

CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNSYLVANIA
2016 FEB 16 PM 2:21

PEPPER HAMILTON LLP
Michael A. Schwartz, Esquire, I.D. No. 60234
Eli Segal, Esquire, Attorney I.D. No. 205845
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000

*Attorneys for Movant Michael A. Schwartz, in
His Capacity as Counsel to Reporter
Christopher Brennan and Philadelphia Media
Network, PBC*

COMMONWEALTH OF PENNSYLVANIA

v.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY,
PENNSYLVANIA

KATHLEEN GRANAHAN KANE

DOCKET NO. CP-46-CR-0006239-2015

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH SUBPOENA DIRECTED TO MICHAEL A. SCHWARTZ,
COUNSEL TO REPORTER CHRISTOPHER BRENNAN AND
PHILADELPHIA MEDIA NETWORK, PBC**

I. MATTER BEFORE THE COURT

Michael A. Schwartz, counsel to reporter Christopher Brennan and Philadelphia Media Network, PBC (“PMN”), files this Memorandum of Law in support of his February 12, 2016 Motion to Quash the subpoena that he received to provide documents in his possession to the District Attorney’s Office, for use in the Commonwealth’s prosecution of Kathleen Kane. (A copy of the subpoena is attached as Exhibit A.)

On January 27, 2016, the Commonwealth served Mr. Schwartz—as counsel for Mr. Brennan and PMN—with a subpoena to produce the original, unredacted documents that Mr.

Brennan received from a confidential source regarding a grand jury investigation of J. Wyatt Mondesire. Mr. Brennan has never revealed the identity of the confidential source. For two independently sufficient reasons, Mr. Schwartz, as counsel for and at the direction of Mr. Brennan and PMN, respectfully requests that this Court quash the subpoena:

- **First**, because the original documents (and forensic testing on, or other analysis of, these documents) could be used to identify Mr. Brennan's confidential source, the Pennsylvania Shield Law provides absolute protection against their forced disclosure. *See, e.g., Castellani v. Scranton Times*, 956 A.2d 937, 948-51 (Pa. 2008) ("Our Shield Law jurisprudence has consistently recognized the statute's absolute protection of a source's identity from compelled disclosure.").

- **Second**, because the Commonwealth has not established that the original, unredacted documents are crucial to its case against Kathleen Kane, the qualified Reporter's Privilege—under the First Amendment of the United States Constitution and Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania—protects against the documents' forced disclosure. *See, e.g., Commonwealth v. Bowden*, 838 A.2d 740, 755 (Pa. 2003) (explaining that the Reporter's Privilege requires a party seeking disclosure of a journalist's newsgathering materials and sources—confidential or not—to show that it has tried and failed to obtain the information from other sources, that it can only access the information via the journalist, and that the information is crucial to its case).

II. QUESTIONS PRESENTED

1. Should the subpoena be quashed under the Pennsylvania Shield Law because it seeks documents that could reveal the identity of reporter Christopher Brennan's confidential source?

Suggested answer: Yes

2. Should the subpoena be quashed under the constitutional Reporter's Privilege because it seeks documents that are not crucial to the Commonwealth's prosecution of Kathleen Kane?

Suggested answer: Yes

III. FACTUAL BACKGROUND

In a June 6, 2014 *Philadelphia Daily News* article, Mr. Brennan reported on a 2009 grand jury investigation of Mr. Mondesire, the now-deceased former head of the NAACP in Philadelphia, that did not result in any charges against Mr. Mondesire. The article referenced a 2009 memorandum by then-Deputy Attorney General William Davis, Jr., to then-Chief Deputy Attorney General Frank Fina and then-Senior Deputy Attorney General E. Marc Costanzo, detailing what had been uncovered about Mr. Mondesire during the investigation. The article also referenced a transcript of a March 21, 2014 interview of Michael Miletto, the special agent who investigated Mr. Mondesire in 2009, by David Peifer, the head of the Attorney General's Bureau of Special Investigations. According to the article, current Attorney General Kane was reviewing what became of the 2009 Mondesire probe, which pre-dated her tenure.

After the publication of this article, a state grand jury began investigating who provided Mr. Brennan with the memorandum and transcript described in his article. The Court appointed Thomas E. Carluccio as Special Prosecutor to lead the investigation and determine,

among other things, whether Attorney General Kane's office leaked the materials in violation of grand jury secrecy.

In the course of that investigation, a subpoena was issued for Mr. Brennan to testify before the grand jury and to produce the documents on which he based his article. Mr. Brennan moved to quash the subpoena, invoking the Shield Law and the Reporter's Privilege and explaining that both protected him from being compelled to disclose the identity of the confidential source or to disclose any information that could lead to the discovery of the source's identity. Based on the Special Prosecutor's explanation of his need for certain information, Mr. Brennan—through his attorney, Mr. Schwartz—did provide copies (but not the originals) of the documents that Mr. Brennan received from the confidential source, but redacted from those documents handwritten markings that could lead to the discovery of the source's identity. Moreover, when he later testified before the grand jury, Mr. Brennan continued to refuse to divulge any information that could lead to the discovery of the source's identity.

Special Prosecutor Carluccio did not move to compel Mr. Brennan to answer any of the questions that he refused to answer before the grand jury or to compel Mr. Brennan to produce the original documents that he received from the confidential source. As part of the grand jury proceedings, Mr. Schwartz agreed to maintain custody of the original documents.

The grand jury ultimately recommended criminal charges against Kathleen Kane for, among other things, allegedly leaking grand jury information to the press. As recounted in the presentment, this recommendation was based on several witnesses' testimony that Kathleen Kane directed the documents' release to Mr. Brennan.

Now, in the course of its prosecution of Kathleen Kane for the alleged leak and for allegedly lying about it to the grand jury, the Commonwealth has served a subpoena on Mr.

Brennan's attorney, Mr. Schwartz, to provide "any and all original, unredacted documents previously provided to Special Prosecutor Thomas Carluccio and/or the 35th Statewide Investigating Grand Jury, Notice #123." The only documents that Mr. Schwartz provided to Special Prosecutor Carluccio or the grand jury were the redacted copies of the documents that Mr. Brennan received from his confidential source.

On January 28, 2016, a day after receiving the current subpoena, Mr. Schwartz wrote the District Attorney that he objected to the subpoena because complying with it could reveal Mr. Brennan's confidential source. (A copy of the letter is attached as Exhibit B.) At a February 5, 2016 status hearing, the District Attorney explained that the Commonwealth is seeking the unredacted originals of those documents in order to perform forensic testing on them. Pursuant to the Court's instructions at the February 5 status hearing, Mr. Schwartz filed his Motion to Quash on February 12 and now files this supporting Memorandum of Law.

IV. ARGUMENT

A. The Subpoena Should Be Quashed Under the Pennsylvania Shield Law Because It Seeks Documents That Could Reveal the Identity of Reporter Christopher Brennan's Confidential Source.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, titled "Confidential communications to news reporters," provides:

- (a) General rule. -- No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.
- (b) Exception [relating to radio or television stations.]

The Pennsylvania Supreme Court repeatedly has held that this statute offers journalists absolute protection from the compelled disclosure of a confidential source or information that could reveal the identity of a confidential source. See *Castellani v. Scranton Times*, 956 A.2d 937, 948-51 (Pa. 2008) (citing and summarizing *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003); *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988); *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987); and *In re Taylor*, 193 A.2d 181 (Pa. 1963)); see also *McMullan v. Wohlgemuth*, 308 A.2d 888, 896 (Pa. 1972) (“[T]he Pennsylvania Legislature has wisely created an absolute statutory right of a newsman to preserve the confidentiality of his sources of information.”). The Pennsylvania Supreme Court also has left no doubt that the protection encompasses not just testimony, but also documents that could reveal a confidential source’s identity. See, e.g., *Bowden*, 838 A.2d at 749 (“[D]ocuments are to be considered sources [under the Shield Law] where their production, even with all names redacted, could breach the confidentiality of a human source.”).

In *Taylor*, a 1963 case involving journalists subpoenaed by a grand jury, the Pennsylvania Supreme Court explained that the Shield Law’s absolute guarantee of source confidentiality is critical to society’s well-being:

It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

Taylor, 193 A.2d at 185 (emphasis in *Taylor*). Therefore, the Court stressed, “the Statute must be liberally construed in favor of the newspapers and news media.” *Id.* And while the Court acknowledged that an absolute privilege under the Shield Law “will enable newsmen to conceal or cover up crimes,” it also made clear that the trade-off was worth it: “We are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime!” *Id.*

Here, Mr. Brennan has assured confidentiality to his source, as is Mr. Brennan’s absolute right based on the Shield Law and the long-standing Pennsylvania Supreme Court precedent discussed above. Moreover, his commitment of confidentiality constitutes an enforceable promise, the breach of which could subject him to personal liability. *See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (affirming a damages award for a journalist’s breach of a promise of confidentiality). Mr. Brennan has faithfully adhered to this confidentiality commitment, including when he was subpoenaed to testify and produce documents in the grand jury investigation for which Mr. Carluccio was Special Prosecutor. Markings on the documents that Mr. Brennan received from his confidential source could be used to identify the source, which, again, is why those markings were redacted from the copies that Mr. Schwartz provided to Special Prosecutor Carluccio on Mr. Brennan’s behalf. Forensic evidence (e.g., fingerprints or DNA) on the original documents—which the District Attorney has acknowledged is a reason that he is seeking them—could be used to identify Mr. Brennan’s source, too. Therefore, under the Pennsylvania Shield Law, neither Mr. Brennan nor his counsel may be compelled to produce the subpoenaed documents.

The District Attorney's Office is expected to raise three arguments as to why it believes that the Shield Law's protection should not apply here. None of the three are correct.

First, the District Attorney's Office will argue that this Court should create a "crime-fraud" exception to the Shield Law and compel compliance with the subpoena under that exception because providing the documents to Mr. Brennan was allegedly a crime. But in 2008 in *Castellani*, yet another case involving a grand jury investigation, the Pennsylvania Supreme Court rejected a similar call for a crime-fraud exception to the Shield Law. *See Castellani*, 956 A.2d at 952 ("The [proposed] exception . . . is in direct tension with our decision in *Taylor*, which recognized that the Shield Law protects a journalist's source information from disclosure, even if such protection would conceal or cover-up a crime."). The Court explained that the text of the statute was unambiguous and that it was for the Legislature, not the Court, to take away the absolute protection that it provides:

[W]e cannot simply engraft upon the statute an exception which would not only contradict the well-established public policy underlying the Shield Law, but, as importantly, would contravene the statute's unambiguous text. The Shield Law has been reenacted three times since it was first enacted in 1937, and twice since this Court interpreted its text in *Taylor*. If the General Assembly disagreed with our interpretation, or wished to establish a crime-fraud exception to the Shield Law, it could easily have done so. The Shield Law provides for one exception, which is not at issue here, see 42 Pa.C.S. § 5942(b), and we are not at liberty to create others that the Legislature, in its wisdom, chose not to include in the text of the statute.

Id. at 950-51 (citation omitted).

The District Attorney's Office might respond by invoking the dicta in *Castellani*, 956 A.2d at 953 & n.14, and *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 508-09 (Pa. 2011), that suggests there *might* be a situation in which the Shield Law would yield to the investigation of a grand jury leak. Yet the Supreme Court's non-committal

hypothesizing about potential future cases does not give this court the authority to create an exception to the Shield Law's unambiguous, absolute protection. The *holdings* of the Supreme Court—issued in full recognition of the fact that they could frustrate criminal investigations—bind this court in adjudicating the Shield Law assertion currently before it. And as the *Taylor* Court held, the Legislature, by design, left no room for any judicial narrowing of the statute's confidentiality guarantee:

The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal.*

Taylor, 193 A.2d at 185-86 (emphasis in *Taylor*).

Second, the District Attorney's Office also is expected to argue that the Shield Law's protection should be unavailable here because an individual has testified that he is Mr. Brennan's source. But just as the Shield Law's unambiguous text contains no crime-fraud exception to the absolute protection it offers journalists, it also includes no exception for situations in which an individual tells the public that he or she is the journalist's confidential source. Moreover, Mr. Brennan's source—whoever it was—has never released Mr. Brennan from his binding confidentiality commitment.

Third, the District Attorney's Office is expected to argue that the Shield Law's protection has been waived because PMN, publisher of the *Daily News* and *The Philadelphia Inquirer*, has published the name of the individual who has said that he was Mr. Brennan's source. This, too, is neither here nor there. For in no *Daily News* or *Inquirer* article did Mr. Brennan disclose the identity of his source.

Therefore, the Shield Law and the Pennsylvania Supreme Court interpreting it permit only one conclusion here: the subpoena should be quashed.

B. The Subpoena Also Should Be Quashed Under the Constitutional Reporter's Privilege Because It Seeks Documents That Are Not Crucial to the Commonwealth's Prosecution of Kathleen Kane.

On top of the absolute protection that the Shield Law provides against the compelled identification of confidential sources, the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit have recognized that journalists have a qualified constitutional right to refuse to disclose their newsgathering sources and materials—confidential or not. *See Bowden*, 838 A.2d 740, 752 (Pa. 2002) (citing various Third Circuit cases).

As the Pennsylvania Superior Court put it, this Reporter's Privilege "will be overcome only where a demonstrated, specific need for evidence presents a paramount interest to which the privilege must yield." *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. Ct. 1997). Specifically, it is the burden of a party seeking to compel disclosure of a journalist's newsgathering materials and sources to show that three constitutionally mandated factors are all satisfied. *See Bowden*, 838 A.2d at 755. *First*, "the party must demonstrate that it has made an effort to obtain the information from other sources." *Id.* (brackets and internal quotation marks omitted) (citing *United States v. Criden*, 633 F.2d 346, 358-89 (3d Cir. 1980); *United States v. Cuthbertson*, 651, F.2d 189, 195-96 (3d Cir. 1981); and *United States v. Riley*, 612 F.2d 708, 717 (3d Cir. 1979)). *Second*, "the party must demonstrate that the only access to the information sought is through the journalist and his or her sources." *Bowden*, 838 A.2d at 755 (brackets and internal quotation marks omitted) (citing *Criden*, 633 F.2d at 359; *Riley*, 612 F.2d at 716; *Davis*, 705 A.2d at 885; and *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw. Ct. 1991)). *Third and finally*, "the party must persuade the court that the information sought is crucial to its claim." *Bowden*, 838 A.2d at 755 (brackets and internal quotation marks omitted) (citing *Criden*,

633 F.2d at 359; *Cuthbertson*, 651 F.2d at 196; *Riley*, 612 F.2d at 716-17; *Davis*, 705 A.2d at 885; and *McMenamin*, 590 A.2d at 811). Moreover, the Pennsylvania Supreme Court and Third Circuit have explained that where, as here, the identity of a confidential source is at issue, the qualified Reporter's Privilege is more difficult to overcome. *See Bowden*, 838 A.2d at 754-55 (explaining this point and citing Third Circuit authority as support).

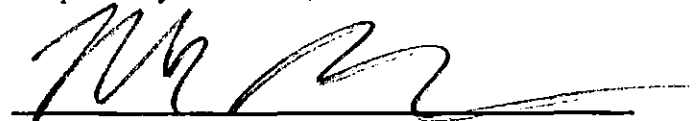
Here, the Commonwealth has not shown any "specific need"—much less one significant enough to overcome the privilege—for the documents that it is seeking from Mr. Schwartz. *See Davis*, 705 A.2d at 885. As reported by the grand jury, several witnesses already have testified—and, presumably, will again testify at trial—that Kathleen Kane directed the leak of the Mondesire-related documents to Mr. Brennan. The Commonwealth thus cannot show, as the third Reporter's Privilege factor requires, that obtaining the original documents and performing forensic testing on them is "crucial" to its case. *See Bowden*, 838 A.2d at 755. Therefore, the Reporter's Privilege, like the Shield Law, mandates that the subpoena be quashed.

V. RELIEF REQUESTED

For all of these reasons, Michael A. Schwartz, counsel to reporter Christopher Brennan and Philadelphia Media Network, PBC, respectfully requests that that this Court quash the subpoena that he received.

Date: February 16, 2016

Respectfully submitted,



Michael A. Schwartz
Eli Segal
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

CERTIFICATE OF SERVICE

I, Michael A. Schwartz, do hereby certify that I have on this date caused a copy of the foregoing Memorandum of Law in Support of Motion to Quash Subpoena Directed to Michael A. Schwartz, Counsel to Reporter Christopher Brennan and Philadelphia Media Network, PBC, to be served by first-class mail and email upon the following:

District Attorney Kevin Steele
Assistant District Attorney M. Stewart Ryan
Office of the District Attorney
Montgomery County Courthouse, 4th floor
P.O. Box 311
Norristown, PA 19404-0311
Email: KSTEELE@montcopa.org
MRYAN@montcopa.org

Gerald Shargel, Esq.
Ross M. Kramer, Esq.
Winston & Strawn LLP
200 Park Ave.
New York, New York 10166
Email: gshargel@winston.com
rkramer@winston.com

Amil Minora, Esq.
700 Vine St.
Scranton, PA 18510
Email: amil.minora@gmail.com

Dated: February 16, 2016

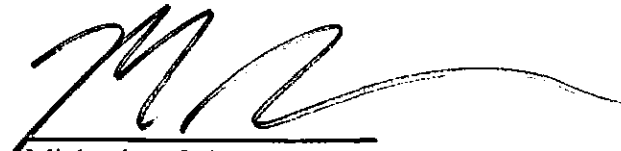

Michael A. Schwartz

EXHIBIT A

See Reverse Side For Easy Opening Instructions

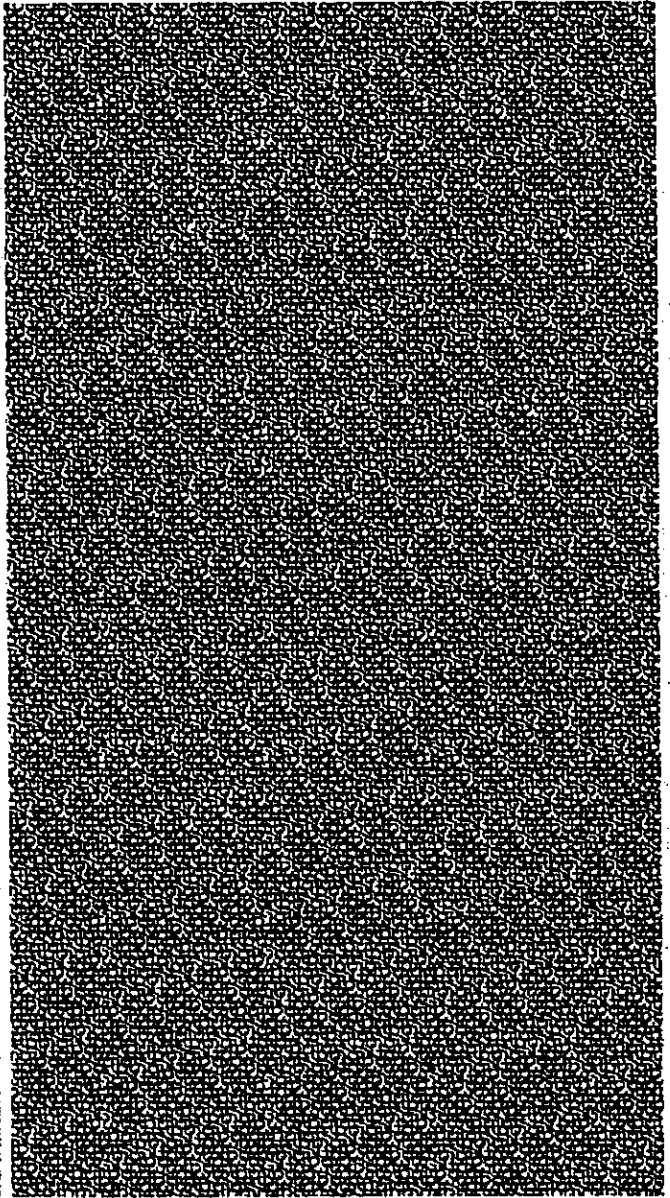


Montgomery County #23
District Attorney's Office
P. O. Box 311
Norristown, PA 19404-0311

Philadelphia Media Network, PBC
c/o Michael Schwatz, Esq.
Pepper Hamilton, LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

WD-3948010-14ZV0

REMOVE BOTH SIDE STUBS FIRST
FOLD, CREASE AND REMOVE THIS STUB AT PERFORATION



REMOVE BOTH SIDE STUBS FIRST
FOLD, CREASE AND REMOVE THIS STUB AT PERFORATION

THEN FOLD, CREASE AND REMOVE THIS STUB AT PERFORATION

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA COMMONWEALTH WITNESS SUBPOENA

Commonwealth of Pennsylvania vs: **KATHLEEN KANE**
 Michael Schwatz

Criminal 6239-15
 Docket:

is commanded by the President Judge, Court of Common Pleas of Montgomery County, to appear as a Commonwealth Witness if needed to testify in proceedings at the Montgomery County Courthouse, Norristown, Pennsylvania.

DUCES TECUM: Please provide the Montgomery County District Attorney's Office with any and all original, unredacted documents previously provided to Special Prosecutor Thomas Carluccio and/or the 35th Statewide Investigating Grand Jury, Notice #123." Bring these documents to Courtroom 1 on **FRIDAY, JANUARY 29, 2016 at 1:30 PM.**
 Upon receipt of the subpoena, if you have any questions, contact **ADA M. Stewart Ryan** at 610-278-3326.

Issued by:



Clerk of Courts

Ann Shady Ryan

WITNESS INSTRUCTIONS

1. Questions should be directed to the Victim / Witness Coordinator at 610-278-3144. All out-of-state witnesses **MUST** call prior to appearance.
2. If we instruct you to appear in court, bring this subpoena with you. To secure Witness Fee and travel expenses, you must present this subpoena to the Victim / Witness Coordinator or the Assistant District Attorney assigned to the case. If you travel by public transportation you must obtain receipts and present them with this subpoena for reimbursement. Checks for fees and expenses will be mailed.
3. You remain under subpoena and must be available to appear and testify until you have been dismissed by the Court or the Assistant District Attorney assigned to the case.
4. If you drive, parking is available at the open lot at the corner of Airy and Dekalb Streets across from the Norristown Post Office. Witness parking is free.

PLEASE CALL US

- 1.) If you have any questions about what to expect in court.
- 2.) If you move or change phone numbers
- 3.) If you have any questions concerning your case
- 4.) If you are contacted by anyone other than the police or this office in regard to your case.
- 5.) If you have transportation problems.
- 6.) If you are an out-of-state witness.

WE WILL CALL YOU

- 1.) To notify you of the exact date the trial will begin.
- 2.) If we need to set up a pretrial interview.
- 3.) If we need additional information from you before trial.

Number of Days	Travel Miles	Total Due \$	Excused by:

A BRIEF GUIDE TO YOUR SERVICE AS A WITNESS

WHAT IS A SUBPOENA

As a witness in a criminal proceeding you have been subpoenaed to appear in court to testify. Your subpoena is simply a court order directing your appearance at the time and place stated. Once you have been subpoenaed you are required to appear if ordered until excused. Failure to appear may be regarded in court as contempt. It is very important that you communicate with this office if you cannot appear as directed.

WITNESS RESPONSIBILITIES

As a witness you have a very important duty to perform. In order for a jury or a judge to correctly decide the facts of the case, evidence must be presented in a truthful manner. This obligation of citizenship is essential to our American system of justice. It is your duty as a witness to give your testimony when it is needed, although it may not be convenient for you to leave your home or place of business to spend one or more days in court. Please remember that justice cannot be accomplished unless people are willing to appear and testify in court.

ATTIRE AND ATTITUDE

Dress appropriately and always be courteous. Your appearance and manner should not distract the judge and jury from careful consideration of your testimony.

LISTEN CAREFULLY

Understand the question before you answer. Have it repeated if necessary. Think before you answer. Don't rush into answering, but neither should there be an unnaturally long delay following a simple question if you know the answer. If you don't know the answer to a question, say so. If you don't understand the question, don't try to answer, but ask that it be explained.

COURTROOM PROCEDURE

A fundamental rule in a criminal case is that both the prosecution and the defense have the opportunity to question the witnesses. When the Assistant District Attorney calls upon you to testify he or she will question you as to the specific facts within your knowledge. After this direct examination is completed, the defense attorney will have the opportunity to ask you questions relating to the same facts. This is called cross examination. Questions asked by both sides are directed toward achieving one goal - to determine the truth in the case. Don't let cross-examination upset you. It may appear at times that the defense attorney is trying to contradict you, but he or she has the right to test your memory and knowledge of the relevant facts in order that the judge and jury can properly regard your testimony.

BE ON TIME

Report to the Courtroom indicated on your subpoena on the date and time you are directed, and each day thereafter until excused by the Assistant District Attorney assigned to your case or by the Witness Assistance Clerk. The Witness Assistance Clerk will make every effort to keep you informed of the progress of your case and will endeavor to release you as soon as possible if your case is delayed for any reason.

An Assistant District Attorney is assigned to your case. He or she will probably want to meet with you prior to commencement of trial. Please remain in the Courtroom or immediate area in order that you may be located when needed.

ANSWERING QUESTIONS

Answer only the question asked. Do not volunteer information not actually asked for. If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it. Remember, the judge and jury are only interested in the facts. Therefore, don't give your conclusions and opinions unless you are specifically asked to do so.

BE ATTENTIVE

If the judge or jury get the impression that you are bored or indifferent, they may tend to disregard your testimony. Speak clearly and loudly. Everyone in the courtroom must be able to hear what you have to say. Although the experience of testifying is unnerving, the judge and jury can only consider what they are able to hear and may judge your truthfulness by the confidence in your voice. Don't be nervous- you are not on trial. Speak as though you are simply telling some neighbors what happened.

BE COURTEOUS

Even if the lawyer questioning you may appear discourteous, don't become angry or argumentative. This will lose the respect of the judge and jury. Becoming angry will probably cause a witness to exaggerate and appear unobjective and unreliable. KEEP CALM.

FINALLY

Stop instantly when the judge interrupts you, or when an attorney objects to a question. Give positive, definite answers and avoid saying, "I think," or "in my opinion." If you can, always be positive.



www.monicopa.org/da

ABOVE ALL - TELL THE TRUTH AND DO NOT LOSE YOUR TEMPER

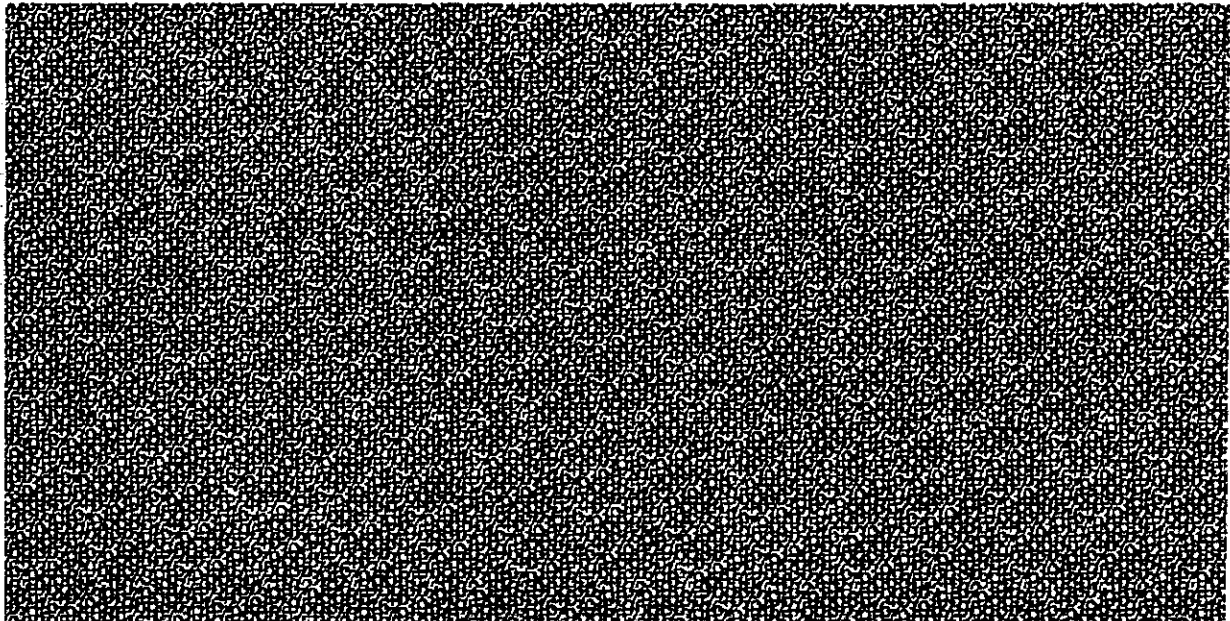


EXHIBIT B

Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Michael A. Schwartz
direct dial: 215 981-4494
direct fax: 800 615-2315
schwartzma@pepperlaw.com

January 28, 2016

By Email (ksteele@mail.montcopa.org)

Kevin R. Steele, Esq.
District Attorney
Montgomery County Courthouse, 4th Floor
P.O. Box 311
Norristown, PA 19404-0311

Re: *Commonwealth v. Kane*, Court of Common Pleas of Montgomery County,
No. 6239-15

Dear Mr. Steele:

I am writing to object to the subpoena that your office served on me yesterday in my capacity as counsel for Philadelphia Media Network, PBC, and reporter Christopher Brennan.

The subpoena seeks "any and all original, unredacted documents previously provided to Special Prosecutor Thomas Carluccio and/or the 35th Statewide Investigating Grand Jury, Notice #123." As you know, the only documents that I provided to Mr. Carluccio or the Grand Jury were in response to a subpoena directed to my client, Mr. Brennan, and were redacted copies of the documents that Mr. Brennan received from a confidential source regarding the investigation of J. Whyatt Mondesire. Mr. Brennan has never revealed the identity of his confidential source and, the copies of the documents that we produced were redacted to protect the identity of the confidential source. As discussed below, because Mr. Brennan believes that the production of the unredacted original documents could reveal that information, the Pennsylvania Shield Law provides absolute protection against the forced production of the documents that your subpoena seeks.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, titled "Confidential communications to news reporters," provides:

(a) General rule. -- No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of

Philadelphia	Boston	Washington, D.C.	Los Angeles	New York	Pittsburgh	
Detroit	Berwyn	Harrisburg	Orange County	Princeton	Silicon Valley	Wilmington

Kevin R. Steele, Esq.

Page 2

January 28, 2016

general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

(b) Exception [relating to radio or television stations.]

The Pennsylvania Supreme Court repeatedly has held that this statute offers journalists absolute protection from the compelled disclosure of a confidential source or information that could reveal the identity of a confidential source. *See Castellani v. Scranton Times*, 956 A.2d 937, 948-51 (Pa. 2008) (citing and summarizing *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2002); *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988); *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987); and *In re Taylor*, 193 A.2d 181 (Pa. 1963)); *see also McMullan v. Wohlgemuth*, 308 A.2d 888, 896 (Pa. 1972) (“[T]he Pennsylvania Legislature has wisely created an absolute statutory right of a newsman to preserve the confidentiality of his sources of information.”). The Supreme Court also has left no doubt that the protection encompasses not just testimony, but also documents that could reveal a confidential source’s identity. *See, e.g., Bowden*, 838 A.2d at 749 (“[D]ocuments are to be considered sources [under the Shield Law] where their production, even with all names redacted, could breach the confidentiality of a human source.”).

In *Taylor*, the Pennsylvania Supreme Court explained that the Shield Law’s absolute guarantee of source confidentiality is critical to society’s well-being:

It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

Kevin R. Steele, Esq.
Page 3
January 28, 2016

Taylor, 193 A.2d at 185 (emphasis in *Taylor*). Therefore, the Court stressed, “the Statute must be liberally construed in favor of the newspapers and news media.” *Id.*

Here, Mr. Brennan has assured confidentiality to his source, as is his absolute right based on the Shield Law and the long-standing state Supreme Court precedent discussed above. Mr. Brennan has faithfully adhered to this confidentiality commitment, including when he was subpoenaed to produce documents and testify in the grand jury investigation for which Mr. Carluccio was Special Prosecutor. Markings on the documents that Mr. Brennan received from his confidential source could be used to identify the source, which is why we redacted those markings from the copies that I provided to Mr. Carluccio on Mr. Brennan’s behalf. Forensic evidence (e.g., fingerprints or DNA) on the original documents could be used to identify Mr. Brennan’s source, too. Therefore, at Mr. Brennan’s direction and on the basis of the Pennsylvania Shield Law, I object to providing the documents your office has subpoenaed.

I hope that your office accepts our assertion of the Shield Law’s absolute protection. If not, please let me know, and we will prepare and file a motion to quash.

Respectfully,



Michael A. Schwartz