IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY WRIGHT,	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 16-5020**
CITY OF PHILADELPHIA, *et al.*,	:	
Defendants	:	

THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE'S OMNIBUS SURREPLY IN FURTHER OPPOSITION TO PLAINTIFF'S AND THE PENNSYLVANIA INNOCENCE PROJECT'S MOTIONS TO STRIKE CONFIDENTIALITY DESIGNATIONS

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Plaintiff and the Pennsylvania Innocence Project (collectively, "Movants") made clear in their motions to strike that "this discovery dispute is whether Defendants and DAO may clawback and deny the Project's use of the 10,250 pages of files from the Philadelphia Police Department's Homicide Unit . . . ." (PAIP Mot. Strike 2, ECF No. 76.) The Court answered that question in its August 23, 2017 Memorandum and Order: *no*. "The DAO ultimately seeks to prevent what has already been done," the Court observed (Mem. 3, ECF No. 86), and "it is not clear to the Court how the DAO proposes to compel the Innocence Project to return the Homicide Files." (*Id.* at 8.) That can and should end the matter.

But Movants appear disinclined to take *yes* for an answer. Now, we are told, the motions to strike are no longer about whether the retroactively designated files can be clawed back, or whether the PAIP may use those files in postconviction proceedings. Rather, the Court must now decide whether the PAIP may discuss those files with Plaintiff's Counsel. (PAIP Reply 2, ECF No. 91.) Movants cite no provision of the Confidentiality Agreement that would bar such communications, however, and the DAO is not aware of any. And consider the implication of this argument: are Movants representing that they have had no communications regarding these files since the City retroactively designated them confidential? And if not, do Movants believe they have been violating this Court's Confidentiality Order? The answer to both questions is likely *no*. Movants cannot manufacture a live controversy by fretting that they might violate a provision that appears nowhere in the Confidentiality Order.

Movants also point to new homicide files that the City produced after these motions were filed. (PAIP Reply 2; Pl.'s Surreply 2, ECF No. 94-1.) Unlike the homicide files at issue here, these files were designated confidential from the start. Movants assert that, although their motions initially sought to strike *retroactive* confidentiality designations on specific homicide

files, they now can be reoriented to strike *prospective* confidentiality designations on different homicide files. But Movants cannot create a live controversy by applying their motion *post hoc* to different files that are in a different procedural posture and subject to different legal arguments. Indeed, much of Plaintiff's motion to strike attacks the retroactive nature of the designations, which is irrelevant when considering new files that have been designated since the time of production.

Finally, Plaintiff adds that maintaining the designations would subject him to other responsibilities: he would be unable to disclose the homicide files to those not involved with this litigation, for example, and must file briefs containing confidential information under seal. (Pl.'s Surreply 1-2.) Plaintiff expressed none of these concerns at the outset, however—his argument, which has since been resolved in his favor, was that "Plaintiff's counsel needed assistance from the PA IP to understand the full context and to determine whether there were materials that were relevant to Mr. Wright's claims." (Pl.'s Mot. Strike 4, ECF No. 72.) If litigants could simply insert new grievances into reply and surreply briefs when old ones have been resolved, the concept of mootness would cease to have meaning. The Court should reject Plaintiff's offer of new and abstract injuries when he has already obtained relief for the concrete injury that caused him to seek Court intervention in the first place.

Move the goalposts enough, and any motion can be reanimated as a live controversy. This controversy is dead, and is best left as such. The motions to strike are moot.

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Apparently mistaking the DAO's disinclination to fight over motions it considered resolved for an inability to fight, the PAIP compares the DAO's silence on the *Pansy* factors[1] to

[1] *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994).

Sir Arthur Conan Doyle's famous dog that did not bark.[2] (PAIP Reply 4.) The DAO can no longer let the PAIP's misreading of *Pansy* stand. The PAIP advocates a rigid application of the *Pansy* factors, which it regards as "required" (*id.* at 3), but *Pansy* itself observed that these factors "are unavoidably vague," *Pansy*, 23 F.3d at 789, so as to "provide the district courts the flexibility needed to justly and properly consider the factors of each case." *Id.* They "are neither mandatory nor exhaustive," *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); rather, they "*may be considered* in evaluating whether 'good cause' exists." *Id.* (emphasis added). Thus, while the factors are helpful in conducting "a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public," *Pansy*, 23 F.3d at 787 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 434 (1991)), the Court should decline the PAIP's invitation to substitute the map for the terrain.

The Third Circuit's decision in *Pansy* reflects a notably different fact pattern and set of considerations than those present here. *Pansy* involved a challenge by several newspapers to the confidentiality of a settlement agreement between the Borough of Stroudsburg and its former police chief. *Id.* at 775. The settlement agreement ordinarily would have been available under the Pennsylvania Right-to-Know Law ("RTKL"), 65 Pa. Cons. Stat. §§ 67.101 *et seq.*—in fact, an RTKL suit to obtain the agreement was pending in state court—but the federal court's confidentiality order precluded the state court from ordering the agreement's release. *Pansy*, 23

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[2] Ironically, Plaintiff himself devotes only one paragraph of his briefing to *Pansy* and addresses only one of the factors. (*See* Pl.'s Mot. Strike 5.) To hear the PAIP say it, this is a highly uncharacteristic oversight by Plaintiff's Counsel. More likely, it is evidence of Plaintiff and the PAIP coordinating their arguments as they attempt to avoid the effect of a Confidentiality Agreement that Plaintiff's Counsel themselves negotiated and executed.

F.3d at 776. This case, by contrast, concerns the ability of private litigants to access for their own private use information that the legislature and a state-court judge have explicitly stated they are *not* entitled to obtain, either under the RTKL or the Post-Conviction Relief Act.[3]

This Court has observed that *Pansy*'s "statement that a second tribunal cannot differently adjudge the same parties' rights and obligations with regard to each other . . . is actually rather unremarkable." *United States v. Dougherty*, No. 07-CR-0361-1, 2014 WL 3676002, at *3 (E.D. Pa. July 23, 2014), *aff'd*, 627 F. App'x 97 (3d Cir. 2015). But Movants deploy the *Pansy* factors in service to the quite remarkable proposition that this Court *should* in fact see things differently from the state tribunal, as well as the state legislature. Viewing the *Pansy* factors through that prism compels a different result. *First*, the PAIP seems primarily concerned with the privacy interest of its clients (*see* PAIP Mot. Strike 4), but the files likely contain names and other identifying information regarding confidential informants or other witnesses whose safety and privacy might be compromised if the files were widely distributed. *Second*, the PAIP asserts that its purpose is "to protect and advance their clients' . . . *Brady* and other rights." (*Id*. at 5.) But the PAIP's motions for discovery of the homicide files have been denied in state postconviction proceedings, and courts have repeatedly held that "civil discovery may not be used to subvert limitations on discovery in criminal cases."[4] *McSurely v. McClellan*, 426 F.2d 664, 671-72

[3] The RTKL exempts investigative information (such as these homicide files) from its ambit, 65 Pa. Cons. Stat. § 67.708(b)(16), and the Criminal History Record Information Act ("CHRIA") expressly *forbids* criminal-justice agencies from turning over such records to anyone other than a criminal-justice agency. 18 Pa. Cons. Stat. § 9106(c)(4). Similarly, the Pennsylvania Rules of Criminal Procedure forbid discovery in postconviction proceedings absent a showing of exceptional circumstances. *See* Pa. R. Crim. P. 902(E)(1).

[4] *See also In re Grand Jury Subpoena*, 646 F.3d 159, 166 (4th Cir. 2011) (same); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980) ("[F]ederal civil discovery may not be used merely to subvert limitations on discovery in another proceeding."); *Carpenter Co. v. BASF SE*, No. 08-5169, 2015 WL 3755010, at *3 (D.N.J. June 16, 2015) (same); *Mine Safety Appliances*

(D.C. Cir. 1970). Avoiding the effect of a state-court decision is plainly not a legitimate reason for accessing the files. The *third* factor, embarrassment, does not play a role here. *Fourth*, maintenance of the designations is important to public health and safety. The PAIP frames its interest from the standpoint of its clients, Messrs. Veasy and Swainson, while ignoring that it is the *release* of information that may be contrary to public safety if doing so would enable guilty PCRA petitioners to secure release. *Fifth*, and as discussed above, efficiency gains from sharing information among litigants are unjustified if the purpose of sharing is to subvert discovery limitations in criminal cases. *See supra* note 4. *Sixth*, it is true that the DAO is a public entity. But unlike in *Pansy*, where the federal confidentiality order was in direct conflict with the legislature's directives in the RTKL, the Pennsylvania legislature has determined that the public's interest is best served by affording protection to investigatory files. The rote response in favor of lifting confidentiality when one party is a public entity loses its force when the public's representatives have made a legislative determination that confidentiality would best serve the public interest. And *finally*, this case involves issues that are important to private individuals, rather than the public at large. Anthony Wright seeks a monetary judgment; Messrs. Veasy and Swainson seek their release from prison. Whether they are entitled to these things is up to a federal jury and the PCRA court, respectively. But they remain private interests—not public.

The PAIP is correct, however, that the briefing in this matter contains a dog that did not bark. Movants cite no cases in which a court applies the *Pansy* factors to deny confidentiality to homicide files or similar police investigative files, and the DAO is unaware of any. And understandably so: *Pansy* was about the public's right to information that the Pennsylvania

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Co. v. N. River Ins. Co., No. 09-0348, 2016 WL 8221566, at *3 (W.D. Pa. Sept. 29, 2016) (same).

legislature has stated it is entitled to have; this case is about private litigants' right to obtain information that the legislature and state courts have repeatedly stated they are *not* entitled to have. The confidentiality designations are both necessary and appropriate here. Movants' motions to strike should be denied.

Respectfully submitted,

Date: September 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2017, I served the foregoing on all counsel of record via filing on the Court's ECF system.

/s/ Michael Scalera
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