

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

No. CP-22- CR-3615-2013

v.

GRAHAM B. SPANIER,

Defendant.

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DAUPHIN COUNTY
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MOTION FOR PRETRIAL DISCOVERY

AND NOW, defendant Dr. Graham B. Spanier, by and through the undersigned counsel, respectfully moves for disclosure of:

- a) Documents, information, recordings, tangible items, and other materials that are favorable to the defendant and material either to guilt or to punishment.
- b) Any alleged written confession or inculpatory statement, and the substance of any alleged oral confession or inculpatory statement, along with the identity of the person to whom the alleged confession or inculpatory statement was made.
- c) Expert reports obtained by the Commonwealth in relation to this matter.
- d) Tangible objects, including documents in any form, photographs, and other tangible evidence, that are relevant to this matter.
- e) Transcripts and recordings of any electronic surveillance in connection with this matter, along with the authority by which the transcripts and recordings were obtained.
- f) Transcripts of any testimony before the investigating grand jury that is exculpatory to the defendant.
- g) Physical evidence presented to the investigating grand jury that is exculpatory to the defendant.
- h) The names and addresses of any eyewitnesses in this matter.

- i) Written, recorded, and oral statements of eyewitnesses that the Commonwealth intends to call at trial.
- j) Written, recorded, and oral statements of the co-defendants, Gary C. Schultz and Timothy M. Curley, and of any other alleged co-conspirators or accomplices in this matter.
- k) The transcript of Cynthia Baldwin's grand jury testimony.
- l) Any motions, hearing, colloquy or argument transcripts, or rulings thereupon with respect to Ms. Baldwin's assertion of attorney-client privilege or work-product protection on behalf of Dr. Spanier or any exceptions asserted by the Commonwealth in order to overcome privilege.
- m) All documents and information regarding any understanding or agreement as to a future prosecution of Ms. Baldwin, including whether Ms. Baldwin was granted immunity for her testimony before the Thirty-Third Statewide Investigating Grand Jury or whether Ms. Baldwin provided such testimony under any other understanding or agreement, whether formal, informal, or tacit, regarding a potential future prosecution.

In support of this motion, Dr. Spanier states the following:

1. On November 1, 2012, a criminal complaint was filed against Dr. Spanier charging him with the following counts: (1) Perjury, a violation of 18 PA. C.S. § 4902 and a felony of the third degree; (2) Endangering Welfare of Children, in violation of 18 PA. C.S. § 4304, a felony of the third degree (two counts); (3) Obstructing Administration of Law or Other Governmental Function, a violation of 18 PA. C.S. § 5101 and a misdemeanor of the second degree; (4) Criminal Conspiracy (to Commit Obstructing Administration of Law or Other Governmental Function), a violation of 18 PA. C.S. § 903 and a misdemeanor of the second degree; (5) Failure to Report, a violation of 23 PA. C.S. § 6319, a summary offense; (6) Criminal Conspiracy (to Commit Perjury), a violation of 18 PA. C.S. § 903 and a felony of the third degree; and (7) Criminal Conspiracy (to Commit Endangering Welfare of Children), a violation of 18 PA. C.S. § 903 and a felony of the third degree.

2. Magisterial District Judge William C. Wenner held the charges against Dr. Spanier for trial following a preliminary hearing on July 29 and July 30, 2013.

3. Dr. Spanier was arraigned on September 20, 2013.

4. To date, the Commonwealth has refused Dr. Spanier's requests for disclosure, each time ignoring the request or responding that Dr. Spanier was not yet entitled to pretrial discovery. Such requests were made on December 12, 2012, April 26, 2013 and September 23, 2013.

5. Pennsylvania Rule of Criminal Procedure 573(B)(1) provides that the following disclosures by the Commonwealth are mandatory:

- a) Evidence favorable to the defendant and material either to guilt or to punishment. PA. R. CRIM. P. 573(B)(1)(a); *see also Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U. S. 83 (1963).
- b) Any alleged written confession or inculpatory statement, and the substance of any alleged oral confession or inculpatory statement, along with the identity of the person to whom the alleged confession or inculpatory statement was made. PA. R. CRIM. P. 573(B)(1)(b).
- c) Expert reports obtained by the Commonwealth. PA. R. CRIM. P. 573(B)(1)(e).
- d) Tangible objects, including documents in any form, photographs, and other tangible evidence. PA. R. CRIM. P. 573(B)(1)(f).
- e) Transcripts and recordings of any electronic surveillance, along with the authority by which the transcripts and recordings were obtained. PA. R. CRIM. P. 573(B)(1)(g).

6. Pennsylvania's criminal discovery rules "are designed to avoid trial by ambush." *Commonwealth v. Ulen*, 539 Pa. 51, 57, 650 A.2d 416, 418 (1994) (ordering a new trial where the Commonwealth failed to provide during pretrial discovery a tape recording of the defendant's phone call with a witness that it used for impeachment at trial); *see also*

Commonwealth v. Moose, 529 Pa. 218, 236, 602 A.2d 1265, 1274 (1992) (“Trial by ambush is contrary to the spirit and letter of th[e] rules and cannot be condoned.”); *Commonwealth v. Thiel*, 323 Pa. Super. 92, 96, 99, 470 A.2d 145, 147, 149 (1983) (ordering a new trial where the Commonwealth failed to disclose documentary evidence in its possession and thereby deprived the defense of any opportunity to investigate the genuineness of the evidence or explore other weaknesses or opportunities for impeachment).

7. The Commonwealth presented evidence at the preliminary hearing that it has collected a massive amount of documents that must be disclosed to Dr. Spanier under the rules outlined above. For example, the Commonwealth’s witnesses testified that 30 terabytes of data from multiple email boxes maintained by Dr. Spanier were collected, and the Commonwealth alleged, among other things, that this evidence revealed that Dr. Spanier deleted emails in an attempt to obstruct the grand jury investigation. Dr. Spanier is entitled to any documents, including electronic documents, that are relevant to this matter, and that certainly includes materials that the Commonwealth relied upon or referred to in making its case at the preliminary hearing.

8. Additionally, the Commonwealth’s mandatory disclosures include the following grand jury materials:

- f) The transcript of any testimony before an investigating grand jury that is exculpatory to the defendant; and
- g) Physical evidence presented to the grand jury that is exculpatory to the defendant. PA. R. CRIM. P. 230(B)(3).

9. Rule 230(B)(3), one of a limited number of exceptions to the secrecy of grand jury testimony, “is intended to reflect the line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963),” which require the Commonwealth to disclose exculpatory materials to the

defense. PA. R. CRIM. P. 230, cmt. Thus, Dr. Spanier is entitled to discover any exculpatory testimony or physical evidence presented to the grand jury.

10. Pennsylvania Rule of Criminal Procedure 573(B)(2) gives the Court discretion to order disclosure of the following items, where they are material to the preparation of the defense and the request is reasonable:

- h) The names and addresses of any eyewitnesses. PA. R. CRIM. P. 573(B)(2)(a)(i).
- i) Written, recorded, and oral statements of eyewitnesses that the Commonwealth intends to call at trial. PA. R. CRIM. P. 573(B)(2)(a)(ii).
- j) Written, recorded, and oral statements of the co-defendants, Gary C. Schultz and Timothy M. Curley, and of any other alleged co-conspirators or accomplices. PA. R. CRIM. P. 573(B)(2)(a)(iii).

11. The Court should order disclosure of the identity of eyewitnesses and the statements of alleged co-conspirators and eyewitnesses it intends to call at trial because these items are material to the preparation of Dr. Spanier's defense and their disclosure does not pose any burden on the Commonwealth. PA. R. CRIM. P. 573(B)(2)(a).

12. Rule 573(B)(2) also gives the Court discretion to order the disclosure of "any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice." PA. R. CRIM. P. 573(B)(2)(a)(iv).

13. The Court has indicated that it will hold a hearing on the issues related to Cynthia Baldwin presented in Dr. Spanier's Motion to Quash Criminal Complaint. Dr. Spanier alleges that he was denied the right to counsel and conflict-free counsel in connection with his grand jury appearance because of Ms. Baldwin's egregious conduct, and additionally that Ms. Baldwin breached the attorney-client privilege and work product doctrine by herself testifying

before the same grand jury as to her confidential communications with Dr. Spanier and work performed on his behalf.

14. For purposes of the hearing on these issues, Dr. Spanier requests that the Court order the Commonwealth to disclose:

- k) The transcript of Ms. Baldwin's grand jury testimony;
- l) Any motions, hearing, colloquy or argument transcripts, or rulings thereupon with respect to Ms. Baldwin's assertion of attorney-client privilege or work-product protection on behalf of Dr. Spanier or any exceptions asserted by the Commonwealth in order to overcome privilege; and
- m) All documents and information regarding any understanding or agreement as to a future prosecution of Ms. Baldwin, including whether Ms. Baldwin was granted immunity for her testimony before the Thirty-Third Statewide Investigating Grand Jury or whether Ms. Baldwin provided such testimony under any other understanding or agreement, whether formal, informal, or tacit, regarding a potential future prosecution.

15. The Court should order disclosure of the above-listed materials relating to Ms. Baldwin's conduct in the interest of having a just, meaningful, and efficient hearing on the issues presented in Dr. Spanier's motion. PA. R. CRIM. P. 573(B)(2)(a)(iv); *see also In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 107, 907 A.2d 505, 516 (2006) (ordering disclosure of grand jury notice of submission because the defendant would "be hampered in the ability to challenge a notice of submission if he lacks any access to the document").

16. As required under Pennsylvania Rule of Criminal Procedure 573(A), counsel for Dr. Spanier made a good faith effort to resolve these discovery issues by written request to Deputy Attorney General Bruce Beemer.

WHEREFORE, for the reasons stated, Dr. Spanier respectfully moves this Court to order the Commonwealth to provide Dr. Spanier pretrial discovery pursuant to the Pennsylvania Rules of Criminal Procedure.

Respectfully submitted,



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Attorneys for Defendant Dr. Graham B. Spanier

Dated: October 4, 2013

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
 : No. CP-22- CR-3615-2013
 :
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 v. :
 :
 GRAHAM B. SPANIER, :
 :
 Defendant. :

ORDER

AND NOW, this _____ day of _____, 2013, upon
consideration of the Motion for Pretrial Discovery and any response thereto, it is hereby
ORDERED and DECREED that the Motion is GRANTED. The Commonwealth is instructed to
provide the requested materials on or before _____, 2013.

BY THE COURT:

_____, J.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
 : No. CP-22- CR-3615-2013
 :
 : OTN No. T-252359-2
 :
 v. :
 :
 GRAHAM B. SPANIER, :
 :
 :
 Defendant. :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Pretrial
Discovery was delivered this 4th day of October 2013, to the following:

By Email and First Class Mail

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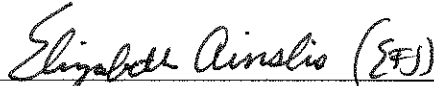
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