

COMMONWEALTH OF PENNSYLVANIA

: IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNTY, PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

: No. 5165 CR 2011; 3614 CR 2013

: CHARGE(S): Endangering the
: Welfare of Children (2 Counts);
: Obstructing the Administration of
: Law or Other Governmental
: Function; Criminal Conspiracy (To
: Commit Obstructing the
: Administration of Law or Other
: Governmental Function); Criminal
: Conspiracy (To Commit Perjury);
: Criminal Conspiracy (To Commit
: Endangering the Welfare of Children)

ORDER

AND NOW, to-wit, this _____ day of _____, 2014,
upon due consideration of Defendant Timothy Mark Curley's Post-Hearing
Memorandum, it is hereby ORDERED and DECREED that the motion is GRANTED and
that Counts Two and Three at Information 3614 CR 2013 are dismissed and that Mr.
Curley's January 12, 2011 testimony is suppressed.

BY THE COURT:

_____, J.

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Edward M. ...
DISTRICT ATTORNEY

WD

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**DEFENDANT CURLEY'S POST-HEARING MEMORANDUM FILED PURSUANT
TO THIS COURT'S JANUARY 17, 2014 ORDER AND AMENDED ORDER**

I. Introduction

Defendant Timothy Mark Curley has claimed deprivation of his right to counsel at the grand jury and a concomitant violation of grand jury secrecy and has moved to dismiss the perjury charge and summary offense at 5165 CR 2011. Alternatively, Mr. Curley has moved to suppress his grand jury testimony. Mr. Curley has claimed a violation of the attorney-client and work product privileges and has moved to dismiss some or all of the charges at 3614 CR 2013. In relation to both sets of charges, Mr. Curley also has claimed prosecutorial interference with his right to counsel and

prosecutorial misconduct where, under the totality of the circumstances, due process was denied which necessitates dismissal of some or all of the charges.^{1, 2}

Mr. Curley requested an evidentiary hearing on these motions. See Curley's Omnibus Pretrial Motion, 11/1/12, p.10; Defendant Curley's Reply to the Commonwealth's Answer to Defendant's Omnibus Pre-Trial Motion, 1/4/13, p. 1, 16; Defendant Timothy Mark Curley's Motion to Suppress his Grand Jury Testimony, to Dismiss Charges and to Incorporate Prior Motions Addressing Same, 11/1/13, p. 4, 8.³

On November 21, 2013, the Court scheduled a hearing for December 17 through December 20. Mr. Curley subpoenaed, among others, Cynthia Baldwin and former Deputy Attorney Generals Frank Fina and Jonelle Eschbach as witnesses for that hearing. These witnesses all filed motions to quash, which Mr. Curley opposed. At the Court's request, Mr. Curley also made extensive written proffers as to the witnesses' expected testimony and offered affidavits by experts. The Commonwealth did not subpoena any witnesses, and it joined the motions to quash. Following argument held on the record but in chambers on December 16 and 17, 2013, the Court granted the motions to quash filed by counsel for Ms. Baldwin, Ms. Eshbach, and Mr. Fina and declined to hear the witnesses proffered by Mr. Curley, including experts. The Court

¹ In his Omnibus Pre-Trial Motion, 11/1/12, Mr. Curley also raised and briefed a conflict of interest and ineffective assistance of counsel claims related to Ms. Baldwin's representation. Those issues were not included in the Court's January 17, 2014 Order. Mr. Curley believes the issues are separate from the issues addressed herein and, therefore, best litigated during the Omnibus Pretrial Motions cycle of litigation. As argued therein, Mr. Curley's grand jury testimony must be suppressed.

² On April 9, 2013, following briefing and argument before the Grand Jury Supervising Judge, that Judge determined that he did not have jurisdiction over any of these claims. On June 7, 2013, the Pennsylvania Supreme Court denied Mr. Curley's Petition for Review of the April 9 Memorandum Opinion and Order, "without prejudice for petitioner to raise the issues in the underlying criminal prosecution."

³ On June 18, 2013, prior to the preliminary hearing, Messrs. Curley, Schultz and Spanier requested delay of the preliminary hearing and requested the Court to hold an evidentiary hearing to address these pending motions. However, a preliminary hearing was held prior to the Court's addressing the present motion.

decided that the transcripts of record from the grand jury proceedings, along with exhibits and letters relating to that testimony admitted after the argument in open court on December 17, 2013, would be sufficient to decide the issue before the Court. The Commonwealth agreed and the defendants preserved their objections to the denial of an evidentiary hearing.

This Court has ordered that the parties submit memoranda which identify the pleadings on the main issues; propose findings of fact and discuss the cognizable relief for the main issues. Those discussions follow.

II. Identification of pleadings raising claims related to alleged deprivation of the right to counsel at grand jury proceedings and alleged breach of attorney-client privilege:

1. November 1, 2012: Curley's Omnibus Pre-Trial Motion

a. Requested Relief: Dismiss the charges and/or suppress Curley's grand jury testimony (p.11); evidentiary hearing (pp. 5-7, 9-10) (for violation of defendant's right to counsel (pp.4-6), right to effective counsel (pp. 6-7) and conflict-free counsel (pp. 6-7) as guaranteed under the Sixth Amendment to the United States Constitution, Article I, Section 9 of the Pennsylvania Constitution and 42 Pa.C.S.A. §4549(c)(1); for prosecutorial interference with defendant's right to counsel (pp. 7-10); and for structural defects in the grand jury proceeding (pp. 10-11));

2. November 28, 2012: Defendants Curley and Schultz' Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product

a. Requested Relief: Quash the (second) presentment as defective (for violation of the attorney client privilege under 42 Pa.C.S.A. §5916 (pp. 6, 7));

3. January 4, 2013: **Defendant Curley's Reply to the Commonwealth's Answer to Defendant's Omnibus Pre-Trial Motion**

a. Requested Relief: Return the parties to the status quo ante (p. 16); an evidentiary hearing in order to further demonstrate the factual bases of the claims (p. 16) (for violation of violation of defendant's right to conflict-free counsel as guaranteed under the Sixth Amendment to the United States Constitution, Article I, Section 9 of the Pennsylvania Constitution and 42 Pa.C.S.A. §4549(c)(1) and (c)(4) (*passim*); for violation of secrecy of grand jury under 42 Pa.C.S.A. §4549(d) and Rule 231 of the Pennsylvania Rules of Criminal Procedure (p.16); and for structural defects in the grand jury process (p.16));

4. January 18, 2013: **Defendant Curley's Reply to Commonwealth's Answer to Joint Motion to Quash Presentment**

a. Requested Relief: Quash the presentment and dismiss criminal charges; suppress Curley's Grand Jury testimony and dismiss all charges as fruits of the poisonous tree (p. 25) (for structural breakdown of grand jury proceedings (pp. 5-7); for violation and abrogation of the attorney client privilege under 42 Pa.C.S.A. §5916 without prior adjudication (pp. 8-20); for prosecutorial misconduct (pp. 20-25));

5. November 21, 2013: **Defendant Timothy Mark Curley's Motion to Suppress his Grand Jury Testimony, to Dismiss Charges and to Incorporate Prior Motions Addressing Same**

a. Requested Relief: dismiss the criminal informations at 5165 CR 2011 and 3614 CR 2013; suppress Mr. Curley's statements at the grand jury; alternatively, order an evidentiary hearing at which Mr. Curley is permitted to submit expert testimony on the issues regarding Ms. Baldwin's representation (p. 8) (for violation of defendant's right to conflict-free counsel as guaranteed under the Sixth Amendment to the United States Constitution, Article I, Section 9 of the Pennsylvania Constitution and 42 Pa.C.S.A. §4549(c)(1) and (c)(4) (pp. 4, 6); for violation of the attorney client privilege under 42 Pa.C.S.A. §5916 (p. 6); for violation of secrecy of grand jury under 42 Pa.C.S.A. §4549(d) and Rule 231 of the Pennsylvania Rules of Criminal Procedure (p. 6)).

6. Additionally, Curley filed the following motions to join raising claims related to alleged deprivation of right to counsel at grand jury proceedings and alleged breach of attorney-client privilege: January 18, 2013: **Defendant Curley's Motion to Join Schultz' Reply to Commonwealth's Answer to Joint Motion to Quash.**

a. Requested Relief: Permit Curley to join Schultz' reply; suppression of Curley and Schultz' grand jury testimony; evidentiary hearing (for deprivation of right to counsel (p. 6); for violation of defendant's right to conflict-free counsel (pp. 7-10); for prosecutorial misconduct by participating in deprivation of right to counsel at grand jury and by participating in violation of grand jury secrecy by allowing Baldwin into the grand jury (p. 10) and for prosecutorial invasion of the defense camp and intrusion into the attorney-client relationship (p. 11) compounded by using the information in the Presentment No. 29)

7. June 20, 2013: **Defendant Timothy Mark Curley's Motion to Join Graham B. Spanier's Motion and Memorandum of Law in Support of Motion to Quash Criminal Complaint and Presentment.**

a. Requested Relief: Permit Curley to join Spanier's Motion and Memorandum of Law; quash charges [Counts One, Four, Five and Seven, i.e., perjury, obstruction, and conspiracy to commit perjury and obstruction] (for violation of the attorney-client privilege (p.6); for deprivation of right to counsel at the grand jury (p.7); for violation of grand jury secrecy based on Baldwin's improper presence at the grand jury (p.7); for violation of right to effective assistance of counsel (p.7)).

III. Findings of Fact

A. Representation of Mr. Curley at the Grand Jury Proceeding on January 12, 2011

1. On February 15, 2010, Cynthia A. Baldwin became Vice President and General Counsel of The Pennsylvania State University. Baldwin Grand Jury Notes of Testimony 10/26/12 (hereinafter Baldwin NT 10/26/12) at 6.

2. On or about December 28, 2010, Ms. Baldwin was contacted by the Pennsylvania Office of the Attorney General (hereinafter OAG) regarding the Sandusky investigating grand jury. She agreed to accept a subpoena duces tecum (referred to as Subpoena 1179) directed to the University and personal subpoenas for Messrs. Curley, Gary Schultz, the retired Vice President of Finance and Business, and Joseph V. Paterno, the head coach of the football team. Baldwin NT 10/26/12 at 11-12.⁴

⁴ Michael McQueary testified at the grand jury on December 14, 2010. Preliminary Hearing Notes of Testimony of July 29, 2013 at 62.

3. At the time, Mr. Curley was the Pennsylvania State University's Athletic Director, who reported to the University's president, Graham B. Spanier. Curley Grand Jury Notes of Testimony (hereinafter Curley NT 1/12/11) at 5.

4. Mr. Spanier indicated to Ms. Baldwin that she could represent Messrs. Curley, Schultz and Paterno in relation to the grand jury proceedings. *Id.*

5. It is customary for attorneys to meet with clients before grand jury appearances and Ms. Baldwin met privately ("one-on-one") with Mr. Curley. Baldwin Grand Jury Testimony 10/26/12 at 16-17.

6. On January 12, 2011, at approximately 9:04 am, Timothy M. Curley and Gary Schultz appeared before Grand Jury Supervising Judge Barry Feudale. Mr. Curley appeared with his legal counsel, Attorney Cynthia Baldwin. Grand Jury Colloquy 1/12/11 (hereinafter Colloquy 1/12/11).

7. Attorneys James Barker, Frank Fina and Jonelle Eshbach of the Office of Attorney General were present at the proceeding. Colloquy 1/12/11 Cover Sheet.

8. When Messrs. Curley and Schultz were presented for swearing of the oath, Judge Feudale directly asked, "Represented by?" Ms. Baldwin responded, "My name is Cynthia Baldwin, general counsel for Pennsylvania State University." Judge Feudale asked, "Will you be providing representation for both of the identified witnesses?" Ms. Baldwin responded, "Gary is retired but was employed by the University and Tim is still an employee." Colloquy 1/12/11 at 8.

9. Judge Feudale immediately conducted a colloquy on the record with Mr. Curley and Mr. Schultz with Ms. Baldwin present. Colloquy 1/12/11 at 8-12.

10. Judge Feudale advised Messrs. Curley and Schultz that as witnesses before the Grand Jury, they had certain rights including, the right to the advice and assistance of a lawyer; the right to the services of a lawyer with whom they may consult concerning all matters related to his appearance before the Grand Jury; that they may confer with their lawyer throughout the grand jury process. Colloquy 1/12/11 at 8-9.

11. Judge Feudale advised Mr. Curley that his lawyer may be present with him during his grand jury testimony. Colloquy 1/12/11 at 9. Judge Feudale advised Mr. Curley that he could consult counsel and “confer with her at that time.” Colloquy 1/12/11 at 9. Judge Feudale advised Mr. Curley that if a problem arose regarding his testimony, he could “stop the questioning and appear before me, either alone or in this case with your counsel” and he would rule on the matter. Colloquy 1/12/11 at 9.

12. Judge Feudale did not conduct a colloquy with Messrs. Curley and Schultz regarding multiple representation of clients by the same attorney.

13. Judge Feudale did not conduct a colloquy with Messrs. Curley and Schultz regarding waiver of the right to counsel at the grand jury.⁵

14. The Commonwealth did not object to Ms. Baldwin’s representation of Mr. Curley.

⁵ The Commonwealth has argued that Mr. Curley waived his right to counsel at the grand jury because he knew Ms. Baldwin was General Counsel to The University. Commonwealth Answer to Joint Motion to Quash Presentment at 4-5. The claim is meritless. A court should indulge every reasonable presumption against waiver of a fundamental right. *Commonwealth v. Bryant*, 855 A.2d 726, 738 (Pa. 2004), citing *Commonwealth ex rel. McCray v. Rundle*, 202 A.2d 303, 305 (Pa. 1964). To ensure that a waiver of right to counsel is knowing, intelligent and voluntary, the court must conduct a “probing colloquy, which is a searching and formal inquiry as to whether the individual is aware both of the right to counsel and of the significance and consequences of waiving the right.” *Commonwealth v. Spatz*, 18 A.3d 244, 264 (Pa. 2011), citing *Commonwealth v. Starr*, 664 A.2d 1325-26 (Pa. 1995); see Curley’s Reply to Commonwealth’s Answer to Joint Motion to Quash Presentment at 10.

15. Judge Feudale granted attorney Eshbach's motion requesting the presence in the grand jury room of the OAG agent and state trooper. Colloquy 1/12/11 at 11-12.

16. Neither Judge Feudale nor the Commonwealth made any attempt to exclude Ms. Baldwin from the secret grand jury proceedings during Mr. Curley's testimony.

17. On January 12, 2011, at approximately 11:20am, Mr. Curley appeared before the Grand Jury to testify. Ms. Baldwin accompanied him into the grand jury room. Curley NT 1/12/11 at 3.

18. In addition to the agent and state trooper, Mr. Fina and Ms. Eshbach were present for Mr. Curley's grand jury testimony. Curley NT 1/12/11 at 1.

19. When asked if he had counsel with him at the grand jury, Mr. Curley replied, "Yes, I do." When asked to identify his counsel, Mr. Curley stated, "My counsel is Cynthia Baldwin." Curley NT 1/12/11 at 3.

20. At that time, Ms. Baldwin did not dispute or seek to qualify or correct Mr. Curley's characterization that she was his counsel at the grand jury proceeding. *Id.*

21. At no time during Mr. Curley's testimony did Mr. Fina or Ms. Eshbach question, challenge or seek clarification about Mr. Curley's statement that his "counsel is Cynthia Baldwin." Curley NT 1/12/11 at 3-4.

22. During his testimony, Ms. Eshbach asked Mr. Curley "to step outside with your counsel and we will find out if the grand jury has any additional questions for you."

The record reflects that "witness and counsel" left the room and then returned and questioning resumed. Curley NT 1/12/11 at 25-26.

23. Mr. Curley reasonably believed that Ms. Baldwin was his personal counsel for purposes of the grand jury proceedings.

24. It is not contested that Ms. Baldwin was a practicing member of the Pennsylvania Bar.

25. During the grand jury proceeding, Mr. Curley testified that Mr. McQueary did not describe the Sandusky shower incident as being sexual in nature. Curley NT 1/12/11 at 8, 12, 21.

26. Mr. Curley testified that the 2002 (which date was later revised by the Commonwealth to "2001") shower incident was not reported to the police and was only reported to The Second Mile charity. Curley NT 1/12/11 at 12-13

27. There is no evidence on this record that Ms. Baldwin assessed the risk of his appearance before the grand jury and his exposure to criminal liability, or that she communicated any such risk or exposure to Mr. Curley.

28. On April 13, 2011, Ms. Baldwin appeared in-chambers before Judge Feudale to object to the scope of a grand jury subpoena for Penn State University e-mails. Grand Jury Transcript 4/13/11 (hereinafter GJT 4/13/11). Present during the proceeding for the Office of Attorney General were Andrea McKenna, David Gorman, Ms. Eshbach and Mr. Fina. GJT 4/13/11 Cover Sheet.

29. Ms. Baldwin told Judge Feudale that her objection to the subpoena had nothing to do with Penn State's willingness to cooperate because "we have cooperated

fully," "that was not a problem in our cooperation," and "we will try to cooperate as we have been all the way through." GJT 4/13/11 at 4-5.

30. Judge Feudale permitted Mr. Fina to present ex parte an offer regarding the parameters of the investigation to justify the scope of the subpoena. GJT 4/13/11 at 7. During the ex parte proceeding, Mr. Fina told Judge Feudale that in 2002 Michael McQueary "actually observed Sandusky in the Lash (sic) building in a shower with what appeared to be an 8-10 year old boy having anal intercourse with the child." GJT 4/13/11 at 9.

31. Mr. Fina told Judge Feudale that Mr. Curley and Mr. Schultz testified before the Grand Jury and denied that McQueary told them the contact he observed was sexual. Mr. Fina stated that, "They're not consistent in their stories," and there are "obvious credibility problems" with the Curley and Schultz testimony. GJT 4/13/11 at 10.

32. Mr. Fina justified the scope of the subpoena for e-mails because "there could be a situation here where people are endeavoring to cover up their knowledge of Mr. Sandusky's misconduct." GJT 4/13/11 at 13.

33. After further explanation by Mr. Fina of the OAG electronic information security measures, Judge Feudale called Ms. Baldwin into chambers and discussed a solution to comply with the subpoena as issued. GJT 4/13/11 at 22-28.

34. University President Graham B. Spanier was scheduled to testify before the grand jury that same day. After resolution of the subpoena matter and immediately before conducting a colloquy with Mr. Spanier, Judge Feudale asked Ms. Baldwin, "Cindy, just for the record, who do you represent?" Baldwin replied, "The University."

The Judge asked, "The university solely?" Ms. Baldwin answered, "Yes, I represent the university solely." GJT 4/13/11 at 28.

35. Immediately thereafter, Mr. Spanier was called into chambers and Judge Feudale conducted a colloquy with Mr. Fina, Ms. Eshbach and Ms. Baldwin present. GJT 4/13/11 at 28-29.

36. As with Mr. Curley, Judge Feudale advised Mr. Spanier of his right to have counsel present during his testimony; to consult with counsel and if a problem arose regarding his testimony, he could "appear before me, either alone or, of course, in this case with your counsel" to resolve the matter. GJT 4/13/11 at 30-31.

37. After advising Mr. Spanier of his rights, the Judge asked the Commonwealth if there was anything else. Mr. Fina answered, "No, thank you." GJT 4/13/11 at 33.

38. As with Mr. Curley, the Commonwealth did not seek to exclude Ms. Baldwin from the secret grand jury proceeding. Similarly, Judge Feudale did not exclude Ms. Baldwin from the secret grand jury proceeding nor did he conduct a colloquy regarding waiver of Mr. Spanier's right to counsel.

39. On November 7, 2011, Mr. Curley was charged with one count of perjury and the summary offense of failure to report. See Court of Common Pleas of Dauphin County, Pennsylvania No. 5165 CR 2011. Attorney Caroline M. Roberto entered her appearance on behalf of Mr. Curley at that time.

40. On January 12, 2011, the prosecution was investigating, inter alia, the steps taken by University employees and administrators regarding reporting Mr.

Sandusky's conduct to the authorities. Mr. Curley, as Athletic Director, was in the chain-of-command of University officials. As such, Mr. Curley's interests were not aligned with the University regarding failure to report Sandusky's conduct.

41. As she explicitly told Judge Feudale, Ms. Baldwin intended to fully cooperate with the Office of the Attorney General on behalf of the University.

42. Allowing Mr. Curley's testimony without seeking or obtaining an agreement from the prosecution was not in Mr. Curley's best interest. Mr. Curley's interest in the grand jury proceeding was not aligned with that of the University's interest of fully cooperating with the prosecution.

B. Mr. Curley Asserted the Attorney-Client and Work Product Privileges

43. On June 11, 2012, attorney Roberto advised Charles A. DeMonaco, counsel for Ms. Baldwin, that Mr. Curley asserted his attorney-client and work product privileges based upon Ms. Baldwin's previous representation. The privilege was invoked in response to all requests from the Attorney General, the United States Attorney's office, the Louis Freeh investigation and all others seeking information or responses related to Mr. Curley. See Curley Record, Exhibit D.

44. On June 22, 2012, Mr. DeMonaco advised attorney Roberto that Ms. Baldwin was counsel for The Pennsylvania State University and represented the interests of the administrators of the University in their capacity as agents so long as their interests were aligned with the University. Mr. DeMonaco advised counsel for The University, Michael Mustokoff, and others of Mr. Curley's assertion of the privilege. See Curley Record, Exhibit E.

45. On October 2, 2012, Mr. Mustokoff sent a letter to Judge Feudale advising that for purposes of the grand jury investigation, The University agreed to waive assertion of attorney-client privilege regarding certain actions taken by the Office of General Counsel regarding compliance with the Commonwealth's investigative efforts related to Gerald Sandusky. See Curley Record, Exhibit G.

46. On October 11, 2012, counsel for Mr. Curley sent a letter to Judge Feudale asserting the attorney-client and work product privilege regarding Ms. Baldwin's representation during the grand jury proceedings. See Curley Record, Exhibit I. Judge Feudale did not acknowledge or respond to counsel regarding the assertion of privilege. Grand Jury Transcript 10/22/12 (hereinafter, GJT 10/22/12) at 11-15 (Judge Feudale discusses a letter that he intended to send to counsel to acknowledge receipt of the letters and to explain to counsel that he would not deal with any matters absent a motion.)

47. On October 19, 2012, Mr. Mustokoff, sent a letter to Mr. Fina which clarified the waiver of The University's privilege and specifically excluded from the waiver "any communication between Justice Baldwin and Messrs. Schultz and Curley." See Curley Record, Exhibit K.

48. Mr. Mustokoff did not waive the attorney-client privilege on behalf of Mr. Curley.

49. Mr. Curley timely asserted the attorney-client and work product privileges.

50. Mr. Curley did not waive the attorney-client and work product privileges.

C. Mr. Curley's Attorney-Client and Work Product Privileges were Violated

51. On October 22, 2012, a conference was conducted in chambers before Judge Feudale to discuss the privilege issue raised by Ms. Baldwin's anticipated grand jury testimony. Present were Frank Fina for the OAG, attorney DeMonaco for Ms. Baldwin and attorney Mustokoff for The University. GJT 10/22/12.

52. Mr. Fina took the firm position that any determination of Mr. Curley's privilege matter must be delayed until after Ms. Baldwin's grand jury testimony as grand jury secrecy must be preserved. GJT 10/22/12 at 11. Mr. Fina acknowledged that his position may be problematic but it was a "risk that the Commonwealth is willing to bear."
Id.

53. Mr. Fina assured Judge Feudale and counsel who were present that he would not ask Ms. Baldwin questions bearing on privileged communication with Mr. Curley. GJT 10/22/12 at 12.

54. Nevertheless, Mr. Fina stated the Commonwealth's position that Ms. Baldwin did not represent Mr. Curley "individually" during the grand jury proceeding. GJT 10/22/12 at 11.

55. On October 26, 2012, Ms. Baldwin testified before the grand jury. Upon questioning by Mr. Fina, Ms. Baldwin testified that she had discussions with Mr. Curley in January 2011 and he told her that he had no materials responsive to the grand jury subpoena 1179. NT 10/26/12 at 17-18. She testified that Mr. Curley never told her about 1998 or 2001 e-mails related to the incident. NT 10/26/12 at 19. She stated that she had to rely on "Athletics" to gather information to respond to the subpoena. NT 10/26/12 at

73. Ms. Baldwin testified that she first found out about the shower incident from the OAG and not from Mr. Curley. NT 10/26/12 at 71-72.

56. Ms. Baldwin testified that although she accompanied Mr. Curley to his grand jury testimony, she never told Mr. Spanier or any members of the Board of Trustees the substance of his testimony. NT 10/26/12 at 51.

57. The attorney-client privilege was violated when, in response to Mr. Fina's questions, Ms. Baldwin testified regarding communication between herself and Mr. Curley related to the grand jury proceedings.

58. The Commonwealth facilitated the circumvention of Mr. Curley's privilege by asking specific questions related to communications between Mr. Curley and Ms. Baldwin.

59. On November 1, 2012, Mr. Curley was charged with Endangering the Welfare of Children, Conspiracy and Obstruction of Justice. The presentment specifically claims that during the course of the grand jury investigation, Mr. Curley failed to comply with subpoena 1179 and obstructed justice by failing to turn over documents related to Mr. Sandusky. The presentment names Cynthia A. Baldwin as a witness against Mr. Curley. The presentment contains privileged information conveyed to Ms. Baldwin by Mr. Curley in preparation for his grand jury appearance. The presentment provides that Mr. Curley "... personally and directly assured her [Baldwin] that [he] knew of no documents involving alleged misconduct or inappropriate conduct by Jerry Sandusky. [He] also assured her that [he] would look and see if [he] could find any such information or documentation." Presentment at 21. This information came from

discussions between Mr. Curley and Ms. Baldwin in preparation for this appearance before the grand jury and disclosure of the communication as is evidenced by the Presentment constitutes a violation of the privilege. Mr. Curley is charged with Obstruction of Justice and Conspiracy in part based upon his failure to produce "pertinent documents and materials involving Sandusky."

D. The Commonwealth Facilitated the Breach of Attorney-Client Privilege

60. On April 13, 2011, Ms. Baldwin told Judge Feudale that she represented The University "solely". On January 12, 2011, when Ms. Baldwin appeared with Mr. Curley at the grand jury, she failed to clarify her status on the record or correct the misapprehension created by her silence.

61. Ms. Baldwin's sole representation of The University impaired her ability to effectively represent and legally protect Mr. Curley as an individual witness before the investigating grand jury.

62. As Mr. Fina told Judge Feudale on October 22, 2012, the Commonwealth was aware that Ms. Baldwin did not represent Mr. Curley individually before the grand jury. The Commonwealth did not seek to clarify the record before Judge Feudale or the grand jury when Mr. Curley stated on January 12, 2011, that "my counsel is Cynthia Baldwin," even though it knew Mr. Curley was not represented by Ms. Baldwin.

63. As stated by Mr. Fina on April 13, 2011, after investigators interviewed Michael McQueary, the grand jury investigation broadened to include a possible cover-up of Mr. Sandusky's conduct by the University administrators.

64. Mr. Curley was more than a ministerial witness before the grand jury when he was subpoenaed to testify on January 12, 2011. Mr. Curley was being investigated for potentially covering up the criminal activities of Mr. Sandusky.

65. The Commonwealth's failure to object or otherwise bring to Judge Feudale's attention the false impression created by Ms. Baldwin's representation of Mr. Curley constructively denied legal counsel to Mr. Curley for purposes of the grand jury proceeding.

66. Under the totality of circumstances surrounding Mr. Curley's appearance before the investigating grand jury, the Commonwealth's failure to correct the false impression created by Ms. Baldwin's representation and circumvention of the attorney-client privilege constitutes prosecutorial misconduct.

IV. Legal Discussion Regarding Cognizable Relief For The Alleged Violations Of Attorney-Client Privilege As Sought In Defendant's Motion To Quash The Criminal Complaint And Motion To Quash The Presentment.⁶

The appropriate and cognizable relief, according to well-established case law, for the violation of the attorney-client privilege is dismissal of the obstruction of justice and conspiracy charges at Counts Two and Three of Information 3614 CR 2013.

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. 5916", ***Commonwealth v. Maguigan***, 511 A.2d 1327, 1333 (Pa. 1986), and provides that "[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

⁶ We are mindful of the Court's January 17, 2014 Order and, pursuant to paragraph 3, will not address the remedy for constructive denial of counsel. As provided in our Omnibus Motion and Reply, the proper remedy is suppression of Mr. Curley's grand jury testimony.

to disclose the same, unless in either case this privilege is waived upon the trial by the client.” The generally recited requirements for assertion of the attorney-client privilege are:

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

Commonwealth v. Mrozek, 657 A.2d 997, 998 (Pa. Super. 1995). Also, see ***Gillard v. AIG Insurance Company***, 15 A.3d 44 (Pa. 2011) which broadens the privilege to include what the attorney communicates to the client in addition to what the client communicates to the attorney.

The first two prongs are easily met: Mr. Curley went to the grand jury represented by Ms. Baldwin, a member of the bar in good standing. The grand jury statute does not contemplate anything but individual representation. See 42 Pa.C.S.A. §4549(c)(1).⁷ We take the position that pursuant to the record before this Court, Mr. Curley reasonably believed Ms. Baldwin’s representation was in his personal capacity.⁸

The third prong of this test, considering whether “The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers,

⁷ Moreover, the legislative history of the Act demonstrates the intent of the legislature that, “the inclusion of defense counsel within the grand juries. . . [i]s the most important element to guard against potential abuse. . . The only way that we can guarantee that any individual who is called before the grand jury will understand what constitutional rights are afforded him is to allow him to have a lawyer present.” 4 Pa. Legis. J. 3097, 3162 (Sept. 21, 1978)(statement of Rep. Anthony Scirica).

⁸ Mr. Curley had a right to counsel in his individual capacity. 42 Pa.C.S.A. §4549(c); Pa.R.Crim.P. 231. The statute and rule do not contemplate “agency” capacity and the Commonwealth has cited to no Pennsylvania case which permits such representation.

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" essentially asks whether the communication was privileged and confidential. At the grand jury, Ms. Baldwin testified about her privileged and confidential conversations with Mr. Curley. Baldwin NT 10/26/12 at 16-17 (asking about the response to subpoena 1179: "And let's go through each one. Tell us about your conversations - - We'll start with Tim Curley and what you discussed with him, what he need to do to comply with the subpoena and what happened"; "Did there come a point when you had these conversations one-on-one with these individuals or were there times when some or all of them were together and you had these conversations with him, if you recollect?"; "Again, staying with Mr. Curley, did he get back to you at any point and tell you whether or not he had evidence or materials that would be responsive to Subpoena 1179?"). The testimony provided by Ms. Baldwin violated Mr. Curley's privilege whether this Court finds the protection was personal to him or to the University as Mr. Curley's principal. Neither Mr. Curley nor the University waived the privilege regarding communication between Mr. Curley and Ms. Baldwin.

Turning to the fourth and final prong, Mr. Curley unequivocally claimed the privilege, as demonstrated by the letters to Attorney DeMonaco, Ms. Baldwin's counsel, and to the Grand Jury Supervising Judge. TMC Exhibit D, 6/11/12 Letter from Roberto to DeMonaco (requesting that he and Ms. Baldwin assert the privilege in response to any requests "seeking information or response related to Mr. Curley"); TMC Exhibit I

10/11/12 Letter from Roberto to Feudale (asserting the privilege). There is no evidence on the record that Mr. Curley waived the privilege.

Alternatively and even if this Court were to decide that Ms. Baldwin only represented Mr. Curley as an "agent" of the University⁹, it nonetheless remains true that the University never waived the attorney-client privilege as to communications between Ms. Baldwin and Mr. Curley. See TMC Exhibit G, 10/2/12 letter of Mustokoff to Judge Feudale (only waiving privilege "as to Office of General Counsel's efforts to comply with the Commonwealth's grand jury investigation") and 10/19/12 letter of Mustokoff to Fina (excepting from the privilege waiver "any communications between Justice Baldwin and Messrs. Schultz and Curley").

Having established that the attorney client privilege was violated when, in response to Mr. Fina's questions, Ms. Baldwin testified regarding the above-discussed communication between herself and Mr. Curley related to the grand jury investigation of Jerry Sandusky, we now turn to the question of relief. As demonstrated in the following discussion, because this information formed the basis of the Obstruction of Justice and Conspiracy charges, counts two and three must be dismissed.

Privileged communications are inadmissible. 42 Pa.C.S.A. §5916. Mr. Curley has not waived the privilege and counsel for the University specifically excluded from its waiver communications with Mr. Curley. Counsel to the privileged information must

⁹ Mr. Curley strongly disputes this characterization of the relationship. This concept of "hybrid" representation at the grand jury is in contradiction to the Grand Jury Act, 42 Pa.C.S.A. §4549 (c)(1); grand jury secrecy and was firmly rejected by another Dauphin County Grand Jury Supervising Judge. *In re Fifth Pennsylvania Statewide Investigating Grand Jury [no. 2]*, 50 Pa.D & C. 3d 617, 1987 WL 61211 (Dauphin C. CCP); see Defendant Curley's Reply to Commonwealth's Answer to Joint Motion to Quash Presentment, 1/18/13, at 11-12 for further discussion of that case.

keep confidential not only the communication from her client but also the communication to her client. *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011). If admitted in error at trial, the verdict must be vacated. *E.g.*, *Commonwealth v. Mrozek*, 657 A.2d 997 (Pa. Super. 1995). Clearly, privileged communication between Mr. Curley and Ms. Baldwin would be precluded at trial under well-established case law. Here, the privileged communication was presented before the grand jury. Ms. Baldwin's grand jury testimony forms the foundation of the obstruction of justice ("he personally and directly assured her that [he] knew of no documents involving alleged misconduct or inappropriate conduct by Jerry Sandusky." Presentment at 21) where he is charged with Obstruction of Justice at count two for "misle[ading] the 30th Statewide Grand Jury regarding the Jerry Sandusky investigation and/or inform[ing] the Pennsylvania State University (Ms. Baldwin) that he had no knowledge of any information or documentation relating to inappropriate conduct between Jerry Sandusky and minor boys when he was in possession of relevant documents and information that were sought by law enforcement." Count Two at Information 3614 CR 2013. Dismissal of charges is the only remedy available for violation of the attorney-client privilege under these circumstances. See *United States v. Marshank*, 777 F.Supp. 1507 (N.D.Cal. 1991)(dismissing indictment where prosecutor interfered with the attorney-client relationship by using information from defense counsel to gather and indict defense counsel's former client).

Dismissal of the infected charges is also proper where it is shown that the conduct of the prosecutor at the grand jury caused prejudice. *Commonwealth v. Williams*, 565 A.2d 160, 164 (Pa. Super. 1989)(adopting test announced in *The Bank*

of Nova Scotia v. United States, 487 U.S. 250 (1988)). Prejudice will have occurred 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.*

In *Commonwealth v. Williams*, 565 A.2d 160, 163, the Superior Court rejected Williams’ claim of prosecutorial misconduct which he argued based on the prosecutor’s permitting him to testify uncounseled and non-immunized in a grand jury proceeding in which he was a “target”. The Superior Court rejected Williams’ prosecutorial misconduct claim holding that a ‘target’ is not entitled to be advised of this status, and he is not entitled to different treatment in a grand jury than any other witness; the judge need not conduct a more probing colloquy, but may utilize the standard colloquy. 565 A.2d at 165-66. Mr. Curley does not complain that the Commonwealth’s failure to advise him of his “target” status alone constituted misconduct, but instead, argues that the circumstances of his representation at the grand jury were sufficiently uncertain to require clarification. Thus, the critical distinctions between the present case and *Williams* is that Williams’ grand jury representation was not in doubt—he was without counsel whereas Mr. Curley went to the grand jury accompanied by counsel who now denies that she represented him. Absent clarification, Mr. Curley’s colloquy was misleading and suggested that he in fact was represented. As such, the colloquy was inadequate.

The Commonwealth chose not to call Ms. Baldwin as a witness at the preliminary hearing on this matter. The criminal charges were subsequently held for court over

defendant's objection. Mr. Curley intends to file a habeas corpus petition challenging the sufficiency of the evidence of the obstruction and conspiracy counts. For purposes of this proceeding, it is clear that Ms. Baldwin's grand jury testimony substantially influenced the grand jury's recommendation to file the charges despite the evidence presented at the preliminary hearing.

The record presents a situation where the prosecution frustrated Mr. Curley's attempts to protect the privilege. Messrs. Mustokoff and DeMonaco relied on Judge Feudale to determine the contours of the privilege, as did Mr. Curley. GJT 10/22/12 at 6-10. However, the prosecution took the position that Ms. Baldwin should testify first and the privilege should be adjudicated later. GJT 10/22/12 at 11.

The position rested upon the need for grand jury secrecy which, according to the prosecution, would be sacrificed if counsel for Messrs. Curley and Schultz were permitted to litigate the privilege issue before Ms. Baldwin's testimony.¹⁰ The history of this case demonstrates that, on January 12, 2011, the Commonwealth was not concerned with grand jury secrecy when it failed to object to Ms. Baldwin's presence during Mr. Curley's grand jury testimony, knowing she was not his counsel and in clear violation of the Grand Jury Act and rules of criminal procedure.

Unfortunately, it appears that the Commonwealth takes an opportunistic view of grand jury secrecy and attorney-client privilege adjudication depending on what best serves its investigatory interests at the time. Such conduct is unacceptable in the Pennsylvania grand jury context. Prosecutors are held to a higher standard and must protect the due process interests inherent in the grand jury process. The prosecution's

¹⁰ Counsel could have signed a secrecy oath as is Judge Krumenacker's practice.

position on October 22, 2012 that Ms. Baldwin never represented Mr. Curley personally might appear more plausible had it objected or otherwise raised the matter before Judge Feudale at the grand jury on January 12, 2011. Instead, its silence then makes its position untenable now.

Moreover, on October 22, 2012, the Commonwealth proffered to Judge Feudale that questioning of Ms. Baldwin would remain within the confines of the University's waiver. That waiver specifically excluded communication between Ms. Baldwin and Mr. Curley, 10/19/12 Mustokoff letter to Fina, Exhibit K. However, once inside the grand jury room, questioning of Ms. Baldwin did not remain so confined. As demonstrated, Ms. Baldwin was repeatedly asked questions regarding privileged communication with Mr. Curley. Therefore, the cumulative effect of the errors manifest in this case require relief.

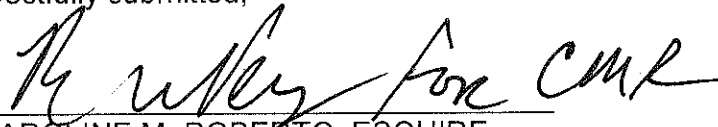
This Court need not find prosecutorial misconduct to grant the relief requested although defendant asserts that the record on the matter speaks for itself. As provided supra., the only remedy available to redress the violation of attorney-client privilege is dismissal of those charges informed by the breach.

V. Conclusion

For the reasons stated herein and those contained in previously filed motions and pleadings, Mr. Curley requests: (1) dismissal of Counts Two and Three at Information 3614 CR 2013 and (2) that his January 12, 2011 testimony be suppressed.

Respectfully submitted,

By:


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COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS
	: DAUPHIN COUNTY, PENNSYLVANIA
v.	:
	:
TIMOTHY MARK CURLEY	: No. 5165 CR 2011; 3614 CR 2013
	:
	: CHARGE(S): Endangering the
	: Welfare of Children (2 Counts);
	: Obstructing the Administration of
	: Law or Other Governmental
	: Function; Criminal Conspiracy (To
	: Commit Obstructing the
	: Administration of Law or Other
	: Governmental Function); Criminal
	: Conspiracy (To Commit Perjury);
	: Criminal Conspiracy (To Commit
	: Endangering the Welfare of Children)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within motion was hand-delivered, this 18th day of February, 2014, to the following:

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 President Judge
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 Harrisburg, PA 17101

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A handwritten signature in cursive script that reads "Caroline M. Roberto for Curley". The signature is written in black ink and is positioned above a horizontal line.

Caroline M. Roberto, Esquire
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