

IN THE COURT OF COMMON PLEAS IN AND FOR  
THE COUNTY OF MONTGOMERY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 8423-2015  
vs. :  
KATHLEEN GRANAHAN KANE :

Pretrial Conference

Courtroom B  
Friday, February 5, 2016  
Commencing at 1:35 p.m.

Norma Gerrity  
Official Court Reporter  
Montgomery County Courthouse  
Norristown, Pennsylvania

BEFORE: THE HONORABLE WENDY DEMCHICK-ALLOY, JUDGE

COUNSEL APPEARED AS FOLLOWS:

KEVIN R. STEELE, ESQUIRE  
THOMAS W. MC GOLDRICK, ESQUIRE  
M. STEWART RYAN, ESQUIRE  
Office of the District Attorney  
for the Commonwealth

AMIL M. MINORA, ESQUIRE  
ROSS M. KRAMER, ESQUIRE  
for the Defendant

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2 THE COURT: Good afternoon.  
3 We're here in the matter of Commonwealth versus  
4 Kathleen Kane. I've met with the lawyers briefly  
5 this afternoon prior to proceeding today. We're  
6 here for pretrial conference.

7 I have met with the lawyers  
8 late last week in chambers to get a proverbial lay  
9 of the land of where we are and also get a  
10 scheduling of proceedings from this day forward,  
11 and we do have that schedule, which I will address  
12 shortly.

13 Preliminarily, gentlemen, is  
14 it accurate to say that informal discovery is  
15 continuing?

16 MR. STEELE: Yes, Your Honor.

17 MR. KRAMER: Yes, Your Honor.

18 THE COURT: Is there anything  
19 to put on the record with respect to that issue of  
20 discovery today from either side?

21 MR. STEELE: I would only  
22 note, Your Honor, we have provided some discovery  
23 to the defense counsel today pursuant to permission  
24 being granted to further law enforcement purposes.

25 However, we also need to

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2 address an item that is premature on discovery so  
3 that we're not providing an item that we don't  
4 have.

5 Michael Schwartz, from the  
6 law firm Pepper Hamilton, is here to address our  
7 subpoena to him in that regard, so at the  
8 appropriate time, I'll ask to move towards that.

9 THE COURT: Okay. And you're  
10 addressing a specific piece of discovery that's  
11 being requested?

12 MR. STEELE: Correct.

13 THE COURT: And you're  
14 suggesting to the Court that Mr. Schwartz may have  
15 an interest in objecting to that piece of evidence?

16 MR. STEELE: He does. Your  
17 Honor, I'll address it briefly, but we sent a  
18 subpoena to Mr. Schwartz to obtain un-redacted  
19 original documents that were originally provided or  
20 redacted documents were provided by Attorney Smith  
21 to 37 Grand Jury.

22 We're requesting originals of  
23 those documents, and Mr. Schwartz represents Chris  
24 Brennan and the Philadelphia Media Network.

25 THE COURT: Okay. Well,

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shall we address that issue now, since it's  
discovery related, and that's my inquiry, about  
whether discovery is completed, which it is not,  
because it's ongoing, which was my original  
inquiry, and it looks like Mr. Schwartz is up and  
ready to address the Court.

MR. SCHWARTZ: Your Honor,  
may I?

THE COURT: You may.

MR. SCHWARTZ: My name is  
Michael Schwartz. I'm with the law firm of Pepper  
Hamilton in Philadelphia.

THE COURT: Good afternoon,  
sir.

MR. SCHWARTZ: I am here as  
the recipient of the subpoena, but really I think  
on behalf of my clients, former Philadelphia Daily  
News reporter Christopher Brennan -- he is  
currently a reporter for the Philadelphia  
Inquirer -- and also the Philadelphia Media Network  
PBC, the new entity that is now the publisher of  
the Inquirer and the Daily News.

We're here objecting to a  
subpoena for original documents asserting the

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2 Shield Law protection in order not to reveal a  
3 confidential source of Mr. Brennan's.

4 We also previously raised  
5 these issues under both the Shield Law, the First  
6 Amendment, and Article I, Section 7, of the  
7 Constitution of the Commonwealth of Pennsylvania,  
8 but for today's purposes, it's really the Shield  
9 Law that's the issue.

10 If I can just briefly give  
11 the Court a little history, because Mr. Brennan's  
12 involvement has been through the grand jury  
13 proceedings here.

14 The special prosecutor had  
15 subpoenaed Mr. Brennan and sought documents,  
16 primarily the records that are the underlying basis  
17 for the story in the Daily News, that is, the  
18 subject of the indictment.

19 THE COURT: That was Mr.  
20 Carluccio's desktop computer --

21 MR. SCHWARTZ: Yes.

22 THE COURT: -- in this  
23 county's grand jury.

24 MR. SCHWARTZ: In this  
25 county's grand jury. We appeared before Judge

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2 Carpenter asserting First Amendment and Shield Law  
3 objections on a limited basis.

4 We agreed that from First  
5 Amendment balancing purposes, that documents at  
6 issue which we reported on, the fact of the  
7 documents or the documents themselves would  
8 probably meet a First Amendment balancing test.

9 The Commonwealth would still  
10 have to show a need and exhausting other sources,  
11 but since we reported on them, we submitted to the  
12 grand jury redacted copies of the documents that  
13 Mr. Brennan received from a confidential source.

14 The three documents that were  
15 at issue I think have been given to Mr. Steele and  
16 I presume are part of the underlying discovery in  
17 this case.

18 However, we asserted  
19 objections before Judge Carpenter to the originals,  
20 because the issue that was presented to us, and I  
21 think the issue that Mr. Steele presented to me the  
22 other day, is the originals may contain forensic  
23 evidence that could lead to the identity of the  
24 confidential source, fingerprints, DNA, could lead  
25 to other people, too, but it could certainly lead

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to the confidential source, whom Mr. Brennan has testified he had received the documents from.

There also are -- there were some redactions and markings on the original documents. When I say original documents, I don't know if these are first-generation originals. I'm talking about the documents that Mr. Brennan received from his source.

There were certain markings on it that were fairly unique, and those markings were redacted to protect the identity of the source.

As this Court may be aware, and we're certainly happy to brief this issue further, but the Supreme Court in Pennsylvania has spoken several times on the Shield Law and has found that it is an absolute privilege.

The leading case is in re Taylor, which goes back a number of years, and it talks about the legislative decision that was made to balance the free flow of information to reporters versus the occasional case where all of the facts relating to a potential crime may not be disclosed.

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2 The legislature made that  
3 balancing test in Pennsylvania in favor of an  
4 absolute privilege, and the Supreme Court has  
5 repeatedly affirmed that privilege against  
6 challenges for unique circumstances, including  
7 grand jury leak issues. Castellani, which was a  
8 case in 2008, dealt with the fact of a grand jury  
9 leak investigation.

10 Here what we're -- what we've  
11 already done, I think, is provide the information  
12 that the Commonwealth is entitled to, the  
13 underlying copies of the documents.

14 The originals, which I think  
15 the reason I have been subpoenaed is because I had  
16 represented to Judge Carpenter when we've asserted  
17 this privilege, and he did not order us to disclose  
18 this, asserted that I would maintain custody of the  
19 originals, put them in an envelope, and maintain  
20 custody of the originals, which I have done.

21 THE COURT: All right.

22 MR. SCHWARTZ: So that's our  
23 position.

24 THE COURT: Mr. Steele, is  
25 there anything you want to put on the record at



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2 this point?

3 MR. STEELE: No, Your Honor.

4 I would just ask for the opportunity to brief the  
5 issue to the Court, and I have nothing further to  
6 add at this point.7 THE COURT: I will give the  
8 lawyers an opportunity to do that, and I'm going to  
9 weave that into our schedule, and I will address  
10 that shortly. So if you wouldn't mind staying, Mr.  
11 Schwartz --

12 MR. SCHWARTZ: Certainly.

13 THE COURT: -- I will give  
14 you a deadline as to your brief and your reply.

15 MR. SCHWARTZ: Thank you.

16 MR. STEELE: And I would ask  
17 that we get a chance to reply to theirs, because it  
18 was our subpoena that they're now objecting to.19 THE COURT: All right. I'll  
20 get to that momentarily.21 So on the issue of discovery,  
22 is there anything else that needs to be said?23 MR. STEELE: No, I don't  
24 think so, Your Honor.

25 THE COURT: I do believe our

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2 conference referenced discovery, reciprocal and  
3 otherwise, so it needs to be ongoing and hopefully  
4 without incident.

5 If you need Court  
6 intervention, all you need to do is alert chambers,  
7 and we'll address any issues that may bubble up.

8 MR. STEELE: We'll try to  
9 work through that informally. I think we've had a  
10 pretty open dialogue so far with things, and we've  
11 provided them with the materials that we had  
12 available.

13 THE COURT: Okay.

14 And then I think what we also  
15 discussed at the conference last Friday was, in  
16 fact, our schedule of hearings, motions and  
17 hearings and ultimately trial.

18 So why don't we flush that  
19 out and make sure we're all onboard with respect to  
20 dates, if there are any changes, adding now this  
21 issue with respect to briefing on shield.

22 So today is the pretrial  
23 conference. The next deadline that I set with  
24 counsel that was agreed upon for a deadline for  
25 informal discovery is Monday, February 29th, 2016.

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2 The deadline for the filing  
3 of any pretrial motions is Friday, March 4th, 2016.  
4 The deadline for answer to reply to pretrial  
5 motions is Friday, March 11th, 2016.

6 Deadlines for briefs with  
7 respect to the pretrial motions, answers, or  
8 replies is Friday, March 18th. Then the hearing of  
9 pretrial motions will occur on Tuesday, March 22nd,  
10 2016, at 1:00 o'clock in this courtroom.

11 And then finally the trial of  
12 this matter will be held on Monday, August 8th,  
13 2016, at 9:00 o'clock in this courtroom.

14 With respect to the briefing  
15 of the shield issues, since this is a matter  
16 involving discovery, why don't we do this.

17 Today is the 5th. Mr.  
18 Schwartz, could you have your brief to us by  
19 Monday, the 15th of February? Would that provide  
20 you enough time?

21 MR. SCHWARTZ: Certainly.  
22 That is Presidents Day.

23 THE COURT: How about the  
24 16th then?

25 MR. SCHWARTZ: The 16th is

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2 fine.

3 THE COURT: Mr. Steele, could  
4 you have your reply brief by the 19th? Would that  
5 provide you with enough time? Give me a moment.

6 - - -

7 (Discussion off the record.)

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9 THE COURT: Let me see Mr.  
10 Schwartz and Mr. Steele over here for one minute.

11 - - -

12 (A conference was held at  
13 side bar, not reported.)

14 - - -

15 THE COURT: All right.  
16 Counsel, I met with you briefly at sidebar, that  
17 is, Mr. Schwartz and Mr. Steele.

18 I'm going to ask the two of  
19 you, really directing myself to Mr. Schwartz, Mr.  
20 Schwartz, have you filed a formal motion or  
21 petition yet in this matter with respect to the  
22 issue?

23 MR. SCHWARTZ: No, I have  
24 not, Your Honor. I've raised an objection to the  
25 subpoena with Mr. Steele, and what I would

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2 respectfully request is the opportunity to file a  
3 motion to quash.

4 THE COURT: Okay. We're  
5 going to allow you to do that.

6 Mr. Steele, we, of course,  
7 will allow you to file a reply, an answer. So  
8 looking at our sequence of events here, and just  
9 help me with the dates, since we just talked about  
10 this at sidebar.

11 The deadline for filing your  
12 motion to quash, Mr. Schwartz, would be, I think we  
13 discussed today is the 5th. So the 12th?

14 MR. SCHWARTZ: That is fine,  
15 Your Honor.

16 THE COURT: And, Mr. Steele,  
17 your response to that motion, how much time would  
18 you need?

19 MR. STEELE: Two days.

20 THE COURT: So we'll give you  
21 till the 16th? Is that okay, with the holiday?

22 MR. KRAMER: Your Honor, even  
23 though we're not a direct party to the motion to  
24 quash, could we ask that we be copied on whatever  
25 is filed by the parties, just so we can keep tabs

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2 on --

3 THE COURT: Is there any  
4 objection to that?

5 MR. SCHWARTZ: No, not at  
6 all. That's fine.

7 THE COURT: Absolutely.

8 So, Mr. Steele --

9 MR. STEELE: Let me make sure  
10 I'm straight in my head. And then you're going to  
11 have the briefing, and then their brief is due on  
12 the 16th, and then our response would be due the  
13 26th?

14 THE COURT: Yes.

15 MR. STEELE: Okay. So our  
16 reply to their motion to quash, why don't we do  
17 that on the following Monday, the 15th?

18 THE COURT: It's a holiday.  
19 That's why I said the 16th.

20 MR. STEELE: The 16th, right.

21 THE COURT: And that gives  
22 you enough time, Mr. Schwartz, also, the 12th?

23 MR. SCHWARTZ: The 12th is  
24 fine, Your Honor, and then we'll file our brief on  
25 the 16th so that they then can have that ten-day

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2 period, from the 16th to the 26th, to respond to  
3 the brief.

4 THE COURT: Sounds good to  
5 me.

6 Mr. Steele, you've asked me  
7 to file a reply brief?

8 MR. STEELE: I have, Your  
9 Honor, if we could have till the 26th to do that.

10 THE COURT: Yes. So the  
11 deadline ultimately for informal discovery per our  
12 original conference last week is February 29th,  
13 just keeping our eye on that ball.

14 So I think that concludes Mr.  
15 Schwartz's portion of this hearing; am I right?

16 MR. SCHWARTZ: Thank you,  
17 Your Honor.

18 THE COURT: All right. Thank  
19 you, sir.

20 So with respect to the  
21 lawyers I have left here, is there anything else  
22 anybody wants to put on the record with respect to  
23 this matter?

24 MR. KRAMER: Just looking  
25 briefly at the discovery that we received today,

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2 it's Ken recording.

3 And I think what may be a  
4 relevant fact is if we could understand on the  
5 record whether these were the recordings that the  
6 DA's Office had ever had in their possession that  
7 arose out of this series of recordings that were  
8 made by federal prosecutors.

9 Then we could understand if  
10 there was a motion to request discovery of any  
11 additional recordings that the DA's Office may have  
12 had or whether this is everything that was ever in  
13 their possession.

14 MR. STEELE: I've provided  
15 everything we have.

16 MR. KRAMER: Thank you.

17 THE COURT: All right. So if  
18 there's nothing else from anybody else, I think we  
19 have addressed all the issues with respect to this  
20 matter today, and with that, this hearing is  
21 concluded.

22 Thank you, gentlemen.

23 (At 1:58 p.m., the  
24 proceedings were concluded.)

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C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

Norma Gerrity, RPR  
Official Court Reporter

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