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

COMMONWEALTH OF PENNSYLVANIA	:	**6239-15**
	:	**8423-15**
v.	:	
	:	
KATHLEEN G. KANE	:	

COMMONWEALTH'S SENTENCING MEMORANDUM

The District Attorney of Montgomery County, Kevin R. Steele, and his Deputy District Attorney, Thomas W. McGoldrick, respectfully represent the following:

I. Facts and Procedural History:

Kathleen G. Kane was elected Attorney General for the Commonwealth of Pennsylvania on November 6, 2012, and her inauguration was held on January 15, 2013. On that date, Kane was administered the Oath of Office pursuant to Article VI § 3 of the Constitution of the Commonwealth of Pennsylvania whereupon Kane swore to "support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth" and to "discharge the duties of [her] office with fidelity." Kane then began her four-year term as Attorney General.

On March 16, 2014, *The Philadelphia Inquirer* published an article that was highly critical of Kane's decision not to pursue prosecutions of

six public officials who had been caught in an undercover sting accepting bribes. This investigation, known as the "Ali investigation," had been led by Frank Fina, a former Deputy Attorney General, while he was still employed by the Office of Attorney General ("OAG"). Fina had left the OAG shortly after Kane was sworn in as Attorney General in January of 2013, and he was hired as an Assistant District Attorney in Philadelphia. After Kane declined to pursue the charges, the investigation was adopted by the Philadelphia District Attorney's Office, which has since obtained convictions in five of the six cases.[1]

Kane was incensed by the *Inquirer* article, and she believed that Fina was responsible for providing the information used in the story to the *Inquirer*. Publicly, however, Kane denied being angry at Fina and issued a press release on March 16, 2014, stating, "Furthermore, I do not have any animosity toward the lead prosecutor of this case. I do not know the former prosecutor any more than I know the individuals targeted in this investigation." On March 17, 2014, Kane held a press conference during which she claimed that the Ali investigation was "so poorly handled by her predecessors that it could not be prosecuted" and that the investigation was racially motivated.[2]

On March 20, 2014, Kane appeared before the Editorial Board of

[1] The sixth and final defendant is scheduled for trial on December 5, 2016.
[2] Subsequently, a Philadelphia Grand Jury that was investigating some of the individuals involved in the Ali case issued a Presentment stating, inter alia, "As the grand jurors represent a cross-section of Philadelphia citizens, we were particularly sensitive to the explosive charge that the defendants were racially targeted... We found, however, that the claims of racism in this instance were simply false."

The Philadelphia Inquirer accompanied by her private attorney. Kane had hired this attorney to represent her personally in potential defamation claims against the newspaper. At the meeting, Kane declined to speak and instead had her attorney speak for her. In the wake of this, several more newspaper articles were published that were critical of Kane's handling of the matter.

Kane then decided to strike back at her perceived enemy, Frank Fina. Kane used her employees in the OAG to review another investigation that had been led by Fina while he was employed by the OAG. This was a 2009 Grand Jury Investigation that probed the possible misuse of grant money by a number of individuals, including J. Whyatt Mondesire. The investigation concluded with the convictions of two individuals. However, Mr. Mondesire was never charged with any crimes. Kane decided that, because Mr. Mondesire had not been prosecuted, this would discredit Fina if it appeared in the press. Kane directed her subordinates to interview Special Agent Michael Miletto, one of the investigators who worked on the 2009 Grand Jury Investigation. Former Special Agent in Charge of the Bureau of Special Investigations David C. Peifer conducted the interview and recorded it on audio equipment. The interview outlined details from the 2009 Grand Jury Investigation. Peifer then had the audio recording transcribed into a twenty-six page document known as the "Miletto Transcript," and he delivered it to Kane.

Kane used her subordinates to gather other documents related to

the 2009 Grand Jury Investigation. These documents included emails and a four-page internal memorandum that had been prepared in 2009 and that contained information gathered during the 2009 Grand Jury Investigation. This document is known as the "2009 Memorandum." A package containing the "Miletto Transcript," the "2009 Memorandum," and the emails relating to the 2009 Grand Jury Investigation was put together, and, on April 22, 2014, Kane asked then First Assistant Attorney General Adrian King to deliver the package to Joshua Morrow, a political consultant and friend of Kane's who had worked on her campaign. King agreed and made arrangements for Morrow to pick up the package at King's home in Philadelphia the following day. On April 22, 2014, Kane called Morrow and informed him that the package contained materials from an investigation into Mondesire that had been dropped by Fina. Kane asked Morrow to leak the documents to the press, and Morrow agreed.[3] On May 4, 2014, Morrow delivered the documents to Chris Brennan who, at that time, was a reporter for the *Philadelphia Daily News*.

Prior to publishing his article, Chris Brennan contacted several of the people whose names appeared in the leaked documents, including Frank Fina. Subsequently, Fina notified the Honorable William R.

[3] Joshua Morrow initially had reservations about agreeing to Kane's request, and, on April 22, 2014, Morrow called his friend John Lisko seeking his advice. This phone call was recorded by the FBI in an unrelated wiretap investigation. During the call, Lisko presciently stated, "there's not going to be anything good that comes of that..." Ultimately, Morrow disregarded his friend's advice and complied with Kane's request.

Carpenter, Supervising Judge of the Statewide Investigating Grand Jury, and informed him that there was apparently a leak of secret Grand Jury information that was now in the hands of a reporter. Judge Carpenter then appointed a Special Prosecutor, Tom Carluccio, to look into the leak of secret Grand Jury information.

On June 6, 2014, Brennan's article appeared in the *Philadelphia Daily News*. (Friday, June 6, 2014: Daily News article written by Chris Brennan: "Wonder Bread" State A.G. is curious about that big 2009 probe of ex-NAACP boss finances"). The article contained detailed information from the 2009 Grand Jury Investigation, and it cited two documents related to the Grand Jury investigation, the "Miletto Transcript" and the "2009 Memorandum."

The Grand Jury Investigation lasted approximately eight months. Dozens of witnesses were called to testify. Kane testified before the Grand Jury on November 17, 2014. On December 18, 2014, the Grand Jury returned a Presentment recommending that criminal charges be filed against Kane. On December 19, 2014, Judge Carpenter made an investigative referral to the Montgomery County District Attorney's Office.

Pursuant to the referral, the Montgomery County District Attorney's Office began an independent investigation into the matter. During this investigation, numerous search warrants were executed, and dozens of witness interviews were conducted. At the conclusion of this independent investigation, a criminal complaint was filed against

Kathleen Kane on August 6, 2015, charging her with Perjury, False Swearing, Obstructing Administration of Law or Other Governmental Function, Official Oppression, and Conspiracy. On August 24, 2015, a preliminary hearing was held and all charges were bound over for court.

Shortly after Kane's arrest, a longtime OAG Executive Secretary and notary Wanda Scheib read the criminal complaint against Kane, and she saw that Kane had testified that she had never been sworn before the 29th Statewide Investigating Grand Jury, which was the Grand Jury that had conducted the investigation involving Mr. Mondesire. Ms. Scheib knew that Kane had been sworn before the 29th Statewide Investigating Grand Jury because Ms. Scheib had notarized Kane's signed oath of secrecy for that Grand Jury. Ms. Scheib realized that Kane had lied in her testimony before the Grand Jury and that no one else seemed to be aware of this fact. Ms. Scheib proceeded to inform then-First Deputy Attorney General Bruce Beemer that Kane had, in fact, been sworn before the 29th Statewide Investigating Grand Jury. Mr. Beemer then relayed this information to the Montgomery County District Attorney's Office.

On September 17, 2015, Montgomery County detectives executed a sealed search warrant upon the OAG and seized Ms. Scheib's notary log book and several signed secrecy oaths, including Kane's signed secrecy oath for the 29th Statewide Investigating Grand Jury. On October 1, 2015, a second criminal complaint was filed against Kathleen Kane

charging her with Perjury, False Swearing, and Obstructing Administration of Law or Other Governmental Function. On November 10, 2015, a preliminary hearing was held and all charges were bound over for court.

The two cases were subsequently consolidated for trial. On August 8, 2016, the jury trial commenced before the Honorable Wendy Demchick-Alloy. On August 15, 2016, the jury convicted Kane of all of the charges submitted to them, specifically:

Docket Number 6239-15
(Count 1) Perjury (F3)
(Count 2) False Swearing (M2)
(Count 3) Obstructing Administration of Law or Other Governmental Function (M2)
(Count 5) Criminal Conspiracy to Commit Obstructing Administration of Law or Other Governmental Function (M2)
(Count 6) Official Oppression (M2)
(Count 7) Criminal Conspiracy to Commit Official Oppression (M2)

Docket Number 8423-15
(Count 1) Perjury (F3)
(Count 2) False Swearing (M2)
(Count 3) Obstructing Administration of Law or Other Governmental Function (M2)

Following the jury verdict, the Court ordered that a Pre-Sentence Investigation ("PSI") and a PPI Evaluation be completed regarding the Defendant. The Court then scheduled sentencing for October 24, 2016. On August 17, 2016, two days after her conviction, Kane resigned as Attorney General of Pennsylvania.

II. Merger:

Section 9765 of the Judicial Code of Pennsylvania provides the following:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S.A. § 9765.

The Commonwealth believes that the two counts of False Swearing merge with the two counts of Perjury for sentencing purposes. All of the statutory elements of the crime of False Swearing are included in the crime of Perjury.[4] In addition, the False Swearing count on docket 6239-15 is based upon essentially the same criminal acts that the Perjury count on docket 6239-15 is based upon. Likewise, the False Swearing count on docket 8423-15 is based upon the same criminal acts that the Perjury count on docket 8423-15 is based upon. Therefore, because the crimes merge for sentencing and because Perjury has a higher grading than False Swearing, the Court should impose sentences on the two counts of Perjury but not on the two counts of False Swearing.

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[4] In pertinent part, the crime of Perjury is defined as follows, "[a] person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath... when the statement is material and he does not believe it to be true." 18 Pa.C.S.A. § 4902(a). In pertinent part, the crime of False Swearing is defined as follows, "[a] person who makes a false statement under oath... when he does not believe the statement to be true is guilty of a misdemeanor of the second degree if: (1) the falsification occurs in an official proceeding..." 18 Pa.C.S.A. § 4903(a).

III. Sentencing Guidelines and Maximum Penalties:

The Defendant stands convicted of two counts of Perjury, a Felony of the Third Degree. The maximum penalty for each of these two counts is 3½-7 years in state prison and a $15,000 fine. The Offense Gravity Score (OGS) for Perjury is 5, and the Defendant's Prior Record Score (PRS) is 0. Thus, the applicable standard guideline range is RS-9 months, the applicable mitigated range is RS-RS months, and the applicable aggravated range is 9-12 months.

The Defendant also stands convicted of two counts of Obstructing Administration of Law or Other Governmental Function, a Misdemeanor of the Second Degree. The maximum penalty for each of these two counts is 1-2 years in state prison and a $5,000 fine. The OGS for Obstructing Administration of Law or Other Governmental Function is 3, and the Defendant's PRS is 0. Thus, the applicable standard guideline range is RS-1, the applicable mitigated range is RS-RS, and the applicable aggravated range is 1-4 months.

The Defendant also stands convicted of one count of Criminal Conspiracy to Commit Obstructing Administration of Law or Other Governmental Function, a Misdemeanor of the Second Degree. The maximum penalty for this is 1-2 years in state prison and a $5,000 fine. The OGS for Criminal Conspiracy to Commit Obstructing Administration of Law or Other Governmental Function is 3, and the Defendant's PRS is 0. Thus, the applicable standard guideline range is RS-1, the applicable

mitigated range is RS-RS, and the applicable aggravated range is 1-4 months.

The Defendant also stands convicted of one count of Official Oppression, a Misdemeanor of the Second Degree. The maximum penalty for this is 1-2 years in state prison and a $5,000 fine. The OGS for Official Oppression is 2, and the Defendant's PRS is 0. Thus, the applicable standard guideline range is RS-RS, the applicable mitigated range is RS-RS, and the applicable aggravated range is RS-3 months.

Lastly, the Defendant stands convicted of one count of Criminal Conspiracy to Commit Official Oppression, a Misdemeanor of the Second Degree. The maximum penalty for this is 1-2 years in state prison and a $5,000 fine. The OGS for Criminal Conspiracy to Commit Official Oppression is 2, and the Defendant's PRS is 0. Thus, the applicable standard guideline range is RS-RS, the applicable mitigated range is RS-RS, and the applicable aggravated range is RS-3 months.

The defendant faces a maximum prison sentence of 12-24 years.

IV. Sentencing Standards and Guidelines:

Section 9721(b) of the Pennsylvania Judicial Code provides the general sentencing standards to be followed by a trial court. 42 Pa.C.S.A. § 9721(b). Section 9722 of the Pennsylvania Judicial Code sets forth the various grounds that would weigh in favor of a probationary sentence, 42 Pa.C.S.A. § 9722, while Section 9725 directs that a trial court "shall

impose" a sentence of incarceration if it is of the opinion that total confinement is necessary because "a lesser sentence will depreciate the seriousness of the crime of the defendant." 42 Pa.C.S.A. § 9725.

When a Judge decides to impose a sentence of confinement, "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. §9721(b). The court also shall consider the applicable sentencing guidelines. Id.; 204 Pa.Code §303.1(a). When the Court finds that aggravating circumstances are present, it may impose a sentence in the aggravated range. 204 Pa.Code §303.13(a). A Court imposing an aggravated range sentence is required to state its reasons on the record and on the Guideline Sentence Form. Id.; Commonwealth v. Bowen, 975 A.2d 1120, 1122 (Pa.Super. 2009) (citing Commonwealth v. Duffy, 491 A.2d 230, 233 (Pa.Super. 1985). The court also may impose a sentence outside the guidelines, so long as it is within the statutory maximum for the offense. Commonwealth v. Yuhasz, 923 A.2d 1111 (Pa. 2007). When the court imposes a sentence outside the guidelines, it must record the reasons for doing so on the Guideline Sentence Form. 204 Pa.Code §303.1(d).

Section 9781(c) of the Pennsylvania Judicial Code defines only three specific instances when an appellate court should vacate a sentence and remand for re-sentencing: (1) the sentencing court applied

the guidelines erroneously; (2) the sentence falls within the guidelines, but is "clearly unreasonable" based on the circumstances of the case; and (3) the sentence falls outside of the guidelines and is "unreasonable." 42 Pa.C.S.A. § 9781(c).

The sentencing guidelines are merely advisory, and the court may sentence a defendant outside of the guidelines so long as it places its reasons for the deviation on the record. Commonwealth v. Tirado, 870 A.2d 362 (Pa.Super. 2005); Commonwealth v. Cunningham, 805 A.2d 566 (Pa.Super. 2002). A sentencing judge has a great deal of discretion in fashioning a sentence, and a sentence will not be reversed absent a manifest abuse of discretion. Tirado at 366; Cunningham at 575. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. Tirado at 366; Cunningham at 575. In exercising its discretion, the sentencing court may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as the court also states of record the factual basis and specific reasons which compelled deviation from the guideline range. Cunningham at 575. When the sentencing court deems it appropriate to sentence

outside the guidelines, it may do so as long as it offers its reasons. Commonwealth v. Davis, 737 A.2d 792 (Pa.Super. 1999). "Our Supreme Court has indicated that if the sentencing court proffers reasons indicating that its decision to depart from the guidelines is not unreasonable, we must affirm a sentence that falls outside those guidelines..." Id. at 798 (citations omitted).

Lack of remorse has long been a legitimate sentencing factor in Pennsylvania, provided that it is specifically considered in relation to the protection of the public, the gravity of the offense, and the defendant's rehabilitative needs. Bowen, 975 A.2d at 1125. However, a trial court may not consider as a sentencing factor a defendant's failure to accept responsibility where the defendant has consistently maintained her innocence.[5] Id. at 1127. But, the trial court is free to consider lack of remorse as a sentencing factor so long as it is based on reasons other than the defendant's silence at sentencing. Id.

In addition, the trial court has the discretion under 42 Pa.C.S.A. § 9721 to impose sentences consecutively. In Commonwealth v. Marts, 889 A.2d 608 (Pa.Super. 2005), the Superior Court reiterated that the "[l]ong standing precedent of this Court recognizes that 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the

[5] To do so would force upon a defendant "the Hobson's choice" of either jeopardizing her appellate claims or risking a greater sentence by remaining silent at the sentencing hearing. Id. at 1127.

same time or to sentences already imposed." A court's decision to run sentences consecutively will not be upset where the aggregate sentence is not raised to a facially excessive level in light of the underlying criminal conduct. Commonwealth v. Mastromarino, 2 A.3d 581, 587 (Pa. 2010).

V. Argument:

The Commonwealth intends to ask this Honorable Court to impose consecutive sentences of incarceration upon the Defendant. The Commonwealth does not make this request lightly. The facts of this case are particularly egregious, and the impact that these crimes have had on the Commonwealth of Pennsylvania, the Office of Attorney General, the law enforcement community, and on J. Whyatt Mondesire and his family is substantial, widespread, and ongoing.

A probationary sentence would be entirely inappropriate here in light of the evidence that was revealed during the trial and the egregious circumstances surrounding the case. Further, the Defendant fails each of the twelve grounds enumerated in 42 Pa.C.S.A. § 9722 except for one.[6] Moreover, pursuant to 42 Pa.C.S.A. § 9725, the trial court "shall impose" a sentence of incarceration if it is of the opinion that total confinement is necessary because "a lesser sentence will depreciate the seriousness of the crime of the defendant." 42 Pa.C.S.A. § 9725. Certainly, the crimes

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[6] "The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime." 42 Pa.C.S.A. § 9722(7).

of this defendant demand a sentence of incarceration.

A. Victim Impact:

Kathleen Kane abused the power entrusted to her by the people of Pennsylvania to advance her own agenda of personal vindictiveness. As the Attorney General and as an Assistant District Attorney in Lackawanna County for approximately twelve years, she was well aware of the restrictions placed upon prosecutors by CHRIA and the Grand Jury Act. She knew full well that confidential investigative information[7] and secret Grand Jury information was not to be released to the press unless authorized by statute or by a Judge.[8] N.T. 8/12/16 pg. 98-103. She knew that part of the rationale for these restrictions was to protect the reputations of individuals who were never arrested or charged with crimes. Nevertheless, she purposely leaked to the press confidential information regarding an investigation into J. Whyatt Mondesire, a man who was never charged with a crime.

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[7] At trial, the Commonwealth introduced into evidence an email exchange between Kane and her then-First Assistant Attorney General Adrian King. In the emails, King expressed to Kane his reservations about her sharing confidential investigative information with her private attorneys. Kane responded, "I am well aware of the limitations of disclosing criminal files and the Wiretap Act. I have been in this business for quite some time." N.T. 8/10/16 pg. 115.

[8] At trial, evidence was presented regarding Kane's prior testimony in 1999 in the case of Commonwealth v. Eagen. The case involved a Lackawanna County Judge who had been charged with bribery and obstruction. Part of the allegations accused Judge Eagen of attempting to breach Grand Jury secrecy by asking then-Assistant District Attorney Kane to disclose secret Grand Jury information to him. Kane testified, "I was not allowed to give out any information to anybody regarding the Grand Jury process. There are very strict rules, and one of the rules is it is a secret process, and for me to give out any information to somebody, who is not going into the Grand Jury, is actually a criminal offense," and "I now have this Judge asking me to give him things that I know are improper. I know that it is a crime for me to give them to him, and he is asking me to do it. He is asking me what is going on before the Grand Jury, and I know I can't tell him." N.T. 8/12/16 pg. 99 and 102.

At trial, the Commonwealth presented the testimony of Catherine Hicks, Mr. Mondesire's fiancé. She testified that, prior to Mr. Mondesire's death in October 2015, she and Mr. Mondesire dated for about ten years before becoming engaged to be married. N.T. 8/12/16 pg. 54. She testified that the leak of the confidential materials by Kane had a tremendous impact upon Mr. Mondesire. Id. at 61-62. Prior to the leak, Mr. Mondesire had been very active in the community. He hosted his own weekly radio program for about 19 years, he was a regular guest on the local television program "Inside Story" for about six years, he was the publisher of the *Philadelphia Sunday Sun* for about 23 years, and he was the leader of the Philadelphia Chapter of the National Association for the Advancement of Colored People ("NAACP"). Id. at 56-60.

When the leaked materials appeared in the *Daily News* on June 6, 2014, Mr. Mondesire was surprised, very upset, and very angry. Id. at 62. Ms. Hicks testified that, in the days that followed, "everything changed." Id. at 63. Mr. Mondesire was not asked back to appear on "Inside Story," and "he was very hurt about that" because he believed that the program "made a difference." Id. at 64. Ms. Hicks testified that the leak impacted his position with the NAACP from which he was suspended after approximately twenty years of service. Id. at 64-65. Ms. Hicks also described that, after the leak, Mr. Mondesire suffered from stress and his health declined. Id. at 65-66. Further, Ms. Hicks testified that, "he just was a different person. This figure that was always

outgoing, outspoken, fighting for everybody, you know, the school district, all of the places that he would go and usually be the voice, he would – he wasn't doing that anymore, and I think it took a toll on him physically, because he internalized a lot of the hurt and the embarrassment, and it just took a toll. It definitely did." Id. at 66.

B. Gravity of the Offenses and Impact on the Community:

Pursuant to 42 Pa.C.S.A. §9721(b), the sentencing Judge should consider "the gravity of the offense as it relates to the impact on the life of the victim and on the community..." As this Court is fully aware, Perjury before an Investigating Grand Jury is an extremely serious offense. The Investigating Grand Jury is made up of ordinary citizens who work with prosecutors to seek the truth in cases of great import to the Commonwealth. Indeed, deception before the Grand Jury goes to the very heart of our justice system. Accordingly, Perjury before the Grand Jury is a crime that demands a significant and stiff sentence.

In addition to the impact upon Mr. Mondesire discussed above, Kane's crimes have had a serious and detrimental impact upon the citizens of the Commonwealth, the employees of the OAG, and upon the entire law enforcement community of Pennsylvania. During her tenure as Attorney General, Kane behaved in a paranoid manner[9] and repeatedly misused her official authority to advance her personal

[9] Joshua Morrow testified that, on more than one occasion before meeting with Kane, her security officers, including Patrick Reese, seized his electronic devices and "wanded" him to make sure that he was not wearing any recording devices on his body. N.T. 8/11/16 pg. 48.

vendettas. Morale among the approximately 800 employees of the OAG plummeted under her leadership. Many longtime employees quit, and others were fired.[10] In the Pre-Sentence Investigation ("PSI"), current Attorney General Bruce Beemer stated, "I saw other employees getting treated unfairly. The office was not operating as well as it could because the way the employees were being treated." PSI pg. 30.

At trial, the evidence showed that, due to her disputes with First Assistant Attorney General Adrian King, Kane intentionally failed to sign a letter designating King to fill in for her when she left the country for a trip to Haiti. N.T. 8/10/16 pg. 116-118. She did this despite knowing that there was an important ongoing wiretap investigation requiring documents to be signed in her absence. Id. at 118-119. This dereliction of her duty is seemingly illustrative of her approach to her position as Attorney General—retribution against those who crossed her took precedence over performing her duties as the top law enforcement officer in Pennsylvania. This behavior created an atmosphere of mistrust within the OAG.

After reading the first criminal complaint against Kane, longtime Executive Secretary and notary Wanda Scheib realized that Kane had lied to the Grand Jury when she denied having been sworn to the 29th Statewide Grand Jury. Ms. Scheib testified that she was scared and

[10] Notably, longtime Deputy Attorney General James Barker was fired by Kane shortly after he was subpoenaed by the Special Prosecutor and testified before the Grand Jury investigating Kane.

didn't know what would happen to her if she spoke the truth about what she knew.[11] Ms. Scheib stated, "Do I say something or don't I? She's the head of our agency... What's going to happen to me if I do say something?" N.T. 8/11/16 pg. 57. Ultimately, she went to Bruce Beemer with the information because, unlike Kane, Beemer was "somebody that I knew I could trust to say something to." Id. at 58.

Kane's crimes and her behavior in office not only destroyed morale within the OAG, it diminished the reputation of the entire OAG and law enforcement generally. In order for our government and our system of justice to operate properly, it is imperative that the citizens have faith in their institutions and in their elected officials who run them. When public officials, especially those in law enforcement and the judiciary, commit crimes and act dishonestly, the inescapable result is that the public loses faith in its government and judicial system. Kane's actions have eroded the public's trust and confidence in law enforcement across the Commonwealth, and, in turn, her crimes have caused incalculable damage to the reputation of police and prosecutors.

C. Lack of Remorse:

As stated above, this Court is free to consider Kane's lack of remorse for her conduct, so long as it is specifically considered in relation to the protection of the public, the gravity of the offense, and the

[11] Wanda Scheib testified that she was not fired after she went to Bruce Beemer with the information that Kane had lied to the Grand Jury, but she did state that she had been moved from her office to a cubicle. N.T. 8/11/16 pg. 69.

defendant's rehabilitative needs, and is not based upon her decision to remain silent at sentencing. Commonwealth v. Bowen, 975 A.2d 1120, 1125-1127 (Pa.Super. 2009). From the moment she decided to leak the confidential materials to the press, Kane has exhibited her lack of remorse repeatedly in both her actions and her words.

In the PSI, Kane stated, "People tend to play it safe. People elected me to do a job and I will do it. The thought of losing my kids over a job kills me." It seems from this statement that Kane believes that her legal troubles stem from her simply doing the job the people elected her to do. Nothing could be further from the truth. Her legal troubles are the result of her conscious decision to break the law and to abuse her authority in order strike back at perceived political enemies. In the PPI Evaluation, Kane stated that her current circumstances were the result of a "30 second decision" implying that an impulsive choice triggered her legal problems. This statement is simply not true, and it is an illustration of her lack of remorse. Kane's subordinates looked for an old case of Fina's that she might be able to use against him, and, when they found one, she had her subordinates conduct an interview and gather together documents related to the case. These were calculated, deliberate steps and were not impulsive in any way.

Also, if Kane truly had second thoughts about leaking the documents, she had ample opportunity to stop the train that she set in motion. Her friend and political advisor Joshua Morrow had the

documents in his possession from April 23, 2014, until he delivered them to Chris Brennan on May 4, 2012. N.T. 8/11/16 pg. 12. The *Daily News* didn't publish Brennan's story until June 6, 2014, which was more than six weeks after Kane asked King to deliver the package to Morrow. The truth is that Kane never second-guessed her decision to leak the documents. Instead, she sent text messages to Morrow about revenge being "best served cold" and asking why it was taking so long for the story to come out. Id. at 23 and 33. Moreover, her lack of remorse is seen in her actions and words during her effort to cover-up her crime and to actively thwart the investigation of her.

At trial, Bruce Beemer testified that he was shocked when he read the *Daily News* article on June 6, 2014, because he knew immediately from reading the article that there had been a leak and that the leak came from within the OAG. N.T. 8/9/16 pg. 116-117. Mr. Beemer testified that he called Kane on June 6th and asked for her permission to look into the leak because it had clearly come from within the OAG but that Kane's response was, "Don't worry about it, it's not a big deal, we have more important things to do." N.T. 8/10/16 pg. 18. Mr. Beemer stated that he was "surprised" by Kane's response because it was an obvious problem and because he believed that it "was incumbent on us to at least take a look as to what happened." Id. at 19. Mr. Beemer further testified that, when he later learned that the Special Prosecutor had been appointed, he was relieved because the matter would be

investigated. Id. at 30-31. Also, Mr. Beemer testified that he spoke to Judge Carpenter and that he promised the Judge that the Special Prosecutor would have the complete cooperation of the OAG during his investigation. Id. at 31-32. However, Mr. Beemer then spoke to Kane on July 28, 2014, and Kane told him that she wanted to challenge the authority of the Special Prosecutor and that she wanted to stop his investigation. Id. at 32, 39-44. Mr. Beemer testified that, at that moment, "my heart sank." Id. at 39.

Mr. Beemer testified further regarding a conversation with Kane in October of 2014 in which they were discussing how she wanted to challenge the Special Prosecutor's investigation. Id. at 45-48. Mr. Beemer testified that he and the other assigned prosecutors tried to express objections they had regarding what Kane wanted them to do, and that Kane responded, "you know, Bruce, if I get taken out of here in handcuffs, what do you think my last act will be?" Id. at 46-47. Mr. Beemer testified that he was concerned because he took that to mean that he and the other assigned prosecutors would be fired if they didn't challenge the Special Prosecutor as they were told. Id. at 47-48.

In the fall of 2014, during the Grand Jury Investigation of Kane, Kane's subordinates surreptitiously obtained information about the Special Prosecutor's investigation of Kane in direct violation of a protective order issued by Judge Carpenter on August 27, 2014, that prohibited any member of the OAG from gaining access to information

about the Special Prosecutor's investigation.[12] Kane tasked the head of her security detail, Special Agent Patrick Reese, with searching the OAG email system. Reese conducted hundreds of illegal searches and read hundreds of emails and attachments that contained information related to the Special Prosecutor's Grand Jury Investigation of Kane. On August 11, 2015, Reese was arrested and charged with Indirect Criminal Contempt. He went to trial and was found guilty of Indirect Criminal Contempt on December 18, 2015. On March 3, 2016, Reese was sentenced to serve three to six months of incarceration at the Montgomery County Correctional Facility, to pay a $1,000 fine, and to perform 100 hours of community service. Certainly, Kane's use of a Special Agent of the OAG for this purpose is further evidence of her lack of remorse for her crimes.

In addition, Kane made many public statements about the investigation both before and after her arrest that further illustrate her lack of remorse. On January 21, 2015, at a press conference, Kane was questioned about the Grand Jury Presentment. Kane claimed that the Special Prosecutor failed to find a leak because "there is no leak." Kane further stated, "I'm not concerned about anything. I went to the Grand Jury voluntarily, under subpoena, but I went, I didn't have to, and I

[12] The protective order provided, in relevant part, that: "[t]he Office of the Attorney General, except upon specific authorization by this Court or the Special Prosecutor, shall refrain from any involvement in, or access to, the investigative efforts of the Special Prosecutor"; and "[e]mployees of the Office of the Attorney General shall not have access to transcripts of proceedings before the Grand Jury or the Supervising Judge, exhibits, or other information pertaining to the Special Prosecutor's investigation" (*Order*, Dated Aug. 27th, 2014, at ¶ 1 and 4 (Carpenter, J.)).

made sure I told the truth because, you know what, the truth is the truth and that's what it is. There was no crime committed." (https://www.youtube.com/watch?v=2h_QpQuam70&feature=youtu.be). These statements are untrue. Kane did not go voluntarily to appear before the Grand Jury. A subpoena is a court order commanding an individual to appear to give testimony. Moreover, Kane attempted to have her subpoena quashed and only complied with the subpoena after the Pennsylvania Supreme Court overruled her challenge to the subpoena. Her false statements to the public and her attempts to evade having to testify before the Grand Jury show her lack of remorse.

Kane not only lied to the public and the Grand Jury, she also furthered her deception in her filings with the Pennsylvania Supreme Court. Prior to her testimony before the Grand Jury, Kane, through her attorneys, filed with the Supreme Court a motion to quash her subpoena. In the motion, Kane claimed that she was "not sworn to secrecy with regard to the 2009 Grand Jury proceedings" and, thus, she "could not as a matter of law be in contempt of court with regard to any disclosure related to that Grand Jury proceeding." Also, in November 2014, just before Kane was scheduled to appear before the Grand Jury, her lawyers filed an emergency motion for extraordinary relief before the Pennsylvania Supreme Court. In this motion, Kane again claimed that she "was never sworn before the 2009 Grand Jury." These false statements should be considered further evidence of Kane's lack of

remorse.

Kane may well argue to the Court at sentencing that her decision to resign as Attorney General on August 17, 2016, two days after her conviction, is evidence of her remorse and should be considered as a mitigating factor for sentencing. Such an argument would ring hollow. The Constitution of Pennsylvania provides that civil officers "shall be removed on conviction of misbehavior in office or of any infamous crime." Article VI, sec. 7. A crime is infamous "if its underlying facts establish a felony, a *crimen falsi* offense, or a like offense involving the charge of falsehood that affects the public administration of justice." In re Humane Soc'y of the Harrisburg Area, Inc., 92 A.3d 1264, 1271 (Pa.Cmwlth. 2014). The removal of a civil officer after conviction of an infamous crime is to occur at the time of sentencing for the infamous crime, and the removal is imposed by the trial judge as part of the sentence. In re Ballantine, 86 A.3d 958, 967-968 (Pa.Jud.Disc. 2013). Accordingly, following her conviction on August 15, 2016, of several infamous crimes, Kane would have been automatically removed from office by this Court at her sentencing on October 24, 2016 pursuant to the Pennsylvania Constitution. Thus, her resignation on August 17th was not a sign of remorse on her part. Rather, it merely sped up what was a foregone conclusion by about nine weeks. As such, Kane's decision to resign should not be given any consideration as a mitigating factor at sentencing.

Finally, on August 17, 2014, which was her last day as Attorney General, Kane gave a brief interview to reporters outside the OAG's Scranton office and indicated that she had no regrets as her tenure came to an end. Kane stated, "I try to live my life without any regrets. I try to live every day like it's my last. I try to do the best job I can every day. And I have no regrets. I hope that people see that we've done our best, and, you know, sometimes the price is high." Again, it seems that Kane continues to argue that her legal troubles are the result of her simply doing her job as best she could and that she believes that she has done nothing wrong. This interview illustrates Kane's clear lack of remorse for her criminal acts.

VII. Conclusion:

In an effort to retaliate against a former state prosecutor who she believed had embarrassed her in the press, Attorney General Kane orchestrated the leak of confidential investigative information and secret Grand Jury information to the press without regard to the damage done to an individual, who was never charged with a crime. When compelled to appear as a witness before the Investigating Grand Jury, Attorney General Kane endeavored to cover up her wrongdoing by attempting to deceive the Grand Jury regarding her conduct and her legal culpability. By engaging in this unlawful behavior, she violated her oath to uphold the laws and the Constitution of the Commonwealth of Pennsylvania,

and she abused the power entrusted to her by the citizens of Pennsylvania.

WHEREFORE, based upon the foregoing, the Commonwealth believes that consecutive sentences of incarceration are appropriate so as to not depreciate the seriousness of the crimes she was convicted of by a Montgomery County jury.

Respectfully Submitted,

Kevin R. Steele
District Attorney

Thomas W. McGoldrick
Deputy District Attorney

VERIFICATION

Subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, I declare that the statements of fact in the foregoing Commonwealth's Sentencing Memorandum are true and correct to the best of my knowledge, information, and belief.

Kevin R. Steele
District Attorney

Thomas W. McGoldrick
Deputy District Attorney

Date: October 17, 2016

CERTIFICATE OF SERVICE

I, Thomas W. McGoldrick, do hereby certify that I have caused a copy of the foregoing Commonwealth's Sentencing Memorandum to be served via email and/or via mail upon the following:

Marc R. Steinberg, Esq.
Rubin, Glickman, Steinberg, and Gifford
2605 N. Broad Street, P.O. Box 1277
Lansdale, PA 19446
mrs@rgsglaw.com

Gerald L. Shargel, Esq.
Ross M. Kramer, Esq.
Seth C. Farber, Esq.
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
gshargel@winston.com
rkramer@winston.com
sfarber@winston.com

Amil Minora, Esq.
700 Vine Street
Scranton, PA 18510
amil.minora@gmail.com

Douglas K. Rosenblum, Esq.
Pietragallo Gordon Alfano Bosick & Raspanti LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
dkr@pietragallo.com

Thomas W. McGoldrick
Deputy District Attorney

Date: October 17, 2016