COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY
v.	:
	: No. CP-22-CR-5164-2011
GARY CHARLES SCHULTZ, Defendant	: : CHARGES: PERJURY; PENALTIES : FOR FAILURE TO REPORT

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY
v.	:
	: No. CP-22-CR-5165-2011
TIMOTHY M. CURLEY, Defendant	: : CHARGES: PERJURY; PENALTIES : FOR FAILURE TO REPORT

COMMONWEALTH'S ANSWER TO DEFENDANTS' MOTIONS FOR SEVERANCE OF COUNTS AND DEFENDANTS WITH MEMORANDUM OF LAW

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Attorney General Linda L. Kelly, Chief of Staff Bruce R. Beemer, and Chief Deputy Attorney General James P. Barker, who file this Commonwealth's Answer to Defendants' Motions for Severance of Counts and Defendants with Memorandum of Law, and in support thereof aver as follows:

Defendant Curley's Motion

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Neither admitted nor denied. Paragraph 6 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

7. Neither admitted nor denied. Paragraph 7 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

8. Denied.

9. Denied.

10. Neither admitted nor denied. Paragraph 10 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

11. Neither admitted nor denied. Paragraph 11 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a

response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

12. Neither admitted nor denied. Paragraph 12 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

13. Denied.

14. Denied.

15. Neither admitted nor denied. Paragraph 15 of Defendant Curley's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Curley is entitled to relief based on the principle recited.

16. Denied.

Defendant Schultz's Motion

1. Admitted.

2. Admitted in part and denied in part. It is admitted that Defendant Schultz so moves. It is denied that he is entitled to relief.

3. Neither admitted nor denied. Paragraph 3 of Defendant Schultz's Motion sets forth a statement of law as to which no response is required. To the extent a response may be required, it is denied that Defendant Schultz is entitled to relief based on the principle recited.

4. Denied.

5. Denied.

MEMORANDUM OF LAW

Defendant Curley moves to sever his trial from that of his codefendant, Gary Charles Schultz and to sever the trial of Count 1, Perjury, from Count 2, Penalties for Failure to Report or to Refer (hereinafter, Failure to Report).

"Joint trials are favored when judicial economy will be served by avoiding the expensive and time-consuming duplication of evidence, and where the defendants are charged with conspiracy."[1] *Commonwealth v. Birdsong*, 24 A.3d 319, 336 (Pa. 2011). The decision to sever codefendants' trials is within this Court's discretion. *Id.*

Joinder of defendants is governed by Rule 582 of the Pennsylvania Rules of Criminal Procedure:

> **Rule 582. Joinder—Trial of Separate Indictments or Informations**
>
> **(A) Standards**
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.
>
> **(B) Procedure**
>
> (1) Notice that offenses or defendants charged in separate indictments or informations will be tried together shall be in writing and filed with the clerk of

[1] The defendants in this case are not charged with Criminal Conspiracy. However, because there is an ongoing investigation, the Grand Jury and/or the Commonwealth may determine that there is evidence to support such a charge.

courts. A copy of the notice shall be served on the defendant at or before arraignment.

(2) When notice has not been given under paragraph (B)(1), any party may move to consolidate for trial separate indictments or informations, which motion must ordinarily be included in the omnibus pretrial motion.

Pa.R.Crim.P. 582.

Once defendants are joined for trial, severance is governed by Rule 583 of the Pennsylvania Rules of Criminal Procedure:

Rule 583. Severance of Offenses or Defendants

The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P. 583.

The Superior Court of Pennsylvania has explained the analysis governing severance of defendants:

> Under Rule 583, the prejudice the defendant suffers due to the joinder must be greater than the general prejudice any defendant suffers when the Commonwealth's evidence links him to a crime. *Commonwealth v. Lauro*, 819 A.2d 100, 107 (Pa. Super. 2003), *appeal denied,* 574 Pa. 752, 830 A.2d 975 (2003).
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> > The prejudice of which Rule [583] speaks is, rather, that which would occur if the evidence tended to convict [the] appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence. Additionally, the admission of relevant evidence connecting a defendant to the crimes charged is a natural consequence of a criminal trial, and it is not grounds for severance by itself.
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> *Id.* (quoting *Commonwealth v. Collins*, 550 Pa. 46, 55, 703 A.2d 418, 422 (1997), *cert. denied,* 525 U.S. 1015, 119 S. Ct. 538, 142 L. Ed. 2d 447 (1988)) (internal citations omitted).
>
> Reading these rules together, our Supreme Court established the following test for severance matters:

> Where the defendant moves to sever offenses not based on the same act or transaction ... the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Collins, supra (quoting *Commonwealth v. Lark*, 518 Pa. 290, 302, 543 A.2d 491, 496-97 (1988)). Pursuant to this test, "a court must first determine if the evidence of each of the offenses would be admissible in a separate trial for the other..." *Collins*, *supra*.

"Evidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime." *Id.*; Pa.R.E. 404(b)(1) (providing: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"). Nevertheless:

> [E]vidence of other crimes is admissible to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.

Collins, *supra* at 55, 703 A.2d at 422-23; Pa.R.E. 404(b)(2). *See also Melendez-Rodriguez*, *supra* at 1283 (reiterating "other crimes" evidence is admissible to show motive, intent, absence of mistake or accident, common scheme or plan, and identity). "Factors to be considered to establish similarity are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." *Commonwealth v. Taylor*, 448 Pa. Super. 238, 671 A.2d 235, 240 (1996), *appeal denied,* 546 Pa. 642, 683 A.2d 881 (1996). *See also Commonwealth v. Andrulewicz*, 911 A.2d 162, 169 (Pa. Super. 2006), *appeal denied,* 592 Pa. 778, 926 A.2d 972 (2007) (upholding consolidation of three cases brought against defendant for sexual assault of three minor females because cases demonstrated defendant's common scheme, and jury could separate evidence for each case). Additionally, "[w]here a trial concerns distinct criminal offenses that are distinguishable in time, space and the characters involved, a jury is capable of separating the evidence." *Collins*, *supra* at 423.

Commonwealth v. Dozzo, 991 A.2d 898, 902-903 (Pa. Super.), *alloc. denied*, 607 Pa. 709, 5 A.3d 818 (2010) (table). *See also Commonwealth v. Brookins*, 10 A.3d 1251, 1255-1256 (Pa. Super. 2010) (also relying on standard set forth in *Collins*), *alloc. denied*, 22 A.3d 1033 (Pa. 2011) (table).

In this case, the evidence of each of the offenses is admissible in a separate trial as part of the history of the case and as forming the natural development of the facts. In 1998, the first report of alleged molestation by Jerry Sandusky, a prominent assistant football coach at Penn State, came to the knowledge of these defendants. The matter was investigated by police and the Centre County District Attorney chose not to file charges against Sandusky. In 2001, a second report of alleged molestation came to the attention of the defendants through the late Joseph V. Paterno, formerly the head football coach at Penn State. According to testimony presented at the preliminary hearing, Michael McQueary, then a graduate assistant football coach, reported to Paterno that he had witnessed Sandusky in a shower with a boy.[2] Paterno informed the defendants. Later, McQueary's father spoke to Defendant Schultz about the incident and believed that Schultz understood that the conduct in the shower was sexual. Emails[3] were exchanged between Curley, Schultz, and University President Graham Spanier showing that these men were aware that McQueary had reported the incident. A common sense reading of the emails also leads to the conclusion that the defendants were aware that the encounter was sexual, as the emails refer to the 1998 incident, indicate that the men believed that Sandusky needed psychological help, and that there

[2] Precisely what McQueary saw and reported, and what Paterno reported, is a matter that the parties dispute. For present purposes, it is sufficient to say that McQueary testified that he believed that Paterno and the defendants understood that Sandusky's conduct was sexual in nature.

[3] Copies of the emails are appended hereto as Appendix A.

was a risk in failing to report the incident to child protective service authorities and Sandusky's organization, the Second Mile.

On January 12, 2011, both men appeared before a Statewide Investigating Grand Jury sitting in Harrisburg, Dauphin County, and gave testimony that contradicted these facts.[4] Curley, for instance, denied any knowledge of the 1998 incident. Schultz indicated that a child protective agency had been notified. Both men denied that they knew that the shower incident was sexual in nature.[5]

Plainly, based on this summary, the facts that the Commonwealth intends to prove at trial are interrelated and show the development of the case. In order to prove the falsity of the Grand Jury testimony, the Commonwealth will introduce the testimony of McQueary and that of his father. Also, the emails will be introduced into evidence. All of this evidence will show what the defendants knew and when. Their testimony, given on the same day before the same Grand Jury, also will be introduced, as will the transcript of their oaths before the Grand Jury Supervising Judge. This evidence shows that the defendants were required to report the 2001 incident and failed to do so. Also, it will show that the defendants testified falsely before the Grand Jury. The only evidence that would vary would be each defendant's testimony before the Grand Jury.

Given the foregoing, the defendants are not entitled to severance. The evidence varies only in regard to the Grand Jury testimony. The evidence supporting the Failure to Report charges would be admissible in a trial of the Perjury charges. That the Perjury evidence would not be admissible for purposes of the Failure to Report is

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[4] The Commonwealth has provided the defendants with a complete list of statements made to the Grand Jury that the Commonwealth considers to have been perjurious. *See* Response to Requests for Bill of Particulars.

[5] Schultz testified that he understood that the incident involved accidental touching while wrestling and indicated that the incident was sexual in nature if such accidental touching is considered sexual.

immaterial, as the Court returns a verdict on the summary offenses, not the jury. That is, the Commonwealth will present its evidence of Perjury to the jury. The Court, based largely on the same evidence,[6] would decide whether the Commonwealth has proven Failure to Report.

There is no risk of prejudice to the defendants. Again, the Failure to Report is not material to this analysis as the Court will be considering that evidence. The jury will hear the evidence of what information the defendants were provided and, through the emails, a reflection of their knowledge. This evidence would be contrasted with the defendants' Grand Jury testimony for purposes of the Perjury charges. A jury is perfectly capable of reviewing the statements of each defendant and determining whether they are consistent with the other evidence of the defendant's knowledge.

In contrast to the defendants' claim that they cannot be tried together is their concerted conduct throughout these proceedings. They appeared before the Grand Jury on the same day and represented by the same counsel. Once charged, they have filed nearly identical motions reflecting identical theories of defense, and have even joined each other's motions. Despite this commonality of interest to date, the defendants now claim that they cannot be tried together. Their actions to date reflect the contrary.

Defendant Schultz makes a lengthy argument relating to the purported inadmissibility of the statements of each defendant as to the other under *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. The rule of *Bruton* does not apply

[6] The Commonwealth also must introduce evidence that the defendants are persons required to report. This evidence would include testimony regarding the presence of children on campus, such as for athletic camps run by the University. The defendants fail to show how they would be unfairly prejudiced by such evidence.

in cases, such as this, where defendants make statements for the purposes of covering up prior misconduct. *Commonwealth v. Cull*, 540 Pa. 161, 656 A.2d 476 (1995) (relying on *Dutton v. Evans*, 400 U.S. 74 (1970)).[7] *See also Commonwealth v. Coccioletti*, 493 Pa. 103, 111-114, 425 A.2d 387, 391-392 (1981). The entirety of this line of argument is misplaced.

In short, severance is not warranted. The defendants acted together both when committing these offenses and afterwards. They are not prejudiced by joinder for trial with the other defendant or for a trial involving the Failure to Report summary offense. There is no reason given that overcomes the presumption of a joint trial.

[7] Cull is a plurality decision in that then-Justice (now Chief Justice) Castille wrote the lead opinion and was joined by one other Justice. However, then-Justice Flaherty wrote a concurring opinion agreeing that codefendants' statements are admissible against a Confrontation Clause challenge and finding Justice Castille's prejudice analysis to be dicta. *Id.* at 176, 656 A.3d at 483. Justice Flaherty was joined in his concurring opinion by two other Justices. Thus, five Justices agreed that the Confrontation Clause does not bar the admission of statements by coconspirators and/or codefendants who make the statements in an effort to conceal prior wrongdoing. Of course, the coconspirator exception to the hearsay rule also would apply under these circumstances.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying the Defendants' Motions for Severance of Counts and Defendants.

Respectfully submitted,
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VERIFICATION

The facts recited in the foregoing this Commonwealth's Answer to Defendants' Motions for Severance of Counts and Defendants with Memorandum of Law are true and correct to the best of my knowledge and belief. This statement is made with knowledge that a false statement is punishable by law under 18 Pa. C.S. § 4904(b).

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Answer to Defendants' Motions for Severance of Counts and Defendants with Memorandum of Law upon the persons and in the manner indicated below:

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