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 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'S COMBINED ANSWER AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S PRETRIAL MOTIONS

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, ttorney General Linda L. Kelly, Chief of Staff Bruce R. Beemer, Senior Deputy Attorney General Jonelle H. Eshbach, and Chief Deputy Attorney General James P. Barker, who file this Commonwealth's Combined Answer and Memorandum of Law in Opposition to Defendants' Pretrial Motions, and in support thereof aver as follows:

I.

COMMONWEALTH'S ANSWER TO DEFENDANT CURLEY'S MOTION TO QUASH COUNT 2 OF THE CRIMINAL INFORMATION

1. Admitted.

2. Admitted in part and denied in part. It is admitted that Defendant made such an argument. It is denied that there are defects with respect to Count 1 of the Criminal Information.

3. Admitted.

4. Denied.

5. Admitted in part and denied in part. As it existed in 2002, the relevant statutory language provided:

> **(a) General rule.**—Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect on the basis of their medical, professional or other training and experience, that a child coming before them in their professional or official capacity is an abused child. Except with respect to confidential communications made to an ordained member of the clergy which are protected under 42 Pa.C.S. § 5943 (relating to confidential communications to clergymen), the privileged communication between any professional person required to report and the patient or client of that person shall not apply to situations involving child abuse and shall not constitute grounds for failure to report as required by this chapter.

An Act Amending Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, etc., Pub. L. No. 1292, Act No. 1994-151, § 3 (December 16, 1994). This language became effective July 1, 1995. *Id.*, § 10(5).[1]

This provision later was amended to read as follows:

[1] The amendments recited herein were to statutory language originally enacted in 1990. An Act Amending Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, etc., Pub. L. No. 1240, Act No. 1990-206, § 2 (December 19, 1990). The statute became effective on March 19, 1991. *Id.*, § 7.

> **(a) General rule.**—A person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when the person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse, including child abuse by an individual who is not a perpetrator. Except with respect to confidential communications made to a member of the clergy which are protected under 42 Pa.C.S. § 5943 (relating to confidential communications to clergymen), and except with respect to confidential communications made to an attorney which are protected by 42 Pa.C.S. § 5916 (relating to confidential communications to attorney) or 5928 (relating to confidential communications to attorney), the privileged communication between any professional person required to report and the patient or client of that person shall not apply to situations involving child abuse and shall not constitute grounds for failure to report as required by this chapter.

An Act Amended Titles 18 (Crimes and Offenses), 23 (Domestic Relations), etc., Pub. L. No. 1581, Act. No. 2006-179, § 3 (November 29, 2006). This language became effective May 29, 2007. *Id.*, § 11(1)(ii).

Defendant complains of two aspects of the language of the Criminal Information, "reasonable cause to suspect" and "entity with which that person is affiliated is a victim of child abuse, including child abuse by an individual who is not a perpetrator." As can be seen above, the "reasonable cause to suspect" language was added to § 6311 in 1995 and so is not in error. Defendant correctly argues that the "entity with which that person is affiliated" language was not added until 2006. It is denied that Defendant is not on notice of the conduct that constitutes the offense or is unable to prepare any available defenses. *See Commonwealth v. Sims*, 591 Pa. 506, 519-520, 919 A.2d 931, 939-940 (2007). Most importantly, while more specific than the language used previously, the 2006 amendment to § 6311 did not change the nature of the offense or

the elements as they apply to Defendant. Based on the Motion to Quash, it is evident that Defendant has sufficient notice to defend the charge.

6. Admitted that the statute so read in 2007. *See* ¶ 5, above.

7. Admitted in part and denied in part. When the statute was first enacted in 1990, the word "suspect" was used in the phrase "reason to believe" was used. In the amendments effective in 1995, "reason to believe" was replaced by "reasonable cause to suspect." Defendant otherwise quotes the statute correctly.

8. Neither admitted nor denied, as ¶ 8 of the Motion to Quash constitutes legal argument. To the extent a response is required, ¶ 8 of the Motion to Quash is denied. Defendant is on notice as to the nature of the charge and is able to prepare a defense. Such notice is all that is required of a criminal information. Further, the "meaningful differences" to which Defendant refers do not impact his ability to prepare a defense. Defendant's arguments more properly belong in the context of preparing a final charge to the jury and the language to be employed. Further, even if the Court determines that there is a defect, it is respectfully submitted that quashing the Criminal Information is not the appropriate remedy, as the purported defect is easily cured through amendment of the Criminal Information. *See Commonwealth v. Slyman*, 334 Pa. Super. 415, 430 and n.11, 483 A.2d 519, 527 and n.11 (1984) (when defect in criminal information could be cured pretrial by amendment of the information, quashing information is not an appropriate remedy); Pa.R.Crim.P. 109 (defendant shall not be discharged or case dismissed based on defect in procedures under Rules unless the defendant is prejudiced thereby).

9. Denied. *See* ¶ 8, above.

10. Denied. *See* ¶ 8, above.

11. Denied. *See* ¶¶ 5-8, above.

12. Denied. *See* ¶¶ 5-8, above.

13. Denied. Defendant was a public employee at the time of the offense and the crime was committed in the course of or in connection with his employment, such that the statute of limitations was tolled for a period of eight years. 42 Pa.C.S. § 5552(c)(2). According to the evidence presented at the preliminary hearing, which reflects testimony before the Grand Jury, the offense was committed in March, 2002.[2] Therefore, the statute did not begin to run until March, 2010, and would not expire until March, 2012. The criminal complaint, filed on November 7, 2011, was timely.

14. Denied. *See* ¶ 13, above.

15. Admitted in part and denied in part. It is admitted that *Fiume* so provides. It is denied that the criminal complaint was not filed within the time permitted by the statute of limitations. *See* ¶ 13, above.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying Defendant Curley's Motion to Quash Count 2 of the Criminal Information.

II.

ANSWER TO DEFENDANT CURLEY'S PETITION FOR WRIT OF HABEAS CORPUS

1. Admitted.

2. Admitted.

3. Admitted.

[2] The investigation into these events is ongoing. If there is evidence establishing an offense date other than that reflected in the record thus far, the Commonwealth will address this issue in light of the new evidence.

4. Admitted.

5. Admitted in part and denied in part. It is admitted that the testimony is quoted accurately. It is denied that the quoted language reflects all of the testimony presented at the preliminary hearing or all of the criminal conduct on the part of Defendant Curley. Further, it is denied that the language of the Presentment is relevant to a pretrial petition for writ of habeas corpus challenging the sufficiency of the evidence presented at a preliminary hearing.

6. Admitted in part and denied in part. *See* ¶ 5, above.

7. Admitted.

8. Admitted in part and denied in part. *See* ¶ 5, above.

9. Admitted in part and denied in part. *See* ¶ 5, above.

10. Admitted in part and denied in part. It is admitted that the testimony of Mr. Paterno was presented as corroborative of the falsity element of the Perjury charge. It is denied that corroboration is an element of the offense that is required to establish a *prima facie* case of Perjury. *See Commonwealth v. Johnson*, 534 Pa. 51, 54-55, 626 A.2d 514, 515 (1993) (common-law two witness rule and 42 Pa.C.S. § 4902 require corroboration of witness to element of falsity in a perjury prosecution).

11. Admitted.

12. Admitted in part and denied in part. It is admitted that Mr. Paterno died from lung cancer complications. The remainder of ¶ 12 is denied. Specifically, it is denied that no other witnesses corroborated the falsity of the Defendants' testimony before the Grand Jury, as John McQueary testified that he met with Defendant Schultz and that Defendant Schultz was aware that the conduct witnessed by Michael

McQueary was sexual in nature. The Defendants' denial that there was sexual contact and that they were unaware of criminal conduct, facts alleged to have been communicated by Michael McQueary, is thereby demonstrated to be false.

13. Denied. The evidence presented at the preliminary hearing established a *prima facie* case of Perjury. Further, it is denied that dismissal is an appropriate remedy. Even if the Court were to find that the evidence is insufficient to support a *prima facie* case, the appropriate action is to conduct an evidentiary hearing at which the Commonwealth is permitted to supplement the record to cure any perceived deficiencies in the evidence.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying Defendant Curley's Petition for Writ of Habeas Corpus.

* * *

Memorandum of Law

In his Petition for Writ of Habeas Corpus, Defendant Curley attempts to take advantage of the death of a Commonwealth witness, Joseph V. Paterno, the former head football coach at the Pennsylvania State University (PSU). Paterno passed away on January 22, 2012, from complications due to lung cancer. At the time of the preliminary hearing, the parties stipulated that the Grand Jury testimony of Paterno would be presented in lieu of live testimony, as Paterno then was undergoing treatment for the cancer. Curley does not argue that the stipulation was invalid, but that Paterno's testimony cannot be presented at trial, and so the evidence presented at the preliminary hearing becomes retroactively insufficient.

The Superior Court has explained the principles governing a pretrial petition for writ of habeas corpus:

> ...It is settled that a petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. Although a habeas corpus hearing is similar to a preliminary hearing, in a habeas corpus proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the offense charged.
>
> A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt. Rather, the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury.

Commonwealth v. Fountain, 811 A.2d 24, 25–26 (Pa. Super. 2002) (quotations, quotation marks, and citation omitted). "In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." *Commonwealth v. Packard,* 767 A.2d 1068, 1071 (Pa. Super. 2001) (citation omitted).

> [T]he scope of evidence which a trial court may consider in determining whether to grant a pretrial writ of habeas corpus is *not* limited to the evidence as presented at the preliminary hearing. On the contrary, ... the Commonwealth may present additional evidence at the habeas corpus stage in its effort to establish at least *prima facie* that a crime has been committed and that the accused is the person who committed it.
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> * * * * * *
>
> ...In the pretrial setting, the focus of the habeas corpus hearing is to determine whether sufficient Commonwealth evidence exists to require a defendant to be held in government "custody" until he may be brought to trial. To make this determination, the trial court should accept into evidence the record from the preliminary hearing as well as any additional evidence which the Commonwealth may have available to further provide its *prima facie* case.

Commonwealth v. Jackson, 809 A.2d 411, 416 (Pa.Super.2002) (quotation omitted) (emphasis in original).

Commonwealth v. Keller, 823 A.2d 1004, 1011-1012 (Pa. Super. 2003).

The offense of Perjury is defined by statute:

> **(a) Offense defined.**--A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.
>
> **(b) Materiality.**--Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.
>
> ...
>
> **(f) Corroboration.**--In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness.

18 Pa.C.S. § 4902(a), (b), (f).

The testimony at the preliminary hearing established that a Commonwealth witness, Michael McQueary, witnessed former PSU defensive coordinator Jerry Sandusky in a shower with a prepubescent boy. (N.T. 12-13) According to Michael McQueary, Sandusky was behind the boy with his arms around the boy's waist. (*Id.*) Both were naked. Michael McQueary saw this after hearing a rhythmic slapping sound upon entering a locker room area. (N.T. 9-10) He saw Sandusky and the boy first through a mirror and then directly. (N.T. 12, 15) According to Michael McQueary, it was plain that Sandusky was engaged in sexual contact with the boy. (N.T. 13) He reported this first to Paterno, although he did not use graphic language out of courtesy. (N.T. 22-23, 24-25) Later, Michael McQueary spoke to Defendants Curley and Schultz. (N.T. 27-31) Although he could not remember the specific language that he used,

Michael McQueary communicated to Curley and Schultz that the contact was sexual in nature and "over the line." (N.T. 32-34, 40) The testimony of Paterno corroborated the testimony of Michael McQueary because Paterno also understood that the conduct was sexual in nature. (N.T. 175)

In contrast, both Curley and Schultz characterized the report by McQueary as consisting only of "horseplay" and not sexual in nature or sexual only in the sense that there may have been contact with a sexual organ as part of the horseplay. Despite repeated questions, neither Curley nor Schultz would admit to learning that Sandusky was engaged in a sex act with the boy. Further, both denied that there was any conduct that could be considered criminal, despite knowing that Sandusky was naked in the shower touching a young boy from behind.

Both Curley and Schultz stipulated to the testimony of Paterno for purposes of the preliminary hearing, and so that testimony was properly admitted. *See* Pa.R.E. 103(a)(1) (error may not be predicated on the admission of evidence unless a timely objection is made). Because the testimony of Paterno was properly admitted and because that testimony corroborates the testimony of Michael McQueary, sufficient evidence to establish a *prima facie* case was presented during the preliminary hearing.

Further, Michael McQueary's testimony was corroborated by that of his father, John McQueary. John McQueary testified that he met with Defendant Schultz some time after the incident described by his son. At that meeting, Schultz's words and behavior indicated that he understood that Michael McQueary had witnessed sexual contact between Sandusky and the boy. Because Schultz would have learned of such from Michael McQueary, the testimony of Michael McQueary is corroborated. This

conclusion also would apply to Defendant Curley, who was present for the same meeting at which Schultz learned of the sexual contact from Michael McQueary. That is, because McQueary communicated to both Defendants at the same meeting, and Schultz knew of the sexual contact as a result, Curley also would have learned of the sexual contact.

Contrary to the position of Defendant Curley, then, Michael McQueary's testimony was corroborated by that of Paterno. Curley waived his right to object to the admission of that testimony for purposes of a pretrial determination of a *prima facie* case when he stipulated to the testimony of Paterno.[3] Further, the testimony of Michael McQueary was corroborated by that of John McQueary, and so the Commonwealth established its *prima facie* case even in the absence of Paterno's testimony. Curley's claim of insufficient evidence fails.

Moreover, the Commonwealth respectfully submits that the falsity of Curley's Grand Jury testimony was not limited to the information related to him by Michael McQueary. The Commonwealth is providing a Bill of Particulars to the defense setting forth the statements that the Commonwealth contends are false. The Commonwealth requests a hearing if the Court determines that additional evidence is necessary to establish a *prima facie* case of Perjury.

III.

ANSWER TO DEFENDANT SCHULTZ'S PETITION FOR WRIT OF HABEAS CORPUS AS TO COUNT ONE OF THE INFORMATION

1. Admitted.

[3] For his part, Defendant Schultz claims that the Commonwealth may not introduce the testimony of Paterno at trial because he did not have an opportunity to cross-examine Paterno under oath. Defendant Gary Schultz's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus at 8 n. 4. Actually, Schultz had such an opportunity and waived it by stipulating to the testimony.

2. (a) Denied.

(b) Denied.

(c) Denied.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying Defendant Schultz's Petition for Writ of Habeas Corpus as to Count One of the Information.

* * *

Memorandum of Law

The Commonwealth incorporates herein its argument in opposition to the Petition for Writ of Habeas Corpus filed by Defendant Curley. As set forth therein, the testimony of Michael McQueary was corroborated by that of Paterno and John McQueary.

For his part, Defendant Schultz sets forth argument that properly is part of a closing argument to the jury. Essentially, Schultz argues that his statements should be interpreted as opinions rather than statements of fact. Of course, such an argument ignores the standard of review, which requires that the record be read in the light most favorable to the Commonwealth. *Keller*, *supra* (quoting *Fountain*). Characterizing the testimony in a manner favorable to the Defendant is inconsistent with that standard.

Schultz also argues that his own testimony was too vague and ambiguous to constitute Perjury. Actually, Schultz's Grand Jury testimony was that McQueary never informed him that there was sexual contact between Sandusky and the boy. Although at one point appearing to concede that there had been sexual contact, which obviously would be criminal given the apparent age of the boy, Schultz limited his concession by indicating that he meant only horseplay: "That's inappropriate. I don't know if that's

criminal. If it's in the context of wrestling or something like that, I don't know." (Schultz Grand Jury Testimony at 32)

Finally, as noted above, the Commonwealth does not believe that the Defendants' false statements are limited to those on which the Commonwealth relied for purposes of the preliminary hearing. Again, the Commonwealth requests a hearing if the Court determines that additional evidence is necessary to establish a *prima facie* case of Perjury.

IV.

SUPPLEMENT TO RESPONSE TO MOTION TO PRESERVE NOTES OF INTERVIEWS, PROFFER STATEMENTS, AND REPORTS OF INVESTIGATION

Presently pending before the Court is a joint motion by Timothy M. Curley ("Curley") and Gary C. Schultz ("Schultz"), the respective defendants in the-above captioned cases, which asks this Court to order the Commonwealth to preserve various items, specifically,

> all actual and potential *Brady* material, including, but not limited to all Witness Interviews, Proffer Statements, Interview Statements and Reports of Investigation related to the present case. This includes any notes or interviews of any persons and any electronic communications with witnesses which were made in preparation of the Grand Jury Investigation and present cases.[4]

Motion to Preserve at pp. 2-3, ¶5. The Commonwealth previously responded to that Motion, and hereby supplements its prior response.

They assert that the Court should do this because "defendants strongly believe that these materials contain *Brady* information, which the prosecution will be required to make available to the defense as we progress toward trial." As explained below, the

[4] *See Brady v. Maryland*, 373 U.S. 83 (1963).

Court should reject this request for three reasons: *First*, what Curley and Schultz are requesting is completely unnecessary and unjustified; *second*, it constitutes an improper attempt to redefine *Brady* and to remake the rules of criminal procedure that govern these proceedings; and *third*, it amounts to a violation of the separation of powers doctrine. For these joint and several reasons, the Court should deny defendants' motion.

A. Defendants' Motion to Preserve is Utterly Unnecessary and Unjustified.

So that there is no confusion about this, the Commonwealth will state at the outset of this discussion that it is not only aware of its discovery-related responsibilities under the Pennsylvania Rules of Criminal Procedure, *see* Pa.R.Crim.P. 573, and its obligations under *Brady* and its progeny,[5] but also that it fully intends to meet them. Defendants' motion, however, implies that the contrary is true; that it is necessary for the Court to intervene and take the extraordinary, affirmative step of ordering that the Commonwealth preserve the laundry list of materials recited in their motions to ensure that is the case. This is not just offensive, it is outrageous. Nothing contained in defendants' motion, nor anything else contained in the records of these cases, establishes that there is any reason to doubt that the Commonwealth will fully and faithfully discharge its responsibilities.

As the parties seeking *Brady*-based relief, defendants have the burden of establishing entitlement to it. *See generally Commonwealth v. Ly,* 980 A.2d 61, 75-76 (Pa. 2009). At very minimum, in the context of these cases, this means demonstrating via concrete evidence, not by innuendo or supposition, that there is a genuine need for

[5] *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972).

the order they now seek. This they have not done—or even have come close to doing. As justification for their out-of-the-ordinary request, they offer nothing but the single and totally unforthcoming statement quoted above. Merely asserting that they "strongly believe" that the materials which are the subject of their motion contain *Brady* material is grossly deficient in terms of demonstrating any entitlement to the relief they now request. At very most, that statement only serves to inform the Court of their subjective views on this issue. It does not supply any definitive proof that the Court might use to objectively ascertain whether there is actually a need for the relief sought.

We must also point out that defendants' motion attempts to foster the impression that the Commonwealth has not been co-operative in the discovery process. *See* Motion to Preserve at pp. 1-2, ¶¶2-3 (discussing defendants' informal requests for discovery). As the discussion there reflects, defendants' requests for informal discovery were made prior to their preliminary hearings. *See id.* at p. 1, ¶2, ln. 1 (indicating that their request for informal discovery was made on November 22, 2011), and p. 2, ln. 1 (referring to forthcoming preliminary hearings).[6] As the procedural rules and interpretive case law all make very clear, they were not entitled to discovery prior to formal arraignment. *See generally* Pa.R.Crim.P. 573(A); *Commonwealth v. Fleming*, 794 A.2d 385, 387-388 (Pa. Super. 2002) (motions to compel discovery may not be filed until after the defendant has been formally arraigned). Notwithstanding this, as they acknowledge, the Commonwealth provided them with copies of their own grand jury testimony and that of Joe Paterno. *See* Motion to Preserve at p. 2, ¶3. In short, the

[6] Schultz waived formal arraignment on January 11, 2012; Curly did the same on January 13, 2012.

Commonwealth more than met its obligations and defendants' attempt to make it appear otherwise in aid of their motion is disingenuous—and disturbing.

For purposes of ensuring compliance with *Brady* and the rules of discovery, a court order would be supererogatory. The Commonwealth is already under an obligation not to destroy *Brady* materials—or other materials it is required to disclose in discovery—and to provide them to the defense.[7] The defendants have not established that there is any creditable reason to believe that obligation will not be honored.

Indeed, given how comparatively little has transpired to date in both cases—each is in early stages of litigation—one is compelled to ask how can there be any good faith basis for even suggesting a problem of this sort, especially when, as the foregoing discussion shows, the Commonwealth has properly discharged its responsibilities.

That defendants have not proven any genuine need for the relief that they now seek is even clearer when one considers the other unstated assumption that underlies their motion: that they have a right to access or to receive all of the materials that they are asking be covered by their motions. It is well-settled that they are entitled by the discovery rules, and/or by *Brady*, to only certain types of materials, not everything they may desire. As our Supreme Court has made clear, defendants are not entitled by *Brady* or by any other authority to unfettered access to the Commonwealth's case or investigative files. *See generally Ly, supra,* 980 A.2d at 84; *Commonwealth v. Paddy*, 15 A.3d 431, 450 (Pa. 2011)("*Brady* does not require the disclosure of information 'that is not exculpatory but might merely form the groundwork for possible arguments or defenses' ")(citation omitted); *Commonwealth v. Counterman*, 719 A.2d 284, 297 (Pa.

[7] That obligation is continuing in nature. *See, e.g.*, Pa.R.Crim.P. 573(D).

1998)(explaining that the "constitutional duty to disclose under *Brady* encompasses only exculpatory evidence; it is not a general rule of discovery").

Superior Court, too, has reiterated these principles. In *Commonwealth v. Lambert*, 765 A.2d 306 (Pa. Super. 2000), the court stressed that "the rationale underlying *Brady* is not to supply a defendant with all of the evidence in the government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the government." *Id.* at 325 (quoting *Commonwealth v. Santiago*, 654 A.2d 1062, 1068-1070 (Pa. Super. 1994), *app. denied*, 664 A.2d 540 (Pa.), *cert. denied*, 516 U.S. 995 (1995)). *Accord Commonwealth v. Burkett*, 5 A.3d 1260, 1267-68 (Pa. Super. 2010)("[a] prosecutor is not required to deliver his entire file to defense counsel, nor is a prosecutor's duty to disclose such that it would provide a defendant with a right to discovery").

Accordingly, to the extent that defendants' motion seeks an order to preserve materials to which they have no right, *i.e.*, non-*Brady* materials or materials not otherwise to be disclosed in discovery, it is improper. To the extent their motion asks for an order to preserve materials to which to the defense is entitled under the either discovery rules or *Brady*, it is unnecessary, as we have already pointed out. Viewed either way, it should be denied.

B. Defendants' Motion Represents an Improper Attempt to Redefine *Brady* and/or to Refashion the Rules of Criminal Procedure.

Defendants' motion should also be denied because it is in effect an attempt either to redefine and broaden the rule of *Brady* and/or to refashion the procedural rules which govern Pennsylvania criminal cases. Neither *Brady* nor any other authority—

state or federal—imposes an obligation on the Commonwealth to preserve materials which are non-exculpatory. Likewise, under the Pennsylvania Rules of Criminal Procedure, including Pa.R.Crim.P. 573, there is no such duty. This is by no means surprising. For as *Ly*, *Lambert* and the other cases cited *supra* all make clear, *Brady* extends only to exculpatory evidence and it is only as to materials of that ilk that the Commonwealth has an obligation to ensure that the defense has equal access. To grant the "preservation" relief defendants seek, would materially alter both the rule of *Brady* and the rules of criminal procedure imposing a new and different duty on the Commonwealth—a duty that has never been endorsed by our Supreme Court.

Putting to the side for a moment the fact that promulgation of procedural rules is the exclusive province of the Supreme Court, defendants' motion supplies no meaningful authority in support of their request. As one can see from the portion of their demand for informal discovery that is recounted in their motion, their position here derives almost exclusively from policies and procedures utilized by federal prosecutors. *See* Motion to Preserve at p. 2 (where reference is made to procedures found in the *U.S. Attorneys' Manual*).[8] That *Manual* does not even remotely pertain to criminal cases being litigated in the courts of the Commonwealth. Because it has no currency

[8]In support of their motion, defendants also cite *United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 21, 2010), a non-precedential federal trial court opinion. Their reliance on *Suarez* is seriously misguided. There, when the prosecution failed to preserve and produce text messages between a cooperating witness and government agents, the district court determined that an adverse-inference charge was appropriate based on principles of spoliation of evidence. According to that court, the failure to preserve the text messages violated the Jencks Act, 18 U.S.C. § 3500, and warranted the sanction. As discussed, *infra*, the Jencks Act does not apply to these proceedings or any other cases being litigated in Pennsylvania's courts. What's more, federal appellate courts have said that the destruction of notes does not violate the Jencks Act when the content of the notes is included in an investigative report. *See, e.g., United States v. Barlin*, 686 F.2d 81, 92 (2d Cir. 1982).

here, it cannot legitimately serve as a practice guide for state—as opposed to federal—cases.

By their motion, defendants are essentially attempting to engraft federal procedures onto state prosecutions. Even if this Court had the authority to take such a huge step, it would be wrong to do so. First and most obviously, the Commonwealth is a separate sovereign and, as such, has the authority to determine how it will enforce its criminal laws and what procedures it will employ to ensure such enforcement meets the requirements of the state and federal constitutions. Pennsylvania decisional law makes this abundantly clear. For example, in *Commonwealth v. Pickering*, 533 A.2d 7356 (1987), where the defendant/appellant again urged the Superior Court to adopt a rule requiring police to "preserve original informal notes which are relevant to a criminal investigation," the court distinguished federal case law establishing such a prophylactic rule by pointing out that Pennsylvania does not have rules analogous to Fed.R.Crim.P. 16 or the Jencks Act, 18 U.S.C. § 3500. *Id.* at 736. Consistent with both the Pennsylvania Supreme Court's body of *Brady* jurisprudence, and its own, Superior Court stressed that the destruction of an officer's notes warranted relief only when it amounted to a *Brady* violation. *Id.* The court went on to add that: "The destroyed notes could not possibly be material because they were substantively incorporated into the officer's typewritten report which was produced at trial. The handwritten notes would have merely been cumulative evidence." *Id.* at 737.

Second, the Pennsylvania courts have never held that held that prosecutors have an obligation to preserve non-*Brady* material, or materials that are not subject to disclosure under Pa.R.Crim.P. 573. Defendants' efforts to try to make it appear

otherwise are ill-considered. None of the authorities to which they point so hold, or even intimate, such a requirement. Neither Pa.R.Crim.P. 573(B)(2)(a)(ii) nor *Commonwealth v. Hamm*, 378 A.2d 1219 (1977), governs (or even mentions) the preservation of evidence.

In fact, Pennsylvania case law interpreting and applying *Brady* and its progeny firmly establishes that there is: no requirement that criminal investigators record custodial interviews in any format, *see Commonwealth v. Craft*, 669 A.2d 394 (Pa. Super. 1995); no requirement that prosecutors make a complete and detailed accounting of all police investigatory work in a case, *see Commonwealth v. Small*, 741 A.2d 666, 676 (Pa. 1999); and no requirement that the Commonwealth disclose all evidence in its possession to a criminal defendant. *See Commonwealth v. Appel*, 689, 891, 907 (Pa. 1997). Also, as *Pickering*, *supra*, reflects Pennsylvania cases make it clear than when the substance of notes taken during an interview is incorporated into an investigative report which is provided to the defense, *Brady* has not been violated; that the notes are merely cumulative. *Accord Commonwealth v. McElroy*, 665 A.2d 394 (Pa. Super. 1995); *Commonwealth v. Haber*, 505 A.2d 273 (Pa. Super. 1986). Because the defendant has been provided with the pertinent information via the investigative report, he has "not be[en] denied access to exculpatory evidence only known to the government," which is the touchstone of any *Brady* claim. *See Santiago*, *supra*.

That there is no existing obligation of this sort can be seen, too, in a recent ruling by another member of this Court. See *Commonwealth v. Perzel,* No. CP-22-CR-0002589-2010 (Dauphin Co.), Mem. Order of 07-29-11 (Lewis, J.)(copy attached).[9] In

[9] This decision, which denied a joint motion, also applied to eight co-defendants whose names are included in the caption, along with corresponding case numbers.

Perzel, Judge Lewis concluded that there was no prosecutorial misconduct when notes of proffer meetings were destroyed after their contents were memorialized in other ways, *i.e.*, by inclusion in investigative reports or in transcribed grand jury testimony. Moreover, as the court observed in *Perzel*, there is nothing inherently improper in the destruction notes taken during interview or proffer meetings. The practice can be the product of sound administrative judgment. *See id.* at pp. 3-4.

If anything, Pennsylvania case law underscores how improper it is for a defendant to try to have a court other than the Supreme Court create a new rule of procedure, something defendants are undoubtedly attempting to do here. In *Commonwealth v. Harris*, 443 A.2d 851, 854 (1982), the defendant/appellant argued that the Superior Court should "adopt a rule requiring the police to preserve rough notes taken during interviews of defendants." After concluding that there was no violation of the discovery rule, Pa.R.Crim.P. 305(B)(1)(b), (now numbered 573(B)(1)(B)),[10] Superior Court observed that what the defendant/appellant was proposing it do would effectively amend the rules of criminal procedure and flatly rejected that request, saying that: "We leave to our Supreme Court any such alteration of the rules which it promulgates." *Harris* 443 A.2d at 854.

In taking that action, Superior Court only did what it was required to do so, as the Supreme Court of Pennsylvania has sole authority for rule-making in the Pennsylvania courts. Pa. Const. art. 5, § 10(c); *Commonwealth v. Liston*, 602 Pa. 10, 17, 19, 977 A.2d 1089, 1093, 1094 (2009). Notably, in the 30 years since *Harris*, the Supreme Court has made some changes to the discovery rules but not has not included the type

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[10] Except for one minor grammatical adjustment—the substitution of "that" for "which"—the language of the rule has not changed.

of change that was sought in *Harris* or is being sought here. Again, this is not surprising, given what the court has said about *Brady* and its boundaries.

In declining to jigger with the procedural rules, Superior Court was no doubt mindful of the fact that promulgation of those rules is a complex process; that our Supreme Court typically does not act unilaterally in this area but rather upon the recommendation of a committee it has appointed to develop and vet proposals. Through these procedures, which include soliciting public comments, different concerns and practical problems, some of which may not be immediately apparent, can be identified and addressed more readily. As discussed in the next section, defendants' thinly-veiled invitation for this Court to engage in rulemaking potentially implicates, and conflicts with, other constitutional principles that figure in this situation, namely, the separation of powers doctrine. For all of these reasons discussed here, the Court should deny defendant's motion.

C. Granting Defendants' Motion Would Impermissibly Interfere With the Right of a Commonwealth Agency to Employ Administrative Procedures of Its Choosing and Thus Would Violate the Separation of Powers Doctrine.

Finally, ordering the Commonwealth to preserve categories of materials, whether or not their contents actually bring them within the rule of *Brady*, is problematic in a less obvious but highly important way: it would impermissibly interfere with the right of an executive agency to employ administrative procedures of its choosing, something that would violate the separation of powers doctrine.[11] As in most jurisdictions, prosecutors

[11] In *Commonwealth v. Allshouse*, 33 A.3d 31 (Pa. Super. 2011), Superior Court included this concise summary of that doctrine:

> One of the distinct and enduring qualities of our system of government is its foundation upon separated powers. Under the principle of separation of the powers of government, . . . no branch should exercise the functions exclusively committed to another branch.

in Pennsylvania are members of the executive branch of government. *See generally* Pa.Const.Art.4, §§1 and 4.1 (Attorney General); Pa.Const.Art. 9, §1 and 16 P.S. §1401 (District Attorneys). So are police departments. *See, e.g.*, 71 P.S. §65 (establishing the Pennsylvania State Police as an executive agency of the Commonwealth). As such they have an inherent right to establish their own operational procedures including procedures related to the compilation and maintenance of records. Absent some illegality, the judicial branch of government cannot interfere with the exercise of that authority.

As indicated earlier, the Commonwealth does not dispute or seek to escape its obligation to preserve and disclose evidence as required by *Brady* and/or Rule 573. It does, however, dispute that defendants are entitled to ask this Court to order the Commonwealth to preserve, or take some other action as to, non-*Brady* material(s) in its possession because granting such a request cause this Court violate the separation of powers doctrine. The disposition of non-*Brady* materials and materials not otherwise subject to disclosure under the rules of discovery, that is, materials to which a defendant has no right of access, is strictly within the discretion of the prosecutorial and/or investigative agency handling a case. As components of the executive branch of government, these agencies are entitled to establish and enforce those administrative policies it believes best effectuate the responsibilities they are assigned under the law. And they are entitled to do this without the interference of either of the other branches,

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Id. at 34-35 (citing *Commonwealth v. Mockaitis*, 834 A.2d 488, 499 (Pa. 2003)(citations and quotations omitted in original)).

just as those other branches are entitled to perform their constitutionally- or statutorily-imposed duties without interference from the executive.[12]

Pennsylvania's appellate courts have carefully adhered to the separation of powers doctrine in criminal matters. For example, under Pennsylvania law, the decision to seek a grant of immunity for a witness in a criminal case is solely relegated to the discretion of a prosecutor. *See* 42 Pa.C.S. §5947(b). Numerous rulings reiterate that, absent a request by a prosecutor, a court has no authority to grant immunity. *See, e.g., Commonwealth v. Einhorn*, 911 A.2d 960, 971 (Pa. Super. 2006), *app. denied*, 920 A.2d 831 (Pa. 2007)(where, citing *Commonwealth v. Mulholland,* 549 Pa. 634, 651, 702 A.2d 1027, 1035 (1997), the court explained that "the decision as to whether immunity should or should not be granted to a witness rests entirely within the judgment of the *executive* branch of government, *i.e.*, the Attorney General or District Attorney")(emphasis in original). *Accord Commonwealth v Johnson*, 487 A.2d 1320, 1322 (Pa. 1985); *Commonwealth v. Hall*, 867 A.2d 619, 634 (Pa. Super. 2005), *app. denied*, 895 A.2d 549 (Pa. 2006).

Similarly, a person against whom criminal charges have been instituted may only be admitted into Accelerated Rehabilitative Disposition ("ARD") upon a motion of the Commonwealth's attorney. *See* Pa.R.Crim.P. 310. Absent the same, a court may not entertain—let alone grant—a motion by a defendant for ARD. *See generally Commonwealth v. Lutz*, 495 A.2d 928 (Pa. 1985).

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[12] As the court in *Allshouse* observed, the separation of powers doctrine serves to protect one branch of government from incursions into its functions by either or both of the other branches. *See* 33 A.3d at 34-35 (where the court said that "[i]nterference in the operation of courts by either the executive or legislative branch is a violation of the separation of powers doctrine")(citing *First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission,* 727 A.2d 1110, 1112 (Pa. 1999)).

As in these other circumstances, this Court should decline to interfere with what is the responsibility of the executive arm of government. As Judge Lewis' ruling in *Perzel, supra,* acknowledged, there are valid reasons underlying administrative policy decisions about record retention and report preparation and court-ordered modifications might have an undesirable effect on an agency's operations.[13]

It is not hard to anticipate the potentially adverse consequences which might follow from granting defendants' request. Memorialization of plea discussions including those involving a proffer of testimony and/or an offer of immunity may serve to discourage potential co-operators who, with their counsel may wish to interact more informally, from coming forward.[14] Chilling this vital process will not only hamper the progress of investigations and prosecutions but will also interfere with the efficient enforcement of Pennsylvania's criminal laws.

In sum, in addition to the other problems we have discussed, insofar as defendants' motion to preserve extends to non-*Brady*, non-discoverable materials, it goes too far and puts this Court in an untenable position. For this further reason, defendants' motion should be denied.

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[13] *Perzel* specifically involved "proffer notes" relating to interviews by co-defendants and others who were potential witnesses for the Commonwealth. This case does not presently involve the same items—although defendants' motion apparently seeks to encompass any materials of this sort that may be generated in the future—but should this actually become an issue in this matter, the Commonwealth will address it more fully at such time. In any event, the same reasoning applies.

[14] Again, we must emphasize that we are not referring to communications between the government and potential co-operators that involve *Brady* material—just the opposite.

D. Conclusion

For all of these reasons, the Court should deny defendants' motion to preserve and vacate the interim order entered on December 22, 2011.

Respectfully submitted,
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VERIFICATION

The facts recited in the foregoing Commonwealth's Combined Answer and Memorandum of Law in Opposition to Defendants' Pretrial Motions 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 Combined Answer and Memorandum of Law in Opposition to Defendants' Pretrial Motions upon the persons and in the manner indicated below:

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