript of Proceedings, December 17, 2013, Exhibit Q, Notes of Testimony Grand Jury Proceedings, Cynthia A. Baldwin, October 26, 2012,

pp. 11-12)(hereinafter, "N.T.G.J. 10/26/12, Baldwin"). The subpoena *duces tecum*, Subpoena 1179, requested any information regarding Sandusky and allegations of misconduct, as follows: "Any and all records pertaining to Jerry Sandusky and incidents reported to have occurred on or about March 2002, and any other information concerning Jerry Sandusky and inappropriate contact with underage males both on and off University property. Response shall include any and all correspondence directed to or pertaining to Jerry Sandusky". (N.T.G.J. 10/26/12, Baldwin, p. 12).

As to the subpoenas directed to individuals, Ms. Baldwin spoke to the University's president, Graham Spanier, and advised that it would be necessary to contact Messrs. Curley, Schultz and Paterno regarding the subpoenas. (N.T.G.J. 10/26/12, Baldwin, p. 13).

The University was not in session. Mr. Curley and Mr. Paterno were attending a bowl game. Mr. Spanier stated that he would contact all three individuals. Mr. Spanier reached Mr. Curley and Mr. Schultz, but neither Mr. Spanier nor Ms. Baldwin reached Mr. Paterno until his return from the bowl game. (*Id.*).

Ms. Baldwin testified that she discussed representation of those individuals after their return. Ms. Baldwin met with Mr. Curley and Mr. Spanier in Spanier's office and explained the grand jury process. (N.T.G.J. 10/26/12, Baldwin, p. 14). In that meeting, she explained that Curley, Schultz and Paterno could be accompanied by an attorney to the grand jury. (*Id.*) Ms.

Baldwin testified that Spanier told Baldwin that she would represent Curley and Schultz before the grand jury. (*Id.*). Ms. Baldwin testified that in another conversation with Mr. Spanier, he stated that Ms. Baldwin would accompany him to the grand jury. (*Id.*).

Ms. Baldwin testified that she had no doubt that she represented the University and that as high ranking officials of the University, she would represent Curley and Schultz as agents. (*Id.*). Ms. Baldwin stated that Mr. Spanier consistently maintained that she would represent them. (*Id.*). Ms. Baldwin testified that she learned that Paterno would be represented by separate counsel, and informed Spanier of the same. (N.T.G.J. 10/26/12, Baldwin, p. 15).

As to compliance with Subpoena 1179, Ms. Baldwin testified that she sent a notice to all affected by the subpoena that they must preserve everything, because it would have to be turned over to the OAG. (N.T.G.J. 10/26/12, Baldwin, p. 16). Ms. Baldwin testified that she told Curley, Schultz and Spanier that they would have to "turn all of the information over" to the Office of the Attorney General. (*Id.*). Ms. Baldwin testified that she instructed Curley, Schultz and Spanier to notify anyone who worked under them to preserve everything and find out if there existed any Sandusky-related materials, so that such materials could be turned over to the Office of the Attorney General. (N.T.G.J. 10/26/12, Baldwin, p. 17). Ms. Baldwin testified that the request for information included emails, paper files or any documents, whether electronic

or non-electronic. (N.T.G.J. 10/26/12, Baldwin, p. 18). Ms. Baldwin testified that Messrs. Curley, Schultz and Spanier told her that they would check and get back to her. (*Id.*).

Ms. Baldwin testified that Mr. Curley reported back to her that "there is nothing."(*Id.*). She testified that Mr. Schultz stated that he would "look for anything he had and especially, he was going to look for documents that would help his recollection." (N.T.G.J. 10/26/12, Baldwin, p. 19). Mr. Schultz reported back to her and stated that he did not have anything. (*Id.*).

Ms. Baldwin testified that Mr. Spanier told her that he had a great many emails, that he never deleted them, and that it would be necessary for IT people to retrieve them. (N.T.G.J. 10/26/12, Baldwin, pp. 17-18). She testified that Mr. Spanier stated to her that "all of his emails were there, but that he did not have anything else." (N.T.G.J. 10/26/12, Baldwin, p. 19).

Mr. Fina represented, in questioning Ms. Baldwin, "as you know and the grand jury knows, since this case was charged against Mr. Sandusky and Mr. Curley and Mr. Schultz, a fair number of emails from 1998 and 2001 have been discovered". (N.T.G.J. 10/26/12, Baldwin, p. 20). Ms. Baldwin responded, "I know that now". (*Id.*).

January 12, 2011-Appearances of Timothy Curley and Gary Schultz Before the Grand Jury,

On January 12, 2011, Timothy M. Curley and Gary C. Schultz both appeared before the Thirtieth Statewide Investigating Grand Jury. (Transcript of

Proceedings, December 17, 2013, Exhibit L, Notes of Testimony Grand Jury Proceedings, January 12, 2011)(hereinafter, "N.T.G.J. 1/12/11"). At the commencement of the proceeding, Judge Feudale inquired as to representation of Messrs. Curley and Schultz as follows:

> MR. BARKER: Judge, we're here on Notice 29. We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.
>
> JUDGE FEUDALE: Represented by?
>
> MS. BALDWIN: My name is Cynthia Baldwin, general counsel for Pennsylvania State University.
>
> JUDGE FEUDALE: Will you be providing representation for both those identified witnesses?
>
> MS. BALDWIN: Gary is retired but was employed by the university and Tim is still an employee.

(N.T.G.J. 1/12/11, p. 8).

Colloquy of Timothy Curley and Gary Schultz

Before they testified, Judge Feudale apprised Messrs. Curley and Schultz, together, of their rights as witnesses before the grand jury as follows:

> As a witness before the grand jury you're entitled to certain rights and subject to certain duties which I am now going to explain to you. All of these rights and duties are equally important and it's important that you fully understand each of them.
>
> First, you have the right to the advice and assistance of a lawyer. This means you have the right to the services of a lawyer with whom you may consult concerning all matters pertaining to your appearance before the grand jury.
>
> You may confer with your lawyer at any time before, during and after your testimony. You may consult with your lawyer throughout your entire contact with the grand jury. Your lawyer will be present with you

in the grand jury room during the time you're actually testifying and you may confer with her at that time.

You may also at any time discuss your testimony with your lawyer and except for cause shown before this court, you may disclose your testimony to whomever you choose, if you choose.

You also have the right to refuse to answer any question pending a ruling by the court directing you to respond if you honestly believe there are proper legal grounds for your refusal. In particular, you have the right to refuse to answer any question which you honestly believe may tend to incriminate you.

Should you refuse to answer any question, you may offer a reason for your refusal, but you're not obligated to do so. If you answer some questions or begin to answer any particular question, that does not necessarily mean you must continue to answer your question or even complete the answers you have started.

Now, any answers you give to any question can and may be used against you either for the purpose of a Grand Jury Presentment, Grand Jury Report, or a Criminal Information.

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

MR CURLEY: Yes.

MR. SCHULTZ: Yes, sir.

JUDGE FEUDALE:

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

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

(N.T.G.J. 1/12/11, pp. 8-11).

Neither Mr. Curley nor Mr. Schultz asked any questions of nor sought clarification by Judge Feudale or Ms. Baldwin regarding the instructions.

Grand Jury Testimony of Timothy Curley,

Mr. Curley testified as to his recollection of information and conversations surrounding a 2002 report by Michael McQueary of an incident involving Sandusky and a child in the shower of a campus locker room. (Transcript of Proceedings, December 17, 2013, Exhibit M, Notes of Testimony Grand Jury Proceedings, Timothy M Curley, January 12, 2011)(hereinafter, "N.T.G.J. 1/12/11, Curley"). The incident which occurred in the Lasch Building locker room, as described in the testimony of Michael McQueary was initially referred to as having occurred in 2002, but later determined to have occurred in 2001. For purposes of this Opinion, we utilize the date as stated in the record, without correction. Mr. Curley provided a characterization of what McQueary reported as to his observation of the incident involving Sandusky and the child. (N.T.G.J. 1/12/11, Curley, p. 7).

Mr. Curley testified regarding a meeting with Joseph Paterno and University Senior Vice President Gary Schultz. *Id.* Curley also testified as to his report of information regarding the incident to the University President, Graham Spanier, and to the executive director of the Second Mile, a charity organization with which Sandusky was associated. (*Id.*). Curley testified that at no time, neither at the time of the 2002 incident, nor the time of his testimony, was he aware of any other incidents of alleged sexually inappropriate conduct by

Sandusky, on University property or elsewhere. Specifically, Curley testified that in 2002, he did not know anything about a 1998 report of an incident. (N.T.G.J. 1/12/11, Curley, pp. 13-15).

At no time during his testimony did Mr. Curley consult with Ms. Baldwin, refuse to answer a question, ask a question of, or seek a ruling by, Judge Feudale.

Grand Jury Testimony of Gary Schultz

Having received the explanation of rights by Judge Feudale set forth above, Gary Schultz testified before the grand jury. (Transcript of Proceedings, December 17, 2013, Exhibit N, Notes of Testimony Grand Jury Proceedings, Gary C. Shultz, January 12, 2011)(hereinafter, "N.T.G.J. 1/12/11, Schultz"). Mr. Schultz acknowledged that he was accompanied by counsel, Cynthia Baldwin. (N.T.G.J. 1/12/11, Schultz, p. 2). Mr. Schultz testified that in June 2009, he retired as Senior Vice President for Finance and Business of the University. (*Id.*).

Mr. Schultz testified regarding his recollection of information related to a report of an incident in 2002 involving Sandusky in the locker room of the Lasch Building. (N.T.G.J. 1/12/11, Schultz, pp. 5-6; p.7). Schultz testified that in a meeting held in Schultz's office, McQueary and Joseph Paterno described the incident in a very general way, with no details. (N.T.G.J. 1/12/11, Schultz, p. 9). Mr. Schultz testified that he formed an impression that the type of conduct was inappropriate sexual conduct. (N.T.G.J. 1/12/11, Schultz, p. 10).

Mr. Schultz testified that, after consulting with Mr. Curley, a child protective agency was contacted to look into the matter. (N.T.G.J. 1/12/11, Schultz, p.11). Schultz recalled that after consulting with Mr. Curley, they determined that it would be communicated to Sandusky that he should not bring children associated with the Second Mile onto campus in the football building. (N.T.G.J. 1/12/11, Schultz, p.11).

Mr. Schultz testified that a child protective agency investigated an incident reported in 1998 involving Sandusky and a boy or boys on the campus. (N.T.G.J. 1/12/11, Schultz, p.12). He testified that he recalled that he, the University police chief, the District Attorney and perhaps University legal counsel, decided to use the child protective agency as the appropriate investigative agency. (N.T.G.J. 1/12/11, Schultz, pp. 15-16). Schultz testified that he did not recall the 1998 matter being turned over to police and believed that it was turned over to the child protective agency for investigation. (N.T.G.J. 1/12/11, Schultz, p. 27). He testified that he did not know of the conclusion of the investigation of the 1998 allegation. (N.T.G.J. 1/12/11, Schultz, p. 15).

Mr. Schultz testified that he was unaware of any memoranda or written documents, other than his own notes, which may have existed at the time of the 1998 incident, after the incident, or regarding the 2002 events. (N.T.G.J. 1/12/11, Schultz, pp. 27-28). Mr. Schultz testified that he was not then in possession of any notes regarding the 2002 incident which he may have written. (N.T.G.J. 1/12/11, Schultz, p. 16). He testified that he believed notes

were probably taken at the time of the 2002 incident. Mr. Schultz testified that he would guess that any notes that old would have been destroyed on or before his retirement in 2009. (*Id.*)

Mr. Schultz testified that he believed he would have consulted with University President Graham Spanier regarding the 2002 incident. (N.T.G.J. 1/12/11 Schultz, p. 17). Schultz testified that he believed that Mr. Spanier was aware of the 1998 incident at the time of the 2002 incident. (N.T. Gary Schultz, pp. 17-18). He testified that he did not attempt to find out the identity of the youth in the shower in the 2002 incident. (N.T.G.J. 1/12/11, Schultz, p. 20). He testified that at the time he retired, he was not aware of any other allegations of sexual conduct involving Sandusky subsequent to the 1998 and 2002 incidents. (N.T.G.J. 1/12/11, Schultz, p. 32).

Mr. Schultz testified that since the 2002 incident involving Sandusky came to light, to his knowledge, the University did not adopt a policy with regard to non-student youth being on University facilities under circumstances such as the 2002 incident. (N.T.G.J. 1/12/11, Schultz, p. 33).

At no time during the testimony did Mr. Schultz consult with Ms. Baldwin, refuse to answer a question, or ask a question of, or seek ruling by, Judge Feudale

April 13, 2011- Conference before the Grand Jury Judge, the Honorable Barry F. Feudale regarding Subpoena No. 1179 for Production of Documents

On April 13, 2011, Judge Feudale conducted an in-chambers conference with Ms. Baldwin and Mr. Fina regarding the document subpoena issued to the University related to the Sandusky investigation. (Transcript of Proceedings, December 17, 2013, Exhibit O, Transcript of Proceedings of Grand Jury, April 13, 2011)(hereinafter, "N.T.G.J. 4/13/11, Conference"). Ms. Baldwin represented to Judge Feudale that the subpoena, which sought emails dating back to 1997, was overly broad, difficult to comply with and, potentially, included sensitive matters on unrelated subjects. (N.T.G.J. 4/13/11, Conference, pp. 2-4).

Judge Feudale requested that Ms. Baldwin leave the room. He then entertained an *in-camera* response on behalf of the Commonwealth regarding the foundation for the request for documents. (N.T.G.J. 4/13/11, Conference, pp. 6-7). Mr. Fina stated that the Commonwealth "really want[s] to find out whether there were emails about the cases we know about, the 1998 incident, the 2002 incident and the alleged 1984-85 incident, but what other incidents there may have been". (N.T.G.J. 4/13/11, Conference, p. 14). Mr. Fina asserted the Commonwealth's view of alleged inconsistencies in the testimony of Curley and Schultz. (N.T.G.J. 4/13/11, Conference, p. 10). The representations by Mr. Fina to Judge Feudale occurred outside the presence of, and based upon the record before us, were not communicated to Ms. Baldwin.

Following that exchange, Ms. Baldwin joined the conference. Mr. Fina indicated that he would not ask Mr. Spanier questions about anything related to the document subpoena. (N.T.G.J. 4/13/11, Conference, p. 24). Ms. Baldwin and Mr. Fina discussed a proposed resolution for the University's response to the document subpoena. Mr. Fina stated, "...[t]hen what we would ask that—we can work on the language in this regard-essentially that any of those emails, any subset of those emails that relate in any fashion, whether they're illusions or direct statements to Mr. Sandusky, that those would be culled out by the University and provided directly to the Office of Attorney General." (N.T.G.J. 4/13/11, Conference, p. 26).

Following the discussion regarding the compliance with the document subpoenas, before commencement of questioning of Mr. Spanier, Judge Feudale inquired:

> Cindy, just for the record, who do you represent?
> MS. BALDWIN: The university.
> JUDGE FEUDALE: The university solely?
> MS. BALDWIN: Yes, I represent the university solely.

(N.T.G.J. 4/13/11, Conference, p. 28).

April 13, 2011- Grand Jury Testimony of Graham B. Spanier

Judge Feudale provided instructions to Mr. Spanier essentially identical to those provided to Curley and Schultz, namely, the right to advice and assistance of a lawyer, the right to the services of a lawyer with whom the

witness could consult at any time before, during or after testimony or contact with the grand jury; the right to confer at any time during the testimony, the right to refuse to answer any questions and seek a ruling on the refusal to answer, a right to stop the questioning and appear either alone or with counsel to seek a ruling on any matter which may arise. (Transcript of Proceedings, December 17, 2013, Exhibit O, Notes of Testimony Grand Jury Proceedings, Graham Spanier, April 13, 2011, pp. 29-31)(hereinafter, "N.T.G.J. 4/13/11, Spanier").

Judge Feudale instructed Mr. Spanier as to the duty to give truthful answers and cautioned that if a witness answers untruthfully, he may be subject to prosecution for perjury, a felony punishable under the Crimes Code. (N.T.G.J. 4/13/11, Spanier, p. 31). Mr. Spanier asked no questions regarding the explanation of rights or duties.

At the commencement of the questioning, Mr. Fina inquired of Spanier as follows:

> BY MR. FINA:
> Q. Sir, you're represented by counsel today?
> A. Yes.
> Q. Could you just identify counsel?
> A. Cynthia Baldwin sitting behind me.

(N.T.G.J. 4/13/11, Spanier, p. 3).

Mr. Spanier testified that Timothy Curley was Director of Athletics and reported directly to him in the chain of command, and that Curley would also

work closely with other senior members of the University administration. (N.T.G.J. 4/13/11, Spanier, p. 6). Mr. Spanier testified that from 1993 or 1994 until approximately 2008, Gary Schultz served as Vice President for Finance, the chief financial and business officer of the University. Duties of that position included oversight of financial expenditures and operational areas of the University such as housing, food services, environmental health and safety, physical plant, transportation, internal audit, the controller's office, the University budgeting and other areas. (N.T.G.J. 4/13/11, Spanier, p. 7). Included in those areas of oversight were University police services and public safety operations. (N.T.G.J. 4/13/11, Spanier, p. 8). Mr. Spanier testified that it would be a rare event that criminal allegations or activities would be brought to his attention (N.T.G.J. 4/13/11, Spanier, p. 10; pp. 12-13). Mr. Spanier testified that if he were to be informed of something, it would come from the senior vice president of finance. (N.T.G.J. 4/13/11, Spanier, p. 12). Spanier testified that during his tenure as president, there was never an occasion on which University police came to him with information regarding Sandusky. (N.T.G.J. 4/13/11, Spanier, p. 13).

Mr. Spanier testified that there was one occasion on which Mr. Schultz and Mr. Curley came to him to seek advice on a matter related to Sandusky. (*Id.*). Spanier testified that in 2002, or approximately that time frame, Curley asked if he could see Spanier because Curley had been approached by a member of his staff "saying that he was somewhat uncomfortable because Jerry Sandusky [*sic*] in the football building locker room area in the shower was with a younger

child and that they were horsing around in the shower. I believe that was the language that was used." (N.T.G.J. 4/13/11 Spanier, p. 14). Spanier testified that he did not know who witnessed Sandusky in the shower with the child. (N.T.G.J. 4/13/11 Spanier, p. 15).

Mr. Spanier testified that he advised that Curley and Schultz should inform Sandusky that "[i]t was not a good practice to bring people under 18 into [the University's locker room] and we'd like to ask him not to do that going forward; secondly we thought since he was no longer employed by the University and we really didn't have any responsibility for him at that point in time that we should also, as a matter of prudence, contact the chair of the board of the Second Mile to simply inform that individual that we were concerned about Second Mile children being brought into Penn State locker facilities and that we were going to ask that that not occur." (N.T.G.J. 4/13/11, Spanier, p. 17).

Mr. Spanier testified that in his discussions with Curley and Schultz, there was no indication that the conduct described could have been sexual in nature. (N.T.G.J. 4/13/11, Spanier, pp. 22-25). Spanier testified that in reference to the recommendations, Spanier did not make any suggestion that Curley should identify who the child was. (N.T.G.J. 4/13/11, Spanier, p. 21). Mr. Spanier testified that he had no impression that that was done by either Mr. Schultz or Mr. Curley. (*Id.*).

Mr. Spanier testified that there was no discussion with or information provided to him about any prior allegations against Sandusky involving

children. (N.T.G.J. 4/13/11, Spanier, p. 22). Spanier testified that he was never informed before 2011 of an allegation in 1998 that Sandusky was in a University shower with two young men and that contact had occurred. (N.T.G.J. 4/13/11, Spanier, p. 22; pp. 34-35). Mr. Spanier testified that he was never informed before 2011 that the Penn State University Police had investigated allegations of potential sexual misconduct by Sandusky. (*Id.*). He testified that he was not aware of any occurrences where Sandusky had brought children into University locker rooms or showers. (N.T.G.J. 4/13/11, Spanier, p. 26).

Mr. Spanier testified that he believed that no writing resulted from the meeting with Curley and Schultz or that anyone prepared a memo, email or handwritten note. (N.T.G.J. 4/13/11, Spanier, p. 30).

Mr. Spanier testified that in 2002, when the matter was reported to him by Curley and Schultz, they did not indicate in any way that they had disclosed the matter to either law enforcement authorities or other public entities. (N.T. Graham Spanier, 36). Mr. Spanier testified that he believed that no writing resulted from the meeting with Curley and Schultz or that anyone prepared a memo, email or handwritten note. (N.T.G.J. 4/13/11, Spanier, p. 30).

At no time during his testimony before the grand jury did Mr. Spanier ask to consult with Ms. Baldwin, refuse to answer a question on any grounds, express uncertainty as to whether he could lawfully refuse to answer a question, ask a question or request to stop the questioning for any reason.

October 2012- Assertion of Attorney-Client Privilege Before the Grand Jury Judge and Waiver of Privilege by Pennsylvania State University

The record includes a series of letters from the period of June 1, 2012 through October 19, 2012, in which counsel for Defendants Curley and Schultz asserted the attorney-client privilege to which the University's counsel, and counsel for Ms. Baldwin responded. The details of these communications are set forth at length, below.

October 26, 2012- Grand Jury Testimony of Cynthia Baldwin

On October 26, 2012, Ms. Baldwin appeared before the grand jury for questioning.

Mr. Fina represented in his questioning of Ms. Baldwin that, since the time that charges were filed against Sandusky, Curley and Schultz, a number of emails from 1998 and 2001 were discovered which directly related to the 1998 investigation and 2001 crime regarding Sandusky. (N.T.G.J. 10/26/12, Baldwin, p. 20). Ms. Baldwin testified that at no time, in response to her request for materials, did Curley, Schultz or Spanier in any way disclose to her the existence of any emails regarding the events of 1998 or 2001. (*Id.*).

Mr. Fina also represented in his questioning that Mr. Schultz had a file in his office regarding Sandusky which contained documents related to his employment and retirement agreement as well as notes and emails pertaining to the 1998 and 2001 crimes of Sandusky. (*Id.*) Ms. Baldwin testified that

Schultz never revealed the existence of a Sandusky file or its contents, and stated that he did not have anything. (*Id.*).

Testimony Related to Graham Spanier

Ms. Baldwin testified that in January 2011, she became aware and received a copy of a report of the 2008 incident. (N.T.G.J. 10/26/12, Baldwin, p.23). She testified that she did not provide a copy of the report to Spanier, but believed that Spanier was aware that she had received the report. (N.T.G.J. 10/26/12, Baldwin, p. 24). Ms. Baldwin testified that Spanier told her that he did not know anything about the 1998 investigation. (*Id.*).

Ms. Baldwin testified that Spanier was interviewed by the Office of the Attorney General on March 22, 2011, and was asked direct questions regarding any knowledge of or involvement in the incidents of 1998 and 2001. She accompanied Spanier to that interview.(N.T.G.J. 10/26/12, Baldwin, p. 25). A few days after the interview, the Office of the Attorney General notified her that it intended to subpoena Spanier to appear before the grand jury. (N.T.G.J. 10/26/12, Baldwin, p. 27).

Ms. Baldwin testified that she apprised Spanier that he would be required to testify, and that he responded that he would do so. (*Id.*). She testified that she kept Spanier, as University President, apprised of everything of which she was aware regarding the investigation, including the fact that interviews with persons in the Athletics Department occurred. (N.T.G.J. 10/26/12, Baldwin, p. 28). Ms. Baldwin testified that she advised Spanier that if he had questions, he

should feel free to ask her, which he did. *(Id.)*. Ms. Baldwin testified that she viewed it as her duty as general counsel to keep Spanier, as University President and Board of Trustees member, aware of the status of the ongoing investigation and believed Spanier expected her to do so. (N.T.G.J. 10/26/12, Baldwin, pp. 28- 29).

Ms. Baldwin testified that communications with the grand jury and the OAG continued from April 2011 through November 2011, during which time she kept Mr. Spanier apprised of those communications. (*Id.*) Ms. Baldwin testified that throughout that period of time, Spanier told her that he did not know anything about the 1998 incident involving Sandusky. (N.T.G.J. 10/26/12, Baldwin, pp. 39-40).

As to the 2001 incident, Ms. Baldwin testified that Spanier stated that Schultz and Curley apprised him of the situation, if it could be so described, and that they had discussions. As University President, Spanier expected that Curley and Schultz would take care of it. (N.T.G.J. 10/26/12, Baldwin, p. 40). She testified that Spanier articulated that he was told that the observation of the incident in the shower of the Lasch Building was horsing around and horseplay. (*Id.*).

Ms. Baldwin testified that in early November 2011, the OAG alerted her that the presentment of the grand jury would include charges against Curley and Schultz related to a failure to report. (N.T.G.J. 10/26/12, Baldwin, p. 41).

III. DISCUSSION

Central to disposition of Defendants' claims and theories for relief is determination of the scope of the attorney-client privilege asserted by each Defendant. We must determine whether the record demonstrates the existence of an individual attorney-client privilege between each Defendant personally and Ms. Baldwin.

We find that, in all matters related to their appearances before the grand jury, including preparation for such appearances, Ms. Baldwin represented each Defendant in his capacity as an agent of the University conducting University business, not in an individual, personal capacity. Thus, in their roles as agents of the University, the Defendants received representation and no denial of counsel occurred.

We also find that the record does not support a divergence of interests of the Defendants as agents from those of the privilege holder, the University, of which Ms. Baldwin was aware, nor a conflict among the Defendants. No apparent conflict of interest precluded her representation of them in their capacities as agents of the University conducting University business.

We further find that the University, as the holder of the privilege, waived its attorney-client privilege, and that any disclosure of information related to the ongoing investigation of Sandusky fell within the terms of the waiver. Therefore, no violations of the attorney-client privilege occurred.

Finally, we find no prosecutorial misconduct based upon a claim that the Commonwealth interfered with the Defendants' constitutional rights, or that

defects existed in the grand jury proceedings with respect to Ms. Baldwin's representation of Defendants before the grand jury.

A. Background of the Attorney- Client Privilege

In their filings, Defendants rely heavily upon standards which govern the establishment of an attorney-client relationship between an individual and counsel, that is,

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

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

The attorney-client privilege is "deeply rooted in the common law," and in both criminal and civil proceedings, the General Assembly has provided that "counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." *In re Thirty-Third Statewide Investigating Grand Jury,* 86 A.3d 204, 215, 216-17 (2014) citing 42 Pa.C.S.§ 5916 (criminal matters) and 5928 (civil matters); *Commonwealth v. Chmiel,* 558 Pa. 478, 738 A.2d 406, 414 (1999). "The attorney-client privilege is "the most revered of our common law

privileges, and, as it relates to criminal proceedings, it has been codified at 43 PA.C.S.A. §5916....[I]n criminal proceedings, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." *Commonwealth v. Maguigan,* 511 Pa. 112, 124, 511 A.2d 1327, 1333 (Pa. 1986). Nevertheless, the Pennsylvania Supreme Court has acknowledged the "ongoing tension between the two strong, competing interests of justice in play- namely -the encouragement of trust and candid communication between lawyers and their clients... and the accessibility of material evidence to further the truth-determining process". *In re Thirty-Third Statewide Investigating Grand Jury,* 86 A.3d at 217 (2014); See also, *Levy v. Senate of Pennsylvania,* 619 Pa. 586, 65 A.3d 361(2013)(attorney-client privilege is often in tension with truth-determining process).

The attorney-client privilege applies to corporations as well as individuals. *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981). However, "[a]s the [United States] Supreme Court has recognized... '[t]he administration of the privilege in the case of corporations... presents special problems. As an inanimate entity, a corporation must act through its agents." *In the Matter of Bevill, Bresler & Shulman Asset Mgmt. Corp.,* 805 F.2d 120, 124 (3d Cir. 1986) citing *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed. 2d 373 (1985).

Further, although "[t]he attorney-client privilege is intended to facilitate 'full and frank communication between the attorneys and their clients and thereby promote broader public interests in observance of the law and administration of justice' tension exists between waiver of a corporation's attorney-client privilege and the assertion of an individual privilege." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *Bevill*, at 125.

The instant case presents the particularly challenging issue of the scope of representation by corporate or organizational counsel and its employees or agents. No parties dispute that Ms. Baldwin represented the University as general counsel and that all three Defendants were high ranking University officials. Defendants assert, however, that Ms. Baldwin represented each Defendant individually and, because of alleged failures of or conflicts in representation, they were deprived of the right to counsel throughout the proceedings, which failures or conflicts entitle them to relief.

Representation of the individual is distinct from representation of the corporate agent in the official capacity. "[T]he party asserting the privilege bears the burden of proving the existence of each element of the privilege." *United States v. Fisher*, 692 F. Supp. 488, 490-91(E.D. Pa. 1988) See also, *United States v. Costanzo*, 625 F.2d 465, 468 (3d Cir. 1980)("While establishment of an attorney-client relationship is not dependent upon execution of a formal contract, the burden of demonstrating that a privileged

relationship exists nonetheless rests on the party who seeks to assert it."). In this instance, that burden of proof rests upon the Defendants.

Pennsylvania cases, and federal cases relying upon Pennsylvania law, have addressed the standard applicable to determination of the scope of corporate counsel's representation. Whether there is a valid claim of privilege exists is decided on a case-by-case basis, and applicability of the privilege based upon the attorney-client relationship is a factual question, the scope of which is a question of law. *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1988) citing *Upjohn Co., v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed 2d 584. Pennsylvania has adopted the five-part test set forth in *Bevill* which governs the issue of whether an attorney-client privilege exists between corporate counsel and corporate officers. See, *Maleski by Chronsiter v. Corporate Life Ins. Co.*, 163 Pa.Cmwlth. 36, 641 A. 2d 1 (1994).

In *Bevill*, the United States Court of Appeals of the Third Circuit affirmed the District Court's order which required disclosure of communications related to corporate matters by corporate officers to corporate counsel where the corporation waived the attorney-client privilege. The Court explained that, in order to assert an individual attorney-client privilege as to communications with corporate counsel, corporate officers must demonstrate that:

> First, they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual

> capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Bevill, 805 F. 2d at 123 (citing *In re Grand Jury Investigation*, 575 F.Supp. 777, 780 (N.D. Ga. 1983).

The *Bevill* Court reminded that any privilege which exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer, and that, "[b]ecause a corporation can act only through its agents, a corporation's privilege consists of communications by corporate officials about corporate matters and their actions in the corporation. A corporate official thus may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters. *Bevill*, at 125 (internal citations omitted). See also, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 349, 105 S.Ct. 1986, 85 L.Ed. 2d 372 (1985)(any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer).

These standards apply equally in civil and criminal settings. For example, in *United States v. Norris*, 722 F.Supp.2d 632 (2010), the United States District Court for the Eastern District of Pennsylvania relied upon the five-part *Bevill* test, adopted as Pennsylvania law, and found that no individual attorney-client relationship between corporate counsel and a chief executive officer of the corporation charged with fabricating information. In *Norris*, as in the instant matter, corporate counsel accompanied the corporate officer to an interview in

advance of the officer's grand jury testimony. The corporation later waived its attorney-client privilege as to communications with corporate counsel regarding representation in connection with the grand jury investigation. In denying the corporate officer's motion to suppress testimony of corporate counsel, the Court concluded that, 1) at no time did the corporate officer ask corporate counsel to represent him personally, 2) the corporate officer provided no evidence of a conversation which did not involve the business affairs of the corporation, 3) the corporate counsel did not believe he represented the corporate officer individually. *Norris*, at 639. The United States Court of Appeals affirmed the District Court's reliance upon *Bevill* and its holding that no attorney-client relationship existed. *United States v. Norris*, 419 Fed. Appx. 190 (March 23, 2011)(3d Cir. Pa.).

B. Application of Law and Conclusions: Scope of the Attorney-Client Relationship

Applying these standards in the instant matter, the evidence fails to establish that Ms. Baldwin represented Defendants in their individual capacities, but instead, demonstrates that Ms. Baldwin represented each Defendant in his role as an official of the University conducting University business. In reaching this conclusion, we rely in part upon evidence presented at the November 20 and 21, 2014 hearings, but for the reason set forth above, we do not cite to that testimony in this Opinion.

First, Defendants each approached Ms. Baldwin for legal advice related to receipt of subpoenas for appearance before the grand jury. In consultation with

the University President Spanier, Ms. Baldwin arranged for contact with Curley and Schultz regarding the subpoenas. The OAG served the subpoenas upon Messrs. Curley and Schultz through Ms. Baldwin as general counsel, rather than upon them personally at their homes or elsewhere. Mr. Spanier instructed Ms. Baldwin that she would represent each before the grand jury. Each met with Ms. Baldwin, at the instruction of the University President, to receive counsel related to their appearances before the grand jury.

Second, Defendants presented no evidence that they sought representation in their individual rather than their organizational capacities. Defendants rely instead upon assertions as to their beliefs regarding representation, which we do not find satisfies their burden of proof. In contrast, Ms. Baldwin presented testimony as to her discussion with Defendants as to their rights related to representation and the nature of their communications with her. Defendants chose to proceed with Ms. Baldwin as their counsel, aware of her role as University counsel and made no request that she represent them individually.

Third, there exists no evidence that Ms. Baldwin communicated with the officials in their individual capacities, knowing that a conflict could arise. We cannot conclude that Ms. Baldwin was aware of facts which raised a conflict between the interests of the University and the Defendants personally; that is, potential personal exposure to criminal charges. In response to Ms. Baldwin's request to gather information required by the subpoena *duces tecum* directed to the University, Defendants responded that they had none. If Defendants

possessed personal knowledge which created either personal criminal exposure or a conflict of interest, we have no evidence upon which we could conclude that Ms. Baldwin was or should have been aware of such information and communicated with them in their individual capacities in spite of such knowledge.

As to the fourth factor, we find that Ms. Baldwin maintained confidentiality of communications with the Defendants in their roles as agents, until such time as the University waived the privilege it held.

Finally, Defendants have not alleged that conversations occurred with Ms. Baldwin which related to private individual matters outside of their roles as University officials.

IV. Defendants' Theories in Support of Claims for Relief

Having reached this conclusion as to the scope of Ms. Baldwin's representation, we turn to Defendants' claims for relief.

A. Right to counsel

No violation of the right to counsel occurred where Ms. Baldwin consistently and properly identified her role as counsel to the University in consultation with the Defendants and in the grand jury proceedings. Defendants chose to proceed with the University's counsel and therefore suffered no denial of the right to counsel.

In support of the claim of denial of the right to counsel, Defendants rely heavily upon Ms. Baldwin's identification of herself as counsel to the University. Indeed, Ms. Baldwin made clear on the record at each proceeding that she appeared as general counsel to the University. Such identification neither concealed nor misrepresented her role.

Ms. Baldwin further correctly noted her representation of the witnesses as University agents. On behalf of Messrs. Curley and Schultz, Ms. Baldwin articulated her representation by reference to their respective roles at the University. (MS. BALDWIN: *My name is Cynthia Baldwin, general counsel for Pennsylvania State University.* JUDGE FEUDALE: Will you be providing representation for both those identified witnesses? MS. BALDWIN: *Gary is retired but was employed by the university and Tim is still an employee.*)(N.T.G.J. 1/12/11, p. 8). Mr. Spanier correctly identified Ms. Baldwin as his counsel in his appearance before the grand jury in the capacity as University president.(MR. FINA: Could you just identify counsel? A. *Cynthia Baldwin sitting beside me.*)(N.T.G.J. 4/13/11, Spanier, p. 3). No reason existed for Ms. Baldwin to correct Mr. Spanier's statement. Ms. Baldwin's identification as their counsel as University officials was consistent with her role as general counsel to the University.

It follows, therefore, that we find meritless Defendants' claims that they appeared before the grand jury without the benefit of counsel. In asserting that argument, Defendants rely upon cases which address the remedies available for failure of a grand jury judge to apprise a witness of his rights, including the

right to counsel. (See e.g., Defendant Curley's Reply to The Commonwealth's Answer to Defendant's Omnibus Pre-Trial Motion, p. 14; Schultz Memorandum of Law in Support of Omnibus Pre-Trial Motion, p. 15, citing *Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. Super. 1972) and *Commonwealth v. Cohen*, 289 A.2d 96 (Pa. Super 1972)).

We find misplaced Defendants' reliance upon *McCloskey* and *Cohen*, which address the denial of counsel before a grand jury. In *McCloskey*, the Supreme Court quashed the indictment of a defendant based upon grand jury testimony provided following denial of the defendant's request to have counsel with him in the grand jury room, or in the alternative, that he be allowed to consult with counsel at will outside the door. The Supreme Court stated,

> In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness's right to exercise his privilege against self incrimination knowingly and intelligently, we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should state the answer.
>
> Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury. He has been summoned to testify, and he is subject to contempt proceedings if he should refuse to testify without justification. The question of when a witness has 'reasonable cause to apprehend danger' and hence can exercise his right against self incrimination is not always clear.

McCloskey, at 776.

Thus, the Court concluded, "a subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self-incrimination." *Id.*

In *Cohen*, the Superior Court applied the requirement of *McCloskey* instructions to the appearance of an attorney as a witness before the grand jury, and quashed the indictment where the supervising grand jury judge failed to advise the attorney-witness of the Fifth Amendment right to remain silent and the Sixth Amendment right to seek the advice of counsel.

No such violations occurred in the instant case. As set forth above, Judge Feudale's instructions fully apprised the witnesses of their right to counsel and all of its related privileges, including the right to the advice and assistance of a lawyer, and the right to confer and consult with a lawyer at any time before, during or after testifying before the grand jury. (N.T.G.J. 1/12/11, pp. 8-11; N.T.G.J. 5/13/11, pp. 29-31). Judge Feudale's instructions complied in every respect to the requirements set forth in *McCloskey* and *Cohen.*

Accordingly, neither Ms. Baldwin's identification of herself as counsel to the University representing the witnesses in their agency capacities nor Judge Feudale's instructions to the witnesses deprived Defendants of the right to counsel. Defendants were represented by counsel in the role in which they appeared, agents of the University.

B. Right to Conflict Free Counsel

We reject Defendants' assertions that they received conflicted representation in derogation of their Sixth Amendment right to counsel based

upon an alleged conflicts of interest. Ms. Baldwin did not jointly represent the individuals personally or in conflict with the University.

We find that the interests of the University and the individuals appeared aligned at the time the Defendants met with Ms. Baldwin and testified before the grand jury, that is, the interests in providing truthful information within their knowledge, as agents of the University, regarding the apparent target of the investigation, Sandusky.

We disagree with the assertion that Ms. Baldwin knew or should have known that the interests of the individual Defendants would diverge from the interests of the University, such that an inevitable conflict existed, which denied Defendants of representation. If, as the Commonwealth alleges, Defendants provided false testimony as to their knowledge of information or documents which created individual exposure to criminal liability, that exposure arose at such time as the Commonwealth viewed their testimony as chargeable conduct. Defendants testified after receiving proper instruction from the grand jury judge regarding their duties. If, in fact, they gave chargeable testimony, we decline to find that the information of which Ms. Baldwin was aware in advance raised an issue of a divergence of interests.

We also decline to find that Ms. Baldwin should have been aware of an alleged conflict by virtue of Mr. Paterno's separate representation. No evidence exists upon which we may make assumptions regarding his choice of representation, and we do not infer that such choice proved the existence of a conflict.

We note that, even after their grand jury testimony, based upon the information of which Ms. Baldwin was aware, the Defendants' testimony appeared consistent. If, as Defendants argue, the Commonwealth shifted the focus from investigation of Sandusky to the University or individual Defendants, the record does not support that the Commonwealth communicated that focus to Ms. Baldwin. Discussions regarding the view of alleged inconsistencies in the testimony of Messrs. Curley and Schultz took place outside of Ms. Baldwin's presence in an *ex parte* discussion regarding the scope of a document subpoena. (See, N.T.G.J. 5/13/11, Conference).

Further, Ms. Baldwin could not have been aware of any alleged inconsistencies between the Defendants' testimony and that of Michael McQueary, who testified in secret grand jury proceedings.

B. *Violation of Grand Jury Secrecy*

Because they were represented by counsel in the capacity in which they appeared before the grand jury, agents of the University, Ms. Baldwin's appearance in the grand jury room with Messrs. Curley, Shultz and Spanier was proper and did not violate secrecy. As counsel, Ms. Baldwin was entitled to accompany her client, the University, by its agents.

C. *Breach of Attorney-Client and Work Product Privileges*

We find that no violation of the attorney-client privilege occurred where Ms. Baldwin testified before the grand jury on October 26, 2012 within the scope of the waiver of privilege of the University, as the holder of the privilege.

Following issuance of the presentment, Messrs. Curley and Schultz obtained individual counsel. On behalf of Mr. Schultz, on June 1, 2012, Thomas J. Farrell, Esq., wrote to Charles DeMonaco, Esq., counsel to Ms. Baldwin. Ms. Baldwin concluded her position as general counsel in January 20, 2012. Attorney Farrell asserted that Ms. Baldwin represented Mr. Schultz during preparation for his appearance before the grand jury, during his interview and appearance before the grand jury on January 12, 2011, and through and until Mr. Farrell's retention on or about October 2011. Attorney Farrell requested that "[Mr. DeMonaco] and Judge Baldwin assert the attorney-client and work product privileges in response to any and all requests from the OAG, USAO in the Middle District of Pennsylvania, Louis Freeh and his investigation group and anyone else who may ask." (Transcript of Proceedings, December 17, 2013, Exhibit C).

Similarly, on behalf of Mr. Curley, on June 11, 2012, Caroline Roberto, Esq., wrote to Attorney DeMonaco and asserted that "Justice Baldwin was previous counsel to Mr. Curley and represented such to him and to others on several occasions. Therefore, I ask that you and Justice Baldwin assert the attorney-client work product privileges in response to all requests from the Attorney General, the United States Attorney's Office in the Middle District, the Louis Freeh investigation and those associated with it, and others seeking information or response related to Mr. Curley." (Transcript of Proceedings, December 17, 2013, Exhibit D).

On June 22, 2012, Attorney DeMonaco responded to Attorney Farrell and Attorney Roberto that:

> .... Cynthia Baldwin, as General Counsel was counsel for and represented The Pennsylvania State University and represented the interests of administrators of the University in their capacity as agents conducting University business, so long as their interests were aligned with the University. She however, as General Counsel for the University, could not and did not represent any agent of the University in an individual capacity. Nevertheless, Cynthia Baldwin considered communications with the University and those agents whose interests were aligned with the University to be confidential.

(Transcript of Proceedings, December 17, 2013, Exhibit F).

On October 2, 2012, Michael Mustokoff, Esq., then counsel for the University, wrote to Judge Feudale advising that the University waived its attorney-client privilege. On behalf of the University, Mr. Mustokoff stated,

> *The University has agreed to waive privilege as to the Office of General Counsel's efforts to comply with the Commonwealth's grand jury investigation related to Gerald Sandusky,* specifically excluding privileged communications with or concerning outside counsel, and has further agreed to waive the University's assertion of privilege regarding certain actions taken by the Office of General Counsel subsequent to November 4, 2011.

(Transcript of Proceedings, December 17, 2013, Exhibit G)(emphasis added).

October 11, 2012, Attorney Roberto wrote to Judge Feudale and asserted that attorney-client and work product privileges existed regarding Ms. Baldwin's representation of Curley during the grand jury proceedings. (Transcript of Proceedings, December 17, 2013, Exhibit I). On the same date, Mr. Farrell wrote to Judge Feudale and asserted that those privileges applied to Ms. Baldwin's preparation for the grand jury, as well as representation during

and after Mr. Schultz's appearance before the grand jury. (Transcript of Proceedings, December 17, 2013, Exhibit H).

On October 19, 2012, Mr. Mustokoff wrote to Mr. Fina regarding the scope of the waiver of the University's attorney-client privilege. Mr. Mustokoff stated exceptions to the University's waiver as follows:

***

> (2) *any communications between Justice Baldwin and Messrs. Schultz and Curley.* We have previously shared our concerns about the Schultz/Curley communications with you and memorialized them in our October 2, 2012 letter to Judge Feudale.

(Transcript of Proceedings, December 17, 2013, Exhibit K).

On October 22, 2012, in anticipation of upcoming grand jury testimony of Ms. Baldwin, Judge Feudale conducted a conference with Mr. Fina, Mr. Mustokoff and Mr. DeMonaco during which counsel and the court discussed the claims of privilege asserted on behalf of Curley and Schultz. (Transcript of Proceedings, December 17, 2013, Exhibit P, Transcript of Grand Jury Proceedings, October 22, 2013)(hereinafter, "N.T.G.J. 10/22/12, Conference").

At that conference, Mr. Mustokoff stated that with all aspects of Ms. Baldwin's representation of the University, the attorney-client privilege belonged to the University. (N.T.G.J. 10/22/12, Conference p. 6). Mustokoff asserted that the issue of the scope of an asserted privilege between Ms. Baldwin and Messrs. Curley and Schultz was a matter for the court. (*Id.*). Mr. DeMonaco, as counsel for Ms. Baldwin, asserted that "[Ms.] Baldwin was counsel for and represented the interest of Penn State University and

represented the interest of administrators of Penn State University in capacity as agents conducting University business so long as their interests were aligned with the University." (N.T.G.J. 10/22/12, Conference, p. 8).

Before Judge Feudale, Fina, Mustokoff and DeMonaco agreed that, in view of the assertion of a privilege on behalf of Curley and Schultz, Mr. Fina would not ask questions of Ms. Baldwin as to the "testimony of Mr. Schultz and Mr. Curley before the grand jury, and any preparation for or follow-up they had with Counsel Baldwin, University Counsel Baldwin" (N.T.G.P. Conference, 10/22/12, pp. 10-11). Mr. Fina stated, " I don't believe [counsel for Curley and Schultz'] attempt to extend the privilege to any actions that Baldwin took as University counsel in fulfilling subpoenas and the contacts that may have occurred between those two gentlemen in the fulfillment of subpoenas that were issued to the University." (N.T.G.J. 10/22/12, Conference 10/22/12, p. 5).

Our analysis of whether Ms. Baldwin's grand jury testimony breached the attorney-client privilege is controlled by identification of the privilege holder, and the scope of any waiver thereof. Attorneys Roberto and Farrell's assertions of the privilege, and the lack of an assertion on behalf of Mr. Spanier, against whom the Commonwealth had not yet filed charges, do not control our analysis. No evidentiary record existed upon which Judge Feudale could decide the issue, asserted only by way of letter. In his April 9, 2013, Opinion, Judge Feudale found that he lacked jurisdiction to do so.

We have determined that Ms. Baldwin represented the University and Defendants as agents conducting University business. Therefore, the University held the attorney-client privilege, which it agreed to waive. Ms. Baldwin testified within the scope of the waiver and the parameters set forth in advance of her grand jury testimony.

As to Messrs. Curley and Schultz, Ms. Baldwin testified regarding their knowledge of documents requested by subpoena directed to the University, to which the University had an obligation to respond. Ms. Baldwin's testimony regarding Mr. Spanier's communication of lack of awareness of the 1998 incident and handling of the 2001 incident was within the scope of the University's waiver. Regardless of whether or not private counsel had asserted a privilege on his behalf, as we have stated, "a corporate official may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters." *Bevill*, at 125.

The University having waived its privilege, Ms. Baldwin's testimony did not breach an attorney-client privilege.

D. *Prosecutorial Interference With the Right to Counsel and Structural Defects in the Grand Jury Proceedings*

We reject Defendants' arguments that the OAG engaged in prosecutorial misconduct or that apparent conflicts existed which required disqualification of Ms. Baldwin by Judge Feudale.

First, Defendants assert that the OAG engaged in prosecutorial misconduct which amounted to denial of the right to counsel because it perceived inconsistencies between the Defendants' testimonies, did not address allegedly resulting conflicts of interest and therefore compromised the grand jury proceedings.

The Commonwealth was not obligated to disclose in advance of Defendants' grand jury appearances, whether or not they viewed them as targets. In *Commonwealth v. Williams*, 388 Pa. Super. 153, 565 A.2d 160 (1989), the Pennsylvania Superior Court considered whether the Commonwealth engaged in misconduct consisting of "setting a perjury trap" for an uncounseled target of a grand jury. Williams sought reversal of convictions for perjury and false swearing and asserted that the Commonwealth engaged in misconduct by bringing Defendant before the grand jury with the primary purpose of extracting perjured testimony from him. *Id.* at 163. In *Williams*, although the Commonwealth recognized the possibility that the witness might perjure himself, truthful answers could have disclosed information useful to the investigation; therefore, the Court declined to say that he was subpoenaed for the sole purpose of extricating perjured testimony. *Williams*, at 164. The Court held that it was not improper for the Commonwealth to allow the witness to testify uncounseled and non-immunized where he was a "target" and not merely a witness and "strenuously disagreed" with Williams' argument that the Commonwealth had a duty to warn him that he was a target, and entitled to counsel and a grant of immunity. *Id.*, at 166.

In so deciding, the Superior Court looked to the adequacy of the instructions to the witness provided by the grand jury judge regarding the duty to testify truthfully. The Court reminded that the witness was given the opportunity to obtain counsel and to refuse to answer questions which might incriminate him. The Court explained,

> ...we do not understand what constitutional disadvantage a failure to give potential warnings could possibly inflict on a grand jury witness, whether or not he has received other warnings. It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Williams, at 166, citing *United States v. Washington*, 431 U.S. 181, 189 97 S.Ct. 1814, 1820, 52 L.Ed. 2d 238, 246 (1977).

In the instant case, the Commonwealth sought information from Curley, Schultz and Spanier in connection with the Sandusky investigation. Judge Feudale provided each one virtually identical instruction to those provided in *Williams*. Pursuant to *Williams*, Defendants' rights as witnesses before the grand jury were the same regardless of the Commonwealth's perception of their status.

Second, Defendants assert that defects existed in the grand jury proceedings because alleged conflicts of interest required that Judge Feudale disqualify Ms. Baldwin.

No structural defect existed in the proceedings by virtue of Ms. Baldwin's appearance with each Defendant as an agent of the University. Her appropriate identification of her role as counsel raised no apparent conflict of interest which required intervention by Judge Feudale.

Defendants' reliance upon *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975), to argue a duty on the part of Judge Feudale to disqualify Ms. Baldwin from representation is misplaced. In *Pirillo*, the Pennsylvania Supreme Court upheld the disqualification of an attorney, engaged by the Fraternal Order of Police, from representing twelve police officers before an investigating grand jury. The Supreme Court agreed that an impairing conflict existed where the Fraternal Order of Police had "avowed [a] public policy of strenuous opposition to any form of cooperation by individual policemen with the Special Prosecutor's office and with the investigating grand jury, and [took] the position that the interest of any single member in cooperating to obtain leniency must be sacrificed to the interest of the membership as a whole in obstructing any inquiry into police corruption" *Id.*, at 518; 528.

In this case, the Commonwealth's theory or belief that inconsistencies existed in testimonies of Defendants did not rise to a level of impairing conflict which required Judge Feudale's intervention into the issue of representation.

No apparent conflicts of interest existed at that time Defendants testified which either denied their right to counsel or compromised the grand jury proceedings.

F. Effective Assistance of Counsel

We decline to consider Defendants' claims that Ms. Baldwin provided ineffective or inadequate representation which warrant relief. (See, e.g. Omnibus Pre-Trial Motion of Timothy Mark Curley, p. 6, Sec. B, Failure to Provide Competent Representation). Claims of ineffectiveness may be brought only after the conclusion of direct appeal following conviction under the Post Conviction Relief Act, 42 Pa. C.S. §§ 9541-9546. See also, *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002).

F. Crime-Fraud Exception and Waiver

As to Ms. Baldwin's grand jury testimony related to Mr. Spanier, the Commonwealth and Defense Counsel dispute the applicability of the crime-fraud exception to the attorney-client privilege. Pursuant to the crime-fraud exception, "[p]rotection under attorney-client privilege is subject to limits, exceptions, and waiver...[t]he crime-fraud exception results in loss of the privilege's protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity." *In re Investigating Grand Jury of Philadelphia County*, No. 88-00-3503, 527 Pa. 432, 441-42, 593 A.2d 402, 406-07(1991). Because we find that Mr. Spanier failed to meet the burden of proving an individual attorney-client relationship with Ms. Baldwin, and the

University, as the privilege holder waived its privilege as to Ms. Baldwin's grand jury testimony, we need not consider the applicability of the crime-fraud exception.

For the same reason, we need not address whether Mr. Spanier waived the attorney-client privilege by his July 23, 2012 letters to the University Board of Trustees or the ABC News interview in the summer of 2012. (Transcript of Proceedings, December 17, 2013, Commonwealth Exhibit).

V. CONCLUSION

For all of the forgoing reasons, we enter the following:

ORDER

AND NOW, this 14th day of January, 2015, it is hereby **ORDERED** that:

As to Defendant Timothy M. Curley, the following Motions are **DENIED**:

1. Omnibus Pre-Trial Motion, filed November 1, 2012 at Docket No. 5165 CR 2011
2. Motion to Preclude Testimony of Attorney Cynthia Baldwin filed November 20, 2012 at Docket No. 1385 MD 2012
3. Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product, filed November 28, 2012

4. Motion to Suppress Grand Jury Testimony, to Dismiss Prior Charges and Incorporate Prior Motions, filed November 21, 2013
5. Joint Motion (with Graham B. Spanier)to Quash Criminal Complaint and Presentment, filed June 20, 2013

As to Defendant Gary C. Schultz, the following Motions are **DENIED**:

1. Omnibus Pre-Trial Motion, filed October 31, 2012 at Docket No. 5164 CR 2011
2. Motion to Preclude Testimony of Cynthia Baldwin filed November 20, 2012 at Docket No. 1386 CR 2012
3. Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product, filed November 27, 2012 at Docket Nos. 217 MD Misc. Docket 2010 and 5165 CR 2011
4. 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, 2103 at 1386 MD 2012
5. Motion to Suppress Grand Jury Testimony, to Dismiss and Incorporate Prior Motions filed October 18, 2013 at 5164 CR 2011 and 3616 CR 2013

As to Defendant Graham B. Spanier, Docket No. 3615 CR 2013, the following Motions are **DENIED**:

1. Motion to Preclude Testimony of Attorney Cynthia Baldwin filed November 20, 2012

2. Motion to Quash Criminal Complaint filed May 16, 2013 seeking quashal of the Perjury, Obstruction and Conspiracy to Commit Perjury and Obstruction charges based upon claims of violation of the attorney-client privilege, deprivation of the right to counsel, alleged improper presence in the grand jury session, violation of the right to effective assistance of counsel, violation of Due Process

Note: The court **RESERVES** ruling upon requests for quashal of charges of Child Endangerment, Failure to Report, Conspiracy to Commit Child Endangerment presented on grounds other than those addressed in this Opinion. Ruling upon these claims shall be made by separate Order.

3. As submitted to Grand Jury Judge:

    a. Motion to Quash Presentment, November 26, 2012
    b. Supplemental Motion to Quash Presentment or in the Alternative to Strike Defendant Grand Jury Testimony filed January 18, 2013

BY THE COURT:

Todd Hoover

TODD A. HOOVER, JUDGE

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