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

CP-22-CR-3616-2013
CP-22-CR-5164-2011

COMMONWEALTH OF PENNSYLVANIA,

v.

GARY C. SCHULTZ
Defendant

COMMONWEALTH RESPONSE TO THE DEFENDANT'S OMNIBUS PRETRIAL MOTION

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The Commonwealth of Pennsylvania, by and through the Office of the Attorney General, hereby submits the following Memorandum in opposition to the Defendant's omnibus pretrial motion.

PROCEDURAL HISTORY

1. On November 7, 2011, following the return of a presentment from the Thirty-Third Statewide Investigating Grand Jury, Timothy Curley (hereinafter referred to as "Curley"), Athletic Director for Penn State University (hereinafter PSU), was charged with one (1) count of Perjury, 18 Pa.C.S. §4902(a), graded as a felony of the third degree, and one summary count of Penalties for Failure to Report or Refer, 23 Pa.C.S. §6319(a).

2. On that same day, Gary Schultz (hereinafter referred to as "Schultz"), Senior Vice President for Finance and Business for PSU, was charged with the same crimes. Schultz's charges were based upon the same presentment referred to in Paragraph 1. The charges against both Curley and Schultz are based on the men's decision not to report to Child Protective Services a 2001 allegation of sexual conduct between Gerald A. Sandusky (hereinafter referred to as "Sandusky") and a male child and then lying about this situation while testifying before the Thirty-Third Statewide Investigating Grand Jury.

3. On December 16, 2011, a preliminary hearing on the above-referenced charges was held before Magisterial District Judge William C. Wenner. All charges against both men were held for court. The Commonwealth filed Criminal Informations against Curley and Schultz as it relates to these charges on January 19, 2012 (Curley's case as to these charges is docketed at CP-22-CR-0005165-2011, while Schultz's case in this regard is docketed at CP-22-CR-0005164-2011).

4. On November 1, 2012, Curley and Schultz were both charged with two (2) counts of Endangering the Welfare of Children, 18 Pa.C.S. §4304(a), graded as felonies of the third degree, one (1) count of Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. §5101, graded as a misdemeanor of the second degree, and three (3) counts of Criminal Conspiracy, 18 Pa.C.S. §903(a), graded as felonies of the third degree. On November 7, 2012, Graham Basil Spanier, former President of PSU (hereinafter referred to as "Spanier") was charged with one (1) count of Perjury, 18 Pa.C.S. §4902, graded as a felony of the third degree, two (2) counts of Endangering the Welfare of Children, 18 Pa.C.S. §4304(a), graded as felonies of the third degree, one count of Obstructing the Administration of Law or Other Governmental Function, graded as a misdemeanor of the second degree, three (3) counts of Criminal Conspiracy, 18 Pa.C.S. §903(a), graded as felonies of the third degree, and one summary count of Penalties for Failure to Report or Refer, 23 Pa.C.S. §6319(a).

5. The charges referred to in Paragraph 4 were filed by the Commonwealth in response to a second presentment returned by the Thirty-Third Statewide Investigating Grand Jury. The charges are based upon evidence presented to the Grand Jury that the men agreed to not report to Child Protective Services and/or law enforcement a 2001 allegation of Sandusky molesting a minor male child in the shower of a Penn State locker room that had been made known to them, thereby jeopardizing the safety and welfare of children who came into contact with Sandusky subsequent to the men being on notice of the 2001 allegation. The failure to notify authorities or take substantial action is rendered all the more egregious by the fact that the men all had knowledge of the 1998 shower incident.

The Perjury charge against Spanier related to material misstatements Spanier made to the Grand Jury regarding his knowledge of the 2001 incident.

6. A preliminary hearing was held before Judge Wenner on the charges specified in Paragraph 4 on July 29, 2013. All charges against the three men were held for court;

7. On September 19, 2013, the Commonwealth filed Criminal Informations as to all three (3) cases that were held for court. Spanier's case was docketed at CP-22-CR-0003615-2013. Curley's second case was docketed at CP-22-CR-0003614-2013. Schultz's second case was docketed at CP-22-CR-0003616-2013.

8. The defendants filed several pretrial motions following the filing of the Criminal Informations. The Honorable Todd A. Hoover held an evidentiary hearing on the pretrial motions on December 17, 2013. One of the issues litigated in the hearing was the allegation made by Curley and Schultz that they were denied their right to counsel during their respective testimony before the grand jury. In particular, the men alleged that Penn State General Counsel Cynthia Baldwin never informed them that she represented Penn State University during their grand jury testimony, rather than representing the men personally (Baldwin accompanied both Curley and Schultz during their respective sessions with the Grand Jury).

9. On January 14, 2015, Judge Hoover denied the pretrial motions, including the one referenced in particularity in Paragraph 8. The defendants were subsequently granted leave to take an interlocutory appeal to the Pennsylvania Superior Court.

10. On April 26, 2016, the Pennsylvania Superior Court reversed Judge Hoover's order denying the defendants' pretrial motion on the issue referenced in Paragraph 8. In so doing, the Superior Court quashed the charges of Obstructing the Administration of Law

or other Governmental Function, and Criminal Conspiracy as it relates to those predicate crimes against both Curley and Schultz. The Superior also quashed the Perjury charge filed against Schultz (The Commonwealth withdrew the Perjury charge against Curley).

11. The Commonwealth is left with the following charges: Failure to report suspected child abuse, two counts of endangering the welfare of a child, and conspiracy to commit endangering the welfare of a child.

FACTUAL HISTORY

1. Michael J. McQueary (hereinafter referred to as "McQueary") testified at the defendant's July 29, 2013, preliminary hearing. In February of 2001, McQueary was a graduate assistant football coach at Penn State University. As such he maintained a locker and an office in the Lasch Building on the campus of Penn State University.

2. On the morning of Saturday, February 10, 2001, McQueary met with Joseph V. Paterno (hereinafter referred to as "Paterno") at Paterno's residence in State College. At the time, Paterno was the head football coach at Penn State University and thus the person to whom McQueary, as a graduate assistant football coach, ultimately reported.

3. During this meeting, McQueary indicated to Paterno that he had witnessed Sandusky sexually molest at minor male child in the showers of the Lasch Building the night before (Friday, February 9, 2001). He told Paterno that he had seen "Coach Sandusky engaged in a very bad sexual act, molestation act with a minor." (N.T. 7/29/13, p. 9). McQueary further indicated to Paterno that the child was between the ages of 10 and 12 years old.

4. McQueary testified that, after he told Paterno this, Paterno told McQueary that he did the right thing by telling him about the incident and that he (Paterno) needed to talk to some

people about how to handle this situation. McQueary was confident that he had relayed the information to someone who would ensure that the matter was appropriately handled.

5. McQueary testified that the next university official he spoke to about the February 9, 2001, sexual abuse incident was Curley. Curley was the Athletic Director of Penn State University in 2001. As Athletic Director, Curley oversaw the entire Athletic Department, including the football program.

6. McQueary testified that approximately ten (10) days after his February 10, 2001, meeting with Paterno, he received a call from Curley. Curley told McQueary that he needed to speak to him in person about what he told Paterno. McQueary testified that he met with Curley and Schultz approximately two (2) days later at the Bryce Jordan Center. (Bryce Jordan Center is a facility on the Penn State Campus that houses the basketball arena and various athletic department offices).

7. McQueary testified that, at the time of the meeting, he knew Schultz to be a Vice President of Finance and that the athletic department and campus police reported to Schultz.

8. During the above-referenced meeting, McQueary was asked by Curley and Schultz to tell them what he had told Paterno about the events he had witnessed in the shower between Sandusky and the boy. McQueary testified that he told Curley and Schultz that he "had seen Jerry Sandusky in a sexual situation, molestation incident in the Penn State football locker room." (N.T., 7/29/13, p. 18).

9. McQueary related in his testimony that this meeting lasted between ten (10) and fifteen (15) minutes and that Curley told McQueary when the meeting was over that he would follow up with him after the incident was investigated.

10. McQuery testified that, with Schultz being present at the meeting, he thought that he was essentially talking to the police in regards to what he observed between Sandusky and the minor male child. Schultz's duties included oversight of the university police department.

11. McQueary indicated that Curley later stated to him that the Second Mile (a charity organization devoted to assisting at-risk youth founded by Sandusky where Sandusky first encountered most, if not all, of his victims) was notified of the incident and that Sandusky was told that he was not permitted to bring young boys to the Penn State athletic facilities.

12. McQueary testified that after the meeting with Schultz and Curley, he was never approached by police about the February 9, 2001, molestation report, nor was he contacted by any Child Protective Services agency about the incident until he was approached in November, 2010, by agents from the Office of Attorney General and investigators from the Pennsylvania State Police.

13. Tom Harmon (hereinafter referred to as "Harmon") testified at the July 29, 2013, preliminary hearing. Harmon was the Chief of Police for Penn State University from the late 1990s until his retirement in 2005. Prior to that, he was the Assistant Chief of Police. In total, he was a member of the PSU Police Department for approximately thirty-three (33) years.

14. Harmon related that he knew Curley as the Athletic Director in the years 1998 and 2001. He described Schultz as his direct supervisor. Harmon indicated that he typically kept Schultz appraised of incidents involving employees of the University and incidents that would potentially attract media attention. Curley would be notified if an incident

involved a student or employee of the athletic department, particularly if it involved the football program.

15. Harmon testified that on May 4, 1998, Ron Schreffler (who was an investigator for the University Police Department at the time) had indicated to Harmon that a mother of a minor male child had called to report that Sandusky had showered with her son in a locker room in the football facilities and had inappropriate physical contact with the child while both Sandusky and the boy were naked in the shower.

16. Harmon indicated that he told Schultz about the incident the same morning that it was reported.

17. A May 5, 1998, email (Commonwealth's Exhibit No. 1 at the 7/29/13 Preliminary Hearing) was admitted into evidence. It documented an email conversation between Harmon and Schultz regarding the Sandusky shower incident. Harmon indicated that he was refraining from entering it into the crime log at that point in time and Schultz thanking Harmon for keeping him informed.

18. A May 6, 1998, email (Commonwealth's Exhibit No. 2 at the 7/29/13 Preliminary Hearing) was admitted into evidence. It detailed a conversation in which Harmon indicated to Schultz that the Department of Public Welfare was going to investigate the incident and Schultz again thanks Harmon for the update;

19. A May 8, 1998, email (Commonwealth's Exhibit No. 3 at the 7/29/13 Preliminary Hearing) was entered into evidence. It was an email from Harmon to Schultz indicating that a child psychologist from Department of Public Welfare was going to interview the child. Harmon expressed in the email that the investigation would not be completed until after the interview took place.

20. A May 14, 1998, email thread (Commonwealth's Exhibit No. 4 at the 7/29/13 Preliminary Hearing) was entered into evidence. Harmon affirmed that Curley was included on this email thread. The thread indicated that on May 13, 1998, Curley wrote, "(a)nything new in this department? Coach is anxious to know where it stands." According to the thread, Schultz responds on May 14, 1998, when he wrote, "Tim, I understand that there was a DPW person here last week. Don't know for sure if they talked to Jerry. They decided to have a child psychologist talk to the boys sometime over the next week. We won't know anything before then." (See N.T., 7/29/13, p. 85).

21. Harmon indicated that he thought that Schultz and/or Curley would have kept Spanier apprised of the investigation due to the high profile nature of Sandusky.

22. Another email (admitted and entered into evidence in the defendant's 7/29/13 Preliminary Hearing as Commonwealth's Exhibit No. 5) dated May 27, 1998, between Harmon and Schultz indicated that Harmon was informing Schultz that there was a disagreement between the DAs Office and DPW in terms of how an interview was to be conducted and that a joint interview might have to be agreed to. Schultz thanked Harmon for the update on May 30, 1998.

23. Another email (Commonwealth's Exhibit No. 8) from Schultz to Curley in response to Curley asking for an update read: "They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigaton. He was a little emotional and expressed concern as to how this might have affected the child. I think the matter has been appropriately investigated and I hope it is now behind us." Harmon and Spanier were copied on this email.

24. A February 12, 2001 email was entered into evidence at the July 29, 2013, Preliminary Hearing as Commonwealth's Exhibit No. 9. It was an email from Harmon to Schultz. It read, "regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged archives." Harmon indicated that this email was in response to Schultz inquiring into whether the 1998 shower incident and investigation was documented in the University Police Department records.

25. Harmon indicated that Schultz never informed him in regards to the February 9, 2001, molestation report made by McQueary.

26. Supervisory Special Agent Braden Cook (hereinafter referred to as "Cook") testified at the defendants' preliminary hearing on July 30, 2013. He performed the forensic analysis of emails turned over from Penn State University to the Office of Attorney General. Cook testified to an email chain that was found in Schultz' archived emails that was marked as Exhibit No. 19 at the July 30, 2013, preliminary hearing. The email had the heading, "Joe Paterno". The original email in the chain was sent by Curley to Schultz on May 5, 1998. Spanier was Cc'd on the email chain. The original email from Curley to Schultz read, "I have touched base with the coach. Thanks, Tim Curley". Schultz replied to this email, "Will do. Since we talked tonight I learned that the Public Welfare people will interview the individual on Thursday";

27. Cook also identified an email chain that was found in Schultz' archived emails from February 27, 2001 (entered and admitted as Commonwealth's exhibit No. 23 at the defendants' July 30, 2013, preliminary hearing). The email chain is essentially a conversation that begins on February 27, 2001, among Curley, Schultz and Spanier. The chain begins with Curley writing to Spanier and Schultz, "I had scheduled a meeting with

you this afternoon about the subject we discussed Sunday. After giving it more thought and talking it over with Joe yesterday, I am uncomfortable with what we agreed were the next steps. I have trouble with going to everyone but the person involved. I think I would be comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we need to assist the individual to get professional help. Also, we feel a responsibility soon to inform his organization and maybe the other one about this situation. If he is cooperative, we would work with him to handle informing the organization. If not, we do not have a choice but to inform the two groups. Additionally, I would inform him that his guests are not permitted to use our facilities. I need some help on this one. What do you think about this approach?"

28. Spanier responded first to Curley, writing, "Tim this approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't heard and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The aproach you outline is humane and a reasonable way to proceed."

29. Schultz responded second to Curley, writing, "Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach with the understanding that we will inform his organization with or without his cooperation. I think that's what Tim proposed. We can play it by ear to decide about the other organization."

30. As of the date of this filing, no report of the 2001 molestation by Sandusky of the minor male child was made to the Pennsylvania Department of Public Welfare, Centre County

Office of Children and Youth, or any other Child Protective Services Agency known to the Commonwealth.

LEGAL ANALYSIS

Schultz raises a series of legal arguments in support of his omnibus motions. The Commonwealth will address them in the same order in which they have been raised.

I. THE COMMONWEALTH ESTABLISHED A PRIMA FACIE CASE OF ENDANGERING THE WELFARE OF A CHILD.

Schultz first alleges that the evidence produced against him at his preliminary hearing failed to establish a prima facie case against him because it failed to establish that he supervised the welfare of children or owed any duty of care to said children. It is well-settled that "[t]he preliminary hearing is not a trial. The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention." *Commonwealth v. Sebek*, 716 A.2d 1266, 1268–69 (Pa.Super.1998). At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a prima facie case of guilt. A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Karetny*, 880 A.2d 505, 513–14 (Pa. 2005).

In the criminal complaint, at Count 1 of CP-22-CR-3616-2013, the Commonwealth charged that:

> The defendant, being a parent, guardian, or a person supervising the welfare of various children under 18 years of age, knowingly endangered the welfare of said children through a course of

> conduct violating a duty of care, protection, or support namely, the Defendant, being a senior administrator of Pennsylvania State University and having oversight of the facilities and Pennsylvania State University Police Department, failed to report to Pennsylvania State University Police or other police agency inappropriate contact between Jerry Sandusky and a minor child, having previous knowledge of a similar incident; and/or failed to report said contact to Children Youth and Families or the Department of Public Welfare for review; and/or continued to allow Jerry Sandusky access to Pennsylvania State University facilities with minor children placing those children at risk after being made aware of concerning and/or inappropriate conduct between Mr. Sandusky and minor boys in violation of Section 4304 of the Pennsylvania Crimes Code, Act of December 6, 972 18 Pa.C.S.A. §4304 as amended.

The statute at issue reads as follows:

> 18 Pa.C.S. § 4304. Endangering welfare of children
>
> `(a) Offense defined.--
>
> (1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
>
> (2) A person commits an offense if the person, in an official capacity, prevents or interferes with the making of a report of suspected child abuse under 23 Pa.C.S. Ch. 63 (relating to child protective services).
>
> (3) As used in this subsection, the term "person supervising the welfare of a child" means a person other than a parent or guardian that provides care, education, training or control of a child.
>
> (b) Grading.--An offense under this section constitutes a misdemeanor of the first degree. However, where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree.

Schultz first claims that he neither supervised nor owed a duty of care to any child in question.

On this front, the Pennsylvania Supreme Court's decision in *Commonwealth v. Lynn*, 114 A.3d

796 (Pa. 2015), is educational. In Lynn, the Court found that where a diocese official charged with investigating and handling allegations of abuse for the Philadelphia Archdiocese put a priest with a known history of abusing children in an environment where there was a significant risk that he would re-offend, said official could be convicted of EWOC. The Commonwealth submits that where Schultz, along with Curley and Spanier, acting in their official capacities with PSU, decided to handle the report of the 2001 incident themselves and address it in-house rather than refer it to the appropriate authorities, such as law enforcement or child welfare agencies, they assumed the duty to ensure that the matter was handled thoroughly and correctly and cannot now shrug off the responsibility that they chose to assume. The position they chose to assume was analogous to that of Lynn and, like Lynn, they can logically be held accountable for their failure to properly safeguard the physical and moral welfare of the children with whom Sandusky would come into contact with as a result of their grossly inadequate response to the incident. Regardless of whether or not Sandusky was an employee of PSU or had retired, Schultz still had the duty to ensure that the allegations of sexual improprieties relayed to him by McQueary were fully investigated and that sexual predators were excluded from the facilities for which he was responsible.

Generally speaking, under the rule of lenity, penal statutes are to be strictly construed, with ambiguities resolved in favor of the accused. *Commonwealth v. Lassiter*, 722 A.2d 657, 660 (Pa. 1998). In the peculiar context of EWOC, however, the Pennsylvania Supreme Court has held that the statute is protective in nature, and must be construed to effectuate its broad purpose of sheltering children from harm. *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976). Specifically, the purpose of such juvenile statutes is defensive; they are written expansively by the legislature "to cover a broad range of conduct in order to safeguard the welfare and security

of our children." *Id.* at 772 (quoting *Commonwealth v. Marlin*, 305 A.2d 14, 18 (Pa. 1973)). In the context of protective juvenile legislation, therefore, the Court has sanctioned statutes that, rather than itemizing every undesirable type of conduct, criminalize instead the "conduct producing or tending to produce a [c]ertain defined result ..." *Marlin*, 305 A.2d at 18. The Court has accordingly observed:

> The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.

Id. (quoting *Commonwealth v. Randall*, 133 A.2d 276, 280 (Pa. Super. 1957)); *Lynn* at 818. Viewed through that prism, Schultz's handling of the 2001 incident and its aftermath was certainly sufficient to expose him to criminal liability. The evidence produced at the preliminary hearing was sufficient to meet all elements of the EWOC charge.

II. SCHULTZ WAS A MANDATED REPORTER OF SUSPECTED CHILD ABUSE.

As discussed above, evidence produced at the preliminary hearing established that Schultz's job responsibilities included oversight of the Penn state University Police Department and that he interacted regularly with the chief of the department and expected to be kept apprised of sensitive issues involving the department. The Commonwealth submits that this made him a law enforcement official and thus a mandatory reporter under 23 Pa.C.S. §6311.

III. SCHULTZ WAS CHARGED WITH PERSONS REQUIRED TO REPORT SUSPECTED CHILD ABUSE WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Schultz alleges that statute of limitations on his failure to report suspected child abuse began to run immediately upon his failure to report the 2001 incident and thus expired in February of 2003. The Commonwealth submits that the case of *Commonwealth v. Stitt*, 947

A.2d 195 (Pa. Super. 2007) is squarely on point and refutes Schultz's assertion. Stitt argued that the statute of limitations for failure to register as a sex offender under § 42 Pa.C.S. § 9795.2(a)(2)(i) ran out two years after the ten day period provided for informing authorities of his new address expired. The Superior Court rejected this argument, holding that:

> What Stitt fails to recognize is that the commission of an offense, the triggering mechanism for the statute of limitations, can also be an ongoing course of conduct, in which case it is the termination of the conduct that triggers the running of statute. *See* 42 Pa.C.S. § 5552(d). The purpose of the registration statute is to allow the proper authorities to keep track of sexual offenders to protect the safety of the citizens of the Commonwealth. While compliance with this statute is accomplished with the discrete act of appearing at the proper place and informing the proper authorities of one's residence, the failure to register represents the ongoing act of preventing the purpose of registration. Thus, it would be the termination of failing to register that triggers the running of the statute of limitations.
>
> If Stitt had registered with the authorities in September, 2002—two months late—the Commonwealth would have had until September, 2004 to prosecute him for the late registration. But Stitt did not register tardily, thus triggering the running of the statute of limitations. Stitt did not register at all—his absolute failure to register represents the ongoing violation of section 9795.2. Thus, the statute of limitations did not begin to run and so could not have been violated.
>
> *Stitt*, 947 A.2d at 197-198

The purposes of the statutes at issue in Stitt and the instant case are quite similar, namely the protection of children. Like Stitt, if Schultz had reported the 2001 incident a month after he had learned of it, i.e. in an untimely fashion, the statute of limitations would have run two years after that tardy report. Where no report was ever made, however, the running of the statute of limitations was never triggered.

IV. SCHULTZ WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD WITHIN THE APPLICABLE STATUTE OF LIMITATIONS AND NO EX POST FACTO CONCERNS ARE IMPLICATED.

Schultz is charged with a course of conduct that stretched from February 2001 until October 31, 2012 on the basis that his ongoing failure to properly report the 2001 shower incident or to take any proper remedial steps to restrict or prohibit Sandusky's access to the PSU campus resulted in children continuously being put in danger and exposed them to the machinations of a serial pedophile. Schultz's claim that he had no supervisory authority over Sandusky subsequent to Sandusky's 1999 retirement is belied by the fact that, by nature of his position and title, Schultz maintained authority over all PSU facilities and could have sought to have Sandusky excluded from these facilities, but never did so. That being the case, Schultz's claim that his conduct is not subject to the amended version of the EWOC statute that was put into effect in 2007 is meritless, since his conduct was ongoing at the time the statute changed. Application of the law is not retroactive and no ex post facto concerns are implicated here.

V. 18 PA.C.S. §4304(A)(2) IS NOT UNCONSTITUTIONALLY VAGUE.

Duly enacted legislation is presumed valid and unless it clearly and plainly violates the Constitution, it will not be declared unconstitutional. Accordingly, the party challenging the constitutionality of a statute bears a heavy burden of persuasion. *Commonwealth v. Davidson,* 938 A.2d 198, 207 (Pa. 2007). Under the void-for-vagueness standard, a statute will only be found unconstitutional if the statute is "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." However, a statute will pass a vagueness constitutional challenge if the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that

does not encourage arbitrary and discriminatory enforcement." *Id.* At the same time, however, the void for vagueness doctrine does not mean that statutes must detail criminal conduct with utter precision. Condemned to the use of words, we can never expect mathematical certainty from our language. Indeed, due process and the void for vagueness doctrine are not intended to elevate the practical difficulties of drafting legislation into a constitutional dilemma. Rather, these doctrines are rooted in a rough idea of fairness. As such, statutes may be general enough to embrace a range of human conduct as long as they speak fair warning about what behavior is unlawful. Such statutes do not run afoul of due process of law. *Commonwealth v. Habay*, 934 A.2d 732, 737 (Pa. Super. 2007). It is also settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *Commonwealth v. Mayfield,* 832 A.2d 418, 421 (Pa. 2003). When an ascertainable standard is present in a statute, the violator whose conduct falls clearly within the scope of such standard has no standing to complain of vagueness." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 247 (Pa.1976).

In light of all of this authority, there is no reasonable basis on which to conclude that the Senior Vice President of a "state-related" university was not acting in his "official capacity" when he consulted with other similarly-situated officials and decided not to report an incident of suspected child abuse. He therefore has no basis on which to complain of vagueness.

VI. THE ALLEGATIONS IN COUNT 1 OF THE CRIMINAL INFORMATION ARE SUFFICIENTLY SPECIFIC TO GIVE SCHULTZ ADEQUATE NOTICE OF THE ACCUSATION AGAINST HIM.

Schultz alleges that Count 1 of the Information violates due process because it alleges only that Schultz put various children in danger from February 2001 through October 2012. The basis of this charge is that Schultz put every child who came onto the Penn State Campus in

jeopardy by allowing a known pedophile to have access to the campus, often accompanied by children he brought with him. The issue is whether or not Jerry Sandusky was afforded access to the campus and facilities, not which particular child might have been there at the time.

VII. THE ISSUE OF PROSECUTORIAL MISCONDUCT DURING THE GRAND JURY PROCEEDINGS HAS ALREADY BEEN ADDRESSED AND RULED UPON BY THE SUPERIOR COURT.

The Superior Court has already examined in great detail Schultz's status vis-à-vis PSU counsel Cynthia Baldwin and whether or not she represented Schultz in a personal or agency capacity. At the conclusion of this review, the court specified that the remedy that Schultz would be granted. "Since Schultz was constructively without counsel during his grand jury testimony, and he did not provide informed consent as to limited representation, we agree that his right against self-incrimination was not protected by Ms. Baldwin's agency representation, and the appropriate remedy is to quash the perjury charge arising from the first grand jury presentment." *Commonwealth v. Schultz*, 133 A.3d 294, 326-327 (Pa. Super. 2016). Under the law of the case doctrine, "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). Where the Superior Court undertook an extensive review of the case and concluded that this was the relief to which Schultz was entitled, there is no reason to revisit that determination at this juncture.

VIII. SCHULTZ HAS FAILED TO ESTABLISH THAT SEVERANCE HIS CASE FROM THOSE OF HIS CO-DEFENDANTS IS WARRANTED.

Severance questions fall within the discretion of the trial judge and an order denying severance will not be overturned on appeal absent an abuse of discretion. *Commonwealth v. Rivera*, 773 A.2d 131, 137 (Pa. 2001); *Commonwealth v. King*, 721 A.2d 763, 771 (Pa. 1998). When conspiracy is charged, a joint trial generally is advisable. *King*, 721 A.2d at 771;

Commonwealth v. Chester, 587 A.2d 1367, 1372 (Pa. 1991). In ruling upon a severance request, the trial court should consider the likelihood of antagonistic defenses. *Chester*, 587 A.2d at 1373; *Rivera*, 773 A.2d at 137. A claim of mere hostility between defendants, or that one defendant may try to exonerate himself at the expense of the other, however, is an insufficient basis upon which to grant a motion to sever. *Chester*, 587 A.2d at 1373. Indeed, this Court has noted that " 'the fact that defendants have conflicting versions of what took place, or the extents to which they participated in it, is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together.' " *King*, 721 A.2d at 771 (quoting *Chester*, 587 A.2d at 1373). Instead, severance should be granted only where the defenses are so antagonistic that they are irreconcilable—*i.e.*, the jury essentially would be forced to disbelieve the testimony on behalf of one defendant in order to believe the defense of his co-defendant. *Commonwealth v. Williams*, 720 A.2d 679, 685 (Pa. 1998); *Commonwealth v. Lambert*, 603 A.2d 568, 573 (Pa. 1992); *Chester*, 587 A.2d at 1373. In the instant case it is obvious that each of the defendants intend to assert that they were never given the necessary information to determine the true nature of the 2001 shower incident. The fact that each of them have given statements to that effect hardly necessitates severance.

It should also be noted that the defendants are charged with conspiracy, a factor which weighs in favor of a joint trial. *See Commonwealth v. Chester*, 587 A.2d 1367 at 1372–73 (Pa. 1991). The Superior Court has ruled that "Since the obstruction of justice and related conspiracy charges in this matter relied extensively on a presentment from an investigating grand jury privy to impermissible privileged communications, we quash the counts of obstruction of justice and the related conspiracy charge." *Commonwealth v. Schultz*, 133 A.2d 294, 328 (Pa. Super.

2016). There is no indication that a prosecution for Conspiracy to commit EWOC has been foreclosed as well.

IX. SCHULTZ HAS FAILED TO ESTABLISH THAT SEVERANCE OF THE SUMMARY CHARGE AGAINST HIM IS WARRANTED.

Pa.R.Crim.P. 648(F) provides that, if there is a summary offense joined with the misdemeanor, felony, or murder charge that was tried before the jury, the trial judge shall not remand the summary offense to the issuing authority. The summary offense shall be disposed of in the court of common pleas, and the verdict with respect to the summary offense shall be recorded in the same manner as the verdict with respect to the other charges. Under the facts and circumstances of this case, the testimony and evidence that will be offered in support of the EWOC charge and Failure to report charge will be very similar. There is no reason to believe that the jury will be aggrieved or distracted by the small amount of additional testimony that will pertain to the failure to report charge.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Defendant's omnibus pretrial motions be denied in their entirety.

Respectfully submitted,

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Date: August 16, 2016

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	**Nos. CP-22-CR-5164-2011**
v.	:	**CP-22-CR-3616-2013**
	:	
GARY C. SCHULTZ,	:	
Defendant	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing **COMMONWEALTH'S RESPONSE TO OMNIBUS PRETRIAL MOTION** upon the persons and in the manner indicated below:

Service by first class mail addressed as follows:

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