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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**No. 6239-15**
v.	:	**No. 8423-15**
	:	
KATHLEEN G. KANE	:	

MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY GENERAL KATHLEEN G. KANE'S SUPPLEMENTAL PRETRIAL MOTIONS

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MEMORANDUM OF LAW

INTRODUCTION

This memorandum of law is respectfully submitted in support of Attorney General Kathleen G. Kane's supplemental motions:

(1) For an evidentiary hearing to establish facts related to the leak of recordings to the press, and potential prosecutorial misconduct; and

(2) For permission to file Attorney General Kane's motion alleging selective and vindictive prosecution under seal.

POINT ONE

An Evidentiary Hearing Should be Held to Establish Facts Related to the Leak of Recordings to the Press, and Potential Prosecutorial Misconduct

Under the unique circumstances of this case, the Montgomery County District Attorney's Office was one of only three parties with custody of recordings that were leaked to the press. The leaked recordings formed the basis of a February 25, 2016 story in The Morning Call, titled "Source: Consultant said Kathleen Kane asked him to pass along documents at center of leak probe, FBI recording shows," that was highly prejudicial to Attorney General Kane. Of those three parties, only the Commonwealth had a motive to release such evidence.

An evidentiary hearing is warranted in this case to establish facts that would allow for a determination of whether the Commonwealth leaked the recordings. If so, the Commonwealth's actions would constitute clear prosecutorial misconduct warranting significant sanctions by the Court.

STATEMENT OF FACTS

Production of the Recordings to Defense Counsel

At the court appearance on February 5, 2016, the Commonwealth produced to defense counsel a CD containing recordings of ten telephone calls made by federal law enforcement under Title III interception. See 18 U.S.C.A. § 2518. The Commonwealth stated that the recordings were made by the United States Attorney's Office for the Middle District of Pennsylvania. The Commonwealth further stated that it had obtained the recordings from the United States Attorney's Office, under the law enforcement exception to Title III, only after clearing significant procedural hurdles (including the approval of a federal judge). See 18 U.S.C.A. § 2517(5); (see Affidavit of Ross M. Kramer, at ¶ 7.).

The recordings consist of calls placed or received by an assumed trial witness for the Commonwealth, Josh Morrow. On some of the recordings, Morrow discusses issues central to the charges in this case. (See Affidavit of Ross M. Kramer, at ¶ 6.)

Disclosure to the Press

On or about February 25, 2016, a news story about the recordings appeared on the website for The Morning Call, "the third largest newspaper in Pennsylvania and the leading

media company in the Lehigh Valley[.]" See "The Morning Call History," THE MORNING CALL (Aug. 8, 2014), http://www.mcall.com/about/mc-morning-call-history-story.html.

The story, titled "Source: Consultant said Kathleen Kane asked him to pass along documents at center of leak probe, FBI recording shows," ***includes specific details about the substance of the recordings*** from a "source" who was familiar with the facts of this case and had heard the recordings first-hand. See Steve Esack, "Source: Consultant said Kathleen Kane asked him to pass along documents at center of leak probe, FBI recording shows," THE MORNING CALL (Feb. 25, 2016), http://www.mcall.com/news/local/investigations/mc-pa-kathleen-kane-fbi-wiretap-20160225-story.html. A copy of the story is attached as Exhibit A.

The story states, in relevant part:

> Attorney General Kathleen Kane's political consultant was caught on an FBI wiretap talking about how she wanted the consultant's help in passing along documents that later became the subject of a grand jury leak probe, The Morning Call has learned.
>
> The FBI recorded the conversation between Kane's consultant, Josh Morrow, and an unidentified person during its 2014 extortion investigation of state Treasurer Rob McCord, a source told the newspaper.
>
> The FBI later provided the recording to the Montgomery County District Attorney's Office, which has charged Kane with lying about her role in passing along the grand jury documents that were discussed in the call, the source said. ... County prosecutors gave the recording to Kane's legal defense team Feb. 5 in preparation for her trial this summer, the source said.

Id.

The "source" leaking information to the press clearly had significant knowledge about this case and first-hand knowledge of the recordings:

> The information Morrow gave in his interview is materially similar to what he said on the FBI recording, the first source said.
>
> Morrow is heard saying 'Kathleen called me' and then he describes what Kane told him to do with the records, the source said. 'He does mention Frank Fina and

> Mondesire,' the source said. 'They talk about what the documents are to be used for.'

Id.

> The story opines on the significance of the recordings to Attorney General Kane's case:
>
> Such a recording offers ***potentially corroborating evidence to bolster prosecutors' claims*** that Kane lied under oath by denying a role in the leak. And it is audio evidence that stands apart from what Morrow told an investigator about a similar phone conversation described in the county's affidavit of probable cause.

Id. (emphasis added).

The story also contains legal analysis of the recordings that is plainly prejudicial to Attorney General Kane:

> ***One legal expert called the recording a "slam dunk" for prosecutors.***
>
> Audio or video evidence ***greatly aids prosecution***, said Jeffrey Lindy, a Philadelphia defense lawyer and former federal prosecutor who has defended high-profile clients such as Monsignor William Lynn, accused of covering up child sex abuse in the Catholic Archdiocese of Philadelphia.
>
> Morrow didn't know he was being recorded in that 2014 telephone conversation. ***So Lindy said it will be hard to convince jurors that he wasn't telling the truth.***

Id. (emphasis added).

The story remains on The Morning Call website, readily accessible to potential jurors. There is no subscription required to access the story.

LEGAL STANDARD

The release of prejudicial information by the Commonwealth to the press can constitute prosecutorial misconduct. See Com. v. Nelson, 408 A.2d 854, 855 (Pa. Super. Ct. 1979) ("It is true that conversing with reporters about a case in litigation can constitute prosecutorial misconduct," but finding no misconduct under circumstances of case); see also Com. v. Herbert

Fogel, No. 2343 (LJP), 1989 WL 817165, at *115 (Mun. Ct. Phil. Oct. 24, 1989) ("Plain and simple, the issuing of statements by a prosecutor during the course of a trial to a known member of the press, who, in turn, disseminates that information by means of public communication, represents totally unacceptable behavior[.]").

The Pennsylvania Supreme Court addressed this issue in Com. v. Pierce, 303 A.2d 209, 214 (1973). In Pierce, the Court held that the release of prejudicial information by law enforcement agents can directly infringe on a defendant's due process right to a fair trial:

> It is not only the fact that the publicity was 'inherently prejudicial' that troubles us about this case – it is also the source of the publicity. The information in this case was not reported as a result of independent research by the representatives of the news media – it came directly from the police.
>
> * * *
>
> Officers of the Commonwealth and the police have a special duty and responsibility to All of the citizens of the Commonwealth. They must never lose sight of the fact that an accused has a right to a fair trial by an impartial jury, that only a jury can 'strip a man of his liberty,' and a man is presumed innocent until Proven guilty in a court of law, and that all men are guaranteed basic rights under the Constitution.

Id.

When prosecutorial misconduct is alleged, the proper procedure is for the trial court to hold an evidentiary hearing to establish the facts underlying such misconduct, and to determine the appropriate remedy. See, e.g., Com. v. Powell, 369 A.2d 726, 726 (1977) (Manderino, J., concurring and dissenting) ("The claim of prosecutorial misconduct did not appear in the trial record, and to properly dispose of the issue, we remanded the record to the court below for an evidentiary hearing."); Com. v. Molan, 465 A.2d 676, 677 (Pa. Super. Ct. 1983) ("These facts were shown in an evidentiary hearing held in response to a defense motion to dismiss because of alleged prosecutorial misconduct."); Com. v. Poaches, No. 1593 EDA 2012 (MJB), 2013 WL

11250777, at *1 (Pa. Super. Ct. Nov. 18, 2013) ("The events alleged to constitute prosecutorial misconduct may have occurred or may not have occurred. If the events did occur, the PCRA court will have to determine their significance. These are issues to be framed in a properly pleaded amended petition and to be decided after any necessary hearing."); Com. v. Watts, 19 Pa. D. & C.3d 105, 106 (Pa. Com. Pl. 1980) *aff'd*, 424 A.2d 503 (1981) (evidentiary hearing held to establish facts necessary to determine whether trial prosecutor's misconduct should preclude second trial).

ANALYSIS

An evidentiary hearing is necessary in this case to establish facts that would allow for a determination of: (a) whether the leak of the recordings was the result of prosecutorial misconduct; and (b) if so, what the appropriate remedy should be.

Under the unique facts of this case, it appears likely that the recordings at issue were leaked by an agent of the Commonwealth. The chain of custody for the recordings is limited and clear. The recordings were made by the United States Attorney's Office for the Middle District of Pennsylvania, and were required to have been held strictly under seal. Upon the request of the Montgomery County District Attorney's Office, and completion of the related procedural steps that were necessary, the recordings were released to the Commonwealth and then to defense counsel for Attorney General Kane. Accordingly, it is apparent that only three parties held copies of these recordings at the time of the leak – the United States Attorney's Office for the Middle District of Pennsylvania; the Montgomery County District Attorney's Office; and defense counsel for Attorney General Kane.

Certainly, Attorney General Kane and her counsel would have no reason to leak recordings to the press that would generate negative publicity, and potentially taint the jury pool against her. Likewise, the United States Attorney's Office for the Middle District of Pennsylvania is not a party to this case, and agents of that office would seemingly have no motive to release the recordings to the press (particularly in light of the strict federal regulations governing the dissemination of Title III recordings). The only party that remains with custody of the recordings and a motive to release them to the press is the Montgomery County District Attorney's Office. Accordingly, we request an evidentiary hearing to establish the facts underlying the leak, and to determine whether the leak constituted prosecutorial misconduct.

Under the circumstances of this case, the Commonwealth cannot reasonably object to an evidentiary hearing relating to a leak of sensitive information to the press. After all, the charges in this case are based on an alleged leak of grand jury information. The allegation against Attorney General Kane resulted in a significant and lengthy investigation, by both an Investigating Grand Jury and the Montgomery County District Attorney's Office. Here, ironically, it appears likely that an agent of the Commonwealth may have leaked sensitive information to the press, to Attorney General Kane's obvious detriment. Fundamental fairness dictates that an investigation, by way of evidentiary hearing, is warranted here.

In advance of the hearing, Attorney General Kane requests that the Court order the Commonwealth to produce: (1) a list of individuals associated with the Montgomery County District Attorney's Office who had custody of the recordings or access to the recordings; and (2) any emails, memoranda, letters or other documents or correspondence related to the release of the recordings to anyone outside of the Montgomery County District Attorney's Office.

Correspondingly, the Commonwealth should be ordered to perform a search of its internal emails and records for such evidence.

If prosecutorial misconduct is established at the hearing, Attorney General Kane respectfully reserves the right to move, among other things, for a change of venue, disqualification of the Montgomery County District Attorney's Office as a party to this case, suppression of the recordings, and/or quashal of the charges in their entirety.

POINT TWO

Attorney General Kane Should be Permitted to File a Motion Alleging Selective and Vindictive Prosecution Under Seal

On March 4, 2016, with the Court's permission, defense counsel filed a redacted version of Attorney General Kane's omnibus pretrial motions. The redacted version omitted Attorney General Kane's motion to quash the charges due to selective and vindictive prosecution. Redaction was necessary in light of an issue arising out of the Philadelphia County Court of Common Pleas. Specifically, during a phone conference on March 7, 2016, Judge Diana L. Anhalt of the Court of Philadelphia Court informed defense counsel that publicly filing a selective and vindictive prosecution motion in this case would likely result in a finding of contempt against both defense counsel and Attorney General Kane. (See Affidavit of Ross M. Kramer, at ¶ 8.)[1]

In light of Judge Anhalt's explicit warning, filing Attorney General Kane's selective and vindictive prosecution motion under seal is both necessary and warranted.

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[1] In an abundance of caution, the recitation of facts in this Memorandum of Law is abridged. At the Court's request, we can supplement the facts here, and/or attach exhibits in support.

LEGAL STANDARD

"Pennsylvania law provides both a constitutional and common law right of public access to judicial proceedings." In re M.B., 819 A.2d 59, 62 (Pa. Super. Ct. 2003).

However, the right of public access to judicial proceedings is not absolute. Com. v. Knight, 364 A.2d 902, 906-08 (1976) (finding no abuse of discretion where judge closed proceedings to all but press and law students during testimony of particular witness); see also M.B., 819 A.2d at 66 (affirming denial of publisher's motion to open proceedings to press and general public).

"[E]ven in the context of a criminal trial, where federal Constitutional guarantees both explicitly and implicitly apply, access rights of the public are subject to limitation by judicial discretion and necessity." Stenger v. Lehigh Valley Hosp. Ctr., 554 A.2d 954, 957 (Pa. Super. Ct. 1989). "Courts have an inherent power to control their records and proceedings, and may deny access when appropriate." M.B., 819 A.2d at 63 (2003) (quoting In re Affidavit for Search Warrant for 4011 Wilson Ave., Bethlehem, Pa., 42 Pa. D. & C.3d 467, 473 (1986). In order to determine when it is appropriate to deny access to the public, "a court must assess all of the circumstances to determine if they present a situation in which an exclusion order is necessary." Knight, 364 A.2d at 906.[2]

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[2] Courts have found a range of circumstances or "important interests" that may necessitate excluding the public from proceedings, or sealing documents. For example, in Com v. Knight, the court determined that it was appropriate to close proceedings to all but press and law students during the testimony of a juvenile witness who would experience "emotional trauma" if made to testify in public. Id. at 907. Similarly, in In re M.B., the court found that the "compelling interest in protecting the privacy rights" of juveniles warranted closing proceedings to both the press and the public. 819 A.2d at 64. In P.G. Pub. Co. v. Com. By & Through Dist. Atty. of Erie Cty., the Superior Court found that "the trial court committed an error of law" when it granted access to affidavits supporting search warrants "by failing to demonstrably balance the governmental interest against the newspaper' right of access." 566 A.2d 857, 862 (Pa. Super. Ct. 1989), *aff'd*, 614 A.2d 1106 (1992). Similarly, in In re Affidavit for Search Warrant for 4011

Once a court has determined that it is appropriate to limit or deny access, the court must determine the scope and duration of the exclusion, balancing the "important interests" underlying the exclusion with the general right of public access to judicial proceedings. Knight, 364 A.2d at 906.

ANALYSIS

Under the facts of this case, filing Attorney General Kane's selective and vindictive prosecution motion under seal is necessary and warranted.

Attorney General Kane has an absolute right to present a viable defense to the criminal charges against her. Attorney General Kane's selective and vindictive prosecution motion is supported by the facts and grounded in Pennsylvania law. At the same time, defense counsel has been informed that filing this viable legal motion carries a strong possibility of defense counsel and the defendant being held in contempt by a Judge who is not supervising this case. The situation presents a direct and imminent threat to Attorney General Kane's constitutional rights to be effectively represented by counsel, and to present a full defense to the criminal charges against her. See U.S. Const. amend. VI.; United States v. Morrison, 535 F.2d 223, 227 (3d Cir. 1976) (right to present a defense violated where defense witness not given immunity by prosecution); Com. v. Horton, 644 A.2d 181, 187 (Pa. Super. Ct. 1994) (reversing conviction for ineffective assistance of counsel where attorney failed to properly raise appropriate defense); Rock v. Zimmerman, 586 F. Supp. 1076, 1083-84 (M.D. Pa. 1984) (counsel ineffective for failing to bring viable motion to suppress evidence); Com. v. Jones, 640 A.2d 1330, 1335 (1994)

Wilson Ave., Bethlehem, Pa., the court held that when release of "documents will jeopardize an ongoing investigation by the police, the court may seal such documents from public access pending completion of the investigations." 42 Pa. D. & C.3d at 473.

(counsel ineffective in failing to file motion to withdraw plea of defendant who was not advised that he could receive consecutive sentences); Com. v. Segers, 387 A.2d 858, 869-60 (1978) (counsel ineffective for "[f]ailure to raise in a pre-trial suppression motion an arguably meritorious claim that a confession was obtained as the result of an unnecessary delay following arrest"); Com. v. Kilgore, 719 A.2d 754, 757 (Pa. Super. Ct. 1998) (counsel ineffective for failure to raise motion); Com. v. Fassett, 437 A.2d 1166, 1169 (Pa. Super. Ct. 1981) (same); Com. v. Carr, 466 A.2d 1030, 1034-35 (Pa. Super. Ct. 1983) (counsel held ineffective for failing to raise post-verdict motions).

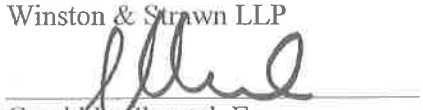
There can be no more "important interest" in this case than the protection of Attorney General Kane's constitutional rights to effective representation and a fair trial. Accordingly, we respectfully submit that this is a situation in which a limited sealing order is necessary and appropriate, to protect Attorney General Kane's constitutional rights. See Knight, 364 A.2d at 906-7. Such an order would cover only the selective and vindictive prosecution motion (and any briefing in response and reply), and the duration of the order could be set at the Court's discretion.

CONCLUSION

For the reasons set forth above, we respectfully submit that Attorney General Kathleen G. Kane's supplemental motions should be granted.

Dated: March 18, 2016
New York, NY

Winston & Strawn LLP



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