

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

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

: 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)

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DAUPHIN COUNTY,
PENNA

**DEFENDANT CURLEY'S MOTION TO JOIN
GARY C. SCHULTZ' MOTION FOR FULL DISCLOSURE OF GRAND JURY
TESTIMONY OF CYNTHIA BALDWIN AND ANY MOTIONS, ARGUMENT,
HEARINGS OR RULINGS RELATING TO THAT TESTIMONY**

AND NOW, comes the defendant, Timothy Mark Curley, by and through his attorney, Caroline M. Roberto, Esquire, and respectfully files this Motion to Join Graham B. Spanier's Motion and Memorandum of Law in Support of Motion to Quash Criminal Complaint and Presentment, and in support thereof, avers as follows:

1. Defendant Timothy Mark Curley hereby requests to join in, adopt, and incorporate the arguments raised in defendant Gary C. Schultz' Motion for Full Disclosure of Grand Jury Testimony of Cynthia Baldwin and Any Motions, Argument, Hearings or Rulings Relating to that Testimony. Attached hereto as Exhibit A.

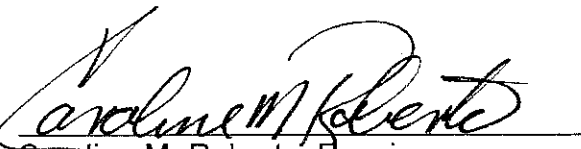
2. The request by Mr. Schultz and the arguments raised in support thereof apply equally to Mr. Curley, and the positions taken by Mr. Schultz in his Motion are consistent with those of Mr. Curley.

3. Joining in the aforementioned Motion will avoid duplicate efforts and reduce the burden on the Court without prejudice to the Commonwealth.

4. Mr. Curley therefore formally requests to join Mr. Schultz' Motion.

WHEREFORE, Defendant respectfully requests this Honorable Court enter the accompanying Order permitting Mr. Curley to join Mr. Schultz' Motion for Full Disclosure of Grand Jury Testimony of Cynthia Baldwin and Any Motions, Argument, Hearings or Rulings Relating to that Testimony.

Respectfully submitted,

By: 
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Attorney for Defendant, Timothy Mark Curley
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IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : No. CP-22-CR-3616-2013
 :
 GARY C. SCHULTZ, :
 : UNDER SEAL
 Defendant. :

**MOTION FOR FULL DISCLOSURE OF GRAND JURY TESTIMONY OF
CYNTHIA BALDWIN AND ANY MOTIONS, ARGUMENT, HEARINGS OR
RULINGS RELATING TO THAT TESTIMONY**

TO THE HONORABLE TODD HOOVER:

AND NOW, comes the defendant, Gary C. Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully file the within Motion for Disclosure of Grand Jury Testimony of Cynthia Baldwin and any related proceedings or filings Pursuant to 42 Pa.C.S § 4549(b), Rule 573(2)(a)(iv) of the Pennsylvania Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution, and states the following in support:

INTRODUCTION

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

2. On November 1, 2012, Curley and Schultz were also charged by Complaint with two counts of Endangering Welfare of Children in violation of 18

Pa.C.S. § 4304, a felony of the third degree, and Obstruction of Justice, a violation of 18 Pa.C.S. § 5101, a misdemeanor of the second degree. That same day, Curley, Schultz, and Graham B. Spanier were also charged with three counts of Conspiracy, in violation of 18 Pa.C.S. § 903, based on the underlying offenses of Obstruction of Justice, a misdemeanor of the second degree, Perjury, a felony of the third degree, and Endangering Welfare of Children, a felony of the third degree. Presentment Number 29 issued by the Thirty-Third Statewide Investigating Grand Jury was attached to the criminal complaint. That Presentment paraphrased at great length the grand jury testimony of former Pennsylvania State University General Counsel Cynthia Baldwin.

3. On October 25, 2013, the Supervising Judge of the grand jury ordered that Ms. Baldwin's October 26, 2012, grand jury transcript and the October 22, 2012, discussion with her counsel about the attorney-client privilege should be unsealed to the extent that those transcripts should be provided to defendants, defense counsel and any person necessary to representation of the defendants. However, the Court prohibited further disclosure of the transcripts.

4. By email dated November 21, 2013, this Court's law clerk directed the parties to identify any grand jury testimony that will be utilized for presentation of the issues at the December 17 hearing. Counsel has submitted that letter to the Court. This motion is in support of that letter. Defendant hereby requests that full and open use be permitted at the December 17 hearing of the entirety of Ms. Baldwin's October 26 testimony, the exhibits used during that testimony, and the

October 22 discussion with the Court about it.

5. Our position is that with the issuance of the Presentment and the need for a full fair and public hearing on the important representation and privilege issues, the transcript should be unsealed fully and in its entirety. There is no need to avoid disclosure of the transcript and compelling reasons to permit it at this time. (The phrase "at this time" suggests just how modest the step is that we ask of the Court: trial is on the near horizon; Ms. Baldwin is a certain prosecution witness at trial; and at that time, her testimony will be fully disclosed. See Pa. R. Cr. P 230(B)(2).)

ARGUMENT

I. Both the Grand Jury Act and the Rules Authorize the Court to Order Disclosure of Ms. Baldwin's Testimony.

6. The Grand Jury Act grants the Court broad discretion to permit disclosure of matters occurring before the grand jury. Jurors, prosecutors and stenographers are sworn to secrecy, but "otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court." 42 Pa.C.S.A. § 4549(b). The statute does not set limits on when the court may so direct. Judge David N. Savitt & Brian P. Gottlieb, *Pennsylvania Grand Jury Practice* §17.02 (1983).

7. Likewise, Pennsylvania Rule of Criminal Procedure 230(B)(2) empowers the supervising judge to order that a defendant be furnished with a copy of a witness's transcript upon the defendant's application. In *Commonwealth v.*

Hemingway, 2011 PA Super 8, 13 A.3d 491 (2011) (en banc), the Superior Court interpreted the rule as permitting disclosure at any time, with the outer limit of that time period being after the witness testifies on direct at trial. 2011 PA Super at 17-18 & n.7, 13 A.3d at 499-500 & n.7.

8. The rules also provide that any transcript, or portion thereof, which contains exculpatory evidence shall be provided to the defendant. Rule 230(B)(3). That rule does not place any time restriction on when the exculpatory evidence should be provided.

9. Ms. Baldwin's testimony is exculpatory in the following respects: At page 14 (lines 14-20) of her October 26 testimony, she agrees that she did represent Curley, Schultz and Spanier during their grand jury testimony. At pages 35 and 51, she states that while she felt a duty to disclose all facts relevant to the investigation to the Board of Trustees and Mr. Spanier, she could not disclose Curley and Schultz' testimony to the grand jury (p. 35, lines 17-24; p. 51, lines 16-19), a position that suggests she believed she owed some duty of confidentiality to them. This undermines the Commonwealth's position, as expressed to Judge Feudale on October 22, 2012, that Schultz and Curley have no valid privilege claims (page 11; DAG Fina, "The Commonwealth, at this point, I think, is going to take a very clear position as does Miss Baldwin that she was University Counsel and she was not individually representing those two gentlemen. . . . There is no appropriate privilege to the testimony that will be provided by Ms. Baldwin beyond that held by the University, which has been waived.")

10. Ms. Baldwin's testimony is material to the preparation and litigation of the defendants' motions to suppress and dismiss, because only her testimony will reveal the manner and extent to which she may have testified about privileged matters. Her testimony also includes statements about whether or not and to what extent she represented the defendants as witnesses before the grand jury. The defendant needs to introduce the October 22 discussion among the OAG and the supervising judge to litigate the issue of whether the OAG properly advised the Court of the privilege issues. That transcript shows that the OAG agreed to limitations on Ms. Baldwin's testimony, limitations which we maintain were transgressed in the grand jury. (Counsel for Ms. Baldwin and counsel for the Pennsylvania State University also attended and made argument at the October 22 conference.)

II. None of the Purposes for Grand Jury Secrecy Apply Here.

11. In *In re Investigating Grand Jury of Philadelphia County, Appeal of Philadelphia Rust Proof Company, Inc.*, 496 Pa. 452, 458, 437 A.2d 1128, 1130 (1981) ("*Philadelphia Rust Proof*"), the Court described the following purposes of grand jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

12. Courts have looked to the above purposes of grand jury secrecy in determining when proceedings should remain secret. Thus, in *Hemingway*, in deciding that the supervising judge had broad discretion to control the timing of release of grand jury testimony, the Superior Court examined whether nondisclosure would advance the purposes of grand jury secrecy: "We see absolutely no public policy consideration or purpose that would be served by interpreting the Grand Jury Act and Rules in this manner where, as here, the grand jury's investigation was complete, charges had been filed against the defendants, there were no noted concerns for the safety of the grand jurors or witnesses, and the commencement of trial was imminent." 2011 PA Super at 20, 13 A.3d at 499-50. The court noted that when the investigation had concluded with charges and the identities of its witnesses are known, there is little justification for secrecy. 2011 PA Super at 20, n.7, 13 A.3d at 499-500 & n.7.

13. Keeping Ms. Baldwin's testimony from the defendants does not advance any of the *Philadelphia Rust Proof* purposes. They have been charged; flight, never contemplated, is not an option; the grand jury has deliberated free from interference; and, the charges having been made public, further secrecy will not protect the reputation of the accused. (*Philadelphia Rust Proof* purposes one, two, and five). Ms. Baldwin already testified; she is represented by counsel; the prosecution has identified and embraced her as a cooperating witness in the Presentment; therefore, the dangers of witness intimidation and tampering no longer exist, or, if they do, the prosecution, having disclosed Ms. Baldwin's

testimony in the Presentment, does not see secrecy as needed to protect against those harms. (*Philadelphia Rust Proof* purposes three and four).

14. The prosecution identified Ms. Baldwin as a key witness in Presentment No. 29 and described her testimony at some length. Obviously, both the grand jury and the prosecutor who prepared the Presentment, see 42 Pa.C.S.A. §4551(a), believed that there was no further need for secrecy with respect to her testimony.

15. Disclosure of the testimony and open hearings on motions concerning the propriety of grand jury proceedings appears common in Pennsylvania case law. Numerous published opinions on grand jury issues similar to the ones raised here describe the testimony and evidence at length, frequently identifying the witnesses involved. *E.g.*, *In re Thirty-Third Statewide Investigating Grand Jury*, 48 A.3d 1217 (Pa. 2012) (granting petition for review and denying application for leave to file under seal); *In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 92-94, 907 A.2d 505, 507-08 (2006) (describing facts, the grand jury subpoena and the issues publicly and in detail); *In re Philadelphia County Investigating Grand Jury XII, Petition of Vladimer*, 529 Pa. 471, 605 A.2d 318 (1992) (describing facts and identifying the parties in an attorney disqualification, conflict of interest case); *Pirillo v. Takoff*, 462 Pa. 511, 517-18, 341 A.2d 896, 899 (1975) (once the prosecutor raised conflict of interest issue with the supervising grand jury judge in camera, a hearing open to the witnesses and their attorneys was held and described at length in the Supreme Court's published opinion).

III. The Defendants Have a 6th Amendment Right to a Hearing Open to the Public on Their Motions to Suppress and Dismiss.

16. Closing the suppression dismissal hearing, or a proportion of it, would violate the defendants' Sixth Amendment right to a public trial. That right applies to pretrial hearings as well. *Waller v. Georgia*, 467 U.S. 39 (1984) (Sixth Amendment open trial right applies to pre-trial suppression hearings). The Sixth Amendment guarantees a defendant in a criminal case the right to a "public trial." *Waller v. Georgia*, 467 U.S. 39, 44-45 (1984). "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606 (1982).

17. A public trial benefits the criminal justice system as well as the defendant "by enhancing due process, encouraging witnesses to come forward, and enabling the public at large to confirm that the accused are dealt with fairly and that the trial participants properly perform their respective functions." *United States v. DeLuca*, 137 F.3d 24, 33 (1st Cir. 1998). "[A] trial is far more likely to be fair when the watchful eye of the public is present." *Owens v. United States*, 483 F.3d 48, 61 (1st Cir. 2007).

18. An order excluding the press and the public from a portion of a proceeding constitutes "total closure" of the courtroom. *United States v. Thunder*, 438 F.3d 866, 868 (8th Cir. 2006). An order directing total closure must adhere to the rule outlined in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984), which holds that "[t]he presumption of openness may be overcome

only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Moreover, "the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48. See also *Presley v. Georgia*, 130 S. Ct. 721, 723-24 (2010)

19. In deciding whether the open hearing right extends to a particular hearing, the courts look to whether the place and process in question has historically been open to the press and general public. Second, the court examines whether public access will play a "significant positive role" in the functioning of the proceeding. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986).

20. "[T]he invocation of grand jury interests is not "some talisman that dissolves all constitutional protections." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990). Thus, the *Butterworth* court decided that once a grand jury investigation concludes, any state rule concerning grand jury secrecy must give way to the for the witness's First Amendment right to speak about his testimony. As have the Pennsylvania courts, the United States Supreme Court noted that with the conclusion of the investigation, the needs for secrecy evaporate: "[W]hen an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape -- that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other. There is also no longer a need to prevent the importuning

of grand jurors since their deliberations will be over." *Id.* at 632-633.

21. While grand jury proceedings traditionally remain closed, once the proceedings are made public, there is a right of access to them. The purpose of the grand jury secrecy rules "is to preserve secrecy. Information widely known is not secret." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006)(ordering disclosure of grand jury transcript). This reflects the *Butterworth* court's balancing of interests. See paragraph 19, *supra*.

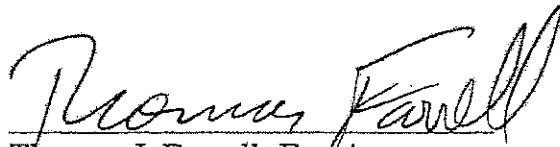
22. At issue in the present case are the sacrosanct attorney-client privilege and an important issue concerning proper representation of witnesses in the grand jury. Defendants also have raised issues of misconduct by a public office, the Office of Attorney General (See *Schultz Reply to Commonwealth's Answer to Defendants' Joint Motion to Quash Presentment* at 3, 11-19 (filed with Supervising Judge on January 18, 2012, since unsealed); *Curley's Reply to Commonwealth's Answer to Joint Motion to Quash Presentment* at 7, 20-25 (filed with Supervising Judge on January 18, 2012, since unsealed); *Spanier Memorandum of Law in Support of Motion to Quash Criminal Complaint* at 19-22 (filed with this Court on May 16, 2013)). Set against the need to litigate and protect those rights and privileges in a public forum is a secrecy interest which, under the facts of this case, serves no purpose. To the contrary, the prosecution's insistence on it would border on the specious: the OAG has already broadcast to the world Ms. Baldwin's testimony in Presentment Number 29.

WHEREFORE, for the reasons stated, Defendants respectfully request this

Honorable Court to enter an Order fully unsealing the October 22 and 26, 2012,
grand jury transcripts for use at the December 17 hearing.

Respectfully submitted,

By:

A handwritten signature in cursive script, appearing to read "Thomas Farrell", written over a horizontal line.

Thomas J. Farrell, Esquire
Attorney for Defendant,
Gary C. Schultz
Pa. I.D. No. 48976
Farrell & Reisinger
436 7th Avenue, Suite 200
Pittsburgh, PA 15219

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY,
PENNSYLVANIA

IN RE: : SUPREME COURT PENNSYLVANIA
: 217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD STATEWIDE :
INVESTIGATING GRAND JURY : DAUPHIN CO. COMMON PLEAS
: No. CP-22-CR-5164-2011
: No. CP-22-CR-5165-2011
:
:

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY,
PENNSYLVANIA

COMMONWEALTH OF :
PENNSYLVANIA, :
: SUPREME COURT PENNSYLVANIA
: 217 M.D. MISC. DKT. 2010
v. :
: DAUPHIN CO. COMMON PLEAS
: No. 1385-MD-2012
: No. 1386-MD-2012
TIMOTHY M. CURLEY and :
GARY C. SCHULTZ, :
Defendants. :
: REQUEST EXPEDITED REVIEW

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion was sent by US
mail and email, this _____ day of December, 2013, to the following:

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Distribution:

The Honorable Judge Todd A. Hoover, President Judge, Court of Common Pleas
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COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

: IN THE COURT OF COMMON PLEAS
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: 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 6th day of December, 2013, to the following:

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

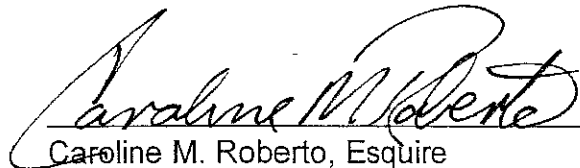
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Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy M. Curley

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

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

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SEALING ORDER

AND NOW, to-wit, this ____ day of ____, 2013, it is hereby ORDERED that
the enclosed Motion and Order be filed under seal with the Clerk of Courts of Dauphin
County until further order of this Court.

BY THE COURT:

_____, J.

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

: IN THE COURT OF COMMON PLEAS
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: Conspiracy (To Commit Perjury);
: Criminal Conspiracy (To Commit
: Endangering the Welfare of Children)

ORDER

AND NOW, to-wit, this _____ day of _____, 2013,
upon due consideration of Defendant Timothy Mark Curley's Motion to Join Gary C.
Schultz' Motion for Full Disclosure of Grand Jury Testimony of Cynthia Baldwin and Any
Motions, Argument, Hearings or Rulings Relating to that Testimony, it is hereby
ORDERED and DECREED that the motion is GRANTED. The Court will consider the
arguments made by Mr. Schultz in his Motion as if the arguments were fully set forth by
Timothy Mark Curley.

BY THE COURT:

_____, J.
