

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

COMMONWEALTH OF PENNSYLVANIA, :

v. :

GARY C. SCHULTZ, :

Defendant. :

No. CP-22-CR-5164-2011

DAUPHIN COUNTY
PENNA

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**MOTION FOR A BILL OF PARTICULARS PURSUANT TO
PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 572(C)**

AND NOW, comes the defendant, Gary C. Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and the law firm of Farrell & Reisinger, LLC, and respectfully requests the following:

1. Gary C. Schultz is charged in a two count criminal information with, at Count 1, Perjury, in violation of 18 Pa.C.S.A. §4902(a), a felony of the third degree, and at Count 2, Persons Required to Report Suspected Child Abuse in violation of 23 Pa.C.S.A. §6319, a summary offense.

2. On January 25, 2012, pursuant to Pa. R. Crim. P. Rule 572(A), Mr. Schultz served upon the Attorney General a request for a bill of particulars with regard to Counts 1 and 2. Exhibit A to this Motion.

3. As of the date of this filing, the Attorney General has not yet furnished a bill of particulars. Thus, Mr. Schultz makes the present motion for relief pursuant to

AND NOW THIS DATE

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COURT ADMINISTRATOR'S
OFFICE
DAUPHIN COUNTY

14 FEB 2012

SERVICE IS HEREBY ACCEPTED
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Edward M. [Signature]
DISTRICT ATTORNEY

Pa.R.Crim.P. 572(C), and requests this Honorable Court to order the Attorney General to provide a bill of particulars stating with greater clarity and specificity the allegations of perjury and failure to report against Mr. Schultz.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR A BILL OF PARTICULARS**

A. Introduction.

Provision of a bill of particulars is required in this matter because the criminal information does not provide Mr. Schultz with the minimum information necessary to prepare his defense to either charge in the Information.

According to Pa.R.Crim.P. Rule 572:

(A) A request for a bill of particulars shall be served in writing by the defendant upon the attorney for the Commonwealth within 7 days following arraignment. The request shall promptly be filed and served as provided in Rule 576.

(B) The request shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested.

On January 25, 2012, Mr. Schultz served the Attorney General with a request for a bill of particulars. Mr. Schultz requested:

- a. Please specify and quote each statement alleged to be false and/or perjurious.
- b. Provide the exact page and line numbers of the allegedly perjurious statement(s) made by Mr. Schultz in his January 12, 2011, Grand Jury testimony.

Exhibit A. The Attorney General has not responded to this request.

Pursuant to the second portion of Pa.R.Crim.P. Rule 572:

(C) Upon failure or refusal of the attorney for the Commonwealth to furnish a bill of particulars after service of a request, the defendant may make written motion for relief to the court within 7 days after such failure or refusal. If further particulars are desired after an original bill of particulars has been furnished, a motion therefor may be made to the court within 5 days after the original bill is furnished.

(D) When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice.

The interests of justice require greater specificity than provided in the criminal information. According to the Pennsylvania Supreme Court, "the function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise." *Commonwealth v. Simone*, 291 A.2d 764, 766 (Pa. 1972). The criminal information in the present case merely identified the crime with which defendant was charged, and the date of his alleged offense. Defendant is entitled to more information to prepare his defense.

B. Perjury.

The Preliminary Hearing evinces the need for clarity and precision in this case. When it came time to identify Mr. Schultz' alleged false statement, 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."¹ Notes of Testimony ("NT") from the Preliminary Hearing of December

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.

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." NT at 248.

However, the criminal information neither identified nor described any such statements. Based on the Deputy Attorney General's assertion, we are left with the challenge of first identifying those three or four occasions, and second, preparing a defense for each of them, not knowing which is the basis for the present charges against him. The law does not require the defense to undergo such an unreasonable task.

The Attorney General must identify the exact statement(s) alleged to be perjurious. This is necessary "to give notice to the accused of the offenses charged in order to permit him to prepare a defense, avoid surprise, and be placed on notice as to any restrictions on the Commonwealth's proof." *Commonwealth v. March*, 551 A.2d 232,235-36 (Pa.Super. 1988)(holding trial counsel ineffective for failing to request a bill of particulars which would have restricted the Commonwealth's proof at trial); *see also Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991). A bill of particulars is also necessary to allow the accused to make intelligent pleas of double jeopardy, should similar charges be brought in the future. *Commonwealth v. Dreibelbis*, 426 A.2d 1111, 1114 (Pa. 1981). These particulars are crucial to the creation of a defense against the perjury charge and are required by the general "interests of justice" of

Rule 572 and also under the Pennsylvania and United States Constitution. According to the Pennsylvania Supreme Court, Due Process requires that the Information be sufficiently specific so as to allow the defendant to prepare any available defenses. *Commonwealth v. Sims*, 919 A.2d 931, 939 (Pa. 2007).

In *Commonwealth v. Davenport*, 386 A.2d 543 (Pa. Super. 1978), the Superior Court was asked whether an indictment was sufficient to sustain a conviction for making inconsistent statements under oath under 18 Pa.C.S.A. § 4902(e) when the indictment described the substance of the alleged inconsistencies, but did not give the exact wording of defendant's inconsistent statements. The defendant did not raise the issue of the sufficiency of the bill of particulars and that question was not before the Court.

The indictment in *Davenport*, unlike here, provided a detailed description of "Statement No.1" and "Statement No. 2". 386 A.2d at 545-546. Moreover, the Superior Court noted that the Commonwealth supplemented that information "by a bill of particulars with specific passages of the transcripts marked to show the testimony in question." 386 A.2d at 546. The defendant in *Davenport* was much better situated to prepare his defense than Mr. Schultz. Unlike the attorney for the Commonwealth in *Davenport*, the Attorney General has not furnished the substantive allegation of falsity nor marked transcripts indicating his allegedly false statements which give rise to the present action. Instead, the Attorney General presented only a bare criminal information. And unlike the defendant in *Davenport*,

Mr. Schultz is not seeking dismissal of the information. He merely requests these particulars to enable him to prepare his defense.

It is well-established Pennsylvania law that, upon request by the defendant, the Commonwealth will be required to provide a bill of particulars giving notice of the proof of falsity of a defendant's testimony that the Commonwealth intends to use at trial. "Proof of falsity" is an essential element of perjury. As the Superior Court explained, the Commonwealth must "prove the falsity of a defendant's testimony by two witnesses or by one witness and corroborating circumstances." *Commonwealth v. Gore*, 90 A.2d 405, 408 (Pa. Super. 1952). The *Gore* Court, and other Pennsylvania Appellate courts have held that when the specific perjury alleged, and the proof of falsity (i.e., the 2 witnesses or 1 witness and corroboration) are not alleged in the indictment, the defendant should move for a bill of particulars.

The Supreme Court held, in 1879, that the Commonwealth need not allege the proof of falsity (i.e., the 2 witnesses or 1 witness and corroboration) in the indictment. However, the Court explained, such information would be required of the Commonwealth, should the defendant motion for bill of particulars. *Williams v. Commonwealth*, 91 Pa. 493 (Pa.1879). The defendant in that case had been charged in a three count indictment, the first two counts perjury for having falsely stated:

I have not paid or contributed, either directly or indirectly, any money or other valuable thing, to procure my elections, except for necessary and proper expenses expressly authorized by law. I have not knowingly violated any election law of this Commonwealth or procured it to be done by others in my behalf.

91 Pa. at 494.

In that case, the defendant moved to quash the indictment, alleging that it did not sufficiently set-out the circumstances of the alleged perjury. The defendant argued that the Commonwealth failed to:

specify or name the person or persons to whom the alleged promises, contributions or payments were made, or the circumstances, nature or amount of such promises, contributions or payments, or the times and places thereof, or in what respect or how, and by what manner or means the defendant violated or caused to be violated the election laws of this Commonwealth.

91 Pa. at 494-95. The Supreme Court agreed that this information was necessary for the defendant to prepare his defense, but explained that rather than move to quash the indictment, the defendant should have requested a bill of particulars:

the accused may apply to the court or judge for an order that a bill of particulars be filed, and on the trial the Commonwealth will be restricted to the proof of the items contained therein ... **Doubtless, had the defendant made application, a bill of particulars would have been ordered.** In simplifying indictments, it was not the intendment to make their brief and comprehensive terms a cover for snares to be sprung on the accused.

91 Pa. at 502 (emphasis added).

More recently, in 1952, the Superior Court reaffirmed the principle that a bill of particulars is the proper method by which a defendant should procure more specifics as to perjury charges. *Gore, supra*. The proof of falsity offered in the trial was evidence of six transactions. As to that proof, the Superior Court stated: "They

provided particularity that might have been obtained by a bill of particulars." 90 A.2d at 409.

In sum, *Gore* and *Williams* establish that the defendant is entitled to a bill of particulars stating with greater specificity the alleged perjurious statements as well as the "proof of falsity". Defendant must not be left guessing as to which statements he is defending against, nor as to basic information as to why such statements are false. Not only is more precision necessary for the preparation of a defense, but without knowing "the precise falsehood alleged," a jury cannot determine the statement's verity and render an intelligent verdict. *United States v. Slawick*, 548 F.2d 75, 83 (3rd Cir. 1977).²

Defendant does not intend this motion as an exploratory request for pre-trial discovery. Instead, he seeks the specifics to which he is entitled pursuant to the "interests of justice" (Rule 572) and his Constitutionally guaranteed Due Process rights. As *Gore* and *Williams* make clear, a bill of particulars is the appropriate remedy for the lack of specificity in the criminal information in the present case.

The defendant therefore requests this Court to order the Attorney General to specify which of Mr. Schultz's statements to the Grand Jury it intends to prove to were perjurious. As is clear from the information, Mr. Schultz is charged with perjury

² The Superior Court has indicated that it will look to the extensive federal law on perjury prosecutions, particularly those involving the grand jury, for guidance. *Commonwealth v. Williams*, 388 Pa. Super. 153, 160, 565 A.2d 160, 164-65 (1989); *Commonwealth v. Robinson*, 332 Pa. Super 147, 151, 480 A.2d 1229, 1231 (1984)

relating to specific statements made to the grand jury. The content of those statements is not only essential to proving the criminal conduct; they are the criminal conduct itself.

C. 23 Pa.C.S.A. § 6313.

Count Two of the Information reads,

The Defendant, a person who, in the course of employment, occupation or practice of a profession, did have reasonable cause to suspect, on the basis of medical, professional or other training and experience; that a child under the care, supervision, or guidance or training of the Defendant or of an agency, institution, organization or other entity with which the Defendant is affiliated has been the victim of child abuse, and that Defendant failed to report or cause a report to be made in accordance with 23 Pa. C.S. § 6313.

Mr. Schultz' January 25 Request for a Bill of Particulars, Exhibit A, included a request for particulars of this offense as well:

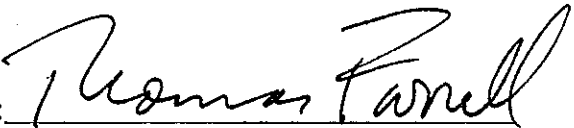
2. With respect to Count II of the Information, the defendant makes the following requests:
 - a. In the course of which employment, occupation or practice of a profession did Mr. Schultz come into contact with children?
 - b. On the basis of what medical, professional or other training and experience did Mr. Schultz have reasonable cause to suspect a child was the victim of abuse?
 - c. How and when was the child who was the victim of abuse under the care, supervision, or guidance or training of Mr. Schultz?
 - d. How and when did the child come before Mr. Schultz?
 - e. In which of Mr. Schultz' professional or official capacities did that child come before him?
 - f. In the care, supervision or guidance of which agency, institution, organization or other entity was the abused child and what was Mr.

Schultz' affiliation with that agency, institution, organization or other entity?

There is no caselaw on the propriety of bills of particulars for a violation of 23 Pa. C.S. § 6313, because there are no reported decisions on the use of that statute to charge a crime. That paucity of law necessitates particularity as to what Mr. Schultz did to constitute a crime. Further, as Mr. Curley's Motion to Quash Count Two (which Mr. Schultz joins) demonstrates, the prosecution has jumbled parts of the pre-2006 statute with others from the post-2006 version to create a crime that may not exist. A Bill of Particulars would assist the defense and the Court in determining if this is so.

WHEREFORE, the defendant respectfully requests that this Honorable Court order the provision of those particulars requested in Mr. Schultz' Bill of Particulars, Exhibit A to this Motion.

Respectfully submitted,

By: 

Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz
Pa. I.D. No. 48976
Farrell & Reisinger, LLC
436 7th Avenue, Suite 200
Pittsburgh, PA 15219
(412) 894-1380

EXHIBIT A

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

COMMONWEALTH OF PENNSYLVANIA,

v.

GARY C. SCHULTZ,

Defendant.

No. CP-22-CR-5164-2011

REQUEST FOR BILL OF PARTICULARS TO THE
ATTORNEY GENERAL PURSUANT TO
PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 572(A)

AND NOW, comes the defendant, Gary C. Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully requests the following:

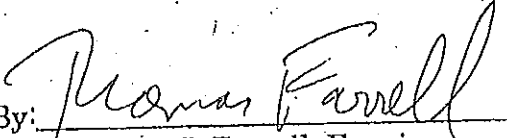
1. With respect to Count I (Perjury), the defendant makes the following requests:
 - a. Please specify and quote each statement alleged to be false and/or perjurious.
 - b. Provide the exact page and line numbers of the allegedly perjurious statement(s) made by Mr. Schultz in his January 12, 2011, Grand Jury testimony.
2. With respect to Count II of the Information, the defendant makes the following requests:
 - a. In the course of which employment, occupation or practice of a profession did Mr. Schultz come into contact with children?

- b. On the basis of what medical, professional or other training and experience did Mr. Schultz have reasonable cause to suspect a child was the victim of abuse?
- c. How and when was the child who was the victim of abuse under the care, supervision, or guidance or training of Mr. Schultz?
- d. How and when did the child come before Mr. Schultz?
- e. In which of Mr. Schultz' professional or official capacities did that child come before him?
- f. In the care, supervision or guidance of which agency, institution, organization or other entity was the abused child and what was Mr. Schultz' affiliation with that agency, institution, organization or other entity?

Mr. Schultz's January 12, 2011, grand jury testimony is twenty eight pages long. Identification of the exact statements the prosecution alleges are false and the specific conduct the prosecution alleges is unlawful is necessary to enable Mr. Schultz to prepare a defense and avoid surprise. *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991). Without identification of the specific alleged false statement and alleged unlawful conduct, Mr. Schultz cannot otherwise properly and adequately prepare for trial.

Respectfully submitted,

By:


Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz
Pa. I.D. No. 48976
Farrell & Reisinger, LLC
436 7th Avenue, Suite 200
Pittsburgh, PA 15219
(412) 894-1380

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

COMMONWEALTH OF PENNSYLVANIA,

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No. CP-22-CR-5164-2011

GARY C. SCHULTZ,

Defendant.

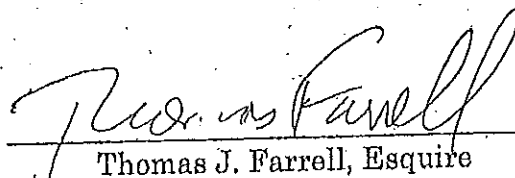
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Request for Bill of Particulars Pursuant to Pennsylvania Rule of Criminal Procedure 572(A), was emailed and mailed, First Class Mail, this 25th day of January, 2012, to the following

Bruce Beemer
Deputy Attorney General
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120
(bbeemer@attorneygeneral.gov)

I also certify that a true and correct copy of the within Request for Bill of Particulars Pursuant to Pennsylvania Rule of Criminal Procedure 572(A), was mailed, First Class Mail, this 26th day of January, 2012 to the following:

Caroline M. Roberto, Esquire
429 4th Avenue, Suite 500
Pittsburgh, PA 15219



Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz

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. :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion, was emailed and mailed, First Class Mail, this 14th day of February, 2012, to the following

Bruce Beemer
Deputy Attorney General
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120
(bbeemer@attorneygeneral.gov)

I also certify that a true and correct copy of the within Request for Bill of Particulars Pursuant to Pennsylvania Rule of Criminal Procedure 572(A), was mailed, First Class Mail, this 14th day of February, 2012, to the following:

Caroline M. Roberto, Esquire
429 4th Avenue, Suite 500
Pittsburgh, PA 15219



Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz

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

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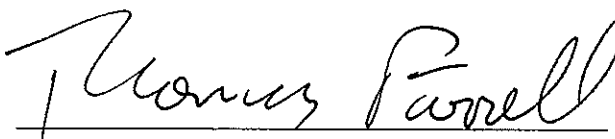
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429 4th Avenue, Suite 500
Pittsburgh, PA 15219



Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz