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

COMMONWEALTH OF

v.

GERALD A. SANDUSKY,

PETITIONER.

CP-14-CR-2421-2011
CP-14-CR-2422-2011

HONORABLE SENIOR JUGDE
JOHN M. CLELAND

TYPE OF PLEADING:

AMENDED PETITION FOR POST CONVICTION RELIEF

FILED ON BEHALF OF:

PETITIONER, GERALD A. SANDUSKY

COUNSEL FOR PETITIONER:

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COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011
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	:	
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	:	HONORABLE SENIOR JUGDE
PETITIONER.	:	JOHN M. CLELAND

AMENDED PETITION FOR RELIEF PURSUANT TO THE PENNSYLVANIA POST CONVICTION RELIEF ACT, 42 Pa.C.S. §§ 9541 et seq.

"I hope you understand that, by God, this guy is going to get a fair trial."

Senior Judge John M. Cleland [1]

"We have to … take the bull by the horns and fix it. *Quickly.*"

Governor Tom Corbett[2]

"I feel that we're duty bound ethically to tell the Court that we're not prepared to go to trial at this time."

Attorney Joe Amendola[3]

COMES NOW, Petitioner Gerald A. Sandusky, by and through his counsel, Alexander H. Lindsay, Jr., Esq., and the Lindsay Law Firm, P.C., who hereby petitions this Court for a new trial and dismissal of the charges against him, pursuant to the Post Conviction Relief Act

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[1] Honorable Senior Judge John M. Cleland, N.T. Trial, June 20, 2012, at 25-26, Appendix P. 369.

[2] Governor Tom Corbett from Don Van Natta, Jr., *Fight On State*, ESPN The Magazine, April 16, 2012, *available at* http://espn.go.com/espn/otl/story/_/id/7770996/in-wake-joe-paterno-death-sandusky-sex-abuse-scandal-power-struggle-spread-penn-state-state-capital. Appendix P. 371.

[3] Attorney Joseph Amendola, N. T. Motion To Withdraw Proceedings, June 5, 2012 at 3, Appendix P. 385.

("PCRA"), 42 Pa.C.S. §§ 9541-9546. Sandusky maintains that he is innocent of the charges for which he was convicted, and that his conviction was the result of a violation of his constitutional rights under the United States Constitution and the Pennsylvania Constitution, and also the result of ineffective assistance of trial and direct appellate counsel.

In support thereof, Sandusky avers as follows:

I. INTRODUCTION.

1. On June 22, 2012, Gerald A. Sandusky (hereinafter "Sandusky") was convicted, after jury trial, of 45 of 48 charges against him related to allegations that he sexually abused ten men (during their minority), eight of whom were identified at trial. All charges against Sandusky arose out of two presentments from a statewide investigating grand jury.[4]

2. Despite the best intentions of the Court as stated above, by any reasonable standard, a fair trial for Jerry Sandusky was not to be. Indeed, by the time the trial court made the statement referenced above, any pretense of a fair trial for Mr. Sandusky was long gone.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. Background Information Required by Pa.R.Crim.P. 902

3. Petitioner is Gerald Sandusky.

4. Sandusky was convicted, after jury trial, of eight counts of Involuntary Deviate Sexual Intercourse under 18 Pa.C.S. § 3123(a)(7), seven counts of Indecent Assault under 18 Pa.C.S. § 3126(a)(7) and (8), nine counts of Unlawful Contact with a Minor under 18 Pa.C.S. § 6318(a)(1)(5), ten counts of Corruption of Minors under 18 Pa.C.S. § 6301(a)(ii), ten counts of

[4] Judge Barry F. Feudale was the Supervising Judge for the Thirtieth and Thirty-Third Statewide Investigating Grand Juries that investigated Sandusky. Judge Feudale was later removed as the Supervising Grand Jury Judge by the Supreme Court of Pennsylvania on Motion from Pennsylvania Attorney General Kathleen Kane.

Endangering the Welfare of Children under 18 Pa.C.S. § 4304, and one count of Criminal Attempt to Commit Indecent Assault under 18 Pa.C.S. §901.

5. The Honorable John M. Cleland, Senior Judge, presided at the jury trial of this matter. Judge Cleland imposed sentence upon Sandusky on October 9, 2012.

6. Judge Cleland sentenced Sandusky to an aggregate sentence of 30 to 60 years' imprisonment, with credit for 112 days served on the aforementioned counts.

7. Sandusky is currently incarcerated, serving the sentence imposed at State Correctional Institute-Greene, 169 Progress Drive, Waynesburg, PA 15370.

8. Sandusky sought reversal of his convictions and the judgment of sentence on direct appeal to the Superior Court. The Superior Court affirmed Sandusky's convictions. See *Commonwealth v. Sandusky*, Docket Nos. 338 MDA 2013 and 343 MDA 2013 (Pa. Super. 2013).

9. Thereafter, Sandusky sought allocatur from the Pennsylvania Supreme Court. The Supreme Court denied Sandusky's Petition For Allowance Of Appeal on April 2, 2014. *See Commonwealth v. Sandusky*, Docket Nos. 835 MAL 2013 and 836 MAL 2013 (Pa. 2014).

10. Under 42 Pa.C.S. § 9545(b)(3), Sandusky's judgment of sentence became final on July 1, 2014, (upon the expiration of the 90-day period for Defendant to seek a writ of *certiorari* from the Supreme Court of the United States). Therefore, Sandusky's instant PCRA Petition is timely.

11. Attorney Joseph L. Amendola (hereinafter "Amendola") represented Sandusky upon his arrest, during pretrial proceedings, at trial, and on direct appeal. Attorney Karl E. Rominger also represented Sandusky pretrial and during trial. Attorney Norris E. Gelman, Esq.,

represented Sandusky during post-sentence motions and on direct appeal to the Superior Court and Supreme Court of Pennsylvania.

12. In his PCRA Petition, Sandusky requests relief in the form of a new trial, and dismissal of the charges against him.

13. The grounds for relief are stated in Section IV of the instant PCRA Petition.

14. Sandusky is innocent of the charges for which he stands convicted and he has consistently maintained his innocence throughout his prosecution.

B. Brief Factual and Procedural Background

15. On November 18, 2008, A.F.'s mother called the Central Mountain High School principal and guidance counselor to discuss her concerns regarding her son and Gerald Sandusky. *See,* H. Geoffrey Moulton, Jr., *Report to the Attorney General on the Investigation of Gerald A. Sandusky*, as amended June 23, 2014 (hereafter "Moulton Report"), at 142, Appendix, P. 146. A copy of the Moulton Report[5] is attached at Appendix, P. 1.

16. The following day, A.F. met with his principal and guidance counselor where he described conduct by Mr. Sandusky which was later deemed "inappropriate". Appendix, P. 146.

17. On November 20, 2008, a Clinton County Children and Youth Services employee contacted the Children and Youth Services Director, Gerald Rosamilia, and reported the purported "inappropriate conduct" by Mr. Sandusky as disclosed by A.F.'s mother. *Id.*

18. After conducting an interview of A.F., Jessica Dershem, a Children and Youth Services caseworker, reported suspected child abuse to ChildLine. *Id.*

[5] The appendices to the Moulton Reports are included in the PCRA Appendix, Volume 1.

19. Ms. Dershem notified the Pennsylvania State Police of A.F.'s allegations on November 21, 2008, resulting in Trooper Joseph Cavanaugh's assignment to the investigation. *Id.* at 147.

20. Following multiple interviews in January 2009, A.F.'s case was concluded to be "indicated" and Trooper Cavanaugh met with Clinton County District Attorney Michael Salisbury, who decided to transfer the case to Centre County as the alleged conduct occurred there. *Id.*

21. After the case was transferred to Centre County, the District Attorney requested the Commonwealth of Pennsylvania Office of Attorney General to assume jurisdiction due to a conflict of interest. On March 18, 2009, the Office of Attorney General assumed jurisdiction of the prosecution. *Id.*at 148.

22. The Office of Attorney General submitted the Sandusky investigation to the Thirtieth Statewide Investigating Grand Jury on May 1, 2009, and the supervising grand jury judge accepted the submission on May 5, 2009. *Id.*

23. By March 2010, Senior Deputy Attorney General Jonelle Eshbach circulated a draft grand jury presentment to her supervisors for review. However, her supervisors expressed concern about the likelihood of a successful prosecution due to problems with A.F.'s credibility, and the lack of other victims. *Id.* at 151.

24. From April, 2010, to October 2010, no significant strides were made in the investigation.

25. On November 3, 2010, Centre County D.A. Stacy Parks Miller received an anonymous email tip suggesting the investigators should speak to Pennsylvania State University

assistant football coach Michael McQueary, as he "may have witnessed something involving Jerry Sandusky and a child that would be pertinent to the investigation." *Id.* at 153.

26. On December 14, 2010, Michael McQueary testified before the grand jury. *Id.*

27. Although McQueary had testified, no additional witnesses were presented to the Thirtieth Statewide Investigating Grand Jury by the time its term expired in January 2011. *Id* at 70.

28. On March 31, 2011, The Centre Daily Times and The Patriot-News published stories, written by Sara Ganim, describing leaked information from the grand jury investigation of Sandusky. *Id.* at 157.

29. According to the Moulton Report, the Ganim story consequently generated significant leads; specifically, Ronald Petrosky called the Pennsylvania State Police on the afternoon that the Ganim article was published, stating that he had information relevant to the investigation. *Id.* at 74-75.

30. As evidence of the investigation's renewed momentum: the Office of Attorney General assigned additional agents to the investigation, Attorney Benjamin Andreozzi contacted investigators regarding a new alleged victim, and additional alleged victims appeared before the grand jury. *Id.*

31. Following the leaked information of the grand jury, a grand jury session was held on April 11, 2011. During this session, Chief Deputy Attorney General Frank Fina requested supervising judge Barry F. Feudale issue a secrecy order, prohibiting the grand jury witnesses from discussing the facts or substance of their testimony before the grand jury to anyone other than the witnesses' own attorneys. This order was prospective only, and did not apply to witnesses who previously testified before the grand jury. *Id.*

32. During this session, A.F. testified for the third time, as well as four other witnesses; notably D.S. (Victim 7). *Id.*

33. On May 19, 2011, Ronald Petrosky and B.S.H. (Victim 4) testified to the grand jury. *Id.* at 160.

34. On June 17, 2011, two more victims testified, Z.K. (Victim 6) and M.K. (Victim 5). *Id.* at 162.

35. On August 18, 2011, the grand jury heard testimony of Z.K.'s sister and J.S. (Victim #3). *Id.* at 166.

36. On November 3, 2011, the Grand Jury voted to approve a presentment recommending charges against Sandusky, Curley, and Schultz. *Id.* at 169. At present, there is still no trial date set for Curley and Schultz.

37. On November 5, 2011, Sandusky surrendered to authorities, was arraigned, and released on bail. *Id.*

38. On November 9, 2011, the Penn State University Board of Trustees fired Penn State Icon, head football coach Joe Paterno and President Graham Spanier. That night, students in State College rioted, even turning over a news vehicle. *See* Nate Schweber, *Penn State Students Clash With Police in Unrest After Announcement*, N.Y. Times, November 10, 2011, *available at* http://www.nytimes.com/2011/11/11/sports/ncaafootball/penn-state-students-in-clashes-after-joe-paterno-is-ousted.html?_r=0. A copy of the Schweber article is attached hereto at Appendix, P. 386.

39. On November 11, 2011, "several thousand students" held a candlelight vigil for Mr. Sandusky's alleged "victims." Bill Pennington, *100,000 Football Fans at Penn State Cheer, but the Mood Is Numb*, N.Y. Times, November 12, 2011, *available at*

http://www.nytimes.com/2011/11/13/sports/ncaafootball/100000-fans-cheer-but-the-mood-is-numb.html?pagewanted=all. A copy of the Pennington article is attached hereto at Appendix, P. 390.

40. On November 14, 2011, Mr. Sandusky's trial counsel inexplicably advised him to sit for an interview with NBC Sports journalist Bob Costas, without any notice that he would be interviewed or preparation for any interview. Indeed, Mr. Sandusky was advised that Mr. Costas was only going to speak to trial counsel.

41. On November 18, 2011, the NCAA announced an investigation into Penn State University's football and athletic programs, and indicated that severe sanctions may result, up to and including the "death penalty" — all before the NCAA began the investigation. *See* Michael Sanserino, *NCAA Launches PSU Inquiry*, Pittsburgh Post-Gazette, November 19, 2011.[6] A copy of the Sanserino article is attached hereto at Appendix, P. 394.

42. Attorney General Linda Kelly and Pennsylvania State Police Commissioner Frank Noonan issued statements concerning the Sandusky investigation, including a request that anyone with information about the case should call the Office of Attorney General or Pennsylvania State Police. Less than a month later a grand jury session on December 5, 2011 brought about testimony from two new purported victims, S.P. and R.R. On December 7, 2011, the Grand Jury voted to approve a new presentment describing S.P. and R.R. as victims. *See,* Appendix, P. 300.

43. The December 7, 2011, presentment incorporated the previously identified victims, and recommended charges for involuntary deviate sexual intercourse, aggravated

[6] *available at http://www.post-gazette.com/sports/psu/2011/11/19/NCAA-launches-PSU-inquiry/stories/201111190153*

indecent assault, indecent assault, attempt to commit indecent assault, unlawful contact with a minor, corruption of minors, and endangering welfare of children. *Id.*

44. That same day, Sandusky was arrested on the additional charges in Criminal Information No. CP-14-CR-2421-2011.

45. On December 8, 2011, Sandusky posted bail and was released. *Id.*

46. On December 13, 2011, Amendola waived Sandusky's preliminary hearing, and the charges were held for the Centre County Court of Common Pleas.

47. On December 16, 2011, following a preliminary hearing in Harrisburg, charges against Curley and Schultz were held for trial. *Id.* at 94. To this day, Curley and Schultz still have not been tried, and no trial date has been scheduled.

48. On January 11, 2012, Mr. Sandusky was formally arraigned on the instant charges.

49. On January 17, and 23, March 7, 12, & 27, April 27, May 4, 9, 14, 16, 18, 24, and 31, and June 4, 8, and 15, 2012, the Commonwealth produced discovery to Defendant.

50. On January 22, 2012 — only eleven days after Mr. Sandusky's formal arraignment, Joe Paterno died from lung cancer. Media reports reporting Paterno's death placed the blame for Paterno's downfall squarely at the feet of Jerry Sandusky. *See, e.g.,* Bob Flounders, *Joe Paterno is Dead: College Football's Most Successful Coach Leaves an Unmatched Legacy Forever Shadowed by his Life's Astonishing Final Chapter*, Harrisburg Patriot News, January 22, 2012.[7] A copy of the Flounders article is attached hereto at Appendix, P. 695-A.

[7] *Available at http://www.pennlive.com/midstate/index.ssf/2012/01/joe_paterno_dies_penn_state.html.*

51. Jury selection occurred on June 5 and 6, 2012, 146 days from Mr. Sandusky's formal arraignment on January 11, 2012. At the time of jury selection the Court advised trial would be three weeks. The Commonwealth estimated it would require two weeks to put in its case.

52. Trial commenced on June 11, 2012 – a mere 152 days from the date Mr. Sandusky was formally arraigned on January 11, 2012.

53. When trial commenced, the specter of the NCAA "death penalty" continued to hang over the Penn State University football program.

54. At trial, eight alleged victims testified. Additionally, the Commonwealth presented evidence relating to two victims who were not identified to the jury.

55. On June 22, 2012, Sandusky was convicted of 45 of the 48 counts tried, as set forth above. This verdict came in the wake of a grand jury leak, a patently false presentment, the firing of Penn State icon Joe Paterno and his subsequent tainted reputation, his death just days after Mr. Sandusky's formal arraignment, and a media frenzy that encouraged an impassioned community to rally around the alleged victims without giving Mr. Sandusky a fair chance to prove his innocence.

56. On October 9, 2012, the trial court imposed an aggregate sentence of 30 to 60 years' imprisonment, with credit for 112 days served on the aforementioned counts.[8]

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[8] Notably, in the trial court's sentencing statement, the court stated:

> I state for the record, however, that the convictions regarding Victim number 8 – Counts 36 through 40 at 2422-2011 -- are specifically intended to run concurrently, and if those convictions should happen to be reversed on appeal it will make no difference to the sentence structure as a whole and will not require a remand for resentencing.

See Judge Cleland's Sentencing Statement, filed October 11, 2012, at p. 6.

57. On October 18, 2012, Attorneys Joseph L. Amendola, Norris E. Gelman, and Karl E. Rominger filed post-sentence motions on Sandusky's behalf. Specifically, the motions included a motion in arrest of judgment and/or for a new trial, a motion for reconsideration, a motion for modification of sentence, motion for hearing on court ordered restitution and court costs, motion for leave of court to file amended post-sentence motion *nunc pro tunc*, and a reservation for ineffective assistance of counsel claims.

58. On January 30, 2013, the trial court denied Petitioner's post-sentence motions.

59. On February 21, 2013, Petitioner filed a Notice of Appeal to the Superior Court.

60. On September 17, 2013, the Superior Court heard oral argument on Petitioner's direct appeal.

61. On October 2, 2013, a mere fifteen days after oral argument, the Pennsylvania Superior Court affirmed all of Petitioner's convictions.

62. On October 30, 2013, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

63. On April 2, 2014, the Pennsylvania Supreme Court denied allocatur, and Petitioner's judgment of sentence became final on July 1, 2014.

III. LEGAL STANDARD.

64. The Pennsylvania Post Conviction Relief Act establishes a Defendant's right to relief in section 9543 of the Act, which states:

> § 9543 Eligibility for relief
>
> (a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

(b) Exception.--Even if the petitioner has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the

> Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.
>
> (c) Extradition.--If the petitioner's conviction and sentence resulted from a trial conducted in his absence and if the petitioner has fled to a foreign country that refuses to extradite him because a trial in absentia was employed, the petitioner shall be entitled to the grant of a new trial if the refusing country agrees by virtue of this provision to return him and if the petitioner upon such return to this jurisdiction so requests. This subsection shall apply, notwithstanding any other law or judgment to the contrary.

42 Pa.C.S. § 9543.

65. Sandusky contends that his conviction resulted from a violation of the Constitution of this Commonwealth or the Constitution of the United States under § 9543(a)(2)(i), and the ineffective assistance of counsel under § 9543(a)(2)(ii).

66. Under section 9546 of the PCRA, if this Court rules in Mr. Sandusky's favor, this Court "shall order appropriate relief and issue supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper." 42 Pa.C.S. § 9546. Accordingly, Sandusky seeks an order vacating his convictions, retrial, and/or discharge or dismissal of all charges.

67. To sustain a claim for ineffective assistance of counsel, a Defendant must demonstrate:

(a) The underlying claim is of arguable merit;

(b) Counsel had no reasonable strategic basis for his or her action or inaction; and

(c) That, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Spotz, 896 A.2d 1191, 1209-10 (Pa. 2006); *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001).

68. Ordinarily, "where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis to effectuate his client's interests." *Commonwealth v. Colavita*, 993 A.2d 874, 884 (Pa. 2010) (internal citations and quotations omitted).

69. However, as the Pennsylvania Supreme Court noted in *Colavita*, "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *See also Commonwealth v. Sneed*, 45 A.3d 1096, 1107 (Pa. 2012) (*per curiam*) (same).

70. The converse of the *Colavita* ruling is that a chosen strategy can be proven to have lacked a reasonable basis if Defendant establishes that an alternative that trial counsel failed to pursue did, in fact, offer a potential for success substantially greater than the course that trial counsel pursued. *Id.*

71. Moreover, while the general rule is "no number of failed [ineffective] claims may collectively warrant relief if they fail to do so individually," *Commonwealth v. Washington*, 927 A.2d 586, 617 (Pa. 2007) (internal quotations and citations omitted, the Pennsylvania Supreme Court has recognized that "if multiple instances of deficient performance are found, the assessment of prejudice may be premised upon cumulation." *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009).

72. In such circumstances, the Court considers "each specific lapse as pertaining to a single, overarching ineffectiveness claim based on trial counsel's failure to adequately investigate and prepare for trial." *Id.*

73. Additionally, even if an underlying claim was previously litigated, it is proper to present any claims for ineffective assistance of counsel related to those claims. *See Commonwealth v. Collins*, 888 A.2d 564, 573 (Pa. 2005)

74. Finally, a petitioner may be entitled to relief under the Post Conviction Relief Act where his constitutional rights were violated to a degree that so undermined "the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i).

75. However, where the error violates a defendant's constitutional rights, the claim may merit relief even where the claim does not directly implicate the adjudication of guilt or innocence. *See Commonwealth v. Hackett*, 956 A.2d 978 (Pa. 2008); *Commonwealth v. Judge*, 916 A.2d 511 (Pa. 2007).

IV. SANDUSKY'S CONVICTION WAS THE RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND DIRECT APPELLATE COUNSEL, AND THE PRODUCT OF A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A. Sandusky's Constitutional Right to Due Process and a Fair Trial Was Violated by Trying Sandusky in Centre County in June of 2012 in Light of the Overwhelming Pretrial Publicity and the Hostile Environment in the Community.

76. It is axiomatic that under the Pennsylvania Constitution and the Constitution of the United States, all defendants are guaranteed a right to a fair trial by jury.

77. While public access to trials is important, the Supreme Court of the United States has cautioned that "[l]egal trials are not like elections, to be won through the use of the meeting-

hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192 (1941).

78. The High Court has also stated that an accused may not be punished without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U.S. 227, 236-37, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940) (emphasis added).

79. The Court also noted:

> It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.

Estes v. Texas, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543 (1965).

80. Under this rubric, the Supreme Court held in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, that where a trial is held in a circus-like atmosphere of media attention, where a jury is not sequestered, and no change of venue or venire is granted, when viewed in the totality of the trial court's other rulings, the defendant's due process right to a fair trial was indisputably violated.

81. In *Sheppard*, the Court described the pervasive and prejudicial pretrial atmosphere as follows:

> The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. Sheppard stood indicted for the murder of his wife; the state was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended

> in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.
>
> While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.' The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard.[9]

Id. at 354, 86 S.Ct. at 1518 (emphasis added, internal citations omitted).

82. The Court suggested that to help reduce the prejudicial impact of the media presence on the trial, the trial court should have restricted media access to the courtroom, "insulated the witnesses," and made "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion." *Id.* at 359, 86 S.Ct. at 1520 (emphasis added).

83. The Court concluded its decision in *Sheppard* by noting that even in 1966, media scrutiny of trials was increasing, and trial courts must take proactive efforts to protect an accused's right to fair trial, stating

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of

[9] In *Sheppard*, members of the media were actually seated at a table inside the bar of the courtroom during trial, and the opinion suggests that members of the media even handled and photographed trial exhibits sitting on counsel table during recesses.

> effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is **never** weighed against the accused.... Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

Id. at 362-63, 86 S.Ct. at 1522 (emphasis added).

84. The Pennsylvania Supreme Court adopted *Sheppard*, holding that certain circumstances warrant a finding that a trial was inherently lacking in due process. *Commonwealth v. Pierce*, 303 A.2d 210, 212 (Pa. 1973). *See also Commonwealth v. Long*, 871 A.2d 1262, 1274 (Pa.Super. 2005) ("The Supreme Court's concerns in *Sheppard* hold true today."), *reversed* 922 A.2d 892 (Pa. 2007).[10] In fact, in *Long*, the Superior Court stated, "A trial judge may impose restrictions to maintain the integrity of the proceedings in the courtroom. The United States Supreme Court held ... that a trial judge may in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. In fact, the trial court has an affirmative duty to limit outside influences upon jurors." *Id.* (emphasis added, internal citations and quotations omitted).

85. The Pennsylvania Supreme Court has further noted that in certain circumstances, before a defendant can receive a fair trial, a "cooling off" period may be necessary.

[10] Sandusky acknowledges that *Long* was reversed by the Pennsylvania Supreme Court, but he maintains that the Supreme Court continued to recognize the viability of *Long*. In *Long*, the Superior Court that the media names and addresses was not part of the public record required to be made available to the media as a public document. The Supreme Court reversed, and held that the public had a right to access juror's names, but not their addresses. *Id.* Sandusky maintains that in limiting the media's right of access to information about jurors, the Supreme Court continued to recognize the balancing act required by *Sheppard*.

Commonwealth v. Robinson, 864 A.2d 460, 484 (Pa. 2004).[11] *See also Commonwealth v. Briggs*, 12 A.3d 291 (Pa. 2011).

86. The media attention on Jerry Sandusky and Penn State University was not confined to mere local media interest. The reporting and coverage of this case extended well beyond the Centre County community and became the subject of intense state, national and international media attention in print, radio, television and on the internet.

87. In Sandusky's case, it is patently obvious that given the highly prejudicial pretrial atmosphere of this case, with the attendant circumstances involving Penn State University, the firing and subsequent death of Joe Paterno, the intense scrutiny of the local, national and international media in the case, and the unquestionable improper leaking of information, Mr. Sandusky's due process right to a fair trial was not only infringed, it was crushed under a stampede of vitriol, rage, and prejudice that mandate a new trial in this case.

88. Moreover, fueling the fire of the prejudicial pretrial environment in this case, in clear violation of the order sealing the presentment, the charges against Sandusky were posted on a website of the Pennsylvania Unified Judicial System, "apparently by mistake." *See* Appendix, P. 26.

89. Curiously, apparently the only person to discover the mistaken posting of the charges against Sandusky, prior to the official public release, was Sara Ganim – the reporter who

[11] In *Robinson*, the court was faced with the question of whether a cooling off period is necessary where pretrial publicity potentially tainted a jury pool warranting a defense request for a change of venue or venire. In this case, given the statewide interest resulting from the impact and consequences the allegations against Mr. Sandusky had against Penn State University as a whole, its highly popular football program, and one of the all-time icons in collegiate sports, Sandusky submits that no change of venue or venire would have reduced the prejudice. Instead, under *Sheppard*, as set forth in the instant Petition, the trial court should have continued the trial to allow the general animus against Mr. Sandusky and Penn State University to dissipate, and trial counsel was ineffective for failing to make a record of this reasoning to the trial court.

also mysteriously received the leaked confidential grand jury material in March 2011. *See* Appendix, P. 22, 88.

90. Additionally, in an apparent effort designed to poison the well with misinformation, the initial grand jury presentment, drafted by the prosecution, contained factually false information.

91. To-wit, the initial presentment stated:

> As the graduate assistant [Michael McQueary] put the sneakers in his locker, he looked into the shower. He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky. The graduate assistant was shocked but noticed that both Victim 2 and Sandusky saw him. The graduate assistant left immediately, distraught.

See, Grand Jury Presentment No. 12 at 6, Appendix, P. 280.

92. The summary in the presentment contradicted McQueary's testimony. Specifically, McQueary testified to the grand jury as follows:

> A. I turned to my locker; and as I turned to my locker and started opening it up, I peaked into the showers. There was a boy, maybe at the time ten. Again, they are wet and everything so I'm not seeing it as clear as maybe one would think, but maybe ten years old and jerry are in there.
>
> Q. Meaning Jerry Sandusky?
>
> A. Yes. They are in the showers, and the one boy is kind of leaning up against the wall. Jerry is directly behind him in what appeared to be in a sexual position. Upon seeing that, obviously, you don't expect to see it. You get so flustered, as you may imagine.
>
> I tried to open the locker as fast as I could. I put my shoes in there and closed it up, began to walk out of the locker room. I looked in the shower again, and the young boy saw me. He was again in that position but kind of- I think he knew someone had come in the locker room. He saw me, kind of looked over his

shoulder and saw me. I looked at him and Jerry then saw the boy look at me and he looked. We made eye contact. I walked directly out as fast as I could to be honest with you.

Q. Okay. You had--you used a particular term when the investigators spoke to you before to describe what you thought Jerry Sandusky was doing to that boy. Do you remember what word you used?

A. I'm pretty sure he was sodomizing him, relatively sure.

Q. You didn't see actual penetration?

A. I did not see actual insertion.

Q. But everything else led you to believe that?

A. Yes.

Q. Was there anybody else around?

A. No. No one else was in the locker room.

N.T., Grand Jury, December 14, 2010, at 7-8, Appendix, P. 696.

93. A plain reading of the testimony indicates McQueary specifically testified he did not see actual penetration; nevertheless, the prosecution drafted the presentment stating that McQueary, did, in fact, see anal penetration.

94. This misrepresentation appeared to be a deliberate act designed to, and having the effect of, further poisoning the atmosphere against Sandusky by sensationalizing, inflating and improperly bolstering what McQueary actually saw into scandalous and outrageous conduct unsupported by McQueary's actual testimony.

95. After Sandusky's arrest, during the upheaval at Penn State University, then-Governor Tom Corbett fanned the flames of the conflagration, attending his first meeting of the Penn State Board of Trustees to discuss whether Paterno should be fired by telephone. During the meeting, Corbett stated, "Remember the children. Remember that little boy in the shower."

See Don Van Natta, Jr., *Fight On State*, ESPN The Magazine, April 16, 2012.[12] A copy of the Van Natta article is attached hereto at Appendix, P. 371.

96. Indeed, as ESPN noted, "Through it all, the central character was Corbett. 'Something not very good happened,' Governor Corbett told reporters on Nov. 9, hours before he urged his fellow trustees to fire Paterno. 'We have to ... take the bull by the horns and fix it. *Quickly*.' Publicly, Corbett made it clear that he thought he was the most qualified person to fix Penn State." *Id.*

97. Additionally, in February 2012, after Sandusky was charged but before he was tried, the Governor again went to the media making comments about the case. Specifically, in a February 8, 2012, interview with WJAC-TV, the Governor stated regarding the Penn State trustee meeting, "The only thing I said is that they have to remember the children." *Id.*

98. In this case, the Governor of the fifth largest state in the country, and the former Attorney General of this state, tasked with the initial investigation, was making highly prejudicial comments regarding Sandusky to the media prior to the trial.

99. Governor Corbett was not alone. On November 11, 2011, only days after Mr. Sandusky's arrest, even President Barack Obama weighed in and publicly opined, calling the case "heartbreaking," stating:

> But I think it's a good time for us to do some soul searching — every institution, not just Penn State — about what our priorities are, and making sure that we understand that our first priority is protecting our kids, and we all have a responsibility -- we can't leave it to a system, we can't leave it to somebody else. Each of us have to take it upon ourselves to make sure that our kids have the love and support and protection that they deserve.

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[12] *Available at http://espn.go.com/espn/otl/story/_/id/7770996/in-wake-joe-paterno-death-sandusky-sex-abuse-scandal-power-struggle-spread-penn-state-state-capital.*

See, David Nakamura, "Obama calls Penn State scandal 'heartbreaking,'" Washington Post, November 11, 2011.[13] A copy of the Nakamura article is attached hereto at Appendix, P. 396.

100. Within forty-eight (48) hours of Mr. Sandusky's arrest and preliminary arraignment, the Commonwealth charged Tim Curley and Gary Schultz with crimes related to this offense, the Attorney General of Pennsylvania announced an investigation into Penn State University, and a groundswell of public outcry for Joe Paterno and Graham Spanier to be held accountable for the accusations against Mr. Sandusky began.[14] See *Curley, Schultz Step Aside; Penn State Announces Safety Steps*. A copy of the State College.com article is attached hereto at Appendix, P. 398.

101. On November 9, 2011, the Penn State University Board of Trustees fired Penn State icon Joe Paterno and President Graham Spanier, and the students rioted in State College. *See* Schweber, *supra*.[15] Appendix, P. 386.

102. On November 11, 2011, "several thousand students" held a candlelight vigil for Mr. Sandusky's alleged "victims." *See* Pennington, *supra*.[16] Appendix, P. 390.

103. On November 14, 2011, Mr. Sandusky participated in the ill-advised interview with Bob Costas of NBC Sports.

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[13] *Available at* http://www.washingtonpost.com/blogs/44/post/obama-calls-penn-state-scandal-heartbreaking/2011/11/11/gIQAN2JnDN_blog.html.

[14] *Available at* http://www.statecollege.com/news/local-news/curley-schultz-step-aside-penn-state-announces-safety-steps,925380/.

[15] *Available at* http://www.nytimes.com/2011/11/11/sports/ncaafootball/penn-state-students-in-clashes-after-joe-paterno-is-ousted.html?_r=0.

[16] *Available at* http://www.nytimes.com/2011/11/13/sports/ncaafootball/100000-fans-cheer-but-the-mood-is-numb.html?pagewanted=all.

104. On November 18, 2011, the NCAA announced an investigation into Penn State University's football and athletic programs, suggesting that the "death penalty" for the school's football program was on the table.

105. On January 22, 2012 — only eleven days after Mr. Sandusky's formal arraignment, Joe Paterno died from lung cancer.

106. Media reports reporting Paterno's death placed the blame for Paterno's downfall squarely at the feet of Jerry Sandusky. *See, e.g.,* Flounders, *supra. available at* *http://www.pennlive.com/midstate/index.ssf/2012/01/joe_paterno_dies_penn_state.html.* *See also,* Alice Park, "'Broken Heart'? What Really Killed Joe Paterno," Time, January 25, 2012, *available at* *http://healthland.time.com/2012/01/25/did-joe-paterno-die-of-a-broken-heart/*; Jessica Bennett and Jason Bernstein, "Joe Paterno's Dead at 85: His Swift Fall From Grace," The Daily Beast, January 22, 2012, *available at* *http://www.thedailybeast.com/articles/2012/01/22/joe-paterno-s-dead-at-85-his-swift-fall-from-grace.html.* A copy of the Park article is attached hereto at Appendix, P. 400, and a copy of the Bennett and Bernstein article is attached hereto at Appendix, P. 402.

107. As further evidence of community hostility directed toward Jerry Sandusky, in the months following Mr. Sandusky's arrest, on two separate occasions unknown persons threw pieces of cinder blocks through the windows of the Sandusky residence.

108. Trial commenced on June 11, 2012 – a mere 152 days from the date Mr. Sandusky was formally arraigned on January 11, 2012, (the formal arraignment date also being within two weeks the death of Penn State icon Joe Paterno).

109. When trial commenced, the specter of the NCAA "death penalty" continued to hang over the Penn State University football program.

110. All of this calamity to Penn State and its revered football program was laid at the feet of Defendant, Jerry Sandusky.

111. At trial, Mr. Sandusky was convicted on 45 of 48 counts in the criminal information.

112. On July 23, 2012 — less than a month after Mr. Sandusky was convicted, the NCAA announced its sanctions against Penn State University, which included a $60 million sanction, a four-year ban on the football program playing in the postseason, a reduction in scholarships, and Penn State's wins from 1998 were revoked, a total of 111 wins removed from the program.[17]

113. Rushing Mr. Sandusky to trial at the height of the public anger and community hostility against him, with the Penn State faithful blaming him for the downfall of Joe Paterno and Penn State University's football program resulted in violation of his right to a fair trial.

114. The end result of forcing Mr. Sandusky to trial only seven months after his arrest and 141 days after his arraignment, in an environment already polluted with inappropriate leaks from the grand jury and false information in the grand jury presentment, resulted in a trial that failed to comport with the ideals of modern American jurisprudence.

115. Under *Sheppard*, the trial court had an absolute duty to continue this case to allow the passions of the community to ameliorate prior to letting that same community sit in judgment of Jerry Sandusky. However, trial counsel failed to support his arguments for continuance with

[17] The defense notes that in the years since Mr. Sandusky was convicted, the NCAA recognized the extreme rush to judgment in this case, and it alleviated many of the sanctions against Penn State University. *See* Zach Schonbrun, *Penn State Faithful Rejoice After Penalties are Lifted*, New York Times, September 9, 2014, *available at* http://www.nytimes.com/2014/09/10/sports/ncaafootball/penn-state-revels-in-lifting-of-penalties-imposed-in-the-sandusky-scandal.html?_r=0.

the clear evidence of the community's continued thirst for Jerry Sandusky to be convicted irrespective of the evidence actually introduced against him.

116. Moreover, trial counsel actually opposed the Commonwealth's motion for a change of venire. *See Defendant's Answer to Commonwealth's Motion for Change of Venire*, filed February 8, 2012.

117. Trial counsel's decision that Mr. Sandusky would benefit from the local Centre County jury pool due to Sandusky's long time connection to the community was made in spite of the fact that he had retained a jury consultant who was forced to decline the case due to prior federal court commitments and this Court's refusal to make an accommodation by granting a continuance, instead of Sandusky being unfairly prejudiced by the result.

118. Given the nature of this case, including the ancillary consequences of the charges resulting in Paterno's termination from Penn State University, it was not reasonable for a seasoned defense attorney to believe that the Centre County jury could fairly and dispassionately sit in judgment of Jerry Sandusky.

119. Sandusky was prejudiced by the pervasive media attention in and on Centre County, and by the fact that the community's overriding sentiment to see Sandusky convicted based on what has turned out to be questionable allegations, and the downfall of Joe Paterno, had not abated.

120. As evidence that the passions of the community had not cooled, on the night the verdict against Mr. Sandusky was announced, a crowd of "hundreds" of people in Bellefonte gathered in the square to hear the verdict. *See* Nikki Krize, *Sandusky Guilty Verdict Reaction*, WNEP, June 23, 2012, *available at* http://wnep.com/2012/06/23/sandusky-guilty-verdict-reaction/. A copy of the Krize article is attached hereto at Appendix, P. 408.

121. The following quote from Ms. Krize's report accurately reflects the public perception of Mr. Sandusky: "'We're so excited. This is what needed to happen. He is absolutely guilty. We knew it–we're excited,' Tammy Watkins of Bellefonte said." *Id.*

122. As noted before, this court stated on the record, "I hope you understand that, by God, this guy is going to get a fair trial." N.T. Trial, June 20, 2012, at 25-26, Appendix, P. 369. However, by the time this court made this statement, all pretense of a fair trial for Mr. Sandusky had long since passed due to the fast-tracking of this case to trial the spotlight of the media attention while the specter of harsh NCAA action against Penn State University hung over Centre County, thereby resulting in Mr. Sandusky's due process rights being violated.

123. Trial counsel and/or direct appellate counsel had no reasonable basis for failing to include this clearly relevant information of the pervasive media attention and the hostile atmosphere in Centre County in their motion for continuance, in post-sentence motions, or on direct appeal.

124. Similarly, trial counsel failed to undertake an investigation or to determine if the passions against Sandusky had dissipated in Centre County or anywhere else.

125. Sandusky believes and therefore avers that had the trial court been presented with this overwhelming community sense of anger at Sandusky, the Court would have granted the Commonwealth's motion for a change of venire, and thus the results of that motion would have been different.

126. Moreover, Sandusky believes and avers that had this information been properly presented to the trial court before the trial, the court would have had no choice but to continue the trial to avoid undue prejudice to Sandusky.

127. Finally, Sandusky believes and avers that had trial and direct appellate counsel preserved this issue in post-sentence motions and on direct appeal, the Superior Court would have ordered a new trial free of the undue prejudice.

128. As a result, this Court must award Mr. Sandusky a new trial.

B. Trial Counsel's Failure to Withdraw, and/or Trial Counsels' Failure to Immediately Appeal the Trial Court's Denial of their Motion to Withdraw Fundamentally Prejudiced Mr. Sandusky and Amounted to Ineffective Assistance of Counsel and a Breach of the Rules of Professional Conduct.

129. As noted above, the extreme rush with which the trial court insisted on holding the trial in this matter despite reasonable requests for continuance by defense counsel was such that no attorney could provide effective assistance of counsel in this matter given the mountains of discovery that was continually disclosed to the defense in this case, especially as such disclosures continued up to the eve of trial.

130. Cognizant of the fact that they were woefully unprepared to try this case in June 2012, after the trial court denied their request for a continuance, trial counsel half-heartedly moved to withdraw in this matter. N.T. Hearing, June 5, 2012, stating:

> I intend to file a motion to withdraw as counsel, Mr. Rominger and I, fully realizing the court will deny it based on the lack of preparation of all of the things that are going most notably the absence of our experts and jury consultant and the issue concerning the potential issues which are apparently becoming public which is based on what I told you yesterday...I feel that we're duty bound ethically to tell the court we're not prepared to go to trial at this time.... So we feel compelled to file this motion, again, fully cognizant of the fact that the court will deny but at least there will be a record.

N.T. Motion to Withdraw, June 5, 2012, at 3-5, Appendix, P. 412.

131. Messrs. Amendola and Rominger specifically advised the trial court that they had an ethical duty to withdraw, citing the Pennsylvania Rules of Professional Conduct. *Id.*

132. The trial court summarily denied the motion.

133. Under Rule 1.1 of the Pennsylvania Rules of Professional Conduct, "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, **and preparation reasonably necessary for the representation.**" *Id.* (emphasis added) Copy attached at Appendix, P. 359.

134. Trial counsel failed to prepare as reasonably necessary for representing Mr. Sandusky at trial; indeed they specifically advised the trial court they could not, to no avail. A copy of Rule 1.16 of the Pennsylvania Rules of Professional Conduct is attached hereto at Appendix, P. 361.

135. Further, Rule 1.16 states:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
> (3) the lawyer is discharged.
>
> * * *
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

136. Under Rule 1.16(a), trial counsel's withdrawal was mandatory. When the trial court denied the motion, trial counsel did not request permission for an interlocutory appeal, either by permission under Pennsylvania Rule of Appellate Procedure 312, or as a collateral order under Pa.R.A.P. 313.

137. Even if the trial court would not have certified the question for purposes of a permissive interlocutory appeal, the issue of being compelled to represent Mr. Sandusky in violation of the canons of ethics should have been appealable by right under Pa.R.A.P. 313, which states:

> (a) *General Rule.* An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
> (b) *Definition.* A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Id.

138. The question of whether an attorney may be compelled to represent a defendant at trial in violation of the attorney's ethical duties is separable from and collateral to the main cause of action, which is determining Mr. Sandusky's guilt on the charges against him. Second, the right involved is too important to be denied review if a true good faith ethical conflict exists. Finally, if the review is postponed until final judgment, the claim is now irreparably lost because Mr. Sandusky was tried and convicted as a result of counsel who had an ethical conflict and could not provide him with effective assistance of counsel.

139. Trial counsel had no reasonable basis for failing to seek review of this question under the collateral order doctrine. This is especially true since Attorney Rominger invoked the doctrine to appeal the trial court's June 26, 2012, Order.

140. Trial counsel, after failing to seek review of this question under Collateral Order Doctrine, chose to proceed to represent the defendant even though they were fully cognizant that their representation was in direct violation of the Pa Rules of Professional Conduct. Put simply, they should have refused to go forward.

141. Mr. Sandusky suffered indisputable prejudice as a result, as he was represented at trial by attorneys who were admittedly proceeding in violation of Rule 1.1 and 1.16 of the Pennsylvania Rules of Professional Conduct, and in violation of their ethical duties to him.

142. There is a reasonable likelihood that the outcome of this case would have been different had trial counsel appealed this order under the collateral order doctrine. Given counsel's own admission that they could not provide constitutionally effective counsel and would be proceeding in violation of the canons of ethics, the appellate courts reasonably should have reversed the trial court's ruling and permitted trial counsel to withdraw from the case rather than violate their ethical duty to their client.

143. Finally, since the Rules of Professional Conduct mandate counsel's withdrawal if they cannot ethically represent Mr. Sandusky, as they affirmatively stated to the Court, trial counsel had a duty to refuse to represent Mr. Sandusky at trial, and they should not have proceeded to trial.

144. Counsel's failure to seek a collateral appeal of the denial of either the motion to continue or the motion to withdraw, and counsel's failure to refuse to represent Mr. Sandusky at trial constitutes clear ineffectiveness, and Mr. Sandusky should be granted a new trial.

C. The Prosecutor's Closing Argument Contained an Unconstitutional Reference to Sandusky's Fifth Amendment Right to Remain Silent and a Blatant Misrepresentation of Fact, Warranting a New Trial.

1. Trial Counsel Failed to Object and Demand a Mistrial to the Prosecutor's Improper Commentary on the Defendant's Right to Remain Silent at Trial

145. During closing arguments, the Prosecution inappropriately referenced the fact that Mr. Sandusky elected not to testify at trial in this matter (while simultaneously commenting on

the fact that Mr. Sandusky participated in an ill-advised pre-trial media interview with Bob Costas of NBC Sports). [18]

146. It is axiomatic that in Pennsylvania, "defendants have an 'absolute right to remain silent and not to present evidence at trial' and that prosecutors cannot comment on a defendant's refusal to testify." *Commonwealth v. Molina*, 104 A.3d 430, 435 (Pa. 2014) (*citing Griffin v. California*, 380 U.S. 609, 615 (1965)) (internal quotations omitted).

147. A court may grant a new trial on the basis of improper commentary by a prosecutor if "the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would then prevent them from properly weighing the evidence and rendering a true verdict." *Commonwealth v. Poplawski*, 852 A.2d 323, 327 (Pa. Super. 2004).

148. In *Molina*, the Pennsylvania Supreme Court recently conclusively and unequivocally ruled that the jurisprudence and public policy of Pennsylvania, as embedded in the Pennsylvania Constitution, "prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense." *Id.* at 451.

149. At trial in this matter, the attorney for the Commonwealth stated:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close.

[18] As noted in the instant petition, Section IV.O, *infra*, trial counsel's action in advising Mr. Sandusky to submit to pretrial interviews with Bob Costas and the New York Times was ineffective assistance, and given that they were highly relevant evidence used by the Commonwealth at trial in this matter, were sufficiently prejudicial under *Strickland* to warrant a new trial.

> Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him?
>
> * * *
>
> I would think that the automatic response when someone asks you if you're , you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question [sic]. **I wouldn't know. I only heard him on TV. Only heard him on TV.** So that's his explanation there. He just enjoys young children.

N.T. Trial, June 21, 2012 at 140-142, Appendix, P. 422 (emphasis added).

150. The Prosecutor again commented on Mr. Sandusky's refusal to testify throughout his closing argument as follows:

> The defendant's explanation on television, is there anything else you missed? Mr. Amendola read it with great animation. I'm not sure if there was anything – any other important information communicated **because he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today**.
>
> * * *
>
> One thing he didn't which he could have provided to Bob Costas, **he could have provided it to anybody at any time. He had the complete capacity and exonerate himself at the time and just say who was there because this is a day** – remember, Mike McQueary, why remember him and not the little boy you're soaping and just being innocently cleansing to? **But he didn't provide that name to anybody, ever,** certainly not to Bob Costas, no. He forgot that.

Id. at 145-46, Appendix, P. 425. (emphasis added).

151. Trial counsel failed to make a proper, timely objection to this statement at the time it was made; instead, per an inexplicable and irrational agreement with the Commonwealth, trial counsel agreed to reserve objections to the Commonwealth's closing until the closing ended unless the objectionable statement was "egregious" – an agreement that itself should be deemed ineffective assistance of counsel, as objections not timely raised are waived, such that the "agreement" to preserve objections amounted to a waiver of Sandusky's valid objections due to a lack of remedy.

152. Indeed, in *Commonwealth v. Sasse*, 921 A.2d 1229, 1238 (Pa.Super. 2007), the Superior Court specifically held that objections to a prosecutor's closing argument must be made contemporaneously, otherwise they are waived. Specifically, the Court stated,

> In order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make an objection and move for a mistrial. *See Commonwealth v. Jones*, 501 Pa. 162, 460 A.2d 739 (1983). Appellant failed to make either a contemporaneous objection or move for a mistrial during the Commonwealth's closing argument; Appellant challenged the statement after the Commonwealth's closing argument. As such, the argument is waived, and we dismiss it. *See Commonwealth v. [Samuel] Jones*, 374 Pa.Super. 431, 543 A.2d 548, 550 (Pa. Super. 1988) (defendant's objection to improper remark by prosecutor must be contemporaneous with improper remark).

Id.

153. Under the plain language stated above from *Sasse*, the agreement between the prosecution and defense to reserve objections until after closing arguments is void, irrespective of the trial court's approval of the agreement. Accordingly, even entering into that agreement is *per se* ineffective assistance of counsel following *Sasse*.

154. Moreover, even if the agreement could somehow be valid, Defendant submits that the Commonwealth would be hard pressed to commit more "egregious" conduct in its closing

argument than to comment on the defendant's right to remain silent at trial, and the failure to lodge a timely objection at the time is *per se* ineffective as the underlying objection clearly has arguable merit, there can be no rational reason for counsel's failure to object at the time, and there is a reasonable probability that the outcome of the trial would have been different had counsel made a timely objection. *See Commonwealth v. (Michael) Pierce*, 786 A.2d 203, 213 (Pa. 2001); *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999).

155. Compounding the ineffective assistance, when Attorney Rominger lodged an ultimately weak objection to the statement, he failed to suggest any remedy. *See* N.T. Trial, June 21, 2012, at 155-57, Appendix, P. 427.

156. As a result of trial counsel's failure to suggest a remedy, the Superior Court found that this issue was waived on direct appeal. *See Commonwealth v. Sandusky*, at 2013 PA Super 264 at 9-10.

157. In the instant matter, the Commonwealth introduced the Costas interview into evidence, used it against Mr. Sandusky in its case in chief, and then the Commonwealth repeatedly commented on the facts that (1) the prosecuting attorney never had the opportunity to question Mr. Sandusky that Bob Costas did; and (2) Sandusky made statements in that interview that he could have clarified "to anybody at any time." N.T. Trial, June 21, 2012, at 145, Appendix, P. 430.

158. The clear intent of these statements was to prejudice Mr. Sandusky to the jury based on the fact that he did not testify at trial in light of giving his pretrial interviews. Specifically, the Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to this jury directly.

159. Since Mr. Sandusky elected not to testify at trial in this matter, the comments were not fair impeachment of his trial testimony.

160. Read in context, the statements could not be construed as a fair response to Defendant's arguments. Instead, the Commonwealth sought to accentuate the fact that Mr. Sandusky explained himself to the media, but he did not explain himself to the jury - a tactic solely designed to prejudice Mr. Sandusky and imply to the jury that he was afraid to testify.

161. In fact, the prosecutor's comment was not at all a "fair rebuttal" to a defense argument; rather it was merely an effort to bolster the Commonwealth's own evidence regarding the interviews and to draw attention to the fact that Sandusky elected not to testify at trial in this matter. *Compare Commonwealth v. Culver*, 51 A.3d 866, 876 (Pa. Super. 2012) (recognizing that an improper comment by a prosecutor may be appropriate if it amounts to a fair rebuttal to a defense comment or argument or is merely "oratorical flair") *with Poplawski, supra* (holding that statements were improper commentary by a prosecutor invoking the jury to consider issues of general community interest beyond the facts of the case by "sending a message").

162. Here, the prosecutor's repeated comments to the fact that Mr. Sandusky failed to testify crossed the line from fair rebuttal or oratorical flair to highlighting Mr. Sandusky's silence and directly pleading to the jury to draw an adverse inference from his failure to testify. As such, the commentary is beyond the pale, and a new trial would have been warranted on direct appeal had trial counsel properly preserved an objection.

163. This conduct was more egregious than that in *Molina*, as the silence in *Molina* concerned pre-arrest silence – in other words, silence at a time before a defendant is required to be advised of his *Miranda* rights. In the instant case, the commentary was a direct attack on Mr.

Sandusky's right not to testify at trial, coupled with his pre-trial media statements, as substantive evidence of his guilt.

164. Indeed, the prosecutor impugned Mr. Sandusky for not clarifying any of his statements in court to the jury. There can be no greater infringement on his right to remain silent at trial than these statements.

165. Given how the statements were clearly inappropriate, and warranted a mistrial, this claim is meritorious. *Spotz, supra.*

166. Trial counsel had no reasonable strategic basis for failing to move for a mistrial or request any remedy for the Commonwealth's misconduct. *Id.*

167. Had trial counsel not completely waived this issue for appellate review, given the clear violation of Defendant's right to remain silent, there is a reasonable probability that the Superior Court would have vacated Mr. Sandusky's conviction and remanded this matter for a new trial.

168. Since the Commonwealth clearly violated Mr. Sandusky's rights under Article I, Section 9 of the Pennsylvania Constitution, *Molina, supra*, and the Fifth Amendment to the Constitution of the United States, and since trial counsel had no reasonable basis for failing to preserve a proper, timely objection to the inappropriate argument, this Court must grant Mr. Sandusky a new trial.

2. Trial Counsel's Failure to Object and Demand a Mistrial When The Prosecutor Made a Blatantly False Statement to the Jury Was Ineffective Assistance of Counsel.

169. In addition to his improper commentary on Mr. Sandusky's exercise of his right not to testify at trial, the prosecuting attorney made a blatantly false statement to the jury in his closing argument solely to ask the jury to consider more global concerns outside the instant case.

170. During the prosecutor's closing argument, he stated the following:

> I don't want to tug at your heart strings. I want to remind you of what the substance of this case is about, because it's what happened to those boys.
> You know what? Not just those boys, to others unknown to us, to others presently known to God but not to us, but we know what the defendant did to them because adults saw them and adults told you about them.

N.T. Trial, June 21, 2012, at p. 111, Appendix, P. 431.

171. Initially, Defendant submits that this statement was a call to the jury to convict Defendant for conduct for which he was not on trial.

172. One clear inference is the prosecutor was implying to the jury that it should convict Defendant on the charges presented because the Commonwealth believed that Defendant had abused other children that had not come forward. This is especially true given the investigative history and the difficulty the Commonwealth had in locating victims before the grand jury investigation was leaked to Sara Ganim.

173. Alternatively, this statement was a lie, as the only potential victim who was presented at trial to which this statement could apply was Victim #2, the individual in the shower, supposedly the victim witnessed by the star witness for the prosecution, Michael McQueary.

174. Victim #2 was, as both the prosecution and defense well knew, an individual whose name was Allan C. Myers.

175. The history related to Victim #2, Allan C. Myers, was also known to the prosecution and the defense in this case. A brief summary of that history is necessary to explain how the statement made by the prosecution was patently false and why this misrepresentation was so significant.

176. On May 6, 2011, Allan C. Myers submitted a letter to the (publication), Appendix, P.432, wherein he stated the following:

> Those investigating Jerry Sandusky should listen more to his adopted son, Matt, and less to Jerry's "accusers."
>
> "My life changed when I came to live here," said Matt in a (Dec 20, 1999) Sports Illustrated article. "There were rules, there was discipline, there was caring. Dad (Jerry) put me on a workout program. He gave me someone to talk to, a father figure I never had. I have no idea where I would be without him and mom (Dottie). And they've helped so many kids besides me."
>
> I am one of those many Second Mile kids who became a part of Jerry's "family." He has been a best friend, tutor, workout mentor and more. We've worked together, competed together, travelled together and laughed together. I lived with Jerry and Dottie for three months. Jerry's been there for me for 13 years and stood beside me at my senior parent's football night.
>
> I drove 12 hours to attend his mom's funeral. I don't know what I would have done without him

A copy of this letter is attached hereto at Appendix, P. 432.

177. Prior to the trial, the Defendant engaged an investigator, Curtis Everhart, who interviewed Allan C. Myers about the allegations related to the Defendant, Jerry Sandusky.

178. Subsequent to the interview, Curtis Everhart reduced the information received by Allan C. Myers to a written summary. A copy of this summary is attached hereto at Appendix, P. 433.

179. As stated in the summary of interview:

> A. The interview then began to focus on specific questions regarding Jerry's conduct with Myers. I asked the specific question: "Did Jerry ever touch you in a manner that you felt to be improper, or caused you to feel concern about his invading your personal space?" Myers answered with a very pronounced "Never, ever, did anything like that occur."

B. Myers stated, "Never in my life while with Jerry did I ever uncomfortable or violated. I think of Jerry as the Father I never had."

C. "I invited Jerry and Dottie to my wedding. Why would I ask Jerry my father figure at senior night, ask Jerry and Dottie to be at my wedding, and the school asked me to ask Jerry to speak at my graduation, which he did, if there was a problem?"

D. At this point I went into very specific questions regarding Myers and Jerry at the PSU complex.

E. I asked Myers about a specific time period in 2002 when he would work out with Jerry. Myers stated it would have been the night that was described as alleged Victim Number Two (2) in the grand jury report. The day was March 1, 2002, I am very positive."

F. Myers stated he and Jerry had just finished a workout and went into the shower area to shower and leave. "I would usually work out one or two days a week, but this particular night is very clear in my mind. We were in the shower and Jerry and I were slapping towels at each other trying to sting each other. I would slap the walls and would slide on the shower floor, which I am sure you could have heard from the wooden locker area. While we were engaged in fun as I described, I heard the sound of a wooden locker close, a sound I have heard before. I never saw who closed the locker. The grand jury report says Coach McQueary said he observed Jerry and I engaged in sexual activity. This is not the truth and McQueary is not telling the truth. Nothing occurred that night in the shower."

G. I asked, "How did you know this was the night McQueary described?" Myers stated, "I heard the wooden locker close. McQueary said he went to the locker room to obtain items from a locker. I know what the door sounds like when it is closed, as I said before. I never saw McQueary look into the shower that night. I am sure." I asked Myers, "Can you be more specific if possible?" Myers said, "That same week Jerry either told me in person or on the phone that the night we were in the showers, Coach McQueary reported that he saw us engaged in sexual acts and reported this to school officials. Jerry told me to expect a call from PSU officials about that night. To be more specific, the last night that Jerry and I showered at the PSU Complex was March 1, 2002, I am certain."

> H. I asked Myers, "Did PSU officials ever contact you?" Myers said, "Never. The next contact I had was when PSP troopers interviewed me regarding the Sandusky case." Myers again stated, "At no time that night, March 1, 2002, did Jerry sexually assault me with anal or oral intercourse, nor did I perform such on Jerry. This is wrong not to tell the truth." Myers said again, "I am alleged Victim Number Two (2) on the grand jury report as the events described match that night in exact details except that Jerry never sexually assaulted me. I would be very sure if something like that happened and I would have called the police. What McQueary said he observed is wrong. I can't understand why this was said. It is not the truth."
>
> I. Myers described, "I told PSP about numerous trips I would take with Jerry and nothing ever happened except Jerry putting his right hand on my left knee. I described that I would stay at Jerry's home, sometimes have meals, sometimes stay overnight. I would shower separate from Jerry at this home. I felt very uncomfortable with the PSP interview process as they would try to put words in my mouth, take my statement out of context. The PSP investigators were clearly angry and upset when I would not say what they wanted to hear. My final words to the PSP were, "I will never have anything bad to say about Jerry."

Id.

180. On September 20, 2011, Corporal Joseph Leiter and Trooper James Ellis interviewed Allan Myers whereby Mr. Myers indicated that Mr. Sandusky never did anything to him that was inappropriate and never did anything to make Mr. Myers feel uncomfortable, thus confirming his initial interview with Mr. Curtis Everhart. A copy of a Pennsylvania State Police Report pages 154-155, dated September 22, 2011 and signed by Corporal Joseph Leiter is attached hereto at Appendix, P. 436.

181. On February 28, 2012, Inspector Corricelli interviewed Allan Myers regarding his relationship with Mr. Sandusky. There was no mention of inappropriate contact with Mr. Sandusky. A copy of Inspector Corricelli's memorandum is attached hereto at Appendix, P. 438.

182. On March 8, 2012, Inspector Corricelli again interviewed Mr. Myers. On this occasion, Mr. Myers related that he was ready to discuss his alleged sexual abuse. He further alleged that he was abused on at least three trips he took with Mr. Sandusky outside of Pennsylvania. A copy of Inspector Corricelli's memorandum is attached hereto at Appendix, P. 441.

183. On March 16, 2012, Inspector Corricelli interviewed Allan Myers regarding the allegations Mr. Myers raised in his March 8, 2012 interview. Mr. Myers indicated that the only time where there was sexual contact by Sandusky occurred at the Lasch Building on the Pennsylvania State University campus. Mr. Myers estimated sexual contact occurred ten or so times, culminating in 2002 when Michael McQueary was present. A copy of the Office of Attorney General Investigative Report Supplemental 149 dated April 11, 2012 from Anthony Sassano is attached hereto at Appendix, P. 443.

184. In March of 2012, three months before the trial in this case, trial counsel Joseph Amendola was informed by a private attorney that he, the private attorney, was now representing Allan C. Myers in a claim against Penn State.

185. The aforementioned private attorney attempted to have law enforcement interview Allan C. Myers as a victim but insisted that he, the private attorney, be present for any such interview.

186. Trial Counsel Karl Rominger was informed by the prosecutors in the case that in order to keep law enforcement officers from interviewing Allan C. Myers outside of this attorney's presence, the private attorney secreted Myers in an undisclosed location so that he was unable to be contacted by law enforcement officials.

187. Although trial counsel was fully aware of this lawyer's activities, there was no attempt to institute an investigation into the attorney's conduct.

188. Subsequent to the trial in this case, an investigator, Ken Cummings, located Allan C. Myers and interviewed him concerning whether or not his original statement made to Curtis Everhart was true.

189. In an interview with current defense counsel's investigator, Ken Cummings indicated that Allan C. Myers reaffirmed the original statement given to Curtis Everhart that no abuse on the part of the Defendant had occurred.

190. The prosecution in this case was fully aware of the above matters relating to Allan C. Myers' original statement and letter and his identity.

191. The foregoing scenario placed the Commonwealth in an awkward position in that if Myers was called as a witness there was a substantial risk of undermining the testimony of its star witness, Michael McQueary. If the Commonwealth did not call the witness, the jury would be left to surmise why the witness had not been called.

192. The prosecution resolved this dilemma by simply lying to the jury and suggesting that this witness was "known to God but not to us".

193. In telling the jury that Victim #2 was "unknown to us...known to God but not to us," the prosecutor violated his duty to limit his comments to the evidence and the fair inferences drawn therefrom. *Commonwealth v. Joyner*, 365 A.2d 1233, 1236 (Pa. 1976)

194. Indeed, the Supreme Court has recognized, "In advocating the cause for this Commonwealth, prosecutors are to seek justice, not only convictions." *Commonwealth v. Cherry*, 378 A.2d 800, 803 (Pa. 1977)

195. Finally, Rule 3.3 of the Pennsylvania Rules of Professional Conduct states "A lawyer shall not knowingly ... make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Pa.R.P.C. 3.3(a)(1). A copy of Pa.R.C.P. 3.3 is attached hereto at Appendix, P. 365.

196. The American Bar Association Minimum Standards of Criminal Justice provide:

> Section 3-2.8 – Relations with the Courts and Bar
>
> (a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.

A copy of the ABA Minimum Standards for Criminal Justice are attached hereto at Appendix, P. 341.

197. In the present case, by advocating to the jury that they should convict Defendant based on victims known only "to God", the prosecutor exceeded the bounds of permissible argument, and indeed, made a blatant misrepresentation to the jury.

198. By making this statement purporting to have no knowledge about the identity of Victim #2 the Commonwealth violated its sacred duty of candor to the tribunal by making a materially false statement of fact to the jury.

199. When he made a materially false representation to the jury, the prosecutor committed prosecutorial misconduct and violated Sandusky's right to due process and a fair trial.

200. Inexplicably, trial counsel did not object to this statement or move for a mistrial based on prosecutorial misconduct.

201. Trial counsel had no reasonable basis for failing to object to this statement, given its evident falsity.

202. Moreover, trial counsel had no reasonable basis for failing to object to this statement or demand a mistrial, since the prosecution was asking the jury to consider the likelihood that Defendant committed criminal acts on unknown victims.

203. Had trial counsel objected and demanded a mistrial, the outcome of the proceedings would likely have been different, as Defendant should have received a new trial, and at the very least, a cautionary instruction would have issued.

204. Accordingly, trial counsel was ineffective for failing to object to this wholly improper statement, and Defendant is entitled to a new trial.

D. The Unavailability of Spanier, Curley, and Shultz Due to the Commonwealth's Disingenuous Charges Against them Violated Sandusky's Right to Present Witnesses and Compulsory Process.

205. At trial in this matter, Defendant's trial counsel made it clear to the Court that Graham Spanier, Tim Curley, and Gary Schultz were critical defense witnesses. *See* Sandusky Motion In Limine To Admit The Out Of Court Statements Of Unavailable Witnesses Spanier, Curly, Shultz, filed June 11, 2012. Nevertheless, the Court denied the Motion in Limine.

206. During trial, the following exchange occurred:

> THE COURT: And then that gets us to a – basically trying Curley and Schultz in this case before they have been tried in their own case.
>
> MR. ROMINGER: I would note we did ask for a continuance past the Curley and Schultz cases.
>
> THE COURT: Yeah, you did note I denied that for obvious reasons.
>
> MR. FINA: They said they would never testify in this case whether acquitted or not.
>
> THE COURT: That is the other aspect. There's no assurance they would ever be available.

MR. ROMINGER: Right.

THE COURT: Okay.

MR. ROMINGER: And, Judge, in fairness, when *Hackett* was decided, *Crawford* -- slash -- *Melendez-Diaz* was not even a glimmer in the eye. So I understand the problem that it creates but, obviously, as an advocate I would like to take the position I can have my cake and they can't cross-examine on it.

MR. McGETTIGAN: By making this motion, you are trying to have your cake and eat it, too, obviously.

THE COURT: I'm not going to mislead the jury. I recognized early on in this case that --and I have expressed it -- that in this complex, constellation of litigation, some case had to go forward first and subsequent events may result in whoever went first has to be tried again. I don't know. If Curley and Schultz are convicted of perjury or some related count, then your issue becomes basically moot.

MR. ROMINGER: Correct.

THE COURT: If they're acquitted, then potentially it creates a problem, depending on how I rule.

So the question in my mind is not the admission of the statement. It is what restriction, if any, should be placed on the Commonwealth?

Another concern that I have here is there's some fundamental due process issues, and I'm not suggesting that the Commonwealth has in any way acted improperly. But one could easily see how the Commonwealth could hamstring the defense by issuing target letters or indictments directed toward defense witnesses. Therefore, you know, effectively quieting a witness who has no choice but to exert a Fifth Amendment privilege. I'm not suggesting that was done but I'm trying to figure out how to sort through that problem.

N.T., Trial, June 18, 2012, at 167-169, Appendix, P. 452.

207. As the Pennsylvania Superior Court has noted, in all criminal trials, the Constitution instills the right for accused persons to have compulsory process for obtaining favorable witnesses. *Commonwealth v. Holloman*, 621 A.2d 1046, 1053 (Pa. Super. 1993).

"This right is a fundamental element of due process of law." *Id.* (*quoting Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 2923, 18 L.Ed.2d 1019, 1023 (1967)).

208. The U.S. Supreme Court has also stated that "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 84, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297, 312 (1973).

209. As the Superior Court noted in *Holloman*, *supra*:

> "Under certain circumstances, intimidation or threats that dissuade a potential defense witness from testifying may infringe a defendant's due process rights." *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988), *cert. denied*, 488 U.S. 867 and 932, 109 S.Ct. 174 and 323, 102 L.Ed.2d 143 and 341 (1988). See, e.g.: *Commonwealth v. Jennings*, [311 A.2d 720, 722 (Pa. Super. 1973)] (due process violated where prosecutor's warning to defense witness of right against self-incrimination was given in a manner designed to exerts such duress upon witnesses as to preclude free and voluntary choice whether to testify at defendant's trial).
>
> * * *
>
> To establish a fourteenth amendment due process violation based on the denial of the right to compulsory process, a defendant must establish more than the mere absence of testimony. There must be a plausible showing that an act by the government caused the loss or erosion of testimony that was both material and favorable to the defense. Therefore, in order to prevail on such a due process claim, an accused must, at a minimum, demonstrate some plausible nexus between the challenged governmental conduct and the absence of certain testimony.

Id. at 1053-1054 (internal citations and quotations omitted). *See also Commonwealth v. Davis*, 704 A.2d 650 (Pa.Super. 1997) (same).; *Commonwealth v. Champney*, 832 A.2d 403, 415 (Pa. 2003)

210. In this case, despite the *in camera* discussion relating to using Spanier, Curley, and Schultz's grand jury testimony, trial counsel took no affirmative steps to have the witnesses actually assert their Fifth Amendment privileges; however, it appears that trial counsel and the

court were placed on adequate notice that if called, those witnesses who were then under charges would have exerted their Fifth Amendment privilege. *See Commonwealth v. Champney*, 832 A.2d 403, 415 (Pa. 2003) (noting that witness should not be placed on the witness stand solely for purpose of invoking Fifth Amendment privilege).

211. Given the fact that the charges have been pending against Curley, Spanier, and Schultz for several years, with no indication that they will ever be tried, Defendant has grounds to believe and therefore avers that the Commonwealth charged those witnesses with criminal events in bad faith to, among other things, preclude Sandusky from calling those witnesses at trial in this matter. This act violated Sandusky's constitutional rights under *Holloman*, *supra*.

212. Under *Holloman*, there is a clear relationship to the Commonwealth's bad faith charges against Spanier, Curley, and Schultz, and their unavailability to testify at Sandusky's trial.

213. Accordingly, the charges against Spanier, Curley, and Schultz was a violation of Sandusky's rights under the U.S. Constitution, and he is entitled to a new trial.

214. Moreover, trial counsel failed to preserve this issue in post-sentence motions or on direct appeal.

215. Trial counsel can have no reasonable basis for failing to preserve and argue this issue on appeal, as it is clearly meritorious on the face of the proceedings that crucial defense witnesses were made unavailable due to suspect charges by the Commonwealth.

216. Even the trial court recognized that the outcome of the entire proceedings might have been different had this argument preserved. *See* N.T. Trial, June 18, 2012 at 167-69, Appendix, P. 452, quoted *supra*.

217. As a result, trial and direct appellate counsel were ineffective for failing to preserve and argue that Sandusky was denied his due process right to call defense witnesses because of the Commonwealth's specious charges against Spanier, Curley, and Schultz.

218. Counsel's ineffectiveness, and the prejudice suffered by Sandusky in that regard mandate a new trial in this matter.

E. The Investigating Grand Jury Process as Used in this Case Unconstitutionally Deprived Sandusky of his Right to Due Process

219. In this case, the Commonwealth referred this case to the investigating grand jury to issue a presentment.

220. The grand jury process as used in the instant case amounted to an unconstitutional deprivation of Sandusky's rights.

1. The Statewide Investigating Grand Jury Process Amounted to an Abuse of Sandusky's Due Process Rights

221. As a matter of record, Judge Barry Feudale was the supervising judge of the grand jury who investigated the allegations against Jerry Sandusky, and Frank Fina was the then-Senior Deputy Attorney General investigating Sandusky.

222. After the verdict in this case, in 2013, upon a request from Attorney General Kathleen Kane, Judge Feudale was removed from the role of supervising judge of the Statewide Investigating Grand Jury. The Supreme Court order removing Judge Feudale from that role is sealed, and has not been made public.

223. Further, according to the Inquirer, "In the e-mail, [between Feudale and Fina] the judge also disparaged a review Kane has launched into how the office pursued Penn State child molester Jerry Sandusky." *Id.*

224. Despite requests from Sandusky's current counsel, the Commonwealth has refused to disclose emails between Fina and Judge Feudale. A copy of Defendant's correspondence seeking copies of these emails is attached hereto at Appendix, P. 457.

225. Given how some of the emails concerned the Attorney General's review into this case may reveal in further infringements on Sandusky's legal rights.

226. Since the Commonwealth refuses to disclose the emails to counsel, Sandusky believes and avers that exceptional circumstances have been presented under Pa.R.Crim.P. 902(E)(1), and Sandusky is entitled to discovery for reasons as more fully set forth in Sandusky's original P.C.R.A. Petition currently under seal by order of court.

227. This is especially true in light of the Moulton Report, commissioned by Attorney General Kane. To summarize, the Moulton Report recognized that the investigation had stalled until Sara Ganim published leaked details of the investigation in the Harrisburg Patriot-News. *See,* Moulton Report at Appendix, P. 40-56.

228. According to the Moulton Report:

a. In March 2009, Senior Deputy Attorney General Jonelle H. Eshbach was assigned to investigate Sandusky once the case was referred to the Pennsylvania Office of Attorney General. Moulton Report at Appendix, P.43.

b. On May 1, 2009, Attorney Fina decided to refer the investigation into Mr. Sandusky to the Thirtieth Statewide Investigating Grand Jury. *Id.* at Appendix, P.45-46. ("According to Fina, while many sexual-assault cases are not necessarily appropriate for referral to an investigating grand jury, this one was, particularly because of the perceived need to keep the investigation secret.").

c. At the time of the referral, the only alleged victim to come forward of which the Commonwealth was aware was A.F., a/k/a Victim #1. *Id.* at Appendix, P. 43-49 .

d. The Commonwealth sought to identify additional victims, but it was having no luck in doing so. *Id.* at Appendix, P. 50-53.

e. By the end of 2009, the Commonwealth only identified one victim willing to testify. *Id.* In December 2009, Eshbach advised the grand jurors, "As of now, we haven't found any other victims. We're still trying. I suspect, although I don't know for sure, that perhaps when this becomes public, we might have some other people turn up. That sometimes happens, but we have been trying pretty hard to find some other folks and so far have not." *Id.* (emphasis added) at Appendix, P. 55.

f. In March 2010, Eshbach prepared a draft presentment related solely to A.F., because "she believed that after a year of looking, the investigation was unlikely to find additional victims, at least until after charges were filed, and because she felt that A.F. deserved to have his allegations heard in court. Eshbach had no illusions that a case against Sandusky, with A.F. as the sole victim, would be easy. Nevertheless, she believed she had adequate corroboration at that time to charge and try Sandusky; she also hoped that once A.F.'s allegations against Sandusky were made public, other victims would come forward." Moulton Report at Appendix, P. 57.

g. Attorney Fina had reservations about the draft presentment. According to the Moulton Report, "Fina recalls that his first reaction to the presentment was the "very strong" belief that the case was too weak to go forward; he believed that

Sandusky would be acquitted at trial (if the case got that far), both because A.F. was not a strong witness and because Sandusky had significant resources and an outstanding reputation in the community. Moreover, he believed that an acquittal would likely doom any subsequent prosecution. In Fina's view, the key was finding more victims before the case was charged." *Id.* at Appendix, P. 59-60.

h. The investigation continued to stall through the summer of 2010 because the prosecution was not able to identify any other victims. *Id.* at Appendix, P. 59-64. ("Between Fina's August 12 [2010] admonition that the investigation 'must do everything possible to find other victims' and the end of October [2010], the investigation did not succeed in identifying any new victims.").

i. The investigation had completely stalled until a November 3, 2010, anonymous email to Centre County Assistant District Attorney Stacy Parks Miller suggested investigators interview Michael McQueary. *Id.* at Appendix, P. 66.

j. Despite McQueary coming forward, no additional witnesses were presented to the Thirtieth Statewide Investigating Grand Jury by the time its term expired in January 2011, and the case was again referred to the Thirty-Third Statewide Investigating Grand Jury. *Id.* at Appendix, P.71.

k. On March 31, the Harrisburg Patriot-News and the Centre Daily Times published a story written by Sara Ganim providing details of the supposedly confidential investigation. *Id.* at Appendix, P.73.

l. The Moulton Report credits the Ganim story with opening the floodgates of the investigation, stating "The publication of Ganim's story had two almost immediate consequences. First, it raised within the investigation the alarming

prospect of a leak of grand jury information. Second, it generated two significant leads on additional criminal conduct by Sandusky." *Id.* at Appendix, P. 74.

m. Specifically, according to the Moulton Report, Ronald Petrosky called the Pennsylvania State Police on the afternoon the Ganim article was published, stating that he had information relevant to the case. *Id.* at Appendix, P. 74-75.

n. In the aftermath of Ganim's report, the "investigation continued to gain momentum," including:

   i. The Office of Attorney General assigned additional agents to the investigation;

   ii. Attorney Benjamin Andreozzi contacted investigators claiming to represent a new alleged victim of abuse, B.S.H.;

   iii. Additional alleged victims appearing before the grand jury, including D.S. and M.S.

o. Additionally, Attorney Fina sought and received an order from Judge Feudale prohibiting the witnesses who testified on or after April 14, 2011 from disclosing "the fact or substance of their testimony" to anyone other than the witness's attorney. *Id.* at Appendix, P.77-78.

229. The indisputable chain of facts shows that the Commonwealth's case, which had remained essentially stalled since it opened in May 2009, rapidly advanced in the summer of 2011 after the fact of the investigation was leaked to Ganim.

230. Moreover, there is evidence that Sara Ganim directly contacted Deb McCord, mother of Z. K. and told her she should reach out to investigators. Specifically, on March 30, 2011, Corporal Joseph Leiter wrote a report detailing a conversation with Ms. McCord, stating:

> On Thursday, March 24, 2011, I received a telephone call from Deb McCord relative being again contacted by Sara Ganim, Harrisburg Patriot News, apologizing for not writing the Jerry Sandusky article earlier as she had previously told McCord she would do but that she was going to print the article over the weekend of March 26 and Ganim was calling McCord to see if she wanted to add anything to her previous statements. McCord advised Ganim that she did not make any previous statement and that she had nothing to speak to her about. Ganim then told McCord that the State Police were not going to do anything with this investigation and that Ganim was providing McCord with an opportunity to have her story told. Again McCord advised Ganim that she had nothing to say to her and hung up.
>
> On Monday, March 28, 2011 I received a telephone call from Deb McCord who related that she had received a text message from Sara Ganim on this date at 0930 hours. Ganim said in the text, "Debra. It's Sara from the Patriot. I just want to pass along this agent's name and number. The attorney general has expressed interest in helping you." McCord did not respond. A copy of this text is attached to the station copy of this report.

A copy of Corporal Leiter's report is attached hereto at Appendix, P. 458.

231. Defendant believes and therefore avers that the leaking of the information, during the time that the Commonwealth's investigation had stalled, was a deliberate act by the prosecution and its agents, or other agents of the Thirtieth and/or Thirty-Third Statewide Investigating Grand Jury to advance the investigation and spur other alleged victims to come forward.

232. Indeed, Eshbach had expressly stated that the prosecution was unlikely to identify any additional witnesses until the investigation became public. *See* Moulton Report at Appendix, P.54.

233. The leak of grand jury information had the express result that Attorney Fina desired, in that additional witnesses came forward before the Commonwealth filed charges against Mr. Sandusky.

234. The leak of grand jury information, in violation of the "secrecy" required, prejudiced Sandusky and created an incentive for people to fabricate accounts of abuse because of the attention drawn to the investigation and a thirst for financial reward.

235. Sandusky is unaware of any evidence that the supervising judge of both the Thirtieth and Thirty-Third Statewide Investigating Grand Jury, or anyone else, took any steps to investigate the leak.

236. While the fact that someone leaked details of the investigation to Sara Ganim was known to the defense upon publication of Ganim's article, the entire scope of the leak and how it impacted the investigation was not known and could not have been discovered by trial counsel until the Moulton Report was published.

237. Moreover, it is apparent that this case is one more example of how the investigating grand jury system has irreparably broken down in Pennsylvania by irresponsible prosecutors and lack of oversight by supervising judges. Indeed, the citizens of Pennsylvania are now being confronted with the unseemly spectacle of leaks from a current investigating grand jury charged with investigating leaks from another investigating grand jury. *See* Wallace McKelvey, *Kathleen Kane Should Be Charged in Connection with Leaks, Grand Jury Says: Report*, Harrisburg Patriot-News, January 8, 2015, *available at* *http://www.pennlive.com/politics/index.ssf/2015/01/kathleen_kane_leaked_secret_in.html*. *See* Appendix, P. 459.

238. Recently our Supreme Court has reaffirmed the inherent power of the supervising judge of the Grand Jury to investigate leaks and indeed has a duty to do the same. In the case of *In Re: The Thirty-Fifth Statewide Investigating Grand Jury; Petition of: Attorney General*

Kathleen G. Kane No. 197 MM 2014 decided March 31, 2015, the Supreme Court, at Page 3 citing *In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa, 296, 19 A.3d 491 (2011):

> There, this Court recently observed that "[t]he very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings" and indicated that, "[w]hen there are colorable allegations or indications that the sanctity of the grand jury process has been breached those allegations warrant investigation, the appointment of a special prosecutor to conduct such an investigation is appropriate." *Id.* at 318, 19 A.3d at 503-04. Further, the supervising judge commented:
>
> > The Supervising Judge of a Statewide Investigating Grand Jury must have inherent authority to investigate a grand jury leak, when there is a conflict of interest as there is here. Clearly, Attorney General Kane could not investigate herself. Otherwise potentially serious violations of grand jury secrecy could go unaddressed. *Id. at Page 4*

239. The Supreme Court in *Kane, supra,* also quoted Judge Carpenter's opinion in *In re Thirty-Fifth Statewide Investigating Grand Jury,* No. 2644-2012:

> A supervising judge of an investigating grand jury must possess [the] inherent power to enforce the traditional rule of secrecy over grand jury proceedings because of the very nature of those proceedings. *Id.* at Page 6

240. The Supreme Court in *Kane, supra* also noted:

> As to the merits of the *quo warranto* challenge, we observe that, via the Investigating Grand Jury Act, the Legislature has charged supervising judges with the substantial responsibility of maintaining the required confidentiality of grand jury proceedings, on pain of contempt sanctions. *See* 42 Pa.C.S. §45499(b). *Id. at Page 9*

241. The Supreme Court in *Kane, supra* further stated:

> Although a supervising judge, in his or her discretion, may regard a historical breach in a different light than a present one, both are equally affronts to the dominant and ongoing requirement of confidentiality which supervising judges are charged with enforcing. *Id. at Page 13.*

242. Based on the foregoing, very recent opinion of the Pennsylvania Supreme Court, it is clear that, to the extent the investigating grand jury system had been abused by unauthorized leaks, it falls on the role of the supervising judge to monitor for abuses and in the appropriate case appoint a special prosecutor; however, in the present case, the supervising judge did not appoint a special prosecutor. Indeed, from the record, it appears that the supervising judge apparently did nothing with respect to the leaks.

243. There is authority that holds that in circumstances where there is concern about the leaking of information from a supposedly secret grand jury proceeding, there should be at least an evidentiary hearing into the source of the leaks and the prejudice the defendant suffered. *See In re Grand Jury Investigation (Appeal of Lance)*, 610 F.2d 202 (5th Cir. 1980); *Commonwealth v. Schwartz*, 115 A.2d 826 (Pa.Super. 1955); *Commonwealth v. Wecht*, 20 Pa. D. & C.3d 627 (C.P. Allegheny County February 27, 1981).

244. In *Wecht*, the Court adopted the five-point test set forth in the Fifth Circuit decision *Lance* which requires an examination of: (1) a clear indication that media reports disclosed information about matters occurring before the grand jury; (2) the articles must indicate that the source of the information is one of the parties who is not permitted to disclose such information under 42 Pa.C.S. § 4549(b)[19]; (3) in determining if a prima facie case to

[19] 42 Pa.C.S. § 4549 states

> **Disclosure of proceedings by participants other than witnesses.**--Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Commonwealth for use in the performance of their duties. The attorneys for the Commonwealth may with the approval of the supervising judge disclose matters occurring before the investigating grand jury including transcripts of testimony to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to

warrant a hearing exists, the court must assume that the statements in the news report are requested; (4) the nature of the requested relief must be balanced; and (5) the court should "weigh any evidence presented by the prosecution to rebut the assumed truthfulness of reports which may otherwise make a prima facie case of misconduct." 20 Pa. D.& C.3d at 639-40.

245. It is also generally accepted in federal court that prosecutorial misconduct in a grand jury proceeding may warrant dismissal of an indictment if the defendant suffers actual prejudice by the misconduct. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228, (1988).

246. In *Bank of Nova Scotia*, the Supreme Court held that "a federal court may not invoke supervisory power to circumvent the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).[20]" *Id.* at 254, 108 S.Ct. at 2374, 101 L.Ed.2d at 237.

247. The Court further stated, "[W]here dismissal is sought for nonconstitutional error ... dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256, 108 S.Ct. at 2374, 101 L.Ed.2d at 238 (*quoting United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 946, 89 L.Ed.2d 50 (1986)).

248. Finally, the Court recognized, however, that prejudice to a defendant may be presumed where "the structural protections of the grand jury have been so compromised as to

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secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret.

[20] Rule 52(a) of the Federal Rules of Criminal Procedure outlines the federal court's obligation to conduct a harmless error analysis.

render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257., 108 S.Ct. at 2374, 101 L.Ed.2d at 238 (internal citations omitted).

249. Moreover, Sandusky notes that the principles underlying the exclusionary rule, as set forth in *Commonwealth v. Edmunds*, 586 A.2d 887, (Pa. 1991)

250. In Pennsylvania, the purpose of the exclusionary rule is, largely, "the safeguarding of privacy," *id.* at 899, in addition to the deterrent effect the rule has on police misconduct.

251. Here, the investigating grand jury system was abused so fundamentally that the only proper remedy is to exclude all evidence derived from the grand jury, including all the witnesses who came forward after the leak to Sara Ganim.

252. In the present case, in light of the Moulton Report's indication that the leak of the grand jury material is what drove the case from being a flawed case with a single unreliable victim to the litany of alleged victims with varying stories of abuse, it is clear that Sandusky was prejudiced by the leaking of grand jury material.

253. Under the test set forth in *Wecht*, the Ganim report clearly disclosed information about matters occurring before the grand jury.

254. Ganim's article does not disclose on its face that the source of the information is one of the persons proscribed from disclosing the investigation under § 4549(b), but Sandusky should be entitled to a hearing and limited discovery on this question.

255. Third, if the Court assumes that the statements in the Ganim report were true, then a prima facie case of improper leak is patently obvious on the face of the Ganim report.

256. Fourth, dismissal of the charges against Sandusky is the appropriate remedy, as Defendant believes and avers that the Commonwealth would not have identified victims 3-10

without the grand jury leak to the media. Defendant also believes and avers that the Commonwealth may have intentionally leaked the grand jury investigation as a last-ditch effort to attempt to identify more victims, and to bolster the case relating to Victim #1 that the internal supervisors in the Office of Attorney General believed was too weak to stand on its own.

257. Finally, it is undeniable that the leak of the grand jury investigation directly contributed to the "lynch mob" mentality that grew in Centre County and contributed to the prejudicial atmosphere that warranted a delay in trial under *Sheppard*, *supra*. This toxic environment only worsened after the Presentment was released with patently false information relating to Michael McQueary, as referenced *supra*.

258. Fifth, Defendant believes and avers that the Commonwealth cannot present any evidence establishing that the Ganim report was not true, as the trial ultimately disclosed that the report was, in fact, accurate.

259. Accordingly, as set forth in *Wecht*, *supra*, the charges against Mr. Sandusky relating to victims 3-10 should all have been dismissed.

260. Moreover, evidence obtained in violation of a defendant's constitutional rights is excluded as the fruit of the poisonous tree. *See Commonwealth v. Hess*, 666 A.2d 705 (Pa. Super. 1995), *appeal denied*, 674 A.2d 1067 (Pa. 1996).

261. The leak to Sara Ganim unconstitutionally violated Sandusky's due process right to a fair trial.

262. As stated above, Defendant believes that the leak to Sara Ganim may have been a deliberate effort by the Commonwealth to "shake the tree" to encourage other alleged victims to come forward. The alleged victims who came forward as a result of the leak are the fruit of that poisonous tree, and all charges relating to those victims should be dismissed.

263. Since the allegations relating to Victims 3-10 should never have been presented to a jury, Sandusky is entitled to a new trial on the charges relating to Victims 1 and 2, as it is impossible to delineate how the prejudicial impact of the improperly admitted evidence bled through and bolstered the case as to Victims 1 and 2.

264. Additionally, given how this case illustrates the continued breakdown of the grand jury process, filled with serial leaks and a general lack of the secrecy required, "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia, supra.*

265. The supervising judge should have exercised his supervisory authority as explained in *Bank of Nova Scotia, supra.* He failed to do so.

266. Inexplicably, trial counsel failed to preserve the issue of the inherent prejudice Sandusky suffered as a result of what, on information and belief, appears to be prosecutorial misconduct.

267. There is at a minimum, a genuine issue of material fact as to whether:

a. The prosecution intentionally leaked secret grand jury materials to "shake the tree" and see if more victims would come forward or for any other reason;

b. Whether Sandusky's right to a fair trial was tainted by the inappropriate leak;

c. Whether the extreme prejudice Sandusky suffered due to the fundamental breakdown in the Pennsylvania grand jury process warranted a dismissal of all charges; and

d. Whether trial counsel could have raised this argument before trial, or if the information was not able to be discovered until the issuance of the Moulton Report after Sandusky's conviction.

268. As a result, Sandusky respectfully requests this Court order a hearing to investigate the nature and extent of the leaks, and whether the leaks were prosecutorial misconduct that warrant relief under the Post Conviction Relief Act.

269. If a citizen who is charged with a crime cannot challenge the process through which he is charged, then who will? As stated by our current Attorney General, Kathleen Kane, "I am fighting for an end to abuse of the criminal justice system. If this can be done to me as attorney general, the chief law enforcement officer of the fifth-largest state in the country, I am sickened to think what can and may be done to regular, good people." *See* Angela Couloumbis and Craig R. McCoy, "AG Kane Faces Grand Jury Challenge," *Pittsburgh Post-Gazette*, January 5, 2015, *available at* http://www.post-gazette.com/news/state/2015/01/05/Pennsylvania-Attorney-General-Kane-faces-grand-jury-challenge/stories/201501050093. A copy of the Couloumbis and McCoy article is attached hereto at Appendix, P. 460.

2. Trial Counsel Was Ineffective For Failing to Interview Any Witnesses Who Testified to the Grand Jury

270. Trial counsel in this case did not interview any of the alleged victims who testified before the grand jury.

271. Upon information and belief, trial counsel failed to interview the witnesses because he believed he was not permitted to speak with those witnesses.

272. Under 42 Pa.C.S. § 4549, the supervising judge of the investigating grand jury may only enter a secrecy order in limited circumstances. Section 4549(d) states:

> (d) **Disclosure of proceedings by witnesses.**--No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney.

42 Pa.C.S. § 4549(d).

273. According to the Moulton Report, "On April 14, before the Grand Jury began to hear testimony for the day, Fina sought and received a protective order from the supervising grand jury judge directing the witnesses not to disclose the fact or substance of their testimony to anyone other than their own attorneys." Moulton Report at Appendix, P. 77.

274. If trial counsel's belief that he could not interview the victims was based on the grand jury secrecy order, that belief is patently unreasonably and mistaken.

275. The facts to which the witnesses testified in the grand jury are not protected from disclosure, and the Commonwealth may not prevent witnesses from speaking with defense counsel or investigators *in toto*. *See Lewis v. Lebanon Court of Common Pleas*, 260 A.2d 184 (Pa. 1969).

276. The Pennsylvania Supreme Court has recognized, "Counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary." *Commonwealth v. Johnson*, 966 A.2d at 535 (*citing Commonwealth v. Basemore*, 744 A.2d 717, 735 (Pa. 2000)).

277. As the Court stated in *Johnson*, "The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance." *Id.* at 535-36.

278. Moreover, the appellate courts in Pennsylvania have stated that a decision by trial counsel is not reasonable where it is based on a misunderstanding of the law governing the proceedings. *See Commonwealth v. Hyeneman*, 622 A.2d 988, 991 (Pa. Super. 1993) (trial counsel ineffective for failing to object to reference to defendant's post-arrest silence because he did not hear the objectionable testimony); *Commonwealth v. Moore*, 715 A.2d 448, 452 (Pa. Super. 1998) (trial counsel ineffective for introducing defendant's criminal history on mistaken interpretation of law); *Commonwealth v. Hull*, 982 A.2d 1020 (Pa. Super. 2009) (trial counsel ineffective when decision not to call character witnesses based on a misunderstanding of the role of character evidence in defense).

279. Indeed, the Superior Court has held that counsel can claim no reasonable strategy for failing to interview eyewitnesses prior to trial. *See Commonwealth v. Matias*, 63 A.3d 807 (Pa. Super. 2013) (holding no competent attorney would have failed to interview an alleged witness to a sexual assault).

280. Sandusky was irreparably prejudiced by trial counsel's in this regard, as the defense was unprepared to cross-examine these witnesses at trial, leaving Sandusky without effective representation to cross-examine these critical witnesses. *See Johnson*, *supra*; *Matias*, *supra*.

281. Had counsel interviewed any of the alleged witnesses prior to trial, there is a reasonable probability that the outcome of the proceedings would have been different, as trial counsel could have elicited some information that would have impeached the witnesses on cross-examination, or obtained further conflicting statements from the witnesses. At the very minimum, counsel would have been prepared to conduct a probing cross-examination of the

alleged victims instead of simply allowing them, and indeed encouraging them to bolster their direct testimonies.

282. Trial counsel's failure to do so was an effective abandonment of Sandusky's defense because trial counsel was unprepared for trial.

283. Defendant requests an evidentiary hearing to explore trial counsel's reasons for failing to interview these critical witnesses.

284. Moreover, to the extent trial counsel failed to interview the witnesses is based on a mistaken reading of the secrecy order, Defendant submits that it is ineffective assistance of counsel to fail to seek clarification or interlocutory appeal of that order. Therefore, Defendant also requests an evidentiary hearing to inquire as to why trial counsel failed to seek clarification on the secrecy order or an interlocutory appeal of the secrecy order at any time, including after charges were filed against Mr. Sandusky.

285. Accordingly, this court must conclude that trial counsel was ineffective for the misinterpretation of Judge Feudale's order, the petition must be granted, and Sandusky must be awarded a new trial.

3. *The Supervising Judge of the Grand Jury and the Commonwealth Acted in Concert to Deprive Defendant of Relevant Exculpatory Evidence Under Brady v. Maryland*, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

286. In preparing for trial in this matter, trial counsel made a discovery request of the supervising judge of the grand jury to view exhibits that were entered and utilized during the grand jury investigation.

287. Attorney Karl Rominger will testify that the supervising judge informed him that none of the exhibits entered or utilized in the grand jury were exculpatory under *Brady v. Maryland*, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

288. *Brady* material is not limited only to exculpatory evidence; rather, evidence that tends to go towards impeaching the prosecution's witnesses must also be disclosed under *Brady*. *See Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000).

289. In the present case, the Commonwealth did not disclose a single exhibit used during the testimony of any of the grand jury witnesses, on the basis of the supervising judge's unilateral determination that none of the evidence was exculpatory.

290. Defendant avers that it was improper for the supervising judge to make this *ex parte* determination, as he was not privy to the defense theory of the case to know whether any of the evidence could have been relevant exculpatory evidence or impeachment material under *Brady*.

291. Since none of the grand jury exhibits were disclosed, Defendant submits that extraordinary circumstances exist under Pa.R.Crim.P. 902(E)(1), such that discovery is warranted to determine if any exculpatory or relevant, material impeachment evidence should have been disclosed.

292. The failure to disclose <u>any</u> of the grand jury exhibits in this matter amounts to a deprivation of Defendant's due process rights under *Strong*, *supra*.

293. Accordingly, Defendant requests discovery of the grand jury exhibits to determine if material impeachment or exculpatory evidence was not disclosed to the defense prior to trial in this case.

294. Additionally, trial counsel and direct appellate counsel were ineffective for failing to preserve this issue in pretrial motions, during post sentence motions, or on direct appeal.

F. Trial Counsel Provided Ineffective Assistance of Counsel by Failing to File a Motion *in Limine* and Seek a Hearing on Repressed and Manufactured Memory and the Effect of Suggestive Questioning.

295. Pennsylvania Rule of Evidence 403 states, "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403.

296. In the present case the alleged victims had given multitudes of inconsistent statements throughout the course of the investigation during interviews, grand jury testimony, media accounts, and ultimately at trial.

297. The variety of inconsistent statements rendered these witnesses' testimony so unreliable that any probative value of the testimony was significantly outweighed by the prejudice suffered by the defense.

298. The Rules of Evidence provide that the trial court must decide preliminary questions about whether a witness is qualified or if evidence is admissible, preferably in a hearing outside the presence of a jury. Pa.R.E. 104.

299. Moreover, any witness may be disqualified and deemed incompetent if, *inter alia*, the witness has "an impaired memory." Pa.R.E. 601(b)(3). As the official comment to Rule 601 states, "The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104." Pa.R.E. 601, cmt. The Pennsylvania appellate courts have ruled that expert testimony is permitted to assist the court in ruling if competency under Rule 601 is an issue. *Id. See also Commonwealth v. Baker*, 353 A.2d 454 (Pa. 1976); *Commonwealth v. Gaerttner*, 484 A.2d 92 (Pa. Super. 1984).

300. In the present case, the witnesses' testimony concerned issues of "repressed memories," *see e.g.,* N.T. Trial, June 11, 2012, at 162, 168 (Appendix, P. 462); June 12, 2012, at 71 (Appendix, P. 464); June 13, 2012 at 146, 152 (Appendix, P. 465); June 14, 2012 at 122 (Appendix, P. 467).

301. Morcover, there was a question as to whether the "memories" in this case were manufactured for financial motive or the product of serial suggestive interviews by law enforcement and other authorities from the Clinton County Office of Children, Youth, and Families.

302. On April 5, 2011, following the leaking of the grand jury investigation to Sara Ganim, Victim #4's attorney, Ben Andreozzi, met with investigators and told them he had a client who may have information relevant to the case.

303. On April 7, 2011, Victim #4 and Attorney Andreozzi met with Pennsylvania State Police and gave some statements, though the content of those initial statements is unknown.

304. On April 21, 2011, Victim #4 again met with investigators and described conduct of inappropriate touching, but he denied that oral sex or any penetration occurred.

305. On May 19, 2011, Victim #4 testified to the grand jury, and his story cascaded to include tales of oral sex, an attempted anal penetration and two attempts at digital penetration. *See* N.T. Grand Jury, May 19, 2011, testimony of Brett Swisher-Houtz at 25-32, 53-60, 85-88 at Appendix, P.698.

306. This progression is important, as the investigators recorded the April 21, 2011, interview with Victim #4. During a break in the interview, when the police believed the recorder was off, the police disclosed circumstances of other assaults to Victim #4, and they told him,

"We need you to tell us this is what happened." Indeed, Corporal Leiter spoon fed details of the investigation to Victim #4 and Leiter's suggested testimony for Victim #4 stating

> We interviewed about nine. Again, I called them kids. I apologize. Nine adults we have interviewed and you're doing very well. It is amazing if this was a book, you would have been repeating word for word pretty much what a lot of people have already told us. It is very similar. A lot of things you have told us is very similar to what we have heard from the others and we know from listening to these other young adults talk to us and tell us what has taken place that there is a pretty well-defined progression in the way that he operated and still operates I guess to some degree and that often times this progression, especially when it goes on for an extended period of time, leads to more than just touching and feeling. That's been actual oral sex that has taken place by both parties and there's – we unfortunately found that there's been -- classifies as a rape has occurred and I don't want you to feel that again. As Trooper Rossman said, I don't want you to feel ashamed because you're a victim in this whole thing. What happened happened. He took advantage of you but when I -- when we first started, we talked and we needed to get details of what took place. So these type of things happened. We need you to tell us this is what happened. Again, we are not going to look at you any differently other than the fact that you are a victim of this crime, and it is going to be taken care of accordingly. But we need you to tell us as graphically as you can what took place as we get through this whole procedure. I just want you to understand that you are not alone in this. By no means are you alone in this.

See N.T. Trial, June 19, 2012 at 57-58 at Appendix, P.468.

307. This portion of the interview was not supposed to be recorded. *See id* at 83, 99-100, Appendix, P. 470.

308. Moreover, this is also consistent with Corporal Leiter's conversation with Attorney Andreozzi prior to the unintentional recording, which was recounted during Corporal Leiter's cross-examination as follows:

> Q. I'm going to read part of that. We'll play the tape after we have a chance to set it up but a comment was made that purported to you, has your initial on it, Mr. Andreozzi asked you

> during the course that you have a witness that's conveyed and your response was we have two that have seen him. We can't find the victim but he may be in there. And then Andreozzi, the attorney, says oh you're kidding. The time frame matches up. Can we at some point in time say to him, listen, we have interviewed other kids and other kids have told us there was intercourse and they have admitted it. You know, is there anything else that you want to tell us?
>
> Purportedly your responses [SIC] was, yeah, we do that with all the other kids. Say, listen, this is what we found so far. You fit the same pattern of all the other ones. This is the way he operates and we know the progression of the way he operates and the other kids we dealt with have told us that this happened after this has happened that. Did that happen to you?
>
> Do you recall that conversation back and forth with Mr. Andreozzi?
>
> A. I don't recall it but if it's been recorded, it's there.

N.T. Trial, June 19, 2012, at 55-56 (Appendix, P. 473-74).

309. This case marks the rare occasion where the defense had audio recording where the Commonwealth planted the seed for Victim #4's ultimate testimony. The testimony greatly conflicted with all of his prior interviews and statements, but yet Victim #4's ultimate trial testimony lined up exactly with the details that Corporal Leiter provided to him.

310. This fact pattern is consistent with the other victims as well. To wit:

a. Victim #1 gave statements in 2008 that no direct sexual activity occurred; after six months of interviews, Victim #1 claims that oral sex occurred. A copy of Jessica Dershem's Child Protective Services Investigation Report dated November 20, 2008, is attached hereto at Appendix, P. 475. In the grand jury testimony on November 16, 2009, Victim #1 denies that oral sex occurred until the prosecutor reminded Victim #1 that he previously stated it occurred. *See* Transcript of Grand Jury, November 16, 2009, at pgs. 2-9, Appendix, P. 703. Thus, Victim #1's story began with not being uncomfortable with Sandusky to

claims of giving and receiving oral sex. Victim #1 further specifically admits that his "memories" developed as his therapist, Mike Gillum, asked suggestive questions. *See* Aaron Fisher, *Silent No More*, at p. 71 at Appendix, P. 481.

b. Victim #2 was interviewed in September 2011, and confirmed that there was never any inappropriate contact between he and Sandusky. A copy of Corporal Joseph Leiter's Pennsylvania State Police Report dated September 22, 2011, is attached hereto at Appendix, P. 436. Additionally, he indicated that he was uncomfortable with his feeling that the Pennsylvania State Police were trying to put words in his mouth, and that the police became angry when he did not respond the way they hoped he would. A copy of Victim #2's Interview with Joseph Amendola, dated November 9, 2011, is attached hereto at Appendix, P. 433. After several more interviews, in March 2012 Victim #2 claims he was abused at some point. A copy of Inspector M. J. Corricelli's Memorandum of Interview, dated March 8, 2012, is attached hereto at Appendix, P. 441.

c. Victim #3 was first interviewed on July 19, 2011, and he denied that any inappropriate or sexual contact occurred. A copy of Trooper Mark Yakicic's Pennsylvania State Police Report, dated July 19, 2011, is attached hereto at Appendix, P. 482. On August 18, 2011, he stated that some inappropriate contact occurred, but there was no abuse. *See* Transcript of Grand Jury, August 18, 2011 at pgs. 10-14, 17-19, 21-23, Appendix, P. 706. When Victim #3 testified at trial, he claimed of the 50 nights he spent at the Sandusky residence, sexual contact occurred on almost every occasion. N.T. Trial, June 14, 2012, at 108 at Appendix, P. 483.

d. Victim #5 was first interviewed in June 2011, and denied any oral sex occurred one time they showered together, but that Mr. Sandusky forced Mr. Kajak to touch Mr. Sandusky's penis. A copy of Trooper Scott Rossman's Pennsylvania State Police report dated June 9, 2011, is attached hereto at Appendix, P. 484. In November 2011, the story escalated to Sandusky forcing Mr. Kajak to touch Mr. Sandusky's penis and Mr. Sandusky also putting his hands on Mr. Kajak's genitals, but that no oral sex occurred. A copy of Corporal Leiter's Pennsylvania State Police report, dated November 10, 2011, is attached hereto at Appendix, P. 487. After several interviews and the publicity swell, Victim #5 testified at trial that Mr. Sandusky assaulted him in a sauna. Mr. Sandusky was acquitted of the charge of indecent assault relating to Victim #5.

e. Victim #6 was initially interviewed in 1998 and stated that no inappropriate contact occurred. A copy of the Victim #6 interview with Ronald Schreffler, dated May 4, 1998, is attached hereto at Appendix, P. 488. In January 2011, Victim #6 was interviewed again, and he denied that any sexual contact occurred. In June of 2011, Victim #6 testified to the grand jury that although Sandusky made him uncomfortable, they did not have sexual contact. *See* N.T. Grand Jury, June 17, 2011, at 11-21 at Appendix, P. 720. The denials continued until Victim #6 testified at trial, when he claimed to have been assaulted. *See* N.T. Trial, June 14, 2012, at 8, 15-17, and 26-27 at Appendix, P. 507.

f. Victim #7 was first interviewed in February 2011, and he stated that Sandusky never actually touched his genitals. A copy of Corporal Leiter's Pennsylvania State Police report, dated February 4, 2011, is attached hereto at Appendix, P 513.

When he testified to the grand jury in April 2011, he stated he recalled no actual sexual contact. At trial, Victim #7 testified that memories that were essentially repressed were being recovered, and that he now recalled Sandusky assaulted him as well. *See* N.T., Trial, June 13, 2012, at 95, 98, 101-103, 105-113, 116, 118-119, 140-146, 152, and 155 at Appendix, P. 515.

g. Victim #9 was first interviewed in November 2011, and denied being sexual with Mr. Sandusky. A copy of Christina Short's written statement regarding Victim #9 is attached hereto at Appendix, P 541. In December 2011, he testified to the grand jury that he engaged in oral sex with Sandusky, but not anal intercourse, although Mr. Sandusky attempted anal intercourse.[21] See Transcript of Proceedings of Grand Jury, dated December 5, 2011, Witness Sebastian Paden, at 17-20, 31-32, Appendix, P. 715. At trial, Victim #9's story evolved to include an allegation that he and Sandusky actually engaged in anal intercourse. *See* N.T., Trial, June 14, 2012, at 217-18, 221, 232-33, 236, and 245 at Appendix, P. 545.

a. Victim #10 was first interviewed in November 2011, and he claimed that Sandusky asked for oral sex, but he refused. A copy of the Office of Attorney General Investigative Report Supplemental 53, dated November 29, 2011, is attached hereto at Appendix, P. 552. By the time Victim #10 testified at trial, he claimed multiple instances of oral sex and digital manipulation that he did not disclose during interviews. *See* N.T. Trial, June 13, 2012, at 32, 41-42, 46, 49-50, 52, 56-59, and 63-67 at Appendix, P. 554.

[21] Notably, this was the first time a witness had testified to any attempted anal intercourse with Mr. Sandusky, and this testimony only occurred after the Presentment was issued with the inaccurate information that Michael McQueary witnessed anal intercourse.

311. The history of how the stories evolved due to continued interviews was consistent with essentially all of the witnesses against Sandusky. With the inadvertent recording of the interview with Victim #4, it is clear that on at least one documented occasion, law enforcement officers were engaged in suggestive interviewing that tainted the victims' testimony.

312. Trial counsel possessed this information before trial, nevertheless, counsel did not file a motion *in limine* to present expert testimony and have the Court make the initial determination as to whether the purported victims' statements were the result of improper suggestive interviewing.

313. Moreover, the timeline above establishes that most of these alleged victims did not come forward with stories of alleged abuse until after the leak of grand jury investigation to Sara Ganim, and some did not occur until after Sandusky's arrest.

314. Given the national press attention to Sandusky case, the ongoing lawsuits against Penn State University, and the book contracts that several of the purported victims' received, the motive to fabricate was so significant that trial counsel should have sought a judicial hearing with sworn testimony to explore the financial motives the witnesses may have had to fabricate their testimonies, including any contingent fee agreements with plaintiffs' lawyers. [22]

315. Trial counsel should have sought a hearing at which expert testimony on the reliability and competency would have been presented for the Court to at least make the initial determination of competency and reliability.

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[22] At trial, Attorney Andreozzi testified that his practice largely consisted of representing crime victims in civil lawsuits. N.T. Trial, June 19, 2012 at 71-72, Appendix P. 570. Moreover, upon information and belief Victims #2, 3, 7, and 10 were all represented by Attorney Andrew Shubin, who may have also had a financial incentive in recruiting claimants against Sandusky. Petitioner believes and therefore avers that Attorney Shubin, as well as the attorneys representing all of the other victims, received payment as a result of civil settlements with Penn State University, and Sandusky requests an evidentiary hearing to determine if the taint and interference with the witnesses extended to their civil counsel.

316. In *Commonwealth v. Nazarovitch*, 436 A.2d 170 (Pa. 1981), the Pennsylvania Supreme Court recognized the importance of having the trial court make the preliminary determination of whether evidence concerning a repressed or recovered memory is sufficiently reliable to permit admission at trial in the case of testimony "recovered" by hypnosis.

317. The Supreme Court of the United States has acknowledged that certain circumstances warrant a court's pretrial assessment of a witness's reliability as a predicate to admissibility of evidence. *See, e.g., Jackson v. Denno*, 378 U.S. 368 (1964) (authorizing a pretrial determination as to whether a defendant's confession was voluntary); *Manson v. Brathwaite*, 432 U.S. 98 (1977) (pretrial hearing into reliability of identification in cases involving suggestive lineups).

318. In the present case, the suggestive interviewing by law enforcement and the Clinton County Office of Children, Youth, and Family caseworkers, combined with the witnesses' evolving tales warranted a pretrial hearing into whether the evidence was even reliable before a fact finder could pass on the question of credibility.

319. Given the overwhelming number of prior inconsistent statements by the witnesses, trial counsel should have filed a motion *in limine* asserting that the purported victims' testimonies were precluded by Pa.R.E. 403, for the following reasons:

a. Due to faulty or impaired memory, the witnesses' competency was at issue, and the trial court should have passed on the preliminary question of whether the witnesses were competent to testify;

b. Due to the contradictory statements, viewed in the context of the cascading descriptions of illegal conduct that combined with continued suggestive interviewing by law enforcement, the witnesses' testimony was

sufficiently unreliable that the trial court should make the initial determination under *Nazarovitch*, *supra*;

c. With the strong financial incentives for the witnesses to pursue private action against Penn State University, the trial counsel should have requested a hearing to determine if the witnesses' motivation to fabricate their tales rendered their testimonies far more prejudicial than probative, warranting exclusion under Pa.R.E. 403.

320. This claim is clearly of arguable merit, based on the development of the interviews and testimony of the witnesses and the clearly suggestive statements made on the tape to Victim #4. *See also State v. Michaels*, 642 A.2d 1372 (N.J. 1994)

321. Trial counsel's failure to at least file the motion *in limine* and request a hearing to develop the record on these issues lacks any reasonable strategic basis.

322. There is a reasonable probability that the outcome of the trial in this case would have been different, as a hearing on this issue would likely have excluded the testimony of at least some of the purported victims, if not all, leaving the Commonwealth with no evidence on numerous charges.

323. Further, Defendant submits that the Commonwealth's case was built on establishing a pattern or practice by Mr. Sandusky, whereby each victim's credibility was bolstered by other victims' testimonies.

324. Moreover, even if none of the witnesses were excluded, trial counsel, at a minimum, could have obtained relevant evidence for impeaching the witnesses at trial, including the fee arrangements with private counsel, ongoing book contract negotiations, and other evidence establishing a motive to fabricate their testimony. Instead, trial counsel "flew blind" on

cross examining these witnesses without any real evidence to support allegations of motive or bias to cause them to testify falsely.

325. Indeed, despite the assertions of the media and Mr. Sandusky's trial counsel that the evidence against Mr. Sandusky was "overwhelming," once the witnesses' competency and reliability are properly questioned, before even passing on the question of their credibility, the evidence in this case was highly questionable. The Commonwealth's entire case was a house of cards resting on testimony that trial counsel should have exposed as incompetent, unreliable, and inadmissible. The failure to even attempt to do so is inexcusable.

326. As a result, trial counsel was ineffective for failing to file a motion *in limine* and seek the trial court's preliminary ruling on the competency of the witnesses, and Mr. Sandusky is entitled to a new trial.

G. Defendant's Constitutional Right to Impeachment Evidence Was Infringed by the Failure to Disclose the Alleged Victims' Financial Incentives to Testify Against Sandusky, Including Contingent Fee Agreements with Private Attorneys to Pursue Private Litigation Against Penn State University.

327. Upon information and belief, many if not all of the purported victims who testified in this matter have pursued civil lawsuits against Penn State University, with many settling with the University. According to an October 28, 2013, press release from Penn State University, the University reached a settlement agreement with 26 alleged victims for a total settlement amount of $59.7 million. This equates to an average settlement of approximately $2.29 million per victim. *See* Penn State University, *Settlements Announced for Sandusky*

Victims, October 28, 2013, *available at* http://news.psu.edu/story/293049/2013/10/28/administration/settlements-announced-sandusky-victims. A copy of the Penn State University press release is attached hereto at Appendix, P. 572.

328. Defendant believes and therefore avers many if not all of the purported victims' stories regarding alleged abuse by Mr. Sandusky surfaced only after the alleged victims had met with and retained civil counsel to pursue an action against Penn State University.

329. Most purported victims who testified at trial, when questioned, stated that they were represented by attorneys. See, N.T. Trial, June 19, 2012, at 144-45, Appendix, P. 573 (Victim #4); June 12, 2012, at 68-70, 74-75, Appendix, P. 575 (Victim #1); N.T. Trial, June 14, 2012, at 115-119, Appendix, P. 580 (Victim #3); N.T. Trial, June 14, 2012, at 36-37, 45, Appendix, P. 585 (Victim #6); N.T. Trial, June 13, 2012, P 135-141, 145, 152, 155, Appendix, P. 588 (Victim #7).[23]

330. Defendant believes and therefore avers that the civil attorneys worked on contingent fee agreements with the purported victims, whereby the attorneys' fees would be a percentage of the amount recovered from Penn State University.

331. Defendant believes and therefore avers this financial arrangement, including the attorney fee agreements, gave the witnesses a significant financial motive to fabricate their accounts of alleged abuse by Mr. Sandusky.

332. Defendant believes and therefore avers the Commonwealth was aware or should have been aware of evidence relating to the fee arrangements between the witnesses and private counsel, and any other financial incentives the witnesses would have had to fabricate their

[23] Victims #5 and 9 were not questioned as to whether they had attorneys; Victim #10 testified he did not have an attorney. Victim #2 did not testify, and Victim #8 was never identified.

stories. Sandusky avers that this evidence would have been relevant impeachment evidence under *Brady, supra.*

333. Moreover, Victim #1, Aaron Fisher, released his book, *Silent No More*, on October 23, 2012, a mere four months after Defendant's conviction. Nevertheless, trial counsel failed to seek any discovery about Fisher's book contract on cross examination or by subpoena.

334. Defendant submits that the failure to disclose this material constitutes a violation of Defendant's constitutional rights under *Brady*, and therefore he is entitled to a new trial.

335. Trial counsel failed to conduct any pretrial discovery or serve any subpoenas seeking information relating to the witnesses' motivation to fabricate their stories for financial incentive.

336. When trial counsel feebly attempted to cross examine the witnesses about these financial incentives, the witnesses failed to fully and completely testify as to their fee arrangements with counsel. *See* N.T. Trial, June 11, 2012, at 209-17, Appendix, P. 598; N.T. Trial, June 12, 2012, at 68-69, Appendix, P. 607; N.T. Trial, June 13, 2012 at 30, 133-139, 145, 154, Appendix, P. 609; N.T. Trial, June 14, 2012, at 37, 110, 118-19, Appendix, P. 619; and N.T. Trial, June 19, 2012 at 84-85, 146, Appendix, P. 623.

337. Trial counsel's failure to subpoena these records and obtain easily documentable evidence that would impeach the witnesses at trial in this matter lacks any reasonable strategic explanation.

338. There is a reasonable probability that the outcome of the proceedings would have been different if counsel had obtained the agreements, which would have either prevented the witnesses from testifying as to a lack of knowledge of the agreements, or counsel would have

been able to impeach their credibility based on the clear financial incentive to fabricate incidents with Mr. Sandusky.

339. Trial counsel's failure to seek and obtain even this most basic impeachment evidence prejudiced Mr. Sandusky and essentially left the defense without a significant challenge to the witnesses' credibility, and constituted a monumental failure to obtain relevant information.

340. As a result, this Court should grant a new trial on the basis of trial counsel's ineffectiveness in failing to make any effort to obtain easily accessible impeachment evidence.

H. Trial Counsel Was Ineffective For Failing to Object to Improper Opinion Testimony by an Unqualified Expert.

341. At trial in this matter, the Commonwealth elicited the testimony of Jessica Dershem, a caseworker with Clinton County Children and Youth Services. N.T. Trial, June 12, 2012 at 123-24, Appendix, P. 626.

342. During her direct examination, Ms. Dershem testified to numerous unfounded and irrelevant facts, and she was permitted to render an expert "professional" opinion, as well as her own personal opinion, without being qualified or offered as an expert in any particular field of expertise.

343. Specifically, Ms. Dershem testified to the following inadmissible or irrelevant facts:

a. That during her interview with Aaron Fisher, she thought that he was withholding information and lying to her because she believed "he was uncomfortable talking about the incidents." *Id.* 127-129, Appendix, P. 628. Ms. Dershem had no basis to opine as to Mr. Fisher's mental state or thoughts during the interview, and trial counsel should have objected.

b. That Centre County CYF did not send out the usual letter it sends with regard to the investigation involving Aaron Fisher because of a concern of retaliation against Mr. Fisher, despite the lack of any evidence of any threats or factual basis for the alleged concern. *Id.* at 131 at Appendix, P. 631;

c. That she thought certain behavior that Mr. Sandusky admitted to engaging in, though not illegal, was "unusual" – a legally irrelevant and prejudicial fact and belief. *Id.* at 138-39 at Appendix, P. 632;

d. That Trooper Cavanaugh of the Pennsylvania State Police advised her that following the interview with Mr. Sandusky, he believed there was sufficient evidence to charge Mr. Sandusky with indecent assault – a charge that was not filed at the time and amounted to prejudicial, irrelevant hearsay. *Id.* at 159-160 at Appendix, P. 634. Inexplicably, this information came from a leading question from trial counsel;

344. Moreover, Ms. Dershem was permitted to express an expert opinion without having been offered or qualified as an expert in the following matters:

a. Ms. Dershem stated as a "trained professional" that she believed there was an "inappropriate" relationship between a middle aged adult and a small child. N.T. Trial June 12, 2012 at 181, Appendix, P. 636. Not only was Ms. Dershem not offered or qualified to render an expert opinion, the opinion on which the question is based is legally irrelevant, as the charges against Sandusky required proof of more than merely "inappropriate" behavior;

b. The Commonwealth asked Ms. Dershem, "in both [her] professional opinion and personal opinion, does the first portion of those things that I have read to you

wrapped up in Aaron for three years, blowing on his stomach, lying on top, can't honestly answer if my hands were below his pants, sounds like someone who has an inappropriate relationship?" N.T. Trial, June 6, 2012, at 182-183 at Appendix, P. 637. First, Ms. Dershem was not offered as an expert and not qualified to give her "professional opinion" or her personal opinion on any matter at issue, and second, as noted above, the issue of an "inappropriate relationship" was not only legally irrelevant, but highly prejudicial as the entire line of questioning seeks to prejudice Mr. Sandusky with the jury to convict him on the grounds of inappropriate conduct.

345. Despite the clear impropriety of this testimony, the fact that Ms. Dershem was never once offered as an expert witness on any subject, and the fact that she was permitted to state her "professional opinion" without identifying that it was to a degree of reasonable certainty in any field whatsoever, trial counsel failed to object to this highly prejudicial and totally irrelevant line of questioning.

346. By permitting Ms. Dershem to testify as to her faux "expert" opinion, without objection, trial counsel gave significance and weight to the notion that the Defendant could be convicted of "inappropriate" conduct.

347. The Pennsylvania Superior Court has noted that "Pennsylvania Rule of Evidence 701 limits a lay witness's opinion testimony to "those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge[.]" *Cominsky v. Donovan*, 846 A.2d 1256, 1259 (Pa. Super. 2004).

348. Here, Ms. Dershem was presented as a lay witness, but the Commonwealth asked her to present opinion testimony based on her specialized knowledge, training, and experience as a caseworker with the Clinton County office of Children and Youth Services.

349. Had trial counsel made an objection, the outcome of Dershem's testimony would have been different, as the trial court would not have permitted her unfounded expert opinion.

350. Mr. Sandusky was prejudiced because Ms. Dershem was never offered as an expert, but the jury was permitted to consider her as if she were an expert because trial counsel allowed her improper testimony to come in without any opposition.

351. Since trial counsel can have no rational basis for failing to object to this issue, trial counsel was ineffective for failing to object to this issue.

352. Trial counsel and direct appellate counsel failed to preserve this issue in post sentence motions.

353. Trial counsel was ineffective for failing to preserve this issue.

354. Due to trial counsel's ineffectiveness, Mr. Sandusky is entitled to a new trial.

I. Trial Counsel and Direct Appellate Counsel Were Ineffective For Failing to Appeal Sandusky's Convictions Relating to Victim #8 as Lacking Sufficient Evidence.

355. In post-sentence motions, trial counsel raised a vague, boilerplate allegation that the evidence against Sandusky was insufficient to sustain the guilty verdicts.

356. Nevertheless, especially with respect to the charges relating to Victim #8, direct appellate counsel failed to raise a claim on appeal that those convictions were supported by insufficient evidence. To-wit, Sandusky was convicted on the hearsay statement of a witness whom the Commonwealth made no showing of unavailability, despite the fact that the witness

later stated in an interview with the police that the perpetrator in the alleged assault was not Jerry Sandusky. *See* Section IV.J., *infra*.

357. Moreover, no victim ever came forward and asserted that Sandusky committed this assault against him in the incident to which Mr. Petrosky testified.

358. The conviction, based on a statement that was either recanted or contradicted by the witness who provided the only evidence against him, Mr. Calhoun, clearly lacked sufficient evidence to be sustained by the Superior Court.

359. Indeed, the trial court expressly recognized the potential problem with the convictions relating to Victim #8 in his sentencing statement. To-wit, the Court stated

> I state for the record, however, that the convictions regarding Victim number 8 – Counts 36 through 40 at 2422-2011 -- are specifically intended to run concurrently, and if those convictions should happen to be reversed on appeal it will make no difference to the sentence structure as a whole and will not require a remand for resentencing.

See Judge Cleland's Sentencing Statement, filed October 11, 2012, at p. 6.

360. Nevertheless, direct appellate counsel inexplicably abandoned this claim on appeal without any rational basis.

361. Had this claim been preserved, it likely would have resulted in a reversal of those convictions.

362. As a result, Mr. Sandusky should be awarded a new trial based on the ineffectiveness of trial and appellate counsel for failing to preserve this issue, and this Court should enter judgment of acquittal on the charges relating to Victim #8.

J. Trial Counsel was Ineffective for Failing to Impeach Ronald Petrosky's Hearsay Testimony Regarding Jim Calhoun With A Tape Recorded Statement by Calhoun Specifically Stating He Never Saw Sandusky Assault The Unknown Victim #8, And Direct Appellate Counsel Was Ineffective For Failing to Raise the Issue of the Violation of Sandusky's Confrontation Clause Rights Relating to Calhoun on Appeal.

363. The trial court permitted Ronald Petrosky, a janitor at Penn State University to testify as to a hearsay statement Jim Calhoun made to him, that he witnessed Jerry Sandusky assaulting a young boy.

364. In discovery in this matter, the Commonwealth disclosed a tape recorded interview Jim Calhoun gave to the Commonwealth's investigator, Trooper Yakicik, on May 15, 2011.

365. In the tape recording, Trooper Yakicic asks Mr. Calhoun about a time he observed an older man committing sexual assault on a young boy. After Calhoun describes seeing the assault in graphic detail, the following exchange occurs:

> Q: Okay ... alright ... um ... I appreciate... do you remember, Mr. Calhoun, do you remember coach Sandusky?
> A. Sandusky?
> Q. Coach Sandusky?
> A. Yes.
> Q. Do you remember if that was Coach Sandusky you saw?
> A. No, I don't believe it was.
> Q. You don't?
> A. No, I don't believe it was. I don't think it was Sandusky that was the person...it wasn't it wasn't him...Sandusky never did anything anything at all that I can see that he was...but uh...it was uh...

Audio tape recording, 5/15/11, at 43:20-44:15 at Appendix, P. 639.

366. Trial counsel failed to use this evidence in any manner to impeach Petrosky's testimony, and by extension, Jim Calhoun's hearsay statement.

367. Trial counsel could have no reasonable basis for failing to utilize this evidence.

368. The outcome of the proceedings would likely have been different had this evidence been introduced, in that there would likely have been insufficient evidence to submit the question to the jury.

369. As a result, it was ineffective for trial counsel to fail to use this evidence, and Mr. Sandusky must be awarded a new trial.

370. Moreover, in opposing Petrosky's testimony, trial counsel opposed Petrosky testifying as to Calhoun's hearsay statement, in part, on the grounds that the testimony violated Mr. Sandusky's rights Confrontation Clause. *See* N.T., Trial, June 13, 2012, at 207-209 at Appendix, P. 640.

371. In that argument, trial counsel conceded the fact that Calhoun's hearsay statement was not "testimonial" hearsay for purposes of a Confrontation Clause argument under *Crawford v. Washington* and its progeny. *Id.*

372. Calhoun's statement was clearly hearsay offered for the truth of the matter asserted; and Sandusky was never afforded the opportunity to cross-examine Calhoun.[24]

373. Irrespective of whether a hearsay statement meets an exception to the general rule against hearsay, a statement may not be admitted if it would violate a defendant's constitutional right to confront the witnesses against him. *See e.g. Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

374. In *Crawford*, the U.S. Supreme Court noted that the crux of the inquiry concerns whether the statement against the accused is "testimonial" in nature, such that the accused has a right to test the statement "in the crucible of cross-examination." *Id.* at 61, 124 S.Ct. at 1354.

[24] Sandusky submits that although the Commonwealth made a proffer that Calhoun was not competent to testify, nothing was ever placed on record establishing that Calhoun was, in fact, incompetent to testify. Petitioner submits that trial counsel was ineffective for failing to require some indicia of incompetence beyond simply the Commonwealth's proffer.

375. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court developed one, non-exhaustive test for determining whether a statement is "testimonial" in nature – to-wit, the question turns on whether the admission of the statement is a "weaker substitute for live testimony."

376. In *Commonwealth v. Allshouse*, 985 A.2d 847 (Pa. 2009), the Pennsylvania Supreme Court interpreted *Davis* as creating a "primary purpose test," such that a statement is not "testimonial" if it "is made with the purpose of enabling police to meet an ongoing emergency." *Id.* at 854. Alternatively, a statement is testimonial if it is not made in the context of an ongoing emergency and if the primary objective of the questioning is to "to establish or prove past events." *Id.*

377. In *Commonwealth v. Abrue*, 11 A.3d 484 (Pa.Super. 2010), the Superior Court recognized that the *Davis/Allshouse* primary purpose test is not always decisive on whether a statement is testimonial; indeed, *Davis* expressly stated so. 11 A.3d at 492 (*citing Davis*, 547 U.S. at 822 n.1 and *Allshouse*, 985 A.2d at 854). Rather, the totality of the circumstances must be examined.

378. Initially, Sandusky notes that although the Commonwealth made a proffer that Calhoun was not competent to testify, the record is void of any actual evidence establishing that Calhoun was incompetent or otherwise unavailable to testify.

379. Trial counsel's was ineffective for failing to require some evidence establishing that Calhoun was incompetent or unavailable to testify.

380. In the present case, Calhoun's statement was not made during interrogation by the police, such that it was clearly testimonial. However, it similarly was not made in the context of assisting police to respond to an ongoing emergency.

381. The important part is how the statement was used. In the present case, the hearsay statement from Calhoun was used as a weaker substitute for live testimony identifying Mr. Sandusky as the perpetrator of a crime.

382. Since the hearsay statement of identification was a weaker substitute for live testimony, it could only be used if Calhoun was unavailable and the accused had a prior opportunity to cross-examine him. *See, e.g. Crawford*, 541 U.S. at 68, 124 S.Ct. at 1354; *Abrue*, 11 A.3d at 493.

383. As noted above, there was no evidence presented establishing that Calhoun was unavailable.

384. The Commonwealth bears the burden of establishing that the statement is admissible by a preponderance of the evidence. *Abrue*, 11 A.3d at 493 (*citing Idaho v. Wright*, 497 U.S. 805, 816, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), *abrogated on other grounds by Crawford*, 541 U.S. at 67-68, 124 S.Ct. at 1354, and *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007), *cert. denied*, 552 U.S. 1275, 128 S.Ct. 1655, 170 L.Ed. 2d 386 (2008)).

385. Moreover, under Article 1, § 9 of the Pennsylvania Constitution, "the accused hath a right ... to meet the witnesses face to face."

386. In the present case, trial and direct appellate counsel failed to raise this issue in post-sentence motions or on direct appeal.

387. Given that Calhoun's hearsay statement was the only direct evidence of the charges related to Victim #8, this issue should have been raised on direct appeal, and if it had, the Superior Court likely would have reversed Sandusky's convictions on all charges relating to Victim #8.

388. Trial and direct appellate counsel had no reasonable basis for failing to preserve this argument on appeal.

389. As a result, trial and direct appellate counsel were ineffective for failing to preserve the issues that (1) Calhoun recanted the statement on audiotape; and (2) the statement was inadmissible hearsay that should not have been admitted at trial.

K. Trial Counsel and Direct Appellate Counsel were Ineffective for Failing to Investigate, Object to, or Preserve Any Arguments Relating to Prosecutorial Misconduct that Deprived Sandusky of a Fair Trial.

390. The instant case was replete with prosecutorial misconduct dating back to the initial referral of the case to the grand jury.

391. The ultimate result of the prosecutorial misconduct was that Mr. Sandusky's right to a fair trial was trampled.

392. The Pennsylvania Supreme Court has addressed the interplay between prosecutorial misconduct at trial and an ineffective assistance claim under the PCRA, stating:

> "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). If the defendant thinks the prosecutor has done something objectionable, he may object, the trial court rules, and the ruling-not the underlying conduct-is what is reviewed on appeal. Where, as here, no objection was raised, there is no claim of "prosecutorial misconduct" as such available. There is, instead, a claim of ineffectiveness for failing to object, so as to permit the trial court to rule. *Cf. id.*
>
> Moreover, ineffectiveness claims stemming from a failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. *Cf. [Commonwealth v.] Carson*, [590 Pa. 501]

> 913 A.2d [220,] 236 [(Pa. 2006)] ("In order to obtain relief for alleged prosecutorial `misconduct,' a petitioner must first demonstrate that the prosecutor's action violated some statutorily or constitutionally protected right.").

Commonwealth v. Tedford, 960 A.2d 1, 28-29 (2008)

393. In the present case, the prosecutorial misconduct began during the grand jury investigation, including but not limited to:

a. The possible involvement of the Attorney General's Office in leaking the substance of the grand jury investigation to reporter Sara Ganin in March of 2011;

b. Patently false information being included in the grand jury presentment that was released and reported. Specifically, the presentment falsely stated that Michael McQueary witnessed Sandusky assaulting Victim #2 so clearly that he observed anal intercourse. In reality, McQueary testified to no such fact;

c. Failure to disclose relevant *Brady* evidence, including but not limited to fee agreements between the purported victims and their private counsel, financial incentives that the purported victims might have had to fabricate their testimony; and

d. Violating *Brady, supra*, by performing late-hour "open file" document dumps in discovery, where boxes of paper documents were disclosed on the eve of trial with the hopes that trial counsel would not find relevant *Brady* material. *See United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009)[25];

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[25] In *Skilling*, the Court noted:

> [E]vidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge

394. All of these instances of misconduct individually and collectively violated Mr. Sandusky's right to a fair trial by depriving him of exculpatory evidence, by polluting the jury pool with the grand jury presentment containing information that was not established by grand jury testimony, tainting the jury pool with false information.

395. Moreover, Sandusky maintains it was prosecutorial misconduct to charge Spanier, Curley, and Shultz with criminal offenses, as the Commonwealth apparently had no intention of actually prosecuting those cases. Indeed, while the court rushed to try Mr. Sandusky in only seven months after arrest, despite reasonable defense requests for continuance to prepare for trial, the Commonwealth has not vigorously opposed the plethora of continuances and interlocutory appeals that have left Curley, and Shultz still untried for their alleged crimes more than three years after charges were filed, and Spanier more than two years after the charges against him were filed. *See* Section IV.D, *supra*.

396. Even the trial court recognized that charging Curley and Shultz would likely result in Sandusky getting a new trial, as noted above, when the Court stated:

> THE COURT: I'm not going to mislead the jury. I recognized early on in this case that --and I have expressed it -- that in this complex, constellation of litigation, some case had to go forward first and subsequent events may result in whoever went first has to be tried again.

N.T. Trial, June 18, 2012, at 168-69 at Appendix, P. 643.

> open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*.

554 F.3d at 577. Petitioner submits that the evidence would demonstrate that the Commonwealth was acting in bad faith in the manner in which it performed its obligations under *Brady* by hiding *Brady* material in a huge open file of tens of thousands of pages of documents, hoping that trial counsel would be overwhelmed and unable to find it.

397. Nevertheless, trial counsel and direct appellate counsel failed to preserve any argument relating to Sandusky's due process rights being trampled by charging his primary defense witnesses, rendering them unavailable for trial.

398. Trial counsel had no reasonable strategic basis for waiving this clearly meritorious issue in post sentence motions, or on direct appeal.

399. Indeed, had this issue been preserved, Mr. Sandusky may well have received a new trial on direct appeal, as his right to present a defense was unfairly infringed.

400. Accordingly, trial and direct appellate counsel were ineffective for failing to preserve and argue any of the areas of prosecutorial misconduct at issue in the trial of this case, and Mr. Sandusky must be given a new trial.

L. Trial Counsel was Ineffective for Failing to Object to Irrelevant Testimony that Bolstered the Commonwealth's Witnesses' Credibility and Prejudiced Mr. Sandusky.

401. In Pennsylvania, it is axiomatic that only relevant evidence is admissible; evidence that is not relevant is inadmissible. Pa.R.E. 402.

402. Evidence is "relevant" if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401.

403. Furthermore, a witness is not permitted to testify to things outside that witness's own personal knowledge. Pa.R.E. 602.

404. At trial in this matter, the several of the prosecution's witnesses were permitted to testify as to their own mental impressions as to things they had heard from other witnesses, none of which were based on personal knowledge. .

405. Specifically, the following witnesses were permitted to testify to the following mental impressions:

406. Jessica Dershem, caseworker with Clinton County Children and Youth Services testified that she thought that Aaron Fisher was "withholding because he was uncomfortable talking about the incident." N.T. Trial, June 12, 2012, Vol. 1, at 129-30 at Appendix, P. 645.

407. Ms. Dershem also testified that they did not send out a "rights letter" following the second interview with Aaron Fisher because "there was concern that there would be some retaliation against Aaron." *Id.* at 131 at Appendix, P. 647.

408. Michael McQueary testified as to detailed conversations he had with his father about the activities he believed he saw. *Id.*at 202-03 at Appendix, P. 648.

409. John McQueary, father of Michael McQueary, testified at trial without any personal knowledge of a single fact of consequence in the case. Instead, all of his testimony related to what Michael McQueary told him, what Michael McQueary's conclusions were from what he observed, and what his own mental impressions were of what Michael observed. N.T. Trial, June 13, 2012, at 5-17 at Appendix, P. 650.

410. Sheryl Sharer, stepmother of R.R., was permitted to testify to the things R.R. told her. *Id.* at 73-74 at Appendix, P. 663. More than just presenting irrelevant testimony, Ms. Sharer testified that she "believed" R.R., which amounted to the Commonwealth inappropriately bolstering R.R.'s testimony in violation of *Commonwealth v. Tann*, 459 A.2d 322, 327 (Pa. 1983);

411. Ronald Schreffler was permitted to testify that he believed that there was more that Z.K. had not told him. N.T. Trial, June 14, 2012, at 63 at Appendix, P. 665.

412. Anthony Sassano of the Office of Attorney General was permitted to testify that it was a "daunting task" to get the alleged victims to tell their stories of alleged abuse because "I wouldn't want to sit here and discuss with you my sexual experiences, and I'm sure none of you would want to sit here and discuss your sexual experiences. *Id.* at 41-42 at Appendix, P. 666.;

413. Angella Quidetto, mother of S.P., testified that she never asked S.P. what Mr. Sandusky allegedly did to him because she did not want to know, and it would be very difficult for him to tell her. N.T. Trial, June 18, 2012, at 44-45, Appendix, P. 668. She also testified that she had no knowledge as to what happened to her son, but that she could "just imagine what happened to him." *Id.* at 48 at Appendix, P. 670.

414. Trial counsel failed to object to any of this testimony.

415. Trial counsel's failure to object is without any reasonable basis, as this testimony was irrelevant and highly prejudicial.

416. Mr. Sandusky was prejudiced by trial counsel's inaction because highly prejudicial, irrelevant evidence was admitted without any adequate foundation of personal knowledge.

417. The outcome of the proceedings would likely have been different had the defense objected to any of this testimony, let alone all of it.

418. Such mental impressions are entirely irrelevant under Pa.R.E. 401, because the mental impressions do not have any tendency to make any fact of consequence in the action more or less likely.

419. Since counsel had no reasonable basis for failing to object to the irrelevant testimony by these witnesses, including their mental impressions and beliefs as to whether other witnesses' testimony were truthful or forthcoming, trial counsel was ineffective.

420. Since this ineffectiveness permeated the entire trial, as each witnesses' testimony bolstered the others, Sandusky is entitled to a new trial.

M. Trial Counsel was Ineffective for Promising the Jury that Mr. Sandusky would Testify at Trial.

421. During Mr. Amendola's opening statement, Mr. Amendola made several promises to the jury that Mr. Sandusky would testify. *See* N.T. Trial, June 11, 2012, Vol. 2, at 9, 26 at Appendix, P. 671.

422. Numerous courts have held that where defense counsel makes a promise in opening statements and fails to see that promise through, counsel is ineffective. *See Ouber v. Guarino*, 293 F.3d 19, 33-34 (1st Cir. 2002) (holding that counsel's failure to present defendant's testimony as to knowledge was "egregious" error that "but for its commission, a different outcome might well have eventuated."); *Anderson v. Butler*, 858 F.2d 16, 18 (1st Cir. 1988) (broken promise from opening statement to present expert psychiatric testimony resulted in finding of ineffective assistance); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffective assistance of counsel."); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003) ("Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility."); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) ("When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up to the claims he made in the opening.").

423. In the present case, trial counsel promised the jury that they would hear Mr. Sandusky deny the conduct for which he was charged and explain his interaction with the men involved.

424. Trial counsel specifically told the trial court that when the Commonwealth informed the defense that Matt Sandusky made a statement to the Commonwealth that Jerry Sandusky had abused him, at the close of the Commonwealth's case, it "took the heart out of our defense," and the defense could no longer call Jerry Sandusky to testify.

425. Trial counsel, having promised the jury that Jerry Sandusky would speak to them and explain his side of events, broke that promise, undermining the defense and completely destroyed the defense's credibility.

426. Mr. Sandusky was prejudiced by the broken promise. *See Harris*, *supra*; *McAleese*, supra.

427. Accordingly, Mr. Sandusky is entitled to a new trial.

N. Trial Counsel was Ineffective for Eliciting Inculpatory Evidence Against Mr. Sandusky and Evidence that Opened the Door for the Commonwealth to Introduce Additional Rebuttal Evidence.

428. At trial in this matter, trial counsel presented the testimony of psychologist Elliot Atkins, "to explain the letters and the purpose of the letters" that Mr. Sandusky wrote to several of the victims. N.T. Trial, June 19, 2012, at 164 at Appendix, P. 673.

429. Dr. Atkins concluded that Mr. Sandusky suffered from "histrionic personality disorder." *Id.* at 169, 172 at Appendix, P. 674.

430. Despite the fact that the testimony was offered only to explain Mr. Sandusky's letters, Dr. Atkins went beyond the scope of the proffer and testified as to Mr. Sandusky's relationships and his broader behavior, including his sexual behavior. *See generally id.*

431. As a result, the Commonwealth elicited from Dr. Atkins on cross-examination that the same symptoms underlying the histrionic personality disorder also support a psychosexual disorder. *Id.* at 215-17, Appendix, P. 676. Indeed, Dr. Atkins stated "If, in fact, the things he is accused of are true, then he would have a psychosexual disorder." *Id.* at 216-17 at Appendix, P. 677.

432. As a result of the ill-considered decision to present Dr. Atkins, trial counsel opened the door to psychiatrist Dr. John O'Brien testifying on rebuttal for the Commonwealth that he opined that Mr. Sandusky suffered from "psychosexual disorder with a focus on adolescence or preadolescence." *Id.* at 295 at Appendix, P. 679.

433. In *Ramos v. Lawler*, 695 F.Supp.2d 347 (M.D. Pa. 2009), the U.S. District Court, in ruling on a federal *habeas corpus* review of a Pennsylvania state conviction, that where defense counsel elicits inculpatory evidence in a jury trial that opens the door to the prosecution introducing evidence that would otherwise not have been admissible, counsel is ineffective.

434. In the present case, as in *Ramos*, trial counsel's direct examination of Elliot Atkins opened the door to Dr. O'Brien's testimony that Defendant exhibited psychosexual disorder with a focus on adolescence or preadolescence.

435. Had trial counsel not introduced the testimony of Elliot Atkins, the outcome of the proceedings would have likely been different, as the Commonwealth would not have been able to present Dr. O'Brien's expert opinion on rebuttal relating to Mr. Sandusky's alleged psychosexual disorder.

436. Moreover, the testimony of Dr. Atkins was irrelevant to Mr. Sandusky's defense that the charged conduct did not occur.

437. As a result, trial counsel had no reasonable basis for presenting the testimony of Dr. Elliot Atkins.

438. Defendant believes and therefore avers that trial counsel presented the testimony of Dr. Atkins after receiving his expert opinion at the eleventh hour before trial simply because they believed it necessary to present some degree of expert testimony to explain Sandusky's alleged behavior.

439. Defendant believes and therefore avers that this belief was not reasonable in light of Mr. Sandusky's defense that the criminal behavior did not happen.

440. Dr. Atkins's testimony would have inevitably caused confusion with the jury, as the jury now is presented with evidence of a mental infirmity of a sort that would, in theory, explain or excuse the alleged criminal behavior, when Defendant's contention was that there was no criminal behavior.

441. Furthermore, it was not reasonable for trial counsel to present this testimony knowing it would open the door to Dr. O'Brien's testimony.

442. Accordingly, trial counsel was ineffective for presenting the testimony of Elliot Atkins, and Defendant is entitled to a new trial.

O. Trial Counsel's General Conduct Before and During Trial Demonstrates that he Essentially Abandoned Sandusky, Leaving Him Without Any Defense, and in Reality, Trial Counsel Acted More Like Another Prosecutor Instead of Defense Counsel.

443. At a hearing on the instant Petition, Defendant will demonstrate that trial counsel was so patently ineffective, that he essentially abandoned Mr. Sandusky, leaving him without any defense.

444. Trial counsel's abandonment of Sandusky can be demonstrated by the following conduct:

a. Failing to communicate and consult with Sandusky prior to ambushing him with the interview with Bob Costas;

b. Failing to fully discuss the substance and potential risks of Elliot Atkins's testimony with Defendant prior to Atkins's testimony at trial;

c. Failing to develop any rational unified theory of a defense or strategy;

d. Failing to subpoena records from Penn State University relating to Sandusky's schedule and activities with the Penn State University football program in order to develop an alibi defense;

e. Waiving Sandusky's preliminary hearing;

f. Failing to investigate whether the purported victims' private counsel improperly induced the victim witnesses to change their testimonies for financial motives;

g. Failing to review the Commonwealth's discovery with Mr. Sandusky;

h. Failing to move for a mistrial when Scott Rossman admitted to violating the witness sequestration order;

i. Failing to have the Court declare witnesses such as Scott Rossman, Joseph Leiter, Benjamin Andreozzi, Dawn Daniels, or Joshua Fravel hostile or adverse witnesses, thus enabling trial counsel to ask leading questions;

j. Failing to develop any strategy for cross-examination and/or failing to properly use leading questions on cross examination; and

k. Failing to object to the Commonwealth's repeated leading of its own witnesses on direct examination

445. In an interview of Karl Rominger by current defense counsel and his investigator, Rominger indicated that Attorney Amendola, as Sandusky's lead trial counsel, had no unified defense strategy in this case.

446. Furthermore, according to Mr. Rominger, Mr. Amendola's lack of preparation ran so deep that he asked Attorney Rominger to cross-examine Michael McQueary, the Commonwealth's key witness, with only approximately thirty minutes' notice.

447. Additionally, trial counsel retained Lindsay Kowalski as a case analyst/consultant to assist with trial. *See generally* Kowalski Affidavit. A copy of the Kowalski Affidavit is attached hereto at Appendix, P.690.

448. On February 28, 2012, Ms. Kowalski was contacted by a mutual acquaintance with trial counsel about working on the case; however, trial counsel did not follow up with her timely manner. *Id.* at ¶¶ 2-3.

449. On April 26, 2012, only weeks before trial, Ms. Kowalski contacted Attorney Amendola again about participating in the defense. *Id.* at ¶ 3. Attorney Amendola did not meet with Ms. Kowalski until May 11, 2012, one month before trial commenced. *Id.* at ¶ 4.

450. Ms. Kowalski was not actually hired until May 22, 2012, less than three weeks before opening statements occurred on June 11, 2012. *Id.* at ¶ 10.

451. Ms. Kowalski states that when she met with Attorney Amendola on May 11, 2012, he emphasized how he was overwhelmed with trying to organize the paperwork in the case and prepare for trial. *Id.*at ¶ 5.

452. Once Ms. Kowalski was retained, her initial tasks were to organize the files for potential witnesses, to read discovery documents to identify the parties, and to organize copies of relevant documents for witness files. *Id.* at ¶¶ 11-13.

453. Ms. Kowalski also created an inventory sheet of discovery material and identified missing discovery material. *Id.* at ¶ 14.

454. Ms. Kowalski prepared charts demonstrating graphic representations of the alleged victims' relationships and inconsistent statements. *Id.* at ¶ 16. For reasons unknown to Ms. Kowalski, trial counsel failed to utilize any of the graphic aids Ms. Kowalski created.

455. Ms. Kowalski states that she was unaware of any cohesive trial strategy, despite having worked with trial counsel up to and during the trial. *Id.* at ¶ 18.

456. Attorney Amendola essentially admitted to the Court that once Matt Sandusky went from being a key defense witness to a new accuser, the defense case was essentially abandoned. *See* N.T. Trial, June 20, 2012, at 65-71, Appendix, P. 680.

457. Moreover, trial counsel not only abandoned Sandusky's defense, trial counsel engaged in a course of conduct more akin to prosecuting Sandusky instead of defending him, specifically in the following ways:

a. Advising the jury during opening statements that the evidence against Sandusky was "overwhelming," N.T. Trial, June 11, 2012, Vol. 2, at 3, Appendix, P. 687;

b. Advising Sandusky to submit to the interview with Bob Costas, without preparation, which severely impacted the Defendant's position in that:

   i. The broadcast of the interview substantially impacted the conflagration of public animosity to the Defendant prior to trial; and

   ii. The interview provided substantial material for the prosecution's closing argument in this case;

c. Introducing inculpatory evidence as follows:

i. Elliot Atkins's testimony regarding "histrionic personality disorder," when Sandusky's defense was that the conduct simply did not happen;

ii. B.H.'s testimony that Sandusky gave him money to purchase marijuana;

d. Failing to object to the prosecution's improper leading questions of Michael McQueary;

e. Making a statement (Attorney Amendola) to the media during trial that he would have a "heart attack" if Sandusky was not convicted; and

f. Making inaccurate and misleading statements during closing argument;

458. As evident from this course of conduct, trial counsel essentially left Sandusky with no defense to the charges against him.

459. Finally, as the last nail in the coffin, trial counsel prejudiced Mr. Sandusky when he testified at the hearing on Mr. Sandusky's post-sentence motion.

460. Specifically, trial counsel testified with respect to the lack of ability to prepare due to the mountainous discovery produced by the Commonwealth in a short period of time as follows:

> Q: What item have you discovered since the conclusion of the trial, in your review of these voluminous documents that you have talked about, that would have altered your conduct at trial?
>
> ...
>
> Amendola: The answer is none.
>
> Q: None. So there is no item, document, or person that in your review of the documents that you received at any time that would have altered your conduct at trial during the course of the trial; isn't that correct?
>
> Amendola: That's correct.

N.T., Post-Sentence Motion Hearing, January 10, 2013, at 39-40, Appendix, P. 688.

461. Trial counsel was ineffective for testifying in this regard because, upon information and belief, trial counsel did not review after the trial all the discovery materials he had lacked time to examine before trial.

462. Secondly, direct appellate counsel was ineffective for failing to ask questions of Attorney Amendola on re-direct examination, wherein Attorney Amendola would have stated that he would have done many things differently had the Court granted the continuance, including increased investigation, and he would have had expert testimony from an expert who simply could not render an opinion for the defense in the time frame required by the trial court.

463. Nevertheless, the Superior Court used this inexplicable statement to conclude that Sandusky was not prejudiced by the lack of a continuance prior to trial.

464. Mr. Sandusky was absolutely prejudiced by the denial of the defense continuance prior to trial, as trial counsel was demonstrably ill prepared to try this case in June 2012, as he had no strategy, and he admittedly did not review all the discovery before trial.

465. This total abandonment of Sandusky is ineffective assistance of counsel.

466. It is impossible to precisely measure the prejudice Sandusky suffered as a result of his own counsel buttressing the Commonwealth's case, instead of zealously defending Sandusky, none the less it is undeniable that prejudice was suffered.

467. As a result, Sandusky must be awarded a new trial.

V. DISCLAIMER

468. The Amended Petition for Relief Pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq. is not a substitute for the Petition for Relief Pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq. filed by Sandusky on April

2, 2015 currently under seal but is a supplement to the same. Sandusky is not waiving any issues contained in the original petition.

VI. REQUEST FOR DISCOVERY.

469. Defendant submits that this case presents extraordinary circumstances under Pa.R.Crim.P. 902(E)(1) that warrant discovery into the following areas:

a. Whether the Commonwealth failed to disclose relevant *Brady* material in the form of grand jury exhibits that were never disclosed to the defense;

b. Whether the Commonwealth failed to disclose relevant *Brady* material in the form of private fee agreements the victims had with private counsel and/or publishers that creates a financial incentive to fabricate allegations against Mr. Sandusky;

c. Whether communications between prosecutors and the supervising judge of the grand jury investigation operated to prejudice Sandusky;

d. The circumstances of the grand jury leaks of information which occurred in March and November of 2011

e. Whether the victims had financial incentives to fabricate allegations against Mr. Sandusky, including fee agreements with attorneys, ongoing settlement discussions with Penn State University, publishing contracts, or other financial incentives;

f. Whether Defendant's constitutional rights were violated by activities of law enforcement and private attorneys regarding Allan C. Myers;

470. Additionally, Defendant reserves the right to seek discovery into numerous other exceptional circumstances as set forth in the instant Petition, and Defendant in no way waives any request for discovery.

VII. REQUEST FOR HEARING.

471. Sandusky avers that the instant PCRA Petition indicates numerous genuine issues of material fact that would warrant relief under the PCRA.

472. Sandusky requests this Court to schedule a hearing on the instant Petition to develop the factual record and elicit testimony from trial counsel and direct appellate counsel to explain their failure to act on numerous instances that would warrant relief.

473. Additionally, should this Court grant a hearing, Sandusky requests leave of court to submit a post-hearing brief based on the evidence elicited at the PCRA hearing.

474. THE UNDERSIGNED Alexander H. Lindsay, Jr. hereby certifies that with respect to the requested PCRA Evidentiary Hearing, testimony will be presented from the following witnesses:

> Attorney Joseph Amendola - Adverse
> D.O.B – June 21, 1948
> 110 Regent Court, Suite 202
> State College, Pennsylvania 16801-7966
>
> Attorney Amendola will testify regarding the issues raised in the PCRA, including: the Costas Interview; the change of venue motion; jury selection; failure to undertake critical investigations; the June 5 request to withdraw as counsel; failure to object to prosecution improper commenting on Sandusky's decision not to testify; interactions with Allan Myers' attorney; failure to object to prosecutorial misconduct as to the identity of victim 2; failure to request a mistrial as a result of the making of materially false statements by the prosecution; failure to subpoena and require the testimony of or the taking of the Fifth Amendment by Curley, Schultz or Spanier; failure to interview or attempt to interview alleged victims; failure to file motions in limine or obtain a hearing on the issues

of repressed memory, manufactured testimony and the effect of suggestive questioning under Pa.R.E. 403; disclosure of financial agreements between victims and civil attorneys as impeachment evidence; failure to object to the improper opinion evidence by Jessica Dersham; failure to impeach the Petrosky testimony with the Calhoun taped statement; failure to object to irrelevant bolstering testimony; ineffectiveness in opening on the defendant testifying at trial; eliciting inculpatory evidence opening the door for the Commonwealth to introduce additional rebuttal evidence; conduct evidencing an abandonment of the defendant and the defense of the defendant; engaging in conduct akin to prosecuting defendant as opposed to defending Sandusky and; failure to review, analyze and utilize all discovery materials prior to and during trial; failure to use, refer to or introduce exhibits prepared by Lindsay Kowalski demonstrating the multiple inconsistencies in the various statements given by the alleged victims; failure to call rebuttal witnesses to attack the credibility of Commonwealth witness, including, inter alia, AF; misstating facts during the evidence summary portion of the defense closing statement.
At hearing the following Exhibits will be used with this witness: Defendant's Answer to Commonwealth's Motion for Change of Venire, Motion for Continuance, Post-Sentence Motions, Appellate Brief, Appendix Pages 412, 359, 361, 365, 341, 572, 573, 575, 580, 585, 588 626, 639, 671, 673, 674, 680, 687, 688. *See also* Trial Testimony.

Attorney Karl Rominger - Adverse
D.O.B. – July 1, 1973
155 South Hanover Street
Carlisle, Pennsylvania 17013
Attorney Rominger will testify regarding the issues raised in the PCRA including: the motion to withdraw and subsequent events regarding ethical duties to the defendant; the failure to object to and demand a mistrial on the improper commentary on Defendant's right to remain silent; failure to demand the court investigate improper conduct of Allan Myers attorney in secreting Myers to prevent interview by agents outside of the attorney's presence; failure to object to and demand a mistrial on the prosecutor's making materially false statements to the court and to the jury regarding the identity of victim 2; failure to subpoena and require the testimony of, or the taking of the protections of the Fifth Amendment by Curley, Schultz or Spanier; the failure to interview or attempt to interview the alleged victims who testified before the grand jury; failure to demand review of the grand jury exhibits to determine whether or not the exhibits constituted Brady exculpatory evidence; failure to file motions in limine or obtain a hearing on the issues of repressed memory, manufactured testimony and the effect of suggestive questioning under Pa.R.E. 403; disclosure of financial agreements between victims and civil attorneys as impeachment evidence; failure to object to the improper opinion evidence by Jessica Dersham; failure to impeach the Petrosky testimony with the Calhoun

taped statement; failure to object to irrelevant bolstering testimony; engaging in conduct akin to prosecuting defendant as opposed to defending Sandusky and; failure to review, analyze and utilize all discovery materials prior to and during trial; failure to use, refer to or introduce exhibits prepared by Lindsay Kowalski demonstrating the multiple inconsistencies in the various statements given by the alleged victims.
At hearing the following Exhibits will be used with this witness: Appendix Pages 412, 359, 361, 422, 425, 427, 430, 431, 443, 365, 341, 452, 77, 572, 573, 575, 580, 585, 588, 626-637, 639. *See also* Judge Cleland's Sentencing Statement, Post-Sentence Motions, Appellate Brief, Trial Testimony.

Attorney Norris E. Gelman - Adverse
D.O.B. – Unknown
2000 Market Street, No. 2940
Philadelphia, Pennsylvania 19103
Attorney Gelman will testify regarding the issues raised in the PCRA including: failure to properly preserve issues, including, but not limited to, due process issues for appeal; failing to appeal Sandusky's conviction as to victim 8; issues of prosecutorial misconduct; failure to conduct an effective re-direct of Attorney Amendola on the issue of what he would have done differently had the Court granted a continuance, including the use of experts the court precluded from participating in the defense due to time constraints.
At hearing the following Exhibits will be used with this witness: Appendix Pages 452, 688. *See also* Post-Sentence Motions, Appellate Brief.

Philip W. Esplin, Ed.D. – Psychologist
D.O.B. September 7, 1945
7131 East Buena Terra Way, Scottsdale, Arizona 85253
Dr. Esplin will testify regarding the issues raised in the PCRA including: necessity of using expert testimony in cases involving repressed or recovered memory, manufactured memory and suggestive questioning and questioning protocol in cases of alleged sexual abuse.
At hearing the following Exhibits will be used with this witness: Appendix Pages 462, 464, 465, 467. *See also* Pennsylvania Rules of Evidence.

Attorney Frank Fina - Adverse
D.O.B. – unknown
Address – Office of the District Attorney of Philadelphia County
Attorney Fina will testify regarding the issues raised in the PCRA including: actions taken after the Sandusky investigation stalled; leak of grand jury information and scope of material leaked to Sara Ganim; Fina's relationship with the supervising grand jury judge later removed by the

Supreme Court; surfacing of inconsistent statements by alleged victims after the retention of civil counsel and fee agreements relating to said retention of counsel for the purpose of suing Sandusky, The Second Mile and Penn State University.
At hearing the following Exhibits will be used with this witness: Appendix Pages 43-49, 50-53, 55, 57, 59-64, 66, 71, 73-75, 77-78. *See also* Trial Testimony.

Attorney Jonelle Esbach - Advserse
D.O.B. – unknown
Address: unknown
Attorney Eschbach will testify regarding the issues raised in the PCRA including: the Sandusky investigation and the identification of additional witnesses and acts taken in furtherance of the investigation by Eschbach; the leak of grand jury information and scope of material leaked to Sara Ganim.
At hearing the following Exhibits will be used with this witness: Appendix Pages 43-53, 55, 57, 59-64, 66, 71, 73-75, 77, 78.

Attorney Joseph McGettigan - Adverse
D.O.B. – unknown
Address: unknown
Attorney McGettigan will testify regarding the issues raised in the PCRA including: the identity of victim 2 and statements made during the prosecution closing relating to the identity of victim 2; false statements to the trial court; inconsistent statements by alleged victims after the retention of civil counsel and fee agreements relating to said retention of counsel for the purpose of suing Sandusky, The Second Mile and Penn State University.
At hearing the following Exhibits will be used with this witness: Appendix Pages 431, 436, 438 441, 443, 572. *See also* Trial Testimony.

Lindsay Kowalski
D.O.B. – Unknown
Address: Boalsburg Road
Boalsburg, Pennsylvania 16827
Witness Kowalski will testify regarding the issues raised in the PCRA including: preparation for and participation in the defense of Sandusky; statements of Joseph Amendola regarding trial readiness and preparation; the lack of an overall and contingency strategies at trial; abandonment of the defense; the Kowalski Affidavit.
At hearing the following Exhibits will be used with this witness: Appendix Page 690.

Ken Cummings
D.O.B. – October 21, 1961
Address:
99 Kinderkamack Road, Suite 303
West Wood, New Jersey 07675
Witness Cummings will testify regarding the issues raised in the PCRA including: Allan C. Meyers and statements made to Cummings at the Meyers home relating to an interview given by Meyers to Curtis Everhart.
At hearing the following Exhibits will be used with this witness: Appendix Page 433.

Former Attorney General Tom Corbett - Adverse
D.O.B. – June 17, 1949
Address: Shaler Township, Pennsylvania
Former Attorney General Corbett will testify regarding the issues raised in the PCRA including: his first meeting after Sandusky's arrest with the Penn State Board of Trustees and statements made thereafter; the information forming the basis of the Corbett statements; Corbett statements relating to the firing of Joe Paterno.
At hearing the following Exhibits will be used with this witness: Appendix Page 371.

Sara Ganim - Adverse
D.O.B. – 1987
Address:
Witness Ganim will testify regarding the issues raised in the PCRA including: the Sandusky investigation; the stalling of the investigation; the leak of grand jury information and material; contact with Deb McCord, mother of Zachary Konstas.
At hearing the following Exhibits will be used with this witness: Appendix Pages 22, 88, 73, 74, 458.

Anthony Sassano - Adverse
D.O.B. – unknown
Address: unknown
Witness Sassano will testify regarding the issues raised in the PCRA including: OAG Investigative Report Supplemental 149 from April 11, 2012 regarding Allan C. Myers.
At hearing the following Exhibits will be used with this witness: Appendix Page 443.

Inspector Coricelli - Adverse
D.O.B. – unknown
Address: unknown
Witness Coricelli will testify regarding the issues raised in the PCRA including: interview of Allan C. Myers of Mach 8, 2012.
At hearing the following Exhibits will be used with this witness: Appendix Pages 438, 441.

PSP Trooper James Ellis - Adverse
D.O.B. – unknown
Address – unknown
Witness Ellis will testify regarding the issues raised in the PCRA including: the September 20, 2011 interview of Allan C. Myers.
At hearing the following Exhibits will be used with this witness: Appendix Page 436.

PSP Corporal Joseph Leiter - Adverse
D.O.B. – unknown
Address – unknown
Witness Leiter will testify regarding the issues raised in the PCRA including: the September 20, 2011 interview of Allan C. Myers and the March 30, 2011 Leiter report on the conversation with Deb McCord, mother of Zachary Konstas.
At hearing the following Exhibits will be used with this witness: Appendix Pages 436, 458.

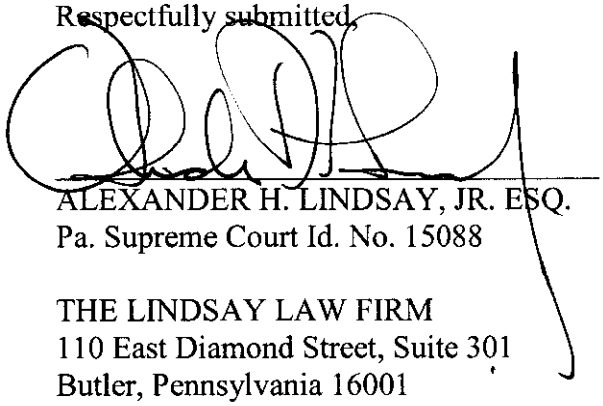
Allan C. Myers - Adverse
D.O.B. – April 28, 1987
Address – unknown
Witness Myers will testify regarding the issues raised in the PCRA including: the substance of statements made to Curtis Everhart and interviews given with Inspector Corcelli and Trooper Sassano.
At hearing the following Exhibits will be used with this witness: Appendix Pages 431, 432, 433, 436, 438, 441, 443.

475. In addition to the foregoing, at hearing, Sandusky may use any document generated during the grand jury investigation, civil actions filed in conjunction with the events forming the prosecution against him, motions (and exhibits) as well as hearing and trial transcripts.

476. Sandusky reserves the right to amend the foregoing witness list, as the record is fully developed, to include, should the court permit, discovery as requested.

WHEREFORE, for the foregoing reasons, Defendant Gerald Sandusky respectfully requests this Honorable Court grant the reliefs requested in the instant Amended Petition for Relief Pursuant to the Post Conviction Relief Act, and ultimately vacate Defendant's convictions and dismiss all charges against Defendant as set forth herein.

Respectfully submitted,



ALEXANDER H. LINDSAY, JR. ESQ.
Pa. Supreme Court Id. No. 15088

THE LINDSAY LAW FIRM
110 East Diamond Street, Suite 301
Butler, Pennsylvania 16001
Phone: 724.282.6600
Fax: 724.282.2672
Attorney For Gerald A. Sandusky

UNSWORN DECLARATION and AUTHORIZATION

I, Gerald A. Sandusky, verify that the statements made in this Amended Petition for Post Conviction Relief are true and correct to the best of my personal knowledge or information and belief. I understand that any false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities. I have authorized Attorney Alexander H. Lindsay and the Lindsay Law Firm to file this Amended PCRA Petition on my behalf.

May 5, 2015

Gerald A. Sandusky

GERALD A. SANDUSKY

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
	:	
v.	:	
	:	
GERALD A. SANDUSKY,	:	
	:	HONORABLE SENIOR JUGDE
PETITIONER.	:	JOHN M. CLELAND

ORDER OF COURT

AND NOW, this ___ day of _____, 2015, upon consideration of the filing of the Amended Petition For Post Conviction Relief by Mr. Sandusky and a hearing on the same being requested therein, IT IS HEREBY ORDERED THAT a hearing to determine the merits of the Petition shall be conducted before this Court on the ___ day of _____, 2015, in the Centre County Courthouse, Courtroom No.___, 2015 at __:__ __.m.

BY THE COURT:

_____
JOHN M. CLELAND, SENIOR JUDGE

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
	:	
v.	:	
	:	
GERALD A. SANDUSKY,	:	
	:	HONORABLE SENIOR JUGDE
PETITIONER.	:	JOHN M. CLELAND

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of May, 2015 he caused an exact copy of the foregoing Amended Petition For PCRA Relief to be served, in the manner specified, upon the following:

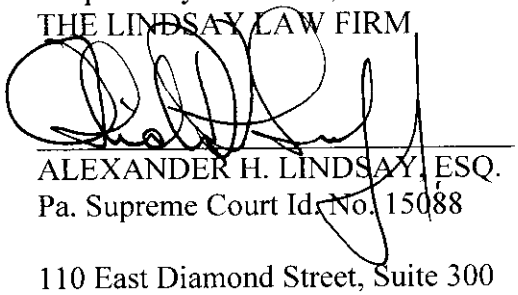
Hand Delivery

Honorable John M. Cleland, Sr. Judge c/o Office of the Court Administrator, and
Office of the Clerk of Courts of Centre County and
Centre County Courthouse
102 South Allegheny Street
Bellefonte, Pennsylvania 16823

First Class United States Mail

Assistant Attorney General Jennifer Peterson
Office of the Attorney General - Criminal Prosecutions Section
16th Floor Strawberry Square
Harrisburg, Pennsylvania 17120

Respectfully submitted,
THE LINDSAY LAW FIRM



ALEXANDER H. LINDSAY, ESQ.
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May 6, 2015