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containing the decisions rendered in the 52nd Judicial District

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No. 28

Public Notices

**DECEDENTS' ESTATES
FICTITIOUS NAME REGISTRATION**

Opinion

Commonwealth v. Uwan English, Steven William Caraballo, Lewis Raymond Morgan, Carl Whitaker, Bryant Jamal Gray and Nashawn Kevin Pearson; L.C.C.C.P. Nos. CP-38-CR-0000824-2017, CP-38-CR-0000825-2017, CP-38-CR-0000826-2017, CP-38-CR-0001149-2017, CP-38-CR-0001148-2017 and CP-38-CR-0001147-2017

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**Paul W. Kilgore, Esq., Chair
Stephanie Axarlis, Esq., Editor
Jennifer Wentzel, Esq., Editor**

DECEDENTS' ESTATES

NOTICE IS HEREBY GIVEN that Letters Testamentary or of Administration have been granted in the following estates. All persons indebted to the said estate are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

FIRST PUBLICATION

ESTATE OF DOROTHY S. BATCHELOR, late of Annville Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

S. James Batchelor, Executor
Keith D. Wagner
P.O. Box 323
Palmyra, PA 17078
Attorney

ESTATE OF WENDEL STAHLER BECKMAN, late of Jonestown, Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administratrix.

Roberta A. Beckman, Administratrix
c/o Weiss Burkett
802 Walnut Street
Lebanon, PA 17042

Samuel G. Weiss Jr., Esquire
Attorney

ESTATE OF GEORGE P. FISHEL, III, late of South Lebanon Township, Lebanon County, PA. Letters Testamentary have been granted to the undersigned Executor.

J. Mattson Fishel, Executor
c/o Reilly Wolfson Law Office
1601 Cornwall Road
Lebanon, PA 17042

ESTATE OF STEVEN LEE FORTI, late of Palmyra, Lebanon County, PA, deceased. Letters of Administration have been granted to the undersigned Administrator.

Roland F. Forti, Jr., Administrator
123 S. Prince Street
Palmyra PA 17078
Hillary N. Snyder, Esq., Attorney

ESTATE OF SALLY ANN GETTLE-SIMMONS, late of Lebanon, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Gregory Gettle, Executor
c/o Weiss Burkett
802 Walnut Street
Lebanon, PA 17042

Loreen M. Burkett, Esquire
Attorney

ESTATE OF BRUCE V. KEENEY, late of Jonestown Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Fred T. Keeney, Executor
c/o Zimmerman Law Office
466 Jonestown Road
Jonestown PA 17038

John M. Zimmerman, Esquire
Attorney for the Estate

ESTATE OF DOROTHY V. KRALL, late of Annville, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Ernest Krall, Executor
c/o Weiss Burkett
802 Walnut Street
Lebanon, PA 17042

Loreen M. Burkett, Esquire
Attorney

ESTATE OF LEONARD L. QUICK, late of Millcreek Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Maureen Q. Leshar, Executrix
1925 Garfield Avenue
Reading PA 19609

Elizabeth Roberts Fiorini, Esquire
Fiorini Law, P.C.
1150 West Penn Avenue
Womelsdorf, Pennsylvania 19567
Attorney

ESTATE OF IDA M. RESSLER, late of Millcreek Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Kelly R. Weidman, Executrix
319 E. Main Street
Newmanstown PA 17073

Elizabeth Roberts Fiorini, Esquire
Fiorini Law, P.C.
1150 West Penn Avenue
Womelsdorf, Pennsylvania 19567
Attorney

ESTATE OF GLORIA P. SHIRK, late of West Lebanon Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Marilyn R. Galebach, Executrix
Kevin M. Richards, Esquire
P.O. Box 1140
Lebanon, PA 17042-1140

SECOND PUBLICATION

ESTATE OF JAMES H. BLOUCH, late of the City of Lebanon, County of Lebanon, Pennsylvania, died December 12, 2017. Letters Testamentary have been granted to the undersigned Executor.

Charles E. Blouch, Jr., Executor
1005 South Second Avenue
Lebanon, Pennsylvania 17042

Attorney: Terrence J. Kerwin
Kerwin & Kerwin, LLP
4245 State Route 209
Elizabethville, Pennsylvania 17023

ESTATE OF RUTH N. HETRICK, late of South Londonderry Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Frederick E. Wilt, Executor
c/o Keith D. Wagner
P.O. Box 323
Palmyra, PA 17078 – Attorney

ESTATE OF PATRICIA A. HOFFMAN, late of the Township of Jackson, County of Lebanon and Commonwealth of Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Douglas L. Hoffman, Executor
7 Lorraine Avenue
Myerstown, PA 17067

Kenneth C. Sandoe, Esquire
Steiner & Sandoe, Attorneys

ESTATE OF JUSTINE M. PRITZ, a/k/a Justine M. Souders, late of Swatara Township, Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administrator.

Keith F. Pritz, Administrator
Kevin M. Richards, Esquire
P.O. Box 1140
Lebanon, PA 17042-1140

ESTATE OF JOAN S. RAGUS, a/k/a Joan Shirley Ragus, late of South Lebanon Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Roxanne L. Dohner, Executrix
Kevin M. Richards, Esquire
P.O. Box 1140
Lebanon, PA 17042-1140

ESTATE OF CLIFFORD L. RASP, late of North Annville Township, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Linda J. Miller, Executrix
c/o Gerald J. Brinser
P. O. Box 323
Palmyra, PA 17078 – Attorney

ESTATE OF JANE L. SHUEY, late of Palmyra Borough, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Co-Executors.

Pamela J. Sheriff, Timothy M. Shuey, Beth M. Dove, Co-Executors
c/o Keith D. Wagner
P. O. Box 323
Palmyra, PA 17078-Attomey

THIRD PUBLICATION

ESTATE OF STEPHEN A. BATDORF, late of 131 W. Chestnut Street, Borough of Jonestown, Lebanon County, PA, deceased. Letters testamentary on the above estate have been granted to the undersigned Executrix.

Alice J. Jenkins, Executrix

In care of her attorney,
Andrew S. George, Esq.
Kozloff Stoudt Attorneys
2640 Westview Drive
Wyomissing, PA 19610

ESTATE OF GLADYS A. BILLMAN, late of the Township of South Lebanon, County of Lebanon and Commonwealth of Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Steven R. Billman, Executor
7851 Paxton Street
Harrisburg, PA 17111

Kenneth C. Sandoe, Esquire
Steiner & Sandoe, Attorneys

ESTATE OF STEWARD E. BOYER, late of the Township of Heidelberg, County of Lebanon and Commonwealth of Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executor.

Deborah D. Frederick, Executor
138 Michters Road
Newmanstown, PA 17073

Timothy T. Engler, Esquire
Steiner & Sandoe, Attorneys

ESTATE OF CHERYL A. BREWER,
late of North Cornwall Township, Lebanon
County, Pennsylvania, deceased. Letters
of Administration have been granted to the
undersigned Administrator.

Ashley Brewer, Administrator
2081 Greystone Drive
Lebanon, PA 17042

Michael S. Bechtold, Esquire
Buzgon Davis Law Offices
P.O. Box 49
525 South Eighth Street
Lebanon, PA 17042

**ESTATE OF JOSEPH E. FIESCHKO,
SR.,** late of Lebanon, Lebanon County,
PA, deceased. Letters Testamentary have
been granted to the undersigned Executor.

Joseph E. Fieschko, Jr., Executor
Fieschko & Associates, Inc.
436 7th Avenue, Suite 2230
Pittsburgh PA 15219
Attorney: Joseph E. Fieschko, Jr.

ESTATE OF ILA M. GEARHART,
a/k/a Ila Mae Gearhart, late of Annville
Township, Lebanon County, Pennsylvania,
deceased. Letters Testamentary have been
granted to the undersigned Executor.

Dennis G. Gearhart, Executor
c/o Keith D. Wagner
P.O. Box 323
Palmyra, PA 17078
Attorney

ESTATE OF LUCILLE F. HOSTETTER,
late of North Londonderry Township,
Lebanon County, Pennsylvania, deceased.
Letters Testamentary have been granted to
the undersigned Executor.

Edwin C. Hostetter, Executor
c/o Gerald J. Brinser
P.O. Box 323
Palmyra, PA 17078
Attorney

ESTATE OF ANTJE MURRAY, late of
616 W. Main Street, Palmyra, PA, deceased.
Letters of Administration have been
granted to the undersigned Administrator.

Yvonne E. Roberts, Administrator
Charles A. Ritchie, Jr., Esquire

Feather and Feather, P.C.
22 West Main Street
Annville, PA 17003
Attorney

ESTATE OF JOSEPH R. SHOTT,
late of the County of Lebanon County
and Commonwealth of Pennsylvania,
deceased. Letters Testamentary have been
granted to the undersigned Executor.

Daryl J. Gerber, Executor
46 E. Main Street
Palmyra, PA 17078

Daryl J. Gerber, Esquire,
The Law Office of Daryl J. Gerber
46 E. Main Street
Palmyra, PA 17078

FICTITIOUS NAME REGISTRATION

NOTICE IS HEREBY GIVEN, pursuant to the provisions of Section 311 of Act 1982-295 (54 Pa. C.S. 311) and its amendments, that on January 24, 2018, Stacie Heuyard, 404 Klein Ave., Lebanon, PA 17042 filed in the Office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, an application for the conduct of a business in Lebanon County, Pennsylvania, under the assumed or fictitious name of Stained & Beyond with its principal place of business at 404 Klein Ave., Lebanon, PA 17042.

Michelle R. Calvert, Esquire
REILLY WOLFSON
1601 Cornwall Road
Lebanon, PA 17042

**COMMONWEALTH OF PENNSYLVANIA V. UWAN ENGLISH, ET AL NOS.
CP-38-CR-0000824-2017, CP-38-CR-0000825-2017, CP-38-CR-0000826-2017, CP-
38-CR-0001149-2017, CP-38-CR-0001148-2017 AND CP-38-CR-0001147-2017**

*Criminal Action-Law-Corrupt Organizations-Drug Trafficking-Discovery-Electronically
Stored Information-Disclosure-Obligation of the Commonwealth-Good Faith-Exculpatory
Evidence*

Defendants were charged with violations of the Corrupt Organizations statute, Title 18 Pa.C.S. § 911, based upon an alleged drug trafficking scheme that occurred in Lebanon County during 2016 and 2017. In response to Defendants' Motions for Discovery, the Commonwealth provided a thumb nail drive containing approximately 10,000 documents comprised of over 30,000 pages. Defendants filed Omnibus Pretrial Motions requesting that the Commonwealth identify the exculpatory material it intends to present at trial among the pages disclosed.

1. Pa.R.Crim.P. Rule 573 requires that the Commonwealth disclose when requested to do so any evidence that is favorable to the accused, the substance of any confessions or inculpatory statements by a defendant and a copy or reproduction of any tangible objects discovered during the relevant investigation. Rule 573 also requires the Commonwealth to disclose in the discretion of the court the names of any eyewitnesses, any written or recorded statements and any other evidence specifically identified by the defendant that justice would require be disclosed.
2. Disclosure shall not be required of legal research or the records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorney for the Commonwealth. Rule 573(G).
3. The purpose of discovery is to accord a defendant the opportunity to discover evidence that he did not know existed, as well as to seek possession of evidence of which he aware.
4. The Commonwealth should exercise the utmost good faith to disclose to the defendant all material evidence in its possession when faced with a mandatory discovery request.
5. Pursuant to *Brady v. Maryland*, 83 S.Ct. 1194 (1963), all information favorable to the accused must be disclosed by the Commonwealth if the Commonwealth is aware of its existence.
6. At a minimum, the Commonwealth has a duty of good faith when it produces discovery via electronically stored information. To comply with that duty of good faith, the disclosure of the electronically stored information must be in a searchable format that is accompanied by an understandable index or digest.

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7. In addition to the above, to comply with its constitutional duty pursuant to Brady, the Commonwealth separately must identify all known exculpatory documents in its electronically stored information data provision and conspicuously must label the exculpatory information so that it is obvious to defense counsel.

8. The Commonwealth's disclosure of electronically stored information is deficient, as the indexing system accompanying the electronically stored information is insufficiently specific because it contains many nonspecific index headnotes when more specific monikers that meaningfully describe the documentation must be provided and the Commonwealth failed separately to identify and to highlight exculpatory documents that the Commonwealth should recognize as exculpatory, which category would include a statement by a defendant that another defendant is innocent, a statement by a witness that would create an alibi defense for a defendant, overhead or intercepted conversations in which a defendant disavows any involvement in the criminal enterprise and video or photographic evidence that directly contradicts statements of a Commonwealth witness as to where a defendant was located at a specific time.

L.C.C.C.P. Nos. CP-38-CR-0000824-2017, CP-38-CR-0000825-2017, CP-38-CR-0000826-2017, CP-38-CR-0001149-2017, CP-38-CR-0001148-2017 and CP-38-CR-0001147-2017, Opinion by Bradford H. Charles, Judge, January 5, 2018.

**COMMONWEALTH OF PENNSYLVANIA V. UWAN ENGLISH, ET AL NOS.
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IN THE COURT OF COMMON PLEAS LEBANON COUNTY

PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-824-2017
VS
UWAN ENGLISH

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-825-2017
VS
STEVEN WILLIAM CARABALLO

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-826-2017
VS
LEWIS RAYMOND MORGAN

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-1149-2017
VS
CARL WHITAKER

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-1148-2017
VS
BRYANT JAMAL GRAY

COMMONWEALTH OF PENNSYLVANIA: NO. CP-38-CR-1147-2017
VS
NASHAWN KEVIN PEARSON

**COMMONWEALTH OF PENNSYLVANIA V. UWAN ENGLISH, ET AL NOS.
CP-38-CR-0000824-2017, CP-38-CR-0000825-2017, CP-38-CR-0000826-2017, CP-
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ORDER OF COURT

AND NOW, this 5th day of January, 2018, in accordance with the attached Opinion, the Commonwealth is directed to revise its electronic discovery disclosure by completing the following:

- (1) By producing a more specific index of the documentation that has already been divided in the Commonwealth's electronic data disclosure; and
- (2) By separately and conspicuously identifying known and obvious exculpatory materials as required by *Brady v. Maryland*, 373 U.S. 83 (1963).

The Commonwealth is to complete the above tasks by no later than February 5, 2018.

BY THE COURT:

BRADFORD H. CHARLES, J.

APPEARANCES:

Nichole Eisenhart	For Commonwealth
First Assistant District Attorney of Lebanon County	
Timothy Engler, Esquire	For Uwan English
Andrew Race, Esquire	For Steven W. Caraballo
Greer Anderson, Esquire	For Lewis R. Morgan
Roberta Santiago, Esquire	For Carl Whitaker
Scott Grenoble, Esquire	For Bryant Jamal Gray
Matthew Karinch, Esquire	For Nashawn K. Pearson

**COMMONWEALTH OF PENNSYLVANIA V. UWAN ENGLISH, ET AL NOS.
CP-38-CR-0000824-2017, CP-38-CR-0000825-2017, CP-38-CR-0000826-2017, CP-
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OPINION BY CHARLES, J., January 5, 2018

In the 1991 movie “A Class Action”, a less than honorable law firm attempted to withhold a “smoking gun” document from a plaintiff’s attorney played by Gene Hackman by hiding it within a truckload of irrelevant records. In the movie, Gene Hackman’s character located the smoking gun and turned the tables on the dishonorable defense team.

In real life, locating a smoking gun “needle” amidst a “haystack” of irrelevant documents is much less likely to occur. With the advent of electronically stored information (ESI), the tactic of hiding relevant information among gigabytes of unimportant data is one that could wreak havoc in the American justice system. Recognizing this, Courts are becoming increasingly sensitive to the need for counsel to exhibit good faith during the civil and criminal discovery process. The problem for Courts is defining what is meant by “good faith”.

In this case, the Commonwealth has responded to the DEFENDANTS’ discovery requests by providing a file dump in excess of 30,000 pages. The Commonwealth asserts that it has displayed good faith by giving the defense every conceivable document relevant to its prosecution and by dividing the data into searchable “chapters”. The defense responds by requesting that the Commonwealth identify what is exculpatory and what it intends to use among the 30,000 pages that were disclosed. The defense asserts that anything less fails the test of good faith. For reasons we will articulate in more detail below, we conclude that the requirement of “good faith” requires the Commonwealth to do something more than simply hand over a thumb drive containing voluminous data. However, “good faith” does not require the Commonwealth to effectively outline its trial strategy for the defense.

I. FACTS & PROCEDURAL HISTORY

Each of the above-captioned DEFENDANTS was charged with a violation of Pennsylvania’s Corrupt Organizations Statute as a result of drug-trafficking scheme that occurred in Lebanon County during 2016. The Commonwealth charges that DEFENDANT Nashawn Pearson (hereafter PEARSON) was the leader of this drug-trafficking network. (Preliminary Hearing N.T. 5). All of the other DEFENDANTS were alleged to be a part of the network. (Preliminary Hearing N.T. 18).

Between February 11, 2016, and March 10, 2017, the Commonwealth identified twenty (20) attempted or actual drug deliveries undertaken by the PEARSON-led drug-trafficking organization. In addition, the Commonwealth has also identified five instances

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of Possession with Intent to Deliver Unlawful Drugs. (See Exhibit 1 to hearing of November 14, 2017).

During the course of its months-long investigation, law enforcement obtained massive amounts of information and documentation. All of these documents were compiled into thumb drives that were provided to each DEFENDANTS' counsel. Everyone agrees that the thumb drive contained approximately 10,000 documents involving in excess of 30,000 pages.

At various times during late 2017, each of the above-captioned DEFENDANTS filed an Omnibus Pre-Trial Motion for Relief. Every one of these Motions contained a request that the Commonwealth "refine" its production of discovery. At a hearing conducted on November 14, 2017, defense counsel characterized the Commonwealth's thumb drive production of documents as a "massive file dump" that included copious amounts of pornography and other dubiously relevant documentation. In response, the Commonwealth produced a table of contents to the ESI it produced. (See Exhibit 9). The table of contents provides a detailed description of some documents (i.e., "Whitaker Facebook Screen Shots"), but it also contains far more obtuse characterizations such as "Facebook" and "Incident Report". Regardless of the moniker employed, the Commonwealth assures the Court that defense counsel could access the separately maintained documents by simply clicking on the description found in the Table of Contents.

To assist the Court and supplement its discovery response, the Commonwealth also produced an exhibit at the November 14, 2017, hearing. That exhibit provided a list of "Predicate Acts" forming the foundation of the Commonwealth's Corrupt Organizations charge. Each act was described by date, location, amount of money exchanged and the name of the DEFENDANT directly involved in the transaction.

Although we have addressed many of the DEFENDANTS' other issues with Court Orders, we have chosen to author an Opinion to address the parties' discovery dispute¹. We predict with some degree of confidence that providing discovery via an ESI data dump will become increasingly common. Our hope is that this Opinion will provide both the District Attorney and the defense bar with some insight with respect to how this Court defines "good faith" in the context of criminal ESI discovery.

¹ As of today's date, the only remaining unresolved pre-trial motion is Defendant Caraballo's Motion to Dismiss based upon Double Jeopardy.

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II. DISCUSSION

The Pennsylvania Rules of Criminal Procedure provide for pre-trial discovery. Pa.R.Crim.P. 573 creates a list of “mandatory” discovery that

the Commonwealth must produce whenever requested to do so. Among the information that the Commonwealth must disclose is the following:

- Any evidence favorable to the accused;
- The substance of any confessions or inculpatory statements by a defendant;
- A copy or reproduction of any “tangible objects” discovered during the relevant investigation. See, Pa.R.Crim.P. 573.

In addition, Rule 573 also contains a list of additional items that the Commonwealth must disclose when ordered by a Court to do so. This list, classified as “discretionary with the Court”, includes the names of eyewitnesses, any written or recorded statements, and “any other evidence specifically identified by the defendant” that justice would require be disclosed.

Excluded from discovery is the work product of the prosecutor. Rule 573(G) states:

“Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth...”

In *Commonwealth v. Rickabaugh*, 706 A.2d 826, 841 (Pa. Super. 1997), the Court stated “To the extent that Appellant argues that the Commonwealth was obligated to reveal its actual trial strategy, and not merely the information at its disposal to formulate the same, we reject Appellant’s argument.” *Id* at page 841.

The Commonwealth must employ good faith during the criminal discovery process. The Pennsylvania Superior Court articulated this obligation of good faith by stating:

“Our Supreme Court has emphasized: ‘The purpose of our Discovery Rules is to permit the parties in criminal matters to be prepared for trial; trial by ambush is contrary to the spirit and letter of those Rules and will not be condoned.’ Our Court has also recognized that, ‘Generally, the purpose of discovery is to accord a defendant the opportunity to discover evidence which he did not know existed, as well as to seek possession of evidence of which he was aware.’ Consequently, ‘The Commonwealth

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should exercise the utmost good faith to disclose to defendant all material evidence in its possession when faced with a mandatory discovery request.’ *Commonwealth v. Long*, 753 A.2d 272, 276 (Pa. Super. 2000) (citations omitted).

In defining this obligation of good faith discovery, Pennsylvania’s Appellate Courts have placed considerable emphasis on the obligation of the Commonwealth to comply with the constitutional principle enunciated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), i.e., that all information “favorable to the accused” must be disclosed by the Commonwealth if the Commonwealth is aware of its existence. See, *Commonwealth v. Sullivan*, 820 A.2d 795 (Pa. Super. 2003).

We did not locate any Appellate precedent in Pennsylvania that implicates a large data dump or the type of discovery tactic that was decried by Hollywood in “A Class Action”. Therefore, we expanded our search to include Federal Courts where high-volume document-intensive prosecutions are more common. Not to our surprise, we did find cases that address the efficacy of discovery via large file dumps.

The most-oft cited Federal case is *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009). In *Skilling*, the government produced several hundred million pages of discovery documentation. However, the files were electronic and readily “searchable”. Moreover, the government produced a separate set of “hot documents” that it thought were important to its case or were potentially exculpatory. In addressing the defense claim that the Commonwealth’s efforts were not enough, the Court in *Skilling* analyzed *Brady v. Maryland*, supra: “Whether a Brady violation exists turns on the government’s actions in addition to supplying the defense with copious documentations.” The Fifth Circuit imposed a duty of good faith upon the prosecution. In doing so, the Court provided examples of what could constitute good faith. Those included:

- The indexing of documents
- Providing the files in a searchable format
- Specifying key documents
- Pulling out known exculpatory evidence and highlighting it.

The Court also cited examples that would be contraindicative of good faith, including conduct that would “pad” the file with superfluous information and the creation of a “voluminous file that is unduly onerous to access.”

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In *Skilling*, the Court declared that the prosecution’s voluminous ESI discovery disclosure complied with a duty of good faith that the Constitution and Brady require. Because the prosecution produced a file that was “searchable” and because the prosecution separately identified “hot documents” that it viewed as particularly important to the prosecution or the defense, the Court rejected the defense claim that the voluminous file dump was improper. See also, *United States v. Rubin*, 825 F. Supp. 2d 451 (S.D.N.Y. 2011) (Production of ESI accompanied by a searchable digest and searchable metadata sufficient; Commonwealth was not required to organize the documents in a format designed by the defense.)

Another pertinent case is *United States v. Blankenship*, 2015 W.L. 3687863 (S.D. W.Va. 2015). In *Blankenship*, the Court rejected the *Skilling* approach that focused upon good faith:

“If there is a non-disclosure occasioned by the massiveness of a document production to which the defense is given access, it should make no difference whether such was accompanied by good or bad faith – a non-disclosure is a non-disclosure no matter what the motivation.”

In *Blankenship*, the Court imposed a duty upon the Commonwealth to specifically designate exculpatory evidence. The Court stated:

“Given the constitutional nature of the government’s Brady obligation, and the circumstances presented in this case, the Court finds designation, to the extent it can be given, is appropriate...the Court observes that the United States, having determined the nature of the charges and having knowledge of the evidence and witnesses it intends to produce to prove those charges, is in a far better position than the defendant to know what evidence might be exculpatory and/or impeachment material under Brady. Further, the government’s burden of production with respect to Brady material is separate and distinct from its obligations under Rule 16 of the Federal Rules of Criminal Procedure.” See also, *United States v. Hsia*, 24F. Supp.2d 14 (A.D.C. 1998) (“Open-file discovery does not relieve the government of its Brady obligations. The government cannot meet its Brady obligations by providing Ms. Hsia with access to six hundred thousand documents and then claiming that she should have been able to find the exculpatory information in the haystack.”)

From the above, we discern the following principles of law:

- (1) At a minimum, the Commonwealth possesses a duty of good faith when it produces

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discovery in an ESI format. That duty requires more than simply disclosing voluminous data and then stating: “Have at it. You figure out what is important.”

(2) The Commonwealth’s duty of good faith does not include a requirement that it effectively disclose its opening or closing statements prior to trial. A prosecutor retains a work product privilege.

(3) In order to comply with its duty of good faith, the Commonwealth’s ESI disclosure must be in a searchable format that is accompanied with an understandable index or digest.

(4) The Commonwealth possesses a duty under Brady that is severable from its obligations under Pa.R.Crim.P. 573. To comply with Brady, the Commonwealth must separately identify all known exculpatory documents in its ESI data dump and it must conspicuously label the exculpatory information so that it is obvious to even the most computer illiterate of defense attorneys.

Having reached the legal conclusions outlined above, we turn to the question of how those conclusions can and should be applied to this case.

We begin by recognizing that the Commonwealth has subjectively endeavored to comply with its ethical duty of discovery. The Commonwealth has categorized and labeled its ESI production and it has provided all conceivably relevant data in a format that is searchable. Nevertheless, we are forced to conclude that the Commonwealth’s ESI discovery packet is deficient in two respects.

First, the Commonwealth’s indexing system is insufficiently specific. The index itself was presented to us as Exhibit 9. A review of Exhibit 9 reveals many non-specific index headnotes, including the following: “Facebook”, “Prison Calls”, “H16-08221-1”, “Morgan”, “Peb”, “Whitaker”, “Levengood Archive”, “Photos”, “Pearson”, etc. To comply with its duty of good faith, the Commonwealth must include more specific monikers that meaningfully describe the documentation contained within each “chapter” of its ESI documentation disclosure. Examples of the type of specificity we would expect are also found in Exhibit 9: “Jamal Gray Witness Sheet”, “Color Consent to Search”, “October 2016 Facebook Screen Shots”, “Pearson Miranda Waiver”, etc.

Second, the Commonwealth did not separately identify and highlight exculpatory Brady material. We understand that the Commonwealth is not prescient and does not now know the specific defenses that will be proffered by each defendant. We in no way wish to require the Commonwealth to predict defense strategy and then identify documents relevant to

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38-CR-0001149-2017, CP-38-CR-0001148-2017 AND CP-38-CR-0001147-2017**

such strategy. However, there are a certain category of documents that even non-prescient prosecutors should recognize as exculpatory. Included within this category would be the following:

- A statement by one defendant that another is innocent;
- A statement by a witness that would create an alibi defense for a defendant;
- Overheard or intercepted conversations where a defendant disavows any involvement in the criminal enterprise that was charged;
- Video or photographic evidence that directly contradicts statements of a Commonwealth witness as to where a defendant was located at a specific point in time.

Without being inclusive, the above represents documents that should be separately highlighted for a defense attorney. Within the context of a voluminous data dump, good faith requires nothing less.

We will be directing the Commonwealth to revise its data disclosure by producing a more specific index and by specifically identifying known and obvious exculpatory materials. Once the Commonwealth accomplishes these tasks, it will have complied with its duty of good faith discovery disclosure. From there, it will be the responsibility of the defense attorneys to review the copious materials presented in order to discern what is and is not relevant to their clients' defense strategies.

A Court Order to accomplish the above will be entered today's date.