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

COMMONWEALTH OF PENNSYLVANIA, :
:
v. :
: No. CP-22-CR-5164-2011
GARY C. SCHULTZ, :
:
Defendant. :

DEFENDANT GARY SCHULTZ'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

AND NOW, comes defendant, Gary C. Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully files this Memorandum of Law in Support of his Petition for a Writ of Habeas Corpus to dismiss Count One of the Information.

INTRODUCTION

An Information, issued after a preliminary hearing held on a grand jury presentment and complaint, charges Gary C. Schultz, former Vice President for Business and Finance of the Pennsylvania State University, with one count of perjury, in violation of 18 Pa.C.A. § 4903. We submit that this Court should grant our application for a Petition of Habeas Corpus and dismiss the perjury charge on the basis of (1) the lack of corroboration of the statements' falsity; (2) the statements' patent ambiguity; and (3) the statements' character as characterization, opinion and unschooled conclusions of law rather than as provably false assertions of fact.

AND NOW THIS DATE
14 FEB 2012

SERVICE IS HEREBY ACCEPTED
AND COPY RECEIVED
Edward M. Marsico, Jr.
DISTRICT ATTORNEY

The Information does not specify which portions of Mr. Schultz's January 12, 2011, grand jury testimony were false, but the Presentment identifies (1) his testimony that Mr. McQueary's allegations "were not that serious"; and (2) his testimony that "there was no indication that those allegations amounted to a crime." Presentment at 12-13. At the Preliminary Hearing, when it came time to identify Mr. Schultz' allegedly false statements, the Deputy Attorney General stated "that when he is making a statement to that Grand Jury that we didn't report this and it was clear there was no crime, that is a perjurious statement." Notes of Testimony ("NT") from the Preliminary Hearing of December 15, 2011, p. 249. The DAG also claimed, again without attribution, that Mr. Schultz went "out of his way on three to four different occasions to assure the Grand Jury that his actions were appropriate because there was nothing criminal. It was clear it was not that serious."[1] NT at 248: 12-16.

Both the Presentment and the prosecutor's Preliminary Hearing argument seem to refer to a single argumentative question and nonresponsive answer from Mr. Schultz' grand jury testimony:

> Q: Would that be standard? Would that be the way the university operates when an allegation is made against a current employee or a very famous prior employee, that nothing be put in writing?
>
> A: The allegations came across as not that serious. It didn't appear at that time, based on what was reported, to be that serious, that a crime had occurred. We had no indication a crime had occurred.

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[1] The DAG exaggerated. Never did Mr. Schultz state "it was ***clear*** that there was no crime." To the contrary, Mr. Schultz testified that when Mike McQueary told him the story, he told it "*without being clear*, without him telling me" exactly what he witnessed. NT at 211 (emphasis added). The DAG's error proves more the reason and need for a Bill of Particulars.

NT at 229: 7-16 (quoting Schultz Grand Jury Transcript, dated January 12, 2011, at 28: 5-14).

The Commonwealth relies on Mike McQueary's testimony as direct evidence that Mr. Schultz' statements were false. At the Preliminary Hearing, Mr. McQueary testified that, to summarize it in a few clear words Mr. McQueary never used, he believed he witnessed Jerry Sandusky anally sodomize a boy of ten to twelve years old in the Lasch Building showers late one night. After he left the boy alone with Mr. Sandusky and declined to call the police, Mr. McQueary told his father and a Dr. Jonathan Dranov something about what he witnessed. The next day, he spoke to PSU football coach Joseph Paterno. Mr. Paterno called athletic director Tim Curley, who called Mr. McQueary to set up a meeting. NT at 26-28; 171-72 (McQueary and Paterno testimony).

Mr. McQueary never asked to speak to Mr. Schultz, but approximately two weeks later, Mr. Curley brought Mr. Schultz along to a meeting with Mike McQueary in which he told them (i) that "what [he] had seen was extremely sexual and over the lines and it was wrong;" (ii) that "[t]here is no question that I conveyed to them that I saw Jerry with a boy in the showers and that it was severe sexual acts going on and that it was wrong and over the line;" (iii) and that "I *would have* described that it was extremely sexual and that I thought that some kind of intercourse was going on."[2] NT at 32, 34, and 39. In that conversation, Mr. McQueary abjured use of the few clear words we use above,

[2] This is the only time Mr. McQueary became more specific in his description of what he told Mr. Schultz than the curious "extremely sexual" and the jock-speak "over the lines," and in this answer, he lapses into stating what he speculates he "would have" said rather than relating what he *did* say.

and he never described what he saw as "anal sex" or "rape" or "sodomy" or "anal intercourse" or "crime" in his statements to Coach Paterno, Mr. Schultz or Mr. Curley.[3] NT at 34 ("I would not have used some words"), 70-71, 80, 88, and 100. Still, we will assume only for purposes of this Petition that Mike McQueary's testimony was some evidence tending to prove as false Mr. Schultz' testimony that McQueary's description was not so serious as to indicate a crime had occurred.

ARGUMENT

I. No Evidence Corroborates Mike McQueary's Testimony; to the Contrary, the Testimony of John McQueary and Joseph Paterno Support the Descriptions Mr. Schultz Gave in His Testimony.

Perjury has the following elements:

> *First*, that the defendant made a false statement;
>
> *Second*, that the false statement was made under oath;
>
> *Third*, that the false statement was made during an official proceeding;
>
> *Fourth*, that the defendant knew that his statement was false at the time it was made; and
>
> *Fifth*, that the false statement was material to the proceeding during which it was made.

PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, 15.4902A – Perjury: Basic Instruction (2008). Additionally, the "falsity of the statement may not be established by the uncorroborated testimony of a single witness." 18 Pa. C.S.A. § 4902(f). "In the event of one witness and circumstantial

[3] The Presentment states that McQueary reported to Schultz "that he had witnessed what he believed to be Sandusky having anal sex with a boy in the Lasch Building showers." Presentment, at 6-7.

evidence, the circumstantial evidence "must fit together so tightly as to preclude any reasonable doubt of guilt." *In re Ullman*, 2010 Pa.Super. 76, 995 A.2d 1207, 1215 (2010) (citation omitted). Here, the Commonwealth cannot satisfy Section 4902(f)'s corroboration requirement and, therefore, cannot prove the falsity of Mr. Schultz's alleged statements.

At the Preliminary Hearing, the Commonwealth used John McQueary's ("John"), Mike McQueary's father's, testimony and Mr. Paterno's testimony in an attempt to corroborate Mike's statements. But neither John's testimony nor Mr. Paterno's testimony corroborates Mike McQueary's testimony. To the contrary, both witness's statements corroborate Mr. Schultz's grand jury testimony. Therefore, there is no corroboration for Mike McQueary's testimony and the falsity of Mr. Schultz'.

At the Preliminary Hearing, John McQueary testified that he had a separate conversation with Mr. Schultz about what his son had seen. NT at 134:18-20. He admits, however, that he only "briefly told [Mr. Schultz] what Mike had seen," (NT at 136: 8-13) that he "wasn't detailed in terms of graphic information," (NT at 137: 1-5) and that he did not give Mr. Schultz "all the detail." NT at 136: 8-13. He further admits that in his discussion with Mr. Schultz he also "never used the word "crime." NT at 152: 7-10. These vague and general statements cannot support Mike McQueary's allegations.

John McQueary testified as follows:

1. Q: Did you tell [Mr. Schultz] what the nature of the contact was?
   A: Yes?
   Q: Did you describe it? That's my question.

A: Okay
Q: What was the nature of the contact?
A: That . . . he saw Jerry Sandusky in the shower, in the shower area, the shower room, with a young boy; and that between the sounds that he observed and the visualization that he saw, that there was something at best inappropriate going on and it was sexual in nature. But certainly beyond that, I couldn't – I couldn't describe it any further because I wasn't there.
NT at 137: 12-138: 2.

2. Q: You told Mr. Schultz that it was sexual in nature?
A: I would think that I said that it was at least sexual overtones to it, sexual in nature, it appeared to be sexual. But, again, I'm doing this from memory. I wasn't there, remember. I just want to make sure.
NT at 138:3-9.

3. Q: I'm talking about in the meeting you had with Mr. Schultz.
A: If you're asking me did [Mr. Schultz] go away from the meeting with an understanding that I was reporting something that I thought was a sexual nature that occurred in that shower room, yes.
NT at 138: 10-16.

4. Q: Was there any question in your mind that you left that meeting informing Mr. Schultz that the incident was sexual in nature?
A: There's no doubt in my mind short of saying that I viewed an act myself that what Mike reported to me appeared to be sexual in nature, sounded like sexual in nature to me, and I think he knows that.
NT at 139: 14-21.

5. Q: And you made sure to accurately and fully describe to Mr. Schultz what your son had told you?

A: Probably in a condensed version. I can't sit here and verify under oath that I told him every detail of that, but I told him enough that I thought he got the picture.
NT at 149: 24-150: 5.

6. Q: In this meeting with Mr. Schultz, did you tell Mr. Schultz that what Mike had seen was a crime?

A: I never used the word crime. I made it, I'm sure, clear that it was at least very inappropriate action and what Mike described to me led me to believe that it was sexual in nature.

NT at 152: 7-14.

John McQueary's statements, individually and collectively, are too vague, general, and imprecise to corroborate his son's testimony and prove falsity. Conduct that has "sexual overtones" or "appeared to be sexual" or "sounded like sexual in nature to me" does not equate to anal intercourse with a young boy, if that indeed is what Mike McQueary and the Commonwealth claim he conveyed to Mr. Schultz and Mr. Curley by "extremely sexual" and "over the lines." The prosecutor failed to pin down the specific meaning of these amorphous terms, preferring to conflate them all with anal intercourse in order to support a perjury charge with facially uncorroborative testimony. The law in this area is clear: "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 361 (1973). A perjury charge must stand on "what was said, rather than what might have been meant". *United States v. Reveron Martin*, 836 F.2d 684, 690 (1st Cir. 1988).

In fact, John McQueary's statements actually corroborate Mr. Schutlz' grand jury testimony. Regarding what Mike McQueary told him, Mr. Schultz testified as follows: (i) "well, I had the impression that it was inappropriate [conduct]" (NT at 206: 20-21)(Schultz Grand Jury Testimony at 10: 2-3); (ii) "I don't recall himself telling us what he observed specifically . . . I believe that he said that he saw something that he felt was inappropriate between Jerry and a boy" (NT at 226: 9-14); (iii) "I had the impression that it was inappropriate . . . I

had the feeling that there was perhaps some kind of wrestling around activity and maybe Jerry might have grabbed the young boy's genitals or something of that sort . . . (NT at 211: 9-16); (iv) Q: "was it your impression that [Mike McQueary] was reporting inappropriate sexual conduct, your impression – A: Yes. (NT 223: 15-18); (v) "We had no indication that a crime had occurred." NT at 229: 15-16). Both John McQueary's and Gary Schultz' testimony describe vaguely sexual and inappropriate conduct, but no specific details, nothing approaching "extremely sexual" or "severe sexual" acts or "intercourse" and certainly not the "anal sex" specified in the Presentment. Thus, John tends to corroborate that Mike related something general and vague to Mr. Schultz, something that might seem sexual and inappropriate, but not serious or explicit enough to sound criminal – a decription similar to Mr. Schultz'.

Mr. Paterno's testimony also supports Mr. Schultz' testimony [4] . Regarding what Mike McQueary told him, Mr. Paterno testified:

> Well, I don't know what you would call it. Obviously, he was doing something with the youngster. It was a sexual nature. I'm not sure exactly what it was . . . . I knew some kind of inappropriate action [was] being taken by Jerry Sandusky with a youngster.

Paterno NT at 175: 18-176: 5. This does not indicate that Mike McQueary reported "intercourse" or anything "extremely sexual" or criminal to Coach Paterno. If he had, Mr. Paterno would not have waited until Monday to call Mr.

[4] To the extent the Commonwealth attempts to use Coach Paterno's testimony to corroborate Mike McQueary's testimony, this Court should reject such attempt for the reasons delineated in Mr. Curley's Habeas Petition, which Mr. Schultz joins. The prosecution cannot use Mr. Paterno's testimony, *see Pointer v. Texas,* 380 U.S. 400 (1965), although Mr. Schultz may offer it, and the Court admit it, against the prosecution because they, not he, had an opportunity to cross-examine him under oath, *see* Pa. R. Evid. 804(b)(1), cmt.

Curley because "[he] didn't want to interfere with his weekend." NT at 177: 2-5. (Mr. Paterno testified that he never spoke to Mr. Schultz about the McQueary report.) Again, Mr. Paterno's testimony more closely resembles Mr. Schultz' than Mike McQueary's, and especially more than the Presentment's recitation of "anal sex."

To the extent the Commonwealth suggests, as the DAG did at the Preliminary Hearing, that Mr. Schultz's knowledge of the 1998 allegations corroborates any purportedly perjurious statement by Mr. Schultz, the suggestion is meritless. In 1998, the allegation was that Mr. Sandusky, again naked in the shower with a young boy, hugged him from the rear (conduct similar to what Mike McQueary says he saw). NT at 117: 23-118: 4. Thomas Harmon, the head of the Campus Police in 1998, testified for the Commonwealth at the Preliminary Hearing that after an investigation by the police, Children and Youth Services, and the Centre County District Attorney's office, "the District Attorney had reviewed the investigation and had determined that he would not pursue it as a criminal offense." Harmon NT at 119:23-120:4; 128: 10-24. Chief Harmon so informed Mr. Schultz. NT 214: 16-17; NT at 119: 24-120: 4. The only fair inference from the evidence is that the 1998 investigation left Mr. Schultz with the belief that, however inappropriate Mr. Sandusky's behavior in showering with and hugging a naked young boy, law enforcement considered it not to be a criminal offense. Accordingly, the 1998 incident does not

corroborate the falsity of Mr. Schultz's assertion that the allegation was not serious enough to be criminal.

II. The Questions and Answers Concerning "Serious[ness]" and "Criminal[ity]" Are So Patently Ambiguous That they Cannot Support a Perjury Prosecution.

A sequence of "patently ambiguous" questions and answers cannot constitute perjury. *Commonwealth v. Spennato,* 318 Pa. Super. 532, 537-38, 465 A.2d 681, 683-84 (1983). *See also Commonwealth v. Karafin,* 224 Pa. Super. 449, 454, 307 A.2d 327, 330-31 (Pa. Super. 1973) (quoting with approval *United States v. Wall,* 371 F.2d 398, 400 (6th Cir. 1967) ("the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony . . . . In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested . . ."). Mr. Schultz' testimony that Mike McQueary's allegation came across as not that serious and that it did not appear that a crime had occurred, particularly when taken in context, are so ambiguous and capable of various meanings that they cannot support a perjury charge.

Defense counsel confesses that he cannot find a Pennsylvania or federal decision that rested a perjury prosecution on the opinion or characterization "serious." According to its dictionary definition, the word "serious" runs the gamut from describing anything of greater moment than a joke to matters dangerous and life-threatening. *See, e.g.,* www.merriam-webster.com/dictionary/serious. (With respect to the

characterization "criminal," there is law, and, as we discuss in Section III, *infra,* it is clear: such a characterization cannot support a perjury allegation.)

The context here does not help. The prosecutor asked:

> Q Did it ever occur to anybody that the police might need to be contacted, either campus police or this entity known as the Pennsylvania State Police?
> A I don't recall that we talked about it being turned over to the police.
> Q That was never part of the discussions between you and Curley or you and Spanier or you and anybody else?
> A No.
> Q Are you aware of any memorandums or any written documents, other than your own notes, that existed either at the time of this incident or after this incident about the 2002 events?
> A No.

NT at 228: 17-225:1. Dissatisfied with these answers, the prosecutor added, with evident sarcasm:

> Q: Would that be standard? Would that be the way the university operates when an allegation is made against a current employee or a very famous prior employee, that nothing be put in writing?
>
> A: The allegations came across as not that serious. It didn't appear at that time, based on what was reported, to be that serious, that a crime had occurred. We had no indication a crime had occurred.

NT at 229: 7-16. The follow-up resulted in Mr. Schultz characterizing the allegation as "important":

> Q Would that be unusual, to be called to Joe Paterno's house on a Sunday to discuss something that wasn't even criminal or sexual?
>
> A Well, it wasn't an everyday thing, but Tim and I and others would meet with Joe weekends, Sundays and so on. But, yeah, it would *an important matter* if we were meeting with Joe on a Sunday.

NT at 230: 1-8. (emphasis added)

From the context, it seems that "serious" might mean something more than "important," but it is unclear what that is, and the prosecutor made no effort to define or clarify the term. To complicate matters, ten pages earlier in the testimony, Mr. Schultz testified that he, University President Graham Spanier and Mr. Curley took the allegation "seriously":

> Q: Did the president of the university express concern about this incident at the time it was reported to him?
>
> A: Very similar to mine and Tim's, yes. *We took it seriously.*

NT at 218: 21-22 (emphasis added).

Thus, if we attempt to translate the various contextual uses of "serious" into facts, it seems to mean: of sufficient importance that Mr. Schultz conferred with the Athletic Director and President of the University, but not of such a nature as to require a written report or complaint to the police. These are factual questions which the prosecution could have explored and could have charged as perjury if proven false: Did Mr. Schultz really confer with Messrs. Curley and Spanier? Did anyone make a written report or complaint to the police? Was there a University policy, what was it, and did Messrs. Curley, Schultz and Spanier act contrary to it? Exploring such factual assertions would have been easy and a perjury case based on untrue answers, if such there were, might have been fair, but that is not the case the prosecution brought.

However, given Mr. Schultz's testimony, the Commonwealth's focus on this one question and answer taken out of context is misplaced, because perjury must assessed in the context of the defendant's entire testimony. *See United*

States v. Serafini, 167 F.3d 812, 820 (3rd Cir. 1999); *United States v. Ronda,* 455 F.3d 1273, 1294 (11th Cir. 2006) (in perjury trial, witness's testimony must be viewed as a whole and not taken out of context);[5]. The prosecutor has the obligation to clarify any ambiguity, particularly in the one-sided setting of the grand jury.[6] *See Commonwewalth v. Spennato,* 318 Pa. Super. At 537-38, 465 A.2d at 684*; Karafin,* 224 Pa. Super. at 455, 307 A.2d at 330-31 ("In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested . . .").

Spennato, illustrates this point under facts much clearer than here. There, the defendant, an individual who sub-leased a pizza shop from John Scotto, was tried for perjury. Before an investigatory panel of the Pennsylvania Crime Commission, which was investigating possible involvement of organized crime in the pizza industry, the following Question and Answer occurred, which answer served as the basis of the perjury charge:

Q: Did you ever make deposits into any other accounts other your own?

A: Never.

Spennato, 465 A.2d at 682.

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[5] The Superior Court repeatedly has drawn on federal law in this area. *See, e.g., Commonwealth v. Karafin,* 224 Pa. Super. 449, 307 A.2d 327 (Pa.Super. 1973)*; Commonwealth v. Broughton,* 257 Pa. Super. 369, 390 A.2d 1282 (Pa.Super. 1978); *Commonwealth v. Robinson,* 332 Pa. Super. 147, 480 A.2d 1229 (Pa. Super. 1984); *Commonwealth v. Williams,* 388 Pa. Super. 153, 160,565 A.2d 160, 163 (Pa.Super. 1989) (adopting federal approach in context of perjury trap).

[6] And particularly where, as here, the witness may have been unrepresented or, at least, there is serious confusion as to whether he was. *See* Sara Ganim, "Special Report: Penn State Counsel Cynthia Baldwin's Role Before Grand Jury Could Affect Tim Curley and Gary Schulz' Perjury Case, Experts Say," HARRISBURG PATRIOT NEWS February 2, 2012 (available at www.pennlive.com).

Because evidence presented showed that the defendant had made several deposits into Mr. Scotto's account, the defendant was charged with perjury and convicted after a jury trial. The defendant claimed that he misunderstood the question, interpreting it to mean any deposits from *his business*, not from his personal monies, and therefore he gave an answer he believed to be true. *Id.* at 682-83. On appeal, the Superior Court reversed. Because the perjury alleged depended on the defendant's subjective belief, the court noted that the context was crucial. *Id.* at 683. In context, defendant's interpretation was not unreasonable, since the majority of the questions asked what was done with cash receipts from the pizza shop.

The Superior Court conluded with language and ruling that apply with equal force to this case: "The interrogation tactic of the . . . investigator reeked of unfairness in that it deprived the appellant of any opportunity to be apprised of the impact of the question; a question so patently ambiguous that to allow it to serve as the basis for a perjury prosecution is contrary to all notions of fairness and justice. We conclude that there is insufficient evidence, circumstantial or otherwise, of the appellant's subjective knowledge of the falsity of his answer." *Spennato*, 465 A.2d at 684.

III. The Testimony At Issue States Opinions That Are Not Capable of Being Proven Knowingly False.

Perjury prosecutions rarely rest on expressions of opinion or belief, for when offering an opinion such as whether an allegation was "serious" or "criminal," the declarant avers only that "'he believes his opinion to be correct,

but he does not warrant it to be true, and he does not pretend that he cannot be mistaken." *Commonwealth v. Johnson,* 534 Pa. 51, 60, 626 A.2d 514, 518 (Pa. 1993) (Cappy, J., dissenting, quoting *In re Pochron's Estate,* 367 Pa. 306, 80 A.2d 794, 797 (1951)). Moreover, "a subjective belief is especially difficult to prove," *Commowealth v. Atwood,* 411 Pa. Super. 137, 158, 601 A2d 277, 288 (1991), because, among other things, when the statements "constitute[]only statements of defendant's conclusions and beliefs," the prosecution must "prove beyond a reasonable doubt not only the falsity of the statements but also that defendant knew them to be false and did not believe them to be true . . . . " *Commonwealth v Karafin,* 224 Pa. Super. 449, 457, 307 A.2d 327, 332 (1973); *see also Spennato,* 465 A.2d at 683 ("this is an especially difficult determination in that it deals with the appellant's subjective intent).

Thus, the Commonwealth must prove that when Mr. Schultz testified, his testimony was both false (by the testimony of two witnesses) and that he knew it was false –meaning, here, that his true belief at the time, contrary to his testimony, was that the Mike McQueary's allegations were serious, whatever that means, and criminal, whatever that means. That the Commonwealth disagrees with his belief or interpretation – or even that a reasonable person might disagree – does not prove perjury.

The unsoundness of a prosecution based on statements of opinion increases when that opinion is about an opinion or legal conclusion. In a perjury prosecution, "the perjurious statement must be with respect to such fact

or facts, that the truth or falsity thereof is susceptible of proof." *Commonwealth v. Karafin*, 224 Pa. Super. 449, 455, 307 A.3d 327, 330-31 (Pa. Super. 1973); *see also United States v. Endo*, 635 F.2d 321, 323 (4th Cir. 1980) ("To be false, the statement must be with respect to a fact or facts and the statement must be such that the truth or falsity of it is susceptible of proof.") (citations and internal quotations omitted).

In *Karafin*, the defendant, an investigative reporter for the Philadelphia Inquirer, was convicted for perjury arising from testimony he gave before a special warrant hearing. *Karafin*, 307 A.3d at 330. The Commonwealth alleged that the defendant lied when he testified that, based on his investigation, members of the District Attorney's office harassed and intimidated him and signed false statements against him. The court noted that defendant's charges "necessarily constituted only statements of defendant's conclusions and beliefs," and therefore the Commonwealth had to prove that the statements were false and that the "defendant knew them to be false and did not believe them to be true." *Id.* The court concluded that the Commonwealth could not prove this. *Id.* "A person may in good faith, yet mistakenly, believe a crime has been committed but may find that belief not to be supported by law or by evidence which the law deems sufficient." *Id.*

Similarly in *Endo*, the defendant was convicted of perjury based on the withdrawal of her guilty plea, wherein she stated she was not guilty. The court overturned the defendant's conviction. As the court stated: "Guilt is a

question of legal status; a defendant is not guilty until a judge or jury has so declared. After the jury determined her guilt, a factual aspect had been added. Thereafter, a "not guilty" answer would have been factually false, and so subject to prosecution. Prior thereto, however, it had not been decided whether or not she was guilty, so any answer, in contemplation of the law, had to be opinion, with no underlying factual component." *Endo*, 635 F.2d at 323.

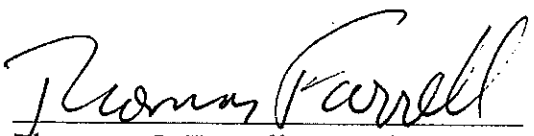
Mr. Schultz's allegedly perjurious testimony rests on an undefined characterization – "serious"- and a conclusion of law, i.e., whether a crime was committed. We have discussed at length how the opinion "serious" is so unclear and ambiguous as to be incapable of supporting a perjury prosecution. *See* Point II, *supra.* The latter opinion depends upon the legal definitions and effects ascribed to basic facts or combinations of facts. "At common law and under many state statutes, statements which present legal conclusions are considered opinion, and cannot form the basis of a perjury conviction." *Endo*, 635 F.2d at 323. Therefore, defendant's statement(s) about criminality cannot form the basis of perjury regarding an ultimate fact that was neither true nor false at the time he made the statement. As the Court stated in *Karafin*, "[a] person may in good faith, yet mistakenly believe a crime has [not] been committed but may find that belief not to be supported by law or by evidence which the law deems sufficient." *Karafin*, 307 A.2d at 332; *see also F.A. Shoenfeld v. The State*, 119 S.W. 101, 103-04 (Crim.App. TX 1909) ("But where the statement which is the basis of the accusation, is a matter of construction, or a deduction from given facts, that it is

erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute false swearing.")

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Schultz's Habeas Petition should be granted and Count One dismissed.

Respectfully submitted,

By: 

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v.	:	
	:	No. CP-22-CR-5164-2011
GARY C. SCHULTZ,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Memorandum of Law was delivered by U.S. Mail and email, this 14th day of February, 2012, to the following:

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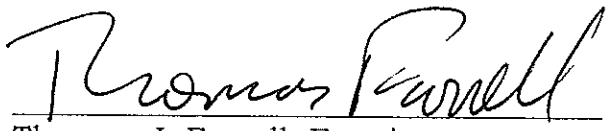

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