IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ESTATE of JOSEPH PATERNO;

and

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
REDACTED EXHIBITS
The National Collegiate Athletic Association's Brief in Support of its Motion to Compel the Production of Documents from the State and Overrule the State's Objections to Related Third-Party Subpoenas

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs,	)	
	)	Civil Division
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	)	Docket No. 2013-2082

REDACTED

EXHIBITS TO BRIEF IN SUPPORT OF MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM THE ESTATE AND OVERRULE THE ESTATE'S OBJECTIONS TO RELATED THIRD-PARTY SUBPOENAS

Dated: December 30, 2015

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants.	)	Civil Division Docket No. 2013-2082

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** Denotes a document designated as Confidential and filed under seal pursuant to the Protective Order (Sept. 11, 2014).*

EXHIBIT 1

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CRITIQUE OF THE FREEH REPORT:

THE RUSH TO INJUSTICE REGARDING JOE PATERNO

KING & SPALDING:

WICK SOLLERS
MARK JENSEN
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FEBRUARY 2013

CONTAINING INDEPENDENT EXPERT REPORTS BY:

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CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE REGARDING JOE PATERNO

After the Freeh Group, which had been retained as Special Investigative Counsel ("SIC") by the Penn State Board of Trustees to investigate the Jerry Sandusky child sex abuse scandal, released its report in July 2012, the Paterno family asked King & Spalding to conduct a comprehensive review of both the report and Joe Paterno's conduct.[1] They authorized us to engage preeminent experts and to obtain their independent analyses as an essential part of that review. This Critique of the Freeh report, which incorporates and attaches those independent analyses in full, sets the record straight. We conclude that the observations as to Joe Paterno in the Freeh report are unfounded, and have done a disservice not only to Joe Paterno and to the Penn State University community, but also to the victims of Jerry Sandusky and the critical mission of educating the public on the dangers of child sexual victimization.

Dick Thornburgh, former Attorney General of the United States, and experts Jim Clemente and Fred Berlin, have each carefully examined the July 12, 2012 report prepared by Louis Freeh, and have each determined that the report is deeply flawed and that key conclusions regarding Joe Paterno are unsubstantiated and unfair.

This Critique summarizes their expert conclusions and describes the most glaring errors on which the Freeh report is based. As Dick Thornburgh explains, the Freeh report reflects an improper "rush to injustice." There is no evidence that Joe Paterno deliberately covered up known incidents of child molestation by Jerry Sandusky to protect Penn State football or for any other reason; the contrary statements in the Freeh report are unsupported and unworthy of belief. As described in more detail below, there is no reason to believe that Joe Paterno understood the threat posed by Jerry Sandusky better than qualified child welfare and law enforcement professionals. There is no evidence that Joe Paterno conspired with Penn State officials to suppress information because of publicity concerns. And Joe Paterno's testimony before the grand jury in 2011 was truthful. As Messrs. Thornburgh and Clemente and Dr. Berlin have each concluded, the full story behind the tragic events involving Jerry Sandusky is not the one told by the Freeh report.

SUMMARY OF KEY POINTS

- Joe Paterno's last written words before his death focused on the victims of Jerry Sandusky. In a handwritten note, Joe Paterno emphasized: "Good side of scandal - it has brought about more enlightenment of a situation (sexual abuse of young people) in the country."

- The Paterno family directed King & Spalding to seek independent opinions of the Freeh report by experts in identifying and investigating child victimization and pedophilia, as well as by experts in conducting independent and reliable internal investigations. Those independent experts include the former top legal officer of the United States, Attorney General Dick Thornburgh; former FBI profiler and child molestation and behavioral expert, Jim Clemente; and The Johns Hopkins Hospital and School of Medicine physician and psychologist, Fred Berlin.

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- King & Spalding's Critique of the Freeh report, which incorporates the independent analyses of these three prominent experts, concludes that the Freeh report is deeply flawed and that its conclusions as to Joe Paterno are unfair and unsupported.

- Each one of the Freeh report's main observations about Joe Paterno is wrong: each is either contradicted or unsubstantiated by the evidence. The authors of the Freeh report chose not to present alternative, more plausible, conclusions regarding Joe Paterno's role in the events involving Jerry Sandusky.

- This Critique concludes, based on our interviews, including of Coach Paterno before his death, based on our review of documents and testimony, and, importantly, based on information from our access to the lawyers for other Penn State administrators, that (1) Joe Paterno never asked or told anyone not to investigate fully the allegations in 2001, (2) Joe Paterno never asked or told anyone, including Dr. Spanier and Messrs. Curley and Schultz, not to report the 2001 incident, and (3) Joe Paterno never asked or told anyone not to discuss or to hide in any way the information reported by Mr. McQueary. Joe Paterno reported the information to his superior(s) pursuant to his understanding of University protocol and relied upon them to investigate and report as appropriate.

- Former Attorney General Thornburgh is an expert in conducting effective fact investigations. He has reviewed the Freeh report and concluded that its investigative methodology is flawed, that its factual findings are limited and incomplete, and that its observations as to Joe Paterno are unreliable and unfounded. In the former Attorney General's own words, he concluded:

  - "The lack of factual support for the SIC's inaccurate and unfounded findings related to Mr. Paterno and its numerous process-oriented deficiencies was a rush to injustice and calls into question the credibility of the entire Report."[2]

  - "In my opinion, the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno."[3]

  - "When considered in the context of investigation 'best practices,' it is evident that the Freeh Report and many of its findings as they relate to Mr. Paterno are not accurate, thorough, fair or credible. . . . The process of the SIC's investigation was deficient in numerous ways, including the failure to interview virtually all of the key witnesses and the reliance upon limited, ambiguous documents."[4]

  - "Perhaps most significantly, the findings in the Freeh Report about Mr. Paterno concerning his alleged knowledge of the 1998 incident and purported concealment of the 2001 incident were not properly supported."[5]

  - "This lack of evidence supporting the Report's most scathing findings and the serious flaws with respect to the process of the SIC's investigation cause me to conclude that the Report's findings concerning Mr. Paterno are unjust and wrong."[6]

- The Freeh report was oversold to the public. Penn State officials, the NCAA, and other bodies detrimentally relied on the Freeh report in a rush to judgment about Joe Paterno. The limitations of the investigation, which were numerous and fatal to fundamental fairness, were not adequately explained or understood before that rush to injustice solidified the false public narrative about Joe Paterno.

- The Freeh report missed a critical opportunity to educate the public on the identification of child sexual victimization, and instead used the platform created by this scandal to sensationalize the blaming of Joe Paterno. The Freeh report ignored decades of expert research and behavioral analysis regarding the appropriate way to understand and investigate a child sexual victimization case. Mr. Jim Clemente is one of the leading former FBI profilers of child sex offenders, and himself a survivor of childhood sexual victimization. As Mr. Clemente bluntly put it:

  - "The SIC failed to properly factor the dynamics of acquaintance child sexual victimization cases into their investigation. Consequently, the SIC misinterpreted evidence and behavior and reached erroneous conclusions. Any investigation will reach the wrong result by using the wrong approach and by interpreting the facts through the wrong filter."[7]

  - "There is no other way to say it: on the most critical aspects of the Sandusky investigation, the SIC report is a failure. It does a tremendous disservice to Penn State, Joe Paterno, and the victims of Jerry Sandusky."[8]

- Expert analysis shows that Jerry Sandusky was a "skilled and masterful manipulator," who deceived an entire community to obscure the signs of child abuse, using a variety of proven techniques. Those techniques included: perpetuating an image as a playful "nice guy" who was a foster and adoptive parent with kids around him at all hours in all types of capacities, leveraging his position as a respected member of the community, and creating a children's charity to legitimize his credibility in interacting with kids.

- Expert analysis shows that Jerry Sandusky fooled qualified child welfare professionals and law enforcement, as well as laymen inexperienced and untrained in child sexual victimization like Joe Paterno. Sandusky's techniques as a pillar of the community created a proven psychological and cognitive impediment for them to recognize the red flags and other signs that Sandusky was a child molester. Joe Paterno himself knew very little about Jerry Sandusky's personal life and did not know private details about Sandusky or his victims. For decades, Joe Paterno respected Sandusky's talent as a coach and professional colleague and recognized Sandusky's widely-stated passion for helping kids, but the Freeh report missed that they disliked each other personally, had very little in common outside work, and did not interact much if at all socially.

- Expert analysis shows that while signs of Jerry Sandusky's child molestation existed with the benefit of hindsight, at the time of the 2001 shower incident reported by graduate assistant Mike McQueary, information was conveyed to Joe Paterno in terms that were too general and vague for him to disregard decades of contrary experience with Sandusky

and to conclude that Sandusky was a child predator. As summarized in former FBI profiler Jim Clemente's own words:

- "Given my 30 years of education, training and experience working, evaluating and assessing child sex crimes investigations around the world, it is my expert opinion that Paterno did not know, or even believe in the possibility, that Sandusky was capable of sexually assaulting boys. At worst, he believed that Sandusky was a touchy-feely guy who had boundary issues. This fact is clear from his repeated statements before he died."[9]

- "[Paterno] did what he believed was reasonable and necessary to address the situation based on his understanding of the facts, and his position at the time. Paterno did what most people who cared about children would have done in the same situation. More than a decade later, and in hindsight, Paterno showed his concern for the victims when he stated he, 'wished [he] had done more.'"[10]

- "Paterno, like everyone else who knew Sandusky, simply fell victim to effective 'grooming.' [Grooming is a dynamic process of seemingly innocent, positive public behaviors by the offender, aimed at gaining the trust of the targeted child, parents and the community.] As an expert behavioral analyst and based on my review of the evidence, Paterno did not believe that the information he received from McQueary amounted to Sandusky being a predatory child sex offender."[11]

- The Freeh report is uniformly biased against Joe Paterno. For the authors of the report, there are no gray areas. They ascribe motives to people they never met or interviewed, and interpret ambiguous documents with a clarity and decisiveness that is impossible to justify.

- None of the experts found any support for the Freeh report's assertion that Joe Paterno, along with three other Penn State administrators, including the President, conspired to conceal Jerry Sandusky's actions because they wanted to avoid bad publicity. That core "conclusion" by Mr. Freeh was entirely unfounded and has resulted in a great disservice to everyone involved in this tragedy.

- Mr. Freeh irresponsibly blamed Joe Paterno in this scandal, and violated the most basic notions of due process by offering a flawed, one-sided viewpoint without affording any meaningful opportunity for Joe Paterno, his representatives, or any neutral third party to assess or even respond to Mr. Freeh's opinions before he announced them as proven at a national press conference. Mr. Freeh generated a rapid domino effect of negative coverage that immediately and unfairly tainted perceptions of Joe Paterno by the media, the Penn State community, the NCAA, and the public.

- The timing of Mr. Freeh's press conference and report ensured that the rush to judgment occurred without any meaningful review of the Freeh report itself. The Freeh report, which was 267 pages and included 702 endnotes and 105 pages of appendices, was released only an hour before his press conference. The virtually instantaneous and uniformly negative reporting after his press conference perpetuated his many unproven

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assertions and opinion-based conclusions, without any evaluation or analysis by the news outlets that adopted Mr. Freeh's wide-ranging and unchallenged proclamations.

- The NCAA improperly relied on the Freeh report in compelling Penn State to enter into a "consent" decree and accept draconian penalties. Only eleven days after the release of the Freeh report, and without conducting any factual investigation of its own, the NCAA announced severe sanctions that deeply impacted the University and the community. The NCAA circumvented its established enforcement mechanisms and violated its own due process rules. It never identified a single infraction of NCAA rules based on Sandusky's crimes, much less an infraction by Penn State that implicated the NCAA's jurisdiction and core mission of ensuring competitive balance in amateur athletics.

- The Freeh report is full of errors, unsupported personal opinions, improper allegations and biased assertions. Despite the Freeh report's claim to the contrary, access to vital documents and critical witnesses was severely limited. Those limitations, which were understated or ignored in the report, call into question the report's legitimacy. Despite reportedly reviewing millions of documents and interviewing hundreds of witnesses, the Freeh report relies primarily on a handful of emails, none of which Joe Paterno authored or received, to make assertions about Joe Paterno, and shockingly does so even though Mr. Freeh never interviewed the actual authors of the emails. This Critique of the Freeh report addresses seven of the most egregious, unfounded, and unfair conclusions about Joe Paterno; the three other expert reports attached to this Critique combine to expose and address many more.

- The facts establish that Joe Paterno acted honestly and in good faith throughout the Sandusky scandal, from the moment he received Mr. McQueary's 2001 report, through his grand jury testimony, until the day of his death in January 2012. Dr. Fred Berlin, a preeminent physician and psychologist from The Johns Hopkins Hospital and School of Medicine, studied and reviewed the evidence in this case, and he assessed Joe Paterno's life more broadly. Dr. Berlin concluded:

  - "I have not seen evidence supporting a conclusion that Joe Paterno had acted in bad faith, nor have I seen evidence supporting a conclusion that he has ever been a man who lacked a genuine concern about the wellbeing of others — including the wellbeing of children."[12]

  - "In my professional opinion, there is absolutely nothing about the way in which Mr. Paterno had led his life, or about his characterological makeup, that would support the unsupported inference that 'in order to avoid the consequences of bad publicity,' he had been one of the 'powerful leaders' at Penn State who had 'repeatedly concealed critical facts related to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large.'"[13]

- In any fair courtroom or truly independent investigation, the target of an inquiry rightfully would expect all the facts, including the full scope of his life, to be considered when assessing his culpability. In this instance, however, the Freeh report ignores Joe

Paterno's lifetime record of moral conduct and altruism as if it were irrelevant to the case. Experts in the behavioral dynamics of child sexual victimization, as well as experts in conducting sensitive investigations, have concluded that such an omission was a serious flaw that undermines the credibility of the report. That conclusion is captured by Dr. Berlin:

> "Joe Paterno had known very little about the extent of the acts for which Mr. Sandusky had subsequently been convicted. In my judgment, given his history of a life well led, and of good character, and in light of the unsubstantiated nature of the inferences against him, to conclude that for any reason he would have been unconcerned about the wellbeing of children, would require turning a blind eye to the values that he had consistently demonstrated, and to the essence of what his life had been all about."[14]

- Joe Paterno died just over a year ago concerned for the victims, determined that the full truth should be revealed, and hopeful that these events could raise consciousness of child abuse detection more broadly and prevent its recurrence. As in his life, Joe Paterno remained committed to helping others at his death.

- Sue Paterno and her family remain deeply committed to that mission and will continue supporting significant steps, and making more contributions financially and emotionally, to increase child abuse awareness, identification and education in this country. This effort is one important chapter in that journey.

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I. Introduction

Rank speculation. Innuendo. Subjective opinions. This rhetoric, not objective facts and evidence, forms the core of the Freeh report's conclusions regarding Joe Paterno.

Speculation and subjective opinions are regularly rejected in the American justice system as unreliable and inadmissible in proceedings designed to discover the truth. Mr. Freeh knows these fundamental rules as a former judge, but sadly he ignored them in favor of substituting his personal opinions for objective factual findings and conclusions throughout his report. Although his report is confident in its conclusions, it lacks the careful distinctions, scrupulous weighing of evidence, and fair consideration of relevant information that is expected of a report addressing issues of such importance.

In the six months since release of the Freeh report, world-renowned experts, including the former Attorney General of the United States, one of the foremost former FBI profilers of child sex crimes, and a leading physician and psychologist specializing in pedophilia at The Johns Hopkins Hospital and School of Medicine, among many others, have reached similar conclusions: The Freeh report is deeply flawed and incomplete, and its statements specifically as to Joe Paterno are unfounded and unfair.

Although any fair-minded reading of the report would expose these clear shortcomings if key observers had taken the time to analyze it before rushing to judgment, the report has been given authoritative weight by both the press and the NCAA.

Adding to the tragic experiences of the victims of Jerry Sandusky, child exploitation experts have observed that the report missed a critical opportunity to educate the public on the identification and prevention of sexual molestation by child predators. Instead, the report sensationalized its "conclusions" with unfounded assertions of conspiracies and cover-ups by Penn State administrators as if they acted as a single-minded, collective group. At the same time, the report ignored the pathology of and psychological manipulation by child predators who gain the trust of entire communities by hiding in plain sight even when abuse warning signs emerge.

In short, Mr. Freeh unilaterally anointed himself the judge, jury, and executioner by deciding to redefine Jerry Sandusky's personal crimes as a Penn State and Joe Paterno football scandal. That bell can never be unrung, but the many associated errors can be corrected.

Mr. Freeh also violated the most basic notions of due process by offering his one-sided viewpoint without affording any meaningful opportunity for Joe Paterno, his representatives, or any neutral third party to test and respond to Mr. Freeh's opinions before he announced them as gospel at a national press conference.

Unlike Mr. Freeh, we are hesitant to speculate about individual motives in this case and why his report drew such irresponsible conclusions. To be clear, we do not impute bad faith to Mr. Freeh, who produced a report under pressure, in a time-sensitive, emotionally charged, and difficult situation. It is readily apparent, however, that the Freeh report viewed the few documents that even relate to Joe Paterno in the light least favorable to him, and through a conspiratorial lens that discarded an entire life of integrity, charity, and dedication to shaping

young men of character. In addition, as a widely respected, former FBI profiler and expert concluded, because the Freeh team approached their investigation the wrong way, and failed to account for the proven behavioral and psychological dynamics of crimes by acquaintance child sexual offenders that fit Sandusky's profile, they reached erroneous conclusions and failed to understand how Sandusky got away with his crimes for so long.

Mr. Freeh and his team wrote their report as if it were an indictment, with the unchecked power of a prosecutor, and delivered unsupported but headline grabbing theories as fact. We may never know if Mr. Freeh was motivated to pursue maximum publicity, to align his views with the media story line that had already been established, to satisfy a desire on the part of many who sought someone to blame in addition to Jerry Sandusky for the awful abuse of children, to justify a pre-conceived conclusion he reached in good faith but that he could support only by contorting "evidence" that did not fit his theory, or something else.[a] Only the test of time will judge those motives.

Recognizing always that the victims of Jerry Sandusky have suffered the most, it remains shocking to see the amount of damage the Freeh report and its aftermath have wreaked upon Penn State University, its alumni, the community, and the individuals targeted by the report. Many faculty, students, student-athletes, alumni, certain members of the Penn State Board, the Governor of Pennsylvania, and, ironically according to press reports, even a member of the Freeh Group itself, have expressed their disappointment and dismay that the NCAA subsequently used mainly the Freeh report as the basis to levy unprecedented, historic penalties on and criticism of Penn State.[15]

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[a] Mr. Freeh's personal opinions are not subject to any greater weight than informed observers' given the lack of facts regarding Joe Paterno, and his speculation about Joe Paterno's "legacy" are no more appropriate than ours about his tenure as the Director of the FBI. In that capacity, Mr. Freeh's judgment was criticized by Congress for such matters as the inappropriate handling of terrorism preparedness leading up to the 9/11 terrorist attacks, the inappropriate handling of matters relating to the follow up investigation of the Ruby Ridge killings, and presiding over the FBI with devastated morale from a perceived double-standard of discipline that favored senior FBI personnel at the expense of the rank-and-file agents, and which prompted multiple independent reviews and reversal of certain of Mr. Freeh's mandated FBI policies. We cite these examples not to opine on those allegations here, but to demonstrate simply that broad, opinion-based conclusions about leaders of large organizations are irresponsible, dangerous, and much easier to allege during press conferences and in self-written reports than to prove in a court of law or any other setting that requires reliability.

Mr. Freeh seemed particularly sensitive to these issues in connection with the release of the bi-partisan 9/11 Commission report, when in 2005 he published a passionate op-ed in the Wall Street Journal titled "An Incomplete Investigation." Mr. Freeh went so far as to call for the country to assess the credibility of the bipartisan 9/11 Commission itself. Among Mr. Freeh's assessments: the Commission ignored the most relevant fact of the entire post-9/11 inquiry; the commission's chair routinely "espous[ed] his own conclusions about 9/11 . . . long before all the facts were in"; and the Commission "grossly neglected" evidence, reached a "half-baked conclusion," and ignored "direct evidence to the contrary." Ironically, Mr. Freeh's own criticisms of the 9/11 Commission apply as forcefully to his own report here and his personal conclusions about Joe Paterno. Louis Freeh, *An incomplete investigation*, WALL ST. J., Nov. 17, 2005.

Indeed, such criticism of Mr. Freeh's alleged speculative capacity is not limited to Mr. Freeh's FBI tenure. In July 2012, over a year after Mr. Freeh was retained as an independent investigator by the Ethics Committee of FIFA (international soccer's governing body) in the FIFA sports bribery scandal regarding Mohamed Bin Hammam, the Court of Arbitration of Sports (CAS) overturned the FIFA decision, which had been based on Mr. Freeh's investigation. According to the CAS panel, Freeh's report "did not sufficiently investigate" key evidence and "was not complete or comprehensive enough to fill the gaps in the record." *Mohamed Bin Hammam v. FIFA*, CAS 2011/A/2625, Arbitral Award, at 50, 54 (July 19, 2012).

In reality, the Freeh report uncovers little new factual information as to Joe Paterno and does very little to advance the truth regarding his knowledge, or more accurately lack of knowledge, of Jerry Sandusky's molestation of children.[b] Instead of recognizing the substantial holes that are apparent from a substantive reading of the Freeh report and the incomplete record on which it is based, Mr. Freeh has done the opposite. He has claimed that the report is exhaustive and thorough, and pronounced grand and sweeping conclusions to the media about what Joe Paterno, in Mr. Freeh's personal view, knew and should have done about Jerry Sandusky. His unsubstantiated personal view has been adopted, incorrectly, by media and observers as proven fact, literally minutes after Mr. Freeh's press conference and before any meaningful study of the actual report was even possible.

In the months following the release of the Freeh report, the Paterno family requested a careful, thoughtful review of the results of the report, which purports to summarize the findings of over 430 interviews and a massive review of data — more than 3.5 million pieces of electronic data and documents — over more than seven months of investigation by Mr. Freeh.[16]

During our review, the judicial system proceeded swiftly as to Jerry Sandusky. In October, 2012, a state court sentenced him to 30-60 years in prison, effectively a life sentence, for his June convictions on 45 counts of child abuse. Sandusky's victims and their families confronted him directly at sentencing, and even then he continued to deny his guilt in the face of massive evidence at trial to the contrary.[17] But with Sandusky held accountable for his actions and the fever pitch regarding Penn State stabilizing with the benefit of time and perspective, a growing chorus of observers recognized that they could provide an honest assessment of the Freeh report without being vilified as defenders of a child molester.

Even during our relatively short review, it is clear that the Freeh report's key findings regarding Joe Paterno are unsubstantiated by the evidence, are the product of Mr. Freeh's personal opinions, and are entitled to no more weight than any other observer's views of these events. The Freeh report's conclusions are distorted by Mr. Freeh's use of Joe Paterno as a lightning rod in this tragedy, and by his repeated and unfair grouping of evidence regarding multiple individuals when the evidence shows that Joe Paterno, himself, knew virtually nothing about Jerry Sandusky's private or personal life or that of his victims, and received very few details about the two key incidents in question.

In these limited pages, and with the hope of continuing the process to find the truth in these horrific events, we seek to collect in one location the unwarranted conclusions and distortions in the Freeh report regarding Joe Paterno. More meaningfully, we also focus this report on one of the most important — and neglected — aspects of this entire scandal: the identification and recognition of child molestation and its prevention in our communities.

[b] Our review specifically evaluates the Freeh report's subjective opinions specific to Joe Paterno, and does not at this point discuss the many other logical gaps and infirmities in the report as to other aspects of his "findings."

II. Process of King & Spalding's review of the Freeh report & mandate to find the truth

When Mr. Freeh held a press conference and simultaneously released his report on July 12, 2012, the Paterno family and others familiar with the facts of the Sandusky scandal were stunned. The report contained few new facts, but the charges leveled against Joe Paterno were extreme, inaccurate, and completely unfounded.

The Paterno family immediately asked King & Spalding, led by Wick Sollers, Mark Jensen, and Alan Dial, to undertake a comprehensive review of the Freeh report and Joe Paterno's actions. They authorized us to engage the best, most respected experts, and to go wherever the facts and theories led us.

Accordingly, we obtained independent analyses and independent reviews of the Freeh report from the leading experts in their fields. When we retained these experts, two of the three knew Mr. Freeh in professional capacities and held him in high regard, a fact that later would lend additional credibility to their expert opinions. These preeminent experts are:

- Former United States Attorney General Dick Thornburgh, the country's top legal officer, who also was a renowned federal prosecutor, Assistant Attorney General in charge of DOJ's Criminal Division, experienced investigator, and the Governor of Pennsylvania. We retained Mr. Thornburgh to examine whether the Freeh investigation and its findings were thoroughly developed, accurate, fair and credible, particularly with respect to Joe Paterno.

- Former FBI Supervisory Special Agent and former state prosecutor Jim Clemente, who is one of the foremost former FBI profilers and experts on how to investigate, analyze, and understand the facts and behaviors of witnesses, offenders and victims in child sexual victimization cases. He also is a survivor of childhood sexual victimization. We retained Mr. Clemente to review and assess the Freeh report and its conclusions, with an emphasis on whether the Freeh report accounted for the extensively-studied behavioral dynamics at issue in child molestation cases.

- Dr. Fred Berlin, a treating physician, psychologist, and leading expert in sexual disorders and pedophilia at The Johns Hopkins Hospital and School of Medicine. He founded The Johns Hopkins Sexual Disorder Clinic, and is an expert in behavioral science and in the assessment of mental and motivational states. We retained Dr. Berlin to evaluate the Freeh report's conclusions about Joe Paterno's conduct.

In retaining these experts, we did not cherry-pick from a group of possible experts to find and secure the most favorable opinions. Instead, these were the only three experts we approached because of their impeccable credentials and reputations. They were compensated for their time, but each agreed to the engagement only if we would accept their unvarnished, objective opinions, whatever those turned out to be.

Despite statements by the Freeh Group that they conducted over 430 interviews and reviewed over 3.5 million documents, that effort yielded remarkably little evidence to advance the truth.

Their overall conclusions regarding the range of issues reviewed were supported by attachments numbering a mere 30 exhibits, including 17 emails, none of which were authored or received by Joe Paterno. We therefore quickly concluded that a "reinvestigation of the investigation" would be unproductive and focused our efforts on reviewing relevant public records, which of course included the Freeh report itself and its exhibits, witness interviews, grand jury and trial testimony, media reports, and other documents we could access to evaluate the Freeh report's conclusions. The Freeh Group never interviewed any of the key witnesses, with the exception of President Spanier, concerning the facts of the 1998 and 2001 incidents. We interviewed Joe Paterno and others and met with the lawyers for Messrs. Curley and Shultz and Dr. Spanier.

The Paternos gave us a direct mandate to set the record straight and find the truth as to Joe Paterno's conduct, whether positive or negative. They committed to complete transparency of our findings and those of the independent experts. All our full reports are available at www.paterno.com.

III. Mr. Freeh's press conference, the NCAA's immediate adoption of the Freeh report & the rush to judgment in the absence of facts regarding Joe Paterno

At 10:46 am on July 12, 2012, Mr. Freeh completed a 42-minute press conference where he repeatedly asserted his personal opinions about Joe Paterno's role in the Jerry Sandusky child molestation scandal. Perhaps his most pointed opinion was that four Penn State senior employees, including Joe Paterno, actively concealed facts about Jerry Sandusky to avoid consequences of "bad publicity."

The report had few new facts, but the conclusions were a surprise to many, including the Paterno family who trusted that Mr. Freeh would provide a report that was fair and balanced. The family reviewed and challenged the report, emphasizing that Joe Paterno accurately reported the 2001 incident and never would have allowed bad publicity to trump child safety if he had any belief that Sandusky molested children. Mr. Freeh presented not one shred of evidence that Joe Paterno interfered with any investigation or asked anyone to conceal relevant information. The family's view largely became relegated to a footnote in the contemporaneous and subsequent media frenzy surrounding the Sandusky scandal.

That morning, major news outlets around the country reported Mr. Freeh's sweeping conclusion as fact, repeating that Joe Paterno covered up for a known child molester. The Freeh report, which was 267 pages and included 702 endnotes and 105 pages of appendices, had been released at approximately 9:15 am, less than an hour before his press conference. The virtually instantaneous negative reporting belies any suggestion that the Freeh report, and its many unproven assertions and opinion-based conclusions, had been thoroughly studied and evaluated by the news outlets that adopted and perpetuated Mr. Freeh's wide-ranging, definitive, and unchallenged proclamations.

Within 24-hours, even respected news journalists[c] wrote that Joe Paterno "lied" and "concealed" his role in the Sandusky affair and that he knew the salacious details of two incidents deemed critical by the Freeh report: (i) a 1998 joint investigation of Sandusky by the district attorney, law enforcement officials, and the Department of Public Welfare, which concluded that no crime would be charged and that no sexual misconduct occurred, and (ii) a 2001 shower incident that graduate assistant Mike McQueary reported to Joe Paterno in general terms and that Joe Paterno learned about on Saturday, February 10, 2001, and reported promptly to his superior(s) that same weekend on Sunday, February 11, 2001.[d]

Only ten days after release of the Freeh report, on Sunday, July 22, 2012, and six months following Joe Paterno's death, Penn State removed his statue from the football stadium amid mounting pressure and criticism generated by the Freeh report and impending sanctions from the NCAA. The Big Ten Conference and private interests would subsequently remove Joe Paterno's name from significant awards and charitable projects.[18]

Only eleven days after release of the Freeh report, on Monday, July 23, 2012, the NCAA announced significant sanctions against Penn State, including a $60 million fine that would establish a child abuse endowment, the loss of scholarships, probation, waiver of transfer rules that allowed student-athletes to transfer from Penn State immediately, a post-season bowl appearance ban, deprivation of wins from 1998 through 2011, and the imposition of significant compliance and monitoring obligations. The NCAA adopted the sweeping compliance recommendations in Chapter X of the Freeh report and made multiple negative references to the culture of the football program. The NCAA also had considered banning the Penn State football program from NCAA competition entirely, known as the "death sentence," but elected instead to issue the above penalties.[19]

In imposing these sanctions, the NCAA acted in an unprecedented manner: it did not follow its own infractions process or abide by its due process rules. The NCAA did not provide Joe Paterno's representatives, any other coaching staff or player impacted by the sanctions, or any of the impacted Penn State administrators cited in the Freeh report, an opportunity to be heard despite such requests. But the President of the NCAA, during his press conference, reserved the ability to impose sanctions on individuals, pending the outcome of ongoing legal proceedings.

The NCAA did not conduct an independent investigation of the facts, and admittedly relied on the Freeh report in forming its view of this scandal and meting out draconian penalties. The President of the NCAA has stated that the NCAA relied on the Freeh report because the Freeh report was much more thorough than any investigation they could conduct without subpoena

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[c] Some of the most scathing commentaries emanated from journalists who previously were either supportive or balanced in their coverage of Joe Paterno's role in this matter. Whether those journalists were more concerned about their own reputations without fully assessing the extraordinary gaps in the Freeh report, simply reacting in good faith to Mr. Freeh's blanket and irresponsible assertions, or something else, only time will tell as the truth in this matter continues to emerge.

[d] In June 2012, a Centre County jury convicted Jerry Sandusky of 45 of 48 counts related child molestation. He was not convicted on the most serious of the five counts of sexual assault relating to the incident that McQueary discussed with Joe Paterno. McQueary acknowledged in this grand jury testimony, at a preliminary hearing for Tim Curley and Gary Schultz, and at trial that he did not provide graphic details to Joe Paterno about what he saw out of respect to Joe Paterno. *See infra* note m.

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power, ignoring that the Freeh Group also lacked subpoena power and did not talk to most of the key witnesses.[e]

On November 24, 2012, the Penn State football team concluded its season with an 8-4 record despite a decimated program and numerous player transfers before the season as a result of the NCAA sanctions. The team would have qualified for a post-season bowl game absent the sanctions. To this day, the NCAA Committee on Infractions, the NCAA's regular enforcement body, has not identified a single infraction of NCAA rules from Sandusky's personal crimes, much less an infraction by Penn State that implicated the NCAA's jurisdiction and core mission of ensuring competitive balance in amateur athletics.[20]

The NCAA completely disregarded its own "fundamental policy" that its rules apply only "to basic *athletics* issues such as admissions, financial aid, eligibility and recruiting."[21] The NCAA's own rules permit major sanctions, such as those imposed on Penn State, only when the rules violations lead to a "competitive advantage."[22] Remarkably, even the NCAA seemed to recognize the limits of its typical authority in the Consent Decree itself with Penn State: "[t]he sexual abuse of children on a university campus by a former university official — and even the active concealment of that abuse — while despicable, ordinarily would not be actionable by the NCAA."[23]

That fact did not deter the President of the NCAA from relying heavily on the Freeh report to circumvent his organization's established procedure, and to invoke morality clauses never extended outside basic athletic and competition infractions to assert that Penn State had institutional culpability for violating amorphous NCAA "expected norms and values" reflected in the NCAA Constitution and Bylaws, including a mandate to "promote civility in society."[24]

The NCAA's position as the moral authority on matters unrelated to competition but squarely within the American judicial system is even more perplexing given its own ethical track record of matters actually within its normal jurisdiction.

In the last three months alone, the NCAA has been criticized for (1) reported confidentiality violations and negatively prejudging the case of a UCLA basketball player before his reinstatement,[f] (2) a report accusing a former USC coach of ethical breaches, that a state court judge described as "flawed" in a ruling that allowed the coach to pursue his defamation claims against the NCAA; the judge reviewed sealed documents and characterized the NCAA's actions as "malicious" and "over the top,"[g] and (3) a reported lack of integrity in an ongoing NCAA investigation into the University of Miami, where a lawyer, acting at the request of a NCAA investigator, is alleged to have improperly obtained information during a legal proceeding to assist the NCAA's investigation, and subsequently was found to be on the NCAA's payroll.[25] The same President of the NCAA who announced the Penn State sanctions has said that the

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[e] According to NCAA President Mark Emmert, the Freeh Group "had more power than we have — we don't have subpoena power, which was more or less granted to them by the Penn State board of trustees." *NCAA prez: Penn St. responding well*, ASSOCIATED PRESS, Sept. 24, 2012.

[f] Baxter Holmes, *Overheard conversation suggests NCAA prejudged Shabazz Muhammad case*, L.A. TIMES, Nov. 14, 2012; Joe Nocera, *Race and the NCAA*, N.Y. TIMES, Nov. 19, 2012.

[g] Anthony McCartney, *Judge says NCAA 'malicious' in USC investigation*, ASSOCIATED PRESS, Nov. 21, 2012.

NCAA did not approve the hiring of the lawyer, and that he had no knowledge of the issue until the lawyer's bills arrived in the mail.[26] Indeed, the NCAA, while using the flawed Freeh report to cast stones at Penn State for the lack of "institutional control," appears to have exposed itself to criticism that it has lost institutional control over its own organization.[h]

The definitive and sweeping proclamations of misconduct in the Freeh report, immediately parroted and endorsed by the NCAA President, became the perceived truth about Joe Paterno and Penn State University despite the many errors that infected those conclusions.

The effect, unfortunately, was to stymie any additional fact investigation into the truth of these matters by non-law enforcement — no additional fact investigation apparently occurred on how Jerry Sandusky could avoid detection as a child molester by his charity, The Second Mile, by child welfare experts, by state authorities at the time, or by foster care and adoption professionals. Instead, three former Penn State administrators are embroiled in the judicial process in their individual cases, but the final chapter on Penn State and Joe Paterno, according to Mr. Freeh and the NCAA, has been written and the book closed.[i] That rush to judgment was a disservice to the truth, the victims of this tragedy, the community of Penn State, and the family of Joe Paterno. All deserve a fair and balanced assessment of the facts.

In short, the personal, subjective, and unsubstantiated opinions of Mr. Freeh, both in his report and in his press conference, provided the basis for an unprecedented assault on the character and integrity of Joe Paterno that has altered dramatically any neutral assessment of the facts in the Jerry Sandusky abuse scandal. A correction of the multiple errors and speculative opinions in the Freeh report follows. More critically, we provide guidance from world-renowned experts on the identification of child sexual victimization that could help to prevent this tragedy from recurring.

IV. Jerry Sandusky fooled the entire Penn State community, including Joe Paterno, who missed the red flags of child molestation as part of proven behavioral dynamics of "acquaintance" child sex offenders; Sandusky's deceptions and behavior are a case study for the public to learn how to detect and prevent child molestation

The entire Penn State community, including Joe Paterno, was fooled by Jerry Sandusky. Joe Paterno missed the red flags of child molestation, and he never believed Sandusky was a child molester due to the proven behavioral and psychological dynamics and blind spots created by "nice-guy" acquaintance child sex offenders. This case, if analyzed correctly through the lens of

[h] Dana O'Neil, *NCAA its own worst enemy — again*, ESPN.COM, Jan. 24, 2013; Joe Nocera, *The N.C.A.A.'s ethics problem*, N.Y. TIMES, Jan. 25, 2013

[i] The NCAA, in responding to the Pennsylvania Governor's January 2013 lawsuit claiming the NCAA overstepped its authority and illegally sanctioned Penn State, remarkably referred to the lawsuit as an "affront" to the victims. Press Release, NCAA responds to Corbett's Penn State sanctions lawsuit (Jan. 2, 2013). The NCAA's repeated use of language as the moral authority in this matter is unfortunate. The NCAA abdicated its responsibility to conduct an investigation of any kind, and closure for victims will depend significantly on the American judicial system, which will afford affected parties due process rights, will take years to resolve, and is well beyond the NCAA's jurisdiction. In the meantime, whether the NCAA has violated federal antitrust laws by issuing the Penn State sanctions is a legal question distinct from Sandusky's personal crimes.

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criminal and psychological research, can serve as a model for the public to learn how to identify and prevent child sexual victimization.

One of the most significant lost opportunities in the Freeh report is its failure to educate the public on the root causes of Sandusky's ability to molest children while holding a highly visible and exalted position in the community. This Critique will not repeat the Freeh report's mistake, and instead attempts to draw some lessons from this scandal. The lessons learned from the Sandusky case, if identified properly and used to sensitize child care organizations, foster care agencies, charities, parents, teachers, coaches, neighbors, and others, could have a powerful impact in preventing child molestation in communities throughout the country.

To that end, both Dr. Fred Berlin and Mr. Jim Clemente have described the difficulty of identifying acquaintance child sex offenders.

Jim Clemente characterized Jerry Sandusky as an acquaintance child molester who fooled his entire community for decades and gained its widespread trust. He concludes that Sandusky:

- "effectively groomed[j] most of the people who came in contact with him, including child care experts, psychologists, professionals, celebrities, athletes, coaches, friends and family. And most notably, [Sandusky] was approved numerous times over thirty years as both a foster parent and an adoptive parent by child care professionals." Based on Mr. Clemente's experience, he would describe Sandusky as "a skilled and masterful manipulator . . . in the top one percent of effective 'groomers.'"[27]

Mr. Clemente also concludes that the Freeh report ignored decades of this expert research and behavioral analysis into the appropriate way to understand and investigate a child sexual victimization case like this one.[k] He put it bluntly:

- "The SIC failed to properly factor the dynamics of acquaintance child sexual victimization cases into their investigation. Consequently, the SIC misinterpreted

[j] Jim Clemente describes "grooming" in his Analysis: "In the context of child sexual victimization, grooming is a dynamic process utilizing a constellation of seemingly innocent behaviors aimed at gaining the cooperation of the child to achieve sexual gratification for the offender. In other words, it is a pattern of activity employed by preferential child sex offenders to gain access, authority, and control over children for sexual purposes, to ensure their silence, and to keep them in a position in which they can be repeatedly victimized. This dynamic process is aimed at potential child victims, their parents or guardians, and the community that surrounds them. Those who are closest to the child victims or the offender are precisely the ones who are most affected by grooming practices." Clemente at 9.

[k] "Stranger" offenders have a dramatically different profile and behavioral pattern than "Acquaintance" offenders like Jerry Sandusky, and these important distinctions require different analytical approaches to understand each type of offender's crimes. Clemente at 11, n.19. For example, the distinction between sexually motivated "stranger" child abductors and "acquaintance" child molesters is that "stranger" offenders typically do not have the skills to groom their victims or community, and they therefore resort to abduction to gain access to children for sex. *Id.* In contrast, the acquaintance offender includes a "particularly insidious sub-category" called "nice-guy" offenders "sometimes referred to as the 'pillar of the community' or 'man of the year' offenders." *Id.* at 8. Mr. Clemente notes that the acquaintance, "nice-guy" sub-category of offenders is very difficult to detect even for trained law enforcement officers. *Id.* at 8-9. He further notes that these two types of offenders use methodologies that differ to such an extreme that professional expertise in evaluating one typology does not necessarily guarantee an expertise in the other. *Id.*

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evidence and behavior and reached erroneous conclusions. Any investigation will reach the wrong result by using the wrong approach and by interpreting the facts through the wrong filter."[28]

- "There is no other way to say it: on the most critical aspects of the Sandusky investigation, the SIC report is a failure. It does a tremendous disservice to Penn State, Joe Paterno and the victims of Jerry Sandusky."[29]

Echoing the difficulty of detecting acquaintance child molesters, Dr. Berlin explained:

- "[t]he fact that persons with pedophilia can so often enjoy spending time with children, showing concern for them, can easily seem so positive; masking the hidden nature of their sexual desires. As a consequence, numerous public examples exist documenting just how difficult it can be for friends, colleagues, relatives, and close acquaintances to appreciate the risk that such an individual can pose to children."[30]

Expert analysis, not surprisingly, shows that such a profile is not unique to Sandusky. It is common in many other case studies of prominent child molesters who hide in plain sight by cultivating and leveraging community trust to escape detection, even in the face of key signs that, in hindsight, indicated child abuse. That fact — the cognitive disconnect between what the community believes it knows about one of its well-regarded members and its inability to reconcile and accept what it later learns about signposts of child abuse — is a behavioral, medical, and psychological reality that repeatedly allows pedophiles to explain away complaints of inappropriate activity. Often, recognition of child molesters is even more difficult for those colleagues or friends who work or socialize most frequently with the child molester, as their own personal experiences and belief that they know the person well in some capacity allows them to accept alternative explanations in the absence of training on how to identify a sophisticated and manipulative child molester.

Jerry Sandusky, unfortunately, benefited from this acquaintance offender profile, which helped him escape detection even when red flags emerged. For example, as Jim Clemente states concerning the 1998 incident:

- "[f]or those who worked closely with Sandusky and knew about the 1998 incident, the closing of this [District Attorney's office] investigation as unfounded was *confirmation* of Sandusky's outstanding reputation and *their belief* that he was a devoted advocate for children."[31] In short, as Mr. Clemente put it, the 1998 matter validated Sandusky's status as a pillar of the community after he was exonerated following a thorough investigation.[32]

In analyzing Jerry Sandusky's profile and grooming techniques, expert analysis has categorized him as a textbook "nice-guy" offender who used his prominent position in the community as a founder of a kids charity, a foster parent, an adoptive parent, and a college football coach to cultivate an image of a safe and trusted figure. Sandusky embraced and perpetuated an image as a "nice guy," "goofy," and even "playful" to lure parents, kids, work colleagues, and many others, to establish a natural explanation for such warning signs as playing physical games with kids, "horsing around" in the shower after workouts, sleep-overs, and generally being with kids of all ages at all times of the day and night in any context.[33]

Mr. Clemente's report describes how Joe Paterno, like many others, was fooled by Sandusky's nice-guy, goofy image. In Mr. Clemente's expert judgment as an FBI profiler who specializes in child sexual victimization investigations, Joe Paterno was not equipped to process and recognize a preferential "nice-guy" child molester under the circumstances of this case.

Mr. Clemente analyzed the 2001 report of a Sandusky shower incident from graduate assistant, Mike McQueary, to Joe Paterno. Mr. Clemente concluded that the report was couched in too vague and general terms for Joe Paterno, as a 72-year-old football coach who was untrained in the complicated, counterintuitive dynamics of child sexual victimization and who came from a traditional background where even consensual sex was not discussed, to conclude that Sandusky was a child molester.

As summarized in Mr. Clemente's own words:

- "Given my 30 years of education, training and experience working, evaluating and assessing child sex crimes investigations around the world, it is my expert opinion that Paterno did not know, or even believe in the possibility, that Sandusky was capable of sexually assaulting boys. At worst, he believed that Sandusky was a touchy-feely guy who had boundary issues. This fact is clear from his repeated statements before he died."[34]

- "[Paterno] did what he believed was reasonable and necessary to address the situation based on his understanding of the facts, and his position at the time. Paterno did what most people who cared about children would have done in the same situation. More than a decade later, and in hindsight, Paterno showed his concern for the victims when he stated he 'wished [he] had done more.'"[35]

- "Paterno, like everyone else who knew Sandusky, simply fell victim to effective 'grooming.' As an expert behavioral analyst and based on my review of the evidence, Paterno did not believe that the information he received from McQueary amounted to Sandusky being a predatory child sex offender."[36]

Dr. Berlin, after evaluating the behavioral dynamics of acquaintance sexual victimization in this case, has reached similar conclusions about Joe Paterno's good faith and limited knowledge of Sandusky's issues:

- "It has been argued in retrospect that Mr. Paterno should have done more, and 'knowing now what he did not know then,' Mr. Paterno himself had expressed that very sentiment. However, in 2001 he had had absolutely no knowledge whatsoever about the extent of Mr. Sandusky's sexual involvements with multiple children; involvements that have only recently been more fully documented in 2012 via Mr. Sandusky's criminal convictions."[37]

- "In looking back, with the advantage of hindsight, it is one thing to suggest that perhaps more could have been done, and that there are lessons to be learned. Arguably, in any situation there is almost always more that can be done, and life often involves a series of adjustments and learning experiences. It is another thing entirely to impugn a lack of

> good faith, and malevolent self-serving motives, in the absence of compelling evidence." "As a football coach, having reported his concerns to his superiors, Mr. Paterno may not have been well equipped to fully appreciate how best to handle such a vexing situation. However, to infer as did the 'Freeh Report,' that he may have been one of those at Penn State who had manifested a 'total and consistent disregard . . . for the safety and welfare of Sandusky's child victims,' is to itself show a serious disregard for Mr. Paterno's repeatedly demonstrated moral values; to his lifelong pattern of responsible conduct and leadership; and to his dedicated commitment to the best traditions of the Pennsylvania State University."[38]

Joe Paterno was one of many deceived by Jerry Sandusky. Experts much more versed in recognizing child abuse than Joe Paterno failed to detect Sandusky's abuse. Between 1998 and 2001 alone, the following trained experts were fooled by Sandusky's deceptions: a detective, a police officer, a caseworker for the Department of Public Welfare, a caseworker for the Centre County Children and Youth Services, an outside counselor who did contract work for Children and Youth Services, and apparently everyone at a kids' charity, The Second Mile, including its executive director, Jack Raykovitz, who is a licensed psychologist.

Furthering Sandusky's carefully crafted image as a protector and advocate for kids, he legally adopted six children, in addition to his role as a foster parent for many others. Three of his children were adopted as infants, and three were adopted presumably after they first entered the foster care system. In other words, on six different occasions, Sandusky was evaluated by state officials and a Pennsylvania judge for fitness to adopt; and six times Sandusky passed that expert scrutiny.

- Sandusky's youngest son, Matt, was fostered in 1996 and adopted several years later. Matt's foster placement and adoption required numerous court appearances and state approval.[39] Sandusky has been convicted of molesting numerous young boys during that time period, and Matt alleges that Sandusky also was molesting him.[40] Yet, Sandusky's conduct went unnoticed by all these state officials. Sandusky also served as a foster parent for many other children dating back to the 1970s, and none of the officials responsible for reviewing his fitness apparently identified his misconduct.[41]

Both Dr. Berlin and Mr. Clemente describe the proven behavioral dynamics of child sexual victimization, and their decades of combined experience have allowed them to identify and describe methods to detect child abuse and child predators in our communities.

We refer further to both experts' reports and published works that provide more details on proven behavioral red flags to help identify child sexual victimization.[42]

As part of the Paterno family's ongoing commitment to Penn State and child abuse detection, it has pledged its full support of child sexual victimization awareness, training, and prevention. More details will follow on these innovative programs, some of which are previewed in Mr. Clemente's recommendations, entitled "A Way Forward."[43] Mr. Clemente's recommendations also include his call for a full review of The Second Mile's actions in this case, which will help to ensure that a trusted charity with experts in the field of child abuse does not miss the warning signs of child victimization again.[44]

It is the Paternos' hope that King & Spalding's work, including the commissioning of the three attached expert reports, will take advantage of an opportunity that the Freeh report missed by using this rare national spotlight to publicize child molestation detection techniques. This review attempts to highlight some positive lessons from this tragedy by prioritizing that issue through these preeminent experts.

Unfortunately, the Freeh report suffers from the most basic procedural limitations in its investigative methods and information gathering. As detailed in the next section, a third independent expert, former Attorney General of the United States, Dick Thornburgh, concludes that the Freeh report is deeply flawed in its investigative processes and methodology, in its access to information, and in its reasoning based on the record, and that ultimately it draws unreliable, unfair and incorrect conclusions as to Joe Paterno.

V. The Freeh report is deeply flawed in its investigative procedures & processes

The Paterno family, from its first review of the Freeh report, publicly urged against a rush to judgment given immediately obvious gaps in its methodology, limited access to critical witnesses and documents, and sensational conclusions as to Joe Paterno not based on facts.

Those requests were largely unheeded in the onslaught of media coverage and understandable rage against Jerry Sandusky. The test of time, however, has only amplified the limitations of the Freeh report, as now confirmed by the former top legal officer of the United States who served in the Justice Department under five Presidents.

Former United States Attorney General Dick Thornburgh undertook an independent review of the Freeh report and its conclusions. Attorney General Thornburgh is a preeminent expert in conducting investigations, having been a federal prosecutor, both as United States Attorney in his home town of Pittsburgh and as Assistant Attorney General of the United States in charge of the Department of Justice's Criminal Division. As a private lawyer he has investigated matters related to the bankruptcy of WorldCom and inaccurate reporting at CBS News "Sixty Minutes Wednesday" by news anchor Dan Rather, among other matters. He also served as a consultant to the World Bank, the Inter-American Development Bank and the United Nations on investigative techniques to be utilized against allegations of corruption within those organizations. He is the former Governor of Pennsylvania whose management of the Three Mile Island nuclear accident was widely praised[45] and is nationally respected for his bipartisanship and independent judgment.[46]

We expressly requested Attorney General Thornburgh to review independently the facts and circumstances associated with the Freeh report and to reach any conclusions he and his team deemed appropriate in their legal judgment, regardless of his conclusions as to Joe Paterno.

Attorney General Thornburgh confirms that the Freeh report suffered from critical deficiencies, including substantive flaws in its findings as to Joe Paterno and in its processes and limited access to key witnesses and evidence. Mr. Thornburgh details a variety of specific infirmities in the Freeh report's methodology and conclusions. As an illustrative sample of his observations:

- "When considered in the context of investigation 'best practices,' it is evident that the Freeh Report and many of its findings as they relate to Mr. Paterno are not accurate, thorough, fair or credible."[47]

- "The process of the SIC's investigation was deficient in numerous ways, including the failure to interview virtually all of the key witnesses and the reliance upon limited, ambiguous documents. Perhaps most significantly, the findings in the Freeh Report about Mr. Paterno concerning his alleged knowledge of the 1998 incident and purported concealment of the 2001 incident were not properly supported."[48]

- "Although the Freeh Report's description of its interview process sounds impressive . . . [it] fails to acknowledge that, as a result of the above-described limitations, it lacked access to the most *critical* witnesses, which severely limits the reliability and usefulness of the Report."[49]

- "Indeed, the SIC interviewed only one witness (Dr. Spanier) who had direct knowledge about the most important incidents discussed in the Freeh Report. Despite this fact, the Freeh Report states that, while the information [that] unavailable witnesses 'could have provided would have been pertinent to the investigation, the findings in this report represent a fair, objective and comprehensive analysis of the facts.' Incredibly, considering the findings in the Freeh Report are supported substantially by less than 30 contemporaneous documents, the Report goes further, stating that the 'extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed.' In light of the broad and damning conclusions in the Freeh Report, such statements by the SIC are irresponsible and self-serving."[50]

- "In my opinion, the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno."[51]

- "[The] findings in the Report are not accurate, supportable or fair."[52]

These shortcomings do not render the Freeh report irrelevant and of no value, but they do completely undermine the reliability of Mr. Freeh's key conclusions and speculative opinions as to Joe Paterno. Attorney General Thornburgh's conclusions are inescapable, and Mr. Freeh's team did not have to proceed as it did.

Mr. Freeh had the option to describe the facts his team developed, responsibly embrace the limitations and gaps in his methodology, and render appropriately balanced, fair, and caveated observations. He had the option to recognize the plausibility of other conclusions given the limitations of his investigation. Instead, Mr. Freeh did the opposite: he championed his own report as the authoritative say on this controversy, and drew headline-grabbing and alarmingly unsupported conclusions, all while the reputation of an entire community hung in the balance. Everyone deserved better.

Our review has concluded, as did three respected experts, that the Freeh report is flawed in multiple ways and "got it wrong" as to Joe Paterno. This Critique of the Freeh report describes

seven of the most egregious, unfounded conclusions about Joe Paterno; the three other expert reports attached to this Critique address many more.

VI. The Freeh report is based on numerous errors and unsupported opinions

The Freeh report is full of errors and unsupported personal opinions, and accordingly it makes improper allegations and biased assertions. The limitations of its conclusions, which were understated or ignored in the report, call into question the legitimacy of the entire report.

A. Error & Unsupported Opinion #1: *Joe Paterno knew that Jerry Sandusky was a child molester and concealed it in 1998.*

Facts & Evidence. The Freeh report does not cite a single witness interview or one shred of evidence establishing that Joe Paterno knew that Jerry Sandusky molested anyone in 1998.

The Freeh report, after conducting over 430 interviews and reviewing millions of pieces of evidence, cites just two email strings that Mr. Freeh claims may refer to Joe Paterno in the context of a 1998 complaint about Jerry Sandusky.[53] Those two emails — in a sum total of 3 lines — come from a single person, Athletic Director Tim Curley, and were not sent or received by Joe Paterno, do not reference sexual conduct of any nature, and are devoid of any statements by Joe Paterno.

In the first of the two documents, Mr. Curley wrote an email that is untitled, dated May 5, 1998, and is subsequently included in an exchange between Mr. Curley, Senior Vice President Finance and Business Gary Schultz, and President Graham Spanier, consisting of a single line: "I have touched base with the coach. Keep us posted. Thanks."[54] The next day on May 6, Mr. Schultz emailed Mr. Curley, copying Dr. Spanier, with a subject line "Re: Joe Paterno," included the May 5 email, and he wrote a single line: "Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday."[55]

- The Freeh report includes no statements from either Mr. Schultz or Mr. Curley regarding the substance of these exchanges because Mr. Freeh's team did not interview them.

- The Freeh report did reference an interview with Dr. Spanier and a written statement by him. In his interview, Dr. Spanier said he did not recall the email he received, and in his statement referred to the email as a "vague reference with no individual named."[56] Dr. Spanier does not believe he was briefed verbally and otherwise had "absolutely no recollection"[57] of any alleged sexual misconduct by Sandusky prior to 2001. Put another way, Dr. Spanier's account is devoid of any reliable evidence, or even a suggestion, that Joe Paterno learned of any sexual misconduct allegations in 1998. If anything, Dr. Spanier corroborates that that the 1998 event was not reported to either of them (if reported at all to Joe Paterno) in serious terms.

The Freeh report cites a second email string regarding the 1998 event that begins between Messrs. Curley and Schultz on May 13, 1998, and culminates in an June 9, 1998 email entitled, "Re: Jerry." The June 9 email copies Dr. Spanier and the Director of Police at Penn State, Thomas Harmon. Mr. Schultz says in the June 9 email that the matter has been "appropriately investigated" and that "[the Department of Public Welfare investigator and police] met with

Jerry on Monday and concluded there was no criminal behavior and the matter was closed as an investigation."[58] This email string contains a single line that may reference Joe Paterno in the May 13, 1998 email authored by Mr. Curley: "Anything new in this department? Coach is anxious to know where it stands."[59]

- The Freeh report concludes that "the reference to Coach is believed to be Paterno."[60] In fact, it is not clear whether "Coach" refers to Sandusky, Paterno, or someone else. While one inference may be that the reference is to Joe Paterno, the Freeh Group's inability to confirm a simple proposition — that an email in fact references Joe Paterno when it appears that it might — demonstrates more broadly the limitations on Mr. Freeh's ability to fact-find, the lack of subpoena power, the limited access to witnesses, and ultimately the prevalence of his speculative judgments to connect dots that often do not even exist.

- Mr. Thornburgh, in his review of the very same email, offers a similar view: "the subject line, 'Jerry,' suggests that the 'Coach' could just as likely be Mr. Sandusky as Mr. Paterno." Mr. Thornburgh explains, "[a]round this time, for example, Mr. Sandusky had proposed to the University administration the possibility of starting a football team at the University's Altoona campus where he could be the head coach." For the Freeh investigators not to consider this option as a reasonable interpretation of this email is telling, especially because the timing of these discussions would have been well documented in the administration files or known by the people in the administration that they interviewed.

- More importantly, the Freeh report offers no evidence about what Mr. Curley meant when he wrote this email, what if anything he conveyed to "Coach," what "Coach" said in response, whether minors were referenced, whether showers were mentioned, whether a general description of an issue with a Second Mile participant was provided, such as "poor judgment" or "an administrative issue," or if more specific details were provided.

  - What is *abundantly clear* from the record, however, is that this episode was thoroughly investigated and that experts outside the Penn State football program were informed, including a licensed psychologist, a detective and a police officer, a caseworker with the Centre County Children and Youth Services (a public agency), a caseworker and investigator from the Department of Public Welfare (a public agency), and the Centre County prosecutor in the District Attorney's office (a public agency). The independent prosecutor's office declined to bring charges and the investigation concluded without any finding of abuse.

  - The Freeh report faults some of these investigators with its 20/20 hindsight, but does not find any evidence of interference by Penn State administrators in the 1998 Sandusky investigation. More importantly, there is no evidence that any Penn State official acted in bad faith or in any way doubted the conclusion of no sexual misconduct. Furthermore, there is no evidence that Joe Paterno covered up anything regarding the 1998 incident, or indeed that there was anything to cover up given an ensuing investigation that included outside independent experts in the field of child abuse.

Despite this clear record, the Freeh report piles inference upon innuendo as to Joe Paterno by citing *Mr. Schultz's* inflammatory, May 4 & 5, 1998 notes that Mr. Schultz held "confidentially in his office and that had been concealed from the Special Investigative Counsel."[61] The May 5 set of notes apparently reflects a discussion with Thomas Harmon, the same head of police that eventually concluded, along with independent experts, that no sexual misconduct had been established.[62]

- Mr. Schultz apparently made these notes on the first two days of the reported event, over a full month before the ensuing investigation ultimately exonerated Sandusky. Critically, Joe Paterno is not referenced anywhere in Mr. Schultz's "confidential" notes, and there is no evidence that Mr. Schultz conveyed his personal thinking to Joe Paterno or otherwise shared the content of these notes with him.

Overall, the Freeh report suffers from a glaring and *indisputable flaw* in drawing conclusions from these two email strings: the Freeh Group never spoke with the author of the emails, Mr. Curley, nor did they speak with the other party to the alleged conversation(s), Joe Paterno.

- Former Attorney General Thornburgh identifies at least 14 key witnesses from the 1998 incident and investigation that the Freeh group apparently did *not* interview as part of the "record," and he concludes that "[a]ny report of these events that excludes primary witnesses is dramatically deficient and incomplete and should not form the basis for findings of the nature of those in the Freeh Report."[63]

Put another way, the former Director of the FBI drew definitive and irresponsible conclusions about what Joe Paterno knew without talking to the two participants in the very conversation(s) at issue, and instead substituted his own speculation regarding what was said, what context did or did not exist, how it was interpreted by the participants, and what it meant.

Former Attorney General Thornburgh describes the Freeh report's interpretation of the 1998 incident as one its "most significant failures," adding:

- "The Freeh Report claims that Mr. Paterno knew about the 1998 incident involving Mr. Sandusky at or about the time that it occurred. However, there is no credible support provided in the Freeh Report for what, if anything, Mr. Paterno was aware of concerning the 1998 incident prior to 2011. Indeed, the Freeh Report ignored contrary evidence that Mr. Paterno did not have such knowledge."[64]

Former FBI profiler Jim Clemente likewise concludes that the Freeh report, in "discussing the 1998 incident [] reaches several misleading and erroneous conclusions that demonstrate the SIC report's rush to judgment against Paterno."[65] He explains:

- "As it relates to Paterno, there is very little to be said about the 1998 incident. As far as Paterno knew, if he knew anything, it was fully investigated and Sandusky was fully cleared. Had Paterno or anyone else taken any action against Sandusky, as far as they knew, they would be exposing themselves and the university to a lawsuit from Sandusky. Nonetheless, I will discuss the 1998 incident in some detail for two reasons. First, if Paterno did know about the 1998 incident and the fact that Sandusky was investigated

> and cleared, this likely would have affected Paterno's understanding of the 2001 incident. Upon hearing the report from McQueary, Paterno could have reasonably believed that Sandusky was simply horsing around with the boy — just like he was determined to have been doing in 1998 — despite the fact that McQueary perceived it as 'over the line.'"[66]

Mr. Freeh drew his conclusions about 1998 on a shockingly incomplete record. That is remarkable in the context of a report that purportedly is based on "facts." And in the context of highly charged opinions and a topic as sensitive as child molestation, it is disappointing that Mr. Freeh lacked the fundamental fairness to acknowledge that he could not reasonably draw such firm conclusions. If his intent was to be fair, Mr. Freeh would have allowed for the various alternative reasonable interpretations that exist for these and other elliptical emails upon which the report so heavily relies.

Rather, the Freeh report glossed over the glaring lack of evidence as to Joe Paterno, used these two email strings to saddle Joe Paterno with the evidence about what *other* officials at Penn State allegedly knew, and opined that it was all a conspiracy to conceal and avoid the consequences of bad publicity. Of course, although "avoidance of bad publicity" is the motive selected by Mr. Freeh for the conspiracy he suggests — and every conspiracy needs a motive — he does not produce a single document, or even interview, as to Joe Paterno that supports his thesis. In fact, the evidence or lack thereof completely undercuts his theory.

More fundamentally, Mr. Freeh's *entire premise is undermined* by the fact that in 1998 public agencies were investigating Sandusky and rendering independent decisions about whether any misconduct occurred, whether "bad publicity" would ensue, how to handle the issue with Sandusky, and ultimately whether to file any charges. Joe Paterno controlled none of that decision-making by public agencies, and suggesting he did so as the beginning of a conspiracy in 1998 misconstrues the record and invents facts not in the Freeh report because they do not exist. Indeed, Mr. Freeh assumes that very premise *in the face of direct evidence that proves the opposite.*

The Freeh Group also fails to acknowledge that they did not identify a single piece of evidence from Joe Paterno himself — not a single note, email, conversation — reflecting any knowledge of Sandusky and sexual misconduct allegations in 1998, despite having access to his files, as well as access to information provided from Joe Paterno's "Sandusky file."

Moreover, the Freeh report acknowledges that there was *no connection* between the May 1998 incident and Sandusky's 1999 retirement.[67] Indeed, Joe Paterno in his contemporaneous handwritten notes concluded that Sandusky would not be the next head football coach at Penn State.[68] He communicated that fact to Sandusky in early 1998, well before the incident described above.[69] Joe Paterno's private notes detail Sandusky's involvement with The Second Mile, which he thought at the time was entirely altruistic but too time consuming, and the notes reflect other details about Sandusky's performance.[70] Yet, not one syllable of these private notes reveals any knowledge or concern about Sandusky and sexual misconduct allegations.

It is disingenuous to conclude that Joe Paterno could have such deep knowledge and concern of such serious allegations, yet fail to record them in contemporaneous, private notes when evaluating Sandusky's future, particularly when the Freeh report cites similar evidence as critical

in other contexts. But where, as here, the notes are exculpatory and show Joe Paterno's good faith, the Freeh Group conveniently ignores their significance because it is inconsistent with their decision to pillory Joe Paterno.

B. Error & Unsupported Opinion #2: *Joe Paterno lied in his Grand Jury Testimony, particularly about the 1998 incident.*

Facts & Evidence. Joe Paterno, at the age of 84, was interviewed by the district attorney, separately testified for 7 minutes before the Grand Jury in 2011, and honestly conveyed what he remembered about the 2001 incident reported by Mr. McQueary ten years earlier.

His testimony was corroborated by other accounts at Sandusky's trial, he fully cooperated with the Attorney General's office, and he was not designated as a subject of the investigation.[l] Mr. McQueary testified that Joe Paterno promptly met with Mr. McQueary at Joe Paterno's house on a Saturday,[71] and that Mr. McQueary conveyed that Sandusky was engaged in inappropriate activity in the Lasch building. Mr. McQueary and Joe Paterno both testified consistently that Mr. McQueary was upset during the discussion and talked about general inappropriate activity that may have been of a sexual nature by Sandusky, but that Mr. McQueary, "out of respect" for the 75-year-old Joe Paterno and due to his own "embarrassment,"[72] did not provide him with specific and graphic details of the 2001 incident.[m]

Mr. McQueary himself, when questioned, acknowledged that he did not see anything in the shower very clearly, such that some of this observations were indirect through a mirror[73] and his observations about Sandusky occurred over just "seconds,"[74] and that he reported hearing slapping sounds but did not communicate details of any actual sexual acts in the shower. Although Mr. McQueary's recollections have not always been consistent over time, Mr. McQueary repeatedly has emphasized he provided limited information to Joe Paterno.[75] Jim Clemente's Analysis provides a similar but much more extensive assessment of Mr. McQueary's observations and statements in the decade between the incident and the Sandusky trial in 2012.[76]

Joe Paterno, like Mr. McQueary, consistently said he was provided no visual details and never was told or believed a boy had been raped in the shower in 2001.[n] He did not know if Mr.

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[l] According to the Attorney General's office, "Joe Paterno was a witness who cooperated and testified before the grand jury. He's not a suspect." Mark Scolforo, *PSU official's lawyer shapes defense*, ASSOCIATED PRESS, Nov. 7, 2011.

[m] According to McQueary, he told Joe Paterno that he "saw Jerry with a young boy in the shower and that it was way over the line," "[t]he rough positioning I would not have described in very much detail." Preliminary hearing at 24. "I told him what I had seen, again, on the surface." Sandusky trial transcript, June 12, 2012, at 205. McQueary has been clear that he did not use the terms "anal," "intercourse," "sodomy," or "rape." Preliminary hearing at 25. Sandusky trial transcript, June 12, 2012, at 205-06. McQueary explains he did not give these details "[o]ut of respect and just not getting into detail with someone like Coach Paterno," "in my mind I don't go to Coach Paterno and go into great detail of sexual acts. I would have never done that with him ever." *Id.* at 25, 74.

[n] According to the notes of Penn State then-university general counsel, on January 3, 2011, Joe Paterno told her that McQueary "[s]aw Jerry horsing around w the kid a young man in shower inappropriate behavior." Freeh report at 83. Paterno told the grand jury on January 12, 2011 that McQueary had seen "a mature person fondling, whatever you might call it — I'm not sure what the terms would be — a young boy." Transcript of Proceedings 4, Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, *In re Notice No. 29* (Jan. 12, 2011) ("Grand jury transcript"). Paterno told a biographer in November 2011 that McQueary "wasn't sure he saw anything. . . . I thought [McQueary] saw them horsing around. Maybe he thought he saw some fondling. I don't

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McQueary thought he saw Sandusky just "horsing around" or something else, like "fondling," but he knew his graduate assistant was upset and uncomfortable with inappropriate behavior. Joe Paterno repeatedly said that he honestly did not know how to handle the situation, that Sandusky no longer worked for him or reported to him, that as a college football coach he was not trained in this field, and that he consulted the Penn State guidelines.[77] He then contacted his superior, Mr. Curley, who had handled Sandusky's retirement and was a skilled administrator.

Contrary to the Freeh report's unsupported assertions, testimony confirms that Joe Paterno acted quickly. He encouraged Mr. McQueary for doing the right thing by reporting the information.[o] He appropriately and promptly conveyed the information — the very next day — to Mr. Curley, the University Athletic Director responsible for all Penn State sports programs and coaches, and/or[p] Gary Schultz, the Senior Vice President who oversaw the University Police Department.[78]

Joe Paterno, after learning the details of Sandusky's crimes, would say before his death that, with the benefit of hindsight, he deeply regretted that he did not do more in 2001, and that if McQueary had told him he saw Sandusky raping a young boy, "We would have gone to the police right then and there, no questions asked."[79] The reality, however, is that Joe Paterno did not appreciate the gravity of the 2001 incident and missed the red flags of child molestation.

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know about any of this stuff. But I could tell it made Mike very upset." JOE POSNANSKI, PATERNO 272 (2012). On December 6, 2011, according to a former player and colleague, Paterno said that "McQueary had told him that he had seen Jerry engaged in horseplay or horsing around with a young boy. McQueary wasn't sure what was happening, but he said that it made him feel uncomfortable. In recounting McQueary's conversation to me, Coach Paterno did not use any terms with sexual overtones." Letter from Gary Gray to Penn State President Rodney Erickson and members of the Board of Trustess (undated), http://www.collegian.psu.edu/archive/2012/08/22/2012-08-22_PSUemailfromEricksontoGGray.pdf. In January 2012, Paterno told the Washington Post that McQueary said "it, well, looked like inappropriate, or fondling, I'm not quite sure exactly how he put it." Sally Jenkins, *Joe Paterno's last interview*, WASH. POST, Jan. 14, 2012. On October 24, 2011, Paterno was asked if McQueary told him that he saw a "sex act." Paterno responded, "He never said that." Statement to Agent Sassano and Randy Feathers, Oct. 24, 2011.

[o] Joe Paterno gave consistent versions of what he said to McQueary. For example, on January 11, 2011, Joe Paterno told the grand jury the following: "I did tell Mike, Mike, you did what was right; you told me. . . . I would refer his concerns to the right people." Grand jury transcript at 6. In November 2011, Joe Paterno told a biographer the following: "I told him he didn't have to tell me anything else. I told him he did the right thing bringing it to me, and that now it was my job to get him together with the right people for him to report it." POSNANSKI at 272. In early January 2012, Joe Paterno told the Washington Post the following: "I said you did what you had to do. It's my job now to figure out what we want to do." Sally Jenkins, *Joe Paterno's last interview*, WASH. POST, Jan. 14, 2012. McQueary similarly testified regarding Paterno's statement: "He said, you've done the right thing. He said, I know it's probably tough for you to come here and tell me this, but you've done the absolute right thing." Preliminary hearing at 27.

[p] Former Attorney General Thornburgh appropriately noted the conflicting testimony as to precisely when, where, and whom Joe Paterno informed. *See* Thornburgh at 29 n.119; *See also* Freeh report at 68-69. Certain testimony states that Joe Paterno spoke with Mr. Curley over the phone the next day on Sunday, February 11, 2001, while other accounts indicate that Joe Paterno met with Mr. Curley and Mr. Schultz at this home that Sunday. The Freeh report's asserted chronology indicates that Joe Paterno reported McQueary's disclosure to *both* Curley and Schultz on Sunday, February 11, 2001. Freeh report at 23, 62. That distinction is less important than the fact that Joe Paterno acted in good faith by promptly reporting to at least one of them, Mr. Curley, if not both. At a minimum, Joe Paterno's report resulted in further disclosures up his administrative line of supervisors. When referencing to whom Joe Paterno reported the 2001 incident, we use the convention "Mr. Curley and/or Mr. Schultz," as well as "supervisor(s)," to avoid any ambiguity.

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The extensive psychological and behavioral analysis of Joe Paterno's actions of this case, described in the attached expert reports, confirms this conclusion. In analyzing Paterno's behavior regarding the 2001 incident through the correct lens of established child sex offender research and experience, Mr. Clemente concludes:

- "As an expert in the field of child sexual victimization, I firmly believe that there is another far more reasonable explanation for Joe Paterno's behavior than the one proffered by the SIC Report: (1) McQueary did not convey to Paterno that he thought Sandusky was having sex with the boy, and (2) Paterno could not make the huge leap from the watered-down, sketchy description and superficial information McQueary told him to the realization that Sandusky was actually a child sex offender."

  "Paterno simply could not reconcile what he knew of Jerry Sandusky with the thought that Sandusky was a huge fraud and a child sex offender. The man Paterno thought he knew through thousands of interactions over decades working with him as a brilliant defensive coach, a loving husband and father, a devoutly religious man, a mentor to disadvantaged kids, an altruist, a teetotaler who looked down on those who drank alcohol, a selfless advocate for disenfranchised youth, a long time colleague, a compassionate advocate for players, and a 'goofy' prankster, could not possibly be a 'monster predator.' This man could not possibly have pulled the wool over Paterno's eyes for decades. He could not have fooled so many coaches, athletes, administrators, contributors, social services workers, psychologists, children, friends, and family. After all, if Sandusky had actually been victimizing children, where were all the victims that he took advantage of? Why hadn't any of them come forward? In fact, in all the years that Sandusky was molesting boys, not one of them came forward to make an allegation of sexual assault against Sandusky until Victim 1 did at the prodding of his mother and counselor in 2008."

  "To Paterno, what McQueary was ineptly suggesting must have all seemed like a huge misunderstanding. Nonetheless, McQueary seemed very upset about what he'd seen. So, in spite of all his reasonable doubts, Paterno reported what he learned up the chain of command in hopes that those more qualified than him would know how to handle the situation and 'get to the bottom of it.'"[80]

Joe Paterno's grand jury testimony is consistent with this expert analysis. When asked during his brief grand jury appearance about any inappropriate sexual conduct by Sandusky with young boys aside from the 2001 incident, Joe Paterno did not recall specific details about 1998 and was not provided with any documents or other information to help him recall events that had occurred thirteen years earlier, when he was 72 years old.[81] Joe Paterno testified that, "I do not know of anything else that Jerry would be involved in of that nature, no. You did mention — I think you said something about a rumor. It may have been discussed in my presence, something else about somebody. I don't know. I don't remember, and I could not honestly say I heard a rumor."[82]

Joe Paterno acknowledged it was possible that someone conveyed a rumor or other unspecific concern to him about Sandusky, but if so, he did not recall it. This fact is especially significant because it is *consistent with the record.* The two 1998 email chains cited above do not establish

that Joe Paterno was provided with any details about sexual misconduct allegations in 1998, authorities did not conclude that any sexual misconduct in fact occurred in 1998, and his contemporaneous private handwritten notes about Sandusky demonstrate no knowledge in 1998 of any sexual misconduct allegations whatsoever.

Against this backdrop, the Freeh report attempts to retroactively impugn Joe Paterno's credibility regarding the 1998 Sandusky event by suggesting that Joe Paterno knowingly concealed details from the Grand Jury, without any evidence establishing what Joe Paterno actually knew 13 years earlier. The report suggests that, even though authorities who investigated the 1998 incident did not find that any sexual misconduct even occurred, Joe Paterno somehow believed that sexual misconduct, in fact, did occur — and then lied to the Grand Jury about it.

The only conclusion actually based on the record is that Joe Paterno told the truth to the best of his recollection in his Grand Jury testimony, and that if he was told anything about those 1998 events 13 years earlier, that information was not sufficiently specific, negative, or significant for him to have recalled it.

C. Error & Unsupported Opinion #3: *Joe Paterno concealed the 2001 incident reported by Mike McQueary as part of a 14-year conspiracy to avoid the consequences of "bad publicity."*

Facts & Evidence. The Freeh report does not cite a single email, conversation, handwritten note, calendar entry, voicemail, statement or other record evidence establishing that *Joe Paterno* was concerned about consequences of bad publicity associated with the 2001 incident. Dr. Berlin, former FBI profiler Mr. Clemente, and former United States Attorney General Dick Thornburgh all have concluded that Mr. Freeh's opinion in that regard is baseless. The Freeh report *does* cite limited evidence in the context of allegations about *other individuals'* concern about publicity in 2001, but it unfairly and without support imputes that concern to Joe Paterno.

The evidence shows that when Mr. McQueary discussed the 2001 incident with Joe Paterno, Joe Paterno promptly reported it to Mr. Curley, the Athletic Director of a Big Ten institution, and/or Mr. Schultz, a Senior Vice President who oversaw a large, significant police force. Mr. Schultz, in turn, reported the incident to Dr. Spanier, the President of the University, and himself a victim of child abuse and a nationally respected Ph.D. in sociology, with particular expertise in family sociology and therapy.[83]

In reality, Joe Paterno did the opposite of "conceal" this event. He reported it up his chain of command, and three senior administrators in that chain had broad authority under the University's procedures for handling and investigating significant complaints. There is no evidence establishing that Joe Paterno was concerned about bad publicity or, for that matter, that he believed the allegations would be hidden by the university police force and not reported publicly by them or through multiple channels he did not control, like The Second Mile.

Nor are Joe Paterno's actions following the grand jury announcements in 2011 consistent with a concern about negative publicity, much less representative of a concern that would compel him to protect a pedophile for over a decade. Joe Paterno volunteered for a regularly scheduled press conference following the indictments in this matter and would have fielded questions about his

recollection of any events.[84] However, the University cancelled that press conference, a fact that did not then, and cannot now, rewrite established history that Joe Paterno was prepared to be open, transparent, and responsive to questions about his knowledge regarding Jerry Sandusky.[85]

Nonetheless, Mr. Freeh draws the conclusion that Paterno concealed the 2001 incident based on one sentence from an email authored by Mr. Curley, dated February 27, 2001. In that email, Mr. Curley writes to Mr. Schultz and Dr. Spanier: "After giving it some more thought and talking it over with Joe yesterday — I am uncomfortable with what we agreed were the next steps."[86] The Freeh report then makes the extraordinary assumption that if any of those next steps were not executed — including confronting Sandusky, reporting the matter to The Second Mile and reporting to the Department of Public Welfare — that Joe Paterno must have participated in the decision-making for that strategic course.

Tellingly, Mr. Freeh in his press conference could not hide the gaping holes in this assertion. When asked if he could elaborate on the content of the alleged discussion between Mr. Curley and Joe Paterno, Mr. Freeh said: "I can't. As you know, we didn't have the opportunity to interview either of them. We are basing this reasonable conclusion on the emails, the circumstantial evidence. . . . [W]e do not know what the content of that conversation was."[87]

Of course, the reference to plural "emails" can only refer to a single sentence of a single email because the Freeh Group cites no other evidence in the millions of pages of data reviewed that references Joe Paterno and follow-up on the 2001 incident. (And the meager two lines in the two 1998 email strings do not establish the cover-up theory for reasons previously described.)

Former Attorney General Thornburgh explains some of the key flaws in Mr. Freeh's assertions regarding this email:

- "Mr. Freeh's mischaracterization of an e-mail critical to his Report at his July 12, 2012 press conference announcing his findings is emblematic of the SIC's unjustified inferences and flaws in the Report. Mr. Freeh stated that an e-mail showed that it was Mr. Paterno who decided not to report to authorities the 2001 shower incident involving Mr. Sandusky and a young boy. However, this is not what the e-mail states. The e-mail suggests that it was Mr. Curley's decision not to report the 2001 incident to authorities and does not state that Mr. Paterno was involved in such a decision or that he was even aware of it. Mr. Freeh did not supply any other evidence at the press conference to support the proposition that Mr. Paterno was involved in or aware of the decision. Indeed, the Report acknowledges that it was Mr. Curley's decision and not Mr. Paterno's in its 'key findings' about the 2001 incident."[88]

Like Mr. Thornburgh, Dr. Berlin analyzed this email from his perspective as a medical and psychological expert in behavioral sciences and the assessment of mental and motivational states. Dr. Berlin concludes that Mr. Freeh engaged in "disingenuous speculation" in negatively interpreting this 2001 email regarding Joe Paterno:

- "[I]n my judgment to conclude that the email phrase 'after talking it over with Joe' constitutes credible evidence that Joe Paterno had not wanted DPW [the Department of Public Welfare] to be informed, or that he lacked a genuine concern about the wellbeing

> of children, would be a stretch. Innuendo and speculation in the 'Freeh Report' that Joe Paterno had control over his superiors when it came to making important decisions is nothing more than just that; disingenuous speculation . . . . [A]t no time whatsoever, has any credible evidence been uncovered documenting that Mr. Paterno himself had been attempting to 'avoid bad publicity.'"[89]

Furthermore, the Freeh report identifies not a single witness, even one email to or from Joe Paterno himself, a single page of notes from Joe Paterno reflecting such knowledge, or a single voicemail establishing that Joe Paterno expressed any view about, or even knew about, any discussions regarding the Department of Public Welfare or advised on any approach to that agency in 2001.

Undeterred by this lack of evidence, Mr. Freeh effectively opines that Joe Paterno participated in a decision to confront Sandusky, to report the incident to The Second Mile, but *not* to report the 2001 incident to the Department of Public Welfare. He then essentially reasons that because the University did not report the incident to the Department of Public Welfare at the same time as confronting Sandusky, Joe Paterno and Dr. Spanier and Messrs. Curley and Schultz all conspired to conceal the incident, even though Joe Paterno did not participate in and is not referenced in a series of subsequent communications over several weeks regarding next steps.

This illogical reasoning is superficial and fails on multiple levels. We provide just a few examples of many possibilities that are contrary to Mr. Freeh's negative speculation about Joe Paterno and the content of that discussion.

- Assuming that Mr. Curley and Joe Paterno even had a discussion about Sandusky on February 26, 2001, we do not know that Mr. Curley and Joe Paterno discussed this precise issue of reporting at all, or what the content of *any* discussion may have been. The record does not reflect that any details were conveyed to Joe Paterno, nor does the record reflect the context, duration, location (hallway, office, phone call, etc.), other attendees (if any), other topics discussed unrelated to this subject matter, or other pertinent facts that would allow a reasonable assessment of any dialogue, what it meant, how it was left, or whether the parties even agreed or disagreed with each other during the interaction.

- Assuming that reporting was even discussed generally, Joe Paterno could have had a limited discussion and said that Mr. Curley should ensure the matter is handled according to University procedures, followed up on appropriately, and communicated to senior officials as necessary to do the right thing. The Department of Public Welfare may not have even been discussed.

- Assuming that reporting to the Department of Public Welfare was discussed specifically, Joe Paterno could have advised that reporting to that agency *was appropriate*, and/or that it made sense to gather the facts first and then make a report. If Mr. Curley wanted to gather facts by confronting Sandusky initially, speaking with The Second Mile, and then making a more comprehensive, subsequent report to the Department of Public Welfare, that scenario also is entirely consistent with Joe Paterno's good faith, especially because the record shows that Joe Paterno was not involved in the subsequent reporting decisions.

> Later emails in that same chain show reporting to the Department of Public Welfare *remained an option* that others continued to consider.

Furthermore, in direct contrast to Mr. Freeh's theory that there was a conspiracy among four reputable men to conceal facts to avoid bad publicity, Joe Paterno never asked Mr. McQueary to stay quiet about the 2001 incident at issue in this email, never asked him to refrain from reporting his concerns to third parties or others, and never asked him to ensure others he told about the incident — including Mr. McQueary's father and his friend Dr. Dranov — contained the spread of the information further. Surely, a co-conspirator under Mr. Freeh's version of events, particularly one as "powerful" and ill-motivated as he views Joe Paterno, would have urged his graduate assistant to bury the evidence. In fact, Joe Paterno did the opposite and told Mr. McQueary that he did the right thing by reporting his observations.

Mr. Clemente also evaluated the February 27, 2001 email in extensive detail, applying his expertise as a behavioral analyst and expert in criminal conduct. Mr. Clemente concludes that Mr. Freeh "misinterprets Curley's February 27, 2001 email," "erroneously conclude[s] that Paterno was involved in an active agreement to conceal," and that the evidence does not establish that Joe Paterno was any "intervening cause" regarding DPW reporting.[90]

- On the contrary, Mr. Clemente observes that, when the Freeh report analyzed the February 27 email, it "ignored" Mr. Schultz's prior notes of a meeting between Messrs. Schultz and Curley on February 12, 2001. Those earlier notes confirm that the *original plan* discussed between Messrs. Curley and Schultz was the same as their course of action described in the February 27 email with respect to DPW. The key adjustment did not remove the possible DPW approach, but rather involved first confronting Sandusky directly before taking any other steps. Hence, Mr. Clemente states, "[i]n my opinion, as discussed above, this purported 'change of plans' as concluded in the SIC report did not in fact happen."[91] Irrespective of any DPW plans by others, Mr. Clemente further observes that "[t]here is no evidence that Paterno participated in the ultimate decision to inform or not to inform DPW."[92]

- Mr. Clemente, like Dr. Berlin and former Attorney General Thornburgh, also concludes that informing The Second Mile was a significant step under the circumstances, and that fact undermines Mr. Freeh's assertion that Joe Paterno participated in an active agreement to conceal Sandusky's actions. Mr. Clemente summarized his views:

  - "[I]nforming The Second Mile is clearly not keeping the information in-house or concealing information. The Second Mile was an independent child care agency/charity founded by Sandusky but run by a board and a CEO. It is also the most likely place where Sandusky obtained access to the child in question. Accordingly, The Second Mile is precisely the organization that was in the best position to identify that child. And, because its CEO, Jack Raykovitz, was a licensed psychologist, he was a mandated reporter of any sexual victimization allegations regarding any children within his institutional care."[93]

- Former Attorney General Thornburgh identifies even more third parties who discussed the 2001 incident with Mr. Schultz or Mr. Curley, including John McQueary (Mike's

father), Dr. Jonathan Dranov, and outside counsel Wendell Courtney, and he notes that the Director of The Second Mile told two additional people affiliated with The Second Mile.

- In short, citing these and other facts, Mr. Thornburgh observes: "the Report falls glaringly short of suggesting, let alone proving, any concealment by Mr. Paterno. . . . [I]t is wrong to make the overarching conclusion that Mr. Paterno chose not to report the 2001 incident for fear of bad publicity."[94]

Ultimately, the Freeh report's interpretation of this single 2001 email does more to undermine the credibility of the report's conclusions than it does to advance the truth, as the alleged conversation between Mr. Curley and Joe Paterno could have transpired in countless ways that exonerate Joe Paterno.

In fact, based on our review, including our discussions with the lawyers for Dr. Spanier and Messrs. Curley and Schultz, we conclude unequivocally that (1) Joe Paterno never asked or told anyone not to discuss or to hide in any way the information reported by Mike McQueary; (2) Joe Paterno never asked or told anyone to limit the investigation of Mike McQueary's report in any way, and (3) Joe Paterno never asked or told anyone, including Tim Curley, Gary Schultz and Graham Spanier, not to report Mike McQueary's story as deemed appropriate.

If anything, the February 27, 2001 email suggests that Mr. Curley himself gave the reporting issue more thought irrespective of Joe Paterno, reached his own conclusion, and then shared that conclusion with Mr. Schultz and Dr. Spanier. Indeed, Mr. Curley describes the issue in the first person, without ever saying that Joe Paterno contributed to any decision: "*I* am uncomfortable," "*I* am having trouble with going to everyone," and "*I* think *I* would be more comfortable meeting with the person."[95] That language does not document that Joe Paterno expressed any view on the reporting issue, much less dictated a course of conduct.

- Mr. Freeh distorts Joe Paterno's word choice in 2012 by quoting Joe Paterno's final interview, published eight days before his death, when Joe Paterno recounted telling Mr. McQueary that he did the right thing by reporting the 2001 incident and that "[i]t's my job now to figure out what *we* want to do."[96]

- Mr. Freeh leaves out of his description that Joe Paterno literally was dying — suffering from lung cancer, a broken pelvis, and active chemotherapy treatments and unable to eat or talk loudly because of radiation. And yet, Mr. Freeh emphasizes this one sentence, said more than ten years after the relevant facts, and actually points to the word "we" as significant evidence of a massive concealment strategy to protect a known child molester. In contrast, he completely ignores the actual language used in the *contemporaneous* email by Mr. Curley in 2001 — the multiple uses of the word "I" — that, *according to Mr. Freeh's own logic*, clearly shows that Joe Paterno was not the decision-maker on where and how to report Sandusky's activities.

- Even more remarkably, as former Attorney General Thornburgh points out, Mr. Freeh, in his own national press conference describing his report, mischaracterizes the content of

> this very email, literally by changing the singular to the "plural to join Mr. Paterno with Mr. Curley's actions: 'After Mr. Curley consulted with Mr. Paterno, however, *they* changed the plan and decided not to make a report to authorities.' In actuality, the e-mail very explicitly uses the singular when referring to Mr. Curley's plan and does not state that Mr. Paterno joined in Mr. Curley's decision or that he was even aware of the decision . . . . Such a misstatement and use of 'collective guilt' without foundation raise very serious concerns as to the credibility of the Report."[97]

In short, Mr. Freeh's selective, inconsistent interpretation of the record has dictated his inevitable conclusion about Joe Paterno *despite* the evidence, not because of it.

Mr. Freeh also ignores hundreds of examples of Joe Paterno acting without regard to a concern about bad publicity and its consequences over decades, particularly as he aged and was less focused on generating positive media relations in favor of coaching.[q]

The Story of Rashard Casey. One of the best examples of Joe Paterno not bending his principles to concerns about bad publicity is the case of Rashard Casey. The Casey incident generated a maelstrom of criticism in 2000 — in between the 1998 and 2001 Sandusky incidents detailed above.

On May 16, 2000, the American public learned the news that Penn State's starting quarterback for the upcoming season, Rashard Casey, had been arrested for assaulting an off-duty police officer. According to the New York Times and the Associated Press, Casey and a friend jumped the police officer, knocked him to the ground, and kicked him in the face.[98] The Hoboken Police Chief told reporters that the officer had to be taken to the hospital and would likely undergo facial surgery. According to the Police Chief, four witnesses had identified Casey as one the assailants; furthermore, Casey had a substantial amount of blood on his shirt.

The supposed reason for the alleged assault was infused with racial animosity: Casey and his friend, both black men, were allegedly upset that the off-duty police officer, a white man, was walking home with a black woman.[99] If convicted, Casey faced up to five years in prison.

Paterno issued a public statement in support of Casey: "Rashard has not been a discipline problem during his time at Penn State and the conduct alleged in the charges is inconsistent with the personality he's demonstrated to me and the members of the coaching staff. Rashard is a good young person who gets along well with his teammates of all races."[100] The statement did nothing to quell the criticism of Paterno and his program. His decision, "set off a firestorm, with columnists across the country calling Paterno a hypocrite and a sell out."[101] Paterno responded, "People rush to judgment and they want to believe the worst."[102]

It became increasingly clear that the story going into the 2000 season would focus not on team accomplishments, but on Casey and Paterno's handling of the matter. At the annual Big Ten Conference press gathering Paterno told reporters, "I'm going to play Rashard Casey until something convinces me I shouldn't." The media asked Paterno what guidelines he follows on

[q] According to author Joe Posnanski, by 2004, "media requests, some of which had already been weeded out, would be cut off almost entirely. The speaking engagements, the appearances, the dinners with sponsors that had become rarities were stopped entirely. . . . Paterno would concentrate on coaching football." POSNANSKI at 306.

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disciplinary matters involving his team. Paterno responded, "Every situation is different. If I told you I had one hard-fast rule (for everybody), I think you'd be looking at a lousy human being."[103]

The criticism of Paterno mounted, which was described as a "PR drubbing."[104] Fans and the media speculated whether Paterno, who was close to an inevitable surpassing of Bear Bryant's win count, should have his record considered illegitimate because it might happen with a convicted felon and racist on the field. Critics said, for example:

- Paterno was "tarnishing the record he had created."[105]
- "If Casey is guilty, or if he is found guilty, then Paterno will have exposed himself and the institution to which he is devoted to embarrassment and humiliation."[106]
- Paterno was being "drummed out of the hall of saints . . . . all because of Rashard Casey."[107]

All the while, Casey continued to start at quarterback, continued to be heckled by opposing fans, and the grand jury continued to meet as it decided Casey's fate, and possibly Paterno's. Joe Paterno, consistent with his long-standing, committed belief in racial equality and the personal character of Casey, withstood the criticism and let the legal process run its course when the safer, easier, and simpler reaction would have been to acquiesce to the crescendo of bad publicity.

In late October, as an otherwise disappointing season neared its end, the grand jury finally held a vote: Casey would not be indicted. Casey's attorney had a message for "all those irresponsible journalists who wrote those unsavory things about Joe Paterno": "May they burn in First Amendment hell."[108] Casey sued the Hoboken Police Department for malicious prosecution, violation of his civil rights, and slander. In June 2003, the police department awarded Casey a cash settlement.[109]

Paterno was not self-congratulatory in his reaction. Instead, he told a reporter that he did not "lose two minutes of sleep" over bad publicity. "You start worrying about that stuff, you'll go nuts. I don't worry about that. I do what I think is right, period. Even with the media."[110]

Many more examples exist where Joe Paterno suspended players and weakened his team on the field when he believed players did not follow the rules, no matter how good they were. In 1997, Paterno dismissed star running back Curtis Enis from the team for talking to and accepting improper gifts from an agent and lying about it.[111] Weeks later Penn State lost its bowl game against Florida. Enis became a first round NFL draft pick.

In Rashard Casey's case, Joe Paterno believed in him despite the admonition that his legacy was being tarnished, that his life's work was on the line, and that he was visiting embarrassment on the University. He looked beyond the criticism, ignored the bad publicity and associated rush to judgment, and did what he thought was right. As Attorney General Thornburgh notes about this example:

- "These facts [about Rashard Casey] raise the question of why Mr. Paterno would be willing to withstand bad publicity for a current player, yet be unwilling to endure bad

> publicity for the actions of a former coach, whom he reportedly did not like much. When taken in context with what was occurring at the University in 2001 with a current football player, the Freeh Report's conclusion of an alleged cover-up to avoid the consequences of bad publicity becomes even more tenuous."[112]

Had Joe Paterno believed that Jerry Sandusky was a child molesting monster, no amount of concern for bad publicity would have motivated him to conceal it. Experts in child sexual victimization the who have studied this case, those who know Joe Paterno's character, and most importantly, the evidence, establish that conclusion.

D. Error & Unsupported Opinion #4: ***Jerry Sandusky's Office was "steps away" from Joe Paterno's office, and, as one of the most "powerful" people at Penn State, Joe Paterno must have known but concealed that Sandusky was a pedophile.***

Facts & Evidence. Jerry Sandusky retired in 1999 after Joe Paterno declined to designate him as the next head football coach at Penn State, and the Freeh report acknowledges that Sandusky was "not pleased about the entire situation."[113] The Freeh report concluded, and it is undisputed, that Joe Paterno communicated to Sandusky that he would not succeed him as Head Coach in February 1998, *before* the May 1998 incident. The Freeh report further concludes that Sandusky's retirement in 1999 was unrelated.[114] Joe Paterno was not responsible for designating Sandusky with Professor Emeritus status, and the Freeh report cites evidence that such status and other details ultimately were approved by other administrators. Tom Bradley took over defensive coordinator duties for Sandusky and replaced him on Joe Paterno's staff, which resulted in Sandusky's office being moved to an office *across the street in a different building.*[115]

Therefore, at the time of the 2001 incident conveyed by Mr. McQueary, Sandusky had been *off the football staff for almost two years*, no longer reported to Joe Paterno, did not have an office "steps away" from Joe Paterno, and had infrequent, if any, interactions with Joe Paterno. All this evidence directly contradicts Mr. Freeh's suggestion that the two had offices in close proximity and that Joe Paterno had visibility into Sandusky's regular routine.

The Freeh report also neglected a fundamental reality that undermines any notion that Joe Paterno would protect Jerry Sandusky if he believed Sandusky molested kids: they were not friends, and Joe Paterno had been disappointed with Sandusky's commitment to football well before his retirement in 1999.

Joe Posnanski, in his 2012 biography of Joe Paterno, recognized that while the two coaches had a healthy respect for each other professionally, they were "never close" and "clashed for many years."[116] He summarized their personal dynamics as follows:

> The two men despised each other from the start. This was well-known among those who knew Joe Paterno and Jerry Sandusky, but at the end it seemed like nobody wanted to mention it. The news reports would assume they were the best of friends or, at the very least, colleagues who respected each other. . . .
> Sandusky, in the words of Penn State's marketing guru [] and many others, was "a knucklehead." He liked practical jokes and messing around, knocking a guy's hat

> off his head, making prank calls, sneaking up behind people to startle them. . . . At one of the first practices before the season, Sandusky was supposed to be on the field but was instead joking around with some players. . . . Later, when Paterno watched film of the practice, he saw Sandusky running onto the field waving his arms like a bird and shouting, "The breakdown coach is on the way! The breakdown coach was on the way!" It was ridiculous. Paterno called in Sandusky, screamed at him at length, called him a complete goofball. . . . Over time, for all of their personal differences, Paterno did come to admire Sandusky's coaching on the field. . . . When he was focused, Sandusky was a force of nature around the players; he connected to them in ways Paterno never could. He joked with them, hugged them, taunted them, and often inspired them. The players, most of them, loved him for that. . . . He was like a big brother teasing them, pushing them, grabbing them, reminding them that they could be great.[117]

It is no doubt true that they were professional colleagues for 30 years, and that their many years of professional interaction gave Sandusky the lasting opportunity to construct a false image as a an advocate and protector of kids. But Joe Paterno and Jerry Sandusky had a limited social relationship that intersected only at occasional charity or football events for the university. They rarely spent any personal time together, they were not part of the other's social circles, they had different social interests, there was a sizeable age gap of 18 years between them, and they believed in different religions and did not attend the same church. Jerry Sandusky did not drink alcohol and purposely made others, including Joe Paterno, who did drink socially feel uncomfortable.

They were work colleagues only, and Joe Paterno generally had no more insight into Jerry Sandusky's personal affairs than the hundreds of other colleagues over his career whom Jerry Sandusky deceived in his role as a child predator. But Joe Paterno did have many thousands of benign work interactions with Jerry Sandusky, which as former FBI profiler Jim Clemente explains in detail, created a proverbial blind spot in which Sandusky hid by using his nice-guy, goofy reputation.

As additional context, and unmentioned in the Freeh report, Joe Paterno had an extraordinary schedule for a man of his age, or any age, at the time of these events. Not only was he coaching a Big Ten football team, recruiting, running key practices and off-season workouts, and generally managing a major football program, he also had community and university obligations, as well as family commitments as a father and grandfather. He simultaneously faced personal and health issues, including attending to his brother who had moved to Penn State to be closer to Joe and Sue Paterno and who was going through a long and difficult health decline, eventually dying in June 2002.

The Freeh report offers none of this context for why Joe Paterno was not focused on Sandusky and missed the signs, like virtually everyone else, that he was a child molester, nor does the report offer any other practical context over a 14-year period. Instead, the Freeh report selectively focuses on a few events to suggest an enduring, multi-year conspiracy that is simply not justified by the record over that period. The Freeh report, jaundiced by subsequent events and with the benefit of the Sandusky jury verdict, thousands of hours of investigation, and the perch of an armchair quarterback, carelessly assumes that Joe Paterno must have known that

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Sandusky was a child molester and concealed it. It is a sensational conclusion, but it is not the truth.

E. Error & Unsupported Opinion #5: *A Janitor who apparently witnessed Sandusky's sexual misconduct in the Fall of 2000 chose not to report it for fear of losing his job because Joe Paterno must have known that Jerry Sandusky was a child molester and actively created a culture to harbor a pedophile.*

Facts & Evidence. One of the more incredible leaps in the Freeh report is to blame Joe Paterno because a temporary janitor witnessed apparent sexual misconduct in the Fall of 2000, but did not report it to the police, to Joe Paterno, or to any Penn State official. According to Mr. Freeh, Joe Paterno is culpable for creating a culture that led the janitor to believe he could lose his job if he reported the incident.[118] It is undisputed, however, that Joe Paterno never had an inkling of this incident.

In Mr. Freeh's words, the reaction of this janitor, and a second janitor he told, was "extremely telling and critical in deciding" Mr. Freeh's recommendations to the Board of Trustees, and in his characterization of the "culture" of the football program that allowed a molester supposedly to operate under Joe Paterno's ultimate supervision.[119] According to Mr. Freeh, what the temporary janitor saw, but chose not to report, was "probably the most horrific rape."[120]

The temporary janitor and a second, permanent janitor with whom he shared the incident, apparently speculated that if they reported the incident *to the police*, the *football program* somehow would "close ranks" to protect the program "at all costs," and, the illogic goes, they could be fired because Paterno "has so much power" and "football runs [the] university."[121]

- Former Attorney General Thornburgh disagrees with this assessment in the Freeh report, finding that the Freeh report's conclusion that Mr. Paterno wielded excessive influence at the University is "[n]ot [s]upported by the [i]nvestigative [r]ecord."[122]

- Mr. Clemente likewise describes why the Freeh report erroneously reached this conclusion:

  "It is only because the SIC report lacks an understanding of the dynamics of acquaintance child sexual victimization that it has misconstrued the behavior of the individuals involved and blamed Sandusky's ability to hide and continue his offending on the 'culture of reverence for the football program.' If the writers of the SIC report had fully understood those dynamics, they would not have been searching for reasons why Paterno and others did not recognize Sandusky's offending behavior for what it was."[123]

Mr. Freeh's unfair interpretation of the facts is revealed further in his characterization of these janitors. He describes these janitors in a positive light, noting that one fought in the Korean War and had seen people "with their guts blowed out."[124] Yet Mr. Freeh concludes that this janitor personally witnessed the "most horrific rape," did nothing to stop it, and declined to report it beyond his supervisor. Consider the irony. The janitor *does not report* to university police what he actually *saw*, and Mr. Freeh describes him compassionately, but Joe Paterno *does report* to his

superior(s) what he *heard second hand*, and Mr. Freeh vilifies him and treats him as a pedophile protector.

In Mr. Freeh's judgment, Joe Paterno — not the janitor himself or the two colleagues he told — is responsible for the janitor's decision not to report this incident. This opinion is an extreme non sequitur that is unsupported by any evidence or fact, and is quintessential innuendo based on Joe Paterno's position as a head coach. Mr. Freeh's inconsistent assessment of similar facts exposes his biased interpretation of the record against Joe Paterno.

If the janitors genuinely held the belief that they would be terminated for reporting Sandusky, they were simply wrong. First, no evidence at all links those assumptions to Joe Paterno. Second, and more importantly, Mr. McQueary, who was a graduate assistant at the time, did have the courage to report what he saw to Joe Paterno, and he was not fired. In fact, he was later promoted to an assistant coach, and even the Freeh report acknowledges that promotion was based on merit and not related to his reporting of the event.[125]

Put simply, there is no evidence that Joe Paterno created any culture of retaliation generally, much less that he specifically created a climate to harbor a pedophile.

F. Error #6: *The Freeh report is neutral and free of bias.*

Facts & Evidence. The Freeh report relies heavily on its "independence," but the reality is that it is filled with biased and unsubstantiated conclusions, and falls well short of a neutral, reliable assessment of the facts. The Freeh report obsessively focuses on Joe Paterno as "an integral part of this active decision to conceal," with an appalling lack of evidence to support that assertion.[126] Again, like a prosecutor, albeit one without even the limited check and balance of a grand jury, Mr. Freeh wrote his charging document in the most provocative terms, rolling it out to the press and the public in a dramatic press conference. Those sensational atmospherics should not afford his conclusions any deference whatsoever.

Mr. Freeh claimed in his press conference that he did not single out Joe Paterno. In fact, he did exactly that. He included him as one of four people in a cover-up with no evidence for that allegation, and adopted a *unique* assumption that, given Joe Paterno's position as the head football coach, "he was in control of the football facilities and knew 'everything that was going on.'"[127] Mr. Freeh's conclusions are no more than sweeping conjecture, which, given the massive and irreparable impact such a damning opinion would have on the Penn State community and the victims of these crimes, makes them so unreliable as to force questions about Mr. Freeh's neutrality as a supposed "fact-finder."

- In the words of former Attorney General Thornburgh: "The lack of factual support for the SIC's inaccurate and unfounded findings related to Mr. Paterno and its numerous process-oriented deficiencies was a rush to injustice and calls into question the credibility of the entire Report."[128]

- Similarly, Mr. Clemente details multiple examples of "Report Bias" in the Freeh report,[129] including that the report "selectively quotes Paterno's testimony to cast Paterno in the worst light."[130]

In truth, Mr. Freeh identified very few facts regarding Joe Paterno. While the many structural recommendations in his report are important, it seems readily apparent that Mr. Freeh has chosen to assert culpability under the unassailable banner of protecting children, regardless of what the evidence shows or fails to show regarding Joe Paterno. Mr. Freeh's approach of using the broadest brush possible to condemn, in reality and in effect, has concentrated the focus on Joe Paterno and unfairly branded him as the protector of a child molester. Mr. Freeh's take on an extremely thin factual record is an abuse of the power ceded to him by the Board of Trustees, it lacks any rational balance, and it would be rejected by any neutral fact-finder if a balanced presentation were made.

- As former Attorney General Thornburgh observed: "When the evidence relied upon in the Freeh Report is considered in an objective manner, it is clear that findings in the Report are not accurate, supportable or fair."[131]

- Similarly, as Dr. Berlin writes in his report, in the critical "effort to protect innocent children, the fair treatment of adults should not become a collateral casualty."[132]

At the same time he was formulating his subjective judgments, Mr. Freeh did not provide the Paterno family any opportunity to rebut or even provide context for any of his so-called conclusions prior to the release of his report, despite repeated requests for this due process. Accordingly, Mr. Freeh did not benefit from any perspectives on his opinions and personal conclusions about Joe Paterno outside the cloistered group of his own investigative team.[r] Mr. Freeh's investigation is reminiscent of the Independent Counsel investigations of the past that were so heavily criticized for unfairly ruining reputations and for their unchecked and abusive power.

Mr. Freeh was under enormous pressure and scrutiny to vindicate the rights of the child victims of this tragedy, and we fully appreciate that legitimate goal. Nevertheless, that does not excuse the trampling of due process, or the finalizing of his conclusions without subjecting his views to outside scrutiny. Nor does it excuse intentionally placing a lightning rod directly over Joe Paterno, which was unjustified by the record but relished by some who delight in tearing down others.

Dr. Berlin, as an expert in pedophilia and related behaviors, offers his perspective on the unfairness of the Freeh report regarding Joe Paterno and the Penn State community:

- "In my judgment, rewriting the history of Joseph Paterno, in the context of unsubstantiated inferences about purported motives, and in the context of concerns about pedophilia and child sexual abuse (as legitimate as those concerns surely are), is neither fair, nor is it justifiable. . . . [I]t is my view that in this instance, Joe Paterno, his family, and the Penn State community had been deserving of a much better outcome."[133]

[r] In his prepared remarks at the press conference, Freeh noted that he "took the unusual step of not providing any draft of this report to the Board of Trustees or to the Task Force prior to the posting this morning. They are seeing it today for the first time, as all of you are." Louis Freeh, press conference, July 12, 2012.

Mr. Freeh's report also omits an important, negative fact about his client, the Board of Trustees, that creates doubt about its even-handedness. Despite critical findings about the Board during its self-described "full, fair, and completely independent investigation," the Freeh report mentions nothing about a now widely-reported decision by key trustees in November 2004 not to adopt measures that would have improved Board oversight and good-governance.[s] These measures reportedly could have prevented a number of additional instances of child abuse by Jerry Sandusky, and the Board has since expressed significant regret they were not enacted.

The omission of key facts that cast his client in a critical light, and the substitution of rampant speculation for facts to "support" unwarranted conclusions about Joe Paterno, combine to raise serious questions about the Freeh report's objectivity.

G. Error #7: *The Freeh report adequately evaluated Joe Paterno's lifetime of integrity in reaching its conclusions.*

Facts and Evidence. Mr. Freeh's lack of objectivity is transparent from his cursory treatment of decades of integrity and character demonstrated by Joe Paterno. Experts in behavioral and psychological dynamics of child sexual victimization, whose full reports are attached, have cited Joe Paterno's long history of integrity and dealings with Jerry Sandusky as critical factors in explaining why Joe Paterno did not recognize Sandusky's child molestation and why Mr. Freeh's conclusions are unjustified.

In the context of the American judicial system and due process, at the end of a criminal trial judges instruct juries to weigh all the evidence in reaching a verdict. Mr. Freeh would have followed this practice as a judge. Evidence of good character, honesty and integrity is admissible, not as a complete defense, but as a factor to be considered in determining a defendant's state of mind and whether actions were consistent with the life that the individual on trial has led.[t] Particularly in a case that is based on circumstantial evidence, character evidence can be compelling and even dispositive of the defendant's guilt or innocence.

Judge Freeh's heavy reliance upon three email strings to draw the most damning conclusions about Joe Paterno's alleged conspiracy to conceal the acts of a pedophile was utterly irresponsible and inconsistent with the jury instructions federal judges routinely approve. He draws extreme inferences with no consideration for Joe Paterno's well-led life and his lifetime

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[s] One reporter observed, "The board's failure to improve its good-governance practices is a curious omission from the Freeh report, which made the trustees' governance failure a main focus of its findings." Don Van Natta, Jr., *Penn St. leaders passed on reform*, ESPN.COM, July 18, 2012. According to Maribeth Schmidt of the alumni group Penn Staters for Responsible Stewardship, "This new development certainly raises additional questions about the integrity of the Freeh report and further demonstrates that its objectivity is severely in question . . . . [A]ny missteps by the board — especially one this significant — which occurred in the years included in the Freeh investigation would have been documented and reported in its entirety." *Id.*

[t] The following is one example of a jury instruction regarding character evidence that federal judges often use as a model: "The defendant has offered evidence of [his] [her] good general reputation for [truth and veracity] [honesty and integrity] [being a law-abiding citizen]. The jury should consider this evidence along with all the other evidence in the case in reaching its verdict. Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime[s] charged, may give rise to a reasonable doubt since the jury may think it improbable or unlikely that a person of good character for [truth and veracity] [honesty or integrity] [being a law-abiding citizen] would commit such a crime or crimes." 1A Fed. Jury Prac. & Instr. § 15:15 (6th ed.).

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dedication to educating and mentoring young people. That Mr. Freeh never analyzes these irrefutable facts only underscores his pre-judgment of the matter, and confirms that his preordained conclusions do not survive the scrutiny of a fair and balanced assessment of the facts.

Dr. Berlin observes that a person's history and character are important to understanding their subsequent behavior, their ability or inability to recognize child molestation, and their good or bad faith. He writes in his analysis:

- "In my professional opinion, there is absolutely nothing about the way in which Mr. Paterno had led his life, or about his characterological makeup, that would support the unsupported inference that 'in order to avoid the consequences of bad publicity,' he had been one of the 'powerful leaders' at Penn State who had 'repeatedly concealed critical facts related to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large.'"

- "Joe Paterno had known very little about the extent of the acts for which Mr. Sandusky had subsequently been convicted. In my judgment, given his history of a life well led, and of good character, and in light of the unsubstantiated nature of the inferences against him, to conclude that for any reason he would have been unconcerned about the wellbeing of children, would require turning a blind eye to the values that he had consistently demonstrated, and to the essence of what his life had been all about."

- "Having read the 'Freeh Report,' and with the benefit of my extensive experience and knowledge about how difficult it can be for a community to recognize persons with pedophilia, I have not seen evidence supporting a conclusion that Joe Paterno acted in bad faith, nor have I seen evidence supporting a conclusion that he has ever been a man who lacked a genuine concern about the wellbeing of others — including the wellbeing of children."[134]

Consistent with Dr. Berlin's perspective, the evidence in Joe Paterno's lifetime of work, charity and community services establishes that he was not only honest when it suited him or his listeners, he was unconditionally honest. His words and his actions throughout a career of coaching and teaching leads to one inescapable conclusion: Paterno was a man of profound integrity with a consuming commitment to the intellectual, moral, and personal growth of young people.

For example, on November 9, 2011, according to one first-hand account, Joe Paterno was read a draft of the press release announcing his retirement after the full details of Sandusky's crimes had emerged.[135] Part of the release read: "I have come to work every day for the last sixty-one years with one clear goal in mind: To serve the best interests of this university and the young men who have been entrusted to my care." Everyone in the room agreed the press release was the best they could do under the circumstances. Then Paterno spoke up: "There's one thing that bothers me about this statement." Everybody looked at Paterno. "This part here that says, 'I have come to work every day for the last sixty-one years with one clear goal in mind.' Well, I didn't come to work every day for sixty-one years. I was sick a couple days, and there were

other things, like when David [Paterno's son] got hurt. I don't know if I'd say that's completely honest."[136]

Joe Paterno was honest even in the final moments of his career — and indeed of his life — and Mr. Freeh ignores this and many other examples, such as his philanthropy, his success with honor philosophy, and the academic success of his program. We detail relevant facts in each of these categories that the Freeh report ignored.

Philanthropy and Commitment to Penn State. Joe Paterno gave much of his life and earnings to making Penn State a better institution.

In 1982, after Paterno's first national championship, he was invited to speak to the Penn State Board of Trustees. Instead of offering a few words of inspiration and accepting their congratulations, Paterno asked for a commitment from the trustees and challenged them to join him in an effort to elevate Penn State as a great academic institution.

One of Paterno's passions was the library. He told the trustees that "[w]ithout a great library, we can't be a great university."[137] Paterno then led by example. Joe and Sue Paterno established a book acquisition fund that is now Penn State Library's largest endowment. Later they established the Paterno Family Librarian for Literature chair and contributed funds for the Paterno Family Humanities Reading Room. Finally, Joe and Sue Paterno led the campaign to build the new library. They raised $13.75 million in private donations and gave thousands more of their own money. In all, Joe and Sue Paterno gave the university more than $5 million for scholarships, endowed faculty positions, and numerous building projects.

Paterno's commitment to academics ran deeper than donations; it animated his entire coaching philosophy. Offensive lineman Kevin Blanchard remembers when he first met Paterno. Paterno walked over to Blanchard and his family and said, "I would invite you to the house for dinner, but since this is an unofficial visit, the NCAA won't allow it." Paterno then turned to Blanchard and explained that he expected Blanchard would go to class, and that he would call his mother if he did not.[138] Blanchard was only one in a long list of Penn State players who received this life lesson. Paterno remained a college coach, in part, so he could continue to deliver that message.

In 1963, Paterno was offered the offensive coordinator position with the Oakland Raiders — he turned it down. In 1968, Paterno was offered the head coaching job with the Pittsburgh Steelers, and he turned it down. In 1973, he was offered the head coaching job for the New England Patriots including partial ownership of the team, and he turned it down. Later, Paterno's former Brown University coach, Weeb Webank, called to see if Paterno was interested in replacing him as the head coach of the New York Jets. Paterno answered, "I'm staying here, Weeb. It's where I'm supposed to be."[139] Four times Paterno was offered the opportunity to leave Penn State for professional football, where he would have earned millions of dollars. Four times Paterno turned down the offer and stayed in a small college town.

Eventually, professional franchises stopped calling. When Paterno's salary was revealed in 2007, it showed that he not only earned far less than he would have as an NFL coach, but he earned far less than other top college coaches. He did not want the money or the fame. He

wanted the challenge of helping mold young men and creating a world-class university, and building a football program that achieved success with honor.

This track record is simply not consistent with the notion that he protected a child molester to avoid bad publicity.

Success with Honor. Joe Paterno spent 46 years as the head coach of Penn State, and during that time there was not a single NCAA major violation. One of the sport's longest serving and most successful coaches created one of the sport's cleanest programs.

It is easy to forget in the current college football environment that previous decades were equally characterized by corruption and cheating. Notwithstanding today's giant TV contracts, endless conference realignments for profit, scandals at USC and Ohio State, the growing concern about player exploitation, and even a recent Atlantic Monthly cover story from October 2011, entitled "The Shame of College Sports," previous decades of college football had similar incidents.

In 1980, Newsweek's cover story on college sports offered a laundry list of common practices: altered transcripts, credit for courses not taken, students paid to take athletes' exams, and athletes funneled into worthless classes to keep them eligible only to leave the university without an education. The story was entitled, like its more recent namesake, "The Shame of College Sports."[140] In 1982, a large sample of NFL players showed that less than 32 percent had college degrees.[141] The mounting public outcry reached critical mass in 1990, when Congress passed the Student Right-to-Know and Campus Security Act. The Act mandated, in part, that colleges and universities report graduation statistics annually to the Secretary of Education. In accordance with this act, the NCAA has published graduation rates for member institutions.

Yet from the day Paterno became head coach in 1966, these were never issues at Penn State. Paterno did not permit players to get away with missing a class, let alone cheating or taking worthless classes. Between 80 and 90 percent of Paterno's players graduated.[142] Two characteristics that differentiated Penn State from many other programs were Joe Paterno's commitment to academics and the absence of NCAA sanctions.

In an era when recruiting trips were indulgent and excessive affairs, Penn State players routinely reported being bored stiff on their trips to Penn State.[143] In an era when coaches grovel in prospects' living rooms, promising players playing time and NFL opportunities, Joe Paterno would say, "We would like to have you come to Penn State. But we don't *need* you."[144] He told them that they had to go to class and get an education, or they would not play.

Paterno did not hide his motivations and he did not hide the truth from parents, recruits, or his players. To suggest that Joe Paterno altered his life-long approach to honorable behavior in the Sandusky scandal and conspired to hide a pedophile simply ignores the reality of the man he was.

Academic Success. One of the greatest testaments to Penn State football's academic achievement may be the Academic Bowl Championship Series ("BCS") rankings created in 2007 by the New America Foundation's Higher Ed Watch.

The Academic BCS measures how well a team supports the "student" side of its student athletes by taking the final BCS standings (a football team's top 25 national ranking based largely on wins/losses) and rearranging the rankings based on academic achievement.[145] Since 2007, Penn State has finished the season in the top 25 of the BCS standing three times, in 2008, 2009 and 2011, and thus received an Academic BCS ranking for those years.

In 2008, Penn State finished 8th in the BCS and 2nd in the Academic BCS. In 2009, Penn State finished 13th in the BCS and 1st in the Academic BCS. And, in 2011 — Paterno's final season — Penn State finished 22nd in the BCS and 1st in the Academic BCS.

The respected organization, Higher Ed Watch, noted Penn State's outstanding graduation rate in 2011 and highlighted that there was no black-white graduation gap among players on the football team. "It's disappointing to say that is very rare for Division I football," noted Higher Ed Watch.[146] The previous year's first place team was Stanford. But in 2011, with Penn State back in the final BCS standings, Stanford fell behind Penn State in the Academic BCS rankings. Higher Ed Watch noted that Stanford had a 21 percent gap between black and white graduation rates for its players.

This type of academic success did not result from a few stellar students, but from years of the sustained and widespread commitment to academic achievement required by Joe Paterno. Countless players walked into his office expressing their interest in playing professional football only to be told that they had futures outside football, and they needed to focus in the classroom.

In a recent article discussing the challenges of NCAA academic reform, Professor Michael Oriard of Oregon State University, notes that the critical consensus from the media today is primarily concerned with the economic exploitation of young men who generate the revenues in football and basketball. Meanwhile, "[n]o such media-driven mandate is present — or even possible, history would tell us — regarding academic reform. Universities, as always, will be on their own here."[147] Fortunately for Penn State, the University was not on its own. It had Joe Paterno as a coach and teacher focused on academics. He did not need the media, Congress, or academia to remind him that the student came before the athlete.

Through years of dedication, Joe Paterno built an honest and honorable football program, not just for his own sake or for football recognition, but to help build young men and a better University. When people asked Paterno how good his team was, he would say, "Ask me in twenty years."[148]

Paterno's legacy is not just wins and losses, or national championships, or even promoting Penn State academics and building a new library. His legacy is the hundreds of players who came through his program, and the thousands of students who studied in the library, and lived in a university community enriched by the spirit of honest college athletics. His legacy is in every town in America where a proud Penn State graduate contributes to his or her community.

The life he led, the values he lived and the character he demonstrated bear no resemblance to someone who would have protected a man who was molesting kids.

VII. Conclusion

Joe Paterno died on January 22, 2012, concerned for the victims in this tragedy, determined that the full truth should be revealed, and hopeful that these awful events could raise consciousness of child abuse detection more broadly and prevent its recurrence. Joe Paterno also died before the few emails on which the Freeh Group based its speculative opinions could be discussed with him. In the most significant ways, the Freeh report does little to advance the truth as to Joe Paterno, and leaves questions that may never be answered with Joe Paterno's death.

The evidence that does exist reflects a very different reality regarding Joe Paterno than the fiction invented by the Freeh report. It shows a man who never concealed, controlled, or knew of any details of sexual abuse in the 1998 investigation that cleared Sandusky; a man who reported promptly what he learned to his superior(s) in 2001; a man who told the truth to the best of his recollection when asked questions in 2011 about his memory of events a decade earlier; and a man who took responsibility for his actions publicly and privately and, with the benefit of hindsight, wished he had done more when learning the extent of Jerry Sandusky's deceptions in 2011.

Joe Paterno never mentioned the impact of this scandal on his "legacy," a term that has been overwrought and elevated to great prominence by others. Instead, he described these events as one of the great sorrows of his life, that as a father of 5 children with 17 grandchildren he was saddened and sickened to learn of these details, and that even at the end of his life he hoped he could still be helpful. None of these sentiments is consistent with the negative implication of cowardice and conspiracy ascribed to Joe Paterno in the Freeh report.

Joe Paterno's actions in this matter, and the balance of his life, repeatedly demonstrate that he tried his best to do the right thing with honor and integrity. Some may vilify the loyalty to the "Penn State way" as part of the cause of this tragedy, but that misimpression based on the flawed Freeh report cannot change the immutable fact that Joe Paterno and Penn State have stood for what is right and good in our society, even if part of that commitment means acknowledging and learning from mistakes and emerging stronger because of them.

Our deepest concern and sympathies remain with the victims of this tragedy, and the Paterno family is committed to supporting significant steps, and making more contributions financially and emotionally, to increase child sexual victimization awareness, detection and education in this country.

* * * * *

ENDNOTES

[1] The Pennsylvania State University ("Penn State" or the "University") formed a Task Force of its Board of Trustees in the wake of the allegations of child abuse by former Penn State assistant football coach Jerry Sandusky. Mr. Louis Freeh, as lead for his law firm at the time, Freeh Sporkin & Sullivan, LLP ("FSS" or "Freeh Group"), was appointed Special Investigative Counsel ("SIC") to that Task Force, and issued a report on July 12, 2012, entitled "Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Abuse Committed by Gerald A. Sandusky." We generally refer to that report as the "Freeh report," but Mr. Freeh's report and investigation also have been referred to publicly as the "SIC" and/or "FSS" report and investigation.

[2] Dick Thornburgh, Review of the Freeh Report Concerning Joseph Paterno, Feb. 6, 2013, at 4-5 ("Thornburgh").

[3] *Id.* at 2.

[4] *Id.* at 10-11.

[5] *Id.* at 11.

[6] *Id.* at 37.

[7] James T. Clemente, Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization, Feb. 2013, at 6 ("Clemente").

[8] *Id.* at 66.

[9] *Id.* at 65.

[10] *Id.* at 65.

[11] *Id.* at 66.

[12] Fred S. Berlin, M.D., Report Regarding Joseph Paterno, Feb. 6, 2013, at 10-11 ("Berlin").

[13] *Id.* at 9-10.

[14] *Id.* at 10.

[15] Statement by a Group of Past Chairs of The Pennsylvania State University Faculty Senate Regarding the Freeh Report, the NCAA Consent Decree, and Their Academic Implications, Aug. 28, 2012, http://www.senate.psu.edu/agenda/2012-2013/aug2012/pastchairs_statement.pdf ("The NCAA Consent Decree, which substantially embellishes the initial Freeh findings in both tone and substance, claimed no standard of proof for its conclusions but nonetheless required Penn State to accept the Freeh Group's assertions as fact."); Statement by 182 Former Penn State Players, A Rush to Judgment, July 29, 2012 ("In short, we believe this report has irresponsibly impugned Paterno's reputation without sufficient evidence."); Penn Staters for Responsible Stewardship Identification of Key Failures of the Freeh Report, Sept. 13, 2012; *Trustee Myers: NCAA would fail ethics class at Penn State and is a petulant child gone wild*, STATECOLLEGE.COM, Aug. 25, 2012; Steve Eder, *Governor sues over penalties to Penn State*, N.Y. TIMES, Jan. 2, 2013; Brad Wolverton, *Freeh group member criticizes NCAA's use of investigative report*, THE CHRON. OF HIGHER EDUCATION, July 27, 2012.

[16] Freeh report at 9.

[17] Mark Scolforo, *Sandusky gets at least 30 years, denies wrongdoing*, ASSOCIATED PRESS, Oct. 9, 2012.

[18] Rick Freeman, *Paterno's name keeps getting erased*, ASSOCIATED PRESS, July 25, 2012.

[19] NCAA, "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University," July 23, 2012, http://www ncaa.com/content/penn-state-conclusions; Don Van Natta Jr., *Penn State faced 4-year death penalty*, ESPN.COM, July 26, 2012.

[20] Two former NCAA presidents, Cedric Dempsey and Gene Corrigan, disagree with the NCAA's actions. Megan Flood, *Panel: NCAA too heavy-handed with Penn State sanctions*, CENTREDAILY.COM, Oct. 3, 2012.

[21] NCAA Constitution, Article 1.3.2 (2011-12 NCAA Division I Manual) (emphasis added).

[22] NCAA Bylaw 19.02.2.2 (2011-12 NCAA Division I Manual).

[23] NCAA Consent Decree at 4.

[24] *Id.* at 2, 4.

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[25] Press release, National Collegiate Athletic Association, NCAA launches external review of enforcement program, Jan. 23, 2013; *NCAA finds issue with investigation*, ESPN.COM, Jan. 24, 2013; Joe Nocera, *The N.C.A.A.'s ethics problem*, N.Y. TIMES, Jan. 25, 2013.

[26] *NCAA finds issue with investigation*, ESPN.COM, Jan. 24, 2013.

[27] Clemente at 3-4.

[28] *Id.* at 6.

[29] *Id.* at 66.

[30] Berlin at 8.

[31] Clemente at 12 (emphasis added).

[32] *Id.* at 12.

[33] *See id.* at 70-71.

[34] *Id.* at 65.

[35] *Id.* at 65.

[36] *Id.* at 66.

[37] Berlin at 8-9.

[38] *Id.* at 9.

[39] Sara Ganim, *Jerry Sandusky, adopted son had 'rocky' relationship*, THE PATRIOT-NEWS, Mar. 25, 2012.

[40] Sara Ganim, *Matt Sandusky says he, too, was abused by his adoptive father*, THE PATRIOT-NEWS, June 22, 2012; Michael Isikoff, *Matt Sandusky details alleged sex abuse by his father*, NBC NEWS, June 26, 2012.

[41] Lisa Riordan-Seville and Hannah Rappleye, *Ghosts of Sandusky's dreams haunt empty home where his charity was born*, NBC NEWS, June 19, 2012.

[42] *See, e.g.*, Clemente at 7-15, 70-71 & Appendix 3; Berlin 7-8.

[43] Clemente at 67.

[44] *Id.* at 71-72.

[45] *See, e.g.*, David Templeton, *TMI papers show Thornburgh as 'hero'*, PITTSBURGH POST-GAZETTE, Mar. 28, 2009.

[46] Steven V. Roberts, *Reagan selects Pennsylvanian for Justice job*, N.Y. TIMES, July 13, 1988 ("Mr. Thornburgh . . . made a reputation as a 'Mr. Clean' figure by prosecuting organized crime and political corruption."); *Sound Legacy of Dick Thornburgh*, THE MORNING CALL, Jan. 19, 1987 ("[Thornburgh] has been, and remains, an oxymoronic creature — a popular politician. He came to the governor's mansion with impeccable credentials, highly respected as a tough federal prosecutor, and he leaves with an impressive popularity. . . . His professional integrity, personal demeanor, demands for excellence and devotion to public service will serve as a fine example to the young people who will be under his charge.").

[47] Thornburgh at 10.

[48] *Id.* at 11.

[49] *Id.* at 11, 13 (emphasis in original).

[50] *Id.* at 13-14 (citations omitted).

[51] *Id.* at 2.

[52] *Id.* at 37.

[53] Freeh report at Exs. 2A, 2E.

[54] *Id.* at Ex. 2A.

[55] *Id.*

[56] *Id.* at 48, Ex. 2J.

[57] *Id.* at Ex. 2J.

[58] *Id.* at 50, Ex. 2E.

[59] *Id.* at Ex. 2E.

[60] *Id.* at 49.

[61] *Id.* at 47, 72.

[62] *Id.* at Ex. 21.

[63] Thornburgh at 23.

[64] *Id.* at 2 (citation omitted).

[65] Clemente at 15.

[66] *Id.* (citation omitted).

[67] Freeh report at 55 ("The Special Investigative Counsel found no evidence to indicate that Sandusky's retirement was related to the police investigation of him in 1998.").

[68] *Id.* at Ex. 3D.

[69] *Id.* at 56 (Curley informed Spanier on February 9, 1998, "Joe tells me he made it clear to Jerry he will not be the next head coach.").

[70] *Id.* at Ex. 3D.

[71] Transcript of Proceedings at 203-05, *Commonwealth v. Gerald A. Sandusky*, Nos. CP-14-CR-2421-2011 & CP-14-CR-2422-2011 (Pa. Commw. Ct. June 12, 2012) ("Sandusky trial transcript").

[72] *Id.* at 205.

[73] Transcript of Proceedings at 57-58, *Commonwealth v. Timothy M. Curley & Gary Schultz*, Nos. CP-22-MD-1374-2011 & CP-22-MD-1375-2011 (Pa. Commw Ct. Dec. 16, 2011) ("Preliminary hearing"); Sandusky trial transcript, June 12, 2012, at 193.

[74] Preliminary hearing at 17; Sandusky trial transcript, June 12, 2012, at 193, 240.

[75] Preliminary hearing at 24 ("The rough positioning I would have described but not in very much detail."); Sandusky trial transcript, June 12, 2012, at 205 ("I told him what I had seen, again, on the surface.").

[76] Clemente at 17-32, 42-47.

[77] JOE POSNANSKI, PATERNO at 272 (2012) ("I tried to go through the Penn State guidelines to see what I was supposed to do. It said that I was supposed to call Tim [Curley]. So I called him.").

[78] Freeh report at 62, 68. The Penn State University Police is governed by a state statute that gives the department and its officers the same authority as municipal police officers. Thus, the Penn State police provide the campus with all law enforcement and security services. *See* P.L. 177, No. 175 (Nov. 26, 1997); 42 Pa.C.S. Ch. 89, Subch. D.

[79] POSNANSKI at 277.

[80] Clemente at 31 (citations omitted).

[81] Transcript of Proceedings at 4-6, Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, *In re Notice No. 29* (Jan. 12, 2011) ("Grand jury transcript").

[82] Grand jury transcript at 7.

[83] Freeh report at 70.

[84] POSNANSKI at 335.

[85] Sara Ganim, *Penn State football press conference canceled by university president*, THE PATRIOT-NEWS, Nov. 8, 2011.

[86] Freeh report at Ex. 5G.

[87] Louis Freeh, press conference, July 12, 2012.

[88] Thornburgh at 3 (citations omitted).

[89] Berlin at 6.

[90] Clemente at 33.

[91] *Id.* at 39.

[92] *Id.* at 41.

[93] *Id.* at 39.

[94] Thornburgh at 20-21 (citation omitted).

[95] Freeh report at Ex. 5G (emphasis added).

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[96] *Id.* at 23, 62, 68; Louis Freeh press conference, June 12, 2012 (prepared remarks and question and answer) (emphasis added).

[97] Thornburgh at 36 (citations omitted) (emphasis in original).

[98] David Comer, *PSU mum on Casey arrest Nittany Lion coach silent, but the attorney for Rashard Casey says the Quarterback did not assault the police officer*, WILKES BARRE TIMES LEADER, May 16, 2000, at A1.

[99] Steve Strunsky, *Player pleads not guilty in assault*, N.Y. TIMES, May 16, 2000.

[100] Press Release, Penn State, Statement by Coach Paterno Regarding Rashard Casey Incident (May 16, 2000).

[101] POSNANSKI at 264.

[102] *Id.* at 264.

[103] Jerry Kellar, *Paterno still behind Casey*, WILKES-BARRE TIMES LEADER, July 27, 2000, at 1C.

[104] Mark Story, *Coaches face dilemma with players in trouble Paterno taking PR drubbing, but is he right?*, LEXINGTON HERALD LEADER, Sept. 3, 2000, at C2.

[105] Bill Livingston, *Paterno faces a bitter fall*, PLAIN DEALER, Sept. 6, 2000, at 1D.

[106] Bill Lyon, *Joe Paterno deserves benefit of the doubt, for now*, THE PHILADELPHIA INQUIRER, Aug. 27, 2000; *see also*, Joe Lapointe, *Paterno takes quest and critics in stride*, N.Y. Times, Aug. 27, 2000.

[107] Mark Story, *Coaches face dilemma with players in trouble Paterno taking PR drubbing, but is he right?*, LEXINGTON HERALD LEADER, Sept. 3, 2000, at C2.

[108] Ray Parrillo, *Casey Cleared by N.J. grand jury*, THE PHILADELPHIA INQUIRER, Nov. 1, 2000.

[109] David Porter, *Former Penn State QB settles lawsuit against Hoboken police*, ASSOCIATED PRESS, Aug. 13, 2003.

[110] Jerry Kellar, *Paterno*, WILKES-BARRE TIMES LEADER, Aug. 3, 2003, at 1A.

[111] Michael Raphael, *Penn State's Enis suspended for Citrus Bowl*, ASSOCIATED PRESS, Dec. 23, 1997.

[112] Thornburgh at 21 (citation omitted).

[113] Freeh report at 57.

[114] *Id.* at 55.

[115] Interview with Paterno family member, Jan. 4, 2013.

[116] POSNANSKI at 247-48.

[117] *Id.* at 247-49.

[118] Freeh report at 65; Louis Freeh press conference, July 12, 2012.

[119] Louis Freeh press conference, July 12, 2012.

[120] *Id.*

[121] Freeh report at 65.

[122] Thornburgh at 33.

[123] Clemente at 54.

[124] Freeh report at 65.

[125] *Id.* at 67, note y.

[126] Louis Freeh press conference, July 12, 2012.

[127] Freeh report at 51.

[128] Thornburgh at 4-5.

[129] Clemente at 49-52.

[130] *Id.* at 50.

[131] Thornburgh at 37.

[132] Berlin at 4.

[133] *Id.* at 11.

[134] *Id.* at 9-11.

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[135] POSNANSKI at 319-21.

[136] *Id.*

[137] *Id.* at 205.

[138] *Id.* at 364-65.

[139] *Id.* at 143.

[140] Pete Axthelm et al., *The Shame of College Sports*, NEWSWEEK, Sept. 22, 1980, at 54.

[141] Michael Oriard, *NCAA Academic Reform: History, Context and Challenges*, 5 J. OF INTERCOLLEGIATE SPORT 4, 12 (2012).

[142] POSNANSKI at 106.

[143] *Id.* at 109.

[144] *Id.* at 110.

[145] Maggie Severns, Higher Ed Watch. The 2011 Academic Bowl Championship Series (Dec. 7, 2011).

[146] *Id.*

[147] Michael Oriard, *NCAA Academic Reform: History, Context and Challenges*, 5 J. OF INTERCOLLEGIATE SPORT 4, 17 (2012).

[148] POSNANSKI at 149.

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APPENDIX A

Review of the Freeh Report Concerning Joseph Paterno

by Dick Thornburgh

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February 6, 2013

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I. Introduction and Executive Summary

I was asked by the family of former Pennsylvania State University ("Penn State" or the "University") head football coach Joseph V. Paterno to perform an independent and objective review of the Freeh, Sporkin and Sullivan LLP ("FSS") report (the "Freeh Report" or the "Report"). FSS was appointed Special Investigative Counsel ("SIC") to a Task Force of the Board of Trustees of the University to conduct an investigation of the University's response to the child abuse charges against former Penn State assistant football coach Jerry Sandusky. The Report was released on July 12, 2012.

At the outset, I believe that the conduct of Mr. Sandusky was reprehensible, and he has been dealt with appropriately by our justice system. The lives of the victims of Mr. Sandusky will never be the same, and I feel for them and their families. My review did not consider the conduct of Mr. Sandusky, but rather was focused solely on the findings of the Freeh Report concerning Mr. Paterno. I evaluated the Report to determine whether statements made by the SIC were accurate, fair and supported by the record. The Paterno family did not ask me to reach any particular conclusion, and I offer no opinion with respect to the findings in the Freeh Report related to any other person. In conducting my review, I drew upon my experience as a former prosecutor and Attorney General of the United States, as well as my expertise in conducting independent internal investigations. I was assisted in my review by my colleagues at K&L Gates LLP.

Perhaps the most significant finding of the Freeh Report was that Mr. Paterno knew about critical facts relating to the child abuse by Mr. Sandusky in 1998 and 2001, but repeatedly

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concealed those facts.[1] Although the Freeh Report makes separate findings against Mr. Paterno and former Penn State President Dr. Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz, and Athletic Director Timothy M. Curley, it combines these findings to make collective conclusions that the four of them conspired together to cover up Mr. Sandusky's crimes.

In my opinion, the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno. The most significant failures of the Freeh Report are as follows:

- The Freeh Report claims that Mr. Paterno knew about the 1998 incident involving Mr. Sandusky at or about the time that it occurred.[2] However, there is no credible support provided in the Freeh Report for what, if anything, Mr. Paterno was aware of concerning the 1998 incident prior to 2011. Indeed, the Freeh Report ignored contrary evidence that Mr. Paterno did not have such knowledge. Instead, the Report relies upon a vague 1998 e-mail chain that does not directly reference Mr. Paterno.[3] The Report also claims that, since unnamed "[w]itnesses consistently told the [SIC] that Paterno was in control of the football facilities and knew 'everything that was going on,'" he must have known about the 1998 incident.[4] Mr. Paterno testified to the grand jury that he did not recall the incident.[5] In press interviews, he also stated that he did not recall learning about the allegation.[6] I am aware of no witness who has challenged the veracity of Mr. Paterno's statements.

- The Freeh Report concludes that Mr. Paterno must have conspired with Messrs. Curley and Schultz and Dr. Spanier to conceal the 2001 incident because: (1) Mr. Paterno wielded "excessive influence" at the University;[7] (2) two documents, neither of which was sent or received by Mr. Paterno, refer to a meeting between

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[1] Freeh, Sporkin & Sullivan LLP, *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, 16 (July 12, 2012) [hereinafter Freeh Report], http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

[2] *Id.* at 20.

[3] *Id.* at Ex. 2A; *see also id.* at Ex. 2B.

[4] *Id.* at 51.

[5] *Pennsylvania v. Curley*, Preliminary Hearing Transcript of Proceedings, Dec. 16, 2011, at 177-78 [hereinafter Preliminary Hearing Transcript].

[6] Sally Jenkins, *Joe Paterno's Last Interview*, WASHINGTON POST, Jan. 14, 2012.

[7] Freeh Report at 65 n.w.

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Mr. Curley and Mr. Paterno concerning the incident;[8] and (3) Mr. Curley, whom "several" unidentified people interviewed during the SIC's investigation described as Mr. Paterno's "errand boy," decided not to report the incident to the Pennsylvania Department of Public Welfare.[9] This does not provide proper or sufficient evidence for such a bold claim.

- Numerous sworn witness statements and other accounts, some of which were referenced in the Freeh Report, describe the extent to which persons beyond Messrs. Curley, Schultz and Paterno and Dr. Spanier were aware of the 1998 and 2001 incidents.[10] This is strong evidence that there was no cover-up.

- Mr. Freeh's mischaracterization of an e-mail critical to his Report at his July 12, 2012 press conference announcing his findings is emblematic of the SIC's unjustified inferences and the flaws in the Report. Mr. Freeh stated that an e-mail showed that it was Mr. Paterno who decided not to report to authorities the 2001 shower incident involving Mr. Sandusky and a young boy.[11] However, this is not what the e-mail states. The e-mail suggests that it was Mr. Curley's decision not to report the 2001 incident to authorities and does not state that Mr. Paterno was involved in such a decision or that he was even aware of it.[12] Mr. Freeh did not supply any other evidence at the press conference to support the proposition that Mr. Paterno was involved in or aware of the decision.[13] Indeed, the Report acknowledges that it was Mr. Curley's decision and not Mr. Paterno's in its "key findings" about the 2001 incident.[14]

- The Freeh Report claims that it conducted a "complete" investigation.[15] This is not accurate because, despite the fact that it supposedly conducted 430 interviews,[16] the SIC did not speak to virtually any of the persons who had the most important and relevant information. Three of the most crucial individuals—Messrs. Paterno, Schultz and Curley—were never interviewed.[17] Michael McQueary, the sole witness to the 2001 incident, was also not interviewed.[18]

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[8] *Id.* at Exs. 5C, 5G.

[9] *Id.* at 75.

[10] *See, e.g., id.* at 67 n.x, 69, 78.

[11] Remarks of Louis Freeh in Conjunction with Announcement of Publication of Report Regarding the Pennsylvania State University (July 12, 2012), at 4 [hereinafter Freeh Remarks]. http://progress.psu.edu/assets/content/Press_Release_07_12_12.pdf; *see also* Freeh Report at Ex. 5G.

[12] Freeh Report at Ex. 5G.

[13] Freeh Remarks at 4.

[14] Freeh Report at 63.

[15] *Id.* at 8.

[16] *Id.* at 9.

[17] *Id.* at 12.

[18] *Id.*

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Another important individual, Dr. Spanier, was interviewed, but just days before the Freeh Report was issued.[19] The usefulness of the Report is also restricted because many of the interviewees cited are not identified, limiting the reader's ability to weigh the witnesses' credibility and reliability.[20]

- The failure to conduct key interviews is all the more consequential because of the lack of relevant documents. Although the SIC purported to review over 3.5 million documents, the Freeh Report references and relies upon only approximately 30 documents, including 17 e-mails. Significantly, the Freeh Report cites only four documents that purportedly reference Mr. Paterno, none of which were sent to him, and only three documents containing notes authored by him.[21] Although not mentioned in the Report, Penn State reportedly did not retain most e-mails dated prior to 2004 because of a technology changeover, making it impossible to search and review the vast majority of e-mails that must have existed during the critical time periods of 1998 and 2001.[22] Indeed, the only e-mails apparently available to the SIC prior to 2004 were those that were saved personally by Mr. Schultz.[23] Particularly in matters in which the relevant events took place more than ten years ago, contemporaneous e-mails are important sources of information. Mr. Freeh should have disclosed this serious shortcoming in his analysis.

In an interview with the media before his death, Mr. Paterno conceded that he wished he had done more with respect to the 2001 incident, particularly when viewed through the powerful lens of hindsight.[24] However, as discussed in more detail below, failing to do more does not translate into a conspiracy to cover up Mr. Sandusky's actions. The findings in the Freeh Report related to Mr. Paterno do not support such a conclusion. The lack of factual support for the SIC's inaccurate and unfounded findings related to Mr. Paterno and its numerous process-

[19] Dr. Spanier was interviewed by the SIC on July 6, 2012. *Id.* at 145 n.4. The Freeh Report was published on July 12, 2012. *See generally id.*

[20] *See generally id.*

[21] *See id.* at Exs. 3D, 3E, and 3F.

[22] Paula Reed Ward, *Spanier Drops Lawsuit Against Penn State*, PITTSBURGH POST-GAZETTE, July 19, 2012 (quoting Dr. Spanier's attorney, who stated that e-mails for Dr. Spanier and other administrators dated prior to 2004 were not retained when the University's computer system was overhauled).

[23] Freeh Report at 72-74.

[24] Jenkins, *supra* note 6.

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oriented deficiencies was a rush to injustice and calls into question the credibility of the entire Report.

II. Background

A. Sandusky Conviction and Charges Against Messrs. Curley, Schultz and Dr. Spanier

On November 4, 2011, following a two-year grand jury investigation, the Pennsylvania State Attorney General ("Attorney General") filed criminal charges in Dauphin County Court against Mr. Sandusky, a retired assistant Penn State football coach, for numerous counts of child sexual abuse between 1994 and 2009.[25] The Attorney General's office issued a grand jury presentment concerning Mr. Sandusky's actions the following day, which described the grand jury testimony of various witnesses, including Mr. Paterno, and summarized in detail the grand jury's findings of fact and recommendations of charges concerning Mr. Sandusky.[26] Also on November 4, 2011, the Attorney General filed criminal charges against Messrs. Curley and Schultz for failing to report allegations of child abuse by Mr. Sandusky and for committing perjury during grand jury testimony.[27]

Although the Attorney General stated publicly on November 7, 2011 that Mr. Paterno was not the target of any investigation,[28] pressure was building at the University and among the public to assess responsibility for Mr. Sandusky's actions at Penn State.[29] The Board of Trustees released a statement on November 8, 2011 that said: "We cannot begin to express the

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[25] Criminal Docket, *Pennsylvania v. Gerald A. Sandusky*, Docket No. MJ-49201-CR-0000636-2011 (Nov. 4, 2011).

[26] Grand Jury Presentment (Nov. 4, 2011) [hereinafter Grand Jury Presentment]. *available at* http://www.attorneygeneral.gov/uploadedfiles/press/sandusky-grand-jury-presentment.pdf.

[27] *Id.*

[28] Pa. Attorney General Press Release (Nov. 7, 2011), *available at* http://www.attorneygeneral.gov/press.aspx?id=6277.

[29] *See, e.g.*, Dan Le Batard, *How could Paterno not have done more to stop Penn State Scandal?*, MIAMI HERALD, November 8, 2011; Scott Ostler, *Paterno Should be Fired by Penn State*, SAN FRANCISCO CHRONICLE, November 8, 2011.

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combination of sorrow and anger that we feel about the allegations surrounding Jerry Sandusky. We hear those of you who feel betrayed and we want to assure all of you that the Board will take swift, decisive action."[30] As a result of this mounting pressure, Mr. Paterno was fired by Penn State on November 9, 2011.[31] Then, on November 11, 2011, the University's Board of Trustees formed the Task Force and appointed Board of Trustees members, Kenneth Frazier, who is the Chief Executive Officer and President of Merck & Co., Inc., and Ronald J. Tomalis, the Secretary of the Pennsylvania Department of Education, to lead the Task Force.[32] On November 21, 2011, the Task Force engaged FSS as the SIC to conduct an "independent, full and complete" investigation of the "alleged failure of [Penn State] personnel to respond to and report to the appropriate authorities" sexual abuse of children by former Penn State assistant football coach Gerald A. Sandusky and the "circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth."[33] Mr. Paterno died on January 22, 2012 before having the opportunity to participate in the SIC's investigation.[34]

After a jury trial beginning on June 11, 2012, Mr. Sandusky was found guilty of child sexual abuse charges on June 22, 2012, and later sentenced to 30 to 60 years in prison on October 9, 2012.[35] On July 12, 2012, the SIC released the Freeh Report.[36]

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[30] Statement by The Pennsylvania State University Board of Trustees, *Penn State Live*, http://live.psu.edu/story/56285 (Nov. 8, 2011).

[31] Report of the Board of Trustees Concerning Nov. 9 Decisions, *Penn State Live*, http://live.psu.edu/story/58341 (Nov. 9, 2011).

[32] Freeh Report at 13-14.

[33] *Id.* at 8.

[34] *Id.* at 53; Ron Musselman, *Penn State legendary coach Joe Paterno has died*, PITTSBURGH POST-GAZETTE, Jan. 22, 2012.

[35] *Pennsylvania v. Sandusky*, No. CP-14-CR-2421-2011, No. CP-14-CR-2422-2011, Verdict Slips (June 22, 2012); *id.*, Sentencing Order (Oct. 9, 2012).

[36] *See* Freeh Remarks at 1.

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Messrs. Curley and Schultz were scheduled to stand trial in January 2013,[37] but, on November 1, 2012, additional child endangerment charges were filed against them.[38] The Attorney General also filed charges on November 1, 2012 against Dr. Spanier for perjury, obstruction, endangering the welfare of children, failure to properly report suspected abuse and conspiracy for his actions in response to complaints about Mr. Sandusky.[39] At the same time, a new grand jury presentment was released summarizing new findings of fact and the grand jury's recommendations of charges against the three men.[40] In light of the new charges against Messrs. Curley and Schultz and a pending motion to dismiss the charges, their January 2013 trial date was postponed.[41]

B. Freeh Report Process

To execute its mandate to perform an independent, full, and complete investigation, the SIC purported to conduct "over 430 interviews" of a "cross-section of individuals including current and former University faculty and staff members, Trustees, and student-athletes" and to review "over 3.5 million pieces of pertinent electronic data and documents."[42] The SIC established a toll-free hotline and dedicated e-mail address to receive any relevant information.[43] The SIC also reviewed applicable University policies, guidelines, practices and procedures and compared them to other large universities.[44]

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[37] *Pennsylvania v. Curley*, No. CP-22-CR-5165-2011, *Pennsylvania v. Schultz*, CP-22-CR-5164-2011, Scheduling Order (Aug. 17, 2012).

[38] *Id.*, Criminal Docket (Nov. 1, 2012).

[39] *Pennsylvania v. Spanier*, No. MJ-12303-CR-0419-2012, Criminal Docket (Nov. 1, 2012).

[40] Grand Jury Presentment (Nov. 1, 2012) [hereinafter 2012 Grand Jury Presentment], *available at* http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley_presentment-11-1-12.pdf.

[41] *See Pennsylvania v. Curley*, No. CP-22-CR-5165-2011, *Pennsylvania v. Schultz*, CP-22-CR-5164-2011, Order Postponing Trial Date, Dec. 5, 2012.

[42] Freeh Report at 9, 12.

[43] *Id.* at 7.

[44] *Id.*

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III. Process of My Review

I conducted my review of the Freeh Report in a completely independent manner. Mr. Paterno's family did not influence the scope of the review or my findings in any way.

In conducting my review, I analyzed thoroughly the Freeh Report and the evidence cited in support of it. However, because the Freeh Report did not identify specifically all of the documents it reviewed or witnesses it interviewed in support of its findings, I also reviewed various other documents and information to evaluate the Report's findings and to discover other potentially relevant information. These documents and information included:

- Various court filings and transcripts, including the grand jury presentment concerning Mr. Sandusky; Mr. Paterno's grand jury testimony; the grand jury presentments with respect to Messrs. Schultz and Curley and Dr. Spanier; witness testimony from the preliminary hearing with regard to the case filed against Messrs. Schultz and Curley; filings and exhibits from the case against Messrs. Schultz and Curley; and trial testimony and documents from the trial of Mr. Sandusky;
- Public statements by and on behalf of Mr. Paterno and members of his family;
- Public statements by Mr. Freeh;
- Public statements by counsel for Messrs. Schultz and Curley and Dr. Spanier;
- Public statements and news reports concerning Penn State and the Board of Trustees;
- News reports, internet postings, and other statements about Mr. Paterno;
- Various statements and news reports analyzing the Freeh Report;
- Documents and correspondence provided to the U.S. Department of Justice by counsel for Mr. Paterno and his family, which included notes by Mr. Paterno and several of his files; and
- A summary of an interview of Mr. Paterno by the Attorney General's office.

I also spoke to counsel for Messrs. Curley and Schultz to gather information relevant to my review.

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IV. The Freeh Report's Findings with Respect to Mr. Paterno Are Flawed

A. The Goals of a Proper Internal Investigation

As Mr. Freeh stated at his press conference releasing the Report, a proper internal investigation and its findings must be accurate, thorough, fair, and credible.[45] An accurate report of an investigation is one in which the conclusions are supported with sufficient and specific facts and investigators consider all of the relevant information. An accurate report should also avoid mistakes, typographical errors and mischaracterizations, as they are the characteristics of a negligent investigative report.[46]

A meaningful internal investigation must be thorough. The investigators should interview all significant witnesses, conduct an extensive review of all pertinent documents, and pursue all possible theories or potential conclusions. In *Mott v. Anheuser-Busch, Inc.*, the court determined that the internal investigation at issue was conducted in a thorough and responsible manner because "the investigation included interviews with *all* relevant parties," including the target of the investigation.[47] Omitting an important witness or failing to follow a meaningful lead can raise serious questions as to the thoroughness of the investigation. Indeed, as Mr. Freeh himself stated recently during his "keynote address" to the Annual Pharmaceutical Regulatory and Compliance Congress:

> The basic skills and tools for conducting credible investigations require more than data review, more than numbers crunching, more than comparative data analysis. It really requires going out, speaking to people,

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[45] *See* Freeh Remarks at 2.

[46] *See, e.g., Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987) (noting that characteristics of a negligent investigative report include "errors in note-taking and quotation of sources" as well as "mechanical or typographical errors").

[47] 910 F. Supp. 868, 876 (N.D.N.Y. 1995) (emphasis added).

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> interviewing them, and using all the lawful techniques that we use and companies are allowed to use to conduct business.[48]

As Mr. Freeh stated, interviewing witnesses "will make the critical difference between a competent and fulsome investigation or not."[49]

Such an investigation must be fair to all parties involved. This is not to say that liability and determinations should not be assessed, but rather that the investigators have a duty to consider both incriminating and exculpatory evidence. When drafting a report, key facts can often be ambiguous and/or conflicting. Fairness requires that an investigation identify such situations and evaluate them when an objective reader could reasonably reach different conclusions. Leaving out any possible exculpatory evidence and ignoring other reasonable alternatives presents the reader with a biased and unfair version of the facts.[50]

Finally, an investigative report must be credible. Inadequate evidence, unreasonable reliance on sources, and the unjustified formulation of conclusions and inferences are all signs of a report that lacks credibility.[51] All potential conflicts of interest or appearances of a lack of independence that could compromise an investigation or its findings' integrity must be identified and vetted in the report.

B. Deficiencies in the Freeh Report

When considered in the context of investigation "best practices," it is evident that the Freeh Report and many of its findings as they relate to Mr. Paterno are not accurate, thorough, fair or credible. Moreover, Mr. Paterno never had the opportunity to speak to the SIC and

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[48] Louis Freeh, Keynote Address at the 13th Annual Pharmaceutical Regulatory and Compliance Congress 20 (Nov. 7, 2012).

[49] *Id.* at 19.

[50] *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 489-92 (2d Cir. 1982) (holding that an internal investigation that excludes crucial information could be perceived as biased and possibly creating a misleading report).

[51] *See Pearce*, 664 F. Supp. at 1510-17.

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explain his involvement before his death. The process of the SIC's investigation was deficient in numerous ways, including the failure to interview virtually all of the key witnesses and the reliance upon limited, ambiguous documents. Perhaps most significantly, the findings in the Freeh Report about Mr. Paterno concerning his alleged knowledge of the 1998 incident and purported concealment of the 2001 incident were not properly supported. Instead, the SIC attempted to construct an unsubstantiated "collective guilt" among Messrs. Paterno, Curley and Schultz and Dr. Spanier to maintain its conclusions.

1. Defects in the Process of the SIC's Investigation

a. *Failure to Identify Witnesses Interviewed or to Interview Key Witnesses*

The SIC described in the Freeh Report that it investigated the events in question by "conducting over 430 interviews of key University personnel and other knowledgeable individuals" including current and former Trustees; current and former administrators, faculty and staff, including coaches and student-athletes; law enforcement officials; and members of the State College community.[52] The SIC stated that it had "unfettered access" in conducting interviews and that it covered in the interviews a "wide range of academic, administrative and athletic topics relating to Sandusky's crimes and the allegations against Schultz and Curley, as well as the governance and oversight function of the University's administrators and Board of Trustees."[53] Although the Freeh Report's description of its interview process sounds impressive, the SIC did not interview the most significant witnesses.

First, other than offering generalizations in the summary of its process, and occasionally specifically identifying witnesses within the text or footnotes, the Freeh Report fails to provide identifying information for the vast majority of the witnesses it interviewed. As a result,

[52] Freeh Report at 9.

[53] *Id.* at 11, 12.

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anonymous sources are often set forth as evidence for critical conclusions in the Report. Without an understanding of who actually made the statements set forth in the Freeh Report, there is no way for the reader to weigh the credibility or reliability of witnesses or the consistency of statements among witnesses. There also is no description in the Report of any such credibility or consistency analysis performed by the SIC. Further, the Freeh Report also does not describe how many witnesses the SIC interviewed during the investigation, and instead discusses the number of interviews it conducted. As a result, it is unclear whether some witnesses were interviewed once or many times.

In at least one instance, the anonymous source for some of the Freeh Report's assertions has been revealed through subsequent press interviews. During those interviews, information was revealed that raises questions as to the source's credibility. Specifically, the Freeh Report describes an incident involving Mr. Sandusky that was witnessed by a temporary Penn State janitor and his decision not to inform Penn State officials about it because he feared retaliation.[54] A footnote in support of the assertion that the janitor was justified in fearing retaliation cites to an anonymous source's account of an April 2007 disciplinary action involving several Penn State football players in which Mr. Paterno intervened in the discipline.[55] Subsequent press interviews revealed that the anonymous source cited in the footnote was Dr. Vicky Triponey, former Penn State Vice President of Student Affairs.[56] Several subsequent commentators and news articles have raised questions as to Dr. Triponey's biased agenda or possible misrepresentation of the

[54] *Id.* at 65.

[55] *Id.* at 65 n.w.

[56] Mike Jensen, *Vicky Triponey, the Woman Who Took on JoePa*, PHILADELPHIA INQUIRER, July 22, 2012.

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facts.[57] Without knowing Dr. Triponey's identity, it would have been impossible to evaluate properly the credibility and reliability of any statements made by her.

Second, in addition to failing to identify whom the SIC *did* interview, the Freeh Report also provides virtually no information about whom the SIC *did not*, or *could not*, speak to and why. The Freeh Report acknowledges that some witnesses declined to be interviewed on the advice of counsel and identifies as examples Messrs. Sandusky, Schultz, and Curley and former University outside legal counsel, Wendell Courtney.[58] Although the Freeh Report states that the Attorney General requested that the SIC not interview former University Director of Public Safety Thomas Harmon and former assistant coach Michael McQueary, it alludes to the fact that the Attorney General asked the SIC not to talk to others, without identifying them.[59] The Freeh Report also describes that, generally, witnesses were cooperative and forthright, but also states, without specifically naming them, that there were a "few exceptions" who were not.[60]

Third, the Freeh Report fails to acknowledge that, as a result of the above-described limitations, it lacked access to the most *critical* witnesses, which severely limits the reliability and usefulness of the Report. Indeed, the SIC interviewed only one witness (Dr. Spanier) who had direct knowledge about the most important incidents discussed in the Freeh Report. Despite this fact, the Freeh Report states that, while the information unavailable witnesses "could have provided would have been pertinent to the investigation, the findings contained in this report

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[57] *See, e.g.*, Anne Danahy, *Penn State Athletics Study Counters Triponey Claims*, CENTRE DAILY TIMES, Sept. 2, 2012 (questioning the claims made by Dr. Triponey regarding the PSU athletic program); Joe Posnanski, *Paterno* 312-15 (2012) (discussing the controversy surrounding Vicky Triponey during her time at Penn State and the incident that eventually led to her resignation); The Vicky Triponey Timeline of Terror, Safeguard Old State, http://safeguardoldstate.org/the-vicky-triponey-timeline-of-terror (last visited Dec. 4, 2012) (Safeguard Old State is a student run advocacy group that posted this timeline back in 2007, documenting the supposed wrongdoings of Dr. Triponey while at PSU).

[58] Freeh Report at 12.

[59] *Id.*

[60] *Id.*

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represent a fair, objective and comprehensive analysis of the facts."[61] Incredibly, considering the findings in the Freeh Report are supported substantially by less than 30 contemporaneous documents, the Report goes further, stating that "the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed."[62] In light of the broad and damning conclusions in the Freeh Report, such statements by the SIC are irresponsible and self-serving. It is virtually impossible to provide a full account of incidents, and more importantly to make judgments related to them, without the benefit of talking to the individuals who were involved at the time they occurred. Perhaps most critically, it is unfair to make findings about credibility and intent without interviewing witnesses necessary to make those conclusions.

Fourth, the SIC apparently gave short shrift to the information important witnesses provided that was contrary to the Freeh Report's findings. As discussed above (and in greater detail below), Dr. Spanier was the only witness interviewed by the SIC with direct knowledge about the alleged cover-up involving the 2001 incident. However, as has been widely reported, the SIC did not interview Dr. Spanier until just six days prior to the Freeh Report's publication on July 12, 2012.[63] According to his counsel, Dr. Spanier vehemently denied the SIC's findings, including the Freeh Report's allegations of a cover-up relating to the 2001 incident to prevent bad publicity for the University.[64] As anyone who has drafted a long report knows, the Freeh Report was likely in near final draft at the time of Dr. Spanier's interview. For the SIC to consider properly Dr. Spanier's statements, and to perform any necessary follow-up, it should

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[61] *Id.*

[62] *Id.*

[63] *See supra* note 19.

[64] Elizabeth K. Ainslie, *Two Investigations: A News Release From Attorneys For Dr. Graham Spanier* (July 16, 2012).

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have conducted his interview well in advance of the date the Freeh Report was released. Even more critically, the Freeh Report should have considered and addressed what Dr. Spanier stated in his interview.[65]

The SIC's lack of access to these most significant witnesses, and the Report's other weaknesses about witnesses described above, calls into question the fairness, completeness, thoroughness, and credibility of the findings in the Freeh Report as they relate to Mr. Paterno.

b. *Failure to Adequately Address Documentation Issues*

The Freeh Report touts the fact that the SIC analyzed "over 3.5 million pieces of pertinent electronic data and documents"[66] and states that "extensive contemporaneous documentation . . . provided important insights . . . ."[67] The Freeh Report's description of the documentary evidence supposedly supporting its findings is of concern.

First, despite the SIC purporting to review millions of documents, the Freeh Report specifically identifies only 30 exhibits as relevant to support its findings.[68] Some of these exhibits subsume portions of other attached exhibits, which gives the appearance of more documented support for the Report's findings than actually exists.[69]

Second, the Freeh Report fails to acknowledge the crucial fact that, due to a University-wide computer system change in 2004, the vast majority of Penn State e-mails dated prior to that

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[65] It has also been widely reported that Dr. Spanier told the SIC that federal investigators reviewed his involvement in the 1998 and 2001 incidents as part of a federal clearance procedure and still determined him to be cleared. *See, e.g., Critique of the Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* at 16, *available at* http://espn.go.com/photo/preview/!pdfs/120822/espn_pennst_critique_of_report.pdf; Timothy K. Lewis, *Press Conference Remarks on Behalf of Dr. Graham B. Spanier*, at 4 (Aug. 22, 2012). The Freeh Report fails to mention this fact, nor does it describe that it made any effort to collect this information.

[66] Freeh Report at 9.

[67] *Id.* at 12.

[68] *See generally id.*

[69] *See, e.g., id.* at Exs. 2B, 2C, 2E.

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year are no longer available.[70] As a result, most of the potentially relevant documents created prior to 2004, including those concerning the 1998 and 2001 incidents that serve as the primary bases for the Report, could not be reviewed. Although the Freeh Report does not discuss it, I understand that the only relevant pre-2004 e-mails discovered and reviewed by FSS were e-mails retained voluntarily by Mr. Schultz, who directed the University's information technology personnel to migrate the historic messages he had saved at the time of the change to Penn State's new e-mail system. Because deleted messages or messages sent or received prior to 2004 by University personnel other than Mr. Schultz apparently were not available for review, it is impossible to know what other e-mails may have provided insight into these matters. The Freeh Report also does not disclose the total number of documents it reviewed from the 1998 and 2001 time period, instead providing only a total number of documents reviewed without reference to the e-mail system change.

c. *Inappropriate Reliance upon Grand Jury Testimony and Presentment*

Throughout the Freeh Report, the SIC references the grand jury proceeding, including the grand jury presentment of November 4, 2011 and testimony thereof from the Centre County investigation of Mr. Sandusky.[71] The Freeh Report's reliance on the grand jury presentment and proceedings is misplaced and overstated.

Grand jury proceedings and any related presentments are used to determine whether there is sufficient evidence to pursue criminal charges against a suspect.[72] The burden of proof on the prosecution in grand jury proceedings is not the higher burden of "beyond a reasonable doubt" used during criminal trials, but rather whether the person "appears to have committed" an

[70] *See supra* note 22.

[71] *See, e.g.*, Freeh Report at 14, 66-69.

[72] *See* 42 Pa. Code § 4548.

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offense.[73] The Freeh Report fails to address this important issue regarding burden and instead treats the November 4, 2011 grand jury presentment as fact. A grand jury presentment, however, is neither evidence nor is it a transcription of testimony. Rather, it is a document drafted by a prosecutor to obtain majority approval by the grand jury.[74] Further, a presentment is not typically admissible in judicial proceedings as it constitutes inadmissible hearsay.[75] The Freeh Report fails to address these important evidentiary issues in relying upon the November 4, 2011 grand jury presentment.

The Freeh Report, in citing to the grand jury testimony of witnesses (*e.g.*, Messrs. McQueary, Paterno, Schultz, and Curley, and Dr. Spanier), fails to discuss the two main evidentiary problems with grand jury testimony generally. First, although a grand jury witness may be represented by counsel, his counsel is not permitted to object to improper or misleading questions, which has the potential to create a one-sided record.[76] Second, there is no cross-examination of witnesses permitted in grand jury proceedings.[77] A thorough cross-examination is always of paramount importance in eliciting accurate and balanced testimony and in evaluating whether certain testimony may be inaccurate. By failing to address these fundamental issues with grand jury testimony, the Freeh Report allows readers to make unfounded inferences about the accuracy of certain statements it relies upon to render its conclusions.

Further, the Freeh Report fails to address substantive discrepancies between the November 4, 2011 grand jury presentment and other witness statements. The grand jury

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[73] *Id.*

[74] *Id.* § 4551(a).

[75] *See, e.g., Jack Martinez, Surviving Partner t/a M & S Tool & Mach. Co. & M & S Tool Mach. Co., Inc. v. Redevelopment Auth. of the City of Philadelphia*, No. 6608, 1992 WL 1071394 (Pa. Com. Pl. Apr. 1, 1992).

[76] 42 Pa. Code § 4549(c).

[77] *Id.*

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presentment asserts through Mr. McQueary's testimony that the 2001 incident in the Lasch Building shower with Victim 2 actually occurred in March 2002.[78] Although the Freeh Report briefly acknowledges this fact,[79] it fails to address the fact that such a discrepancy could raise credibility issues regarding Mr. McQueary's testimony. In addition, the grand jury presentment describes the testimony of Mr. McQueary relating to the 2001 incident as Mr. Sandusky subjecting Victim 2 to "anal intercourse."[80] However, at the December 16, 2011 preliminary hearing concerning Messrs. Curley and Schultz ("Preliminary Hearing"), Mr. McQueary testified, "I have never used the word anal or rape in this – since day one."[81] The November 4, 2011 grand jury presentment also states that Mr. McQueary went to Mr. Paterno's home "where he reported what he had seen."[82] Again, at the Preliminary Hearing, Mr. McQueary repeatedly testified that he never told Mr. Paterno any of the specifics of what he saw.[83] For these reasons, the Freeh Report's heavy reliance on the November 4, 2011 grand jury presentment and proceedings is misplaced. This problem is further compounded given Mr. McQueary was not interviewed as a part of the SIC's investigation.

2. There Is No Credible Evidence to Support the Finding That Mr. Paterno Conspired with Others to Cover Up Mr. Sandusky's Actions

The Freeh Report claims that Mr. Paterno conspired with Messrs. Schultz and Curley and Dr. Spanier to cover up the incidents involving Mr. Sandusky in order to avoid bad publicity.[84] The Report, however, fails to offer any credible evidence to support such an assertion.

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[78] Grand Jury Presentment at 6.

[79] Freeh Report at 66.

[80] Grand Jury Presentment at 6-7.

[81] Preliminary Hearing Transcript at 72.

[82] Grand Jury Presentment at 7.

[83] *See, e.g.*, Preliminary Hearing Transcript at 24, 74, 102.

[84] Freeh Report at 16.

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First, as discussed in greater detail below, the Report fails to acknowledge that there is no credible evidence of what, if anything, Mr. Paterno knew of the 1998 incident or about Mr. Paterno's involvement in the 2001 incident after he learned of it from Mr. McQueary and reported it to Messrs. Curley and/or Schultz.

Second, the SIC's conclusion that a conspiracy existed to "conceal" the actions of Mr. Sandusky in order to avoid bad publicity is also undermined by the very facts the Report describes. "Concealment" is "[t]he act of refraining from disclosure; especially, an act by which one prevents or hinders the discovery of something; a cover-up."[85] A fair and credible report by the SIC should have addressed why the SIC believed the record supported the finding of a cover-up, despite the fact that so many people were told of the incidents. Had Mr. Paterno wanted to conceal the facts from authorities for the betterment of his football program, it is difficult to understand why he would have disclosed the accusations to Messrs. Curley and/or Schultz. Moreover, Mr. McQueary confirmed that no one, including Mr. Paterno, Mr. Curley, or Mr. Schultz, ever asked him to refrain from disclosing the 2001 incident.[86]

Mr. Paterno was not the only alleged "co-conspirator" to act in ways inconsistent with a purported attempt to "conceal" the actions of Mr. Sandusky. In his grand jury testimony, Mr. Curley testified repeatedly that he spoke in person with Dr. Jack Raykovitz, Director of The Second Mile, about Mr. Sandusky's actions relating to the 2001 incident.[87] Mr. Freeh acknowledges this in the Report, and states further that Dr. Raykovitz told two people affiliated with The Second Mile.[88] Also, during the Preliminary Hearing, John McQueary, Michael

[85] *Black's Law Dictionary* 306 (8th ed. 2004).

[86] Preliminary Hearing Transcript at 38.

[87] *Id.* at 182, 195-96.

[88] Freeh Report at 78.

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McQueary's father, testified that he, along with Dr. Jonathan Dranov, a McQueary family friend and the elder McQueary's boss, spoke with Mr. Schultz about the 2001 incident after a business meeting in John McQueary's office sometime after Michael McQueary initially came to him.[89] In addition, John McQueary testified that Mr. Schultz indicated that there had been other allegations against Mr. Sandusky and that they had "never been able to really unearth anything or sink our teeth into something that we had that was substantial."[90] This is most likely a reference to the 1998 incident. Although the Freeh Report cites to the testimony by John McQueary during the Preliminary Hearing about his conversation with Mr. Schultz,[91] the Report completely ignores the fact that his description of this encounter weighs against the Report's conclusion of an alleged conspiracy to conceal Mr. Sandusky's actions. Moreover, Mr. Schultz reached out to Wendell Courtney, outside counsel for Penn State, about the situation.[92] This is further evidence that there was no intent to limit the number of people who knew of this matter, much less engage in a cover-up. Without any evidence and without speaking to any of the key parties involved with the initial reporting, the Report falls glaringly short of suggesting, let alone proving, any concealment by Mr. Paterno.[93]

Third, the Freeh Report asserts:

> Taking into account the available witness statements and evidence, the [SIC] finds that it is more reasonable to conclude that, *in order to avoid the consequences of bad publicity*, the most powerful leaders at the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the

[89] Preliminary Hearing Transcript at 135-39.

[90] *Id.* at 139.

[91] Freeh Report at 67 n.x.

[92] *Id.* at 69.

[93] In addition, and significantly, the Freeh Report notes that there is no evidence of interference by Mr. Paterno or any University administrator with the 1998 investigation. *Id.* at 52. That does not prevent the Freeh Report, however, from drawing the conclusion of a cover-up of Mr. Sandusky's actions. *Id.* at 16.

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> University's Board of Trustees, the Penn State community, and the public at large.[94] (emphasis added).

However, the Freeh Report fails to support this broad finding about motive with any actual evidence, including identifying any specific witness statement or document. Without any evidence, it is wrong to make the overarching conclusion that Mr. Paterno chose not to report the 2001 incident for fear of bad publicity.

Moreover, there is contrary evidence that Mr. Paterno in fact did *not* fear bad publicity for his football program. Not even a year prior to the 2001 incident, Mr. Paterno was criticized by the media for keeping star quarterback Rashard Casey on the Penn State football team after he was charged with aggravated assault of an off-duty police officer.[95] Those charges were later dropped, and Mr. Casey eventually settled his lawsuit against the police department for malicious prosecution.[96] Throughout this tumultuous period, Mr. Paterno stood by Mr. Casey, whom he believed had been falsely charged with a serious crime despite receiving harsh criticism from the media. These facts raise the question of why Mr. Paterno would be willing to withstand bad publicity for a current player, yet supposedly be unwilling to endure bad publicity for the actions of a former coach, whom he reportedly did not like much.[97] When taken in context with what was occurring at the University in 2001 with a current football player, the Freeh Report's conclusion of an alleged cover-up to avoid the consequences of bad publicity becomes even more tenuous.

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[94] *Id.* at 16.

[95] Ray Fittipaldo, *Testy Paterno Backs Casey*, PITTSBURGH POST-GAZETTE, July 27, 2000.

[96] David Porter, *Rashard Casey Settles Suit With Hoboken Police Department*, ASSOCIATED PRESS, Aug. 13, 2003.

[97] *See, e.g.*, Posnanski, *supra* note 57, at 213.

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3. The Freeh Report's Conclusions About Mr. Paterno Are Not Appropriately Supported

a. *The Report's Findings Concerning Mr. Paterno's Knowledge of the 1998 Incident Are Unfounded*

In the Freeh Report, the SIC describes that, on May 3, 1998, an incident occurred between Mr. Sandusky and a young boy that included physical contact in the showers of the Lasch Building on the campus of the University.[98] The following day, after noticing her son was upset, the boy's mother contacted a psychologist who encouraged her to contact the local authorities, who then began an investigation into the matter in coordination with child protective services organizations.[99] As the Freeh Report describes in great detail, the 1998 incident was investigated exhaustively by the full spectrum of Pennsylvania authorities, the officials of which were all educated, trained and experienced in dealing with child sexual abuse. These authorities included: (1) the University Police Department; (2) the Centre County Children and Youth Services ("CYS"); (3) the State College Borough Police Department; (4) the Centre County District Attorney; and (5) the Pennsylvania Department of Public Welfare ("DPW").[100] After the investigation about the 1998 investigation was complete, the District Attorney's office declined to file charges against Mr. Sandusky.[101]

The Freeh Report's findings regarding Mr. Paterno's knowledge of or involvement in the 1998 incident suffer from the same deficiencies of process and lack of evidentiary support identified above. At the outset, the Freeh Report refers generally to "the record" when making certain assertions regarding the 1998 incident and investigation without ever describing what the

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[98] Freeh Report at 41-42.

[99] *Id.* at 42.

[100] *Id.* at 42-47.

[101] *Id.* at 46.

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alleged "record" is based upon.[102] It is apparent, however, that "the record" is lacking because the SIC apparently failed to interview virtually all of the key witnesses from the 1998 incident and investigation including: (1) Mr. Sandusky; (2) Mr. Schultz; (3) Mr. Curley; (4) Mr. Paterno; (5) the 1998 victim; (6) the mother of the 1998 victim; (7) the second 1998 victim, interviewed by police during the 1998 investigation regarding a similar shower incident with Mr. Sandusky; (8) Mr. Harmon, former University Director of Public Safety; (9) Ray Gricar, former Centre County District Attorney; (10) Karen Arnold, former Centre County Assistant District Attorney; (11) Alycia Chambers, psychologist of the 1998 victim; (12) John Seasock, the CYS counselor who evaluated the 1998 victim; (13) John Miller, the CYS caseworker involved; and (14) Mr. Courtney, outside counsel to the University during the relevant time. It is also unclear whether the SIC interviewed Jerry Lauro, the DPW representative who handled the case, or Detective Ron Schreffler from the University Police Department—two of the individuals most intimately involved in the investigation of the 1998 incident. Any report of these events that excludes the primary witnesses is dramatically deficient and incomplete and should not form the basis for findings of the nature of those in the Freeh Report.

Despite the Freeh Report's findings to the contrary, there is no credible evidence of what, if anything, Mr. Paterno was aware of concerning the 1998 incident or the investigation that followed. Mr. Paterno died without the opportunity to talk to the SIC about its allegations. However, in his testimony to the grand jury in January 2011 regarding the 1998 incident, Mr. Paterno was asked, "Other than the [2001] incident that Mike McQueary reported to you, do you know in any way, through rumor, direct knowledge or any other fashion, of any other inappropriate sexual conduct by Jerry Sandusky with young boys?" He responded:

[102] *Id.* at 51.

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> I do not know of anything else that Jerry would be involved in of that nature, no. I do not know of it. You did mention—I think you said something about a rumor. It may have been discussed in my presence, something else about somebody. I don't know. I don't remember, and I could not honestly say I heard a rumor.[103]

Similarly, in his final news interview with Sally Jenkins of the *Washington Post*, Mr. Paterno was asked about his awareness of the 1998 incident and investigation. Mr. Paterno reiterated his lack of knowledge: "You know [the 1998 incident and investigation] wasn't like it was something everybody in the [football] building knew about. Nobody knew about it."[104]

The scant evidence that is discussed in the Freeh Report does not contradict Mr. Paterno's testimony or interview that he was unaware of the 1998 incident or investigation. The SIC relies primarily on two e-mails to support its findings that Mr. Paterno had knowledge of the events in 1998. However, these e-mails, attached as Exhibits 2A and 2B to the Report, are ambiguous at best. First, as with the other e-mails appended to the Freeh Report as evidence concerning the 1998 and 2001 incidents, these e-mails were located in Mr. Schultz's files, which he retained as part of his own voluntary practice. Because all other e-mail from this time period apparently was not saved by the University when it migrated to a new e-mail system in 2004, it is impossible to know what other or related e-mails may have once existed regarding these matters. Second, because the SIC failed to interview the authors or recipients of Exhibits 2A and 2B, the contents and the context in which they were drafted and sent could not be verified.

In addition, when these e-mails are examined closely, it becomes even more clear that they do not support the SIC's findings with respect to Mr. Paterno. Exhibit 2A includes a May 5, 1998 e-mail from Mr. Curley to Mr. Schultz with the subject line, "Joe Paterno," and states, "I

[103] Preliminary Hearing Transcript at 177-78.

[104] Jenkins, *supra* note 6.

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have touched base with the coach. Keep us posted. Thanks."[105] There are a number of issues with this document that the Freeh Report wholly ignores in using it as support for its conclusions about Mr. Paterno's knowledge of the 1998 incident. First, it is unclear what Mr. Curley was referring to when he said he "touched base with the coach."[106] Second, it is also unclear who "the coach" referenced in the e-mail is. Other than the subject line, there is no specific mention of Mr. Paterno.[107] The Freeh Report, however, assumes without any supporting evidence, particularly given that the SIC did not speak to the author or recipient, that "the coach" is Mr. Paterno.[108] Third, there is no evidence cited in the Report to support the proposition that this initial e-mail relates to the 1998 investigation at all. Even assuming that the e-mail does relate to the 1998 investigation, there is no evidence of the level of information regarding the 1998 incident, if any, that Mr. Curley provided to "the coach."

Exhibit 2B contains a May 13, 1998 e-mail from Mr. Curley to Mr. Schultz with a subject line, "Jerry," and states, "Anything new in this department? Coach is anxious to know where it stands." Exhibit 2B also cannot withstand the type of close scrutiny the Freeh Report chose not to give it. First, as with Exhibit 2A, from the face of the document, it is unclear who the "Coach" referenced in the e-mail is. The subject line, "Jerry," suggests that the "Coach" could just as likely be Mr. Sandusky as Mr. Paterno. Unfortunately, neither the recipient nor the sender was interviewed and the Report offers no other direct evidence regarding it. Second, similar to Exhibit 2A, there is no evidence to support that this initial e-mail relates to the 1998 incident and could just as easily concern other topics. Around this time, for example, Mr. Sandusky had

[105] Freeh Report at 48; *see also id.* at Ex. 2A.

[106] *Id.* at 48; *see also id.* at Ex. 2A.

[107] *Id.*

[108] *Id.* at 51.

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proposed to the University administration the possibility of starting a football team at the University's Altoona campus where he could be the head coach.[109] Ultimately, the administration chose not to move forward with this proposal.[110] The Freeh Report, however, does not discuss this possible reading of the e-mail. Third, there is no indication in the later e-mails that Mr. Curley intended to or in fact did communicate any information regarding the 1998 investigation from Mr. Schultz to the "Coach."

For all these reasons, it is wrong for the Freeh Report to draw the conclusion that this e-mail somehow confirms that Mr. Paterno was "kept informed"[111] of the 1998 investigation without simultaneously acknowledging its deficiencies and other equally reasonable explanations. Because the vast majority of key witnesses, including the authors and recipients of these e-mails, were unavailable for interviews, there was no way for the SIC to confirm the documents' contents or context.

The Freeh Report makes further unsupported inferences and assumptions regarding the level of detailed knowledge that Mr. Paterno possessed relating to the 1998 incident and investigation. Even assuming that Mr. Paterno generally was aware of the 1998 incident, the Freeh Report presumes that Mr. Paterno was intimately aware of all the details of the investigation that followed. For example, the Freeh Report assumes and implies that Mr. Paterno was informed of the conclusion and result of the 1998 investigation. The Freeh Report states, "[T]he available record is not clear as to how the conclusion of the Sandusky investigation was conveyed to Paterno."[112] Embedded in that sentence is the implication that Mr. Paterno knew

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[109] *Id.* at 56.

[110] *Id.* at 57.

[111] *Id.* at 39.

[112] *Id.* at 51.

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about the 1998 investigation and was made aware of the conclusion of the 1998 investigation by the Report's use of the word "how" instead of "whether." The "evidence" on which the Freeh Report relies to make such a conclusion is that "[w]itnesses consistently told the [SIC] that Paterno was in control of the football facilities and knew 'everything that was going on.'"[113] The Freeh Report does not explain which witnesses made these conclusory statements or upon what information the witnesses based their statements. Without more, such statements made during a supposed independent investigation should be given little-to-no credibility as it relates to Mr. Paterno's specific knowledge of the investigation of the 1998 incident or its conclusion.

The Freeh Report draws additional strained inferences regarding Mr. Paterno's knowledge of the 1998 incident.[114] The Freeh Report discusses Exhibit 2G, which is a handwritten note allegedly maintained by Mr. Paterno relating to Mr. Sandusky's proposed involvement with the University after his 1999 retirement, including "[a]ccess to training and workout facilities."[115] The handwritten note then states, "Is this for personal use or 2nd Mile kids. No to 2nd Mile. Liability problems."[116] The most obvious conclusion to be drawn from the note is Mr. Paterno's concern regarding the potential insurance liability associated with bodily injury to young children using University workout facilities. However, the Report does not make that logical conclusion and instead jumps to an extreme and unsupported finding that Mr. Paterno was referring to potential liability associated with Mr. Sandusky's abuse of children in the Lasch Building. Such inappropriate inferences once again call into question the accuracy, fairness and credibility of the Freeh Report's findings.

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[113] *Id.*

[114] *See id.* at 51 n.m.

[115] *Id.*

[116] *Id.*

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The Freeh Report also wholly disregards then-current Pennsylvania law regarding the confidential nature of an investigation into child abuse allegations. Under these laws, it would have been illegal for the investigators to reveal details about the 1998 incident or investigation.[117] The existence of these laws weighs against the Report's inference that Mr. Paterno would have been aware of the 1998 investigation. Significantly, Mr. Sandusky was not charged with any crimes after the 1998 investigation.[118] It is wrong to claim that one should treat another as a suspected criminal even after he has not been charged with any crime subsequent to an investigation by multiple Pennsylvania law enforcement and child protective services agencies.

b. *The Report's Conclusions About Mr. Paterno's Actions with Respect to the 2001 Incident Suffer from Numerous Deficiencies and Are Not Supported by the Record*

As with many other parts of the Freeh Report, the SIC relies on sparse documents and few facts to draw wide-reaching conclusions with respect to child sexual abuse by Mr. Sandusky on February 9, 2001. The facts, as stated by the Freeh Report, are that Mr. McQueary observed and/or heard some sort of sexual activity occurring between Mr. Sandusky and a young boy in the showers at the Penn State Lasch Building, a facility used by the football program. Mr. McQueary then told his father, John McQueary, and Dr. Dranov. John McQueary and Dr. Dranov suggested to Michael McQueary that he report what he saw and/or heard to Mr. Paterno, rather than go directly to the police. Reportedly, Michael McQueary called Mr. Paterno the next

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[117] *See, e.g.*, 55 Pa. Code § 3490.91, which reads: "(a) Reports, report summaries and other accompanying information obtained under the CPSL, Child Protective Service Law, and this chapter in the possession of the department, a county agency and a CPS, Child Protective Service, are confidential." Further, 23 Pa. Code § 6339 states:

> [R]eports made pursuant to this chapter, including, but not limited to, report summaries of child abuse and written reports made pursuant to section 6313(b) and (c) (relating to report procedure) as well as any other information obtained . . . concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service shall be confidential.

See also McClary v. Smalls, No. 95-12600, 1996 WL 614630 (Pa. Com. Pl. Jan. 3, 1996).

[118] Freeh Report at 39.

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day (Saturday, February 10, 2001) and arranged to visit Mr. Paterno at his home to inform him of the 2001 incident. Mr. Paterno then reported Mr. McQueary's disclosure about the 2001 incident to Mr. Curley and/or Mr. Schultz[119] on Sunday, February 11.

Similar to the 1998 incident, most of the key witnesses who were first made aware of the 2001 incident—Messrs. Sandusky, McQueary, Paterno, Curley, and Schultz—were not interviewed by the SIC.[120] In addition, the SIC reportedly did not interview Dr. Dranov or John McQueary, the first individuals to meet with Michael McQueary, to better understand what Michael McQueary saw and heard or to gather facts concerning whom Dr. Dranov or John McQueary spoke about the incident.[121] Instead, the SIC relied upon the grand jury testimony of the relevant witnesses involved.[122] As discussed above, such grand jury testimony is a poor substitute for actual interviews, especially when the Report draws such strong conclusions based upon the perceived credibility of particular witnesses.[123]

After reporting Mr. McQueary's observations to Mr. Curley and/or Mr. Schultz, there is no evidence that Mr. Paterno participated in determining Penn State's response to the 2001 incident. Mr. Paterno told the Attorney General he was not further involved during an interview concerning these matters in October 2011:

> Q: And do you know what happened after that [reporting to Mr. Curley] with regards to Mr. McQueary and/or Mr. Curley?
>
> A: Nope.

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[119] There is conflicting testimony as to precisely when, where, and whom Mr. Paterno informed. Certain testimony states that Mr. Paterno spoke with Mr. Curley over the phone, while other accounts indicate that Mr. Paterno met with both Mr. Curley and Mr. Schultz at his home on Sunday. *Id.* at 68. Due to the lack of clarity, this review and the Freeh Report use the phrase "Mr. Curley and/or Mr. Schultz" to avoid any ambiguity. *See, e.g., id.* at 63.

[120] The SIC did interview Dr. Spanier, *see id.* at 16, but there is no evidence that he was directly involved with the initial reporting. As a result, he would not likely offer much, if any, insight into these initial events.

[121] *Id.* at 67 n.x.

[122] *See generally id.*

[123] *See supra* at 16-18.

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> Q: Did Mr. Curley get back to you at some point in time after that to advise you what actions were taken . . .
>
> A: No, no, I didn't, I had other things to do, we had . . . As I said, Jerry was not working for me.
>
> . . .
>
> Q: Subsequent, [sic] to that you're saying Mr. Curley never got back to you, correct, to advise you?
>
> A: There was no need to get back.
>
> Q: Did any police department ever get ahold of you about this?
>
> A: Nope.
>
> Q: Did anybody from the University, well, anybody from the University Police Department contact you?
>
> A: Well, not till ten years later.[124]

Despite this assertion by Mr. Paterno that he had no further involvement, the SIC goes to great lengths in the Report to insert Mr. Paterno into the chronology and groups Messrs. Paterno, Curley and Schultz and Dr. Spanier into one collective unit to conclude that the four men conspired to cover up the incident to avoid bad press. To support these allegations about Mr. Paterno, the SIC relies upon two ambiguous documents.

First, Exhibit 5C is a page from Mr. Schultz's notes dated February 12, 2001, the first business day after Mr. Paterno reported the incident to Mr. Curley and/or Mr. Schultz.[125] The notes state in part, "agreed TMC will discuss w JVP and advise we think TMC should meet w JS on Friday." As the Report presumes, TMC likely stands for Timothy M. Curley, JVP likely stands for Joseph V. Paterno, and JS likely stands for Jerry Sandusky.[126] However, the SIC did not interview Mr. Schultz to obtain further confirmation or explanation about these notes. Nor did the SIC question Mr. Curley to determine whether he actually followed-up with Mr. Paterno.

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[124] Interview of Joseph V. Paterno, Commonwealth of Pennsylvania – Office of Attorney General (Oct. 24, 2011).

[125] *See* Freeh Report at Ex. 5C.

[126] *See id.* at 70.

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This one page of unclear notes, without any explanation from the author or information as to subsequent follow-up from the participants, is not a reliable source in support of the Freeh Report's far-reaching conclusions.

The Freeh Report's findings with respect to Mr. Paterno also rest upon Exhibit 5G, which is an e-mail from Mr. Curley dated February 27, 2001. In the e-mail, Mr. Curley writes, "After giving it more thought and talking it over with Joe yesterday--I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. . . ." As with Exhibits 2B and 2C supporting the SIC's findings about Mr. Paterno's knowledge of the 1998 incident, Exhibit 5G was part of the e-mail retained voluntarily by Mr. Schultz. Other e-mails prior to 2004 apparently are no longer available for review because of the University's system conversion. For the reasons discussed above, these e-mails are ambiguous and unfortunately cannot be put into context by related messages or explained by the persons who drafted or received them. As a result, it is neither fair nor appropriate to draw any conclusions from them.

The Report characterizes Exhibit 5G as a damning piece of evidence proving Mr. Paterno conspired with Messrs. Curley and Schultz and Dr. Spanier to conceal the 2001 incident.[127] As further support for this finding, the SIC makes the extremely general statement that "several people" said that Mr. Curley was "Paterno's 'errand boy,'"[128] and thus Mr. Curley's knowledge or actions should be attributed to Mr. Paterno. The SIC never provided the identity of these people, nor any information to assess their credibility. Significantly, the Report also provides no evidence that Mr. Curley's decision was either known or agreed to by Mr. Paterno. The Report

[127] *See id.* at 75.

[128] *Id.*

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also contains no evidence that Mr. Paterno ever attended a meeting with Mr. Schultz or Dr. Spanier about the 2001 incident; that either Mr. Schultz or Dr. Spanier ever mentioned a conversation with Mr. Paterno on this matter; or that the files of either Mr. Paterno or Mr. Schultz[129] contained any instructions or questions posed by Mr. Paterno to the group.

The actual language in Exhibit 5G also does not support the SIC's contention that Mr. Paterno was part of any "decision" not to report the incident to a law enforcement or child protection authority. Exhibit 5G reads, "After giving it more thought and talking it over with Joe yesterday-- *I am uncomfortable* with what we agreed . . . ."[130] Mr. Curley uses the singular when discussing his proposed change in direction. If, as the SIC contends, Mr. Curley was so heavily influenced by Mr. Paterno then it would seem more likely that he would use the plural to demonstrate the fact that Mr. Paterno supported his proposal. Furthermore, there is no mention of what Messrs. Curley and Paterno discussed. The SIC's failure to interview any of the parties to the e-mail creates a gaping hole in its analysis. The Freeh Report fails to recognize or discuss this gap.

c. *The Freeh Report's General Conclusions About Mr. Paterno Lack Support*

In addition to the specific allegations discussed above regarding the 1998 and 2001 incidents, several more general findings about Mr. Paterno permeate the entire Report. Unfortunately, many of the general conclusions made by the SIC regarding Mr. Paterno lack support and, as a result, raise significant questions as to their accuracy and credibility.

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[129] Mr. Schultz appears to have kept a rather extensive file labeled "Sandusky." *See* 2012 Grand Jury Presentment at 21-24. Many of the notes referenced in the Report appear to have come from that file. Freeh Report at 47, 70. One question raised by this file is, if Mr. Paterno was as involved in the collective group discussion as alleged in the Report, why would none of Mr. Schultz's notes reference Mr. Paterno's position or opinions. The Report never addresses this concern.

[130] Freeh Report at Ex. 5G (emphasis added).

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i. The Freeh Report's Conclusion That Mr. Paterno Wielded Excessive Influence at the University Is Not Supported by the Investigation Record

The Freeh Report states without any credible evidence that Mr. Paterno wielded "excessive influence at the University."[131] In support of this assertion, the Freeh Report replays an incident that occurred in the fall of 2000, where a temporary member of the Penn State janitorial staff allegedly witnessed Mr. Sandusky performing oral sex on a young boy.[132] This janitor, referred to in the Report as "Janitor A," was a temporary employee and, though other janitors seem to have encouraged him to report the incident to authorities, Janitor A refused, saying, "No, they'll get rid of all of us."[133]

While fear of reprisal may be the reason why Janitor A did not report the incident to others at Penn State or state authorities, the Report makes the mistake of assuming that this impression of a temporary employee was an accurate assessment of what would have happened had the janitor reported the incident. The SIC offers no concrete evidence to support the Report's contention that the janitor would have been fired. In actuality, the very facts reported by the SIC demonstrate the inaccuracy of Janitor A's assessment. Mr. McQueary did report what he claimed he saw one year later and not only was he not fired, but he later received a full-time position as a coach for the Penn State football team.

The Freeh Report also relies on a University official's perceived pressure from the Athletics Department during the discipline of certain football players in 2007. Again, the Freeh Report offers no specific evidence that Mr. Paterno was ever involved in actually reducing the discipline of any of his players, nor does the Report provide the identities of its sources. Other

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[131] *Id.* at 65 n.w.

[132] *Id.* at 65.

[133] *Id.*

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than citing to generalized views of select, anonymous individuals who may or may not have had interactions with Mr. Paterno, the Freeh Report fails to support an overly broad conclusion about Mr. Paterno's influence at Penn State.

To the contrary, it is well known that Mr. Paterno was demanding of his players personally and academically and did not tolerate poor behavior.[134] This is best illustrated by the mantra he instilled over his many decades at the University of "Success with Honor."[135] This view of his football program was designed to shape young men into true student-athletes. During his tenure, Penn State annually had one of the highest graduation rates for its football players of any university in the country.[136]

ii. The Freeh Report's Conclusion That Mr. Paterno Lacked Empathy for the Victims of Mr. Sandusky's Abuse Is Unfounded and Offensive

The Freeh Report accuses Mr. Paterno and the other Penn State administrators of failing to demonstrate concern for the victims and placing the football program above all else.[137] The assertion that Mr. Paterno lacked empathy for children and/or victims of child abuse is contradicted by his long history of charitable work and dedication to the development of young men. Mr. Paterno dedicated his life to training student-athletes, and he spent his career trying to instill strong values and moral traits in those that went through his football program. He had a reputation for being dedicated to his players, even when it constrained the potential success of

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[134] Posnanski, *supra* note 57, at 107.

[135] Joe Paterno, Penn State Commencement Speech (June 16, 1973), *available at* http://www.la.psu.edu/documents/Paterno1973CommencementSpeech.pdf.

[136] Kayla Webley, *Paterno's Payback? Penn State Football is No. 1 in Academic Bowl*, TIME, Dec. 7, 2011.

[137] Freeh Report at 16; *see also* Freeh Remarks at 4 ("The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized. Messrs. Spanier, Schultz, Paterno and Curley never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest.").

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his football team.[138] Mr. Paterno also committed himself to charitable activities, with a primary focus on children and young adults.[139] He gave more than $4 million to charitable causes and helped raise an additional $13.5 million to expand the Penn State library.[140] He made sure to participate in and support the Penn State dance marathon charity that raised money for children with cancer and his family remains active supporters of the Special Olympics program.[141] These examples do not point to a person who lacked any concern for children or who would simply choose to ignore the suffering of children. Instead, his professional dedication and charitable giving demonstrate that Mr. Paterno was deeply concerned with the welfare of children.

4. Substantive Errors in the Freeh Report Call Into Question the Report's Accuracy and Credibility

The Freeh Report's accuracy was further undermined by the SIC's issuance of an extensive errata report less than two weeks after the report was issued.[142] The errata sheet corrected not only several typographical errors, but also a substantive error that, in two instances, dramatically mischaracterized the meaning of an e-mail.[143] As originally written, the Freeh Report cited an e-mail to support the SIC's contention that Mr. Schultz was lying when he allegedly denied knowledge of the 1998 incidents in writing to Wendell Courtney, an outside lawyer to the University.[144] In fact, the SIC misquoted the e-mail: the document actually reflects

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[138] *See* Posnanski, *supra* note 57, at 103.

[139] *Id.* at 150, 204-05.

[140] *Id.* at 372.

[141] ESPN.com, *PSU Event Kicks Off Without Joe Paterno*, Feb. 21, 2012, *available at* http://espn.go.com/college-football/story/_/id/7588755/penn-state-nittany-lions-dance-marathon-goes-joe-paterno.

[142] *See* Freeh, Sporkin & Sullivan LLP, *Errata Sheet* (July 24, 2012) [hereinafter Errata Sheet], *available at* http://progress.psu.edu/assets/content/Louis-Freeh-Report-on-Penn-State-ERRATA-SHEET.pdf.

[143] *Id.*

[144] *Id.*

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Mr. Courtney denying knowledge of the incident in an e-mail to Mr. Schultz.[145] Such significant substantive errors are indicative of a defective report.

5. A Public Statement Made by Mr. Freeh Is Not Supported by His Report

At the press conference releasing his Report, Mr. Freeh mischaracterized the content of a critical e-mail from February 2001.[146] This e-mail, as described by the Report, was one of the most important documents discovered during the investigation. As explained in more detail above,[147] Mr. Curley explains in the e-mail the plan regarding the possibility of reporting the 2001 shower incident.[148] At his press conference, however, Mr. Freeh uses the plural to join Mr. Paterno with Mr. Curley's actions: "After Mr. Curley consulted with Mr. Paterno, however, *they* changed the plan and decided not to make a report to authorities."[149] In actuality, the e-mail very explicitly uses the singular when referring to Mr. Curley's plan and does not state that Mr. Paterno joined in Mr. Curley's decision or that he was even aware of the decision.[150] The distinction is important because, without this connection, Mr. Freeh and his investigation fail to offer any evidence connecting Mr. Paterno to the decision not to report Mr. McQueary's observations to the authorities. Such a misstatement and use of "collective guilt" without foundation raise very serious concerns as to the credibility of the Report.

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[145] *Id.*; Freeh Report at 28, 52.

[146] Freeh Remarks at 4.

[147] *See supra* at 31-32.

[148] Freeh Report at Ex. 5G.

[149] Freeh Remarks at 4 (emphasis added).

[150] The e-mail states in part, ". . . I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. . . ." Freeh Report, Ex. 5G. Unlike other errors made by Mr. Freeh at the press conference, this one was not corrected in the subsequent Errata Sheet. *See generally* Errata Sheet.

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V. Conclusion

When the evidence relied upon in the Freeh Report is considered in an objective manner, it is clear that findings in the Report are not accurate, supportable or fair. There is no direct evidence that Mr. Paterno was aware of the 1998 incident or the investigation that followed. Furthermore, there are no credible facts in the Freeh Report to support its principal finding against Mr. Paterno that he conspired with others to cover up the 2001 incident. A review of a chronology of relevant events shows this lack of support:

- Mr. McQueary witnessed a young boy and Mr. Sandusky in the shower in the locker room of the Lasch Building on the night of February 9, 2001. The SIC never interviewed Mr. McQueary.
- Mr. McQueary then described what he witnessed that night to his father, John McQueary, and McQueary family friend, Dr. Dranov. Neither was interviewed by the SIC. Both men testified that Mr. McQueary never told them that what he saw and heard in the locker room was sexual in nature. Both men also testified that they told Mr. McQueary to report the incident to Mr. Paterno.
- Pursuant to the elder McQueary and Dr. Dranov's suggestion, Mr. McQueary informed Mr. Paterno about the incident the next day. The SIC never interviewed Mr. Paterno.
- Mr. Paterno reported the matter to Messrs. Curley and/or Schultz, who both then spoke to Mr. McQueary. The SIC never interviewed either Mr. Curley or Mr. Schultz.
- Mr. Schultz then spoke to Mr. Courtney, an outside lawyer for the University, about the 2001 incident. The SIC did not interview Mr. Courtney.
- Mr. Schultz also spoke to Dr. Raykovitz at the Second Mile, who reportedly spoke to at least two other people affiliated with the charity. The SIC did not interview Dr. Raykovitz and there is no indication that the SIC interviewed the other two people he informed.

The fact that there is also no evidence that Mr. Paterno or anyone else ever instructed these individuals or others not to discuss the incident further undermines the finding that Mr. Paterno conspired with others to cover up the 2001 incident. This lack of evidence supporting the Report's most scathing findings and the serious flaws with respect to the process of the SIC's investigation cause me to conclude that the Report's findings concerning Mr. Paterno are unjust and wrong.

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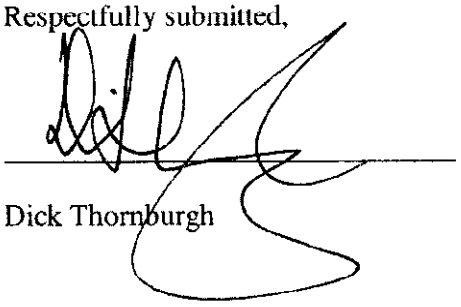
Respectfully submitted,



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APPENDIX B

Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky

&

Education Guide to the Identification and Prevention of Child Sexual Victimization

James T. Clemente
February 2013

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INTRODUCTION

When I was asked by representatives of the Paterno family to conduct an independent review and assessment of the findings and conclusions in the SIC report,[1] I was reluctant to do so. I have tremendous respect for my former boss and FBI director, Louis Freeh, and I thought I knew everything I needed to know about the case by reading various news accounts.

Nonetheless, I was told that the Paterno family wanted to find out the truth, whether it condemned or exonerated Joe Paterno. I decided to read any additional news accounts I could find. In one, it was recounted that immediately after Joe Paterno was fired by phone late at night, his wife called back and said, "After 61 years, he deserved better." I also read that he died less than three months later and one of his dying wishes was that the public would learn the truth about what actually happened at Penn State. People may disagree as to whether Joe Paterno did deserve better, but there is no question that the public deserves to know the truth. That is why I agreed to read the full SIC report. After reading the report, it was clear to me that a number of the SIC's conclusions were not supported by the evidence presented and many of the findings were based on common, yet erroneous, stereotypes of child sex offenders. I therefore decided to undertake a full analysis of the SIC investigation.

My analysis is based on my review of the SIC report, grand jury testimony, preliminary hearing testimony, the Sandusky trial transcripts, as well as articles, books, investigative reports, interviews, documents, and my education, training, experience, and expertise in the field of child sexual victimization. That expertise was developed over three decades of work and study in the field; first as a prosecutor for the New York City Law Department in the Bronx Family Court, then as a Federal Bureau of Investigation (FBI) Special Agent on the Joint FBI/NYPD Sexual Exploitation of Children Task Force, then on the MPD Cold Case and Major Crimes Task Force, followed by more than a decade as a Supervisory Special Agent on the Behavioral Analysis Unit, Crimes Against Children section in the FBI's National Center for the Analysis for Violent Crime (NCAVC), and as an expert witness in the field of child sexual victimization.

In my private and professional life, I have worked with child advocacy groups, government organizations and non-government organizations concerned with the protection of children from sexual victimization. I have also worked with mental health professionals and organizations that treat, counsel, and monitor child sex offenders. In addition, I have lectured extensively on child sexual victimization and spoken publicly across the United States and around the world, sharing my story as a survivor of childhood sexual victimization. For a more complete record of my background and qualifications, please see my qualifications and curriculum vitae in appendices 1 and 2.

When the crimes of a prolific child sex offender are fully uncovered, people often think that a "monster predator" like that can not get away with such wicked acts for so long without detection or a cover up. I am here to tell everyone who reads my analysis, acquaintance molesters like Jerry Sandusky get away with their hidden crimes without any help every single

[1] Freeh Sporkin & Sullivan, LLP. Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky (2012) (also known as the "SIC report" or "Freeh report") [hereinafter SIC report].

day; they spend a lifetime honing their grooming skills and, through thousands of individual benevolent acts, they convince the rest of us that they are the opposite of a molester, despite warning signs that are obvious only in hindsight. Understanding, detecting, and investigating acquaintance child sex crimes require us to think counter-intuitively and throw out everything we thought we knew about offender and victim behavior. Above all, it requires us to be educated and to have open dialogue about this difficult and complicated subject. My hope is that this analysis will serve as an educational tool so that every community, organization, and family can be better equipped to identify and prevent every type of child sexual victimization.

The SIC report makes a number of errors and draws incorrect conclusions, but above all, the report ignores everything we know about how acquaintance child molestation cases differ from child abuse,[2] and stranger and abduction-related child sex crimes. This case, therefore, is not just about Penn State football, or State College, Pennsylvania, or Joe Paterno; this case is about preferential, nice-guy, acquaintance child sex offenders and how they groom, deceive, and defraud all of us right under our noses. This case is about compliant victimization and the shame, embarrassment, and guilt that drive victim behavior. It also is about the exacerbating circumstances involved in male on male acquaintance child sex crimes.

I was told the Paterno family wanted to know how Sandusky got away with it. They wanted to understand what actually happened at Penn State, so they could help prevent child sexual victimization in the future. I have dedicated my career and a good part of my life to studying, investigating, and attempting to eradicate child sexual victimization. So, I seized this opportunity to educate the public in furtherance of that goal.

[2] Although the SIC report employs the often misused moniker of "sexual abuse" to describe the victimization crimes committed by Jerry Sandusky, this report will use the more accurate and generic description of "sexual victimization." Sexual abuse is the term used by professionals in the field to describe sexual victimization of a child within the ring of care and custody, and is more applicable to intra-familial victimization, as opposed to the acquaintance molestation that is demonstrated in the majority of Sandusky's known victims. However, in instances in which Sandusky victimized his foster or adoptive children, those cases are properly categorized as "sexual abuse."

STARTING POINTS

First, Jerry Sandusky is a rightfully convicted preferential child sex offender (PSO)[3] who is guilty of numerous serious and repeated sex crimes against a number of boys.[4] As I will explain, Sandusky is a skilled and masterful manipulator, and in my expert opinion, he is in the top one percent of effective "groomers."[5]

Second, as a career federal investigator, former prosecutor and former child sex crimes expert for the FBI, an expert witness in the field of child sexual victimization, and as a survivor of child sexual victimization myself,[6] I am first and foremost concerned about the health, safety, and welfare of the children who were victimized by Sandusky and other offenders. It is my hope that my efforts documented herein will help educate the public about acquaintance child sexual victimization in general, and male sexual victimization in particular.

Third, I hope that those victimized by Sandusky and other offenders will be encouraged by this opportunity for open dialogue and discussion to come forward into an environment that is both more understanding and supportive of their plight, as well as helpful and restorative to their futures, so they can heal, find justice, and go on with their lives. I stand as a living example that being victimized does not mean you are less of a person, or your life is ruined. With the help and support of family, friends, the community and mental health professionals, children who are victimized can and do grow up to lead happy, healthy, and productive lives.

Fourth, I have no interest in or connection with Penn State football, I had no personal or professional interaction with Joe Paterno, and I have not followed his career in any way or seen any game that he coached.[7] I do not follow college or professional football. Though I am being paid for my time to research and write this report, I have maintained independence while conducting my review of the SIC investigation and supplementing it with my own investigation.

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[3] Though the SIC report uses the term "pedophile," this term actually denotes a clinical diagnosis regarding those who have recurring and intense fantasies, urges, or behaviors aimed at prepubescent children. Instead, law enforcement uses the descriptive term preferential child sex offender for offenders who have not been clinically diagnosed as pedophiles but exhibit a long-term and persistent pattern of sexual attraction to children of any age.

[4] Based on my expertise in this area, I believe there are likely far more prior victims, similar to Matt Sandusky, who have not yet come forward. *See* Sara Ganim, *Matt Sandusky says he, too, was abused by his adoptive father*, The Patriot-News, June 22, 2012; Michael Isikoff, *Matt Sandusky details alleged sex abuse by his father*, NBC News, June 26, 2012.

[5] Some of the terminology and phraseology will be repeated at times in this analysis due to the relevance of those terms to various concepts and the fact that they are necessary to explain those various concepts.

[6] I was victimized as a teen by the director of a CYO camp, who was also my basketball coach. I did not disclose my victimization until about a decade later when I found out there were other victims. I then went to the FBI/NYPD SEOC Task Force and worked with them to investigate and prosecute the offender. In the end, it was determined that he had victimized several dozen boys in fourteen different schools and camps where he had taught and coached. When the case was concluded, the FBI agent who had worked the case recruited me into the FBI and I began my FBI career working on that same task force.

[7] The only time I have been to State College, Pennsylvania was in 2005 for the funeral of a friend and colleague of mine who had attended Penn State. Former FBI director Louis Freeh graciously travelled to State College to give the eulogy at his funeral. It was a heartfelt and moving gesture on the part of Director Freeh, which gave much comfort and support to the bereaved.

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Fifth, I hold former FBI Director Louis Freeh in the highest regard both personally and professionally. It was an honor to have served under him in the Bureau. He has been a great leader and a kind man to my colleagues and me. Therefore, when I was asked shortly after the SIC report was issued, and before I read the report, to contact Louis Freeh on behalf of a child sex crimes prevention group, I was happy to do so and thank him on their behalf for conducting the investigation. I too was very glad that his investigation was evoking an open dialogue about child sexual victimization. However, after reading the SIC report in its entirety, I now know that the SIC investigation made a number of errors, including its failure to properly consider the behavioral dynamics of the offender, the victims, and witnesses within the context of acquaintance child sexual victimization.

Sixth, investigating this type of crime is markedly counter-intuitive and investigators and the public need to have a deep understanding of these behavioral dynamics before they can understand and properly interpret the information and behavior presented in this case. It is precisely because this information is not within the general knowledge of the average person/juror, that local, state, and federal courts admit the testimony of expert witnesses, like myself, to explain to jurors the complicated behavioral dynamics of "preferential child sex offenders," "nice-guy" acquaintance offenders, "grooming," and "compliant victimization." In fact, the SIC report does not once mention "preferential child sex offenders," "nice-guy" acquaintance offenders, or "compliant victimization," and uses the term "grooming" only once without applying this critical behavioral reality to their analysis. By not factoring in these dynamics, the SIC report got it wrong.

Seventh, while I authored this report at the behest of the representatives of the Paterno family, it is not just about Joe Paterno. This report is about finding the truth and educating the public about acquaintance child sexual victimization in the real world. This report does not take the focus away from the victims; it restores that focus. As an expert in this field, and as a former victim, I can attest that one of the worst things professionals, the media, and the public can do in the aftermath of the discovery of nice-guy offenders, like Sandusky, is to perpetuate the myth that his victims must have been frightened, threatened, or physically forced into sexual behavior with him.[8] This practice, though well-meaning, hurts those children who became compliant in their victimization[9] because this type of offender actually takes the opposite approach and treats them well, is kind to them, pays attention to them, shows them affection, makes them feel special, and/or gives them gifts.[10] Another hurtful practice is talking about how horrendous, horrific, or life-changing these crimes were to the victims. The more we amplify what happened to the victims with emotional rhetoric, the more they and other victims in the general public feel damaged by what they have endured. They feel a sense of futility about ever being whole again. They feel the obstacles to leading happy and healthy lives are insurmountable. And most unfortunately, as a result of both of these practices, they and other victims are less likely to come forward.

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[8] Although a percentage of child sex crimes are committed by female offenders, I use the male pronoun here for simplicity. However, child sex crimes committed by females are just as illegal as those committed by male offenders and female offenders should be prosecuted with the same vigor as male offenders.

[9] See Part III.D and appendix 3 for detailed information regarding compliant victimization.

[10] As discussed below, this type of non-violent grooming behavior was testified to by all of Sandusky's victims.

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Eighth, revealing the truth, educating the public on the real dynamics of acquaintance child sexual victimization cases, and discerning the truth about Joe Paterno's actions and inactions in the process, should help the victims understand that they are not alone in what they experienced. It should assure them that the rest of us are gaining a better understanding of how to prevent this from happening again. Most victims will acknowledge that one of the things that haunts them the most about not feeling safe enough to come forward sooner is that they might have prevented other children from being victimized. The problem is that the general public's views and expectations about victim behavior are so skewed and unrealistic that it discourages real victims from coming forward. By describing the behavior exhibited by real victims who are groomed into compliance, this analysis will hopefully encourage victims to come forward and prevent other children from being victimized.

Finally, the sad truth is that as you read this analysis, there are thousands of acquaintance offenders similar to Sandusky sexually victimizing children in communities across this country. These "nice-guy" offenders are getting away with it because they appear to be good people who genuinely care about children. These "nice-guy" offenders escape detection even by those who are vigilant because they are on the look out for evil predators, not pillars of the community. Unless everyone in the public takes on the responsibility to educate themselves about the dynamics of acquaintance child sexual victimization, "nice-guy" offenders will continue victimizing children undetected and undeterred. For that reason, paying attention to the details of this analysis, sharing its contents with everyone you know, engaging in an age-appropriate open dialogue with children, however difficult, and investigating those who exhibit red flag warning signs, will go a long way towards eliminating this type of offending behavior.

I. The SIC Mandate and Conclusions

The special investigative counsel, Freeh Sporkin & Sullivan, LLP was hired to perform an independent, full, and complete investigation of: "The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ('Sandusky')"; and "The circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth."[11]

The SIC report reached three main conclusions regarding Paterno: (1) Paterno and others "concealed Sandusky's activities from the authorities, the University's Board of Trustees, the Penn State community, and the public at large." And, according to Louis Freeh, Paterno "was an integral part of this "active agreement to conceal" in 2001; (2) Paterno and others "repeatedly concealed critical facts relating to Sandusky's child abuse from authorities . . . in order to avoid the consequences of bad publicity"; and, (3) as a result of these actions, Paterno and others "failed to protect against a child sexual predator harming children for over a decade," "empowered Sandusky to attract potential victims to the campus," and "exposed [a] child to additional harm."

This report will do two things. First, it will explain in detail why each one of these conclusions is wrong due to a failure to consider the behavior, facts and circumstances within the context of acquaintance child sexual victimization, a lack of evidence, a failure to consider additional evidence, and/or direct contradiction by the evidence contained in the SIC report itself. Second, it will give the reader enough background to understand what really happened, and how we can all work toward discovering other similar situations that are occurring right now in communities across this country, and preventing still others from happening in the future.

Before going any further it is critical to note that Freeh based his report on "reasonable" conclusions. This is not a standard of proof in any legal proceeding. It is tantamount to saying that it "could" have happened that way. It is not anywhere near the standard of proof in criminal cases, which is beyond a reasonable doubt. It is not sufficient proof to meet the minimum standard necessary to win a civil lawsuit, preponderance of the evidence. It is not even based on the weakest level of proof necessary to qualify for a search or arrest warrant, probable cause, which means that it is more likely to have occurred than not. Conclusions can be "reasonable" and at the very same time they can be 100 percent wrong. This is the case in many of the most important conclusions drawn in the SIC report. In many instances, the conclusions that are drawn are not even "reasonable" in light of the evidence.

II. How the SIC Got It Wrong

The SIC failed to properly factor the dynamics of acquaintance child sexual victimization into their investigation. Consequently, the SIC misinterpreted evidence and behavior and reached erroneous conclusions. Any investigation will reach the wrong result by using the wrong approach and by interpreting the facts through the wrong filter. There are a number of

[11] SIC report at 8. Although the SIC also provided recommendations regarding university governance, oversight, and administrative policies and procedures to help prevent and respond to sexual victimization of children in the future, this report will not opine on those narrow, university-specific recommendations.

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complicated dynamics to this case, but ultimately it is about one core concept that the SIC missed. an insidious "nice-guy" acquaintance child sex offender who effectively groomed compliant victims and the community in and around Penn State University in order to sexually offend against boys for decades.

I and a number of my colleagues have spent our careers investigating, interviewing offenders and victims, writing reports, researching, lecturing, and testifying, all in an effort to explain how challenging these cases are and why "nice-guy" acquaintance offenders consistently get away with their criminal behavior for so long undetected. If you do not approach these cases and their facts with an understanding of the unique nature of acquaintance child sex crimes, then you will never reach the right conclusions, and you will never comprehend how the offender got away with it. And, you will never be able to stop the next "nice-guy" offender from victimizing children.

Indeed, without understanding these behavioral dynamics, we will repeatedly discover other offenders, like Sandusky, who got away with it for decades, and no amount of compliance monitoring and NCAA sanctions will make a difference. That's what the SIC report does: it ignores decades worth of research and analysis we have done trying to understand the unique behavioral dynamics of these cases. The SIC treated this case as if it were investigating a "stranger danger" or "monster predator" offender,[12] instead of the very different and insidious "nice-guy" acquaintance offender. Simply put, in addition to the limitations of SIC's mandate and the dearth of available facts, the SIC got it wrong because they investigated the case in the wrong way. It is a common mistake to think that all child sex offenders operate in the same way and present as horrible, evil people, but that is absolutely not true and it caused the SIC to draw erroneous conclusions. This report, applying my expertise developed over the past thirty years in the specialized field of acquaintance child sexual victimization is the first step toward correcting the record.

III. Behavioral Dynamics of Acquaintance Child Sex Offenders

In order to understand what happened at Penn State, the public first needs a basic understanding of who "nice-guy" acquaintance child molesters are, how they operate, and how they evade detection. The following background is the product of decades of work on the part of the members of the FBI's National Center for the Analysis of Violent Crime, the Behavioral Analysis Unit, and other law enforcement and child care professionals in the field of child sexual victimization. As difficult as these concepts are to talk about, let alone read about, they should be read and discussed in detail by all adults who have any contact with or responsibility for children.[13]

[12] Stranger offenders typically use a ruse or lure to gain access to children and often control their victims through threats, force, or physical violence.

[13] Although child sex crimes are not occurring in every school, organization, and community, every youth serving organization (YSO) is at risk for attracting child sex offenders. Therefore, every YSO has a responsibility to set up a program to educate, train, and monitor its employees and volunteers in an effort to prevent child sexual victimization.

A. Preferential Child Sex Offenders[14]

With respect to their victims, child sex offenders typically fall into three general categories: strangers, acquaintances, and family. Their motivations for offending are evaluated on a continuum. The two ends of that spectrum are represented by situational and preferential offenders. Situational offenders are those who victimize children but who do not have a definitive sexual attraction to children. As a result, their sexual offenses against children tend to result from circumstantial access to children rather than a methodical effort to pursue sexual encounters with children. Their offenses can generally be described as opportunistic and/or impulsive in nature; however, their sexual desires and fantasies typically involve adults.

Preferential child sex offenders (PSO), on the other hand, have a definitive sexual attraction to children, usually of a particular age range, gender, body type, personality, vulnerability, other set of characteristics, or any combination of the above. Despite their specific sexual interest in these particulars, preferential offenders may at times offend outside of their preference due to availability or circumstances. Acquaintance PSOs typically gain access, authority, and/or control over their intended victims through a process known as "grooming." Sandusky is a preferential child sex offender. Sandusky also personifies a common and insidious subcategory of the PSO: the "nice-guy" acquaintance offender.

B. "Nice-Guy" Acquaintance Offenders

"Nice-guy" child sex offenders are much more prevalent, effective, and prolific than the stereotypical "stranger danger" type offender. In fact, the vast majority of children who are sexually victimized are offended against by someone they know. We call those offenders "acquaintance offenders." The category of "acquaintance offenders" includes any non-stranger and any non-biological relative. One particularly insidious sub-category of acquaintance offenders is "nice-guy" offenders (sometimes referred to as the "pillar of the community" or "man of the year" offenders).

These are offenders who are friendly, normal, helpful, giving, loving people who no one would suspect are harboring sexual attractions to children. These cases are very difficult to investigate because a number of these offenders have high social status or are authority figures, such as: "teachers, camp counselors, coaches, clergy members, law-enforcement officers, doctors, judges . . . . Such offenders are in a better position to seduce and manipulate victims and escape responsibility." And, equally important, "they are usually believed when they deny any allegations."[15] Both their status in the community and their affable personalities make it difficult to make a case against them for sexual victimization of children. "Convicting an acquaintance child molester who is a 'pillar of the community' is almost impossible based only on the testimony of one confused 5-year-old girl or one delinquent adolescent boy."[16]

The above passages underscore the fact that even when it comes to trained law enforcement officers, it is very difficult to determine whether a person, who everyone in the

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[14] See appendix 3 for a full discussion of these topics.

[15] Kenneth V. Lanning, Child Molesters: A Behavioral Analysis 77 (5th ed. 2010).

[16] *Id.* at 140.

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community knows and respects, is a child sex offender. Sandusky is a textbook preferential child sex offender, as well as being a textbook example of a "nice-guy" offender. However, I would put him in the top one percent of effective groomers in this country. This is based on the fact that he was so bold in his high-profile "altruistic" public persona, he founded a youth serving organization, and he was caught in the act — though cleared at the time — of what turned out to be grooming and sexually assaulting children in the showers in 1998, yet he still did the same thing in the same place again in 2001.[17] Sandusky was able to deceive his way out of it. He built his reputation both professionally and interpersonally over many years of hard work and sacrifice. Drive, determination, selflessness, and altruism were his calling cards. He motivated others to give millions to needy children at The Second Mile. Sandusky was lauded and celebrated for his work. He effectively groomed most of the people who came in contact with him, including child care experts, psychologists, professionals, celebrities, athletes, coaches, friends, and family. And most notably, he was approved numerous times over thirty years as both a foster parent and an adoptive parent by child care professionals.

C. Grooming

In the context of child sexual victimization, grooming is a dynamic process utilizing a constellation of seemingly innocent behaviors aimed at gaining the cooperation of the child to achieve sexual gratification for the offender. In other words, it is a pattern of activity employed by preferential child sex offenders to gain access, authority, and control over children for sexual purposes, to ensure their silence, and to keep them in a position in which they can be repeatedly victimized. This dynamic process is aimed at potential child victims, their parents or guardians, and the community that surrounds them. Those who are closest to the child victims or the offender are precisely the ones who are most affected by grooming practices.

Offenders who "groom" typically seek out needy, isolated, or disadvantaged children and provide both emotional and tangible things to fill the needs of those children. They do this by providing: attention, recognition, affection, kindness, romance, gifts, money, trips, jewelry, clothing, food, shelter, drugs, alcohol, privileges, driving, and/or smoking. They also break down the boundaries that usually exist between adults and children by lowering inhibitions, by being overly physical and playful with them, by talking about or encouraging masturbation and/or sex, by giving sexual instructions, or by supplying pornography. They are very careful to do only those things that will be viewed in a positive light in public, and typically reserve the sexual behavior for one-on-one private encounters.

D. Compliant Victimization

One of the most counter-intuitive aspects of child sexual victimization investigations is embodied in the concept of compliant victimization.[18] Children who are groomed into sexual

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[17] In my experience, because people do not want to talk about the topic of male on male child sexual victimization these types of "close calls" happen regularly with "nice-guy" offenders, but witnesses either do not believe what they see, do not know how to handle it, misinterpret what they see, or do not think anyone will believe them if they told.

[18] Compliant victimization is such a difficult concept for people to understand and accept that when my colleague Ken Lanning first attempted to add the concept to his monograph (*see supra* note 15), the National Center for Missing & Exploited Children (NCMEC) repeatedly asked Lanning not to use it in his publication because they

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victimization typically do not call out to be rescued or disclose when questioned about possible victimization because of a complex set of social and psychological factors, including the fact that they don't want anyone to know what has been done to them or what acts they had to do with the offender. For some, this is because they have finally found someone (the offender) who treats them well or tells them they are special; someone who grants them entrée into a world they never had a hope of entering before. Typically, this creates a feeling of intense ambivalence on the part of the victims. On one hand, they love the offender for the things he has done for them. On the other hand, they hate the offender for the things he has done to them. That's why the boy in the shower in 2001 kept silent even though McQueary witnessed him being groomed and assaulted by Sandusky. That's why the nine other victims who testified, or were testified about in Sandusky's trial, never made an immediate outcry. Even when investigators first came to some of these boys and asked them direct questions, most of them remained silent or denied anything sexual occurred. They claimed that they had not been victimized, when in fact they had. Eventually, most of them made partial or incremental disclosures, and then over time gave a full account of their victimization. It's called the "conspiracy of silence" that surrounds child sexual victimization. It is the opposite of an "active agreement to conceal."

E. "Conspiracy of Silence" Surrounding Child Sexual Victimization

The "conspiracy of silence" by victims, their families, and their communities that surround them is the result of multiple factors. On one level, people are horrified by the idea of child sexual victimization and don't want to talk about it or hear about it. Therefore, they do not discuss it with their children. Though they may be trying to keep their children sheltered from such knowledge, they in effect, make their children easier targets for sex offenders because the children don't see it coming from a nice guy and don't understand what is happening to them. People also tend to demonize the offenders to an extreme, calling them "evil," "monsters," and "predators," such that they don't want to believe that anyone they know could possibly be that evil, especially a nice guy who seems to love and selflessly help so many children. Consequently, victims and witnesses are reluctant to speak out against "nice-guy" offenders.

On another level, the victims feel isolated, damaged, guilty, shameful, and helpless. For the most part, they are unprepared to emotionally process what the offender has done to them or why. They don't know who to turn to or how to tell them what they have endured. In fact, typically, the last thing they want is anyone to ever know what was done to them and/or what they were made to do with the offender. So, they too remain silent.

A perfect, yet extreme, example of this occurred in a case that I worked on with my colleagues while in the FBI's Behavioral Analysis Unit (BAU). On January 8, 2007, Ben Owenby, a 13-year-old boy, was abducted on his way home from school in Missouri. Four days later, he was rescued from the apartment of Michael Devlin, who had abducted and sexually assaulted him. But the startling thing about this case was 15-year-old Sean Hornbeck also was recovered from the same location. Sean was an 11-year-old when Devlin abducted him in 2002. Devlin eventually plead guilty to abducting and sexually assaulting Ben over four days and Sean over four years. The indignities suffered by male child victims of an adult male offender are so

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believed it would sound like he was blaming the victims. This concept does not blame the victims; it explains their behavior.

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confusing and destructive to their personalities that they become compliant in their own victimization. That is what kept Sean Hornbeck from crying out or running away from Devlin for over four years. Within months after he had been abducted and repeatedly victimized, he had become so compliant that Devlin granted Sean more and more freedom. During that time he spoke to police officers, rode his bike around in public, and had the freedom to come and go as he pleased. After he was victimized, he had trouble with the thought of facing his family and friends knowing that they would discover the horrors and indignities that he had suffered. He knew that rescue meant revelation and he did not want to face that fact.

Abductors typically use force and violence to gain compliance in their victims. Groomers do the opposite and use attention, affection, gifts, freedom, access, and love to build a debt of gratitude in their victims.[19] They fill a void in the lives of their victims and at the same time they ingratiate themselves into the family and/or community in which the victim lives. As mentioned above, disadvantaged youth have the greatest vulnerability to such offenders because their needs are so great and their assets are so meager. However, children of all walks of life and all familial situations are vulnerable to grooming simply because they are human beings. It is very easy for an adult offender who has the means and access to exciting adventures and activities to lure and control children by giving them things they never dreamed they would have or experience. It also is very easy for an adult offender to win a child over with the simple gift of attention. It is obvious in the trial testimony of certain boys victimized by Sandusky that they did not want the best thing that ever happened to them to stop, so they "put up with" the victimization and remained silent.

F. How Offenders Use These Complicated Dynamics to Their Advantage

The combination of nice-guy acquaintance offending, coupled with the "conspiracy of silence" by victims and "compliant victimization," is why Paterno did not know that Sandusky was really a child molester. It is why the entire State College community did not know. One astute mother, however, saw a behavioral change in her son and recognized it as a possible sign of victimization and reported Sandusky in 1998. She might have initially bought into Sandusky's grooming, giving him access to her child hoping the relationship would help her son have a better life. But the behavioral changes her son exhibited after spending an evening with Sandusky triggered her intuition and she fought for her son's protection. She is a hero. Unfortunately, the system failed her, and her son. We all want to search for the culprit who caused the system to fail. In my professional opinion, the culprit is ignorance of "nice-guy" offending.

One psychologist, trained in the art of deciphering offender behavior, Alycia Chambers, evaluated the boy, saw and recognized all the red flags presented by Sandusky's behavior, but her report apparently did not receive the attention it deserved. Centre County Children and Youth

[19] The distinction between sexually motivated child abductors and acquaintance child molesters is that the former typically do not have the skills to groom their victims and they therefore resort to abduction to gain access to children for sex. Their methodologies differ to such an extreme that an expertise in one typology does not necessarily guarantee an expertise in the other.

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Services (CYS) referred the case to counselor John Seasock,[20] who, without reading Chamber's report, evaluated the boy for one hour and then wrote a report concluding nothing improper took place.[21] That is why no one at Penn State did anything to sanction Sandusky. The University Police Department, the Department of Public Welfare (DPW), and the District Attorney all closed their cases based in large part on Seasock's report.[22] For those who worked closely with Sandusky and knew about the 1998 incident, the closing of this investigation as unfounded was confirmation of Sandusky's outstanding reputation and their belief that he was a devoted advocate for children.

Though a trained child sex crimes investigator should have known to keep a close watch on Sandusky from that point forward, civilians generally revert back to the thousands of positive interactions they have had with him and validate the belief in their own minds that they knew Sandusky couldn't have been a "monster predator." If he had been, they tell themselves, they would have known. They would have been able to tell the difference between that kind of evil person and the affable Sandusky they knew, whom they viewed as a dedicated husband and father, who fostered and adopted dozens of children, an altruist, who founded a children's charity, and a professional, who worked for decades as assistant football coach of one of the most successful college teams in the country.

Depending on the experience of the offender, his skill at grooming, and the reaction of the victim to the sexualization of their interactions, offenders learn from their interactions with victims and those around the victims. They use their knowledge of child and adolescent psychology to manipulate children into sexual activity and rely on the fact that the child will be too embarrassed, shameful, and needy to say anything about it. Offenders also use their knowledge of adult psychology and social norms to manipulate those around their intended child victims into allowing them continued access to children. Offenders know that the worst crime anyone can accuse another of is a child sex crime. They therefore take advantage of the tremendous insult that making a false accusation against someone would be and push the limits of social interactions and norms. Even when allegations are made against them, they often react by feigning outrage or hurt at being so maligned. This reaction reduces the chances that anyone will further pursue allegations against them.

In 1998, Sandusky cleverly showed remorse and sorrow at the possibility that his actions could have harmed the boy in any way. This reaction apparently appeased the CYS and DPW, convincing them that there was no sexual intent on the part of Sandusky. In fact, Sandusky was very likely actually saddened that he had caused the boy any harm. Sandusky is what is referred

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[20] Seasock is listed in the UPD police report as a psychologist. However, according to state records it appears that Seasock was not a licensed psychologist in 1998. Mike Dawson, *Man who evaluated alleged victim was not psychologist*, Centre Daily Times, Mar. 28, 2012.

[21] Seasock claims to have never seen Chambers' report. According to Seasock's report, "[n]o other information was provided to the interviewer prior to the initial meeting . . . ." A partial and redacted version of John Seasock's May 8, 1998 report is available here, http://msnbcmedia.msn.com/i/msnbc/sections/news/Seasock_Sandusky_Report_Redacted1.pdf. Seasock's flawed methodology will be discussed in greater detail in Part VIII.B.2.

[22] According to the SIC, Seasock told Detective Schreffler that "Sandusky 'didn't fit the profile of a pedophile,' and that he couldn't find any indication of child abuse." SIC report at 45. Caseworker Jerry Lauro told the SIC that "it wasn't until Schreffler told me that there wasn't anything to the case that I closed mine." *Id.* 46-47. According to the SIC, Schreffler's file notes state that Lauro agreed that no sexual assault occurred." *Id.* at 47.

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to as a "boy lover."[23] He actually falls in "love" with his boy victims and sees his sexual activity with them as natural extensions of that love. This is the type of rationalization he employs in his own mind to convince himself that his offending behavior is okay, because he would never "hurt" a child. This is the reason that even after being convicted on 45 counts, and facing life in prison, Sandusky proclaimed his innocence on the radio and to the sentencing judge. Sandusky knows that he committed sex crimes against many boys,[24] but in his twisted mind he attempts to continue his grooming of the community by trying to validate those crimes as an expression of love. This is why Sandusky says "they can make me out to be a monster . . . I know I did not do these alleged, disgusting acts."[25] In his mind, molesting is not monstrous, and what he did with the boys was not disgusting because he actually "loved" the boys.

Because of the private and one-on-one nature of the vast majority of child sex crimes, adult offenders know that in most circumstances, if the child makes an allegation against them, they have a higher likelihood of being believed than a troubled youth. And, as the inaction by McQueary and the janitor exhibit, even if adults witness this behavior, they are reticent to get involved or make a detailed report because it is just too difficult to comprehend or believe or talk about what they witnessed.

As I will develop in much greater detail below, these complicated dynamics, which so few people understand (and most find completely counter-intuitive) explain why McQueary behaved as he did. They explain why he did not rescue the boy in 2001, and instead, left the scene as quickly as possible. They explain why McQueary had such difficulty recounting what he saw to his father and Dr. Dranov, and even more difficulty speaking about it to Paterno. McQueary likely was relieved when Curley and Schultz did not ask him detailed questions about what he had witnessed. At the time, he was not certain of what he saw because it was so abjectly counter to what he knew about Sandusky and how he expected a child victim to behave. They also explain why McQueary gave Paterno such a watered down and, ultimately, unhelpful version of events.

These complicated dynamics explain why Paterno did not conclude that Sandusky was a child molester, and why Paterno did what he did and nothing more. Paterno did not witness a child being sexually assaulted. Paterno did not have the opportunity that McQueary had to rescue that child while he was being sexually assaulted. Paterno did not have the opportunity to catch Sandusky in the act and restrain him while calling the police. As I'll discuss in more detail below, Paterno only heard the sketchiest version of what happened from a confused, embarrassed, and reticent McQueary. Paterno could not read McQueary's mind. He did not know what McQueary actually witnessed, but sensing that McQueary was having so much trouble talking about it and wanting to minimize his distress, Paterno told McQueary that he did not have to speak the details to Paterno, that he did the right thing coming to Paterno, and that Paterno

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[23] The term "boy lover" is used by groups such as the North American Man Boy Love Association (NAMBLA) to rationalize their desires to have sex with boys. This in no way condones or justifies the criminal actions of Sandusky or offenders like him. It is meant to help the public understand the nature of is sexual attraction to boys as his motivation for sexually assaulting them.

[24] It is clear that Sandusky knew he was committing sex crimes against children because he consistently hid his behavior over decades.

[25] Amy McConnell Schaarsmith, *Jerry Sandusky issues statement blasting 'false accusations'*, Pittsburgh Post-Gazette, Oct. 8, 2012.

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would find the right people for McQueary to report it.[26] Paterno was not an investigator. Paterno had no authority over Sandusky, who had retired two years earlier. Paterno ran into Sandusky infrequently and did not socialize with him. Paterno did his best to address the situation by informing the people at the university who were in a position to deal with Sandusky, and, in fact, who had dealt with Sandusky's retirement and continued to deal with Sandusky about administrative details.

G. The Case of Richard Taus

One of the most disturbing cases of my career best illustrates many of the topics I have described above and will hopefully give the reader greater insight into how challenging it is for people to identify "nice-guy" acquaintance child sex offenders, especially for those who know and are close to the molester.

At the time, I was on the FBI/NYPD Joint Sexual Exploitation of Children Task Force and we were investigating allegations against a veteran FBI Agent named Richard Taus. Like Sandusky, Taus had a high-profile job and enjoyed a great reputation in the community. He was a highly decorated chopper pilot in Vietnam; he was lauded for adopting a son from Vietnam. He even founded a junior soccer league in Long Island, New York, that catered to hundreds of young boys, many of whom he molested over a number of years. And like Sandusky, there are friends and colleagues who to this day believe he was wrongfully convicted.

One of the many potential victims whom I interviewed during the investigation had a very interesting story to tell. First, I spoke with the boy's mother. She assured me that she had already asked her approximately 6-year-old son whether Taus had molested him. He said no, so she believed there was no reason for me to talk to her son. I told her I would just like to ask a few questions and it would not take long. She reluctantly agreed. I interviewed the boy while he sat beside his mother and asked the boy a number of questions before I inquired whether Taus played any games with him. He answered that yes, they played the tickle game. I asked how the game was played. At that point, I recall the boy turning to his mother and saying, "You remember Mom, when I was sitting on his lap last time he was here talking to you. He had his hand up my shorts tickling my privates. He tickles me and I have to try not to laugh." I looked at the mother and all the color had drained from her face. She could not believe that Taus had molested her son right in front of her very eyes and she had no idea that it had happened. She trusted Taus so much based on his profession, his reputation, and her repeated positive interactions with him that she never even questioned the fact that he liked to have her son sit on his lap.[27]

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[26] See Parts IV.B.9 and IV.D and accompanying footnotes for a complete analysis of Paterno's response to McQueary.

[27] Child sexual victimization investigators are trained to elicit information in an objective, age-appropriate, and non-judgmental way so that the child feels comfortable talking about events that may have occurred, and does not misunderstand questions that are asked of him. In this case, the mother had asked her son if Mr. Taus had touched him in a bad way. Her son didn't understand the "tickle game" as a bad touch, especially since it had occurred right in front of her. Thus, Taus had made the mother an unwitting accomplice in her son's grooming. Because this activity went on right in front of her, the boy assumed that she tacitly approved.

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This is a perfect example of the boldness and invisibility of offenders who are charismatically smiling in our faces while they are molesting children literally and figuratively in front of our eyes. If Taus was able to molest a 6-year-old boy right in front of the boy's mother without her having the least bit of suspicion about it, and his mother even assured me that it could not have happened, then it is reasonable to conclude that an equally sophisticated offender like Sandusky could effectively pull the wool over the eyes of Paterno and others in the Penn State community. I urge all readers of this report to avoid using the information that is now known about Sandusky to judge people like Paterno who were legitimately fooled by Sandusky at the time. If you judge Paterno based on what we now know instead of what he knew at the time, then you will miss a valuable opportunity to educate yourself about the dynamics of child sexual victimization and "nice-guy" offenders. You will continue putting children at risk by thinking it could not happen to you, to your child, or in your community. But it can. If that boy's own mother can be groomed and fooled, then anyone can be fooled by a master manipulator like Sandusky.

IV. Analysis of the SIC Findings

A. Analysis of 1998 Incident

As it relates to Paterno, there is very little to be said about the 1998 incident.[28] As far as Paterno knew, if he knew anything, it was fully investigated and Sandusky was fully cleared. Had Paterno or anyone else taken any action against Sandusky, as far as they knew, they would be exposing themselves and the university to a lawsuit from Sandusky. Nonetheless, I will discuss the 1998 incident in some detail for two reasons. First, if Paterno did know about the 1998 incident and the fact that Sandusky was investigated and cleared, this likely would have affected Paterno's understanding of the 2001 incident. Upon hearing the report from McQueary, Paterno could have reasonably believed that Sandusky was simply horsing around with the boy — just like he was determined to have been doing in 1998 — despite the fact that McQueary perceived it as "over the line." Second, the SIC report spends significant time discussing the 1998 incident and reaches several misleading and erroneous conclusions that demonstrate the SIC report's rush to judgment against Paterno.

Though there are references that imply Joe Paterno had been informed of some unspecified information regarding Sandusky during or after the investigation in 1998, there is no direct evidence to corroborate that he ever knew about this investigation. Paterno testified before the grand jury on January 12, 2011, that he did not remember ever hearing anything about this incident. This lack of memory, though, may have been an artifact of his advanced age, his as yet undiagnosed cancer, and/or the fact that more than a decade had elapsed between the events in 1998 and his testimony. Irrespective of this lack of direct evidence or memory, the allegations of sexual misconduct were fully investigated by the University Police and Public Safety ("University Police Department" or "UPD"), DPW, CYS, and the District Attorney's Office. The "victim" and Sandusky were repeatedly interviewed at the time and it was determined that Sandusky had no sexual intent and did not commit any crimes. The investigators had even

[28] The allegations against Sandusky in 1998 were made by the mother of an 11-year-old boy whom Sandusky had bear-hugged in the shower after working out, wrestling, and kissing him on the head and telling the boy that he loved him.

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identified another boy who recounted virtually the same story as the first boy and they still did not find sexual or criminal intent.[29] Thus, even if the 1998 accusations had been communicated to Paterno, there would simply have been no way for Paterno to know that Sandusky was actually sexually attracted to boys and that he had been sexually victimizing a number of them in secrecy for years.

Following the closing of this investigation, UPD Detective Schreffler instructed Sandusky not to shower again with any child.[30] This explicit advice coming from the law enforcement body responsible for policing Penn State — and not simply the head coach — should have put Sandusky on notice that his actions were being scrutinized and dissuaded him from showering with any more boys at Penn State or anywhere else. UPD apparently did nothing else with respect to Sandusky beyond issuing this "advice." Curiously, while admonishing Paterno, Curley, Schultz, and Spanier for not doing anything after the 1998 incident, for not limiting Sandusky's access to Penn State facilities, and for failing to protect children from sexual victimization on campus, the SIC report makes no mention at all of the UPD never following up on whether Sandusky was adhering to Detective Schreffler's admonition not to shower again with any child, never warning the community, never warning The Second Mile, and never doing anything to monitor or limit his access to children.

Certainly, the members of this approximately 50-man police department were better trained in the area of sex crimes and investigations than Paterno. Certainly UPD had the ultimate responsibility to police and secure all facilities on Penn State's campus. And certainly, UPD had the ultimate responsibility to protect all persons, including children who were guests on campus. Paterno is blamed by the SIC for not instituting his own prevention program, when the very police agency that was charged with conducting, and actually conducted, the 1998 investigation, did absolutely nothing to investigate Sandusky further, to prevent him from bringing children into the showers, or to inform university staff and students about the allegations against Sandusky. That's because Sandusky was cleared.

Paterno didn't know about or have access to the 98-page report that the UPD had compiled on the 1998 incident. Paterno didn't have a team of detectives who presumably were trained to recognize sex offender behavior. Paterno's profession had nothing at all to do with children, or sex offenders, or investigations, or recognizing the red flags of child sexual victimization. It is incorrect to assert that Paterno, even as head coach and football icon, was in a better position to keep an investigative eye on Sandusky and prevent him from offending on campus than was the UPD.[31]

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[29] This conclusion demonstrates that even these investigators and DPW caseworkers and counselors did not fully understand grooming, compliant victimization, or "nice-guy" acquaintance offending. If they had, they would likely not have made this erroneous conclusion.

[30] Transcript of Proceedings at 66-68, *Commonwealth v. Gerald A. Sandusky*, Nos. CP-14-CR-2421-2011 & CP-14-CR-2422-2011 (Pa. Commw. Ct. June 14, 2012) ("Sandusky trial transcript"); SIC report at 46.

[31] The SIC report highlights the fact that Sandusky had an office just steps away from Paterno's office. However, there are no allegations that Sandusky ever groomed or sexually victimized any children in or around that office. And, in 1999 when Sandusky retired, he moved to another office in another building.

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Additionally, there is no mention in the SIC report of why DPW or CYS didn't warn The Second Mile about the 1998 allegations and investigation at the time.[32] Nor did either of these public agencies, whose mandates include the protection of children from sexual victimization, make any effort to limit Sandusky's access to children or to re-evaluate Sandusky's status as a foster or adoptive parent. There is no doubt that the government agencies charged with investigating and protecting children from child sexual victimization are in a better position to decide whether to implement these types of protective measures than a football coach.

Finally, the SIC report did not mention why the District Attorney's office, which declined prosecution of Sandusky, did not direct its investigators to take any of the steps that Paterno is accused of not taking to prevent Sandusky from victimizing children. The SIC report cannot have it both ways: either the UPD, DPW, CYS, and the DA's office also should be accused of "callous and shocking" "total disregard for the safety and welfare of Sandusky's child victims,"[33] or the accusations against Paterno related to the 1998 incident are biased and wrong.

B. Analysis of 2001 Incident

1. A note about memory and testimony

The entire case against Paterno regarding the 2001 Sandusky shower incident hinges on the words of Mike McQueary. Paterno was not an eyewitness. His only basis of knowledge about what Sandusky did in the shower with a boy in February 2001 was the words McQueary chose to tell Paterno at that time. Clearly, those were not the detailed and explicit words McQueary used a decade later when talking to investigators and during his testimony.[34] What is most critical in analyzing Paterno's subsequent behavior is what McQueary actually *communicated* to Paterno during that five to ten minute conversation on the morning of Saturday, February 10, 2001.

There are no contemporaneous recordings, notes, or confirmatory emails from this meeting, and the documentation that was made closest in time to the actual events was a statement made by McQueary to attorney general investigators, Trooper Rossman and Agent Sassano, almost a decade later on November 22, 2010. Because of the lapse of time between the actual conversation and the documentation thereof, the probability that particular details of this conversation are reliably recalled from memory is very low. In other words, as an educated and experienced law enforcement officer, I am reticent to believe that McQueary, or anyone else for that matter, could accurately recount the specific language he actually used during a particular conversation that he remembers having over nine years earlier. Therefore, though generalities from the conversation might be recalled with some degree of reliability, particular words and details should not be relied upon to any great extent.

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[32] This omission means that in 2001, when Curley did in fact notify The Second Mile about the Sandusky shower incident, Curley actually took a protective step that the UPD, CYS, and DPW did note take in 1998.

[33] Louis Freeh, press conference, July 12, 2012 (Freeh's delivered remarks).

[34] McQueary repeatedly acknowledged in his testimony that he did not give Paterno "very much detail," only described what he saw "on the surface," and did not use any graphic language. Transcript of Proceedings at 24, *Commonwealth v. Timothy M. Curley & Gary Schultz*, Nos. CP-22-MD-1374-2011 & CP-22-MD-1375-2011 (Pa. Commw Ct. Dec. 16, 2011) ("Preliminary hearing"); Sandusky trial transcript, June 12, 2012, at 205.

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Additionally, another factor to consider is that when a layman, like Paterno, hears ambiguous information about an incident that might involve male on male child sexual victimization and "considers" but rejects the possibility of it actually being true, it does not mean that it is an act of deliberate or willful denial or an attempt to conceal. This is especially true when the accused "offender" does not act like a heinous criminal and the alleged "victims" don't act like he did anything wrong to them at all. What is actually going on with the untrained layman is a common and fundamental misunderstanding of offender and victim behavior and honest disbelief.

2. The events of February 9-10, 2001

As a behavioral analyst, I have spent most of my professional life evaluating and analyzing the criminal behavior of human beings: how people react in certain situations, what their behavior tells us about what they say and do, and how the best predictor of future behavior is a past pattern of behavior. Based on all my education, training and experience, and based on a reading of all the available testimony and evidence, the following is my expert opinion regarding how the events in February 2001 are best understood.

Based on Mike McQueary's own testimony, we know the following: McQueary walked into the coaches' locker room between 9:30 and 10:00 on a Friday night. After McQueary passed through the first of two privacy doors to the locker room, he heard the showers running. He then heard what he has variously described as "two or three"[35] "slapping noises,"[36] "smacking sounds,"[37] and "rhythmic slapping sounds"[38] over the course of a second or two. In McQueary's words, he "immediately became alerted and kind of — I don't know — embarrassed that I was walking in on something that I didn't want to see or walk in on."[39]

At that moment McQueary "thought maybe one of the other people had someone with him in the showers."[40] McQueary got to his locker and glanced over his right shoulder and, using the reflection of a mirror, looked into the shower.[41] His first glance lasted one to two seconds. In McQueary's words, "I immediately turned back to my locker, trying to digest what I just saw and making sure I saw what I just saw. . . . I thought maybe I wasn't seeing what I was seeing."[42]

McQueary then stepped to the side and looked directly into the shower.[43] According to his testimony, McQueary saw Sandusky in the shower with a young boy. The boy was standing up with his hands up against the wall at shoulder height, and Sandusky's arms were wrapped around the boy's midsection. In some of his testimony, McQueary had said that Sandusky's

[35] Preliminary hearing at 95.

[36] Mike McQueary statement to Trooper Rossman and Agent Sassano, Nov. 22, 2010.

[37] Sandusky trial transcript, June 12, 2012, at 192.

[38] McQueary's handwritten account on Nov. 23, 2010; Preliminary hearing at 10.

[39] Sandusky trial transcript, June 12, 2012, at 192.

[40] *Id.*

[41] *Id.* at 193.

[42] *Id.*

[43] Preliminary hearing at 12; Sandusky trial transcript, June 12, 2012, at 193.

midsection was making some subtle movement.[44] Taking into account all of McQueary's testimony, that's all the detail he has given about what he actually saw as opposed to what he thought was happening or what he thought he heard, or what he told Paterno.[45] McQueary also testified to what he did not see or hear. He did not see the front of Sandusky or the boy until the two of them were standing three to five feet apart and were facing him.[46] He did not see any genitalia, erection, or insertion. He did not see any fondling. He did not see any sex act. He did not hear any "protests or any verbiage."[47]

McQueary says he was "extremely alarmed, extremely flustered, extremely shocked, all of those things."[48] He went back to his locker and "tried to think . . . I accentuate the word 'try.'"[49] McQueary explained, "this is a Penn State football building . . . you don't register that. . . . I'm used to pressure situations, and I can tell you that's — that's more than my brain could handle at that time."[50] McQueary was so overwhelmed that he described what he had seen as "ridiculous" as opposed to criminal.[51]

McQueary's testimony has varied regarding what he did next. In the handwritten account McQueary gave the attorney general investigators in 2010, he wrote, "In a hurried/hastened state, I finished at my locker. I proceeded out of the locker room. . . . I was hastened and a bit flustered." When interviewed by the investigators that same week he told them that after looking into the shower he then "turned around and started to leave because he just wanted to get out of there as fast as he could . . . ."[52] At the preliminary hearing for Curley and Schultz and at

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[44] At the preliminary hearing for Curley and Schultz, McQueary testified that there was "[v]ery little . . . I would say slow movement, certainly not hard or fast movement but a little movement." Preliminary hearing at 15. At Sandusky's trial, McQueary testified that "[t]here was not much movement on my glances, very slow, slow, subtle movement." Sandusky trial transcript, June 12, 2012, at 196.

[45] McQueary has been inconsistent about the following: how many times he looked into the shower, what he was doing when he looked into the shower, whether the boy and Sandusky were looking at McQueary, whether they made eye contact with McQueary, and whether McQueary stopped what was happening by slamming his locker closed.

[46] Preliminary hearing at 18; Sandusky trial transcript, June 12, 2012, at 194.

[47] At trial, McQueary said that he saw the boy and Sandusky three times. First, he saw them through a mirror. Second, he moved around the locker and saw the boy and Sandusky directly, without the aid of the mirror. Neither time did the boy or Sandusky see McQueary. Finally, after slamming his locker shut, McQueary moved around his locker again and saw the boy and Sandusky but this time they were standing apart and looking back at McQueary. According to Sandusky's attorney during cross examination, McQueary told the grand jury that the second time he looked at the boy and Sandusky, Sandusky still had his arms wrapped around the boy from behind but the boy looked back at McQueary. Sandusky trial transcript, June 12, 2012, at 273. Interestingly, McQueary's grand jury testimony has more in common with Dr. Dranov's trial testimony. Dr. Dranov remembered McQueary saying that he and the boy made eye contact before McQueary eventually saw Sandusky come out of the shower. Sandusky trial transcript, June 20, 2012, at 11.

[48] Sandusky trial transcript, June 12, 2012, at 194.

[49] *Id.*

[50] *Id.* at 198.

[51] *Id.* at 200.

[52] Mike McQueary statement to Agent Sassano and Trooper Rossman on Nov. 22, 2010.

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Sandusky's trial, McQueary testified that he slammed his locker door shut.[53] McQueary explained that he slammed his locker "to say, 'Okay. Someone is here. Break it up. Please.'"[54]

Possibly hearing the noise of the locker, when McQueary looked back into the shower, Sandusky and the boy had separated and both were looking directly at McQueary. McQueary claims that he never saw any genitalia or erections. Even if you believe his later account that he slammed his locker shut, and that is what separated Sandusky and the boy, McQueary did nothing more. He ran away.

This is a remarkable admission by McQueary; and, it is one of the facts that gives us the most insight into McQueary's behavior and his subsequent actions and inactions. Consider for a moment what we know about McQueary.

In 1997, less than four years prior, Mike McQueary started as quarterback in all 12 games for Penn State. He was a team captain. In Penn State's six home games, McQueary played in front of an average crowd of 96,000 while hundreds of thousands more watched the games on national television. As a quarterback, McQueary was responsible for not only knowing his own assignments and his different options, but the assignments and options of his ten other teammates. Furthermore, during every play, McQueary had to read and anticipate the movements of all eleven defenders, many of whom were McQueary's size or larger and some were faster and stronger. Most of the time these defenders were trying to confuse McQueary and force him into mistakes or crush him. In the two to four seconds between the snap of the ball and the need for decisive action, McQueary had to assess the positions of all other players and avoid the rush of the defenders determined to take McQueary to the turf. McQueary repeated this exercise thousands of times in practice and games throughout his high school and college career.

So, what would cause a 26-year-old man, who was 6'4", over two hundred pounds, and had excelled in one of the most pressurized, scrutinized, action-oriented positions on the field to not act? Some believe that he wanted to save the name of Penn State football and so he decided to forget what he saw and walk away rather than to act to save the boy or restrain Sandusky. However, if this were true, he would not have attempted to tell five other people about what he saw and he would not have been so upset while he was trying to do so.

In my experience the reasonable conclusion is that he was so overwhelmed by what he saw that he was paralyzed with confusion and disbelief. He did not understand how a man he knew and respected could possibly be doing something like that to a boy. He could not understand why the boy was not screaming out in pain or protest, or fighting to free himself. He could not understand why, when faced with a potential rescuer (McQueary), the boy did not even ask for help. He could not understand how Sandusky could just stare at him with a blank expression only seconds after he was apparently sexually assaulting a boy. And he did not understand how any of this could have happened in his own football locker room. Quite simply, in McQueary's mind, it did not compute.

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[53] Preliminary hearing at 17, 60; Sandusky trial transcript, June 12, 2012, at 194, 199.

[54] Sandusky trial transcript, June 12, 2012, at 198.

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In a few short seconds, McQueary was forced to reconcile three things in his mind that he did not know how to reconcile: (1) when he heard the slapping sounds, he expected to see "normal" sexual activity, but what he saw was shocking, (2) he had always known Sandusky as a nice guy, professional, altruistic person, but now he was confronted with the sight of Sandusky apparently sexually assaulting a boy, and (3) the young boy was not fighting, screaming, or attempting to get away — all the things he would expect the victim of a sexual assault to do.

At the time, and in the subsequent days, McQueary could not reconcile these things. He knew nothing about preferential sex offenders, grooming, "nice-guy" acquaintance offenders, and compliant victimization. Consequently, he did not rescue the boy. He ran away. He did not go to the campus police, he went to his office and called his dad. McQueary lived on his own, but he did not go home. He went straight to his parents' house. While McQueary's actions are confusing to many, in my experience they are typical of someone who is completely baffled and confused by what he saw and consequently he did not have the confidence to report it in detail.

3. What McQueary did and did not witness

a) Background

In order to better understand what McQueary actually witnessed, it is necessary that the reader have some additional background regarding the behavior of child molesters in general and Jerry Sandusky in particular. Child molesters' grooming and offending behavior can be broken down into M.O. (method of operation) and ritual. While their M.O. can develop and evolve over time and will typically be tailored and responsive to the vulnerabilities and reactions of each individual child victim, offenders also engage in repeated, almost identical, patterns of ritualistic behavior. Experience tells offenders which patterns of behavior most successfully groom and seduce targeted children and help them get away with their crimes. Their inner fantasies, needs and desires dictate their ritualistic behavior.

The trial testimony of Sandusky's victims offers a very detailed picture of the types of M.O. and ritual Sandusky utilized to groom his victims. One of Sandusky's primary grooming and offending techniques was showering with boys as a way to get the boys into a naked and vulnerable position. Once in the shower, Sandusky typically engaged in a pattern of activity that allowed him to have physical contact with the boys. Though Sandusky also showered with boys while other coaches and players were around in part to normalize the behavior with his victims, he was careful not to have any physical contact with boys while anyone else was around. At times he had soap fights or wrestled with the boys, or washed their bodies, and then grabbed them in a bear hug from behind and lifted them up purportedly to rinse them off under the shower. These techniques allowed Sandusky to disguise his sexual advances as games and horsing around and afforded him the ability to deny any sexual intent if the child protested or later disclosed. They also allowed him to test the waters and see how far he could go with a particular boy at a particular time.

Of the six victims that testified to taking showers with Sandusky, four of them testified that while in the shower Sandusky would bear hug them from behind. Or, Sandusky would claim that he needed to lift them up to the showerhead to rinse them off. However, out of the eight victims that testified at Sandusky's trial, not one of them said that Sandusky sodomized them

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while standing in the shower. One victim did testify that while Sandusky was laying on top of him on the shower floor, he attempted to sodomize him, but there was no penetration.[55]

b) What McQueary actually witnessed

Considering the highly ritualistic and predictable behavior of child molesters, the testimony of the eight victims at trial, the difference in stature between Sandusky and the boy McQueary saw with him,[56] and the fact that the jury did not find that Sandusky committed involuntary deviate sexual intercourse against Victim 2, McQueary did not actually witness Sandusky sodomizing the boy in the shower. What McQueary witnessed was no doubt a grooming incident and a sexual assault, however, McQueary admitted he did not actually see anal sodomy.

When McQueary passed through the outer door before he entered the locker room and heard two or three "slapping sounds," he admittedly had already formed a visualization in his mind of what he expected to see. When he looked into the mirror only seconds later, he was expecting to see "normal" sexual activity. When he saw Sandusky standing behind the boy, he assumed that the sounds he had just heard meant Sandusky was having sex with the boy. However, based on what McQueary actually saw, and Sandusky's known past pattern of behavior, it is much more likely that Sandusky had been rubbing his genitals against the boy's back,[57] or "bear hugging" the boy at the time. Or he may have just finished wrestling around or soap fighting with the boy. Or the boy may have been making the slapping sounds some other way. But Sandusky was not sodomizing the boy.[58]

None of this is to say that Sandusky is not a serial child molester or that McQueary did not witness Sandusky engaging in sexual behavior with the boy. However, using the available evidence to determine what McQueary actually witnessed is important because the SIC and some in the general public believe, as McQueary believed, that he may have witnessed anal sodomy. Since McQueary's stated belief at the time was reported in the Sandusky grand jury presentment, it was assumed that McQueary had communicated this belief, or something close to it, to Paterno. However, when McQueary finally testified, he admitted that he never actually saw anal penetration, intercourse, or any other type of sexual act. And McQueary has consistently testified that he did not tell Paterno any graphic details, so it is highly probable that McQueary did not tell

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[55] Sandusky trial transcript, June 11, 2012, at 135.

[56] Because of the height difference — McQueary testified that the boy stood only as tall as the lower part of Sandusky's chest — the anatomical parts necessary to commit this crime simply do not line up. Preliminary hearing at 94-95; Sandusky trial transcript, June 12, 2012, at 195.

[57] According to the audiotape of Matt Sandusky's statement to the police department made during the Sandusky trial, Sandusky would rub his genitals against Matt in the shower. "Matt Sandusky told police he was molested . . . saying that his father would become sexually aroused by rubbing against him in the shower, during wrestling sessions and in bed." Michael Isikoff, *Matt Sandusky details alleged sex abuse by his father*, NBC News, June 26, 2012.

[58] John McQueary's testimony is corroborative of the fact that McQueary did not witness sodomy: John McQueary testified, "I asked him if he seen [sic] anal sex or — and I got more descriptive. I said, do you — did you see anything that you could verify, penetration, or I might have used the word sodomy. He said, no, I did not actually see that. I said, so you did not actually witness penetration or anything that you could be more descriptive. He said, no." Sandusky trial transcript, June 13, 2012, at 12.

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Paterno anything that would have led Paterno to believe that Sandusky was sexually assaulting the boy in the shower.

4. McQueary's report to Paterno

The following day, McQueary went to Paterno's house. According to McQueary, he told Paterno that he "saw Jerry with a young boy in the shower and that it was way over the line,"[59] "[t]he rough positioning I would have described but not in very much detail,"[60] "I told him what I had seen, again, on the surface."[61] However, McQueary has been clear that he did not use the terms "anal," "intercourse," "sodomy," or "rape."[62] McQueary explains he did not give these details "[o]ut of respect and just not getting into detail with someone like Coach Paterno,"[63] "in my mind I don't go to Coach Paterno and go into great detail of sexual acts. I would have never done that with him ever."[64]

Though this was out of respect, McQueary could not have done Paterno more of a disservice. In fact, the reason McQueary didn't want to use sexual terms with Paterno was the very reason why he needed to. Paterno was known as a prude who was uncomfortable talking about sex.[65] Implying a sex act was not enough to undermine Paterno's years of interactions with Sandusky and Sandusky's image as a pillar of the community. McQueary needed to be direct, explicit, and comprehensive in his description. If McQueary had simply said to Paterno, "I saw Sandusky having sex with a boy," then at least Paterno would have known what McQueary meant. Paterno may still have had trouble believing McQueary, but he would at least have been aware of what McQueary was saying. Instead, McQueary used general terms about the rough positioning of Sandusky and the boy, using implications, which were easily misinterpreted.

McQueary, at various times testified that when communicating to Paterno he used the phrases "extremely sexual," "sexual in nature"[66] and "way over the line." These are examples of the kind of specific language that should not be taken as exact when recounted a decade later. Nonetheless, even if McQueary did use phrases like, "extremely sexual," "sexual in nature," and "way over the line," or some other variation on this theme, the inclusion of these phrases, while at first may appear to raise the severity of the allegation, actually detract from the probability that

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[59] Preliminary hearing at 24.

[60] *Id.*

[61] Sandusky trial transcript, June 12, 2012, at 205.

[62] Preliminary hearing at 25; Sandusky trial transcript, June 12, 2012, at 205-06.

[63] Preliminary hearing at 25.

[64] *Id.* at 74. McQueary also did not share the details with his father. At Sandusky's trial, McQueary testified that "The first time I talked to [my dad] at the house, it was him alone in his bedroom." Sandusky trial transcript, June 12, 2012, at 201. "I . . . did not get overly, unbelievably into detail, but made sure he knew it was extremely, extremely wrong, extremely sexual." *Id.* at 202. John McQueary's testimony is corroborative: According to John McQueary, "I asked him if he seen [sic] anal sex or — and I got more descriptive. I said, do you — did you see anything that you could verify, penetration, or I might have used the word sodomy. He said, no, I did not actually see that. I said, so you did not actually witness penetration or anything that you could be more descriptive. He said, no." Sandusky trial transcript, June 13, 2012, at 12.

[65] Interview of Paterno family member, Jan. 4, 2013.

[66] In his preliminary hearing testimony, McQueary stated on cross examination that he was uncertain whether he used the words, "in nature." Preliminary hearing at 75.

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McQueary had effectively communicated what he believed he saw. That is, Sandusky having sex with a boy. These phrases would be unnecessary if McQueary had said or even effectively insinuated that Sandusky was having sex with the boy. If you tell someone you witnessed sex, you do not need to add that sex is "extremely sexual" or "sexual in nature." If you tell someone you witnessed a 57-year-old man having sex with a 12-year-old boy, there is no reason to add that it was "way over the line." However, if you are generally conveying an incident that is equivocal in nature, then you might add those modifiers in an attempt to convey that it appeared sexual to you, or to emphasize that while what you had just said did not sound sexual, you believe it may have been.

McQueary's repeated testimony that he did not go into detail with Paterno and only told him what he saw "on the surface," begs the question what details McQueary would have left out. As described above, the complete detail of what McQueary now says he witnessed is brief. If that's the most detail he saw, and he told Paterno only general positioning information and no detail, then consider how little information he actually could have given to Paterno.

Respect for Paterno likely is not the only reason McQueary did not give Paterno more details. Sexual behavior is typically very private; criminal sexual behavior is extremely private. McQueary was understandably embarrassed by what he witnessed, and he acted like someone who had never had to talk about this difficult topic before in his life. It apparently was particularly difficult for McQueary to talk to an elder and iconic figure whom he looked up to about the details of sexual activity. In my opinion, it was even more difficult to do because the sexual activity was by a male offender on a male child.

Paterno's own recollection was that McQueary was uncertain about what he had seen, and Paterno believed that McQueary wasn't sure if he actually saw anything in particular.[67] Paterno remembers that the whole thing made McQueary very uncomfortable. So, uncomfortable, in fact, that talking about it was difficult for McQueary. In response, Paterno, trying to spare McQueary from any further distress, told McQueary that he didn't have to tell Paterno anything else, that McQueary did the right thing bringing it to Paterno, and that it was Paterno's job to get McQueary together with the right people for McQueary to report it.[68]

At his press conference, Louis Freeh seized on the fact that Paterno supposedly told McQueary, "It's my job now to figure out what we want to do." In reality, Paterno has given three versions of what he said to McQueary. On January 11, 2011, Paterno told the grand jury the following: "I did tell Mike, Mike, you did what was right; you told me. . . . I would refer his concerns to the right people."[69] In November 2011, Paterno told his biographer the following: "I told him he didn't have to tell me anything else. I told him he did the right thing bringing it to me, and that now it was my job to get him together with the right people for him to report it."[70]

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[67] Joe Posnanski, Paterno 272 (2012) ("Posnanski").

[68] *Id.* Although there are three different versions of what Paterno says he told McQueary that day, I quote this one because it describes what we know Paterno in fact did. By all accounts he called Curley, reported what McQueary had told him to Curley and Schultz, and put them in touch with McQueary so McQueary could report to them.

[69] Transcript of Proceedings at 6, Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, In re Notice No. 29 (Jan. 12, 2011) ("Grand jury transcript").

[70] Posnanski at 272.

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In early January 2012, Paterno told a reporter the following: "I said you did what you had to do. It's my job now to figure out what we want to do."[71] And McQueary's testimony regarding what Paterno told him was: "He said, you've done the right thing. He said, I know it's probably tough for you to come here and tell me this, but you've done the absolute right thing."[72] The fact that the two people involved in the conversation a decade earlier could not agree on the specific language used during the conversation underscores the relative unreliability of any particular words being accurately recounted. The SIC report should not have assigned a high degree of reliability to the specific words in any one version. Instead, they should have generally taken all of the versions given by Paterno and McQueary, and garnered the general meaning behind their combined recollections. After that, they could have accurately measured that evidence against what is known about what was actually done by Paterno.

What we do know from Paterno's recounting of events and his later shock and surprise when he finally read McQueary's statements in the presentment the week of November 7, 2011,[73] was that Paterno did not have any idea that McQueary was trying to tell him that Sandusky was sodomizing the boy or even sexually assaulting the boy. When asked by an investigator if McQueary said there was a sexual act, Paterno responded, "He never said that."[74] When Paterno finally read the presentment, he asked his son what the word "sodomy" meant.[75] After his son explained it to him, Paterno asked, "Can a man even do that to a boy?"[76] Nonetheless, as Paterno explained, if he had been told that Sandusky was raping a boy, or having sex with a boy in the shower, he "would have gone to the police right then and there, no questions asked."[77]

Is it reasonable to believe that five responsible adult men to whom McQueary reported the 2001 Sandusky shower incident, understood what McQueary was implying, and still did not feel the need to call the police? Is it reasonable to believe that they all turned a blind eye to the sexual victimization of a child? In my opinion, based on investigating, consulting on, and studying thousands of similar cases, it is more reasonable to conclude that these five men did not understand the true nature of Sandusky's actions because McQueary did not convey what he thought he had conveyed to them. That's because McQueary relied on implication, and deliberately did not use explicit or graphic terms in describing what he thought he witnessed in the shower.

Of those five men, the one who was most prepared for such a situation arguably would be Dr. Dranov. As a medical doctor, he is a mandated reporter, and he acted like one. He asked all the right questions aimed at determining whether McQueary had seen any specific sexual acts.[78]

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[71] Sally Jenkins, *JoePaterno's last interview*, Wash. Post, Jan. 14, 2012.

[72] Preliminary hearing at 27.

[73] Posnanski at 333-34.

[74] Joe Paterno statement to Randy Feathers and Agent Sassano, Oct. 24, 2011, at 1-2.

[75] Posnanski at 334.

[76] *Id.* Interview with Paterno family member, Jan. 4, 2012.

[77] Posnanski at 277.

[78] At Sandusky's trial, Dr. Dranov testified to the following: "[W]hen he came in [to the locker room], he heard what he described as sexual sounds. . . . I asked him what he meant and said, Mike, what do you mean? He said, well, sexual sounds, you know what they are. I said, no, Mike, you know, what do you mean? And he couldn't

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McQueary repeatedly said no and got more upset when Dr. Dranov attempted to get more details out of him. Dr. Dranov then advised McQueary to tell Coach Paterno and did nothing more. Dr. Dranov did not tell McQueary to call the police, he did not call the police himself, and he did not call the Department of Public Welfare. This behavior is consistent with Dr. Dranov deducing at the time that what McQueary had actually witnessed was non-sexual in nature.

The fact that none of the people to whom McQueary reported his observations took any steps to notify the police, is a strong behavioral indicator that none of them believed at the time that such action was called for based on what McQueary had told them. All of them also knew that McQueary himself did not call the police. McQueary did not convey to John McQueary, Dr. Dranov, Paterno, Curley, or Schultz what he thought he had conveyed. Hence, the people to whom he reported the incident responded to what they gleaned from his disclosure, not to what was hidden in his mind.[79] The fact that the accounts of all of these men are fairly consistent with each other on the non-sexual nature of what McQueary actually reported to them, is strong corroboration for the accuracy of their accounts and that assessment.

What is clear is that McQueary, emboldened by age, maturity, and the fact of a police investigation into Sandusky's offending behavior gave a more detailed account of what he had witnessed in his testimony in 2010, 2011, and 2012, than he had been able to do initially in February 2001. The problem is there was no contemporaneous documentation of his initial reports. Also, memory is not a perfect record of events that one witnesses or words that one has spoken. Memory is an even worse keeper of accurate details after the passage of time. Thus, we do not have any record or any reliably accurate testimony as to the exact words that McQueary said. All we have is the memories of those to whom he spoke. These men recount very different versions of what McQueary told them and even McQueary has been remarkably inconsistent about what he saw and what he said and what he did. The one consistency, however, which McQueary has repeatedly testified to, is that he told everyone else, particularly Paterno, far less than what he thinks saw and what he now says he saw.

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go on. He just seemed to get a little bit more upset. So I kind of left that. And then he said he looked toward the locker or the shower and a young boy looked around. He made eye contact with the boy. I asked him — to the best of my recollection, I asked him if the boy seemed upset or frightened. He said no. An arm reached out and pulled the boy back." Sandusky trial transcript, June 20, 2012, at 11-12. After returning to his locker, "he turned around and faced the shower room and a man came out and it was Jerry Sandusky." *Id.* at 12. Sandusky's counsel asked, "Did [Mike McQueary] describe seeing any particular sex act?" Dr. Dranov responded, "No he did not. He implied it had gone on with what he talked about with sexual sounds. But did he give me any kind of graphic description? No." *Id.* at 13. On redirect, Sandusky's counsel said "[Y]ou asked [Mike McQueary] three times if he saw a sexual act?" Dr. Dranov responded, "In the conversation, yes. I didn't use the term did you see a sexual act. I kept saying what did you see and each time he would come back to the sounds. I kept saying but what did you see. And it just seemed to make him more upset. So I backed off that." *Id.* at 15-16.

[79] This seems to be corroborated by the fact that Curley, in the email dated February 27, 2001, tells Spanier that he, "would plan to tell him [Sandusky] that we are aware of the first situation." This implies that the 2001 situation was the same as the one in 1998. Not an escalation, but a recurrence of what they feel "is a problem" and they "want to assist the individual [Sandusky] to get professional help." They are discussing this as if they were referring to a boundary issue problem that Sandusky should get professional help for, not as if they saw it as a child rape. Though denial may have played a significant role in their decisions, there is nothing in this email that even suggests that Paterno ever knew or believed that Sandusky had raped a boy and attempted to cover it up. *See* SIC report at Ex. 5G.

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5. McQueary's subsequent silence

It is clear from McQueary's behavior, reporting, and testimony that he was very embarrassed, confused, baffled, and upset by what he witnessed. McQueary's subsequent decade-long silence is understandable because for most people male sexual victimization is a noxious topic that they find disgusting and abhorrent. They don't want to think about it, they don't want to hear about it, they don't want to read about it, and they don't want to talk about it, much less discuss it in detail. Often times, they do not understand it when they do hear about it. Because of this, most people remain ignorant of, and unwittingly contribute to, the behavioral dynamics that keep sexual victimization of children hidden. These very dynamics, in conjunction with "nice-guy" acquaintance offending, effective "grooming," and "compliant victimization" allow offenders like Sandusky to hide their offending behavior for decades. This is one of the reasons that McQueary found it so difficult to recount details to Paterno in February, 2001. This is also what kept McQueary silent over the years after 2001.

During those years, McQueary had to endure face-to-face meetings with Sandusky at Penn State and The Second Mile events. For McQueary, it was years of having to deal with the potential demons of self-doubt and second-guessing. They were years of possible self-recrimination about not having acted more forcefully to subdue Sandusky and rescue the child. McQueary had many opportunities to ask Curley, Schultz, or Paterno why Sandusky was still allowed on Penn State's campus and why he was not in jail. But he remained silent. Did McQueary remain silent for all those years because he didn't care about child sex victims? Or, was he so confused by what he had seen that he had doubts about what he saw, and he didn't know how to deal with it? Also, since no child had come forward to say that they had been sexually assaulted by Sandusky, and everything seemed to go on like nothing had happened, this must have reinforced the doubts in McQueary's mind about the nature of what he had witnessed.

6. Sandusky's sterling reputation in 2001

It is only in retrospect, when everyone knows Sandusky is now a convicted child sex offender, that it is so easy to believe that Paterno must have known that Sandusky was a child sex offender back in 1998 and 2001.[80] In fact, this is not true. Back in 1998 and 2001, things were very different.

When Jerry Sandusky retired after the 1999 season, what Paterno knew about him is the exact opposite of what we now know. He was the founder of The Second Mile, an organization he named after a quote from Jesus' sermon on the mount.[81] The Second Mile claimed to have reached out to more than 100,000 Pennsylvania children. The "success" of The Second Mile was largely built on the special rapport Sandusky had established with its well-respected benefactors. Sandusky's many contributions and achievements had been publicly acknowledged. Sandusky had been named an Alumni Fellow in the College of Health and Human Development. Sandusky had been inducted into the Pennsylvania Sports Hall of Fame. Sandusky had been selected as the

[80] It is important to note here that the Sandusky jury found that McQueary did not in fact witness Sandusky anally sodomizing a boy in the shower in February 2001. The jury also found that Victims 5 and 6 were not the victims of indecent assault in 2001 and 1998, respectively.

[81] Matthew 5:41 (NRSV) ("and if anyone forces you to go one mile, go also the second mile"); Jerry Sandusky & Kip Richael, Touched: The Jerry Sandusky Story 184 (2000).

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Pennsylvania recipient of the SGMA Heroes Award, which was presented for "contributions to the pursuit of sports excellence, sportsmanship, participation or opportunity within their local community." Sandusky had been awarded the University's Barash Human Services Award and the YMCA Service-To-Youth Award. Sandusky and his late father had received the annual Human Rights Award presented by the Washington, Pennsylvania, branch of the National Association for the Advancement of Colored People.

In announcing his retirement in the pages of Sports Illustrated, the article finished with this quote: "Here's the best thing you can say about Jerry Sandusky: He's the main reason Penn State is Linebacker U . . . and the linebackers aren't even his enduring legacy."[82]

Sandusky adopted six children and had fostered many others since the 1970s. Sandusky had been married to the same woman since 1966, giving him the imprimatur of being a loving husband. Three of his children were adopted as infants, three after having them in foster care. In other words, on six different occasions, Sandusky was evaluated by state officials and a Pennsylvania judge for fitness to adopt; six times Sandusky passed. As far as anyone knew, a number of children had come through Sandusky's home and none of them had alleged that he had abused them.

Paterno had coached with Sandusky for 30 years and had known him even longer. Paterno watched Sandusky go from playing football at Penn State, graduating first in his class and serving as student marshal, to becoming one of the most successful assistant coaches in the country, while at the same time founding The Second Mile, which was honored by President George Bush as being a national "Point of Light" organization. Through thousands of individual acts, both large and small, Paterno watched Sandusky for almost four decades be the total opposite of what he would expect a child molester to be. Events and behaviors that look like red flags today seemed to be the exact opposite in 1998 and 2001.

7. The mistaken belief that someone had to know

Most people in the general public believe that close colleagues, nice guys, altruistic people, dedicated professionals, good fathers, child advocates, people who love children, cannot at the same time be child sex offenders. But this belief is not true at all. A large percentage of child sex crimes victims are victimized by teachers, priests, boy scout leaders, mechanics, trainers, psychologists, doctors, reporters, actors, anchormen, camp counselors, coaches, police officers, and even FBI agents who are well thought of in the community. They are "good people" who work hard, pay their taxes, raise families, go to church, act normal, but they all hide very dark secrets.

There also is a common misperception in the public that someone had to have known what Sandusky was up to all of those years: The coaches and others at Penn State must have known and covered for him. After all, molesters are different from the rest of us. Because they have such evil thoughts on the inside, they must be weird, quirky, or "off" on the outside. We assume that people close to the offender probably knew something was wrong and suspected

[82] Jack McCallum, *Jerry Sandusky, the dean of Linebacker U, is leaving Penn State after 32 years to devote himself to a different kind of coaching*, Sports Illustrated, Dec. 20, 1999.

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something but chose to ignore it. People must have seen the red flags but kept quiet because he was Jerry Sandusky. This could not be further from the truth.

Even after he was arrested, many people who knew Sandusky had a very hard time believing he was a child sex offender. In fact, two of Sandusky's long time colleagues, Dick Anderson and Book Brooks, testified in Sandusky's defense at trial. Anderson played football with Sandusky and then coached with him for over 20 years. Brooks coached with Sandusky for 15 years. Anderson testified that Sandusky "had a wonderful reputation in the community. He was well thought of in every regard."[83] Brooks was asked if he knew anything about the charges against Sandusky. Brooks responded, "I did read it online from the grand jury report. But I understand everything. I am an adult that's knowledgeable and I know everything that happens in the grand jury room is only one-sided and I'll wait for the end of the everything before I make up my mind."[84] In other words, after having known Sandusky for decades, having coached with him for years, having traveled with him to Bowl games, and seeing him on the sidelines with children, Brooks read the grand jury presentment with the testimony of six victims and still had not made up his mind. That is the effect Sandusky had on those closest to him.

The false belief that those who knew Sandusky understood and covered up his offending is rebutted by more than just the experiences and testimony of his friends and former colleagues. Consider the testimony of Joe Miller. At the time of Sandusky's trial, Miller worked for the Chambers Environmental Group in Bellefonte, Pennsylvania, and on the side he coached wrestling at an elementary school. But he was well aware of Sandusky's reputation in the community. Miller testified for the prosecution at Sandusky's trial to corroborate the testimony of Victim 1. According to Miller, in 2006 or 2007, Miller was driving home from school after practice. His son had left his wrestling gear at school, so Miller went back to get it. When Miller returned, he noticed that a light was on in the weight room. Here is Miller's description of what happened next:

> [S]o I went in there to turn the light off. And the light switch was to my right, and I heard something when I went to turn the light off. And before I turned the light off, I turned to my left and I saw Jerry and [Victim 1] all the way in the back far corner beneath the rock-climbing wall on a small, little exercise mat, and they were laying there fact-to-face, side-to-side — or face-to-face on their sides. And by the time I turned and looked, Jerry propped himself up on one arm and looked at me and said, "Hey, Coach, [Victim 1] and I are just working on some wrestling moves."
>
> And I didn't think really a whole lot of it because I've seen Jerry with him a number of times and I looked at Jerry as, you know, sort of a father figure to [Victim 1]. So I said, "Okay, Jerry, no problem. Just make sure you turn the light off and secure the door before you leave."[85]

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[83] Sandusky trial transcript, June 18, 2012, at 85.

[84] *Id.* at 129.

[85] Sandusky trial transcript, June 12, 2012, at 308-09.

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On the ride home, Miller started to think about it. He thought it was kind of "peculiar" that Sandusky would be working on wrestling moves late in the evening on a small mat in the back corner of the weight room when there was a whole wrestling room right next door. The wrestling move Sandusky was supposedly showing Victim 1 was unlike any wrestling move Miller was familiar with. Moreover, to Miller's knowledge, Sandusky did not know anything about wrestling. As these thoughts passed through his mind, he reached this conclusion:

> "Well, it's Jerry, Jerry Sandusky. He's a saint, you know. What he's doing with these kids, it's fantastic, you know." I didn't think anything of it.[86]

Joe Miller has a son the same age as Victim 1 and who was in the same grade at the same school. He also has a son two years younger than Victim 1. Miller is a responsible, concerned father who cares about his own sons, as well as the other young boys he coaches in wrestling. Miller witnessed Sandusky in the process of grooming, and the beginning of a sexual assault as Victim 1 later testified.[87] Yet, Miller, like everyone else, looked right past it. He missed it not because of the culture of football, or fear of bad press, or indifference to the safety of children, but because of ignorance regarding "nice-guy" acquaintance offenders.

8. Paterno's character

Paterno is well known for his decency and ethics, no matter the situation. Everyone who knew him attests to his honesty and integrity, so much so that he was considered by some to be too pious and sanctimonious.[88] After all, he would not allow his children to use the pencils he brought home from work because, he said, "that's university property."[89] However, what is less discussed, but well known by those close to Paterno, is that he was a prude; he was extremely uncomfortable with private and sexual matters. The Paternos rarely watched television except for *The Wonderful World of Disney* on Sunday nights.[90] According to his children, Paterno found the television series *Love Boat* to be too racy.[91] When Paterno served in Korea, he wrote letters reporting his revulsion with fellow GI's engaging prostitutes.[92] On the eve of his son's wedding, who was then 22-years-old, in passing Paterno asked whether his son needed to talk to him about anything (i.e., implying sex). His son said, "no, I'll figure it out," and Paterno replied, "okay, good."[93] Paterno was so outdated or uncomfortable with the subject, or both, that he could not bring himself to use the word "sex" with his own adult son. Paterno was even put off by the word "fart."[94]

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[86] *Id.* at 309.

[87] Sandusky trial transcript, June 12, 2012, at 33.

[88] Interview with Paterno family member, Jan. 4, 2013.

[89] Posnanski at 132.

[90] *Id.* at 4-5.

[91] Interview with Paterno family member, Jan. 4, 2013.

[92] *Id.*

[93] Interview with Paterno family member, Jan. 25, 2013.

[94] Posnanski at 131.

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9. Why Paterno did what he did and no more

Contrary to the SIC report's opinion, it was not fear of bad press or public scrutiny that caused Paterno to simply report to his superiors what he'd been told and step away from the investigative and/or decision-making process. When he heard the detailed allegations against Sandusky, he lamented and wished he had done more, but there was never any evidence that fear of damage to the reputation of Penn State or its football program was ever a factor. What is at fault is the basic ignorance of the general public (and apparently at least one counselor contracted by Centre County Children and Youth Services in 1998) of the behavior of "nice-guy" preferential child sex offenders, the results of effective "grooming," and the dynamics of "compliant victimization."[95] As I have discussed, all of these factors are critically important in gaining a complete understanding of the behavioral dynamics surrounding child sexual victimization, especially when it involves an adult male offender victimizing male children.

As an expert in the field of child sexual victimization, I firmly believe that there is another far more reasonable explanation for Joe Paterno's behavior than the one proffered by the SIC report: (1) McQueary did not convey to Paterno that he thought Sandusky was having sex with the boy, and (2) Paterno could not make the huge leap from the watered-down, sketchy description and superficial information McQueary told him to the realization that Sandusky was actually a child sex offender.

Paterno simply could not reconcile what he knew of Jerry Sandusky with the thought that Sandusky was a huge fraud and a child sex offender.[96] The man Paterno thought he knew through thousands of interactions over decades working with him as a brilliant defensive coach, a loving husband and father, a devoutly religious man, a mentor to disadvantaged kids, an altruist, a teetotaler who looked down on those who drank alcohol, a selfless advocate for disenfranchised youth, a long time colleague, a compassionate advocate for players, and a "goofy" prankster, could not possibly be a "monster predator." This man could not possibly have pulled the wool over Paterno's eyes for decades. He could not have fooled so many coaches, athletes, administrators, contributors, social services workers, psychologists, children, friends, and family. After all, if Sandusky had actually been victimizing children, where were all the victims that he took advantage of? Why hadn't any of them come forward? In fact, in all the years that Sandusky was molesting boys, not one of them came forward to make an allegation of sexual assault against Sandusky until Victim 1 did at the prodding of his mother and counselor in 2008. To Paterno, what McQueary was ineptly suggesting must have all seemed like a huge misunderstanding. Nonetheless, McQueary seemed very upset about what he'd seen. So, in spite of all his reasonable doubts, Paterno reported what he learned up the chain of command in hopes that those more qualified than him would know how to handle the situation and "get to the bottom of it."[97]

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[95] When the mother of Victim 6 pushed for an investigation against Sandusky for having physical contact with her son in the shower, the boy repeatedly said he did not want Sandusky to get into trouble.

[96] The difficult truth is that Sandusky was actually not a complete fraud. He actually helped many disadvantaged children over the decades. What was fraudulent about Sandusky was his motivation for helping children. He did it to gain access, authority, and control over boys so he could molest them. Of course, none of the positive work he did excuses his many sex crimes against those children.

[97] Posnanski at 273.

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Paterno then stepped out of the decision-making process and may or may not have been kept abreast of how the administration handled the situation. However, according to McQueary, in the few months after McQueary's report, Paterno checked up on McQueary a couple of times asking him if he was "okay."[98] In other words, Paterno presented McQueary at least two opportunities over the next few months — after time had passed and McQueary's emotions had subsided — to tell Paterno the explicit details of what he had seen or express displeasure with how the matter was being handled. Despite these opportunities, McQueary remained silent.

C. Paterno Not Part Of Any "Active Agreement To Conceal"

1. No evidence linking Paterno to any active agreement to conceal

When law enforcement investigators endeavor to prove an active agreement to conceal between two or more people (i.e., a conspiracy), they search for several different types of dispositive evidence. They look for emails, text messages, letters, notes, documents, or other communications sent between the members of the conspiracy in which they discuss their agreement or actions. They search for phone records, calendar entries, logs, or other information that document conversations or meetings between the conspirators. They initiate or search for audio or video recordings of such conversations. Investigators also attempt to find witnesses who overheard conversations between the co-conspirators. And, if corroborated, the best type of evidence they could find is a co-conspirator who is willing to come forward and admit their involvement in the conspiracy and testify against the other members of the conspiracy. Investigators also look for attempts to silence witnesses, limit the flow of information, influence those looking into the matter and make attempts to hide the truth.

In this case, there are no emails or other electronic communications written by Joe Paterno to any conspirators. There are no emails or other electronic communications written by any conspirators to Joe Paterno. There are no documents that purport to lay out any instructions by Paterno in furtherance of any conspiracy. There are no audio or video recordings of Paterno engaging in any conversations about, or acts in furtherance of, any conspiracy. There are no witnesses who report that Paterno was actively involved in a conspiracy. And, there are no co-conspirators who claim that they conspired together with Paterno. In short, there is absolutely no evidence at all that Paterno actively participated in an agreement to conceal.

After reviewing 3.5 million communications and documents, the SIC located only three relevant emails and one note[99] that even mention Joe Paterno. However, none of these records contain any evidence of any participation in an "agreement to conceal" or "conspiracy" by Paterno. None of them even contain any verifiable information that can be attributed to Paterno.[100]

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[98] Preliminary hearing at 39-40.

[99] An additional "relevant" note was written by Paterno circa 1999, but that note had to do with basic insurance liability issues and not Sandusky's grooming or offending behavior. *See* SIC report at Ex. 2G.

[100] The SIC never interviewed Paterno. Moreover, the SIC never interviewed Curley or Schultz about the content of these records. The SIC interview Spanier less than a week before it published its report. The emails and notes were located in March 2012 and Spanier was interviewed on July 6, 2012.

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In two of those emails sent in 1998 referencing Paterno, Curley wrote, "I touched base with coach," and "Coach is anxious to know where it stands."[101] Neither of these emails were corroborated, nor did they contain any details as to what was purportedly discussed or what Paterno's reactions were to what was purportedly discussed. These emails simply reference Paterno. He was not a party to either of them. He wasn't even copied on them.[102] And there is no evidence that the conversations actually took place. There is also no evidence proffered to support the contention that these purported conversations included any active agreement to conceal. Though it is possible that others later concealed information about the 1998 and/or 2001 incidents, there is no evidence linking Paterno to such concealment, there is no evidence that he knew about such concealment, and there is no evidence that he participated in such concealment.[103] Without such evidence, it is simply wrong to accuse a person of such a criminal act.

2. The SIC misinterprets Curley's February 27, 2001 email

What led the SIC to erroneously conclude that Paterno was involved in an active agreement to conceal is found in the remaining two documentary references to Paterno. Those references can be found in the 2/12/01 handwritten note by Schultz memorializing a discussion between Schultz and Curley, and the 2/27/01 email from Curley to Schultz and Spanier. In order to draw the conclusion that there was an agreement to conceal, the SIC ignored the former and therefore misinterpreted the latter.

The lynchpin that the SIC report uses to base its conclusion that Paterno engaged in an active agreement to conceal with Curley, Schultz, and Spanier, is the note and exchange of emails between Curley, Schultz, and Spanier dated 2/25/01 to 2/28/01. The SIC characterizes the 2/27/01 email from Curley as documenting a change in plans to not inform DPW of the 2001 incident.[104] In his prepared remarks upon issuing the SIC report, Freeh stated that the only intervening cause between the 2/25/01 plan to inform DPW and the 2/27/01 plan not to inform DPW, was Curley talking it over with Paterno.[105]

The problems with this conclusion are many. The SIC mischaracterizes the 2/27/01 email by failing to consider it in the context of all of the communications on the topic as opposed to just the note from the February 25 and the emails on February 26 through February 28. A basic

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[101] SIC report at Exs. 2A & 2E.

[102] Although Paterno did not utilize an electronic email account, his secretary maintained an email account in Paterno's name and in the rare event that he received an email, she would print it out and give him a hard copy. Paterno would then write a hard copy response and have that physically delivered to the other party. Interview with Paterno family member on Jan. 4, 2013.

[103] There are pending criminal cases against Curley, Schultz, and Spanier regarding their grand jury testimony and related actions that have not yet been litigated at the time of this analysis, and may relate to this issue. Nonetheless, Paterno, who fully cooperated with the investigation and testified in the grand jury was never charged with a crime and no evidence exists to date that inculpates Paterno in any way.

[104] SIC report at 63, 74-76.

[105] Louis Freeh, press conference, July 12, 2012 ("Based on the evidence, the only known, intervening factor between the decision made on February 25, 2001 by Messrs. Spanier, Curley, and Schultz to report the incident to the Department of Public Welfare, and then agreeing not to do so on February 27th, was Mr. Paterno's February 26th conversation with Mr. Curley regarding what to do about Sandusky.").

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content analysis of these documents in conjunction with the note from 2/12/01, reveals the plain meaning of these documents and undermines the SIC's claim that the 2/27/01 email represents a change in plans to not inform DPW.

The SIC's conclusion ignores the fact that Schultz's note of his meeting with Curley dated 2/12/01, clearly document an intention on the part of Curley to meet with Sandusky and, "unless he 'confesses' to having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned with Child Welfare." So the *original* plan to contact DPW was conditioned on Sandusky not confessing, and that plan was made two weeks *before* what the SIC purports was the "intervening cause" conversation between Curley and Paterno on 2/26/01.[106] The fact that Curley merely restates this same conditional plan in his email of 2/27/01 proves it is: (1) not a change in plans, (2) not the result of the call he said he made to Paterno on 2/26/01, and, therefore (3) Paterno is not the intervening cause.

In order to fully understand what led to the erroneous assertion by SIC that Paterno was the "intervening cause" in a decision by Curley to not notify DPW of the allegations against Sandusky, it is important to review the totality of documentation on that subject:

In a handwritten note dated 2/12/01, Schultz writes:

> Talked w TMC
> -reviewed 1998 history.
> -agreed TMC will discuss w JVP and advise we think TMC should meet w JS on Friday.
> -unless he "confesses" to having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned w Child Welfare.
> -TMC will keep me posted.[107]

This note states that Schultz talked with Curley but it doesn't give a date, time, place or methodology utilized for this talk. It then goes on to mention that they "reviewed 1998 history." When they "reviewed 1998 history," the similarities between what they knew about the two incidents would have been obvious, and they would have known that the incident in 1998 had been investigated and resolved with a finding of no criminal behavior. This could reasonably result in Curley's and Schultz's anticipation that the 2001 incident, which Paterno informed them about the day before, would also likely lead to the same conclusion.[108]

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[106] As discussed infra, the 2/25/01 note and 2/26/01 email are simply summary bullet points of the types of actions they are planning on taking, not detailed specifics of any plans at the time.

[107] SIC report at Ex. 5C.

[108] Because the 1998 investigation concluded with a finding of no sexual intent, it would have reinforced in the minds of those who knew and were close to Sandusky that the allegations were wrong. As discussed supra, it is extremely common for people who know and respect a "pillar of the community" offender to disbelieve any allegations of sexual improprieties against the person, especially when they were investigated and determined to be unfounded. In this instance, it was much more reasonable for Curley, Schultz, Spanier, and Paterno to believe that Sandusky was a good man who just did not recognize the impropriety of horsing around with boys in the shower.

However, the situation in 2001 raised a bigger issue this time because it indicated to them that Sandusky did not heed the UPD warning to refrain from showering with children. (This is exactly what Spanier had noted as a potential vulnerability in his 2/27/01 email.) Curley, Schultz, and Spanier saw Sandusky's behavior as indicating that Sandusky had a problem with recognizing that horsing around with boys in the shower was not appropriate.

The 2/12/01 note also appears to delineate, with some specificity, the plans by Schultz and Curley to deal with the information provided to them by Paterno about what McQueary had told him. Five things are clear from this note: (1) Paterno was not involved in the discussion that produced these plans; (2) Curley had agreed to discuss something with Paterno before Friday, February 16, 2001; (3) Curley's and Schultz's discussion included a conditional plan to contact DPW unless Sandusky "confesses"[109] to having a problem; (4) there is no mention of what they plan to do if Sandusky "confesses" to having a problem; and, (5) there was no documented plan at this time to notify The Second Mile.

Two weeks after his 2/12/01 note, Schultz writes in a hand-written note dated 2/25/01:

> (3). Tell Chair* of Board of Second Mile.
> (2). Report to Dept of Welfare.
> (1). Tell J.S to avoid bringing children alone into Lasch Bldg
> *Who's the chair ??

This note appears to briefly list the plans after the reports from Paterno and McQueary to Curley and Schultz about the Sandusky shower incident. There is nothing about this note that indicates it is a comprehensive and detailed description of what they planned to do about the Sandusky incident. Instead, on its face, it is a bullet-type summary list of their plans. There is no indication that the plan to "Report to the Dept of Welfare," is not still conditioned upon whether or not Sandusky "confesses" to having a problem (just as it was documented in greater detail in the 2/12/01 Schultz note and later in the 2/27/01 Curley email). The 2/25/01 note does not go into any details about who would perform the three listed steps or when or where the steps would be taken, further indicating that it is in fact just a brief summary. To conclude that this is now a change in plans to report to DPW without condition is not supported by the evidence.

Schultz then recounts this bulleted summary of their plans, though in a different order, in his 2/26/01 email to Curley stating:

> From: Gary C. Schultz <gcs2@psu.edu>
> Sent: Monday, February 26, 20011:57 PM
> To: TMC3@psu.edu
> Cc: Coble-Joan (JLC)
> Subject: Confidential
>
> Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the

[109] Schultz put the word "confesses" in quotes to likely distinguish it from the literal meaning of "confesses," which typically indicates an admission of wrongdoing.

> University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know.[110]

Again, though there is slightly more detail about the timing of the talk with Sandusky and about Curley being the one who would perform the listed tasks, it is still consistent with the fact that their plan to contact the "Dept of Welfare" remained conditioned on whether Sandusky "confesses" to having a problem." This is most likely the case because in Curley's email to Schultz and Spanier the next day on 2/27/01, Curley goes into great detail about the plans and he restates, in virtually the same language, the original conditional plan: they would go to DPW in the event that Sandusky is not "cooperative." The only change in the plan to contact DPW evinced in the 2/27/01 email, from the one delineated in the 2/12/01 Schultz note, is the change from "unless he 'confesses'" to "if he is cooperative." Arguably, these phrases meant exactly the same thing to these men and that is why "confesses" was in quotation marks in the original note.

On 2/27/01, Curley, Spanier, and Schultz traded the following emails regarding this subject:

> At 08:10 PM 2/27/01 -
> 0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and and [sic] maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. I need some help on this one. What do you think about this approach?[111]
>
> At 10:18 PM 2/27/01-
> 0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am

[110] SIC report at Ex. 5F.

[111] *Id.* at Ex. 5G. Although the emails are listed in reverse order in the original, (latest email on top) I have reversed them here for clarity by putting them in chronological order.

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> supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.[112]

Schultz responded the next day:

> From: Gary C. Schultz <gcs2@psu.edu>
> Sent: Wednesday, February 28, 2001 2:13 PM
> To; Graham Spanier; Tim Curley
> Subject: Re: Meeting
>
> Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.[113]

The SIC mischaracterized the 2/27/01 email because their reading of the following: "After giving it more thought and talking over with Joe yesterday --- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved." The SIC took this sentence to mean that Curley wanted to inform only Sandusky and not inform DPW. The SIC's reading of these sentences is both internally inconsistent and externally inconsistent with the other three related emails and documents. Three sentences later Curley writes, "Also, we feel a responsibility at some point soon to inform his organization and and [sic] maybe the other one about the situation." One sentence after that, Curley writes, "If not, we do not have a choice and will inform the two groups." This is a clear delineation of the same conditional plan that Schultz wrote about on 2/12/01.[114]

When he wrote, "I am having trouble with going to everyone, but the person involved," Curley was raising the issue of his discomfort with not disclosing to Sandusky the information they had about the shower incidents as well as their plans to speak to The Second Mile and DPW.[115] Curley was not stating that he did not want to report to DPW. He was stating that when he spoke to Sandusky first — as they had planned — he wanted to also confront Sandusky with all the information they had and the fact that they believed he had a problem. Curley wanted to go a step further than merely telling Sandusky about the proper use of Penn State facilities. In effect, Curley did not want to go behind Sandusky's back to The Second Mile and DPW without

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[112] *Id.*

[113] *Id.* at Ex. 5G.

[114] *Id.*

[115] It appears from the language used here by Curley that he understood Schultz's email from 2/26/01 to mean that all he was supposed to talk to Sandusky about was "the appropriate use of the University facility." But Curley apparently was uncomfortable with this and wanted to do more, not less. This willingness to do more is what Spanier apparently applauded him for in his email on 2/27/01.

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first giving Sandusky an opportunity to cooperate.[116] This is confirmed in Spanier's 2/27 reply, in which he applauds Curley for offering to take the additional, difficult step, of confronting Sandusky with what they know and the fact that they feel he has a problem.

Curley then goes on to lay out in great detail a scripted version of what he planned to say to Sandusky when he met with him. Included in that version is a detailed discussion of under which circumstances he will notify The Second Mile and maybe notify DPW and under which circumstances he will notify both. Therefore, the notification of DPW plans devised on 2/12/01 were the same as those recounted in the 2/27/01 email. Hence, there was no change in plans instigated by Paterno. He was not an intervening cause in any change of plans because the evidence shows there was no change of plans with regard to conditionally notifying the DPW. Therefore, there was no conspiracy or any agreement to conceal.

At the time, everyone still believed that Sandusky was a respected member of the community. This is why Schultz called this plan "more humane and upfront." It wasn't because he was indifferent to child victims, it was because he had no idea that there were any child victims. It was humane because it contemplated not going behind Sandusky's back with embarrassing information, and it was upfront because it contemplated telling Sandusky the whole truth. Apparently, their earlier discussions, which were only briefly summarized by Schultz in the 2/25 note and the 2/26 email, must have contemplated only talking to Sandusky about the appropriate use of the facilities.

What is different about the plans as discussed by Curley and Schultz in the 2/12/01 notes, and the later notes and emails, is the addition of notifying the chair of The Second Mile. Therefore, it is more reasonable to conclude that if a conversation with Paterno was an intervening cause, it was to *add* The Second Mile to the list of those to be notified, not *remove* DPW. After all, The Second Mile was the very agency that was most likely responsible for the well-being of the child who McQueary saw being victimized in the shower by Sandusky. It was also an outside agency "providing children with help and hope."[117] And there is no question that Curley planned to and in fact did notify The Second Mile. Yet the SIC still found it reasonable to conclude that Paterno and others engaged in an active agreement to conceal Sandusky's behavior. This despite the fact that there is no evidence that they attempted to control or limit what the executive director of The Second Mile did with the information Curley provided to him. In fact, the executive director informed two trustees of the organization as well, neither of which reported any attempt to silence or limit what they did with the information.

The way that the 2/27/01 email is written lends itself to the conclusion that Curley had thought about going further with what he wanted to discuss with Sandusky and then discussed this with Paterno (i.e., "After giving it more thought and talking it over with Joe yesterday . . ."). Throughout this email, Curley carefully and deliberately used the personal pronoun "I" nine times to convey his plans and motivations, as well as, the plural pronoun "we" nine times to convey the plans and motivations of himself and unspecified others. The only aspects of these

[116] This language is also consistent with the belief that the "problem" they were referring to was that Sandusky did not understand that horsing around with boys in the shower was improper.

[117] The Second Mile website can be found at http://www.thesecondmile.org.

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plans and motivations that could potentially be attributed to Paterno are the ones that follow "we."[118]

In fact, none of the uses of "we" evince a change in mind or an agreement to conceal. However, at least three of these references are followed by plans to conditionally notify DPW just as is stated in the 2/12/01 Schultz note. Therefore, it is not accurate to state that this email encompasses a change in plans or a plan to not notify DPW. This fact undermines the SIC's assertion that Paterno was the intervening cause in a decision not to inform DPW.

In my opinion, as discussed above, this purported "change of plans" as concluded in the SIC report did not in fact happen. Instead, the 2/27/01 email simply restates a plan that was devised in a meeting between Schultz and Curley on 2/12/01. Also, the fact that there were circumstances under which they did not necessarily plan to inform DPW was based on a completely reasonable belief that they didn't know whether informing DPW was necessary. At the time, as delineated in Schultz' 2/12/01 note, they believed that informing DPW was necessary only if Curley couldn't get Sandusky to admit to having a problem and agree to get help. They saw DPW as an agency skilled at investigating and dealing with similar situations, which may be helpful in impressing upon Sandusky the problems with his behavior. However, if Sandusky were to admit that he had a problem and was cooperative, then there would be no need to enlist the help of DPW. Additionally, even if they didn't notify DPW initially, they left open to option to still decide to inform DPW in the future, after Curley had confronted Sandusky, and after they had notified The Second Mile.[119] They never even contemplated that Sandusky might have been committing sex crimes against boys, which is why they never even discussed the issue or discussed going to the police.

Either way, informing The Second Mile is clearly not keeping the information in-house or concealing information. The Second Mile was an independent child care agency/charity founded by Sandusky but run by a board and a CEO. It is also the most likely place where Sandusky obtained access to the child in question. Accordingly, The Second Mile is precisely the organization that was in the best position to identify that child. And, because its CEO, Jack Raykovitz, was a licensed psychologist, he was a mandated reporter of any sexual victimization allegations regarding any children within his professional or institutional care.

3. Vulnerability for not having reported

In the his 2/27/01 email, Spanier raised the following issue, "The only downside for us is if the message isn't heard and acted upon, and we then become vulnerable for not having reported it; But that can be assessed down the road."[120] This indicates that Spanier felt some vulnerability regarding the conditions under which they were not planning on reporting to DPW, however, the nature of what that vulnerability was is not stated here. Spanier later stated that his

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[118] The SIC apparently did not do a detailed content analysis of this email.

[119] All of the notes and emails in this series listed contacting Sandusky first. The 2/25/01 Schultz note listed contacting DPW before The Second Mile; however, the 2/26/01 Schultz email listed contacting DPW after The Second Mile. This change in the order of their plans is consistent with the theory that they had contemplated notifying DPW only as a last resort on 2/26/01 before Curley talked to Paterno.

[120] SIC report at Ex. 5G.

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only "concern [was] about the possibility that Jerry would not accept our directive and repeat the practice."[121] This indicates that their concern was with Sandusky's "practice" of horsing around in the shower with boys as opposed to an indication that they knew or even suspected he was sexually assaulting boys.

Schultz then addresses this same issue in his 2/28/01 email by saying, "We can play it by ear to decide about the other organization." Again, there is no definitive decision here to refrain from reporting to DPW. They are simply delaying the decision to do so, until they see whether Sandusky is cooperative and admits to having a boundary issue problem. That way, their decision could be based on the outcome of Curley's confrontation of Sandusky. In other words, it would be an informed decision, rather than one made in the dark. The crucial issue here is that they wanted to get Sandusky to realize that he has a problem horsing around with boys in the shower and he needs to get help for it. If Sandusky were to admit to this, and agree to get help, then there would be no need to enlist DPW. On the other hand, if Sandusky were uncooperative and did not confess to having this problem, then they would have to enlist the help of DPW to investigate and convince Sandusky that he did in fact have a problem that required help.

In the end, according to Spanier, Curley reported that he had spoken with both Sandusky and The Second Mile and "those discussions had gone well and our directive accepted, and the matter was closed."[122] Meaning, Sandusky was told not to bring children into the facilities at the university and The Second Mile was alerted to the "problem" that Sandusky had with horsing around with boys in the shower, so there was no need in their minds to enlist the help of DPW to enforce the directive against Sandusky. None of these communications indicate any belief on the part of the men that Sandusky was committing sex crimes against boys.

It is clear from the notes and emails beginning on 2/12/01 through 2/28/01 that Curley, Schultz, and Spanier are trying to develop and execute a plan to make their former colleague understand and accept that he has a problem, which they naively believed professional help would resolve.[123] There is no indication in any of these documents or in their behavior that these men had any idea of the actual nature and extent of Sandusky's "problem" or that he had long ago progressed to being a child sex offender.

If there was any error in the logic and plans of Curley, Schultz, and Spanier in dealing with the 2001 Sandusky shower incident, it was the fact that they believed that a boundary issue problem was not sufficient to warrant a notification to the UPD. Schultz contacted the UPD on February 12, 2001 asking about whether a file existed on the 1998 incident. There is no evidence

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[121] *Id.* at Ex. 2J.

[122] *Id.* at Ex. 2J.

[123] The difference between this naïveté on the part of men who had no professional contact or care of children, and did not know that Sandusky had committed any sex crimes against children, versus the purported ignorance on the part of the leaders in the Boys Scouts of America and Catholic Church, which received explicit repeated complaints of actual child sex crimes perpetrated against children, from the children themselves, is that both of those organizations are in the business of care of children that are entrusted to them and are therefore in a position to have to know about the behavior of child sex offenders and had been put on notice by victims, parents, law enforcement, child care professionals, lawyers and District Attorneys. And yet, there were deliberate acts of moving offenders to other jurisdictions, or hiding or destroying documents, or ordering victims and witnesses to be silent. While Curley, Schultz, and Spanier, were not in the childcare business and had no training in this area at all.

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indicating whether Schultz notified the UPD at that time about the existence of the then current allegation against Sandusky. If he did not, it could mean that he relied on Courtney's advise to him that what had taken place was not reportable, or this could be troubling evidence that may indicate a decision on the part of Schultz to conceal information from law enforcement authorities. This is also consistent with the more recent discovery on March 20, 2012[124] of a "private" file that had been kept in Schultz's office and was not disclosed to investigating authorities or the SIC. We do not know whether Schultz was aware of this file at the time he received inquiries or subpoenas regarding files related to allegations against Sandusky. We do not know whether Curley and/or Spanier knew about the existence of the inquiry Schultz made to the UPD or of the private file that Schultz maintained. However, what is certain is that there is no evidence to date that indicates Paterno ever knew of the existence of the UPD inquiry or of the "private" Schultz file.

4. "A more humane approach"

On February 28, 2001, Schultz wrote, "Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed)."[125] Schultz was most likely referring to Curley's additional plan to tell Sandusky what they knew about his behavior and that he had a problem. Schultz referred to the approach as "upfront" because it involved going to Sandusky directly. Schultz is talking about disclosing additional information, rather than hiding information. Schultz goes on to write, "We can play it by ear to decide about the other organization."[126] In other words, Schultz is indicating that he, Spanier, and Curley had not ruled out going to DPW, if necessary.

5. No evidence of Paterno's participation in an active agreement to conceal

There is no evidence that Joe Paterno was part of any agreement to conceal what McQueary reported witnessing in the Lasch Building showers in 2001. All available evidence suggests that Paterno did (1) inform McQueary he would find out who in the school's administration should handle this matter, (2) inform his superiors (Curley and/or Shultz) and make sure that McQueary spoke directly to them, (3) step out of the administrative process at that point, (4) at most was updated about the administration's response to McQueary's report, and (5) went back to McQueary and made sure he was okay. There is no evidence that Paterno participated in the ultimate decision to inform or not to inform DPW.

All available evidence also suggests that Paterno did not (1) dissuade McQueary from believing what he saw Sandusky doing in the locker room, (2) persuade McQueary to forget what he saw, (3) ask McQueary who else he had told, (4) tell McQueary to keep what he saw a secret, (5) filter, shape, or edit what McQueary told the Penn State administration about what he saw, (6) attend the administration's interview of McQueary, (7) debrief McQueary about what he had recounted to the administration, (8) participate in the administration's investigation of the events that McQueary reported, (9) dissuade the administration from thoroughly investigating

[124] Louis Freeh, press conference, July 12, 2012.

[125] SIC report at Ex. 2F.

[126] *Id.*

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what McQueary reported, (10) make any attempt to hide what the administration found during their investigation of what McQueary reported, (11) make any attempt to prevent the administration from acting as it deemed appropriate as a result of their investigation into what McQueary reported, or (12) limit or shape what the administration reported to The Second Mile.

In the United States we enjoy the presumption of innocence. If an investigation finds no evidence to prove a crime, you must not make leaps of faith and jump to conclusions to find participation in that "crime." For all the above stated reasons, it is erroneous to attempt to tie Paterno, using innuendo and conjecture, into any agreement to conceal as the SIC claims.

D. Paterno's Subsequent Actions

Every single action Paterno took subsequent to McQueary's report in 2001 and throughout the ensuing ten years, indicates that Paterno did not understand what McQueary was trying to communicate to him. In fact, the aspect of McQueary's testimony that has remained fairly consistent is the fact that he did not give Paterno any specific details about what he thought Sandusky was doing in the shower. While other witnesses have told versions of events that minimize their role and their knowledge, Paterno has done the opposite. He admits that he didn't know how to handle what was reported to him and he simply passed on the version of events he heard from McQueary. At the time it was all he thought he needed to do. Later, when he found out the truth about Sandusky's actions, he wished he had done more.

1. Paterno mischaracterized facts which put his own actions in a less favorable light

When Paterno testified before the grand jury that after he received the report from McQueary, he waited to inform others because he did not want to interfere with their weekends. That was factually incorrect and to his detriment. Based on the record, he may have called Curley the same day that McQueary came to him. If he didn't, he unquestionably conveyed McQueary's report to Curley and met with Curley and Schultz on Sunday, the very next day.[127]

When Paterno spoke about reporting the incident, he said he merely called Curley, but maybe spoke to him in person. In fact, according to Curley and Schultz, Paterno called them that weekend, and both of them went to Paterno's house on Sunday and spoke to Paterno in person. If Paterno were trying to make it sound like he responded appropriately to a serious situation, he would not testify that he sat on the information and then informed one person over the phone. Paterno was undermining the strength of his own actions in response to the report by McQueary. Thanks in part to the testimony of others, we now know that is not what happened. Paterno, in fact, acted even more promptly than he originally remembered. If Paterno had been trying to cover up something, he would have been much more likely to oversell his actions than to undersell them.

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[127] In fact, with an hour of meeting with McQueary, Paterno flew to Pittsburgh for induction into the Pittsburgh Sports Hall of Fame and remained there overnight. Interview with Paterno family member, Feb. 6, 2013. This ceremony had been planned months in advance and Paterno was the guest of honor. The next opportunity Paterno had to meet with Curley and Schultz was in fact the day he met with them, Sunday, February 11, 2001. "I had a meeting with Tim and Gary [Schultz] might have been there, and I told them what Mike had told me." Posnanski at 273.

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2. Paterno's first account

On Monday, January 3, 2011, Cynthia Baldwin, general counsel for Penn State, interviewed Paterno about his recollection of what McQueary told him in 2001. Baldwin took what appear to be contemporaneous notes of this interview. According to these notes, Paterno said McQueary "[s]aw Jerry horsing around w[ith] the kid a young man in shower, inappropriate behavior. Turned it over to Tim Curley. Notified Tim Curley didn't talk to Gary. No conv. since then."[128] This was Paterno's first interview about the incident that had happened in 2001. Baldwin's notes indicate that Paterno did not think McQueary was reporting anything sexual. This was before Paterno had heard or read any of the details of the 2011 allegations against Sandusky. This is before Paterno spoke with the grand jury. However, by the time Paterno had testified in the grand jury, he was aware that Sandusky was being investigated by the state attorney general for molesting boys.

3. Paterno's explanations

Paterno gave the following reasons when asked why he took no action to identify the February 9, 2001 child victim and for not reporting Sandusky directly to state authorities.

Paterno told a reporter that "I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was. So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way."[129]

This answer appears to be typical of Paterno's frank, open, and honest style of speaking. It is very revealing that he admits he didn't know how to handle what he was told. It also is illuminating that Paterno was afraid to break even the university rules. That is not something that would worry someone who was planning on breaking criminal laws by concealing information about child sex crimes. Paterno doesn't try to spin his behavior in the best light. He simply explains what he did and admits that it did not work out. If McQueary had simply told Paterno that Sandusky was raping a boy, or having sex with a boy in the shower, then Paterno, like everyone else in the world, would have known what to do: "We would have gone to the police right then and there, no questions asked."[130]

In what was perhaps the most comprehensive interview of Paterno on the subject, Joe Posnanski, author of the biography, *Paterno*, had the following conversation with Paterno in late November 2011.

> Posnanski: Did Mike [McQueary] say that he saw anything?
> Paterno: I think he said he didn't really see anything. He said he might have seen something in a mirror.
> Posnanski: A mirror?

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[128] SIC report at 83. This also indicates that Paterno was again underselling his actions.

[129] Sally Jenkins, *Paterno's Last Interview*, Wash. Post. Jan. 14, 2012.

[130] Posnanski at 277.

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Paterno: Yeah, like the bathroom mirror. But he told me he wasn't sure he saw anything. He just said the whole thing made him uncomfortable.
Posnanski: What did you think he saw?
Paterno: I didn't know. I thought he saw them horsing around. Maybe he thought he saw some fondling. I don't know about any of this stuff. But I could tell it made Mike very upset.
Posnanski: What did you say to him?
Paterno: I told him he didn't have to tell me anything else. I told him he did the right thing bringing it to me, and that now it was my job to get him together with the right people for him to report it.
Posnanski: Did you consider calling the police?
Paterno: To be honest with you, I didn't. This isn't my field. I didn't know what to do. I had not seen anything. Jerry didn't work for me anymore. I didn't have anything to do with him. I tried to look through the Penn State Guidelines to see what I was supposed to do. It said that I was supposed to call Tim [Curley]. So I called him.
Posnanski: That day?
Paterno: I'm pretty sure I called him that day. I know it was a weekend, so I can't be a hundred percent sure, but I do think I called him that day.
Posnanski: And what did you say?
Paterno: I said, "I think there may be a problem here. You need to get to the bottom of this."[131]

Here, Paterno is honest about the limits of his memory of a decade old conversation. He does not overstate details but remembers generally what was said. The most significant components of his memory were that McQueary was uncertain about what he'd seen and the general observation Paterno made at the time that McQueary was very upset by what he saw and was having trouble talking about it to Paterno. So much so, that Paterno told McQueary he didn't have to tell him any more. This, coupled with McQueary's admission that he only used generalities and not "very much detail" when recounting what he saw to Paterno, underscores the fact that McQueary did not convey to Paterno the same thing he would testify about a decade later. Namely, McQueary did not convey in 2001 that he thought he saw Sandusky having intercourse with a boy in the shower. Posnanski, unlike the prosecutor who questioned Paterno in the grand jury, went on to ask further details.

Posnanski: Were you shocked?
Paterno: I wasn't really even sure what it was. Mike didn't give me any details. I could just tell he was upset.
Posnanski: Had you heard any rumors at all about Jerry Sandusky [showering with boys]?
Paterno: Absolutely not. Maybe people talked about it, I don't know. But I didn't hear anything.

[131] *Id.* at 272-73.

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> Posnanski: Did you think about investigating yourself?
> Paterno: I wouldn't know how to investigate something like this. I don't know anything about it. [Jerry] didn't work for me. I had a meeting with Tim and Gary [Schultz] might have been there, and I told them what Mike had told me. And they said they would get to the bottom of it. I trusted Tim would take care of it. He's a good administrator. He had negotiated the retirement deal with Jerry, and he was still in contact with Jerry. Tim's a good person. I expected him to handle it right.
> Posnanski: Did you ever follow up?
> Paterno: No. I trusted Tim.
> Posnanski: Do you regret that?
> Paterno: I did what I thought was the right thing. . . . If what they're saying about Jerry is true, I think we all wish we would have done more.[132]

Paterno, even up to a few months before he passed away, still used the qualifier "if" when referring to the allegations about Sandusky. He still didn't believe it himself. He had not formed an opinion as to Sandusky's guilt because he thought he knew Sandusky and he trusted and expected the system to work to determine the veracity of the allegations. He had plenty of reason to harbor extremely ill will towards Sandusky at this point. The entire university and city were up in arms by this point about Sandusky's crimes. Despite the fact that Paterno and Sandusky had reportedly disliked each other for years, Paterno tried to remain neutral. Not because he was trying to protect the name of Penn State football, but because Sandusky hadn't had his day in court yet and Paterno still could not believe that Sandusky had fooled him and everyone else for so long.

In his statement to the community just before he was fired, Paterno said, "If true, the nature and amount of charges made are very shocking to me and all Penn Staters."[133] Then he went on to say, "I understand that people are upset and angry, but let's be fair and let the legal process unfold."[134] From these statements it does not appear that Paterno knew or even believed that Sandusky was in fact a child sex offender. By this time, he had read the presentment against Sandusky in all of its graphic detail and he still couldn't believe that what was being alleged was true about a man he thought he knew. Paterno showed his real concern for children who were molested by Sandusky by lamenting, "I wish I had done more." As opposed to McQueary who said, "I did right . . . I did the best I could."[135]

4. Conclusions

Paterno's actions, in the wake of McQueary's cryptic disclosure, were arguably the most honest and moral of anyone involved. Although later he would wish he had done more, that was

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[132] *Id.* at 273-74. Paterno was almost 85-years-old when Posnanski conducted the above interview and he was undergoing both radiation and chemotherapy for terminal lung cancer.

[133] Paterno family press release, Nov. 6, 2011.

[134] *Id.*

[135] Mike McQueary's email to Senior Deputy Attorney General Jonelle Eshbach, Nov. 10, 2011.

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only after he found out that there was a possibility that Sandusky had deceived him and everyone else at Penn State and had been sexually victimizing boys for decades.

Everything in Paterno's behavior speaks to him wanting to get to the bottom of what Sandusky may or may not have been doing in the shower with the boy. He informed two of the top people in the university and, if he was actually kept informed of what happened next, he would have known that the president of the university was also informed. These are the top administrative people at Penn State. Paterno would have no reason to believe anything other than they would properly handle the information and determine what had actually taken place. Paterno would not have had any reason to believe, and it has yet to be proven, that Curley, Schultz, or Spanier would conspire to conceal the information he passed on to them. He trusted them and their judgment.

Paterno also may have known from his discussion with Curley that Curley had planned to inform at least The Second Mile and maybe DPW. Either plan is clearly not an attempt to conceal information. If he had known about the 1998 investigation and if he had remembered any details of it in 2001, it would not have seemed unusual for the 2001 allegations also to turn out to be unfounded and easily explained as boundary issues. He was not trained in the area of child sexual victimization. He did not know that Sandusky would later be found out and convicted of numerous counts of sexually assaulting boys. He thought he knew Sandusky and was fooled by his personality, professionalism, and outward dedication to helping children.

When there exists another more reasonable interpretation of the events that actually takes into account the specific and counter-intuitive dynamics of acquaintance child sexual victimization, in my opinion it is incorrect to conclude that Paterno's intent was criminal in nature as opposed to simply being fooled like the rest of the community. Yes, everyone but Sandusky wishes that Paterno had been trained in the field of preferential child sex offender behavior, "nice-guy" acquaintance offenders, "grooming," and "compliant victimization." If he had, he might have been better able to recognize Sandusky's behavior for what it was. He might also have been able to decipher McQueary's sketchy report for what it was intended to be. But Paterno was never trained in this area and had no experience dealing with issues related to it. In light of the fact that Paterno is no longer here to answer detailed questions about the incident or his reactions thereto, it is wrong to conclude that he was involved in an agreement to conceal Sandusky's activities from law enforcement. There is no evidence that Paterno had reason to believe that Sandusky was a child sex offender in the first place, and no evidence that he was part of any agreement to conceal.

Based on my decades of experience with these exact type cases and offenders as skilled as Sandusky, it is completely understandable, and in no way blameworthy or immoral, that Paterno did not recognize Sandusky for what he truly was and do more. Years of anecdotal evidence tells us that nearly anyone in his position, even those held in the highest moral regard like Paterno, without an understanding of acquaintance child sexual victimization, would have acted in the same way. What Paterno did and didn't do in this case is very different from what has been revealed and litigated in the past in organizations like the Boy Scouts of America, and the Catholic Church, where there was a knowing and deliberate plan to conceal the explicitly documented sex crimes of multiple offenders to preserve the name of the organization.

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Instead, Sandusky is a case involving effective grooming by a "nice-guy" acquaintance offender, with classic compliant victims who were extremely reluctant to come forward. The victims and witnesses who did come forward in 1998 and 2001 gave equivocal and watered down versions of what happened and as a result, the true nature of Sandusky's behavior was not discovered at the time. Sandusky fooled an entire community for decades because he actually did help thousands of children through The Second Mile, while he molested selected boys from that group.

V. Difficulties Investigating "Pillar of the Community" Cases

Most people don't realize how extremely difficult it is to make a case against a male "pillar of the community" who is accused of committing sex crimes against boys. As demonstrated in this case in 2008 when allegations again surfaced against Sandusky, it took the better part of three years for the authorities to remove his access to children and arrest him. This delay occurred despite the fact that, this time, the allegations came from a victim who explicitly articulated that Sandusky had sexually assaulted him. By 2010, they had already interviewed and gotten a detailed statement from at least one victim[136] and an objective adult eye-witness, McQueary. At that time McQueary was actually giving detailed accounts of his belief that he had witnessed Sandusky sodomizing the boy. Why didn't they move immediately to arrest Sandusky and protect the children that were exposed to him?

The answer is not a simple one. It is as complicated and tragic as what happened when McQueary and the janitors witnessed Sandusky sexually assaulting boys. The sad truth is that law enforcement officers and prosecutors know that going up against a "pillar of the community" "nice-guy" offender with the word of just one victim is both risky, in terms of the unlikelihood of conviction, and unfair to the victim, in terms of putting a huge burden on the victim's shoulders. Therefore, they try to build an airtight case against the offender by finding more victims that are willing to testify against him. The biggest obstacle to doing that is most male victims of child sex crimes refuse to talk about it, ever. There is too much societal stigma, too many negative sexuality implications, and too much of a threat to their manhood to overcome.[137] In addition, once you have identified victims and gotten them to fully disclose, it can still take a long time to convince them to agree to testify in open court. This is something that requires a great deal of strength and courage on the part of the victims. I have investigated and consulted on hundreds of similar cases and have found that most if not all are extremely difficult to investigate and prosecute.

In my colleague Ken Lanning's treatise on the subject, *Child Molesters: A Behavioral Analysis*, he states:

> For the public the "default setting" still seems to be stranger abduction. To them child molesters are sick perverts or "predators" who physically overpower children and violently force them into sexual activity.

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[136] Sandusky trial transcript, June 12, 2012, at 148.

[137] This is in addition to the guilt, shame, embarrassment and/or self-loathing that most victims of child sex crimes experience.

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> The often forgotten piece in the puzzle of the sexual victimization of children is acquaintance molestation.[138]

> Acquaintance molesters are still, however, one of the most challenging manifestations of sexual victimization of children for society and professionals to face. People seem more willing to accept a sinister, unknown individual or "stranger" from a different location or father/stepfather from a different socioeconomic background as a child molester than a clergy member, next-door neighbor, law-enforcement officer, pediatrician, teacher, coach, or volunteer. Acquaintance molesters often gain access to children through youth-serving organizations. The acquaintance molester, by definition, is one of us. He is not simply an anonymous, external threat. He cannot be identified by physical description and, often, not even by "bad" character traits. Without specialized training or experience and an objective perspective, he cannot easily be distinguished from others.[139]

This last sentence is critical in understanding the behavior of Paterno in this case. He did not have any specialized training or experience. He was not in an objective position. He had known Sandusky for more than thirty years and everyone who knew Sandusky thought that he was a fundamentally good and honest person.

> Acquaintance offenders with a preference for younger victims (younger than 12) are more likely to also have to spend time seducing the potential victim's parents/guardians or caretakers to gain their trust and confidence.[140]

This dynamic is perfectly exemplified in this case. Sandusky was able to groom not only the parents, or legal guardians of the boys he victimized, but the entire community with his affable and goofy personality, his role as a husband and as a foster and adoptive parent, his work with the charity he founded, and his tireless efforts raising funds to care for tens of thousands of disadvantaged youth.

Society's lack of understanding and acceptance of the reality of acquaintance molestation and exploitation of children often results in:

- Victims failing to disclose and even denying their victimization
- Incomplete, inaccurate, distorted victim disclosures when they do happen
- Degrees of shame, embarrassment, and guilt felt by victims

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[138] Lanning at 7.

[139] *Id.* at 8.

[140] *Id.* at 10.

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- Offenders being able to exploit numerous victims over an extended period of time.[141]

All of these factors are present in the Sandusky case. Jerry Sandusky was a cunning and deliberate child sex offender. He presented himself as an advocate for children, a philanthropist, and altruist and community icon in order to get access to children for sex. That is not to say that he didn't actually "love" boys. He did "love" boys and that is why he could put up with spending so much time with them. By his own words, he actually enjoyed their company. But his "love" for boys was sexual in nature and not the nurturing love that he purported it to be. He admits in his book, *Touched*, that he felt like a kid himself. This is a common trait of many "boy lover" child sex offenders. Indeed, Sandusky and similar offenders rationalize to themselves that because they love boys, having sex with those boys is a natural extension of that love. They tell themselves that this kind of loving sex with boys is educational and nurturing for the boys and not harmful. Clearly, they are wrong. Though this country has seen many "nice-guy," "pillar of the community" child sex offenders, few of them have been as bold as to create a foundation for children, making a name for themselves as a child advocate, as someone who has dedicated his life to caring for troubled children, and as foster and adoptive parent for dozens of those children, while at the same time, using that very charity, and the foster program, as a source to hunt for victims.

Joe Paterno, on the other hand, was actually an advocate who cared deeply about his athletes as students, so much so, that he consistently maintained one of the highest graduation rates for his football players in the country. He was a true philanthropist, an altruistic community leader, and a national icon. Paterno worked with Sandusky for 30 years. He thought he knew the man. However, he and everyone else in State College who thought they "knew" Sandusky were very wrong.

VI. Additional Biases, Limitations, and Erroneous Conclusions in the SIC Report

A. Report Bias

1) The SIC report wholly accepts and rationalizes the behavior of Mike McQueary despite inconsistencies, impossibilities, and unexplained behavior.

The five men to whom McQueary reported the Sandusky shower incident in February 2001, all had recollections that differed from what McQueary believes he conveyed. Inconsistency in eyewitness testimony undermines the credibility of that testimony, it does not bolster it. I do not suggest that McQueary didn't witness Sandusky grooming and sexually assaulting a boy in the shower in 2001, but his accounts of what he saw, how he saw it, how many times he saw it, what he said to his father and Dr. Dranov, and then later to Paterno and still later to Curley and Schultz were filled with inconsistencies and generalities. However, they were taken as credible and accurate accounts of the actions he observed and undertook, and the words that he used. Given the fact that none of the actions or words were documented at the time — in fact they were first documented almost a decade later — the accuracy and reliability of those accounts and specific words should have been taken as fairly low, particularly in light of

[141] *Id.* at 11.

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the variations in those accounts. The one thing that McQueary has consistently stated is that he told Paterno far less than what he thought he saw.

2) The SIC report rationalizes McQueary's and the janitors' behavior and condemns the actions of Paterno.

The executive summary of the SIC report is written in such a way that it rationalizes the behavior of McQueary and the janitors while it condemns most of Paterno's behavior. By doing this, the SIC is engaging in argument instead of stating fact. For example, the SIC stated, "Fearing that they would be fired for disclosing what they saw, neither janitor reported the incidents to the University officials, law enforcement or child protection authorities."[142] This statement rationalizes the behavior of the janitors. Later, the SIC notes that "McQueary met with and reported the incident to Paterno on Saturday, February 10, 2001." This is a neutral statement of fact. Compare both of these statements to the SIC characterization of Paterno: "Paterno did not immediately report what McQueary told him, explaining that he did not want to interfere with anyone's weekend."[143] This statement is argumentative and misleads the reader into thinking that Paterno unnecessarily delayed reporting the incident based on an absurdly weak excuse.[144]

3) The SIC report did not understand the behavior and reactions of McQueary and the janitor, so the SIC blamed the confusing reactions of McQueary and the janitors on Paterno and Penn State.

What the SIC report fails to process or even consider is the fact that McQueary and the janitor witnessed such a confusingly negative event that it affected both of them profoundly. The janitor compared what he witnessed to the horrors of war he witnessed in Korea. He said that he witnessed something he will never forget, but he couldn't bring himself to report it to the authorities. And McQueary testified that what he had just witnessed was "ridiculous" and was so embarrassing that he wanted to get out of there as quickly as he could. Though McQueary pushed past his discomfort to a degree, reporting the incident to his father and Dr. Dranov, he had a great deal of trouble verbalizing the details. Then when he recounted the incident to Paterno, he apparently had an even more difficult time recounting any details because of how "prudish" Paterno was known to be. It is the profoundly disturbing nature of child sex crimes that is to blame for the message getting lost on the people to whom McQueary reported.

4) The SIC selectively quotes Paterno's testimony to cast Paterno in the worst light.

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[142] SIC report at 62. Fear of losing one's job is not a justification for not acting when you are an eyewitness to a child being sexually assaulted. Although I have no reason to question whether the janitor feared for his job, this is absolutely no excuse for an adult to allow a child to be sodomized right in front of his eyes. This janitor is the only known person who actually witnessed Sandusky sodomizing a boy, and knew exactly what he was witnessing, yet he let it happen and did nothing to stop it or report it to any administrators or authorities.

[143] *Id.*

[144] Paterno did in fact interfere with their weekends and the SIC was well aware of this. As the SIC report itself states on page 62, "On Sunday, February 11, 2001, Paterno met with and reported the incident to Curley and Schultz." *Id.* at 62.

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According to the SIC, "We also know that he delayed . . . Mr. Paterno . . . reporting Sandusky's sexual conduct because Mr. Paterno did not to 'want to interfere' with people's weekend."[145]

The SIC is well aware that Paterno did in fact "interfere" with the weekends of Curley and Schultz because he met with them the very next day on the very same weekend — Sunday, February 11, 2001. And the SIC should be aware that Paterno may very well have called Curley on Saturday to set that meeting up. Remarkably, the SIC failed to note that Paterno was unavailable and flew to Pittsburgh that Saturday — the day McQueary reported to Paterno — to be inducted into the Pittsburgh Sports Hall of Fame. This is a fact that was well documented in new stories.[146]

The SIC quotes from Paterno's grand jury testimony but ignores Paterno's later testimony and the testimony of others. In November 2011, Paterno told his biographer, "I'm pretty sure I called him that day. I know it was a weekend, so I can't be a hundred percent sure, but I do think I called him that day."[147] In January 2012, Paterno told an interviewer that he "[w]aited till Sunday because I wanted to make sure I knew what I was doing."[148] (Notably, the SIC quotes Paterno's words that immediately precede this sentence, but ignores this sentence.) Furthermore, Curley and Schultz have testified that they did in fact meet on Sunday, February 11 to discuss this matter. So, Paterno did interfere with Curley's and Schultz's weekend. None of them remember exactly when Paterno called, but we do know that they met the very next day. It is possible that Paterno made the call on Saturday, February 10, the same day that McQueary told him about the incident, and they met the following day. In sum, the SIC selectively quotes the one statement that puts Paterno in the worst light even though two of Paterno's later statements and the testimony of everyone else involved in addition to the facts themselves directly contradict the quote that the SIC chose to highlight.

5) The SIC unfairly compares the 1998 investigation into allegations against Sandusky, which resulted in a finding of no sexual intent and no criminal conduct, to banning a sports agent from campus who was found guilty of a crime.

In criticizing Penn State officials for not limiting Sandusky's access to Penn State facilities, the SIC report compares the Sandusky investigation to a situation in which a sports agent had been banned from the campus. This type of comparison demonstrates the SIC's lack of understanding regarding acquaintance child sexual victimization. According to the SIC report, "Spanier never declared Sandusky a 'persona non grata' on Penn State campuses, as he did toward a sports agent who, before the 1997 Citrus Bowl . . . ."[149] The SIC quotes Spanier as saying at the time that the "agent fooled around with the integrity of the university, and I won't

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[145] Louis Freeh, press conference, July 12, 2012. The SIC also repeats this misleading claim three times in its report. SIC report at 23, 62, and 68.

[146] *See, e.g.*, Ed Bouchette. *Dorsett, Paterno enter Pittsburgh hall*, Pittsburgh Post-Gazette. Feb. 10, 2001, at B-1.

[147] Posnanski at 272-73.

[148] Sally Jenkins, *Joe Paterno's last interview*, Wash. Post. Jan. 14, 2012.

[149] SIC report at 52.

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stand for that."[150] What the SIC does not mention is that the agent Spanier was referring to actually broke the law, was charged and convicted.[151] There was no question that it was a crime, and there was no question about what actually happened. And the result of that investigation was that the agent pleaded no contest, was found guilty, and the judge ordered him to pay a $10,000 fine and perform 100 hours of community services as part of a year of probation for his conviction. Contrast that with the Sandusky incident in 1998. The original accusation was the Sandusky had showered with a young boy and it may have been inappropriate. After a full investigation, child welfare experts, police, and the district attorney made a finding of no criminal activity. This is not a fair comparison.

B. Limitations of Mandate

However well intentioned, the SIC investigation was admittedly limited in scope, depth, and power. It was neither a criminal nor a civil litigation-based investigation with subpoena power, grand jury power, the power to conduct covert investigation or overhears, the power to compel interviews or take sworn testimony, or the power to grant limited or complete immunity. Because this investigation lacked the power and authority to utilize these basic and essential investigative tools, it should not be taken as the final and comprehensive word on the facts and circumstances surrounding the sexual victimization crimes committed by Jerry Sandusky.[152] It had the limited scope and purpose of investigating the child sexual victimization activities by former Penn State coach Sandusky at the university, and the administration's response to those activities. The SIC investigation had to rely on the voluntary cooperation of individuals and organizations involved. The SIC investigation was not intended to replace a thorough and comprehensive civil or criminal investigation into all of the sexual victimization offenses committed by Jerry Sandusky, of The Second Mile, or of any other matter inside or outside Penn State University.

Of particular note is the SIC investigation does not find evidence of earlier child sex crimes by Sandusky during the nearly three decades of Sandusky's association with Penn State prior to the allegations that surfaced in 1998. We know from Sandusky's adoptive son, Matt, that Sandusky had been molesting him since he was 8 years old in 1987[153] and preferential child sex offenders typically recognize their attraction to children in their late adolescence and begin offending shortly thereafter.[154] In the Catholic Church child sexual victimization cases, a majority of victims took over 30 years to disclose their victimization.[155] Furthermore, the SIC does not explore the nearly three years of sex crimes likely committed by Sandusky during the Attorney General's investigation that began in 2008.

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[150] *Id.*

[151] The agent took Penn State's running back, Curtis Enis, on a $1,000 shopping spree. Donald Gilliland, *Graham Spanier said agent in Curtis Enis incident 'fooled around' with Penn State's integrity*, The Patriot-News, July 15, 2012.

[152] It should be noted here that when asked, Louis Freeh stated that the SIC report was not intended to make criminal conclusions, it only made "reasonable conclusions."

[153] Michael Isikoff, *Matt Sandusky details alleged sex abuse by his father*, NBC News, June 26, 2012.

[154] Lanning at 53.

[155] Karen J. Terry, et al., John Jay College Research Team, The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010, at 78 (May 18, 2011).

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There have been unconfirmed news reports of allegations against Sandusky between the 1970s when he founded The Second Mile and 1987, and as an expert in the field, in my opinion, there is a very high probability that Sandusky had been grooming and victimizing boys during this time. This, in and of itself, underscores both the limitations of the SIC investigation and the effectiveness of Sandusky's "grooming" capabilities.

The SIC investigation was also limited in that it did not utilize the typologies of "nice-guy" acquaintance child sex offenders and their methodologies, of "grooming" and the results thereof, and of "compliant victimization" and the counter-intuitive way in which victims of this class of crimes behave. In sum, it is my opinion that in addition to the SIC being hampered in their task by not having criminal or civil investigative powers, they drew erroneous conclusions based on, among other things, their lack of consideration of the specific and counter-intuitive dynamics particular to acquaintance child sexual victimization cases.

Though the SIC investigation conducted over 430 interviews, and reviewed over 3.5 million pieces of data and documents, they actually uncovered only four that reference Paterno.[156] They did not interview any victims, nor did they interview Mike McQueary, John McQueary, Dr. Dranov, Paterno, Curley, Schultz, or Sandusky. None of the emails or notes discovered by the SIC investigation that referenced Paterno were found before Paterno's death and therefore Paterno was never given the opportunity to affirm or refute the references made to him therein. This dearth of evidence relating to Paterno creates a hole in any case against him, but it does not create a justified opportunity to fill that hole with conjecture and assumptions.

The SIC report treats the well-disguised, insidious, and hidden behavior of Sandusky as if it were an average event on campus about which Paterno would know everything. In fact, it is anything but that.

The SIC report gives all sources of information equal weight and credibility without taking into account their reliability or nature, including contemporaneous documentation of events, decade old memories of events, sworn testimony, statements made to the press, triple hearsay, rumor, and innuendo. However, the report unfortunately ignores a tremendous resource, Joe Posnanski, a biographer who was interviewing Paterno during critical periods of the breaking Sandusky scandal. As such, Posnanski was witness to events as they unfolded and since Paterno is no longer alive, the interviews Posnanski had with Paterno contain valuable information that should have been considered. While his book was not published until August 2012, it was well-known that he was writing the book and had access to Joe Paterno.

C. Other Errors and Erroneous Conclusions

1.) *The SIC concludes that there was "[a] culture of reverence for the football program that is ingrained at all levels of the campus community."*[157]

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[156] *See* Curley's May 5, 1998 email to Schultz, SIC report at Ex. 2A; Curley's May 13, 1998 email to Schultz, SIC report at Ex. 2B; Schultz's handwritten note on February 12, 2011, SIC report at Ex. 5C; Curley's February 27, 2001 email to Spanier and Schultz, SIC report at Ex. 5G.

[157] SIC report at 17.

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The fact that Paterno is personally responsible for conducting "The Grand Experiment" that resulted in making Penn State football one of the most successful, academically oriented college football programs in the country should and rightly did command a culture of reverence within the university and within college football in general. Moreover, a culture of reverence can exist in any sport, in any organization, in any community, in any location; and, "nice-guy" acquaintance offenders have groomed victims and members of all those communities over the years.

It is only because the SIC report lacks an understanding of the dynamics of acquaintance child sexual victimization that it has misconstrued the behavior of the individuals involved and blamed Sandusky's ability to hide and continue his offending on the "culture of reverence for the football program." If the writers of the SIC report had fully understood those dynamics, they would not have been searching for reasons why Paterno and others did not recognize Sandusky's offending behavior for what it was.

2.) *The SIC incorrectly assumes that McQueary communicated enough information to Paterno for Paterno to understand the need for immediate law enforcement intervention.*

According to Louis Freeh at his press conference, "We never had the opportunity to talk with Mr. Paterno, but he did say what he told McQueary on February 10, 2011 when McQueary reported what he saw Sandusky doing in the shower the night before. 'You did what you had to do. It is now my job to figure out what we want to do.' What was to figure out here?"

All the evidence and McQueary's own testimony indicates that Paterno did not know that McQueary believed he saw Sandusky having sex with the boy. McQueary's implications were not direct enough to convey to Paterno that the boy was being sexually victimized. And, the above quoted statement by Paterno[158] was further illuminated in his interview with Posnanski in which he stated, "I told [McQueary] that he did the right thing bringing it to me, and that now it was my job to get him together with the right people for him to report it."[159] What Paterno had to figure out was who were the right people to report to. So, in Paterno's own words, "I didn't know what to do. I had not seen anything. Jerry didn't work for me anymore. I didn't have anything to do with him. I tried to look through the Penn State Guidelines to see what I was supposed to do. It said that I was supposed to call Tim [Curley]. So I called him."[160] The record speaks for itself here.

3.) *The SIC claims that it was not making legal conclusions. At his press conference, Louis Freeh was asked "could it be construed as obstruction of justice, conspiracy, aiding or abetting, or a cover-up?" Freeh replied, "Those are all legal conclusions, which I'm not prepared to make. The evidence clearly shows in our view an active agreement to conceal, and I*

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[158] *See supra* Part IV.B.4. As stated earlier, Paterno gave three different accounts of what he told McQueary and the SIC chose the quote that put Paterno's actions in the worst light.

[159] Posnanski at 272.

[160] *Id.*

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think it would be up to a grand jury and a law enforcement officer to make decisions whether it meets the elements of criminal offenses."[161]

In fact, Freeh did make a number of unsubstantiated legal conclusions. Freeh stated "[t]he evidence clearly shows" that Paterno "repeatedly concealed critical facts relating to Sandusky's child abuse from authorities," Paterno was an "integral part of this active decision to conceal," and, consequently, Paterno "empowered Sandusky" and "failed to protect against a child sexual predator harming children for over a decade." The definition of a conspiracy is an agreement between two or more persons to commit a crime. And knowingly conspiring to conceal evidence of the sexual victimization of a child is a crime. While Freeh never used the word "conspiracy," he nonetheless enunciated the elements of a criminal conspiracy.[162]

Although, Curley, Schultz, and later Spanier, were all charged with crimes, Paterno was not. However, the SIC report lumps all four of these men, and their actions and inactions, together effectively accusing Paterno of committing a crime.

4.) *The SIC notes, "Before May 1998, several staff members and football coaches regularly observed Sandusky showering with young boys in the Lasch Building (now the East Area Locker Building or "Old Lasch"). None of the individuals interviewed notified their superiors of this behavior."*[163]

As stated in the SIC report, none of the staff members who observed Sandusky showering with boys informed Paterno, therefore, it is wrong for the SIC to attempt to hold Paterno responsible for the actions and inactions of others.[164] However, even if Paterno had known about this practice, adult coaches showering with boys after sporting or exercise activity is not wrong unless there are nefarious or sexual intentions. This happens every day across the United States and around the world in gyms, locker rooms, and YMCA's. In fact, Paterno's own son showered with Sandusky and other coaches on many occasions.[165]

5.) *According to the SIC, "On May 5, 1998, Schultz's notes about the incident state: "Is this opening of pandora's box? Other children?"*[166]

These are valid questions that were officially answered by the closing of the investigation with a finding of no sexual intent and no criminal behavior. However, there is no evidence Paterno was ever aware of these notes.

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[161] Louis Freeh, press conference, July 12, 2012.

[162] Additionally, by alleging that all four men were responsible for the actions of each individual. Freeh was relying on the legal principles of conspiracy. Once any person involved in a conspiracy commits an overt act in furtherance of a conspiracy then all of the co-conspirators are responsible for all actions committed in furtherance of that conspiracy.

[163] SIC report at 39, 40.

[164] As head coach, Paterno had a shower in his office. However, Paterno rarely used the shower and instead showered at home. He therefore did not shower with the other coaches and athletes. Interview with Paterno family member on Jan. 4, 2013.

[165] Interview with Paterno family member on Jan. 4, 2013.

[166] SIC report at 20, 39, 48.

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6.) *According to the SIC, "On June 9, 1998, Schultz emails Spanier and Curley: 'I think the matter has been appropriately investigated and* I hope it is now behind us.*'"*[167] *The SIC' italicized that last clause for emphasis.*

Of course Schultz would be relieved that the matter was investigated and resolved with a finding that there was no sexual victimization. However, by italicizing the phrase for emphasis, the SIC report attempts to superimpose nefarious intent on this communication when the evidence about 1998 proves the opposite.

7.) *According to the SIC, the "Detective recalled interviewing Sandusky in the Lasch Building so as not to put him 'on the defensive.' The detective advised Sandusky not to shower with any child and Sandusky said he 'wouldn't.'"*[168]

This is a common investigative practice, especially in child sexual victimization cases. In fact, this is how the FBI teaches CSV investigators to maximize the chances of gaining cooperation. The fact that the SIC report even mentions it in this light demonstrates a misunderstanding of child sexual victimization cases and how they are investigated. The more relaxed and non-confrontational the law enforcement officers are when interviewing suspected child sex offenders, the more they increase their chances of obtaining a confession. This is because child sex offenders expect to be vilified by law enforcement. When they are treated with dignity and respect and encouraged to relax, it undermines their expectations, builds a bond of rapport, and it creates an environment that is more prone to honest disclosures.

Additionally, as discussed above, the fact that the detective advised Sandusky not to shower with any child is an appropriate response to a finding that he had boundary issues related to showering with boys and horsing around with them. Such an admonition holds far greater weight than that of the head coach, especially since it relates to children on and off campus.

8.) *According to the SIC, "Despite their knowledge of the criminal investigation of Sandusky, Spanier, Schultz, Paterno and Curley took no action to limit Sandusky's access to Penn State facilities or took [sic] any measures to protect children on their campuses."*[169]

This is an absurd statement in light of the circumstances. These men are not clairvoyant. The information received from the trained childcare worker, detective, and prosecutor was that there was no sexual intent, and no crimes committed.[170] Instead, there were indicators of boundary issues. Taken in the context of a well-respected member of the community who was highly thought of and praised for his work with youth, this is not the factual profile the general public would expect to pose a threat to children. This suggestion by the SIC implies that all people exonerated during the course of a criminal investigation should be treated as if they had been convicted. It is wrong to accuse these men of doing nothing to protect children from a man who was just exonerated.

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[167] *Id.* at 39, 50.

[168] *Id.* at 20, 39, 46.

[169] *Id.* at 39.

[170] *See id.* at 46-50, Ex. 2D, Ex. 2E.

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They were not told, for example, that the investigation against Sandusky uncovered evidence that he was victimizing children but they did not have enough to prosecute. They were told, instead, that there was no sexual intent. And at worst, they may have been told that Sandusky may have boundary issues. Therefore, the proper action to take was to have the police admonish Sandusky not to cross those boundaries again by showering with any child in the future. That would include children on or off the Penn State campus.

9.) *According to the SIC, "At the very least, Mr. Paterno could have alerted the entire football staff in order to prevent Sandusky from bringing another child into the Lasch Building."*[171]

This is a baseless suggestion. Paterno would have made himself vulnerable to a defamation lawsuit or other action if he had spread rumors about Sandusky after he was cleared of wrongdoing in this matter. Those at Penn State who knew about the 1998 investigation would have had no reason to suspect that this was not an isolated incident that would never be repeated because Sandusky had been admonished not to shower again with any child by the UPD.

10.) *The SIC notes, "Paterno told a reporter that 'I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was. So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way.'"*[172]

Paterno's fear of breaking even University rules should be more reasonably taken as an indication of his integrity, not as an indication that he was afraid of bad publicity. In fact, no evidence recounted by the SIC Report indicates that Paterno even mentioned bad publicity or a fear of the effects thereof.

11.) *According to the SIC, Paterno's "failure to protect the February 9, 2001 child victim or make attempts to identify him, created a dangerous situation for other unknown, unsuspecting young boys who were lured to the Penn State campus and football games by Sandusky and victimized repeatedly by him."*[173]

Paterno had no way of knowing that Sandusky had any victims. Sandusky had been cleared in 1998 and he did not know McQueary was trying to tell him that he thought Sandusky was actually having sex with the boy in the shower in 2001. Paterno told his biographer, "I wouldn't know how to investigate something like this. I don't know anything about it. [Jerry] didn't work for me. I had a meeting with Tim and Gary [Schultz] might have been there, and I told them what Mike had told me. And they said they would get to the bottom of it. I trusted Tim would take care of it. He's a good administrator. He had negotiated the retirement deal with Jerry, and he was still in contact with Jerry. Tim's a good person. I expected him to handle it right."[174]

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[171] Louis Freeh, press conference, July 12, 2012.

[172] SIC report 16, 77-78 (quoting Sally Jenkins, *Paterno's Last Interview*, Wash. Post, Jan. 14, 2012).

[173] Louis Freeh, press conference, July 12, 2012.

[174] Posnanski at 273.

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Additionally, with respect to making attempts at identifying the victim in 2001, the plans that Curley may have talked over with Paterno included notifying the chair of The Second Mile. Paterno had known and worked with Sandusky for over 30 years by this time and he was well aware that Sandusky often brought The Second Mile children to Penn State and elsewhere. Had Paterno been told any details of Curley's plans, Paterno would have had every reason to believe that by informing The Second Mile of what Sandusky was seen doing with a boy in the shower, The Second Mile would easily be able to identify that child and investigate what if anything happened to him that day. To say that he did nothing to identify that child or protect him or other boys from victimization is simply inaccurate.

12.) *According to the SIC, "The law enforcement officers did not question Sandusky at this time. Had the officers been better trained in the investigation of child sexual abuse they would have interrogated Sandusky directly after his confrontation with the boy's mother. A timely interview with Sandusky may have elicited candid responses such as the identification of other victims."*[175]

The officers may have been trying to protect their investigative source (the mother) and their investigative method (consensually monitoring the conversations) from Sandusky. They may very well have promised the mother that they would not let Sandusky know that she was cooperating with the investigation. We really shouldn't be "Monday morning quarterbacking" here. Even if this statement were true, none of this has anything to do with Paterno or Penn State administrators. In fact, Paterno had absolutely no child sex crimes investigative training, or even child sex crimes awareness training. If objective, trained investigators and child welfare workers misevaluated this situation, then it is even more likely that Paterno did as well, especially when he personally knew Sandusky and his only conceivable source of information about the incident, if he received any information at all, was from those very professionals.

13.) *According to the SIC, "Sometime between May 27, 1998 and June 1, 1998, the local District Attorney declined to prosecute Sandusky for his actions with the boy in the shower in the Lasch Building on May 3, 1998. A senior administrator of a local victim resource center familiar with the 1998 incident said the case against Sandusky was 'severely hampered' by Seasock's report."*[176]

Though Seasock's report may have been filled with misconceptions, mischaracterizations, and erroneous conclusions, nevertheless, it was the report that the DPW, UPD, and the DA based their decision on to close the 1998 investigation.

14.) *According to the SIC, "Schreffler also noted that no referral of the Sandusky incident was made to the Penn State Office of Human Resources ("OHR"). Schreffler said such referrals routinely were made in other cases. A senior OHR official recalled no report of the Sandusky incident in 1998, and the OHR files contained no such report. The official thought the Sandusky case was so 'sensitive' that it was handled by Schultz alone. The official said no*

[175] SIC report at 45-46.

[176] *Id.* at 46.

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written policy required OHR to be notified by the campus police of incidents involving employees, but it was 'very rare' for OHR not to be notified."[177]

When allegations of this nature are made against a "pillar of the community" and are determined to be unfounded, then it is in fact proper to contain the information and treat it as "sensitive," because of the grave damage that it can do to the reputation and profession of an innocent person. Had the allegations been substantiated, however, then notifications and warnings would have been necessary and proper.

15.) *The SIC includes a passing footnote stating, "Penn State officials were familiar with the issues of liability that could arise from Sandusky bringing minors to the Lasch Building. For example, notes maintained by Paterno reflect that Sandusky proposed several continuing connections with Penn State when he retired in 1999. Among these connections was that he would have continuing '[a]ccess to training and workout facilities.' A handwritten note on this proposal reads: 'Is this for personal use or 2nd Mile kids. No to 2nd Mile. Liability problems.'"*[178]

While it is clear from this notation that Paterno appropriately considered potential "liability problems" associated with Sandusky bringing The Second Mile kids into training and workout facilities at the university, there is absolutely no evidence to indicate that this concern had anything to do with potential sexual victimization. This reference related to benign general liability regarding use of school facilities for non-school purposes. This is a basic tenant of insurance coverage law. It is a reasonable concern that the school would be outside its standard coverage for any instance in which The Second Mile children were brought on campus.

16.) *The SIC notes that "In the Fall of 2000, a University janitor observed Sandusky sexually assault a young boy in the East Area Locker Building and advised co-workers of what he saw. Also that evening, another janitor saw two pairs of feet in the same shower, and then saw Sandusky and a young boy leaving the locker room holding hands. Fearing that they would be fired for disclosing what they saw, neither janitor reported the incidents to University officials, law enforcement or child protection authorities."*[179]

The SIC ignores that the janitor who witnessed this sexual assault was a part-time, temporary employee.[180] How is it that this person who was not even a full-time employee of the university is in a position to characterize the culture at the university? Again, the SIC report fails to point out that the janitor made a grave miscalculation. In fact, he would have not have been fired if he reported Sandusky or rescued the child he actually witnessed being sodomized. This is proven by the fact that McQueary reported what he saw and remained on staff and later was even promoted.

17.) *The SIC notes that "On Sunday, February 11, 2001, Schultz reached out to then University outside legal counsel Wendell Courtney to discuss the 'reporting of suspected child*

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[177] *Id.* at 49.

[178] *Id.* at 51, note m.

[179] *Id.* at 62.

[180] Sandusky trial transcript, June 13, 2012, at 201, 224.

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abuse.' Courtney conducted legal research on this issue and had another conference with Schultz about it that day."[181]

Paterno was not a party to this conversation. Though Wendell Courtney categorized his consultation with Schultz as related to the "reporting of suspected child abuse," he followed it up with research and apparently reported the results of that research to Schultz.[182] According to Spanier, though Courtney did not remember the content of this conversation in 2012, Courtney was certain that what Schultz told him about the incident did not amount to a reportable event. This is because if it had been, then Courtney would have insisted that the event be reported and he would have noted his file accordingly.[183] Also, there is no evidence that Paterno knew about this conversation at the time or was ever informed of it later.

18.) *The SIC draws the following conclusion about a note written by Schultz in February 2001. "The note states that Schultz and Curley '[a]greed [Curley] will discuss w JVP [Paterno] & advise we think [Curley] should meet w JS [Sandusky] on Friday. Unless he confesses to having a problem, [Curley] will indicate we need to have DPW [Department of Public Welfare] review the matter as an independent agency concerned w child welfare.' Without ever speaking to McQueary, Schultz and Curley had already decided that not reporting Sandusky's conduct to authorities may be an option."*[184]

This extreme interpretation of the note ignores the content and context of the note itself. It is yet another example of the SIC taking the most negative and "conspiratorial" interpretation in order to substantiate a case that is based on conjecture and innuendo.[185] In fact, this note actually shows that despite Schultz being counseled by attorney Courtney that the incident did not amount to a reportable event, these men still considered reporting to DPW under certain conditions even before they talked to McQueary.

19.) *According to the SIC, "There is no information indicating that Spanier, Schultz, Paterno or Curley made any effort to identify the child victim or determine if he had been harmed."*[186]

As an expert in child sexual victimization, I disagree that Paterno and others did not make any effort to identify the child victim in 2001 or determine if he had been harmed. All of the options they discussed, and the actions Curley in fact carried out, included reporting the incident to The Second Mile.[187] The Second Mile was the highest probability source of information on the

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[181] SIC report at 62.

[182] *Id.* at Ex. 5A.

[183] Although Spanier made this statement to the SIC during its interview of him in July 2012, the SIC did not include this illuminating and exculpatory information in this section of its report. However, the SIC did use the notation in Courtney's notes to imply that Schultz suspected that Sandusky's behavior amounted to "suspected child abuse."

[184] *Id.* at 63.

[185] For analysis *see supra* Part IV.C.

[186] SIC report at 63.

[187] *See supra* Part IV.C.2 for an explanation for why it is likely that informing The Second Mile may have been at the urging of Paterno.

child that Sandusky had with him in the shower that day. The then CEO of The Second Mile is a licensed psychologist who is a mandated reporter. Paterno would have no reason to believe that The Second Mile would not follow through on the report from Curley, and it would be reasonable for Paterno to believe that The Second Mile would be in the best position to determine who the child was and whether he had been harmed in any way. If the chair of The Second Mile did nothing to follow up on the same information provided to Paterno, then surely Paterno was justified in doing what he did.

20.) *According to the SIC report, "On March 5, 2001, Curley met with Sandusky and told him: we are 'uncomfortable' with this information about the incident, that he was going to report the incident to the Executive Director of the Second Mile; and that Sandusky was not to be in athletic facilities with any young people. According to Sandusky's counsel, Curley never accused Sandusky of abusing children or used the words "sex" or "intercourse" during the discussion.*[188] *Furthermore, according to the SIC, "Advising Sandusky that the February 9, 2001 assault in the Lasch Building had been reported exposed the victim to additional harm because only Sandusky knew his identity."*[189]

Actually, informing Sandusky that his activity with the boy in the shower had been reported to The Second Mile likely significantly reduced the chances that Sandusky would do anything else with that child. It also likely reduced the chances of Sandusky doing anything in the Lasch building with other children. This is because Sandusky was now on notice that what McQueary had seen had been reported. Remember, Sandusky was the only adult who actually knew exactly what he had done to the child in the shower. Curley would have had no basis for using the words "sex" or "intercourse" with Sandusky because McQueary never used those words when he reported the incident to him.

Moreover, in the course of the 1998 investigation, the University Police informed Sandusky that his actions had been reported and admonished him not to shower with any child again. Informing a person that an allegation has been made against them and attempting to elicit a confession from that person is a well-established and effective interrogation technique that is employed by law enforcement around the world. It has the additional benefit of putting the suspect on notice that people are watching him and are suspicious about his behavior. Also, warning Sandusky not to bring any young people into the athletic facilities should reasonably curtail his use of those facilities to molest children because it increased the probability that he'd be caught if he did.

Additionally, Sandusky was not the only person who knew the identity of the child in the shower. The Second Mile was also in a position to know or determine the child's identity and investigate whether any sexual victimization occurred as well. Sandusky would not have been able to hide the identity of the child from The Second Mile had they investigated the matter.[190]

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[188] SIC report at 64.

[189] *Id.* at 63, 76.

[190] It is unknown whether The Second Mile did anything to determine the identity of the child or the nature of Sandusky's contact with him. However, what is certain is that The Second Mile had a duty of care with regard to that child and should have investigated the matter.

21.) *The SIC report accepts without proffering any evidence at all, Janitor B's word that "reporting the incident 'would have been like going against the President of the United States in my eyes.' 'I know Paterno has so much power, if he wanted to get rid of someone, I would have been gone.' He explained 'football runs this University,' and said the University would have closed ranks to protect the football program at all costs."*[191]

The SIC report uses this unsubstantiated statement to prove the football culture ruled at Penn State and he couldn't report what he saw because they would all be fired. The fact that this is not the case was proven when McQueary, who was only a graduate assistant at the time, reported an incident to the head football coach, the athletic director, and a vice president of the university. That report also went all the way up to the President of the school. Despite all of these people being informed of McQueary's report, not only was his job not affected negatively, he was promoted a few years later to assistant coach based on merit and unrelated to the 2001 incident.

22.) *According to the SIC, "The Second Mile executive director informed two Second Mile Trustees about the incident involving Sandusky and they concluded it was a non-incident for Second Mile and there was no need for further action."*[192]

Again, The Second Mile executive director is a trained psychologist, heading up a foster care organization, educated in matters of child sexual victimization, who is a mandated reporter, and he determined that Sandusky's behavior was a non-incident, not reportable, and obviously not criminal. The standard of care that this childcare professional is held to is much greater than that of Paterno in these kinds of matters. Why did the SIC not consider how this determination and inaction on the part of The Second Mile and its board would have influenced the way in which Penn State officials, and possibly Paterno, would have viewed the incident? When professionals who are trained and burdened with the responsibility to investigate and protect children from victimization do not see a problem, it is wrong for the SIC to blame people in the general public for not seeing it as well.

23.) *The SIC report claims that "Paterno [was] obligated to report the 2001 Sandusky incident to the University Policy Department for inclusion in Clery Act statistics and for determining whether a timely warning should be issued to the University Community."*[193]

In reaching this conclusion, the SIC report misstates the Clery Act and misapplies it to Paterno. Under the Clery Act, colleges and universities are required to disclose the number of criminal offenses on campus that are reported each year.[194] Recognizing that not all crimes are

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[191] *Id.* at 65.

[192] *Id.* at 64.

[193] *Id.* at 110.

[194] The Clery Act is codified at 20 U.S.C. § 1092 and the related regulations are found primarily at 34 C.F.R. § 668.46. The main goal of the Clery Act was to ensure that when selecting an institutional of higher education ("IHE"), current and prospective students, as well as their parents, would be able to obtain accurate "official" statistics about how much crime had occurred on a campus. This in turn would pressure IHEs to take student safety more seriously because they would be at a competitive disadvantage when attracting students if they did not take such steps. Bonnie S. Fischer, et al., *Making Campuses Safer For Students: The Clery Act as a Symbolic Legal Reform*, 32 Stetson L. Rev. 61, 63-64 (2002).

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reported to campus police, the Clery Act created a category of persons called campus security authorities (CSAs). The function of the CSA is to pass the report on to the official or office designated by the university to collect crime report information. The university is then responsible for including the report as a statistic in its annual security report to the U.S. Department of Education.

Even though the Clery Act creates a category of school employees called campus security authorities, the Clery Act does not place any affirmative requirements on these individuals. Nor does the Clery Act contemplate any sort of penalty for CSAs who do not make a report.[195] Instead, the Clery Act places an affirmative requirement on the institution to disclose the reports received from its CSAs.[196] It is up the institution to designate who is a CSA and craft internal university policy for collecting crime reports from its CSAs.[197] The SIC report ignores this basic fact that the Clery Act created no obligation for Paterno.

In 2001, Penn State had not even implemented the Clery Act. In fact, as of November 2011, the university's Clery Act policy was still in draft form.[198] Moreover, prior to 2007, the Penn State official charged with Clery Act compliance was unaware that the Clery Act included the concept of CSAs.[199] Therefore, in 2001, Joe Paterno along with the rest of the Penn State community, had received zero guidance from his employer that the university may want to treat him as a CSA and what that would entail.

Nonetheless, to persuade the reader that Paterno qualified as CSA, the SIC cites to the Clery Act Handbook — guidance drafted by the U.S. Department of Education.[200] The SIC is correct that on page 75 of the current Handbook a "team coach" is listed as an example of an individual who meets the criteria for being a campus security authority.[201] The SIC acknowledges in a footnote that it is citing to the 2011 Handbook but explains that "the Department of Education has had similar guidance in place setting forth its interpretation of Campus Security Authorities since at least 1999."[202] The most likely reason the SIC wrote "similar guidance" is because in 1999 the Department of Education had not published a

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[195] *See* 20 U.S.C. § 1092(f)(13). Furthermore, the Clery Act also places strict limits on its enforcement and reach. According to the statute, it may not be construed to "(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or (ii) establish any standard of care." 20 U.S.C. § 1092(f)(14).

[196] Penn State, as an institution, may have had an obligation under the Act to include any reports regarding Sandusky in its statistical disclosures pursuant to the Clery Act. However, Joe Paterno, as an individual, did not have such an obligation.

[197] According to the Department of Education, "official responsibilities and job titles vary significantly on campuses, a list of specific titles is not provided in the regulations. To determine specifically which individuals or organizations are campus security authorities for your institution, consider the function of that individual or office." U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Crime Reporting*, Washington, DC, at 75 ("Clery Act Handbook"); *See also* 34 C.F.R. § 668.46(c)(2).

[198] SIC report at 116.

[199] *Id.* at 115.

[200] Clery Act Handbook at xi.

[201] *Id.* at 75.

[202] SIC report at 113, note rr.

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Handbook (the first Handbook was published in 2005[203]) and the U.S. Code Federal Regulations did not — and still does not — indicate that a "team coach" qualified as CSA. In fact, under the Act, institutions are not obligated to designated their "team coaches" CSAs.[204]

After misstating the Clery Act and mischaracterizing the Clery Act guidance, or lack thereof in 2001, the SIC proceeds to find fault with Paterno. First, the SIC acknowledges that Paterno "did report the [2001] incident to Schultz who, as SVP-FB, was ultimately in charge of the University Police Department."[205] However, the SIC concludes that "Schultz was not a law enforcement officer and was not the person designated to receive Clery Crime reports or collect Clery Crime statistics for the University."[206] In support of this claim, the SIC included this footnote: The Clery Act regulations "require[] the University to include in its ASR [annual security report] a statement setting forth to whom individuals should report crimes. The University's ASR for 2001 did not contain any such statement; however, it generally states that the police department investigates crimes."[207] In other words, the SIC report finds fault with Paterno where no Clery Act guidance existed and where the university had not even designated him as a CSA. Despite the fact that Paterno was not required to report the incident to anyone under the Clery Act, Paterno nonetheless reported what he learned to the vice president of the university who oversaw the police department.

In sum, the SIC report is wrong about the Clery Act in two ways. First, the SIC report incorrectly states the law. Second, even if the SIC report's statement of the law were correct, Paterno fulfilled the requirements and spirit of the Clery Act. In fact, in the face of the university's failure to comply with the Clery Act and giving Paterno zero internal guidance, Paterno did exactly what he should have done under the Clery Act.

VII. Conclusions

1.) This case is a textbook example of how people in the general public misinterpret the behavior of real world acquaintance child sex offenders. The sad truth is that people do not recognize the "grooming" behavior of "nice-guy" acquaintance offenders when they know or are close to that person. They also don't talk about the topic of acquaintance child sex offenders except to show extreme outrage when such an offender is discovered among them. They then tend to demonize that offender, calling him evil and therefore imbuing him, nominally, with supernatural powers that elevate him to the level of an insurmountable adversary who displays disturbing and recognizable features. Unfortunately, this image creates a huge obstacle to

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[203] On page 50 of the 2005 Clery Act Handbook it states, "For example, a dean of students who oversees student housing, a student center or student extracurricular activities has significant responsibility for student and campus activities. Similarly, a director of athletics, a team coach and a faculty advisor to a student group also have significant responsibility for these activities."

[204] In addition to the fact that "team coach" is not listed in the Act or the regulations, according to the U.S. Department of Education's Helpdesk for Campus Safety and Security for Clery Compliance, universities are not obligated to make "team coaches" into CSAs.

[205] SIC report at 118.

[206] *Id.* at 118.

[207] *Id.* at 118, note aaa.

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identifying actual acquaintance offenders.[208] Other observers in the general public who read media accounts of these cases are misguided by these mischaracterizations. In the end, they do a great disservice to victims. Children hear these things and become fearful of monsters but never see the "nice-guy" offender who treats them special as he grooms them for sexual victimization.

2.) Because people are on the lookout for monsters, predators, perverts, and despicable human beings, they therefore do not recognize the actual "nice-guy" offenders who are standing right in front of them. This is why Paterno said, "If what they're saying about [Sandusky] is true."[209] Like so many who knew Sandusky, it was still hard for Paterno to believe that Sandusky had actually committed a host of sex crimes against boys. Hopefully, the Sandusky scandal and trial has started the process of teaching the world that seemingly good, affable, charismatic, hard working, loving, caring, "normal," professional people, can actually be child sex offenders at the very same time. Thankfully, most of them are not, but some are and we each have a responsibility to be vigilant in weeding them out.

3.) Given my 30 years of education, training and experience working, evaluating and assessing child sex crimes investigations around the world, it is my expert opinion that Paterno did not know, or even believe in the possibility, that Sandusky was capable of sexually assaulting boys. At worst, he believed that Sandusky was a touchy-feely guy who had boundary issues. This fact is clear from his repeated statements before he died. He did what he believed was reasonable and necessary to address the situation based on his understanding of the facts, and his position at the time. Paterno did what most people who cared about children would have done in the same situation. More than a decade later, and in hindsight, Paterno showed his concern for the victims when he stated he, "wished [he] had done more." He also said, "If this is true we were all fooled, along with scores of professionals trained in such things, and we grieve for the victims and their families. They are in our prayers."[210]

4.) In the end, it was the perfect storm of events that created the circumstances under which Paterno reasonably failed to recognize the severity of what McQueary was trying to suggest to him and consequently did not do more to address the issue. McQueary was overwhelmed with confusion and disbelief at what he briefly witnessed in the shower in 2001 and did not effectively communicate what he saw to Paterno. McQueary knew nothing about "nice-guy" acquaintance offenders, so he was completely thrown-off by what he saw Sandusky doing to that boy. And he knew nothing of "compliant victimization," and therefore was further confused by the counter-intuitive way in which the boy acted when they made eye contact during the incident. Consequently, McQueary didn't know what to do at first. He then went to his father and Dr. Dranov for advice and was directed to inform Paterno. Unfortunately, McQueary failed to use graphic sexual terms with Paterno, whom he looked up to and respected. Instead,

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[208] One of the best indicators of the continuing lack of understanding of the nature of "pedophilia" is that the media and society still view as a contradiction the fact that someone could be a caring, dedicated teacher (e.g., clergy member, coach, doctor, children's volunteer) and sexually victimize a child in his care. The vast majority of dedicated schoolteachers are not pedophiles, but many pedophiles who become schoolteachers are dedicated teachers. Lanning at 37.

[209] Posnanski at 273-74.

[210] Paterno family press release, November 6, 2011.

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McQueary gave a watered-down version with implied sexual behavior to Paterno who reasonably inferred borderline/non-sexual behavior from McQueary's words.

5.) Paterno, like everyone else who knew Sandusky, simply fell victim to effective "grooming." As an expert behavioral analyst and based on my review of the evidence, Paterno did not believe that the information he received from McQueary amounted to Sandusky being a predatory child sex offender.

6.) There is no evidence to support the conclusion that Paterno engaged in "an active agreement to conceal." As this report demonstrates, Paterno learned so little from McQueary there was nothing for him to conceal. Nonetheless, if we accept the erroneous conclusion that Paterno had something to conceal, the SIC misinterprets a critical email[211] to which Paterno was not even a party. Quite simply, the SIC misread the email, ignored its context and content, ignored an earlier critically important document,[212] and reached what it deemed a "reasonable" conclusion. In that process, the SIC erred in its findings and failed to reach a more reasonable conclusion grounded in fact and informed by decades of child sex crimes research and case work.

7.) It is clear from the evidence that Paterno never made any attempt to hide any information, hinder or impede any investigation, silence any witnesses, or limit the number of people to whom McQueary reported the incident. It is also clear that there is absolutely no evidence presented by the SIC that Paterno ever expressed any fear of or aversion to bad publicity or the effects thereof.

8.) The fact that Sandusky molested a number of boys over the course of several decades has nothing to do with Penn State football or Joe Paterno. It could have happened under any head coach, of any sport, in any school or university. If the public continues to convince itself of that misperception, then they are unwittingly enabling other "nice-guy" offenders who are out there right now. In doing so, they will cancel out everything learned about acquaintance child sexual victimization during the past several decades. They will not get us closer to understanding these cases and preventing or limiting them in the future. And we, as a society, are doomed to seeing this happen over and over again, at other schools and in other settings. Unfortunately, this is the mistake that the SIC report made. There is no other way to say it: on the most critical aspects of the Sandusky investigation, the SIC report is a failure. It does a tremendous disservice to Penn State, Joe Paterno, and the victims of Jerry Sandusky.

9.) Indeed, it is time we stop letting child sex offenders get away with their crimes right under our noses by blaming their ability to hide their activities on things like the culture of college football. The blame should be shared by all who refuse to speak openly about child sexual victimization and on our ignorance of the ways offenders actually disguise their offending behavior. We must have a dialogue on what "nice-guy" offenders look and act like, and the counter-intuitive ways in which real victims respond to "grooming" and sexual victimization. This is especially true for male children who are victimized by male offenders. They simply do not want to talk about it. Most of them want it to stop but do not know how to accomplish that

[211] SIC report at Ex. 5G.

[212] *Id.* at Ex. 5C.

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without stopping the benefits they are receiving through grooming, or without hurting the offender's feelings, or they feel trapped by the circumstances and don't know how to extricate themselves from the relationship into which they have been manipulated. Blaming football and Joe Paterno has not gotten us any closer to protecting children from "nice-guy" acquaintance offenders.

VIII. Recommendations

A. What the Freeh Group and SIC Report Should Have Done

In my opinion, the SIC investigators should have taken into account the fact that charges were never brought against Paterno. This was for good reason: he cooperated fully with the investigation and did not commit any crimes. The SIC should have withheld final conclusions until the evidence against Curley, Schultz, and Spanier was presented and examined regarding perjury and concealment of information to determine its accuracy and credibility. The SIC should have refrained from speculation until the attorney general's office lifted the restrictions on interviewing critical witnesses and suspects in the Sandusky, Curley, Schultz, and Spanier investigations. In short, the SIC report was a rush to judgment.

They should have interviewed Sandusky's victims, his foster and adoptive children, and his wife. They should have admitted on the record that, although they have theories about concealing information and questions about why more was not done, they did not find any actual evidence of an agreement to conceal between Curley, Schultz, Spanier, and Paterno. And they should have admitted that, even if they did find that a conspiracy existed between Curley, Schultz, and/or Spanier, they did not find any evidence to tie Paterno into that agreement. They should have refrained from speculating and accusing a man who should have been presumed innocent until proven otherwise. Although the SIC states that their conclusions are "reasonable," this is not a legitimate legal standard and would therefore hold no weight in a court of law and should hold little weight in the court of public opinion. Finally, and most importantly, the SIC should have taken into consideration the unusual dynamics of acquaintance child sexual victimization crimes, grooming, and compliant victimization in order to better understand the actions and inactions of all the people involved, including Joe Paterno's reasonable response to the limited information he was given.

B. A Way Forward

1. Next steps

A thorough and complete criminal investigation should be undertaken into the child sexual victimization crimes committed by Jerry Sandusky. Though the statute of limitations has most likely lapsed on any crimes he committed long ago, in order to get a complete picture of Sandusky's offenses against children, this investigation should go back as far as Sandusky's association with younger children that his parents cared for when Sandusky was a teen and young adult. Although many decades have passed since Sandusky was a teen, based on the behavioral typology of offenders like him, the potential for him to have victimized children since that time is very high. More importantly, the ramifications of such victimization could still be

affecting those victims today. They deserve to have the crimes they were subjected to investigated and resolved.

Additionally, a comprehensive and proactive investigation should be undertaken of The Second Mile and its administration. All former child participants in the program who had any private, one-on-one contact whatsoever with Sandusky should be interviewed by a forensic child interview specialist and/or evaluated by a forensic child psychologist and offered psychological counseling. All of Sandusky's former foster children should be interviewed to determine if any of them were witnesses or victims of grooming or sexual victimization by Sandusky. All of Sandusky's adopted children (male and female) should also be interviewed for the same reason. If not done already, Sandusky's computers should be searched for child pornography, child erotica, and other evidence as should his home and offices.

2. Lessons learned

When I first heard about the allegations against Sandusky and the six prior incidents that were reported about him (the "wrestling" in the weight room and the five shower incidents: Victim 6 and his friend, Janitor A, Janitor B, and Victim 2), I too jumped to the conclusion that Sandusky must have been protected because of his position at Penn State, or that McQueary must have been afraid to lose his job just like the janitors were. However, the facts simply do not support those conclusions.

When I actually read the SIC report, the attorney general's investigative reports, and the grand jury, preliminary hearing, and trial transcripts, it became clear to me that the people who witnessed these events largely did not communicate with each other. In fact, as is typical in such cases, people do not want to talk about such a distasteful topic at all. They steadfastly avoid these conversations and are then blindsided when news breaks about a sex offender in their midst. Had Mike McQueary, John McQueary, Dr. Dranov, Paterno, Curley, Schultz, Spanier, Janitor A, Janitor B, Joe Miller, the mother of Victim 6, Dottie Sandusky, Matt Sandusky, Detective Schreffler, caseworkers, psychologists, the head of The Second Mile, and CYS and DPW all talked to each other, a critical mass would have been reached that would have unearthed Sandusky's hidden crimes. But they largely kept the details of what they knew to themselves or to a small group of people. If it wasn't such a taboo topic, those people would have been much more likely to speak openly about what happened and Sandusky's crimes would have been uncovered earlier. We should learn from this example.

The lesson we also should learn from this case is that adults must push through the difficult barriers that prevent them from confronting and speaking about issues surrounding child sexual victimization, especially when it involves male offenders on male victims. The more we discuss the uncomfortable reality that male children are easily manipulated into compliant victimization though the use of effective grooming techniques employed by nice-guy acquaintance offenders, the less of a taboo topic it will be. And the more we will be able to prevent it. An example should be made of the mothers of Victims 1 and 6 as the heroes of the Sandusky case. These mothers recognized behavioral changes in their sons, found out what happened to them, and vehemently pursued the truth but were blocked at every turn. Yet they remained determined and vigilant and didn't give up their efforts to protect their sons. It is a shame that the system failed these mothers and their sons for so long.

It is a shame that once Victim 1 reported his victimization to the police, it took nearly three years to arrest Sandusky. It should be enough to get an offender arrested that he has victimized one child one time. But it is extremely difficult to prove such a case in our criminal justice system. So offenders like Sandusky are free to offend with relative impunity unless and until a number of credible victims come forward. Even when they do, they typically have issues. The very same issues that made them vulnerable to sexual victimization are the ones that can make them undesirable witnesses. Most prosecutors would prefer to only put victims on the stand who are "innocent angels." However, most children who are victimized have behavioral problems, they may fall into substance abuse, they may get into trouble with the law, they may become sexually promiscuous, or they may become self-destructive in many other ways.

People should be made aware that most government child services agencies are set up to investigate and deal with child sexual abuse (intra-familial victimization) rather than acquaintance or stranger sexual victimization. These agencies are often underfunded and understaffed. They are bogged down with procedural roadblocks to effectively addressing offenders like Sandusky. If these agencies are going to more effectively prevent child sexual victimization, instead of just responding to it, then they must be given a broader mandate, bigger budgets, and greater manpower, training, and investigative powers.

For example, although the report of counselor Seasock regarding the 1998 Sandusky incident is methodical and thorough, it is filled with inaccurate, rigid, pigeonholed assumptions about the behavior of "pedophiles." Though I understand his desire to go into a potential victim interview unbiased by the reports and conclusions of others, it is irresponsible to make any final conclusions in such a vacuum. He had a responsibility to gather information from all available sources and assess it before reaching his final conclusions in the case. He should have read the transcripts of the previous interviews of the alleged victim, the Chambers report, and other police reports to determine whether the child had been consistent in the allegations and whether additional information had been elicited during those interviews. His inept handling of the case and his erroneous conclusions about "pedophiles" in general, and Sandusky in particular, are a major reason why Sandusky was not discovered as a preferential child sex offender in 1998.

People should pay close attention to the perjury and conspiracy trial of Curley, Schultz, and Spanier. Scrutinize the information that is proven during this trial and see what the jury determines. If these men actively participated in an agreement to conceal the crimes of Sandusky, they should be punished. However, if they, like all the childcare professionals who dealt with Sandusky, and the people who worked and lived with him, were deceived by his effective grooming capabilities, then they should learn from their mistakes. Their experiences should educate the population about how easily offenders can get away with child sex crimes if we continue as a people to avoid the topic of discussion.

If you know of an adult who is friendly, kind and helpful, and who is spending an inordinate amount of time with children who are not his own, if that adult tends to be very physical and playful with children, if he describes himself as a child or childlike, if he frequently puts himself in positions where he is alone with children, taking them on trips, spending the night with them, having them change clothes, having them shower with him, spending time at night "tucking them in," entering the bathroom while they are showering, telling them he loves them when he has just recently met them, lavishing them with attention, affection, gifts, access, and

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adventures, then you know someone who is exhibiting some of the major red flags of potential child sexual victimization. Be advised, that if you look the other way, you are enabling him to potentially offend against children. If on the other hand, you confront him, question his behavior, put him on notice that you are watching him, and educate the parents and children around him, engage in a frank, age-appropriate dialogue with them, let them know that no matter what happens/happened you are there for them, notify child care professionals about your suspicions, and even notify law enforcement, then you are taking steps to stop and prevent child sexual victimization.

I have worked with an organization called Stop It Now!, which has championed adult responsibility and the need for adults to recognize early warning signs and take action immediately to protect children from sexual victimization. On its website, www.stopitnow.org, helpful information can be found regarding warning signs and actions people can take to protect children from ongoing or potential sexual victimization.

Do you know an adult or older child who exhibits one or more of these red flag behaviors for child sexual victimization?

- Doesn't seem to understand what's acceptable when it comes to personal space.
- Makes others uncomfortable by ignoring social, emotional or physical boundaries or limits.
- Refuses to let a child set any of his or her own limits regarding boundaries or touch. Uses teasing or belittling language to keep a child from setting a limit.
- Insists on hugging, touching, kissing, tickling, wrestling with or holding a child whether or not the child wants this physical contact or attention.
- Frequently walks in on children/teens in the bathroom.
- Turns to a child for emotional or physical comfort by sharing personal or private information or activities, normally shared with adults.
- Has secret interactions with teens or children (e.g., games, sharing drugs, alcohol, or sexual material) or spends excessive time emailing, text messaging, writing to, or calling children or youth.
- Insists on or manages to frequently spend uninterrupted time alone with a child.
- Misses or ignores social cues about others' personal or sexual limits and boundaries.
- Often has a "special" child friend, maybe a different one from year to year.
- Spends most of his/her spare time with children and shows little interest in spending time with someone their own age.
- Encourages silence and secrets in children.

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- Seems "too good to be true," i.e., frequently baby sits different children for free; takes children on special outings alone; buys children gifts or gives them money for no apparent reason.
- Allows children or teens to consistently get away with inappropriate behaviors.
- Is overly interested in the sexuality of children or teens (e.g., talks repeatedly about the child's developing body or interferes with normal teen dating).
- Frequently points out sexual images or tells dirty or suggestive jokes with children present.
- Exposes a child to adult sexual interactions or images without apparent concern.
- Links sexuality and aggression in language or behavior, e.g., sexualized threats or insults, like "whore" or "slut."
- Makes fun of children's body parts, describes children with sexual words like "stud" or "sexy" or talks about the sexual activities of children or teens.
- Masturbates so often that it gets in the way of important day-to-day activities.
- Has an interest in sexual fantasies involving children and seems unclear about what's appropriate with children.
- Looks at child pornography or downloads/views internet pornography and is not willing to show whether children are involved.
- Asks adult partners to dress or act like a child or teen during sexual activity.
- Minimizes hurtful or harmful behaviors when confronted; denies harmfulness of actions or words despite a clear negative impact.

3. What the SIC report got right

The SIC report discovered notes, emails, and other records that had not been located by the attorney general's investigators. These documents shed light on the response by Penn State's administration to Sandusky shower incidents in 1998 and 2001. Without these records much of what happened would be left to conjecture.

The SIC report established a number of administrative policies and procedures that will go a long way toward correcting the problems at Penn State and hopefully become a benchmark for other universities and institutions across the country.

Also, the detailed description of events contained in the SIC report helped educate the public about how people in leadership positions too often are not equipped to deal with early warning signs, let alone allegations of possible or actually sexual victimization, and too often are

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more concerned about not wrongfully accusing adults rather than taking protective action for children.

The SIC report makes clear that the bottom line is that all organizations that work with children and youth, even in a tangential or temporary way, need to put the safety of children above other concerns and must be willing to have the tough conversations, rules, training, and preventative procedures in place regarding boundaries that are needed to keep children safe.

Hopefully, the discussion started by the SIC report and my analysis will, in the end, act as a "tipping point" that results in institutional behavioral changes around understanding their responsibility to not only recognize and respond to red flag behaviors but also to educate themselves and all their employees in an effort to create an environment and culture of safety and accountability.

4. Best ways to prevent this from happening again

a) Education and dialogue

There should be resources dedicated to commission a panel of experts to compile a comprehensive Education & Prevention Manual to help ensure that the events that took place at The Second Mile and Penn State are never repeated again in any university, school, club, organization, team, or community center. This panel should be comprised of a multi-disciplinary team of experts from the various organizations that deal with child sexual victimization, and it should compile a manual of best practices for education and prevention of child sexual victimization.

b) Create a national child sexual victimization umbrella organization

There should be resources dedicated to create a national umbrella organization that would coordinate the efforts of state, local, and community child sexual victimization organizations across the country. It should be a repository of information, education, model policies, model practices, prevention guidelines, best practices, education, training, and support for other organizations so that they are not reinventing the wheel each time a new offender is discovered. This national organization would benefit greatly from the world-renowned charitable fundraising efforts of the Penn State student body and generous alumni. This would allow the organization to fund grants to improve child sexual victimization education and prevention efforts across the country and around the world.

c) Foster an environment of support and healing for victims

Helping the victims of Jerry Sandusky and their families overcome the negative effects of sexual victimization should be a priority for everyone at Penn State and the surrounding State College community. I strongly recommend the establishment of a support group for these individuals to help them through this process.

To conclude, the lesson from the Sandusky scandal is that we all can and must do more to help prevent child sexual victimization. By raising awareness of this insidious crime and bringing it out in the open, we will help prevent the abuse of countless thousands of children.

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APPENDICES

APPENDIX 1

QUALIFICATIONS

Retired FBI Supervisory Special Agent (SSA) James T. Clemente is an expert in the area of child sexual victimization formerly assigned to the FBI's Behavioral Analysis Unit (BAU) Crimes Against Children Section. The BAU is a component of the National Center for the Analysis of Violent Crime (NCAVC), which is the country's center for research and investigative knowledge regarding violent and sexual crimes. Clemente is one of only a handful of similarly qualified nationally recognized experts in the fields of child sexual victimization, child sex offender behavior, grooming, and child pornography. Clemente has testified as such in Federal, State, Military, criminal, and civil courts on these and related matters. Prior to the FBI, he earned his law degree and was a prosecutor for the City of New York.

Clemente had been a Special Agent with the FBI since 1987. He was promoted to the Behavioral Analysis Unit (BAU) in 1998 and retired out of that unit at the end of 2009. As a member of the BAU, Clemente consulted on child sexual victimization cases throughout the United States and around the world. Clemente's training has involved over 100 specialized courses in the area of child victimization. He has given over 200 presentations and lectures to local, state and federal law enforcement officers, judges, prosecutors, defense attorneys, psychologists, social workers, health care professionals, undergraduate and graduate students throughout the United States and around the world on various topics related to child sexual victimization, including, but not limited to the following topics: Behavioral Analysis of Child Sex Crimes Offenders; Interviewing Sex Offenders And Their Victims; Behavioral Dynamics of Child Sex Offences; Compliant Sexual Victimization; Grooming; and Child Sex Offender Typologies. In addition, he has lectured on these and related topics at the FBI new agent training academy, the FBI National Academy, and a number of universities across the country.

As a member of the BAU, Clemente analyzed and consulted on hundreds of child sexual victimization cases a year. His analyses are based on all available evidence, including relevant statements, behavior, and background information. The vast majority of the cases he has analyzed have involved either preferential or situational sex offenders.

Clemente's role in these cases has varied as follows: from assisting in investigations, to analyzing investigative results for the purpose of making investigative suggestions, to providing expert affidavits for search warrant applications, to providing interview strategies for subjects and victims, to assisting and consulting with local, state, and federal investigators on all aspects of investigations, to consulting with prosecutors on trial strategies, to testifying as an expert witness. In addition, Clemente has interviewed approximately 100 offenders himself, and has consulted on the interviews of approximately 1,000 additional offenders. A behavioral analysis is not a clinical diagnosis; rather, it is a law enforcement tool used to identify, understand, and sometimes predict offender behavior. It has also been used to dispel myths concerning the behavior of child sex offenders, their victims, and their interactions.

APPENDIX 2

CURRICULUM VITAE

James T. Clemente

Supervisory Special Agent FBI (Retired)
Behavioral Analysis Unit
National Center for the Analysis of Violent Crime

FBI Supervisory Special Agent (SSA) James T. Clemente retired in November 2009, from the National Center for the Analysis of Violent Crime (NCAVC), Behavioral Analysis Unit (BAU), an integral part of the Critical Incident Response Group, which provides behavioral support during all FBI crisis incidents. Its mission is to provide Criminal Investigative Analysis of violent, sexual and serial crimes as a resource available to law enforcement agencies worldwide. Prior to the FBI, he earned his law degree and was a prosecutor for the City of New York.

The FBI's Behavioral Analysis Unit is staffed by Supervisory Special Agents with an average of 18 years of law enforcement experience focused on violent and sexual criminal investigations. Many BAU members hold advanced degrees in areas including Law, Psychology, Entomology and Criminology. Each member has completed the NCAVC's comprehensive 560-hour training regimen, as well as numerous other advanced and specialized courses.

All BAU members perform case analysis, conduct research, and provide training. Annually they analyze 1,500+ cases, conduct multiple ongoing research projects, and train more than 10,000 law enforcement officers, prosecutors, judges, medical and mental health professionals worldwide. BAU members also provide on-site Crime Scene Analysis, Case Consultation, Crime Reconstruction, Investigative Strategies, Interview and Interrogation Strategies, Prosecutive Strategies, Statement Analysis, and other related services, as well as, Expert Testimony.

SA Clemente entered on duty with the FBI on November 16, 1987. His first duty assignment was to the New York Field Division's Joint FBI/NYPD Sexual Exploitation of Children Task Force. He was then assigned to the Office of the Independent Counsel in the Little Rock Division in 1994 and the Washington Field Office in 1995. In 1998, he was promoted to SSA and assigned to a Supervisory position in the NCAVC. While in the FBI he has been qualified as an Expert Witness in the areas of Child Sex Offender Behavior, Child Sexual Victimization and Child Pornography. Prior to joining the FBI, Clemente headed the Child Sex Crimes Prosecution Team for the New York City Law Department, Bronx, NY.

Since retiring from the FBI on October 30th, 2009, Clemente has been providing Expert Consulting and Testimony services for Park Dietz & Associates on Civil Matters and for the Academy Group, Inc. on Criminal Matters related to violent and sexual crimes, and abductions, and the investigations thereof. He also lectures to Law Enforcement and Academic Audiences across the U.S. and Internationally.

Employment History:

2009 to Present:	Consultant/Expert Witness
-2009 to Present:	Independent Consultant - Park Dietz & Associates
-2009 to Present:	Independent Consultant - Academy Group, Inc.
1987 to 2009:	Federal Bureau of Investigation
-1998 to 2009:	Behavioral Analysis Unit, FBI Academy, Virginia
-1996 to 1998:	Major Case Homicide Task Force, Washington Field Office
-1995 to 1996:	Office of the Independent Counsel, Washington, DC
-1994 to 1995:	Office of the Independent Counsel, Little Rock, AR
-1988 to 1994:	SEOC, Violent Crimes, WCC, New York Division
1983 to 1987:	New York City Law Department
-1985 to 1987:	Prosecutor for the City of New York, Bronx, New York
-1983 to 1985:	Law Clerk for NYC Corporation Counsel, New York, New York

Educational History:

1985:	Juris Doctor Degree, Law - Fordham University School of Law
1981:	Bachelor of Science Degree, Chemistry - Fordham University
2000 – 2003:	Masters level courses offered by University of Virginia and Virginia Commonwealth University at the FBI Academy.

Professional Associations:

1986:	Admitted to the New York State Bar, First Judicial District
1992:	FBI Agents Association
1992:	FBI Evidence Response Team
1997:	Virginia Homicide Investigators Association
1998:	Association for Crime Scene Reconstruction
2000:	International Homicide Investigators Association
2001:	International Criminal Investigative Analysis Fellowship
2001:	National Organization of Male Sexual Victimization
2002:	Expert Panel - "Stop It Now"
2003:	Advisory Board – NOMSV
2003:	Legal & Expert Testimony Program Manager, CIRG, BAU
2003:	Advisory Board - "Stop It Now"
2006:	Adjunct Professor, University of Virginia

Specialized Training Received:

1985:	New York City Law Department Prosecution Seminar, New York
1986:	Interviewing Child Witnesses and Victims Seminar, New York
1986:	Sex Abuse and Neglect of Children Seminar, New York

1987:	Prosecuting Child Sex Crimes Seminar, New York
1987:	Special Agent Training, FBI Academy, Virginia
1988:	Advanced Violent Crimes Investigator's In-Service, FBI Academy, Virginia
1992:	Evidence Response Team Basic Training, New York
1996:	Certified Legal Instructor/Advisor In-Service, FBI Academy, Virginia
1997:	Evidence Response Team Advanced Training, Washington, D.C.
1998:	Serial, Sexual & Mass Murder Seminar, George Mason Univ., VA
1998:	Managing Death Investigations, FBI National Academy, Virginia
1998:	Innocent Images On-Line Sex Crimes Against Children Training, Maryland
1998:	On-Line Sex Crimes Against Children Regional Seminar, Illinois
1998:	Interpersonal Violence, FBI National Academy, Virginia
1998:	Dallas National Crimes Against Children Seminar, Texas
1998:	On-Line Sex Crimes Against Children Regional Seminar, California
1998:	NCAVC Coordinator's In-Service, FBI Academy, Virginia
1998:	Sexually Violent Crimes Seminar, George Mason University, Virginia
1998:	Clinical Forensic Psychology, FBI National Academy ,Virginia
1998:	Violent Crime Profiling/Behavioral Analysis, George Mason University, VA
1998:	NCMEC Missing & Exploited Children Seminar, Virginia
1998:	NCAVC Research Seminar, NCAVC, Virginia
1998:	NCAVC Serial Homicide Research Seminar, NCAVC, Virginia
1999:	Research Methodologies, Virginia Commonwealth University
1999:	Forensic Anthropology, NCAVC ,Virginia
1999:	Statement Analysis, NCAVC ,Virginia
1999:	On-Line Sex Crimes Against Children Regional Seminar, Missouri
1999:	Psychopathy, NCAVC ,Virginia
1999:	Statement Analysis, NCAVC ,Virginia
1999:	Threat Assessment, NCAVC ,Virginia
1999:	FBI National School Violence Seminar, Virginia
1999:	Neuro Linguistic Programing in Interviewing & Interrogation, NCMEC, VA
1999:	Dallas National Crimes Against Children Seminar, Texas
1999:	Certified Police Instructor In-Service, NCAVC, Virginia
1999:	DOJ/OJJDP Missing Children Seminar, Washington, D.C.
1999:	Serial Rape Research Interview Briefing, NCAVC, Virginia
1999:	MO, Ritual & Signature Advanced Seminar, NCAVC, Virginia
1999:	Advanced NLP in Interview & Interrogation, NCAVC, Virginia
1999:	NCAVC Coordinator's In-Service, FBI Academy, Virginia
1999:	Department of Justice Hate Crimes National Symposium, Washington, D.C.
1999:	NCAVC Criminal Investigative Analysis Training, NCAVC, Virginia
1999:	Expert Testimony, NCAVC, Virginia
2000:	Reid & Associates School of Interview & Interrogation, Virginia
2000:	Criminology, Virginia Commonwealth University
2000:	Stalking & Threat Assessment, George Mason University, Virginia
2000:	International Homicide Investigators Association Annual Conference, VA
2000:	Police Fellowship/NCAVC Coordinators In-Service, FBI Academy, Virginia
2001:	Stalking Threats: Risk Assessment and Risk Management, Reid Meloy, Ph.D., Forensic Psychologist, FBI Academy, Virginia
2001:	Back to Basics Training, FBI Academy, Quantico, Virginia
2001:	Victimology, The Peter Wilke Case Study, Baltimore, MD
2002:	Threat Assessment Training, FBI Academy, Quantico, VA
2002:	Cross Examination of Behavioral Experts, VA Legal Education
2002:	Threat Assessment Protocol Training, Dr. Stock, NCAVC, VA

2002: Sex Offender Treatment Modalities, Dr. Fred Berlin, Arlington, VA
2002: Law Enforcement/Business Interface in Threat Assessment, Dr. Stock, NCAVC, Virginia
2002: Development of Deviant Sexual Behavior, Major Galbraith, Charleston, SC
2002: Interviewing Teen Sex Victims, Kim Poyer, FBI, Charleston, SC
2003: Child Victim Dynamics, M. Finnegan, FBI, St Thomas, USVI
2003: Prosecuting Child Sex Cases, A. Turkel, APRI, St Thomas, USVI
2003: Case Study: Jeffery Dahmer, Det. P. Kennedy, Ret. Milwaukee PD
2003: Medical Expert in Child Sexual Exploitation, S. Cooper, MD, UNC
2003: Digital Image Manipulation, John Van Vliet, Migrant Film Works
2003: The PROTECT Act, Monique Perez Roth, DOJ CEOS
2003: DNA Technology, Norm Gahn, ADA, Milwaukee, WI
2003: Working with Compliant Victims, Martha Finnegan, FBI
2003: Juvenile Sex Offenders, Allison Turkel, Sr. Atty., APRI
2003: Pretext Phone Calls, John Bradley, DA, Georgetown, TX
2003: Ethics, Rod Leonard, DDA, Los Angeles, CA
2003: Cross Examination of Expert Witness, D. Trufio, ADA, Syracuse, NY
2003: Compliant Victims, Ken Lanning, CAC Consultants (Ret. FBI)
2003: Child PROTECT Act, USAO, Tampa, FL
2004: Paraphilias & Sex Offenders, Dr. Nathan Galbraith, USAF
2004: Incarcerated Sex Offender Treatment, Dr. Michael Bourke, USBOP
2007: Overview of BAU Research Projects, CIRG
2007: Detection of Deception for Law Enforcement, Dallas, TX
2007: Clergy Sex Abuse Research, John Jay College of Criminal Justice, NY, NY
2007: New Zealand, Male Survivors of Child Sexual Abuse, NY, NY
2007: The Lost Self, Survivors of Childhood Sexual Assault, Dr. Alan Downs
2008: Cyber Personalities & Threats, CIRG
2008: Men Of Courage, 1st Provincial Conference on Male Sexual Victimization
2008: Why I Didn't Say Anything, Sheldon Kennedy, Toronto, Ontario, Can.
2008: Forensic Science in Criminal Investigations, Dr. Henry Lee, Wash., DC
2008: Sex Offender Research, Dr. Michael Bourke, USBOP
2008: Expert Testimony – Moot Court, BAU, Quantico, VA
2009: Women Who Molest Children, Capt. Carson, MD Heights PD
2009: Behaviorally Based Interviewing, Wayne Sheppard, NCMEC
2009: Cross-Examining Defense Experts, Victor Vieth, Winona State Univ.
2009: Fantasy Defense in Internet SEOC Cases, Ken Lanning, Dallas, TX
2009: Victim Identification, Jennifer Lee, NCMEC
2009: Cyber-Bullying, Yeager, Rampolla and Donofrio, Dallas, TX
2009: The Star Kids Investigation, SA Baker, SA Miller, Dallas, TX
2009: False Allegations of Child Abduction, SSA Canning, Dallas, TX
2009: Facebook Investigations, Max Kelly, CSO, Dallas, TX
2012: Male Survivor Conference, John Jay College of Criminal Justice

Presentations, Lectures, Symposiums, and Training Given:

1998: Behavioral Analysis of Child Sex Crimes Offenders, Maryland
1998: Equivocal Death Investigations, FBI National Academy, Virginia
1998: Equivocal Death Investigations, FBI National Academy, Virginia
1998: Equivocal Death Investigations, FBI National Academy, Virginia
1998: On-Line Sex Crimes Against Children, National Academy Retrainer, KY

1998:	On-Line Sex Crimes Against Children, Innocent Images, Maryland
1999:	Equivocal Death Investigations, FBI National Academy, Virginia
1999:	Interrogation & Miranda, Georgetown University School of Law, Wash, DC
1999:	On-Line Sex Crimes Against Children, Innocent Images, Maryland
1999:	Dallas National Crimes Against Children Seminar, Texas
1999:	On-Line Sex Crimes Against Children, Regional Police Conference, Ohio
1999:	Equivocal Death Investigations, FBI National Academy, Virginia
1999:	NCAVC Coordinators In-Service, FBI Academy, Virginia
1999:	On-Line Sex Crimes Against Children, NCMEC, Virginia
1999:	On-Line Sex Crimes Against Children, Regional Police Conference, MA
1999:	On-Line Sex Crimes Against Children, Innocent Images, Maryland
1999:	Profiling Concepts in Law Enforcement, American University, Wash., D.C.
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	On-Line Sex Crimes Against Children, Innocent Images, Maryland
2000:	On-Line Sex Crimes Against Children, NY State Regional Conference, NY
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	Profiling Concepts in Law Enforcement, American University, Wash., D.C.
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	Equivocal Death Investigations, FBI NCAVC, Virginia
2000:	On-Line Sex Crimes Against Children, Oklahoma
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	On-Line Sex Crimes Against Children, Texas
2000:	On-Line Sex Crimes Against Children, Innocent Images, Maryland
2000:	Behavioral Analysis of On-Line Child Sex Offenders, American Psychological Association, Washington, D.C.
2000:	Interrogation and Miranda, Guest lecture Georgetown University School of Law, Washington, D.C.
2000:	On-Line Sex Crimes Against Children, Texas
2000:	On-Line Sex Crimes Against Children, Texas
2000:	Behavioral Analysis of On-Line Child Sex Offenders, American Psychological Association National Symposium, Washington, D.C.
2000:	On-Line Sex Crimes Against Children, Advanced CAC Coordinators In-Service, FBI Academy, Virginia
2000:	Criminal Investigative Analysis, NCAVC, Virginia
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	On-Line Sex Crimes Against Children, Innocent Images Franchise, MD
2000:	Government Corruption in FHA, White Collar In-Service, FBI Academy, VA
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	On-Line Sex Crimes Against Children, Innocent Images Franchise, MD
2000:	On-Line Sex Crimes Against Children - Case Studies, FBI NA, VA
2000:	Dallas National Crimes Against Children Seminar, Texas
2000:	Equivocal Death Investigations Regional Conference, California
2000:	On-Line Sex Crimes Against Children, Kentucky
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	Equivocal Death Investigations, FBI National Academy, Virginia
2000:	Advanced Presentation Skills on Power Point, NCAVC, Virginia
2000:	Central America Regional CAC Seminar: El Salvador, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, and Panama.
2000:	DOJ, Office of Justice Programs second National Summit: Sexual Assault Prevention and Sex Offender Management.
2001:	Behavioral Analysis of Child Sex Offenders/Victimology, FBI Academy, VA
2001:	Child Sex Offender Interactive Panel, FBI Academy, Virginia

2001: On-Line Child Sex Crimes; Sexual Tourism & Child Prostitution; Child Abduction Response Plan; Expert Testimony; DOJ Manila, Philippines
2001: Sex Offender Behavior Typologies, CAC Regional, Phoenix, AZ
2001: Investigating Child Abuse and Exploitation, FBI Academy, Virginia
2001: Computer Child Sex Crimes, FBI National Academy, Virginia
2001: Sex Offender Behavior Typologies, CAC Regional, Chicago, IL
2001: Cyber Sex Crimes, US Courts Federal Probation, St. Louis, MO
2001: Behavioral Aspects of Internet Child Sex Crimes, ACIT Cross Training, CIRG, NCAVC, Virginia
2001: Child Sex Offender Behavioral Typologies, MJJA, Lake Ozark, MO
2001: Behavioral Analysis & CAC Research, Centennial HS Law & Justice Program, NCMEC, Alexandria, VA
2001: Child Sex Offender Typologies & Expert Testimony, Texas District Attorney's Association, Richardson, TX
2001: Equivocal Death Investigations, FBI National Academy, Virginia
2001: Cyber Sex Offenders & Expert Testimony, Utah Prosecutor's High Tech Crime Conference, Salt Lake City, UT
2001: Applied Behavioral Science for Law Enforcement, Quantico, VA
2001: Internet Exploitation Case Studies, FBI National Academy, Virginia
2001: Vince Foster Death Investigation, FBI Dallas, TX
2001: Child Pornography Collectors, British CAC Investigators, NCAVC
2001: Equivocal Death Investigations, FBI National Academy, Virginia
2001: ON-Line Child Sex Crimes, FBI National Academy, Virginia
2001: Computer Child Sex Crimes, Violence in America Seminar, FBI-NA, VA
2001: Foster Death Investigation, FBI National Academy, Quantico, VA
2001: Indian Country Child Abuse, Offender Typologies, Seattle, Washington
2001: Foster Death Investigation, Harvard Associates International Homicide Seminar, Annapolis, Maryland
2001: CAC Regional Conference, Chicago, IL
2001: Child Sex Offender Typology, US Probation National Conf, Lake Tahoe, CA
2001: Sex Offender Typologies, NOMSV, John Jay College, NYC, NY
2001: Federal Agent/Survivor, NOMSV, John Jay College, NYC, NY
2001: Sex Offender Typologies, Mid States National Academy, Ozark, MO
2001: Sex Offender Treatment Group, National Institute for the Prevention and Treatment of Sexual Trauma, Baltimore, MD
2001: Sex Offender Typologies, 8th Circuit US Probation Conference, Nebraska
2001: National CAC Enhancement Training, FBI Academy, Quantico, VA
2002: Child Sex Offender Typologies and Victimology, Arlington, VA
2002: Sex Offender Panel, Dr. Galbraith, Arlington, VA
2002: Equivocal Death Investigations, FBI Academy, Quantico, VA
2002: Sex Crimes Against Children, FBI Academy, Quantico, VA
2002: Sexual Tourism & Child Sex Offenders, San Jose, Costa Rica
2002: Child Abduction Homicides, San Jose, Costa Rica
2002: Expert Testimony in Child Sex Cases, San Jose, Costa Rica
2002: Ashcroft v. Free Speech: Legal & Repercussions, Charleston, SC
2003: Behavioral Investigations of Internet CAC Cases, Calverton, MD
2003: Behavioral Dynamics of Child Sex Offences, St Thomas, USVI
2003: Child Sex Offences a Multi-disciplinary approach, St Thomas, USVI
2003: Behavioral Investigations of Internet CAC Cases, Calverton, MD
2003: Sex Offender Typologies, Fox Valley Tech. College, Fox Valley, WI
2003: Sex Offender Typologies, South West Regional, El Paso, TX
2003: Child Sex Crimes Overview, McAllen, TX

2003:	Behavioral Dynamics of Child Sex Offenders, Phoenix, AZ
2003:	Understanding & Interviewing Child Sex Offenders, US Secret Service Polygraph School, Orlando, FL
2003:	Internet Child Sex Crimes Offender Behavior, Managua, Nicaragua
2003:	Child Abductions & Sex Crimes, Managua, Nicaragua
2003:	Internet Child Sex Crimes Offender Behavior, El Paso, TX
2003:	Sex Offender, Survivor, Treatment Panel, Male Survivor Conference, MN
2003:	Sex Offender/Survivor/Treatment Panel, St. Paul, MN
2003:	Child Sex Offender Typologies/Child Pornography, McAllen, TX
2003:	Behavioral Insights of Sex Offender Management, Crystal City, VA
2003:	Expert Search Warrants in CAC Investigations, NAC, Columbia, SC
2003:	Compliant Sexual Victimization: An Additional Perspective, USAO/FDLE Interagency Training, Tampa, FL
2003:	Child Sex Offender Typologies, APRI Equal Justice, Baltimore, MD
2003:	Internet Child Sex Crimes, Midland, TX
2003:	Child Sex Crimes Offender Behavior, Appleton, WI
2003:	Child Sex Crimes A Behavioral Perspective, Columbus, OH
2003:	Internet Child Sex Crimes Offender Behavior, Toronto, Canada
2003:	Internet Child Sex Crimes Offender Behavior, NCAC, Quantico, VA
2004:	Behavioral Investigations of Internet CAC Cases, Calverton, MD
2004:	Internet CAC Training Course, Richmond, KY
2004:	Behavioral Investigations of Internet CAC Cases, Calverton, MD
2004:	Behavioral Investigation of Sex Crimes Against Children, Roanoke, VA
2004:	CAC In-Service: CSO Typologies & The CARP, Arlington, VA
2004:	CAC In-Service: CSO Typologies & The CARP, Quantico, VA
2004:	Stopping Internet Sex Crimes Against Children, Richmond, VA
2004:	Child Sexual Victimization Continuum, Baltimore, MD
2004:	NCAVC Coordinator Basic Training, Fredericksburg, VA
2004:	Search Warrants Affidavits in CAC Cases, Fox Valley Tech. College, WI
2004:	Behavioral Investigations of Internet CAC Cases, Calverton, MD
2004:	Under Cover Investigations of Internet CAC Cases, Calverton, MD
2004:	BAU Training: Sexual Victimization of Children, Quantico, VA
2004:	Undercover Sex Crimes Investigations, London, United Kingdom
2004:	Behavioral Aspects of Child Pornography & Molestation, CIA
2004:	Host: International Online Child Sexual Victimization Symposium at VA
2005:	Interview & Active Listening, Cohorts Training, FBI Academy
2005:	Interview & Active Listening, FBI Police Training, FBI Academy
2005:	Advanced Interview of Sex Crime Victims, FBI National Academy/UVA
2005:	Interview & Interrogation, FBI New Agent Training, FBI Academy
2005	Seminar In Investigative Interviewing, FBI National Academy/UVA
2005:	Online Child Sex Crime Offender Behavior, Burlington County, NJ
2006:	Seminar In Investigative Interviewing, FBI National Academy/UVA
2007:	Child Abduction Rapid Deployment Team training, FBIHQ
2007:	Psychopathy Checklist Training, Dr. Hare & Dr. Forth, CIRG
2007:	Interviewing Sex Offenders, FBI National Academy/UVA
2007:	Behavioral Analysis Applied to Criminal Investigations, FBI Academy
2007:	Interviewing Child Victims, FBI Academy New Agents
2007:	Online Undercover Agent In-Service, Calverton, MD
2007:	Behavioral Analysis of Child Sex Crimes, Phase I Training, CIRG
2007:	Sex Offender Behavior, Advanced Undercover School, Calverton, MD
2007:	Interviewing Sex Offenders, FBI National Academy/UVA
2007:	Sex Offenders & Child Sexual Victimization Continuum, Dallas CAC

2007: Virtual Global Task Force, Washington, DC
2007: Sex Offenders & CSVC, Project Safe Child, New Hampshire
2007: Behavioral Analysis Applied to Criminal Investigations, FBI Academy/UVA
2007: Online Undercover Agent In-Service, Calverton, MD
2007: Advanced Investigative Interviewing, Las Vegas, NV
2007: Investigations Seminar, Georgetown Law School, Washington, DC
2007: Interviewing Sex Offenders, Univ. Of Texas, Austin, TX
2007: Federal Agent/Survivor, MS, John Jay College, NYC, NY
2007: Sex Offender Typologies & Male Victimization, John Jay College, NYC
2007: Overview of BAU Child Sex Crimes, London, UK
2007: Behavioral Analysis Applied to Criminal Investigations, FBI NA
2007: Risk Assessment Protocol, Dr. Harley Stock, Arlington, VA
2007: Interviewing Sex Offenders, FBI National Academy/UVA
2008: Expert Behavioral Analysis Testimony, Dr. Kris Mohandie
2008: Interviewing Sex Offenders, FBI National Academy/UVA
2008: Federal Agent/Survivor, MS, Toronto, Ontario, Canada
2008: Sex Offender Typologies & Male Victimization, Toronto, Ontario, Can.
2008: Interviewing Sex Offenders, FBI National Academy
2008: Advanced Investigative Interviewing, Atlanta, GA
2008: Art & Science of Criminal Profiling, Duquesne Law, Pittsburgh, PA
2008: Interviewing Sex Offenders, FBI National Academy/UVA
2008: Focused Investigations/Interviews, Fed. Energy Reg. Comm., Wash, DC
2008: Child Sex Offenders and Their Male Victims, 1st Provincial Conference on Male Sexual Victimization, Ottawa, Ontario, Canada
2008: SVOC/Rape Panel, Sexual Assault Centre-Quinte, Bellevue, Ontario, Can.
2008: Survivor to Thriver, Sexual Assault Centre-Quinte, Bellevue, Ontario, Can.
2008: Training Video: SVOC, Catholic Charities of Baltimore, MD
2008: Keeping Children Safe from SVOC, Bellevue, Ontario, Canada
2008: CSI Effect, National Symposium on Media & Forensic Science, Duquesne University School of Law, Pittsburgh, PA
2008: Criminal Behavioral Analysis, Duquesne Law, Pittsburgh, PA
2008: Advanced Interview/Interrogation Seminar, Nat. Black P.O. Assoc. Atl, GA
2008: Interviewing Sex Offenders, FBI National Academy, Quantico, VA
2008: Forensic Science and Fiction, Colombia University, NYC, NY
2008: Internet Social Networking, Children's Justice Cntr., Salt Lake City, UT
2008: Interviewing Sex Offenders, FBI National Academy, Quantico, VA
2008: CSOT, Child Sexual Victimization Continuum, Conroe, TX
2008: Art & Science of Criminal Profiling, Towson, Univ., Baltimore, MD
2008: FBI-BAU Methodology & Research, Serious & Organized Crime Agency, Child Exploitation & Online Protection, London, UK
2008: FBI-BAU Methodology, Research & Cases, National Police Improvement Agency, Bramms Hill, UK
2008: FBI-Behavioral Analysis Overview, American Univ., Wash., DC
2008: SVOC/CSVC, Santa Monica Rape Treatment Center/LAPD, LA, CA
2008: Detection of Deception, Marymount Univ. Grad. School, Arlington, VA
2008: Behavioral Aspects of Interview/Interrogation, FBI NA, Quantico, VA
2008: Investigations: Cong./IC/Criminal, Georgetown Law, Wash., DC
2008: SVOC/Child Abduction, Nat. Assoc. - Public School Administrators, MB, SC
2008: Detection of Deception, Marymount Univ. Grad Sch., Arlington, VA
2009: FBI & Law Enforcement Careers, JS Burke & Washingtonville HS, Goshen, NY
2009: Interviewing Child Sex Offenders, Child Advocacy Center, Bristol, VA

2009:	Detection of Deception, Marymount Univ. Grad. School, Arlington, VA
2009:	BAU Overview, FBI National Academy, Quantico, VA
2009:	Interviewing Sex Offenders, FBI-NA, Quantico, VA
2009:	Child Sex Offenders, FBI-NA, Quantico, VA
2009:	CSI Effect on Investigations & Prosecutions, Boston, College, Boston, MA
2009:	Interviewing Sex Offenders, FBI-NA, Quantico, VA
2009:	Child Sex Offenders, FBI-NA, Quantico, VA
2009:	SVOC & Grooming, Fox Valley Technical College, Appleton, WI
2009:	CAC/Child Abductions, Nat. Latino Police Officers Assoc, LA, CA
2009:	False Allegation of Child Abduction Case Study, BAU, Quantico, VA
2009:	SVOC/Grooming, UCLA Regional Seminar, LA, CA
2009:	Behavioral Analysis of Child Sex Offenders, Dallas CAC, Dallas, TX
2009:	Interviewing Sex Offenders, FBI-NA, Quantico, VA
2009:	Rigorous Obedience to the Constitution, FBI Core Values Video, FBI Office of Integrity Compliance, FBIHQ, Wash., DC
2009:	Detection of Deception, Univ. or Conn Grad School, New Haven, CN
2009:	Detection of Deception, Marymount Univ, Arlington, VA
2010:	Sex Offender Investigations, University of PA, Forensic Mental Health Dept.
2010:	Sex Offenders and Child Abductors, Fairbanks Alaska PD
2010:	Interviewing & Detection of Deception, Henry C. Lee Institute of Forensic Science, University of New Haven, New Haven, CN
2010:	Sex Offence Investigations, US Dept of the Navy
2010;	Non-Traditional Fraud/Corruption Investigations, USDOJ, Public Integrity Section
2010:	Sex Offences, Rape & Abductions, National Assoc. of Forensic Nursing. Las Vegas, NV
2010:	Profiler Profiled: Male Sexual Victimization, John Jay College of Criminal Justice
2011:	Interviewing Sex Offenders & Their Victims and Child Abductions, Arizona Homicide Investigators Assoc., Las Vegas, Nevada
2011:	Profiling, The Media, and Investigations, Toronto, Canado
2011:	Use of Cooperating Witnesses in Major Crimes Investigations, USDOJ Greenwich, CN
2011:	Detection of Deception in Interviewing, Henry C. Lee Institute of Forensic Science, University of New Haven, New Haven, CN
2012:	Detection of Deception, National Black Police Officers Org.

Criminal Investigative Analysis Consultations:

- SSA Clemente has analyzed hundreds of cases for and has provided investigative, prosecutive, and sentencing guidance to FBI Agents, Federal, State, and Local Law Enforcement Agencies, Prosecutors', Psychologists, Social Workers, and other professional organizations across the United States and overseas in cases involving Sexual Exploitation of Children, Child Pornography, Child Sex Abuse, Child Prostitution, Child Abduction, Serial Rape, Incest, Sexual Assault, Sexual Homicide, Serial Homicide, Kidnapping and Equivocal Death.

Expert Testimony and Affidavits:

- SSA Clemente has given sworn expert testimony in the areas of Child Sex Offender Behavioral Characteristics, Child Sexual Victimology, and Child Pornography in the following cases:

2001: US v. Daniels, US Army Base Camp Ederly, Vicenza, Italy [Case-in-chief]
2001: US v. Daniels, US Army Base Camp Ederly, Vicenza, Italy [Sentencing]
2001: US v. Smith, US District Court, District of Colorado [Sentencing]
2001: US v. Vogt, US District Court, Southern District of Florida [Case-in-chief]
2001: US v. Vogt, US District Court, Southern District of Florida [Sentencing]
2002: Texas v. Doyle, Montgomery County Court, Conroe, Texas [Case-in-chief]
2002: Texas v. Doyle, Montgomery County Court, Conroe, Texas [Sentencing]
2003: US v. Thomas, US District Court for the Northern District of Maryland [Detention]
2007: US v. Sanders, US District Court for the Central District of California [Case-in-Chief]
2007: US v. Sanders, US District Court for the Central District of California [Case-in-Chief]
2008: US v. McGill, US District Court for the District of Wyoming [Case-in-Chief]
2008: US v. Farris, US District Court Western District of Pennsylvania [Detention]
2009: US v. Pepe, US District Court for the Central District of California [Case-in-Chief]
2009: US v. Weisberg, US District Court, Central District of California [Case-in-Chief]

- SSA Clemente has given expert testimony in the form of affidavits in Support of Government's motions for detention a number of cases including:

2001: US v. White, United States District Court for the Eastern District of California
2001: US v. Holverstott, United States District Court for the Eastern District of California
2002: US v. Pertle, United States District Court for the Northern District of California
2002: US v. Froman, United States District Court for the Southern District of Texas
2002: US v. Johnston, United States District Court for the Southern District of Texas
2002: US v. Ezeta, United States District Court for the Southern District of Texas
2002: US v. Anderson, United States District Court for the Southern District of Texas
2002: US v. White, United States District Court for the Southern District of Texas
2002: US v. Tinney, United States District Court for the Southern District of Texas
2002: US v. Seamens, United States District Court for the Southern District of Virginia
2003: US v. Thomas, United States District Court for the Northern District of Maryland
2003: US v. Adkins, United States District Court for the Eastern District of Kentucky [Affirmed by Court of Appeals]

- 2002: -SSA Clemente has provided expert opinions on Child Sex Offender Behavior, Child Sexual Victimization and Child Pornography for the FBI's Testimony before the U.S. Congressional Subcommittee on Crime, Terrorism and Homeland Security.

- 2002: -SSA Clemente has provided expert testimony in the form of a Declaration regarding Child Sex Offender Behavior and an analysis of Defendant's recidivism risk and danger to the community: People v. Gove: Manitowoc County, Wisconsin

- 2009: -SSA Clemente has provided expert testimony in the form of a Declaration regarding Grooming Behavior: US v. DeWitt, US District Court, Central District of California

- SSA Clemente has provided expert affidavits regarding Sexual Victimization of Children, Child Pornography, and On-line Sex Crimes Against Children in several hundred search warrants.

Awards, Letters & Commendations:

1997:	Exceptional Performance Award, DOJ
1997:	Certificate of Appreciation, NDIC Homicide Task Force, MPD, Wash., DC
1998:	Certificate of Recognition, State of Wyoming
1998:	Exceptional Performance Award, DOJ
1998:	Superior Service Award, FBI
1999:	Exceptional Performance Award, DOJ
2000:	Exceptional Performance Award, DOJ
2001:	Director's Certificate of Commendation
2001:	Superior Service Award, FBI
2002:	Superior Service Award, FBI
2003:	Superior Service Award, FBI
2004:	Superior Service Award, FBI
2004:	Commendation Award, DOJ
2007:	Superior Service Award, FBI
2008:	Superior Service Award, FBI
2008:	Distinguished Award, DOJ
2009:	Superior Service Award, FBI

- SSA Clemente has received numerous letters of commendation from Federal, state, and local Law Enforcement Agencies, Prosecutors' Offices, as well as, other professional organizations across the United States.

Research Projects:

1999 to 2009:	-Serial Rape Research Project, Joint Research by NCAVC, University of Virginia, and Radford University
1999 to 2009:	-NCAVC/Innocent Images On-line Sex Crimes Against Children Project
2001 to 2004:	-Incarcerated Sex Offender Re-Offending Study, Joint Research by NCAVC, Federal Bureau of Prisons.
2004 to 2009:	-Committee Chair/Editor: Behavioral Analysis Manual, FBI BAU

Publications:

■	2001:	Contributor to Interpol's Investigative Manual Chapter 3: "Sexual Offences Against Children & Child Pornography"
■	2002:	Co-author of the FBI's Testimony before the U.S. Congressional Subcommittee on Crime, Terrorism and Homeland Security on the topics of Child Sex Offender Behavior, Child Sexual Victimization and Child Pornography.
■	2007:	"Equivocal Death Investigations." Journal of Forensic Nursing
■	2008:	(Pending)"Behavioral Analysis Manual," (Committee Chair)

APPENDIX 3

ADDITIONAL BACKGROUND ON CHILD SEXUAL VICTIMIZATION

Based on my education, training, and experience, and the institutional knowledge of the FBI's Behavioral Analysis Unit, the following traits and characteristics are generally found to exist and be true in cases involving individuals who sexually victimize children.

With respect to their victims, child sex offenders typically fall into three general categories: strangers, acquaintances, and family. Their motivations for offending are evaluated on a continuum. The two ends of that spectrum are represented by situational and preferential offenders. Situational offenders are those who victimize children but who do not have a definitive sexual attraction to children. As a result, their sexual offenses against children tend to result from circumstantial access to children rather than a methodical effort to pursue sexual encounters with children. Their offenses can generally be described as opportunistic and/or impulsive in nature; however, their sexual desires and fantasies typically involve adults.

1. Preferential Child Sex Offenders

Preferential child sex offenders (PSO), on the other hand, have a definitive sexual attraction to children, usually of a particular age range, gender, body type, personality, vulnerability, other set of characteristics, or any combination of the above. Despite their specific sexual interest in these particulars, preferential offenders may at times offend outside of their preference due to availability or circumstances. Acquaintance PSOs typically gain access, authority, and/or control over their intended victims through a process known as "grooming." The grooming process is typically aimed at the intended child victims and those who are responsible for their wellbeing as well as the community that they operate in. Grooming is a constellation of otherwise innocent appearing behavior that is intended to give them ongoing access to children for sexual purposes, as well as, preventing discovery by others.

Though it is often misused by those in the public and law enforcement alike, the term "pedophile" is actually a paraphillic mental disorder that must be clinically diagnosed. This diagnosis results from a full clinical evaluation by a psychologist or psychiatrist who finds that the person being evaluated has recurrent and intense, sexually arousing fantasies, urges, or behaviors aimed at prepubescent children, typically under the age of 13. Absent such a finding, law enforcement professionals use the term preferential child sex offender to designate those who are sexually attracted to children and who commit sexual crimes against them. This criminal typology has been extensively researched and written about by my colleague, retired Supervisory Special Agent Ken Lanning and it has been utilized world-wide in the law enforcement community.

Unlike "normal" adult/adult sexual relationships, preferential offenders cannot develop lifelong sexual relationships with the object of their sexual desires. This is because the children they are sexually interested in always grow up and "age-out" of their desired age range. This drives these offenders to periodically search for and groom new children. Their sexual behavior with children therefore, is typically repetitive and predatory in nature. This phenomenon is typically referred to as "the grooming pipeline." That is, they are simultaneously involved in

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various stages of grooming multiple victims at the same time in order to enable concurrent or sequential victimization.

Grooming behaviors can be used by an offender against children across a spectrum of relationships. That is, they may target children within their family, acquaintances, e-quaintances (those they met on-line), neighbors, and/or complete strangers. Since the purpose of grooming is to gain access, authority and control over their intended victims, the more parental the relationship is between the offender and the victim, the easier it is for an offender to use "normal" parenting as a grooming tool.

A preferential offender's sexual attraction to children may be either exclusive or non-exclusive. That is, their sexual attraction may be focused solely on children, or it may be more diverse, including a variety of sexual interests in addition to children. It is not uncommon for these offenders to engage in multiple paraphillic behaviors. A paraphilia is the recurrent and intense sexual arousal to inanimate objects or non-consenting parties (pedophilia is one example of a paraphilia). Individuals who engage in one paraphilia are likely to engage in more than one. Also, some preferential offenders can be sexually attracted to adults and children at the same time and can engage in sexual activity with adults as well as children concurrently.

Although it is impossible to accurately predict human behavior with absolute certainly, the best predictor of human behavior is a past pattern of behavior. Preferential offenders tend to engage in highly repetitive and predictable patterns of behavior. In order to satisfy their sexual desires, these offenders devote substantial amounts of time, effort, energy and/or money to the pursuit of sexual and/or non-sexual contact with children, child pornography and child erotica. They also typically discover their sexual attraction to younger children in their own late adolescence and may begin to act on this attraction soon thereafter.

The four hallmarks of preferential child sex offenders are: 1) long term persistent patterns of behavior; 2) specific sexual interests; 3) well-developed techniques; and 4) fantasy and desire driven behavior. These characteristics may be identified by some or all of the following behaviors: long-term persistent patterns of behavior demonstrated by a willingness to commit significant time, money, and energy in furtherance of their sexual interest in children, often resulting in multiple offenses; an interest in children as sexual objects and the development of a rationale to justify that interest (e.g., "I would never hurt a child, I love children," and/or "I never did anything the child didn't want me to do"); well-developed techniques for gaining access to victims and/or sexualized child-related material, characterized by the ability to skillfully manipulate the situation, the victims, and/or other individuals necessary for gaining access to children for sexual purposes; and a significant fantasy component featuring children as sex objects and often supported by the collection and organization of child-related material, writings, and/or child pornography. Although no single factor delineated above is determinative in and of itself, the most telling factor in determining whether an individual is a preferential child sex offender is the collection of child pornography.

Individuals with a sexual preference for children may derive sexual gratification from actual physical contact with children as well as from fantasies involving the use of sexual depictions of children or literature describing sexual contact with children. Preferential child sex offenders gravitate to employment, activities and/or relationships which provide access or

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proximity to children; and frequently persist in the criminal conduct even when they have reason to believe the conduct has come to the attention of law enforcement. These are desire driven behaviors to which the offender is willing to devote considerable time, money, and energy in spite of the risks and contrary to self-interest.

2. Nice-Guy Acquaintance Offenders[1]

"Nice-guy" child sex offenders are much more prevalent, effective, and prolific than the stereotypical "stranger danger" type offender. In fact, the vast majority of children who are sexually victimized are offended against by someone they know. We call those offenders "acquaintance offenders." The category of "acquaintance offenders" includes any non-stranger and any non-biological relative. One particularly insidious sub-category of acquaintance offenders is "nice-guy" offenders (sometimes referred to as the "pillar of the community" or "man of the year" offenders).

These are offenders who are friendly, normal, helpful, giving, loving people who no one would suspect are harboring sexual attractions to children. These cases are very difficult to investigate because a number of these offenders have high social status or are authority figures, such as: "teachers, camp counselors, coaches, clergy members, law-enforcement officers, doctors, judges . . . . Such offenders are in a better position to seduce and manipulate victims and escape responsibility." And, equally important, "[t]hey are usually believed when they deny any allegations."[2] Both their status in the community and their affable personalities make it difficult to make a case against them for sexual victimization of children. "Convicting an acquaintance child molester who is a 'pillar of the community' is almost impossible based only on the testimony of one confused 5-year-old girl or one delinquent adolescent boy."[3]

The above passages underscore the fact that even when it comes to trained law enforcement officers, it is very difficult to determine whether a person, who everyone in the community knows and respects, is a child sex offender. Sandusky is a textbook preferential child sex offender, as well as being a textbook example of a "nice-guy" offender. However, I would put him in the top one percent of effective groomers in this country. This is based on the fact that he was so bold in his high-profile "altruistic" public persona, founded a youth serving organization, and he was caught in the act of grooming and sexually assaulting children in the showers before, yet he still did the same thing in the same place again in 2001.[4] Both times Sandusky was able to deceive his way out of it. He built his reputation both professionally and interpersonally over many years of hard work and sacrifice. Drive, determination, selflessness and altruism were his calling cards. He motivated others to give millions to needy children at The Second Mile. Sandusky was lauded and celebrated for his work. He effectively groomed most of the people who came in contact with him, including child care experts, psychologists,

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[1] Kenneth V. Lanning, Child Molesters: A Behavioral Analysis 23-34 (5th ed. 2010).

[2] *Id.* at 77.

[3] *Id.* at 140.

[4] In my experience, because people do not want to talk about the topic of male on male child sexual victimization these types of "close calls" happen regularly with "nice-guy" offenders, but witnesses either do not believe what they see, do not know how to handle it, misinterpret what they see, or do not think anyone will believe them if they told.

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professionals, celebrities, athletes, coaches, friends and family. And most notably, he was approved numerous times over thirty years as both a foster parent and an adoptive parent by child care professionals.

Sandusky loved children, and it showed. But he effectively hid from everyone in the community that his love for boys extended into criminal sexual activity with those boys. One reason why he was so effective at hiding this is because people find it very difficult to believe that someone as nice, as giving, as personable, as charismatic, as altruistic, as friendly, as caring, as fatherly, and as successful as Jerry Sandusky could possibly be the kind of hideous monster that is a child sex offender. Now, of course, everyone who knew Sandusky knows they were wrong. They all know that he fooled them for decades. With the degree and duration of his access, authority and control over vulnerable and needy boys and his "pillar of the community" social status, I can state there is a high degree of probability that the majority of Sandusky's victim's have not yet come forward. Many of them never will. It is simply too risky, too stigmatizing, too embarrassing, too misunderstood, for them to make the huge leap of faith required to tell the world that they were sexually victimized, and worse yet, by a man.

If, as a society, we are going to help these boys and men overcome their victimization, we have to have an ongoing open and non-judgmental public discussion about male sexual victimization. This is a problem that I faced for many years even within the FBI. Some of my colleagues did not want me to speak publically about being victimized as a teen. They said it would embarrass the Bureau. That it was unprofessional. Eventually, I stopped listening to them and I spoke out at conferences across the country and around the world. Almost every time I spoke out, one or more men and women quietly approached me and disclosed that they too were victimized as a child and had not disclosed to anyone before. One of the detrimental things that child advocates, investigators and lawyers do that is meant to help child sex crime victims but ultimately hurts them is overstating the resultant effects of child sexual victimization when they speak publicly about it.

Many, including the writers of the SIC report use terms like, horrendous, heinous, devastating, ruined, and other extreme words to describe what happened to the child victims. I'm sure the speakers mean well, however, those very same victims, and future victims, are hearing and reading those words and it fills them with a sense of hopelessness. It robs them of their future. They feel that they are doomed, damaged, and worthless. As responsible adults, we should make sure we temper our rhetoric and give victims the hope for a better day.

I trained hundreds of FBI agents and law enforcement officers who worked child sex crimes undercover investigations on the internet under the banner of the FBI's Innocent Images major case undercover operation. I participated in, consulted on, and testified as an expert witness on these cases for more than a decade. And I found that male agents and officers, almost to a person, preferred to create undercover personas as girls instead of boys. This, despite the fact that the statistics are very clear that offenders who target adolescent boys are, by far, much more prolific than those who target girls. It is not unusual to discover a male sex offender who has gotten away with molesting boys for thirty or more years and has amassed a victim pool in the hundreds.

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However, the majority of offenders who are caught in these undercover operations are those who prey on girls, mainly because male investigators would rather pose as a young girl rather than engaging in undercover conversations posing as boys talking with adult male offenders about sexual activity that the undercover officers consider to be homosexual activity. I have lectured many thousands of law enforcement officers across the country and around the world and have pleaded with them to overcome their inhibitions and insecurities so they can address the cases with these statistics in mind. I hope that perhaps with the infamy attached to the Sandusky case and the more open dialogue that has begun as a result of it, that law enforcement officers will take the lead and investigate the offenders who prey on boys with at least the same fervor as those who prey on girls.

The rationalizations and justifications in the SIC report about the janitors who witnessed and/or were told by co-workers of acts of sodomy against a boy by Sandusky were unfortunately part of the problem. They, as well as any other adult who witnessed a child being victimized, should have acted immediately to extricate the child from the situation, bring him/her to a hospital for forensic evaluation and do what ever is within their power to identify and report the offender to the police. If in fact those janitors were frightened of the ramifications to their careers, imagine how frightened those boys were of the ramifications to their lives. Children already grow up in a "land of giants." From the perspective of children they find themselves living in a world populated by people who are bigger than Shaquille O'Neal is to the smallest adult. Children are surrounded by adults who dwarf them in size, have freedom to do what they want, have the ability to order them around with impunity, and have ultimate authority and control over them. They find themselves helpless against the whims and wishes of those who control them. Adults who come in contact with children in any way or forum should be acutely aware of their responsibility towards those children. This means that they have a responsibility to learn proper boundaries, red flag warning signs, and resources available to help children who are or may be victimized.

3. Grooming[5]

In the context of child sexual victimization, grooming is a dynamic process utilizing a constellation of seemingly innocent behaviors aimed at gaining the cooperation of the child to achieve sexual gratification for the offender. In other words, it is a pattern of activity employed by preferential child sex offenders to gain access, authority, and control over children for sexual purposes, to ensure their silence, and to keep them in a position in which they can be repeatedly victimized. This dynamic process is aimed at potential child victims, their parents or guardians, and the community that surrounds them. Those who are closest to the child victims or the offender are precisely the ones who are most affected by grooming practices.

Offenders who "groom" typically seek out needy, isolated, or disadvantaged children and provide both emotional and tangible things to fill the needs of those children. They do this by providing: attention, recognition, affection, kindness, romance, gifts, money, trips, jewelry, clothing, staples, food, shelter, drugs, alcohol, privileges, driving, and/or smoking. They also break down the boundaries that usually exist between adults and children by lowering inhibitions, by being overly physical and playful with them, by talking about or encouraging

[5] Lanning at 26-28.

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masturbation and/or sex, by giving sexual instructions, or by supplying pornography. They are very careful to do only those things that will be viewed in a positive light in public, and typically reserve the sexual behavior for one-on-one private encounters.

Offenders will many times touch, hug, embrace, pat, and tussle the hair of targeted children in front of their parents, guardians, or other adults to desensitize the child to touch and to surreptitiously imply that the parent or other adult tacitly approves of such behavior. That way, when the offender is alone with the child, it is much easier to take the physical interactions to the next level. Sandusky used these behaviors very commonly, as well as using invitations to attend games or work out, followed by trips to the locker room to change clothes (desensitizing the child to being undressed in front of him and vice versa) and to shower with him (desensitizing the child to being naked with him and vice versa) and horsing around in the shower (desensitizing the child to touch while naked) all of which were grooming tactics aimed at sexually victimizing the child.

On the other side, the offender rationalizes his abusive behavior by telling himself that the child's need for nurturing is really an invitation to get close and become sexual with that child. This is one of the fundamental ways in which offenders who actually "love" children, justify in their own minds that they are not hurting a child, or not doing anything the child didn't want them to do. In fact, it is typically a shock and surprise to the child when the offender who has been so nice to them suddenly turns their interactions into something sexual.

The results of effective grooming are both far-reaching and long-term. They include: continued access to the child, initial cooperation of the child, isolation of the child, feelings of love, loyalty, and a debt of gratitude on the part of the child towards the offender. Then, when the sexual activity occurs, the child can experience intense feelings of shame, embarrassment, guilt, and confusion. They typically have strongly ambivalent feeling for the offender at this point, wanting to believe that he truly loves them and not wanting the positive things that he is providing to stop, while at the same time they do not want the sexual activity to continue.

This results in behavior by the child that we call "compliant victimization." Some victims are so grateful for the positive things the offender is doing for them that they actively participate in or enjoy the sexual activity. Others feel so shamed and guilt-ridden, or compromised and trapped, that they simply put up with it. Either way, the situation is such that it enables the revictimization of multiple kids over a long period of time. And typically, none of them want anyone to find out what they have been subjected to. This is especially the case when the offender is male and the child victims are male.

Most people in the general public believe offenders are "monster predators," evil people who are so despicable, so offensive, so heinous, that they must be horrible people, who are strangers, who look weird, act unusually, and most importantly, deliberately hurt children. However, the vast majority of offenders who sexually assault child victims are known to the victim, may be related to them, are seen as harmless, helpful, kind people who are considered "nice-guys." [6]

[6] Although there are a percentage of offenders who are female, I will use the masculine pronoun in my analysis to generalize about offenders.

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One of the nefarious consequences of effective grooming is that the offenders' motives are seen as altruistic, loving, and kind. He is seen to be sacrificing his time for the benefit of the children he helps. He is seen to be a person who would "never hurt a child." In fact, in most cases of "nice-guy" offenders, the perpetrator actually loves children, enjoys their company, and has convinced himself that the sexual interactions he has with the children he feels close to are merely expression of love and not harmful to the child. This is an example of rationalization and minimization that help a child sex offender grant himself permission to commit the offenses. The "nice-guy" persona is so diametrically opposed to that of the "monster predator" most people believe embodies any person who would sexually assault a child, that those who personally know the offender cannot reconcile the thought that they could possibly be one in the same. Simply put, people who know a "nice-guy" cannot believe that he could possibly be a reviled offender.

Faced with thousands of examples of kind, altruistic, friendly, fatherly, loving, interactions with a person who you know and trust, it is actually very difficult to undo all that experience based on a couple of incidents that you hear about second or third hand, and now believe something completely different. This is likely why McQueary has stated that he had to look again and again into the shower to make sure that what he thought he saw was actually what he saw.

4. Compliant Victimization[7]

One of the most counter-intuitive aspects of child sexual victimization investigations is embodied in the concept of compliant victimization.[8] Children who are groomed into sexual victimization typically do not call out to be rescued or disclose when questioned about possible victimization because of a complex set of physical and psychological factors, including the fact that they don't want anyone to know what has been done to them or what acts they had to do with the offender. For some, this is because they have finally found someone (the offender) who treats them well or tells them they are special; someone who grants them entrée into a world they never had a hope of entering before the offender. Typically, this creates a feeling of intense ambivalence on the part of the victims. On one hand, they love the offender for the things he has done for them. On the other hand, they hate the offender for the things he has done to them. That's why the boy in the shower in 2001 kept silent even though McQueary witnessed him being groomed and assaulted by Sandusky. That's why the nine victims who testified, or were testified about in Sandusky's trial, never made an immediate outcry. Even when investigators first came to some of these boys and asked them direct questions, most of them remained silent or denied anything sexual occurred. They claimed that they had not been victimized, when in fact they had. Eventually, most of them made partial or incremental disclosures, and then over time gave a fuller, more detailed account of their victimization. It's called the "conspiracy of

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[7] *See* Lanning at 24-26.

[8] Compliant victimization is such a difficult concept for people to understand and accept that when my colleague Ken Lanning first attempted to add the concept to his monograph (*see supra* note 1), the National Center for Missing & Exploited Children (NCMEC) repeatedly asked Lanning not to use it in his publication because they believed it would sound like he was blaming the victims. This concept does not blame the victims; it explains their behavior.

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silence" that surrounds child sexual victimization. It is the opposite of an "active agreement to conceal."

5. High Risk Situations

There are certain high-risk situations that arise in investigating acquaintance exploitation cases. Unfortunately certain youth organizations inadvertently provide the child molester with almost everything necessary to operate a child sex ring. A scouting organization, for example, fulfills the offender's needs for access to children of a specific age or gender, a bonding mechanism to ensure the cooperation and secrecy of victims, and opportunities to spend the night with a victim or have a victim change clothing. The bonding mechanism of the scouts is especially useful to the offender. Loyalty to the leader and group, competition among boys, a system of rewards and recognition, and indoctrination through oaths and rituals can all be used to control, manipulate, and motivate victims. Leaders in such organizations should be carefully screened and closely monitored. Another high-risk situation involves high-status authority figures. As stated above, child molesters sometimes use their adult authority to give them an edge in the seduction process. Adults with an added authority (e.g., teachers, camp counselors, coaches, clergy members, law-enforcement officers, doctors, judges) present even greater problems in the investigation of these cases. Such offenders are in a better position to seduce and manipulate victims and escape responsibility. They are usually believed when they deny any allegations. In such cases the law-enforcement investigator must always incorporate understanding of the seduction process into interviews, take the "big-picture" approach, and try to find multiple victims or recover child pornography or erotica in order to get a conviction.[9]

[9] *See* Lanning at 137-67 ("Investigating Acquaintance Sexual Exploitation").

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APPENDIX 4

REFERENCES AND RESOURCES

Child Molesters: A Behavioral Analysis by Ken Lanning Supervisory Special Agent (retired) of the FBI's Behavioral Analysis Unit is the most comprehensive and enduring reference regarding Child Sex Offender Behavior. Lanning's monograph can be downloaded here: http://www.ncmec.org/missingkids/servlet/ResourceServlet?LanguageCountry=en_US&PageId=469

National Center for Missing and Exploited Children (NCMEC) is a national and international resource for individuals and law enforcement agencies that are interested in learning about, reporting, detecting, investigating, and protecting children from sexual victimization, child pornography, and abduction. Its website is an extremely valuable resource: http://www.ncmec.org/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US&

Male Survivor is an international organization that I am a long-time member of that is dedicated to preventing, healing, and eliminating all forms of sexual victimization of boys and men through support, treatment, research, education, advocacy, and activism. Its website is a great resource for individuals, groups and organizations to learn about the issues particular to, and resources available for, survivors of male sexual victimization, as well as, detection and prevention tips: http://www.malesurvivor.org/

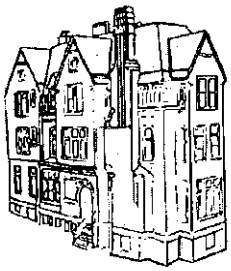
Stop it Now! is and organization that I have worked with over the years and which has become a leading voice in the fight against child sexual victimization. Its website is a comprehensive and helpful resource for any person or organization that is interested in finding out more about recognizing and preventing child sexual victimization: http://www.stopitnow.org/

Protect is a very successful political action organization, that I am a lifetime member of, which has championed many helpful and effective child advocacy laws. Its website is a valuable resource for information: http://www.protect.org/home

Safe4Athletes is an organizational advocate that I am working with for athlete welfare where every athlete is provided a safe and positive environment free of sexual victimization, bullying and harassment. Its website is a tremendous resource for individuals, groups, schools, clubs, and teams that need information and guidance on how to create safe environments for child athletes. They have model policies, agreements, complaint forms, and the like that can be used free of charge by any organization: http://safe4athletes.org/

APPENDIX C

National Institute for the Study, Prevention and Treatment of Sexual Trauma
104 E. Biddle Street
Baltimore, MD 21202
(410) 539-1661
fredsberlinmd@comcast.net



February 6, 2013

J. Sedwick Sollers, III
Attorney at Law
King and Spalding, LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4707

RE: Joseph Paterno

Dear Mr. Sollers:

As an expert on Pedophilia, I am writing in response to a request for my professional opinions about the document titled "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky." That document, which had been produced by Freeh, Sporkin, and Sullivan, LLP, is dated July 12, 2012, and it has sometimes been referred to as the "Freeh Report." I was asked to focus on inferences that have been made about Joseph Paterno in that report, and to additionally focus on his response to the information he received about Gerald A. Sandusky. I have been asked to do so in light of my extensive experience in assessing and treating pedophilia, and in researching and addressing child sexual abuse, and related issues. My professional background also includes training in the behavioral sciences, and in the assessment of mental and motivational states. To that end, I have testified in Federal Court on more than one occasion as an expert psychiatric witness; providing information to jurors to assist them in determining the motivational state (i.e., the mental intent) of accused defendants. Because the "Freeh Report" has made certain inferences about Joseph Paterno's alleged mental motivations, I will comment briefly about that aspect of the report as well.

Because there are a variety of criminal charges pending against certain former Pennsylvania State University personnel, I will avoid commenting in detail about those individuals at this time. I will also limit any comments that I may make regarding Gerald Sandusky, as his criminal case may yet be the subject of further appeal.

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Summary of Dr. Berlin's Conclusions:

The "Freeh Report" alleges that there had been a "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims." It further alleges that "in order to avoid the consequences of bad publicity, the most powerful leaders at the University – Spanier, Schultz, Paterno, and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse..." As an acknowledged expert on pedophilia (and as a mental health professional with training and expertise in the behavioral sciences, and in assessing mental and motivational states), having carefully reviewed the "Freeh Report," I have reached the following conclusions:

1. Like many others in the community, Joe Paterno may not have appreciated that Gerald Sandusky likely had pedophilia; along with the inherent risks that that condition can pose. Numerous public examples exist documenting just how difficult it can be for friends, colleagues, relatives, and close acquaintances to identify a person with pedophilia, and to appreciate the risk such an individual can pose to children. In my professional opinion, Joe Paterno was likely one of hundreds, if not thousands, of such people who were so deceived. That said, I have seen no credible evidence in the "Freeh Report" supporting the conclusion that Joe Paterno had acted in bad faith regarding the Sandusky situation. Nor have I seen any evidence that Joe Paterno was a man who lacked a genuine concern for the well-being of others – particularly children. Remarkably, the "Freeh Report" shows virtually a complete disregard for Joe Paterno's strengths of character, repeatedly demonstrated moral values, and life-long pattern of responsible conduct and leadership; while instead relying heavily upon unsubstantiated inferences and innuendo.

2. Of particular significance in the "Freeh Report" is what it did not find, especially in view of the fact that its authors had had access to such a large volume of information. For example, given the very serious nature of the contained allegations, remarkably the "Freeh Report" presented no credible evidence whatsoever substantiating the claim that Joe Paterno had been involved in an effort to repeatedly conceal critical facts relating to Mr. Sandusky's child sexual abuse. In 1998, Joe Paterno may have known that Mr. Sandusky had been investigated regarding some type of alleged improper behavior with a child, and that no basis had been found for criminal prosecution. In 2001, after having been informed in vague and general terms by a graduate assistant about possible improper sexual behavior by Mr. Sandusky, Joe Paterno had immediately and responsibly passed that information along to his superiors. In essence, that is what Joe Paterno may have known, or did know – and that is what he had done about it. It is entirely unclear to me how that translates into a "total and consistent disregard" for the "safety and welfare of Sandusky's child victims," or into repeatedly concealing critical facts relating to Mr. Sandusky's child sexual abuse.

3. The "Freeh Report" infers that Joe Paterno had had control over his superiors when it came to important decisions; presumably, including decisions about how to handle information regarding Mr. Sandusky's alleged sexual abuse. Remarkably, the "Freeh Report" presented no credible evidence whatsoever (only unsubstantiated innuendos) to support such a serious contention. It also presented no credible evidence whatsoever to support the notion that Joe Paterno had wanted, or had somehow encouraged, his superiors to refrain from reporting Mr. Sandusky's alleged sexual acts to the Department of Public Welfare, or to refrain from reporting it to anyone

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else. Once again, in the absence of any such evidence, it is entirely unclear to me how the "Freeh Report" could have implied that Joe Paterno had somehow been involved in an effort to repeatedly conceal critical facts relating to Mr. Sandusky's child sexual abuse.

4. Given the very serious nature of the contained allegations, remarkably the "Freeh Report" presented no credible evidence whatsoever to support the suggestion that with respect to Mr. Sandusky, Joe Paterno had been motivated to try to avoid bad publicity.

5. Remarkably, based upon the unsubstantiated inferences contained in the "Freeh Report," numerous very severe sanctions had quickly been imposed. Those had included (1) the removal of the now ex-head football coach Joseph Paterno's honorary statue from a previous place of prominence, (2) the withdrawal of Mr. Paterno's name from consideration for the receipt of a number of potential honors, (3) the removal of his name from some previously bestowed honors, and (4) the vacating of more than 100 victories previously earned by the Penn State football team – thereby denying Joe Paterno the praiseworthy achievement of having been the winningest coach in major college football history. In my professional opinion, the unsubstantiated inferences of the "Freeh Report" cannot, and should not, have been used to justify such sanctions.

6. Finally, wanting to be fair to Joe Paterno is not incompatible with having a genuine concern about the serious matter of child sexual abuse.

Dr. Berlin's Professional Background:

I am an Associate Professor of Psychiatry and Behavioral Sciences at The Johns Hopkins University School of Medicine. I am also an Attending Physician at The Johns Hopkins Hospital. I have earned a Ph.D. degree in Psychology, as well as an M.D. degree, and I am Board Certified as a Psychiatrist by the American Board of Psychiatry and Neurology. One of my areas of expertise within the field of psychiatry is related to the various Sexual Disorders; including Pedophilia. I served as a member of the Subcommittee on the Paraphilias (in layman's terms, the Sexual Disorders) for the third revision of the Diagnostic and Statistical Manual of Mental Disorders (the DSM). I have been an invited participant at a White House conference on Child Sexual Abuse; invited to address various Subcommittees of the United States Senate regarding that same matter; and invited to address Colleges of Judges in several states.

I had also been asked to serve as a member of the Ad Hoc Committee on Sexual Abuse of the National Conference of Catholic Bishops, and to serve as a member of The Cardinal's Commission for the Protection of Children. I have published extensively in a variety of professional journals (including The Journal of the American Medical Association, The American Journal of Psychiatry, and The American Journal of Forensic Psychiatry), and I have provided peer reviews for many of those same entities. My published papers have spanned a number of topics including pedophilia, changes in brain chemistry during sexual arousal, and the mandatory reporting of suspected child sexual abuse. I have participated in a number of symposia sponsored by the Federal Bureau of Investigation, and by the United States Department of Justice. One of the Sexual Disorders Treatment Programs that I direct has been designated as

a "National Resource Site" by the Justice Department. I have enclosed a more complete copy of my professional vitae along with this letter.

The "Freeh Report;" Its Inferences Regarding Joseph Paterno, His Motivations, and His Actions:

The authors of the "Freeh Report" gathered and reviewed a tremendous volume of both detailed, and sometimes sketchy, information. Some of that information had been dependent upon the memories of various individuals about events that may, or may not, have taken place more than a decade ago, and some of that information was of a hearsay nature. Having examined and analyzed that information, the authors of the "Freeh Report" had then presented their theories, and conclusions, about what had occurred.

Shortly after their findings had been released on July 12, 2012, a number of very severe sanctions were quickly imposed. Those sanctions had included (1) the removal of the now ex-head football coach Joseph Paterno's honorary statue from a previous place of prominence, (2) punishments imposed upon the Penn State football team (its players and fans having had nothing to do with the allegations in question), (3) the withdrawal of Mr. Paterno's name from consideration for the receipt of a number of potential honors, (4) the removal of his name from some previously bestowed honors, and (5) untold damage to his reputation, to his family, and to the Penn State community. In addition, the NCAA (National Collegiate Athletic Association) vacated more than 100 victories previously earned by the Penn State football team – thereby denying Joseph Paterno the praiseworthy achievement of having been the winningest coach in major college football history. (Coach Paterno passed away in January 2012.) All of that had been done before any meaningful opportunity had been given to the representatives of Joseph Paterno to adequately digest and possibly publically rebut the theories and conclusions of the "Freeh Report."

Beyond that, many who had felt that Coach Paterno had been treated unfairly (including numerous members of the student body) were accused by various members of the media, without any credible evidence whatsoever, of being insufficiently concerned about the serious matter of Child Sexual Abuse. Wanting to be fair to Mr. Paterno is not incompatible with having such concerns. To suggest otherwise would be disingenuous. In our legitimate effort to protect innocent children, the fair treatment of adults should not become a collateral casualty.

According to the "Freeh Report," "The most saddening finding by the Special Investigative Council is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims." The report goes on to allege that "Taking into account the available witness statements and evidence, the Special Investigative Council finds that it is more reasonable to conclude, that in order to avoid the consequences of bad publicity (my emphasis added), the most powerful leaders at the University – Spanier, Schultz, Paterno, and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large."

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It is important to note that even though it is not possible to read the mind of another, the "Freeh Report" infers a specific motivational state; that is, an interest in avoiding bad publicity, accompanied by a "total and consistent disregard... for the safety and welfare of Sandusky's child victims." It does so to the exclusion of seriously considering any other meaningful alternative possible explanations. It is also important to note that although the report's theory about what had taken place is "the most powerful leaders at the University . . . repeatedly concealed critical facts relating to Sandusky's child abuse," at the time of the initial formal allegations against Mr. Sandusky (which had been in 1998), no such abuse had as yet been established. In fact, Mr. Sandusky was exonerated of any illegal conduct in 1998 by the District Attorney, the police, and an examining caseworker.

At most there had only been two occasions over the years when, in the midst of his other ongoing obligations, Mr. Paterno may have been informed of concerns regarding Mr. Sandusky. Once had been in 1998; the other in 2001. In 1998, a police investigation had not resulted in the prosecution of Mr. Sandusky; a fact that may have been known by Mr. Paterno, although he did not recall that in 2011. The police investigation in 1998 had not concluded that Mr. Sandusky had engaged in any illegal pedophilic acts, and at that time it had been believed that he had been helpful to many disadvantaged children.

The "Freeh Report" seems to allege, or at least to infer, that in 2001 Mr. Paterno had been one of those who had "repeatedly concealed critical facts" in order to "avoid the consequences of bad publicity." Prior to his death in 2012, Mr. Paterno himself had told a reporter that per his recollection, "I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the University procedure was. So I backed away and turned it over to some other people I thought would have a little more expertise than I did. It didn't work out that way." That statement says nothing about a concern regarding bad publicity. Nor am I aware of any documents cited in the "Freeh Report" that support the conclusion that Joseph Paterno was concerned about bad publicity, or that he had had a "total and consistent disregard... for the safety and welfare of Sandusky's child victims." Reporting his concerns to his superiors in 2001, as he did, had been an appropriate action for Mr. Paterno to have taken.

The "Freeh Report" also alleges that in 2001, one of the ideas deliberated by Mr. Paterno and his superiors had been that the "humane" thing to do was to confront Mr. Sandusky, and to hear him out; possibly even suggesting to him, amongst other things, that he seek treatment. In deciding to consider confronting Mr. Sandusky in 2001, Mr. Paterno's superiors had expressed the concern that they might subsequently be criticized for doing so; rather than more immediately making a report to the Department of Public Welfare (DPW). Arguably, had they simply been attempting to protect themselves, they would not have wanted to unnecessarily leave themselves open to others "second guessing" their motives for acting in such a fashion. Because there are still legal issues pending about whether Mr. Paterno's superiors had failed to comply with Pennsylvania's mandatory reporting requirements regarding suspected child sexual abuse, I will not further address that issue here. However, I would note that they had not remained secretive about Mr. Sandusky's actions; having reported their concerns to representatives of the Second Mile Program. Although it is possible to second guess any decision after the fact, confronting an individual who has been accused of wrongdoing, even wrongdoing of a criminal nature, is not necessarily an unacceptable administrative strategy.

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In my professional opinion, having reviewed the public record, no credible evidence has been presented documenting that Joe Paterno had ever agreed that Mr. Sandusky's actions should not be reported to DPW. The "Freeh Report" references an email from Athletic Director Tim Curley to both Senior Vice President Gary Schultz and President Graham Spanier dated February 27-28, 2001 that reads, in part, as follows: "After giving it more thought and talking it over with Joe yesterday (presumably Joe Paterno), I am uncomfortable with what we agreed were the next steps." It would appear that the original "next steps" had involved a plan to notify DPW, without first giving Gerald Sandusky the opportunity to respond to the allegations that had been made against him. The email in question had then gone on to state "I am having trouble with going to everyone but the person involved. I think I would be more comfortable meeting with the person and telling him about the information we received. I would plan to tell him we are aware of the first situation [presumably the 1998 allegation against him]. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also we feel a responsibility at some point soon to inform his organization and maybe the other [presumably DPW] about the situation. If he is cooperative, we would work with him to inform his organization [presumably, The Second Mile Program]. If not, we do not have a choice and will inform the two groups" (presumably both The Second Mile Program, and DPW).

President Graham Spanier responded by stating, in part, "The approach you outlined is humane, and a reasonable way to proceed." Senior Vice President Scultz had responded by stating "This is a more humane and upfront way to handle this" – adding "we can play it by ear" – according to the Freeh Report, that referred to the decision about whether to then notify DPW.

Once again, because there are legal proceedings pending against some of those involved in the exchange of the above-noted emails, I will not comment any further about their actions at this time. However, in my judgment to conclude that the email phrase "after talking it over with Joe" constitutes credible evidence that Joe Paterno had not wanted DPW to be informed, or that he had lacked a genuine concern about the wellbeing of children, would be a stretch. Innuendo and speculation in the "Freeh Report" that Joe Paterno had control over his superiors when it came to making important decisions is nothing more than just that; disingenuous speculation.

The above-noted information notwithstanding, at no time whatsoever, has any credible evidence been uncovered documenting that Mr. Paterno himself had been attempting to "avoid bad publicity." In fact, it is unclear what sorts of bad publicity Mr. Paterno would have feared, had a report been made concerning suspicions of a possible incident of child sexual abuse on campus by a former Penn State employee – albeit a very prominent *former* employee. Mr. Paterno could just as easily have been praised for his involvement in making such a report potentially available to the public. I have also seen no credible evidence that Mr. Paterno had "repeatedly concealed critical facts related to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State Community, and the public at large."

Mr. Paterno has never been accused of failing to properly report the 2001 allegations against Mr. Sandusky to his superiors. To the contrary, it is very clear that he had done just that. Mr. Paterno has never been charged with a failure to comply with Pennsylvania's Mandatory Reporting Statutes regarding Child Sexual Abuse.

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Parenthetically, it might be noted that even though he had notified his superiors about his concerns, arguably Joe Paterno may not have even been a member of the category of persons who are mandated to report suspected child sexual abuse under Pennsylvania law. In defining the general rule regarding who is mandatorily required to report, the relevant statute states that "A person who, in the course of employment, occupation, or practice of a profession, comes into contact with children shall report or cause a report to be made..." It is not clear that Joe Paterno "in the course of employment, occupation, or practice of a profession" was a person who "comes into contact with children." Be that as it may, he had nevertheless responsibly reported his concerns to his superiors. In a situation such as this, having been appropriately informed, it would ordinarily be the responsibility of a designated representative of an institution to report (or to cause a report to be made about) suspected child sexual abuse to DPW. It would not ordinarily be the sole responsibility of that institution's football coach.

As a football coach, undoubtedly Mr. Paterno had sometimes been subjected to "Monday Morning Quarterbacking" (i.e., to second guessing his decisions after the fact). In retrospect, prior to his death, while looking back at what had occurred, Mr. Paterno himself had reportedly expressed the wish that he could have done more. The "Freeh Report" has gone far beyond "second guessing" Mr. Paterno's actions by impugning his credibility and suggesting that he had not been acting in good faith. Having passed away, sadly Mr. Paterno is no longer in a position to defend himself. I will further address some of the above-noted issues below. I will also comment about Mr. Paterno's considerable strengths of character over the course of his lifetime; a consideration that was given little, if any, meaningful weight in the "Freeh Report."

What is Pedophilia; and Why Can It Be So Difficult to Recognize:

Pedophilia is a psychiatric condition in which an individual's sexual orientation is directed, either in whole, or in part, towards young children. Although I have not clinically evaluated Mr. Sandusky, he was found guilty of multiple counts of child sexual abuse, and it is quite possible that he manifested that disorder. However, having not evaluated him clinically, I am not in a position to formally make such a diagnosis in this instance.

In growing up, some individuals discover that they have a pedophilic sexual makeup. Because of the tremendous societal stigma attached to experiencing pedophilic sexual desires, most persons with the condition would ordinarily be expected to keep that sort of very private information about themselves quite secretive. Unless others somehow become aware of the fact that an individual has actually enacted his pedophilic cravings, it can often be very difficult to conclude with confidence that a colleague, or perhaps even a close friend, has such a condition. Many persons with the disorder are hesitant to seek help; fearful that in doing so they may become a public pariah should that fact become known to others. In retrospect, Tim Curley's suggestion that, in addition to other steps, Mr. Sandusky should have been encouraged to seek out treatment may have been very much on point and appropriate.

When behaviors are a reflection of one's observable traits of character, and temperament, (for example, a tendency to be untrustworthy, or to become easily angered), such a person's actions

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do not necessarily come as a surprise to others. When behaviors are a reflection of the most intimate aspects of one's private sexual makeup, a makeup that one may be very motivated to conceal, anticipating "bad acts" (or even fully appreciating their significance) may become much more problematic.

Persons with pedophilia can manifest a genuine concern for the well-being of children, and they often enjoy spending time with them. That is not the problem. The problem is that in the context of spending time with them, unlike the rest of us, persons with pedophilia can then be tempted sexually – and if they act on such temptations, what might otherwise have been a very positive relationship can quickly turn tragic. The fact that persons with pedophilia can so often enjoy spending time with children, showing concern for them, can easily seem so positive; masking the hidden nature of their sexual desires. As a consequence, numerous public examples exist documenting just how difficult it can be for friends, colleagues, relatives, and close acquaintances to appreciate the risk that such an individual can pose to children. I have seen many such examples over the years in the course of my professional work.

What Did Joseph Paterno Know; When Did He Know It; And What Did He Do About It:

Keeping in mind how difficult it can be to recognize that an individual has pedophilia, in the present instance the question can be asked "what did Joseph Paterno know, and when did he know it?" In 1998, Mr. Paterno may have learned that Mr. Sandusky had allegedly been suspected of some type of improper behavior with a child. Mr. Paterno did not recall the incident when asked about it in 2011. He may also have learned that Mr. Sandusky had been investigated – and that no basis had been found for criminal prosecution in 1998. Although in 2012 Judge Freeh infers that at that point Mr. Paterno could have done more, it is unclear what that "more" might have been. It is also unclear, as the coach of the football team, based upon the information available to him at that time, how it would have been appropriate, following a police investigation, to have taken it upon himself to have done much further. Prior to the 1998 incident, Mr. Paterno had already told Mr. Sandusky that he would not be his successor as Head Football Coach. Mr. Sandusky retired from Penn State the next year in 1999.

In 2001, three years following the earlier allegation, Mr. Paterno had been informed by graduate assistant Mike McQueary that he had observed Mr. Sandusky engaging in acts that had appeared to possibly involve some form of improper sexual contact with a child. All agree that the description was general and not graphic. Eleven years later in 2012, Mr. McQueary and Mr. Paterno apparently had somewhat different recollections about the exact details of what they had discussed in 2001. That would not necessarily be unexpected given the fact that so much time, and so many life events, had ensued in between. Be that as it may, Mr. Paterno had quickly reported his concerns about Mr. Sandusky to his superiors in 2001. That would appear to be the extent of what Mr. Paterno had known about Mr. Sandusky's actions at that time.

It has been argued in retrospect that Mr. Paterno should have done more, and "knowing now what he did not know then," Mr. Paterno himself had expressed that very sentiment. However, in 2001 he had had absolutely no knowledge whatsoever about the extent of Mr. Sandusky's

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sexual involvements with multiple children; involvements that have only recently been more fully documented in 2012 via Mr. Sandusky's criminal convictions.

In looking back, with the advantage of hindsight, it is one thing to suggest that perhaps more could have been done, and that there are lessons to be learned. Arguably, in any situation there is almost always more that can be done, and life often involves a series of adjustments and learning experiences. It is another thing entirely to suggest a lack of good faith, and malevolent self-serving motives, in the absence of compelling evidence. As a football coach, having reported his concerns to his superiors, Mr. Paterno may not have been well equipped to fully appreciate how best to handle such a vexing situation. However, to infer as did the "Freeh Report" that he may have been one of those at Penn State who had manifested a "total and consistent disregard . . . for the safety and welfare of Sandusky's child victims," is to itself show a serious disregard for Mr. Paterno's repeatedly demonstrated moral values; to his lifelong pattern of responsible conduct and leadership; and to his dedicated commitment to the best traditions of the Pennsylvania State University.

I have seen no credible evidence suggesting in 1998, 2001, or 2012 that the "most powerful leaders" at Penn State had ever collaborated or conspired with Joseph Paterno to present a concocted version of what had occurred, or conspired with him to keep it a secret. Nor have I seen any credible evidence to suggest that Joseph Paterno had feared that there would be a discovery that he himself had acted improperly. Reportedly, upon learning that he had been accused of being one of those "powerful leaders" who had manifested a "total and consistent disregard for the safety and welfare of Mr. Sandusky's child victims," Mr. Paterno had expressed both pain and surprise; hardly the reaction to be expected from a man who had had reason to believe that he had acted wrongfully.

Joseph Paterno's Character:

In contrast to the private nature of sexual desires and behaviors, evidence of one's character is often more publically accessible. In Mr. Paterno's case, his commitment to instilling good values, and the importance of achieving a solid education, into the minds of his football players have all been a matter of public record. As a football coach at Penn State, he had demonstrated for others an outstanding work ethic – devoting his professional life to his players, to his University, and to his community for over 61 of his adult years. He had insisted that all of his players perform well not only athletically, but academically also; the result being that between 80% to 90% of his players had successfully graduated. He and his wife were extremely philanthropic; giving millions of dollars to Penn State University. Many of those dollars were not to support athletics, but to support the building of a new library that now bears his name. His football team had never been involved in any recruiting scandals. His life had been one of dedication and devotion to his family and to his University. As is true of all of us, he was not a perfect person, and like all of us, at times he had likely erred. That said, he was well known to be an honest man of integrity.

In my professional opinion, there is absolutely nothing about the way in which Mr. Paterno had led his life, or about his characterological makeup, that would support the unsupported inference that "in order to avoid the consequences of bad publicity," he had been one of the "powerful

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leaders" at Penn State who had "repeatedly concealed critical facts related to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large." In point of fact, as noted above, Joe Paterno had known very little about the extent of the acts for which Mr. Sandusky had subsequently been convicted. In my judgment, given his history of a life well led, and of good character, and in light of the unsubstantiated nature of the inferences against him, to conclude that for any reason he would have been unconcerned about the wellbeing of children, would require turning a blind eye to the values that he had consistently demonstrated, and to the essence of what his life had been all about.

Concluding Comments:

Preventing child sexual abuse must remain one of society's most important priorities. Understandably, it is also an issue that generates intense emotion. When thinking about how to deal with it as an abstract concept, devoid of the emotions associated with having to actually face such a situation in real life, it is easy to be confident about one's ability to handle the matter well. Thankfully, in the life of any given adult, discovering that a colleague, or even a close friend, may have actually acted in such a fashion is a very rare event. Because of that, under real life circumstances, one may easily feel confused and uncertain about what has happened, and about how best to deal with it. Arguably, Coach Paterno may not have handled the situation as well as he himself, having subsequently learned much more, had wished that he had. However, I do not necessarily agree with such an assertion, and in my judgment Coach Paterno is still one of the "good guys."

The man responsible for Mr. Sandusky's actions is Mr. Sandusky himself. Although it is reasonable to ask what lessons can be learned about how individuals and institutions can better deal with such situations in the future, in my judgment polarizing the matter to the point where students, and others, wanting to defend Joe Paterno are accused of caring more about football than about child sexual abuse is improper, and doing so serves no useful purpose.

Although the "Freeh Report" may have been a good faith effort to investigate this tragedy, that does not mean that they reached the correct conclusions as to Joe Paterno's motivations and conduct, particularly in the apparent absence of an appreciation of how persons with pedophilia can be so difficult to recognize. Eventually, as inevitably it does, history will make the final judgment about these matters. I do not doubt that history will support the legitimacy of doing everything possible to protect innocent children. I am less certain that history will conclude that all of the adults involved in this matter were treated fairly.

In my professional opinion, unsupported inferences about Joe Paterno's motives, and about his alleged actions (or inactions) in this situation, should not trump all of the good that he has done over the course of his lifetime. Such unsupported inferences should not be allowed to redefine, or to otherwise alter, perceptions about his character, nor should they be allowed to unfairly impugn his integrity. Having read the "Freeh Report," and with the benefit of my extensive experience and knowledge about how difficult it can be for a community to recognize persons with pedophilia, I have not seen evidence supporting a conclusion that Joe Paterno had acted in

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bad faith, nor have I seen evidence supporting a conclusion that he has ever been a man who had lacked a genuine concern about the wellbeing of others – including the wellbeing of children.

In the past, there have been instances in which attempts have been made to "rewrite history," without fair "due process," by "erasing" records of honors previously received, and of lives well led. During the Joseph McCarthy anti-communism era, many good lives had been unfairly deprecated, and many good reputations had been unjustly tarnished. Historically, whenever that has been done, ostensibly it has been for the sake of some purported greater good. In my judgment, rewriting the history of Joseph Paterno, in the context of unsubstantiated inferences about his purported motives, and in the context of concerns about pedophilia and child sexual abuse (as legitimate as those concerns surely are), is neither fair, nor is it justifiable. Based upon the information currently available to me, and for the reasons detailed above, it is my view that in this instance, Joseph Paterno, his family, and the Penn State community had been deserving of a much better outcome. It will now become the choice of others to determine the extent to which that potentially still fluid outcome should be further addressed.

I trust that this information will prove useful. Should you require any additional information from me at this time, please do not hesitate to let me know. Thank you very much.

Sincerely,

Fred Berlin

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Enclosure: Dr. Berlin's Professional Vitae

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RESEARCH ACTIVITIES:

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Berlin FS. An Interview by the Editor. The Maryland Psychiatrist, 17, pp. 5-7, 1990.

Berlin FS, National Conference of Catholic Bishops Interview, National Conference of Catholic Bishops' Ad Hoc Committee on Sexual Abuse, Published online at usccb.org, Baltimore, Maryland, 09/08/97

Berlin FS Diagnosis and Treatment of Paraphilias. Audio Digest Psychiatry, 17, p. 17, September 5, 1988.

Berlin FS. Treating Sexual Disorders with Medroxprogesterone Acetate: An Interview with Fred S. Berlin. Currents in Affective Illness, 6, 7, pp. 5-15, 1987.

Berlin FS. Psychiatry Meets the Sex Offender. Audio-Digest Psychiatry, 16, p. 13, July 13, 1987.

Berlin FS, Meinecke CF. Treatment of Sex Offenders with Antiandrogenic Medications. Audio Digest Psychiatry, December 1981. (Audio Cassette).

EXTRAMURAL SPONSORSHIP:

GRANTS AND CONTRACTS:

The Harry Frank Guggenheim Foundation: The Assessment of Compulsive Rapists and Pedophiles for Hormonal, Chromosomal and Neurobiological Pathologies. Grant awarded on July 15, 1985.

Berlin FS, Conner E, Rider M: Annotated Bibliographic Review of Literature on Etiology and Treatment of Sex Offenses and Sex Offenders. Contracted and published by The National Institute of Mental Health, 1982.

EDUCATIONAL ACTIVITIES:

TEACHING:

Classroom Instruction – Yearly lecture, 2nd year medical students, The Johns Hopkins University School of Medicine.

Clinical Instruction – Bedside and didactic teaching, psychiatric residents and students, Meyer-5 ward (currently attending physician 3 months of the academic year), The Johns Hopkins Hospital.

(See also below – "Primary Service Responsibilities")

CME INSTRUCTION:

Invited Participant, When Sex Offenders are Adolescents, Ministry of the Sick, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 4/29/96.

Invited Participant, Positron Emission Tomography and the Chemistry of Mental Illness: Changes in Brain Chemistry During Sexual Arousal, Nuclear Medicine Seminar, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 3/13/97.

Course Director, Pedophilia and Rape, 143rd Annual Meeting, American Psychiatric Association, New York, New York, 5/12/90 - 5/17/90.

Course Director, Diagnosis and Treatment of Pedophiles and Rapists, 142nd Annual Meeting, American Psychiatric Association, San Francisco, California, 5/6/89 - 5/11/89.

Course Director, Assessment and Treatment of Adult and Adolescent Sex Offenders, 141st Annual Meeting, American Psychiatric Association, Montreal, Canada, 5/9/88.

Course Director, Diagnosing and Treating Rapists and Pedophiles, 140th Annual Meeting, American Psychiatric Association, Chicago, Illinois, 5/13/87.

Invited Participant, Positron Emission Tomography: Changes in Opiate Receptor Activity on PET Scanning During Sexual Arousal, The Johns Hopkins University School of Medicine Continuing Education Course, Baltimore, Maryland, 4/19/86.

(See also below – "Conferences Organized")

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MENTORING:

Member, Board of Student Advisors, The Johns Hopkins University School of Medicine, 1980-1983.

Member, Ph.D. Thesis Committee, for Dr. Kate Thomas and Dr. Kathy Pilero.

Clinical Supervisor for a Variety of Psychiatric Residents.

Supervisor of Elective Training to a Variety of Pre- and Post-doctoral Students.

EDITORIAL BOARD APPOINMENTS:

Member, Editorial Board, Family Violence and Sexual Assault Institute, 2003 – present

Member, Editorial Board, Journal of Sexual Addiction and Compulsivity, 2001 - present

Associate Editor, International Journal of Offender Therapy and Comparative Criminology, January 1997 – December 2002

PEER REVIEW PERFORMED FOR THE FOLLOWING JOURNALS:

The American Journal of Bioethics - Neuroscience
The American Journal of Psychiatry
Behavioral Sciences and the Law
Journal of the American Medical Association (JAMA)
Journal of Child Sexual Abuse
The Journal of Nervous & Mental Disease
The Journal of Pediatrics
The Journal of the American Academy of Psychiatry and the Law
The American Journal of Clinical Hypnosis
The Archives of General Psychiatry
Archives of Sexual Behavior
Child Abuse and Neglect: The International Journal
The Journal of Consulting and Clinical Psychology
The Journal of Neuropsychiatry and Clinical Neurosciences
Psychosomatics
Social Psychiatry and Psychiatric Epidemiology
The Harvard Review of Psychiatry

CLINICAL ACTIVITIES:

LICENSURES:

Licensed Physician, State of Maryland, 1975 – Present, ID #D18703.

CERTIFICATIONS AND FELLOWSHIPS:

Diplomat, National Board of Medical Examiners, ID #141770, 1975.

Board Certified in Psychiatry, American Board of Psychiatry and Neurology, ID #21208, 1980.

Distinguished Life Fellow, American Psychiatric Association, 2010.

Diplomat, The American Board of Forensic Examiners, ID #660, 1994.

Diplomat, The American Board of Sexology, ID #1760, 1995.

(have also provided questions for board certification examinations)

Board Certified in Forensic Psychiatry, American Board of Psychiatry and Neurology, ID #504, 1998 to 2008.

PRIMARY SERVICE RESPONSIBILITIES:

Attending Physician, Psychiatry, Meyer-5 Inpatient Service, Currently 2 months per year (previously as much as 12 months per year) – includes periodic weekends on-call

Periodic on-call physician for the Hopkins Access Line (HAL).

Director, Sexual Behaviors Consultation Unit, involves teaching and supervision of Johns Hopkins staff, psychiatric residents and medical students during their outpatient training.

ORGANIZATIONAL ACTIVITIES:

THE JOHNS HOPKINS MEDICAL INSTITUTIONS:

Member, Medical School Counsel, The Johns Hopkins University, 1982 – 1984.

Member, Gender Identity Committee, The Johns Hopkins Hospital, 1980 – 1981.

Member, Utilization Review Committee, The Johns Hopkins Hospital, 1977 – 1978.

Member, Advisory Committee, House Staff Council, The Johns Hopkins Hospital, 1977 – 1978.

Member, House Staff Council, The Johns Hopkins Hospital, 1976 – 1978.

PROFESSIONAL SOCIETIES:

ELECTED POSITIONS:

President, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 4/95 - 4/98.

Treasurer, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 1993-1995.

Elected Member of Council, Maryland Psychiatric Society, 1993-1996.

APPOINTED POSITIONS:

Appointed Member, Technical Advisory Committee, The Spurwink Institute, 1996.

Appointed Member, Board of Directors, Maryland Foundation for Psychiatry, 1995.

Appointed Member, Task Force on Examinations, Section on Sexological Research, The American Board of Sexology, 8/31/92.

Appointed Member, Legislative Committee, Maryland Psychiatric Society, 1989 - Present.

Appointed Member, Legislative Network, Mental Health Association of Metropolitan Baltimore, 1985.

Appointed Member (by the Governor of Maryland), The Board of Patuxent Institution, 1984 – 1989.

MEMBERSHIPS:

American Academy of Psychiatry and the Law
American Association for the Advancement of Science
American Board of Forensic Examiners
American College of Forensic Psychiatry
American Medical Association
American Professional Society on the Abuse of Children
American Psychiatric Association
Association for the Treatment of Sexual Abusers
Eastern Psychological Association
Greater Baltimore Task Force on Sexual Offenders
Maryland Psychiatric Society
Mental Health Association of Maryland
National Adolescent Perpetrator Network
Society for Scientific Study of Sex
Society of Biological Psychiatry
Southern Medical Association

CONFERENCES ORGANIZED:

Course Director, The First Annual Symposium Child Sexual Abuse: A Public Health Perspective, The Johns Hopkins Bloomberg School of Public Health, Baltimore, Maryland, 04/27/12.

Course Director, The Cycle of Sexual Trauma: Treating the Victim and Treating the Offender, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/10/94 - 2/12/94.

Course Director, Sex Offenders: Focus on Treatment, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/88.

Course Director, Sex Offenders: Criminals or Patients? The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/87 - 2/21/87.

Course Director, The Sex Offender: Medical and Legal Issues, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/86 - 2/22/86.

Course Director, Diagnosis and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland 2/21/85 - 2/22/85.

Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/84.

Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/16/83.

PEER REVIEW GROUPS:

Member, National Institute of Mental Health Special Emphasis Panel, ZMH1 ERB – 1(01), Adult and Adolescent Interventions, 10/29/04.

National Institute of Mental Health Grant Review Panel, Bethesda, Maryland, 03/04/00.

Ad Hoc Member, National Institute of Mental Health Review Group, Violence and Traumatic Stress Research Review Committee, 1997.

External Peer Reviewer of the Psychiatry Program at Shodair Hospital, Helena, Montana, 1996.

Grant Reviews performed for the Mental Health Foundation, Ottawa, Canada, 1984-85, 1996.

CONSULTANTSHIPS:

Consultation provided to the Ministry of Justice, Republic of Korea, August 30, 2010.

Consultation provided to Gerry Sutcliffe, MP, Under Secretary of State for Criminal Justice and Offender Management, United Kingdom, July 21, 2006.

Consultant, Prison Service Division, Correction Bureau, Ministry of Justice, Japan, September 15, 2005.

First Draft Technical Advisory Research Person, Entertainment Industries Council, 2002

Member, Cardinal's Commission for the Protection of Children, Archdiocese of Boston, 2002

Standing Ethics Committee Member, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 7/2001 – Present.

Standing Advisory Member, Advisory Board, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 12/00 – 12/08.

Standing Advisory Member, Ad Hoc Committee on Sexual Abuse, National Conference of Catholic Bishops, Washington, D.C., 11/13/93 – Present.

Ad Hoc Commentator, The Forensic Psychiatry Echo, New York, NY, 1996 – Present.

Consultant, Wisconsin Department of Corrections regarding the use of antiandrogens. July 2001.

Psychiatric Consultant, State of Maryland Division of Corrections, 1980 – 1994.

Psychiatric Consultant, The Maryland Training School for Boys, 1980 – 1988.

Consultation provided to several state agencies regarding establishment of treatment programs for sex offenders (e.g., Pennsylvania, Tennessee, Virginia, Oregon) 1984 – 1994.

Consultation provided to European Parliament regarding rehabilitation of sex offenders, 1984.

Numerous court appearances as an expert witness on the diagnosis and treatment of paraphilic disorders (and on the insanity defense), 1980 – Present.

RECOGNITION:

AWARDS, HONORS:

Distinguished Fellow, The American Psychiatric Association	*May 2003*
National Institute for the Study, Prevention and Treatment of Sexual Trauma designated as a National "Resource Site" by the United States Department of Justice	*1997*

Listed in "The Best 2000 Doctors"	*1996 - Present*
Listed in "Who's Who in Medicine and Healthcare"	*1996 - Present*
Presidential Citation, City of Baltimore	*December 1996*
Citation of Meritorious Achievement, Dictionary of International Biography, Cambridge, England	*May 1995*
Listed in "The Best Doctors in America"	*1994 - Present*
Listed in "Who's Who in America"	*1990 – Present*

INVITED TALKS:

GRAND ROUNDS (VISITING SPEAKER):

Invited Speaker, Sex and the Internet. Psychiatry Grand Rounds, The Johns Hopkins University School of Medicine, Baltimore, Maryland, 01/24/11

Invited Speaker, Sex Offenders: Criminals or Patients, Psychiatry Grand Rounds, George Washington University, Washington, DC, 03/11/10.

Invited Speaker, Sex Offenders: Criminals or Patients, Psychiatry Grand Rounds, Georgetown University Hospital, Washington, DC, 03/27/08.

Invited Speaker, Men Who Rape. Psychiatry Grand Rounds, The Johns Hopkins University School of Medicine, Baltimore, Maryland, 12/12/05.

Invited Speaker, Sex Offenders: Criminals or Patients?, Psychiatry Grand Rounds, University of Massachusetts, School of Medicine, Worcester, Massachusetts, 12/16/04.

Invited Presenter, The Paraphilias: Moral or Medical Problem?, Psychiatry Grand Rounds, Quillen College of Medicine, Johnson City, Tennessee, 08/27/04.

Invited Presenter, Clergy Sexual Abuse: The Crisis in the Catholic Church, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 11/21/02.

Invited Presenter, Evidence-based Treatment of Sex Offenders, Park Ridge Hospital, Rochester, New York, 10/2/03.

Invited Presenter, Psychiatry and the Law, Charles E. Steinberg Grand Rounds Lecture, University of Rochester Medical Center, Rochester, New York, 10/01/03.

Invited Presenter, Sex Offenders: Criminals or Patients? Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 04/15/12, 8/22/03.

Invited Presenter, The Crisis in the Catholic Church, Mendelsohn Lecture Series, The New England Medical Center, Boston, Massachusetts, 09/30/02.

Invited Presenter, Diagnosis and Treatment of Paraphilias, Correctional Mental Health Grand Round Series, Baltimore, Maryland, 11/17/00.

Invited Speaker, The Paraphilias, Grand Rounds, Columbia University College of Physicians and Surgeons, The Psychiatric Institute, New York, New York, 10/27/00.

Invited Speaker, Ethical Issues in the Care and Treatment of Sexual Predators, Grand Rounds, Bronx Psychiatric Center, Albert Einstein College of Medicine, Bronx, New York, 5/7/98.

Invited Speaker, Diagnosis and Treatment of Sexual Offenders, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 4/9/98.

Fifth Annual Speaker, Diagnosing and Treating Paraphilias, Paul Mendelsohn Memorial Grand Rounds on Psychiatry and the Law, New England Medical Center, Tufts University School of Medicine, Boston, Massachusetts, 4/28/95.

Invited Speaker, Psychiatric and Other Issues in Paraphilias, Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 2/18/94, 7/24/92, 4/26/91, 3/30/90.

Invited Speaker, The Insanity Plea and the Paraphilias, Grand Rounds, Sheppard Pratt Hospital, Baltimore, Maryland, 5/1/93.

Invited Speaker, The Paraphilias, Adolescent Psychiatry Grand Rounds, University of Maryland, Baltimore, Maryland, 2/23/93.

Invited Speaker, Treating Sexual Disorders, Grand Rounds, Crownsville Hospital Center, Baltimore, Maryland, 1/22/93.

Invited Speaker, Differential Diagnosis and Treatment Strategies in Sexual Perversions, Psychiatric Grand Rounds, West Virginia University School of Medicine, Morgantown, West Virginia, 4/1/92.

Invited Speaker, Interventions for the Paraphilic Patient, Psychiatric Grand Rounds, University of Maryland, Baltimore, Maryland, 3/26/92, 3/19/85.

Invited Speaker, The Paraphilias, Psychiatric Grand Rounds, Bethesda Naval Hospital, Bethesda, Maryland, 1/27/88, 5/20/87.

Invited Speaker, Treating the Paraphilias, Psychiatric Grand Rounds, University of Texas School of Medicine, Dallas, Texas, 10/27/87, 1/17/86.

Invited Speaker, Treating Sex Offenders, Psychiatric Grand Rounds, University of Virginia School of Medicine, Charlottesville, Virginia, 9/12/85.

Invited Speaker, Management of the Paraphilias, Psychiatric Grand Rounds, St. Elizabeth's Hospital, Washington, D.C., 5/23/84.

INVITED TALKS AND MEMBERSHIP
AT GOVERNMENT SPONSORED ACTIVITIES:

(FEDERAL GOVERNMENT):

Invited Participant, "Sexual Assault in the Military Part Three: Context and Causes," Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, Congress of the United States, House of Representatives, Washington, DC, 06/25/09.

Invited Participant, Judicial Hearing Regarding Sex Offender Legislation, Subcommittee on Crime, Terrorism, and Homeland Security, United States Congress, Washington, DC, 6/9/05.

Invited Speaker, Sexual Addiction and the Fantasy Defense, International Online Child Sexual Victimization Symposium, United States Department of Justice, Federal Bureau of Investigation, Leesburg, Virginia, 06/06/04 – 06/11/04.

Invited Participant, Online Sexual Victimization of Children Working Group, Federal Bureau of Investigation, Quantico, Virginia, 02/04/04 – 02/05/04.

Invited Speaker, Understanding Sex Offenders, Annual In-service Training, Crimes Against Children Unit, Headquarters Federal Bureau of Investigation, Washington, DC, 03/20/2002.

Invited Participant, Second National Summit, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, D.C., 12/17/00 – 12/19/00.

Member, Office of Justice Programs Planning Group Regarding Safe Management of Sex Offenders in the Community, Center for Effective Public Policy, Center for Sex Offender Management (CSOM), U. S. Department of Justice, Washington, D.C., 9/9/96 - Present.

Invited Participant, National Resource Group Meeting, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, DC, 10/2/00 – 10/3/00.

Invited Participant, Third Meeting of the Center for Sex Offender Management's National Resource Sites, Boston, Massachusetts, 7/26/99 – 7/31/99.

Invited Participant, Mental Health and the Criminal Justice System Forum, U.S. Department of Justice, Office of Justice Programs and the Center for Mental Health Services, Washington, DC, 7/22/99 – 7/23/99.

Invited Speaker, Safe Management of Sex Offenders in the Community. Center for Effective Public Policy, Office of Justice Programs Symposium, U. S. Department of Justice, Washington, D.C., 11/24/96 - 11/26/96.

Invited Speaker, Treatment of Sex Offenders, United States Parole Commission (Northeastern Region), Baltimore, Maryland, 6/27/89.

Invited Testimony, presented to members of The Meese Commission on Pornography, Baltimore, Maryland, 5/16/85.

Invited Participant, NIMH Sponsored Conference, Allocation of Grant Funding to Support Training on Research Related to Sex Offenses and Sexual Disorders, St. Louis, Missouri, 3/2/85 - 3/8/85.

Invited Speaker, Subcommittee on Juvenile Justice Hearings, United States Senate, Washington, D.C., 9/18/84.

Invited Participant, White House Conference on Child Sexual Abuse, Washington, D.C., 4/1/83.

INVITED PRESENTATIONS:

(STATE GOVERNMENT and STATE BAR ASSOCIATIONS):

Keynote Speaker, Sex Offenders: Criminals or Patients? Clinical Evaluation of Sex Offenders, Treatment of Sex Offenders, Legislative Issues, Civil Commitments and "Cyber-Sex," Massachusetts District Attorneys Association, Boston, Massachusetts, October 25, 2007.

Invited Speaker, Watching and Restricting Dangerous Offenders, Annual Meeting, National Conference of State Legislatures, Nashville, Tennessee, 08/16/06.

Invited Speaker, Treatment of Sexual Offenders, State House Judiciary Committee, Annapolis, Maryland, 10/18/04.

Invited Speaker, Treatment of Sexual Offenders, Specialized Treatment Committee, New Jersey Study Commission on Parole, Trenton, New Jersey, 4/22/96; 10/23/96.

Invited Speaker, Megan's Law: Community Notification. Justice Committee, New Jersey State Legislature, Trenton, New Jersey, 2/22/95.

Invited Participant, Assessing Dangerousness and Treatment Potential, Conference of the Superior Court of California, San Diego, California, 1/15/95 - 1/17/95.

Invited Speaker, Designing a Model Sex Offender Treatment Program for the State of Texas, 2nd Round House Conference, Child Abuse and Texas Families, Austin, Texas, 9/24/93.

Invited Speaker, Cause and Elements of Pedophilic Behavior, Child Abuse Seminar, The New Jersey Institute for Continuing Legal Education, The New Jersey State Bar Association, Fairfield, New Jersey, 4/25/92.

Invited Speaker, Sentencing Alternatives and the Developmentally Handicapped Sex Offender, Wisconsin State Public Defender Service, Milwaukee, Wisconsin, 11/14/91.

Invited Speaker, Treatment of Sex Offenders with Depo-Provera, Seminar for South Carolina Judges and Penal Officers, Columbia, South Carolina, 4/17/90.

Invited Speaker, Rapist and Sex Offender Rehabilitation, Subcommittee on Crime and Corrections, New York State Senate, Albany, New York, 6/15/89.

Invited Speaker, Men Who Rape: Profiles of Rapists, Criminal Law and Sentencing Institute Conference, Supreme Court of Wisconsin, Oshkosh, Wisconsin, 5/17/89.

Invited Speaker, The Sex Offender and the Criminal Justice System, Cook County Circuit Court Judges Seminar, Chicago, Illinois, 9/24/88.

Invited Speaker, Sentencing Alternatives, Judicial Education Conference, District Court of Maryland, Baltimore, Maryland, 10/5/88.

Invited Speaker, Sex Offender Treatment, Annual Meeting, Pennsylvania State College of Judges, Hershey, Pennsylvania, 7/25/87.

Invited Speaker, Treating the Incarcerated Sex Offender, Special Conference, State of Maryland Division of Correction, Baltimore, Maryland, 11/16/87

Invited Speaker, Paraphilic Disorders and the Criminal Justice System, Annual Conference, Kansas State College of Judges, 10/14/86 - 10/16/86.

Invited Speaker, Treatment of Sex Offenders, Annual Conference, State of Utah Department of Corrections, Salt Lake City, Utah, 9/28/86 - 9/30/86.

Invited Speaker, Sex Offenders: Treatment and Sentencing Alternatives, Annual Meeting, Vermont Judicial College, Burlington, Vermont, 6/4/86 - 6/6/86.

Invited Speaker, Medical Assessment and Treatment of Sex Offenders, Annual Meeting, Maryland States Attorneys Association, Ocean City, Maryland 6/4/85.

Invited Speaker, Community Setting Programs for the Treatment of Sex Offenders, South Carolina Department of Parole and Community Corrections, Columbia, South Carolina, 5/10/85.

Invited Speaker, Issues in the Rehabilitation of Sex Offenders, Maryland State Parole Board, Baltimore, Maryland, 3/9/84.

Invited Speaker, Rape and Sexual Assault, Governor of Maryland's Task Force on Rape and Sexual Violence, Baltimore, Maryland, 10/4/83.

Invited Speaker, Rehabilitation of Sex Offenders, Somers Treatment Program, State of Connecticut Department of Corrections, Somers, Connecticut, 7/8/83.

INVITED PRESENTATIONS:

(LOCAL GOVERNMENTS and LOCAL BAR ASSOCIATIONS)

Invited Speaker, Mandatory Reporting of Child Sexual Abuse, Forum on Child Abuse and Confidentiality: Privacy Protection and Accountability, Association of the Bar of the City of New York, Committees on Family Court and Family Law and Children and the Law, New York, New York, 10/13/92.

INVITED PRESENTATIONS TO NATIONAL CONFERENCES OF JUDGES:

Invited Speaker, Sexual Offenders and the Criminal Justice System, National Conference of Juvenile Court Judges, Burlington, Vermont, 8/20/85 - 8/21/85.

Invited Speaker (as a National Leader in Law and Health), National Symposium on the Child Victim of Sexual Abuse, National Counsel of Juvenile and Family Court Judges, Burlington, Vermont, 2/24/85 - 2/27/85.

INVITED PRESENTATIONS TO LAW ENFORCEMENT AGENCIES:

Invited Speaker, Evaluation and Treatment of Sex Offenders, Annual Child Sexual Exploitation Seminar, Baltimore County Police Academy, Baltimore County, Maryland, 10/14/98; 10/15/97; 8/30/96; 7/20/95; 7/16/93; 6/14/91; 8/23/90; 9/15/89; 7/15/88; 6/15/87, 10/6/99, 10/13/00, 10/10/01, 10/11/02, 10/15/04, 10/25/05, 10/27/06. 10/23/07.

Invited Speaker, Profiling the Rapist. Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 9/22/97

Invited Speaker, The Mind of the Sex Offender, Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 12/6/96.

Invited Speaker, Clinical Perspectives and Profiles of Sexual Offenders, Colorado Association of Sex Crimes Investigators, Lakewood, Colorado, 9/8/94 - 9/10/94.

Production of a Training Film, Psychosexual Disorders as They Relate to Law Enforcement, Maryland State Police, Baltimore, Maryland, 3/25/86.

Invited Speaker, Sex Offenders and the Law, Educational Seminar, Baltimore City Police Department, Baltimore, Maryland, 12/17/85.

PRESENTATIONS AT NATIONAL TREATMENT CONFERENCES:

Invited Lecturer, Diagnosis and Treatment of Paraphilias/Pedophilia, Society for Sex Therapy and Research (SSTAR) 2011: 36th Annual Meeting, Palm Beach, Florida, 04/02/11.

Invited Speaker, Pre-Conference Seminar, Differential Diagnosis of Rapists, Plus a Conceptual overview of the Paraphilias, Association for the Treatment of Sexual Abusers (ATSA) 29th Annual Research and Treatment Conference, Phoenix, Arizona, 10/20/10 – 10/23/10.

Invited Panelist, Confrontation, Compassion, and Forgiveness: A Triangle for Transformation, Association for the Treatment of Sexual Abusers (ATSA) 29th Annual Research and Treatment Conference, Phoenix, Arizona, 10/20/10 – 10/23/10.

Invited Participant, A Case of Auto-eroticism, 34th Annual Meeting, Society for Sex Therapy and Research (SSTAR), Arlington, Virginia, 04/04/09.

Keynote Speaker, 2008 National Conference of The Society for the Advancement of Sexual Health (SASH), Cambridge, Massachusetts, 09/19/08.

Invited Participant, Child Pornography Roundtable: Toward a Shared Understanding of the Problem & Prevention Strategies, National Center for Missing and Exploited Children, Alexandria, Virginia, 02/07/08.

Invited Speaker, The Assessment and Etiology of Paraphilias & The Rationale for Treatment, and Treating Paraphilias, ValueOptions Postgraduate Institute for Medicine, Behavioral Health Update 2006, Phoenix Arizona, 03/04/06.

Invited Speaker, Sex and the Nursing Home Resident: Pharmacological Enhancement of Sexual Control, American Association for Geriatric Psychiatry, 17th Annual Meeting, Baltimore, Maryland, 02/21/04 – 02/24/04.

Invited Speaker, Sex Offenders: Criminals or Patients? National Defense Investigators Association, Federal Public Defenders Office, National Training Conference, Ft. Lauderdale, Florida, 4/23/03 – 4/25/03.

Keynote Speaker, Sex Offenders: Criminals or Patients? Annual Meeting of the Minnesota Association for the Treatment of Sexual Abusers, Minneapolis, Minnesota, 3/21/03.

Invited Participant, Law and Disorder: SVP, Mock Trial, American Academy of Psychiatry and the Law Annual Meeting, Newport Beach, California, 10/24/02 – 10/27/02.

Keynote Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity (NCSAC) Conference, Nashville, Tennessee, 10/6/02 – 10/8/02.

Invited Speaker, The Diagnosis and Treatment of Sex Offenders, SAPEN Conference, Pittsburgh, Pennsylvania, 9/6/01.

Invited Keynote Speaker, Sex Offenders: Criminals or Patients (and also The Use of Actuarials at Civil Commitment Hearings), Association for the Treatment of Sexual Abusers (ATSA), San Diego, California, 11/1/00 – 11/4/00.

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Sexual Abuse Prevention and Education Network (S.A.P.E.N.) Annual Conference, Harrisburg, Pennsylvania, 10/10/00.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, American Academy of Psychiatry and the Law (AAPL) Annual Meeting, Baltimore, Maryland, 10/15/99.

Invited Participant, Diagnosing and Treating Sexual Offenders From a Medical Perspective, Association for the Treatment of Sexual Abusers (ATSA) 18th Annual Research and Treatment Conference, Lake Buena Vista, Florida, 9/22/99 – 9/25/99.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Specialized Training Services – Assessing and Treating Sex Offenders, Chicago, Illinois, July 8, 1999.

Keynote Speaker, Sex Offenders: Criminal or Patient? The National Council on Sex Addiction and Compulsivity 1999 National Conference, St. Louis, Missouri, 4/9/99.

Invited Panelist, Toward a Whole Systems Approach to Sex Abuse, 22nd Annual Family Therapy Network Symposium, Washington, D.C., 3/20/99.

Invited Panelist, The Missing Face in Sex Abuse Prevention, The International Society for Traumatic Stress Studies and The Dartmouth-Hitchcock Medical Center XIV Annual Meeting, Washington, D.C., 11/22/98.

Invited Panelist, A Serial Murderer: From Competency to Sentencing, American Academy of Psychiatry and the Law, New Orleans, Louisiana, October 23, 1998.

Invited Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity, Louisville, Kentucky, 3/26/98 - 3/28/98.

Invited Panelist, Sex Offenders: Criminals or Patients? 150th Annual Meeting, American Psychiatric Association, San Diego, California, 5/20/97.

Invited Speaker, Forensic Evaluation of the Accused Sexual Offender: Can He Be Treated? 12th Annual Symposium, American College of Forensic Psychiatry, Montreal, Canada 5/8/94 - 5/15/94.

Invited Speaker, Jeffrey Dahmer: Was He Ill? Was He Impaired? 11th Annual Symposium, American College of Forensic Psychiatry, Santa Fe, New Mexico, 4/23/93.

Invited Panelist, Jeffrey Dahmer: A Case Study, Annual Meeting, American Academy of Psychiatry and the Law, San Antonio, Texas, 10/15/92 - 10/18/92.

Invited Panelist, Diagnosis and Treatment of Sex Offenders, Annual Meeting, American Academy of Psychiatry and the Law, Washington, D.C., 10/19/89 - 10/20/89.

Invited Speaker, Evaluating and Treating Sex Offenders, 3rd Annual Meeting, American College of Forensic Psychiatry, Newport Beach, California, 4/18/85 - 4/21/85.

Invited Speaker, Behavioral Medicine Seminar, Medical Evaluation and Treatment of the Paraphilias, 136th Annual Meeting, American Psychiatric Association, 5/18/83.

ADDITIONAL SIGNIFICANT LECTURES:

Invited Participant (via teleconference), "Chemical Castration" and its limits for crime recidivism prevention, International Conference on the Treatment of Sexual Offenders, International Academy of Forensic Sciences, Rome, Italy, October 1, 2009.

Invited Participant, Mentally Ill/Problematic Sexual Behavior Summit Conference, University of Massachusetts Medical School, Beechwood Hotel, Worcester, Massachusetts, November 17, 2006

Invited Speaker, Sexual Offense and Sexual Offenders: An Overview, Reading Specialists Offender Treatment Services, The Delaware County Association of Criminal Defense Lawyers, and The Criminal Legal Education Committee of the Delaware County Bar Association, Sexual Offenders & the Law: Issues and Process in Treatment, Defense & Prosecution of Sexual Offenders, Reading, Pennsylvania, October 4, 2006

Invited Speaker, Sexually Violent Predators: Medical Issues and Trends, National Association of State Mental Health Program Directors, Alexandria, Virginia, 08/07/06.

Invited Presenter, Understanding Paraphilias: The Place for Research Findings, Topics in Psychiatry, Sixth Annual Course, Johns Hopkins Continuing Medical Education, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland, November 18, 2005.

Invited Speaker, Sex Offender Treatment, Massachusetts Psychiatric Society, Third Annual Genetics Update and Fall Seminar, Newton, Massachusetts, October 29, 2005.

Invited Speaker, Sexually Dangerous Persons: Issues and Controversies, Forensic Health Services, Boston, Massachusetts, June 24, 2005.

Invited Speaker, Sex Offenders: Criminals or Patients?, Massachusetts Psychiatric Society, Worcester, Massachusetts, 12/16/04.

Panel Member, The Need for a New Sexual Disorders Diagnosis in DSM-V, Annual Conference, The Society for the Advancement of Sexual Health (NCSAC / SASH), Washington, DC, 10/07/04.

Invited Speaker, Sex: Victims and Victimizers, Tristate American Academy of Psychiatry and the Law, Annual Meeting, New York University School of Medicine, New York, New York, 01/24/04.

Invited Speaker, Rehabilitation of Sex Offenders, Maryland Mensa, Baltimore, Maryland, 10/17/03.

Invited Speaker, Evaluating and Treating Sexual Disorders, Judicial Process Commission, Rochester, New York, 02/17/03.

Invited Speaker, Sexual Disorders and The Catholic Church Crisis, Diocese of Rochester, Rochester, New York, 2/17/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Criminal Justice Seminar, Rochester Institute of Technology, Rochester, New York, 2/17/03.

Invited Speaker (full day), Diagnosing and Treating Sexual Offenders, Colorado Association for the Treatment of Sexual Abusers, Denver, Colorado, 2/23/01.

Invited Presenter, Diagnosis and Treatment of Sex Offenders, Association of Paroling Authorities International, 15th Annual Training Conference, Biloxi, Mississippi, 4/19/99.

Invited Speaker, Diagnosis and Treatment of "Sexually Violent Predators", Atascadero State Hospital, Atascadero, California, 2/26/99.

Invited Speaker, Sex Offenders: Criminals or Patients?, Tristate AAPL Annual Conference, New York, NY, 1/23/99.

Invited Speaker, Treatment of Sex Offenders, Center for Sex Offender Management Conference, Washington, D.C., 12/8/98

Invited Speaker, The Diagnosis and Treatment of Sex Offenders, Arizona State Hospital, Arizona Community Protection and Treatment Center, Phoenix, Arizona, 11/17/98.

Invited Speaker, Understanding Deviant Sexual Behavior, Effective Sex Offender Management Conference, Sponsored by the Arizona Supreme Court and the Center for Sex Offender Management, Phoenix, Arizona, 11/16/98.

Invited Speaker, Assessing and Treating Sex Offenders, Specialized Training Services and The National Association for the Development of Work With Sex Offenders (NOTA), London, England, 7/3/98.

Invited Speaker, Sexual Aggression: Treatment or Punishment, 2nd Biennial Meeting, American Psychiatric Association - French Federation of Psychiatry, Carre' des Sciences, Paris, France, 6/10/98.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, First Annual Conference on Violence and Aggression, Centre de Richerche Phillippe Pinel de Montreal, Montreal, Canada, 11/1/96.

Distinguished Lecturer, The Evaluation and Treatment of Sex Offenders, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 9/27/96.

Distinguished Lecturer, Differential Diagnosis and Treatment of Sexual Offenders, The Spurwink Foundation Distinguished Lecture Series, Nashua, New Hampshire, Portland, Maine, 3/15/95; 3/17/95.

Invited Panelist, Understanding Paraphilias and Sexual Offenders, 29th American Society of Hospital Pharmacists Annual Mid-year Meeting, Miami, Florida, 10/5/94.

Invited Lecturer, Understanding and Treating Sexual Trauma in Children and Adolescents, Devereux Glenholme Professional Resource Center, Windsor Locks, Connecticut, 10/31/94 - 11/2/94.

Visiting Professor, A Forensic Perspective on the Jeffrey Dahmer Case and Overview of the Paraphilias, Visiting Professor Seminar, Pennsylvania Hospital, Philadelphia, Pennsylvania, 7/29/93.

Invited Speaker, Reassignment of Priest Pedophiles, Cardinal's Commission on Sex Abuse, Archdiocese of Chicago, Chicago, Illinois, 4/30/93.

Invited Speaker, Theories on the Physical Causality of Homosexuality, Annual Meeting, Bishops of North America, Central America and the Caribbean, Dallas, Texas, 2/5/93.

Invited Speaker, Sexual Addiction, Research Seminar, National Institute on Alcohol and Drug Abuse, Rockville, Maryland 1/12/93.

Invited Lecturer, Treatment of the Paraphilias, 4th Annual Forensic Psychiatry Symposium on Sexual Misconduct in the Military, Walter Reed Army Hospital, Washington, D.C., 11/23/92.

Distinguished Lecturer, Jeffrey Dahmer and Other Sexual Offenders: Diagnosis and Treatment, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 7/15/92.

Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Annual Meeting, National Conference of Catholic Bishops, University of Notre Dame, West Bend, Indiana, 6/20/92.

Invited Speaker, How to Deal With Priest Pedophiles, Cardinal Bernardin's Commission on Sexual Misconduct, Archdiocese of Chicago, Chicago, Illinois, 3/19/92.

Invited Lecturer, Diagnosis and Treatment of the Paraphilias, Tenth Annual Columbia Hospital Psychiatry Conference, Medical College of Wisconsin, Milwaukee, Wisconsin, 3/10/92.

Invited Speaker, Paraphilia, Personality and Sex Offending Behavior, Annual Meeting, Society for Sex Therapy and Research. Baltimore, Maryland, 3/17/90.

Invited Panelist, Sexual Abuse: Research and Solutions, Child Help U.S.A. Forum, Capital Hill, Washington, D.C., 11/9/89.

Invited Panelist, Human Sexual Aggression and Dominance: Biological Clues, Differential Diagnosis and Pharmacological Treatment of Sex Offenders, Annual Meeting, American Association for the Advancement of Science, San Francisco, California, 1/14/89 - 1/19/89.

Invited Speaker, Diagnosis and Treatment of the Paraphilias, Northeast Ohio Psychiatric Association, Columbus, Ohio, 1/11/89.

Invited Lecturer, Diagnosis and Treatment of Paraphilic Disorders, Continuing Medical Education Program, Eastern State Hospital, Williamsburg, Virginia, 11/14/88.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Midwest Conference on Child Sexual Abuse and Incest, Madison, Wisconsin, 9/26/88 - 9/27/88.

Invited Lecturer, Diagnosing and Treating Sex Offenders, Education Program in Psychiatry, The Institute of Living, University of Connecticut Health Center Consortium, Hartford, Connecticut, 11/12/87 - 11/13/87.

Invited Panelist, Etiology and Treatment of Sexual Disorders, Conference on the Management of Sex Offenders, University of Illinois College of Medicine, Peoria, Illinois, 10/30/87.

Keynote Speaker, The Paraphilias, Annual Meeting, Scientific Society for the Study of Sex. Philadelphia, Pennsylvania, 4/3/87 - 4/5/87.

Invited Panelist, Evaluation and Treatment of Paraphilic Disorders, Annual Conference, National Association of Forensic Social Workers, Charleston, South Carolina, 3/26/87.

Invited Panelist, Issues in the Exploration of Biological Factors Contributing to the Etiology of the Sex Offender, Plus Some Ethical Considerations, Human Sexual Aggression Conference, New York Academy of Sciences, 1/7/87 -1/9/87.

Invited Speaker, Coordinating Treatment for Sex Offenders With Parole and Probation, Annual Conference, National Association of Parole and Probation, Baltimore, Maryland, 8/5/86.

Invited Speaker, Paraphilic Coercive Disorder, Board of Trustees, American Psychiatric Association, Washington, D.C., 6/24/86.

Invited Speaker, The Paraphilias: Forensic Issues, The Ohio Forensic Society, 6/7/86.

Invited Speaker, Inclusion of Paraphilic Coercive Disorder as a DSM-III-R Diagnosis, Hearing on Rapism, American Psychiatric Association, Washington, D.C., 10/4/85.

Invited NIMH Panelist, Rehabilitating Sex Offenders, 37th Annual Meeting, American Society of Criminology, San Diego, California, 11/13/85 - 11/17/85.

Invited Speaker, Assessment and Treatment of Incarcerated Sex Offenders, Annual Meeting, National Association of Prison Administrators, Philadelphia, Pennsylvania, 11/14/85.

Invited Speaker, The Paraphilic Disorders, Annual Meeting, Kansas Mental Health Association, Kansas City, Kansas, 8/17/85.

Invited Speaker, Changes to be Made in DSM-III-R Related to the Paraphilic Disorders, Educational Seminar, New York Division, American Academy of Psychiatry and the Law, New York, New York, 1/19/85.

Invited Speaker, Sex Offenders: Differential Diagnoses and Treatment, Centrocare Symposium, Sex Offender Treatment in Canada, St. John, New Brunswick, 10/17/84 - 10/18/84.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, National Association of Parole and Probation, Boston, Massachusetts, 8/24/84 - 8/27/84.

Invited Speaker, Treating Rapists, District of Columbia Conference on Rape and Sexual Violence, Washington, D.C., 5/8/84.

Invited Speaker, Diagnosing and Treating Incest, Third National Conference, Sexual Victimization of Children, Arlington, Virginia, 4/26/84.

Invited NIMH Panelist, Biological Factors Related to Rape, 35th Annual Meeting, American Society of Criminology. Denver, Colorado, 11/9/83 - 11/13/83.

Invited Speaker, Medical-Legal Issues in the Treatment of Sex Offenders, Georgetown University Law School Symposium, Washington, D.C., 1/20/83.

Invited Speaker, Pharmacological Treatment of Sexual Deviation, Psychiatric Symposia Series, Taylor Manor Hospital, Ellicott City, Maryland, 3/25/92, 3/21/86, 5/19/82.

Invited Speaker, Antiandrogenic Medication in the Treatment of Sex Offenders, Third National Conference, Evaluation and Treatment of Sexual Aggressives, Avila Beach, California, 3/15/81 - 3/18/81.

Invited Speaker, Victims Turned Victimizers, First World Congress of Victimology, Washington, D.C., 8/20/80 - 8/24/80.

OTHER TALKS AND PRESENTATIONS:

Invited Speaker, Addressing Pedophilia and Other Sexual Disorders. Urology Nursing Society, Inc. Baltimore, Maryland, October 4, 2012.

Invited Speaker, Evaluating and Treating Sexually-Disordered Patients, St. Luke Institute, Washington, DC, July 26, 2012.

Invited Speaker, Sex Offenders: Evaluation and Treatment, Discover Hopkins class, National Institute for the Study, Prevention and Treatment of Sexual Trauma, Baltimore, Maryland, July 11, 2012.

Keynote Speaker, Understanding Pedophilia and Other Paraphilias from a Psychiatric Perspective, B4U-ACT Symposium, Pedophilia, Minor-Attracted Persons, and the DSM: Issues and Controversies, BWI Airport, Maryland, August 17, 2011.

Invited Speaker, Sex Offenders: Evaluation and Treatment. Abnormal Psychology and Forensic Cases, The Johns Hopkins University, Baltimore, Maryland, July 11, 2011.

Invited Speaker, Sex Offenders: Evaluation and Treatment, Forensic Fellowship Lecture, University of Maryland School of Medicine, Courthouse East, Baltimore, Maryland, June 3, 2011, June 1, 2012.

Keynote Speaker, Sex Offenders: Criminals or Patients? Undergraduate Research Symposium, The Johns Hopkins University, Baltimore, Maryland, April 5, 2010.

Invited Speaker, Sex Offenders: Criminals or Patients? Forensic Fellowship Lecture, University of Maryland School of Medicine, Courthouse East, Baltimore, Maryland, March 19, 2010.

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Invited Speaker, A Critical Appraisal of Proposed DSM-V Paraphilic Diagnoses (panel), 40th Annual Meeting, American Academy of Psychiatry and the Law, Baltimore, Maryland, October 29, 2009.

Invited Speaker, Provided Full-Day Statewide Training Session on Chronic Mentally Ill Patients with Comorbid Problematic Sexual Behaviors, University of Massachusetts Medical School, Worcester, Massachusetts,06/20/08.

Invited Panelist, Contemporary Perspectives on Sexual Paraphilias, American Association of Sexuality Educators, Counselors and Therapists (AASECT), Baltimore, Maryland, 05/18/08.

Invited Speaker, Sex Offenders: Criminals or Patient? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 02/14/08, 02/29/09, 02/04/10, 01/13/11, 01/19/12, 01/03/13.

Invited Speaker, Sex Offenders: Criminals or Patients? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 04/19/07.

Invited Speaker, Sex Offenders: Criminals or Patients? Roland Park Place Men's Club, Baltimore, Maryland, 01/08/07.

Invited Speaker, Using Actuarial Tables, New Perspectives on Youth Sexual Behavior, Sponsored by the Maryland Association of Resources for Families and Youth, Linthicum Heights, Maryland, 05/05/06.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore/DC Cluster of the Fielding Graduate University, Baltimore, Maryland, 01/07/06.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Towson, Maryland, 06/07/05.

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Topics in Psychiatry, The Johns Hopkins University, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland 11/05/04 – 11/06/04.

Invited Speaker, Sexuality Facts vs. Religious Responses, United Religious Initiative, Episcopal Cathedral, Baltimore, Maryland, 02/17/04.

Invited Speaker, Sexual Relations Between Adults and Children, Social and Community Psychiatry Seminar, The Johns Hopkins Hospital, Baltimore, Maryland 09/24/03.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Baltimore, Maryland, 04/15/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Third Annual Henry L. Hartman Forensic Psychiatry Conference, Medical College of Ohio, Toledo, Ohio, 11/8/02.

Invited Speaker, The Crisis in the Catholic Church, Adult Night at St. John the Evangelist Catholic Church, Phoenix, Maryland, June 2, 2002.

Invited Chair, Vanderbilt Symposium on "Sexual Addiction," American Foundation for Addiction Research, Vanderbilt University, Nashville, Tennessee, 3/22/01 – 3/23/01.

Invited Speaker, Treatment of Adolescent Sex Offenders, Reading Specialists, Reading, Pennsylvania, 05/05/00.

Invited Lecturer, Sexuality Issues/Disorders Training, Maryland Department of Health and Mental Hygiene – Sponsored by DDA Central Regional Office, The Community College of Baltimore County – Catonsville Campus, Catonsville, Maryland, 03/24/00.

Invited Participant, The Neurobiology of Compulsive Sexual Behavior and Sexual Addiction – A Planning Meeting, Sponsored by Vanderbilt Addiction Center and The American Foundation for Addiction Research, Vanderbilt University Medical Center, Nashville, Tennessee, 2/3/00 – 2/4/00

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Regional Training Seminar Worcester County Department of Social Services, Salisbury State College, Salisbury, Maryland, 1/28/00

Invited Lecturer, Sex Offenders and the Law, course on Law and Psychiatry, University of Baltimore School of Law, Baltimore, Maryland, 11/1/99, 10/23/00.

Guest Lecturer, Diagnosis and Treatment of Sexual Disorders, Villa Julie College, Baltimore, Maryland, 7/14/99.

Invited Speaker, Evaluations and Etiology of Sex Offenders, Charter Psychosexual Rehabilitation and Education Program, Understanding, Assessing and Treating Male Adolescent Sex Offenders, Pittsburgh, Pennsylvania, 7/9/99.

Invited Speaker, Sex Offenders: Criminals or Patients, Chesapeake Bay Chapter of AAPL, Bethesda, Maryland, 6/30/99.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Allegany County Health Department, Cumberland, Maryland, 6/1/99.

Invited Lecturer, Sex Offenders: Criminals or Patients, Course on Psychiatry and the Law, University of Baltimore School of Law, Baltimore, Maryland, 3/17/99.

Invited Participant, The Use of Triptorelin in Paraphilia Management, DebioPharm S.A. Developpements Biologiques et Pharmaceutiques, Lausanne, Switzerland, 2/8/99.

Invited Speaker, Sexual Compulsivity, The National Catholic Bioethics Center, Dallas, Texas, 2/4/99.

Invited Participant, Mixing of Sex Offenders in Custodial Drug Treatment Therapeutic Community Units: Problems and Potential Solutions, A Gathering of Leading Experts, University of California, San Diego, School of Medicine, San Diego, California, 1/19/99 - 1/20/99.

Invited Presenter, Sexual Misconduct by Clergy, Case Conference at St. Luke Institute, Silver Spring, Maryland, 11/5/98.

Invited Speaker, Rape and Child Sexual Abuse, University of Baltimore, Baltimore, Maryland, 9/17/98.

Invited Speaker, Sexual Offenders: Criminal or Patients?, Loudon County Mental Health Center, Loudon County, Virginia, 9/15/98.

Invited Speaker, Sexual Offenders - Registration Statutes and Treatment Alternatives, Maryland Criminal Defense Attorney's Association Annual Meeting, Baltimore, Maryland, 6/6/98.

Invited Speaker, Treating the Paraphilias with Depo-Lupron, Maryland Health Administration, State-wide Pharmacy and Therapeutics Committee, Spring Grove Hospital, Baltimore, Maryland 5/29/98.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Utah Correctional Association Conference, St. George, Utah, 3/30/98 - 4/2/98.

Invited Speaker, Paraphilias in the Developmentally Disabled, The Kennedy-Krieger School, Baltimore, Maryland 12/10/97.

Invited Speaker, The Paraphilias, Sexual Offender Assessment, Risk Management and Treatment, Continuing Education Seminar, Psychiatry Department, The University of California School of Medicine, San Diego, California, 8/20/97 - 8/22/97.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Conference, Sexual Abuse Prevention and Education Network, New Cumberland, Pennsylvania, 8/6/97 - 8/8/97.

Invited Speaker, Evaluation, Etiology and Treatment of the Sex Offender, Educational Seminar, Forensic Hospital, Trenton, New Jersey, 6/23/95.

Invited Speaker, Reporting Sexual Abuse of Adult Survivors, Educational Seminar, Central Maryland Sexual Abuse Treatment Task Force, Baltimore, Maryland, 11/18/94.

Invited Speaker, The Etiology of Sexual Disorders: The Damaged Child Grows Up, Clinical Seminar Series on Infancy, University of Maryland School of Medicine, Baltimore, Maryland, 11/16/94.

"Guest Professor", Rape and Pedophilia, Course on Psychology of Criminal Behavior, Georgetown University, 11/14/94, 10/25/93, 2/2/93, 11/12/90, 4/2/90, 4/24/89, 4/9/87, 3/24/87.

Invited Speaker, Child Sexual Abuse, Conference on Domestic Violence: Sexual Trauma, Elder Abuse, Child Abuse, Doyelstown, Pennsylvania, 10/14/94.

Invited Speaker, Rape and Pedophilia, Forensic Mental Health Associates, Salt Lake City, Utah, 8/24/94; St. Petersburg, Florida, 7/1/94; Denver, Colorado, 8/31/88 - 9/1/88; Chicago, Illinois, 5/11/88 - 5/12/88; Boston, Massachusetts, 10/1/87 - 10/2/87; Denver, Colorado, 8/31/87 - 9/1/87; Fargo, South Dakota, 7/16/87 - 7/17/97; Chicago, Illinois, 5/11/87 - 5/12/87; Orange County, California, 1/21/87 - 1/23/87; Phoenix, Arizona, 10/30/86 - 10/31/86; Detroit, Michigan, 9/11/86 - 9/12/86; Cleveland, Ohio, 7/31/86 - 8/1/86; Dallas, Texas, 3/27/86 - 3/28/86; Lake

Buena Vista, Florida, 8/29/85 - 8/30/85; San Francisco, California, 3/21/85 - 3/22/85; Dallas, Texas, 10/11/84 - 10/12/84.

Invited Speaker, Sentencing Sex Offenders, Annual Meeting, National Association of Sentencing Advocates, Baltimore, Maryland, 6/9/94 - 6/11/94.

Invited Lecturer, The Paraphilias, Criminal Justice Class, The American University, The Johns Hopkins Center, Baltimore, Maryland, 4/22/94.

Invited Speaker, Paraphilic Development and Treatment, Educational Seminar, National Center on Institutions and Alternatives, Alexandria, Virginia, 10/15/93.

Invited Speaker, Treatment of Sexual Disorders and Sexual Trauma, Annual Symposium, Virginia Correctional Counseling Association, Charlottesville, Virginia, 6/2/93.

Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Catholic Bishops of Indiana, Fort Wayne, Indiana, 9/3/92.

Invited Speaker, Treatment of Sex Offenders, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 4/23/92.

Invited Speaker, Issues of Pedophilia in the Developmentally Handicapped, Rosewood Hospital Center, Baltimore, Maryland, 12/18/91, 05/09/97.

Invited Speaker, Pharmacological Treatment of Juvenile Sex Offenders, Mathom House Residential Facility for Adolescents, Philadelphia, Pennsylvania, 9/20/91.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Community Mental Health Conference, Howard County Health Department, Columbia, Maryland, 9/17/91.

Invited Speaker, Paraphilias: Evaluation and Treatment, Psychiatric Staff Meeting, St. Joseph's Hospital, Towson, Maryland, 5/21/91.

Invited Speaker, Sexual Psychopath Laws, Medical Service, Circuit Court for Baltimore City, Baltimore, Maryland, 12/19/90.

Invited Speaker, Aspects of the Diagnosis and Treatment of Sexual Disorders, Educational Seminar, University of Maryland, College Park, Maryland, 11/16/90.

Invited Speaker, Diagnosis and Treatment of Paraphilias, Educational Meeting, Suburban Maryland Psychiatric Society, Greenbelt, Maryland, 10/11/90.

Invited Speaker, Working with Paraphilic Individuals, Educational Seminar, Counseling Associates, Hollywood, Florida, 10/5/90.

Invited Speaker, Forensic Issues of the Sex Offender, University of Maryland Forensic Fellowship Program, Baltimore, Maryland, 12/13/89.

Invited Speaker, Adolescent Sex Offenders, Conference on the Treatment of Adolescent Sex Offenders, Regional Institute for Children and Adolescents (RICA), Rockville, Maryland, 12/6/89.

Invited Speaker, Managing the Sex Offender on Probation, Annual Conference, Middle Atlantic States Correctional Association, Atlantic City, New Jersey, 5/22/88 - 5/25/88.

Invited Speaker, Treatment of the Sex Offender, Child Sexual Abuse - Adult Substance Abuse Connection Conference, St. Elizabeth's Hospital, Washington, D.C., (Rape Crises Center and Drug Abuse Center), 2/17/88.

Invited Speaker, Treating the Adolescent Sex Offender, State-wide Clinicians Network of Services for Adolescent Sex Offenders, Ellicott City, Maryland, 1/29/88.

Invited Speaker, Mandated Reporting of Child Sexual Abuse, People Against Child Abuse (PACA) Conference, Anne Arundel Community College, Anne Arundel, Maryland, 11/7/87.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, Allegheny County Health Department, Hagerstown, Maryland, 10/2/86.

Invited Speaker, Treating Incarcerated and Paroled Sex Offenders, Special Symposium, South Carolina Association for the Treatment of Sexual Aggressives, Columbia, South Carolina, 4/24/86 - 4/25/86.

Invited Speaker, The Paraphilias, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 1/23/86.

Invited Speaker, Victims and Victimizers, Maryland Conference on Child Victimization, Baltimore, Maryland, 1/6/86.

Invited Speaker, Sexual Offenders: Treatment Issues for the Social Worker, University of Maryland School of Social Work, Baltimore, Maryland, 9/17/85, 9/10/85.

Invited Speaker, Paraphilic Disorders and the Clergy, St. Luke's Institute, Suitland, Maryland, 8/23/85.

Invited Speaker, Protecting Children from Sexual Abuse, Annual Meeting, Montessori Society of Central Maryland, Baltimore, Maryland, 5/13/85.

Invited Speaker, Forensic Issues in Evaluation Sex Offenders, Clifton T. Perkins Hospital, Baltimore, Maryland, 1/14/85.

Invited Speaker, Differential Diagnosis of Sex Offenders, Annual Conference, Psychiatric Associates, Virginia Beach, Virginia, 11/9/84.

Invited Speaker, Use of Antiandrogenic Medications, Patuxent Institution, Baltimore, Maryland, 10/25/84, 5/29/84, 1/20/83.

Invited Speaker, Treating the Abuser, Community Seminar on Child Sexual Abuse, Carroll County, Maryland, 10/23/84.

Invited Speaker, Treatment of Sex Offenders, Symposium, Howard County General Hospital, Howard County, Maryland, 5/15/84.

OTHER PROFESSIONAL ACCOMPLISHMENTS:

Appointed Member, Subcommittee on the Paraphilias, American Psychiatric Association Committee to Review the 3rd Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), 1984-1989.

President, Board of Directors, National Institute for the Study, Prevention and Treatment of Sexual Trauma

Chairman, Board of Directors, Foundation for the Study, Prevention and Treatment of Sexual Trauma (a nonprofit foundation supporting clinical care, teaching and research)

MAJOR NATIONAL MEDIA INTERVIEWS (PARTIAL LIST):

Face the Nation
Sixty Minutes
Nightline
Larry King Show
Anderson Cooper Show
Dianne Rehm Show (National Public Radio)
Emmy Winning Group W Documentary (Child Molesters: Please Make Them Stop)
Good Morning America
Today Show
20/20
48 Hours
NBC Dateline
Johnnie Cochran Show (Court TV)
Alan Dershowitz Show (Court TV)

EXHIBIT 2



"If you read this book with an open heart, you won't be able to look at that scandal of Joe Paterno in the same way again."

—**Joe Posnanski,** national columnist, NBC Sports

"Jay takes us inside the life of a public icon, giving us the vantage point that only a son and a colleague can have. College football fans and anyone who still believes in the quintessential American success story will be all the richer for *Paterno Legacy*."

—**Ivan Maisel,** senior writer, ESPN.com

"Bravo, he was the gold standard by which all other football programs were measured."

—**Phil Knight,** Nike co-founder, from his foreword

"This is a sharp, in-depth, inside look at a son's love for his iconic father."

—**Dennis Dodd,** senior college football columnist, CBS Sports

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PATERNO LEGACY

JAY PATERNO

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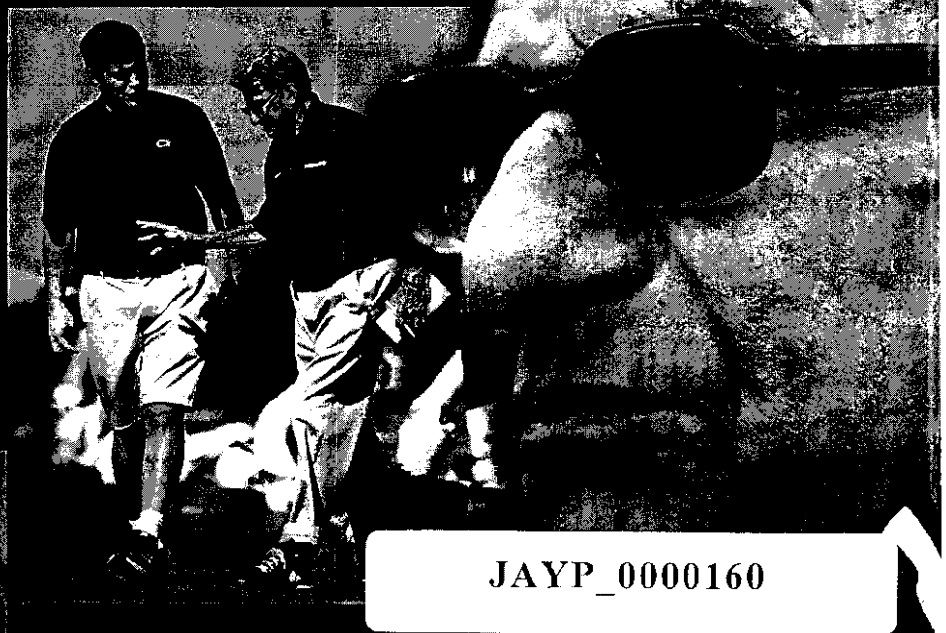
Paterno Legacy

Enduring Lessons from the Life and Death of My Father



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Jay Paterno

FOREWORD BY **PHIL KNIGHT**

$26.95 / $29.95 CAN

Paterno Legacy: Enduring Lessons from the Life and Death of My Father is the revealing, poignant, and definitive biography of legendary coach Joe Paterno written by the man who knew him better than anyone: his son and coaching protégé, Jay Paterno. His work is not only a stirring memorial, but it also paints a full picture of his father's life and career as well as documenting the case of an innocent man convicted by the media for a crime in which he had no part.

From lessons learned to punishments endured, Jay takes you inside the Paterno family, detailing what Joe was like as a father, husband, and grandfather. From memories of watching his father break down film in the den at sunrise to sitting at Joe's bedside during his final hours, *Paterno Legacy* is a behind-the-scenes look at a man who ruled over college football and Penn State for more than 50 years.

Jay also offers insight from his unique role, which included playing for Joe in college and then coaching under him from 1995 to 2011. The former quarterbacks coach takes the reader through recruiting trips and how Penn State landed stars like Kerry Collins, Jamba Hali, and Michael Robinson. He also gives the in-game strategies and schematic changes, which included a revamped offense that helped the Nittany Lions' turnaround from a 4–7 team in 2004 to an 11–1 Orange Bowl winner in 2005.

It was moments like those on-the-field bowl triumphs as well as Joe's commitment to academics, his team, and the integrity of the game that led him to become such a beloved figure. Paterno means "fatherly" in Italian, and it was an appropriate surname for Joe. As a coach, he evolved over the years from a harsh taskmaster into a more paternal figure. Even during his most demanding

(continued on back flap)

times, he had a genuine love for the student-athletes in his program, and that's why his memorial service became such a moving tribute. Jay evocatively illustrates what it was like to mourn a great man while fighting the slings, accusations, and arrows intended to tarnish his legacy.



JAY PATERNO spent more than two decades coaching college football, including 17 seasons at Penn State after coaching stops at the University of Virginia, the University of Connecticut, and James Madison University. At Penn State, Paterno coached three All-Big Ten quarterbacks and two Big Ten MVPs and helped orchestrate some of the most successful offenses in Penn State and Big Ten conference history. He writes columns for StateCollege.com and has written for *The Daily Collegian*, *USA TODAY*, the NCAA, *The Penn Stater*, and the *Centre Daily Times*. He lives with his wife and children in State College, Pennsylvania.

Cover photo courtesy of USA TODAY Sports Images
Cover photo (inset) courtesy of AP Images
Back cover photo courtesy of Steve Manuel

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Chapter 39

The Fight Back

"Kites rise higher against the wind than with it."

—Winston Churchill quote from Joe Paterno's handwritten notes

On a June Saturday, I took my dog out for our morning walk. I'd finished morning prayers and tuned in my iPhone to NPR to catch up on the news. A show came on that caught my attention.

It was a BBC program called *Dream Builders*, focusing on architects and their craft. Daniel Libeskind, the designer of the Jewish Museum in Berlin, was talking about his process. In the course of the interview, the host asked him about his design of the Holocaust Tower, a stark bleak structure lighted inside by a single slit coming through the walls.

Libeskind told the story of a female Holocaust survivor he'd heard. She was pushed into a dark cattle train car where all she could see was a solitary crack of light. She did not know where she was going or what fate awaited her at the end of her journey, but that sliver of light was her hope. The story inspired Libeskind and, in his sharing, I was inspired.

From the morning of July 12 when it seemed the world turned on my deceased father and our university, we found ourselves under siege. But I drew strength in knowing that if someone facing a situation as desperate as

the horrible unknown of a train ride into the Holocaust could find hope, I could certainly withstand the much smaller challenges of my life.

I knew the truth. The Bible tells us when we find God's light of truth, we do not hide it under a basket. We hold it up to chase the darkness.

That was the fuel of the fight. I went back to that conversation I'd had with my father in December of 2011 when he reminded me that we would have to fight to defend the student-athletes, coaches, administrators, faculty, medical staff, and alumni who had done things ethically in every sport from those creating and promoting lies about our university.

Defending what we did on the playing fields and in the classrooms was in no way taking away from the fight Jerry's victims faced. It was an issue of two wrongs not making a right. Collateral damage to a university and to men and women who were not responsible for the actions of one man should never be a price we carelessly pay to hastily close the chapter of one story so we can move on for the sake of moving on.

After the Freeh Report was issued, we knew that if there was to be a factual review of what really happened it was going to have to come from us. We set out through our attorneys to conduct a thorough and factual review and issue a report that could do some good in educating society and preventing this in the future.

Approached by our attorneys, two of the men, former United States attorney general Dick Thornburgh and former FBI profiler Jim Clemente, had worked with Louis Freeh and were reluctant to get involved. However, once they'd read Freeh's report and seen how terribly wrong he'd gotten it, they agreed.

On the night of October 11, 2012, I had the first dream about my father since he'd died nearly nine months earlier. In the dream I was called to the football office to coach again. When I got to my locker, someone else's name was on it, so I went to see equipment manager Brad Caldwell. As I walked through the locker room, the whole scene was in sepia, a brownish hue that you see in old-time pictures. I heard a familiar voice in the locker room and I turned to see people crowded around someone wearing a blue blazer. They were recruits and their parents, and the man in the blue blazer, the blue being the only color in the dream, looked like my dad.

Initially I was furious that they'd hired a Joe Paterno impersonator to pose for pictures with recruits until I got closer and heard the voice and saw

the lines on his face and the unmistakable mannerisms.

It was my father.

He turned and saw me and painfully hobbled toward me. "Jay, you've got to help me," he said.

"Help?"

"You've got to get me home, just get me home. Then everything will be better."

As I walked him slowly from the locker room, the doors opened into a brilliant light, and I shot straight up in bed—wide awake.

I was crying because I knew he wanted us to fight to make things right.

Our patience was tested, waiting to see what would become of the reports, and the dream was probably a symptom of that. Finally, in early February, the reports were ready. I traveled to Washington, D.C., to start reading the reports. About a week or two later, I was home studying the reports and getting ready for a day at ESPN doing all the interviews.

I spent a lot of time on the phone with my brother Scott, discussing the reports after they'd been issued to us and before I went to do the interviews. What many people do not know was that prior to reading the reports we were not even aware of who was writing them. In fact for a long period of time, the men writing the individual reports were not aware if there were others also writing reports or who the others were. These men looked at the evidence individually and came to very similar conclusions.

The week before the reports came out, we went to New York to tape *Katie,* Katie Couric's show. It was my mother's first interview on television. It was an effort to get people to take a second look at the facts of the case. My mom did a great job on the show.

We were in a room backstage where we could see all the cameras, and as my mother talked about losing my father and about what had happened, we could see the shots of the women in the studio wiping tears away. The majority of the women there were unattached to the story. It was good to see they had open minds and had their hearts open to my mother. My mother stated that, given the failure of the experts to recognize Jerry's problems, how were we all to know?

The reports were issued a few days after the *Katie* taping. On Sunday morning February 10, the men who wrote the reports went on ESPN's *Outside the Lines* to talk about their findings. On Monday the full-court

press would begin. *Katie* would air that afternoon. As part of the push, I flew up to Connecticut to do the ESPN "car wash," meaning the grand tour of all the television and radio shows.

The day began with *Mike & Mike*, followed by *SportsCenter, First Take*, Colin Cowherd, *SportsCenter* again, *The Stephen A. Smith Show*, and Scott Van Pelt's show. *Mike & Mike* got heated, but I appreciated their willingness to challenge our case with tough questions yet allow me to answer in full. They did not cut me off.

First Take featured Skip Bayless and Stephen A. Smith, and before we went on the air, Skip shared some information with me. "Jay, I see your side of this," he said. "Now Stephen has been tougher on you guys."

But when the show began, I give Stephen a lot of credit for allowing me to correct some false information. Stephen had made a point about Jerry and kids being at our practices and on team trips with us after the incident in 2001. I stopped him to point out he had his facts wrong and I stated very clearly that neither Jerry nor any of his victims were at practices or on team trips after he retired in 1999. Stephen asked me again, and I stated again the truth of the matter in no uncertain terms.

As soon as the interview was over, my cell phone rang. It was my brother Scott. "Jay," he said, "great job so far, but you should stay away from saying that Jerry and the victims weren't at practice. We don't want to contradict anyone."

"I appreciate what you're saying, but what I'm saying is the truth," I said.

To Stephen's credit when I went on his radio show later, he brought up that question for me again, so that his radio listeners who hadn't seen the earlier interview would hear what I'd said. That is what good journalists should do: have open minds willing to hear facts and share them with the public.

After ESPN we flew to Newark and on the way into Manhattan, I called in to Mike North's FOX Sports radio show and to LaVar Arrington's radio show in D.C. before heading to CNN for Erin Burnett's show. While I waited to go on the show, I looked out the window to see a snow-covered Columbus Circle.

Finally, I walked on to the set where Erin and I were seated across a very narrow table from each other—so narrow we could've shared a milkshake with two straws. Former attorney general Dick Thornburgh joined the show via satellite.

As the day wore on, the reaction from Penn Staters and people who wanted to hear the truth was gaining momentum. Our push on ESPN, CNN, and combined with my mother's appearance on *Katie* made for a good first start to letting the world see the truth.

Truth Rule@PCTypesCanSukit 2/11/13

@JayPaterno You're making a Fool of yourself dumbass. Your father Joe Pa did nothing to help stop a Pedophile he absolutely knew all about.

From Twitter

racy Atacheson @tjatcheson 2/11/13

@Jay Paterno @mikeandmike U did a gr8 job! To think ur Dad would cover this up for the sake of PSU is crazy! Goes against everything he stood 4!

From Twitter

Bands4RAINN 2bands4RAINN 2/11/13

@JayPaterno @mikeandmike glad the focus was clearly on the victims too. Please help join my fight http://RAINNmakers.rainn.org/bands4rainn

From Twitter

Note: RAINN is a child sexual abuse prevention group.

Sure, there were people who wanted us to just shut up and go away. My response was simple: if *their* father or their school had been unfairly stained with accusations of covering up for a pedophile, they'd fight, too. Defending Penn State's honor is not an offense to the victims. We should never fear the truth. Moses ben Maimon, a leading rabbinic authority of the medieval period, wrote: "Hear the truth, whoever speaks it."

The truth for Penn State and for Joe Paterno has been discounted because those who should defend the university found it in their personal

interests to sell an alternate story. They neglected to defend the university they'd been entrusted to protect.

The rest of the week I did interviews with nearly two dozen more people in cities like Atlanta, Philadelphia, Miami, and Los Angeles. I went and talked with all the local media outlets as well. It was important that the people in our home community hear what Clemente's report had to say about how we miss the nice guy offenders in communities all over the country.

Many people in State College who'd worked for or volunteered with Sandusky's charity, The Second Mile, were carrying collective guilt. I wanted them to know nice guy offenders operate without enablers; they neither need nor want them. I also wanted people to realize there were many young people whose lives had been saved by the work of The Second Mile volunteers.

As we went on the offensive, Louis Freeh hid behind his written statement. He'd been asked to appear and declined. The damage his false narrative had wrought was but a blip in his rearview mirror as he counted his Penn State money.

Subsequently, Louis Freeh and Mark Emmert have declined every chance to appear on camera with anyone from our side.

One of our objectives as we issued the reports was to create awareness of the issues of child sexual abuse in this country. Clemente was given a segment on *Katie.* My mother and I were asked to speak to the Pennsylvania Family Support Alliance at their awareness breakfast in Harrisburg on April 10, 2013.

While I made it quite plain in my speech that I was not there to talk about my father, we were criticized by members of the media, who were not even in the room, for trying to use Abuse Awareness Month to try and "defend Joe Paterno." The media that was actually in the room had a very different take on our message.

Shortly after my speech, I heard from Jolie Logan, who is the CEO of Darkness to Light, a group based in Charleston, South Carolina, that trains people to recognize the signs of child sexual abuse. They asked if I could help Penn State student Lance Chappelle with his prevention walk. I was more than happy to do so in September of 2013 but also noticed the university administration's absence at the event.

As the spring of 2013 moved toward summer, there were more and more positive developments. NBC's Bob Costas took another look at the Sandusky scandal and hosted a show on the NBC Sports Network as we announced

a sweeping lawsuit against the NCAA. In the run-up to the show, Costas showed why he is among the most respected journalists on the planet. He openly admitted that he had not read the entire Freeh Report before commenting in July of 2012. With more study and time, he asserted that Joe Paterno wasn't involved in a cover-up.

I was grateful for Bob's willingness to stand as a bigger person than others in the media who refused to further study what had happened here. Journalism should be a constant re-evaluation and analysis of facts as we learn more and more. Bob Costas gets it, and that's why he is among the elite.

Others weren't as ethical.

Christine Brennan from *USA TODAY* stated that she knew everything she needed to know before even reading our report. I laughed as I heard her say that. Good thing Galileo and the explorers of the 1400s and 1500s didn't just accept that the world was flat.

In the fall of 2013, the prosecutors of the Sandusky case told CBS that there was no evidence of Joe Paterno being involved in a cover-up. I am still awaiting Sally Jenkins' retraction from what she wrote in July of 2012 about Joe Paterno being a cover-up artist. I'm disappointed because I respect Sally so much.

The sweeping lawsuit against the NCAA united a broad-based group of people. Faculty members signed on, unafraid of the potential retaliation from the university administration. Five trustees—Anthony Lubrano, Ryan McCombie, Adam Taliaferro, Al Clemens, and Peter Khoury—signed onto the suit. Peter was later forced to choose between being on the lawsuit or be removed from the committee choosing Penn State's next president. He stepped off the lawsuit but made sure the media knew why he'd done so.

Nine former players stood up: Michael Robinson, Anwar Phillips, Justin Kurpeikis, Pat Mauti, Richard Gardner, Gerald Cadogan, Shamar Finney, Anthony Adams, and Josh Gaines. All of them had played between 1998 and 2011 and had wins stripped. Bill Kenney and I put our names in to represent the former coaches. The group stood shoulder to shoulder armed with a slingshot to take on the NCAA Goliath. It might have only been a slingshot, but it was loaded with the truth.

In the summer there was more ammunition for our cause.

On the Thursday of the Arts Festival, former Penn State football player Brian Masella and his wife had joined forces with former basketball player

EXHIBIT 3

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; RYAN MCCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Nominal Defendant.	Civil Division Docket No. 2013-2082

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS TO GEORGE SCOTT PATERNO, AS DULY APPOINTED REPRESENTATIVE OF THE ESTATE AND FAMILY OF JOSEPH PATERNO

The National Collegiate Athletic Association (the "NCAA"), by and through its counsel, hereby requests, pursuant to Pennsylvania Rule of Civil Procedure No. 4009.11, that George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno ("Coach Paterno") produce documents in accordance with the Instructions and Definitions set

forth herein for inspection and copying at the offices of Latham & Watkins LLP, 555 11th Street NW, Suite 1000, Washington D.C. 2004, within thirty (30) days of service of this request.

DEFINITIONS

As used herein, the words and phrases set forth below shall have the broadest meaning or meanings permitted under Pennsylvania Rule of Civil Procedure No. 4003.1. Unless defined, all words used in these Requests are to be given their plain and ordinary meaning.

1. "You" or "Your" shall mean George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno, and all other persons acting on behalf of the Estate and/or Family of Joseph Paterno, including, but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of the Estate and/or Family of Joseph Paterno.

2. The "NCAA" shall mean the National Collegiate Athletic Association.

3. "Defendants" shall mean the NCAA, Mark Emmert, Edward Ray, and the Pennsylvania State University.

4. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

5. "All" or "any" shall mean "each and every."

6. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

7. "Document" or "Documents" is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without

limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or records of any sort.

8. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

9. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

10. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

11. "Amended Complaint" shall means the First Amended Complaint filed in the above-captioned matter on February 5, 2014.

12. "Penn State" shall mean The Pennsylvania State University.

13. "Sandusky" shall mean former Penn State assistant football coach, Gerald Sandusky.

14. "Coach Paterno" shall refer to Joseph Paterno, the decedent represented in this Action by You.

15. "FSS" shall mean the firm of Frech Sporkin & Sullivan LLP.

15. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

16. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by The National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

17. The "Athletics Integrity Agreement" shall mean the August 2012 Athletics Integrity Agreement Between The National Collegiate Athletic Association and The Big Ten Conference, and The Pennsylvania State University.

INSTRUCTIONS

1. In accordance with the Pennsylvania Rules of Civil Procedure, in producing the requested Documents, You are to produce the requested documents on behalf of the Estate and Family of Coach Paterno, including all Documents that (1) are in Your actual or constructive possession, custody, or control; (2) had been in the actual or constructive possession, custody, or control of Coach Paterno at the time of his death; or (3) are in the actual or constructive possession, custody, or control of the Estate and/or Family of Joseph Paterno. This includes Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on behalf of the Estate and/or Family of Coach Paterno.

2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.

3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these requests shall be promptly supplemented.

4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and the addresse(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this request should be produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created in, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. Pursuant to Pennsylvania Rule of Civil Procedure No. 4009.12, You must fully respond to each Request. Objections to any part of these requests shall be stated in full with a brief statement setting forth the grounds for such objections.

8. The fact that another party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

9. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

10. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

11. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Documents Concerning the Consent Decree, including but not limited to any of the sanctions set forth in the Consent Decree, any purported attempt to seek an appeal regarding the Consent Decree, or the Athletics Integrity Agreement.

RESPONSE:

REQUEST NO. 2:

All Documents Concerning the Freeh Report.

RESPONSE:

REQUEST NO. 3:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees, including, without limitation, Documents Concerning the retention of FSS by the Special Investigations Task Force of the Penn State Board of Trustees, the investigation conducted by FSS, the Freeh Report, and Penn State.

RESPONSE:

REQUEST NO. 4:

All Documents Concerning Mr. Richard Thornburgh or research and preparation for, the drafting of, or the final version of Mr. Thornburgh's February 2013 *Review of the Freeh Report Concerning Joseph Paterno*, including, without limitation, all Communications with Mr. Thornburgh, all Communications regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

REQUEST NO. 5:

All Documents Concerning King & Spalding's February 2013 *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno*, including, without limitation, all Documents regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

REQUEST NO. 6:

All Documents Concerning James T. Clemente or the February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization* by James T. Clemente, including all Communications with James T. Clemente.

RESPONSE:

REQUEST NO. 7:

All Documents Concerning Fred S. Berlin or the February 6, 2013 letter from of the National Institute for the Study, Prevention and Treatment of Sexual Trauma to J. Sedwick Sollers, III, including all Communications with Fred S. Berlin.

RESPONSE:

REQUEST NO. 8:

From January 1, 2000 to present, All Documents Concerning Sandusky or The Second Mile.

RESPONSE:

REQUEST NO. 9:

All Documents from January 1, 1996 to present Concerning Sandusky's retirement, interaction or involvement with children, sexual abuse, and/or Penn State privileges and benefits.

RESPONSE:

REQUEST NO. 10:

All Communications between or among any of the Plaintiffs (including Coach Paterno or You) and one or more of the following: Sandusky, Graham Spanier, Tim Curley, Gary Schultz, and former Penn State assistant coach Michael McQueary.

RESPONSE:

REQUEST NO. 11:

All Communications with the Pennsylvania Attorney General's Office.

RESPONSE:

REQUEST NO. 12:

All Documents Concerning (i) institutional control over Penn State's football team, (ii) the level of deference or reverence provided to the Penn State football program, players, or coaches by Penn State students, faculty, staff, alumni, and fans, or (iii) the allegations in Paragraphs 99-101 of the Amended Complaint.

RESPONSE:

REQUEST NO. 13:

All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, or Plaintiffs Al Clemens, Joseph V. Paterno, or William Kenney, including, without limitation, any public opinion surveys or polls.

RESPONSE:

REQUEST NO. 14:

All Communications involving You or Coach Paterno and a public relations or media consultant or specialist.

RESPONSE:

REQUEST NO. 15:

All Communications Concerning the value of Coach Paterno's assets, financial net worth, or the financial net worth of Coach Paterno's Estate.

RESPONSE:

REQUEST NO. 16:

Documents sufficient to identify all sources of income, revenue or other money earned by Coach Paterno or the Estate from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 17:

Coach Paterno's pay-stubs, federal and state income tax returns, and any statement or record of other income received from 2006 to the present.

RESPONSE:

REQUEST NO. 18:

All Documents Concerning the transfer of assets to or from Coach Paterno or his Estate since January 1, 2006.

RESPONSE:

REQUEST NO. 19:

Documents sufficient to identify all investments and their monthly and annual values made by or in Coach Paterno's name or the name of his Estate since January 1, 2006.

RESPONSE:

REQUEST NO. 20:

Documents sufficient to identify all corporate entities and business partnerships in which Coach Paterno or his Estate has a partial or whole ownership or beneficial interest at any point between January 1, 2006 and the present.

RESPONSE:

REQUEST NO. 21:

All Documents Concerning the actual or contemplated sale of any goods from which Coach Paterno or his Estate had a possibility of earning money or did earn money, from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 22:

All draft and final contracts or agreements that had the possibility of generating income or other money for Coach Paterno or his Estate, including, without limitation, licensing contracts and contracts for television appearances, from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 23:

All Communications regarding deliberations or negotiations about, the decision to enter into, the benefits of, or the terms of, any contract or agreement produced in response to Request No. 22.

RESPONSE:

REQUEST NO. 14:

Documents sufficient to fully demonstrate the monthly and annual sales performance of all merchandise or other goods sold from which Coach Paterno or his Estate has a financial interest, including, without limitation, royalty or licensing payments from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 15:

All Documents Concerning any naming rights options offered to Coach Paterno or his Estate from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 26:

All Documents Concerning any books contemplated, drafted, or published by Coach Paterno, his Estate, or any other member of the Paterno family.

RESPONSE:

REQUEST NO. 27:

Invitations, contracts, agendas, speeches, awards, or information about payment received for any event in which You, Coach Paterno, Sue Paterno, or any other member of the Paterno family was invited to speak or attend as a celebrity guest or honoree from 2008 to present.

RESPONSE:

REQUEST NO. 16:

All Communications Concerning negotiations or discussions with Penn State regarding Coach Paterno's salary, employment benefits, title, job responsibilities, or contract from January 1, 2006 to present.

RESPONSE:

REQUEST NO. 29:

Any other Documents Concerning the claim of financial or pecuniary loss from January 1, 2006 to the present brought on behalf of the Estate and Family of Coach Paterno.

RESPONSE:

REQUEST NO. 30:

All Documents Concerning the damages the Estate and Family of Coach Paterno is seeking in this action from the Defendants, including, without limitation, all Documents

Concerning Your claims for "substantial injuries, economic loss, opportunity loss, reputational damage, emotional distress, and other damages."

RESPONSE:

REQUEST NO. 17:

All non-privileged Communications between or among any of the Plaintiffs (including Coach Paterno and You) Concerning this lawsuit, or any and all facts or circumstances related to the allegations in the Amended Complaint, including the Consent Decree, the Freeh Report, the reputation of any Plaintiff (including Coach Paterno), Coach Paterno's termination or departure from Penn State, Sandusky, and Rodney Erickson.

RESPONSE:

REQUEST NO. 18:

All Communications with any current or former Penn State (i) football coach or player, (ii) staff member, (iii) faculty, or (iv) Penn State trustee not party to this lawsuit, Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, or Rodney Erickson.

RESPONSE:

REQUEST NO. 19:

All Communications, commentary, or other content from Facebook, Twitter, an Internet "blog," MySpace, Instagram, or any other social media source created, sent, received, forwarded, or otherwise transmitted by You Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

REQUEST NO. 20:

All text messages You sent or received Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

REQUEST NO. 21:

All Documents that You believe support, confirm, rebut, or contradict any fact or conclusion in the Amended Complaint, including all Documents referred to or relied upon in the Amended Complaint.

RESPONSE:

Respectfully submitted,

/s/Thomas W. Scott

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Counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Defendant National Collegiate Athletics Association First Requests for Documents to Plaintiff George Scott Paterno as Duly Appointed Representative of the Estate and Family of Joseph Paterno on the following by First Class Mail and email:

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Dated: May 21, 2014

/s/Thomas W. Scott

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Attorney for Defendants

EXHIBIT 4

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LATHAM & WATKINS LLP

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October 29, 2015

VIA EMAIL

Patricia L. Maher
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Re: *Paterno, et al. v. NCAA, et al.*, Civ. No. 2013-2082

Dear Trish:

We write regarding Plaintiffs' position with regard to the NCAA's discovery requests related to the *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno* (the "*Critique*") and its constituent independent analyses. We have had a number of discussions on this topic, including, among others, telephonic meet and confer discussions on July 10, 2015 and September 18, 2015. The purpose of this letter is to memorialize our understanding of Plaintiffs' position with regard to this issue.

Specifically, we have discussed the NCAA's discovery requests (both documents and depositions), and anticipated discovery, from: (1) Fred Berlin and James Clemente for materials related to their independent analyses of the Freeh Report, which were part of the *Critique*; (2) K&L Gates regarding Dick Thornburgh's analysis of the Freeh Report, which is also part of the *Critique*; and (3) the Estate concerning the *Critique* and its constituent independent analyses, including a deposition of the *Critique's* author. Each item is addressed below.

As we understand it, Plaintiffs' position with regard to discovery of Fred Berlin and James Clemente is as follows:

- Berlin and Clemente are now consulting experts for Plaintiffs.
- As such, Berlin and Clemente will provide no discovery to the NCAA concerning their independent analyses, on the basis that Pennsylvania Rule of Civil Procedure 4003.5 does not permit such discovery.
- If Plaintiffs decide to designate Berlin and Clemente as testifying experts, the NCAA would be allowed only that discovery pursuant to Rule 4003.5. (You have subsequently clarified that such discovery will not include expert depositions.)

With regard to discovery of K&L Gates, we understand Plaintiffs' position to be as follows:

- Mr. Thornburgh is not a consulting expert and you have not designated him as a testifying expert.
- Plaintiffs will object to discovery from Mr. Thornburgh to the extent it calls for materials that you believe are protected by the attorney-client privilege or work product doctrine.
- Plaintiffs will not object to a deposition of Mr. Thornburgh.
- If Plaintiffs later decide to designate Mr. Thornburgh as a testifying expert, you will allow only the discovery available under Rule 4003.5.

After review of the recent production of 65 documents from K&L Gates, it appears that the Estate's assertion of privilege will preclude production of the underlying work papers, communications, drafts, internal documents related to the public report, and other materials. K&L Gates informed us that the Estate instructed them to withhold the "majority" of responsive documents based on privilege.

Regarding the NCAA's requests concerning the *Critique* itself, Plaintiffs take the following position:

- You understood that the NCAA's document requests to the Estate include materials that may be in the possession of the Estate's attorneys or agents, including King & Spalding LLP. You also noted that the Estate recently produced certain communications on behalf of King & Spalding, which primarily included communications between Wick Sollers and third parties.[1]
- The authors of the *Critique* (attorneys at King & Spalding) are not, and will not be, experts in the case.
- The Estate will not produce documents or communications responsive to the NCAA's requests concerning the *Critique* on the basis that these materials are protected under the attorney-client privilege or work product doctrine, with the exception of the materials the Estate produced on August 11, 2015 involving communications with third parties.
- We noted that the *Critique* publicly discloses certain materials, such as notes from Wick Sollers' interview of Joe Paterno and communications

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[1] The majority of documents in the Estate's August 11, 2015 production were communications between King & Spalding and Penn State, unrelated to the *Critique*, with the exception of the Berlin and Clemente engagement letters.

with counsel for Messrs. Curley and Schultz. The Estate will confirm whether such materials exist. However, you indicated that, even if these documents exist, the Estate considers these documents to be protected from discovery by the attorney-client privilege and/or work product doctrine.

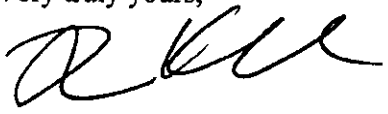
We have expressed our disagreement with Plaintiffs' privilege and work product assertions described above and their interpretation of Pennsylvania Rule 4003.5. Among other concerns, we have noted the apparent inconsistency between Plaintiffs' privilege assertions here and their posture towards discovery of materials related to the Freeh investigation and final report. Nonetheless, Plaintiffs have indicated their intention to stand by their privilege assertions.

* * *

Finally, as you know, the Pennsylvania Rules of Civil Procedure required that Plaintiffs produce a privilege log of any withheld responsive materials thirty days after service of the document requests, which would have been in June 2014. *See* Pa.R.C.P. 4009.12(b)(2). The NCAA has requested a log of these documents on numerous occasions, and you agreed to produce one in July of this year. To date, Plaintiffs have not provided any log. Please let us know when we can expect to receive a privilege and redaction log.

We appreciate your time and cooperation in attempting to work through these issues. Please promptly let us know if we have misunderstood or misstated any of the Plaintiffs' positions.

Very truly yours,



Brian E. Kowalski
for LATHAM & WATKINS LLP

EXHIBIT 5

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al.	)	
	)	**Docket No. 2013-2082**
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.	)	
Defendants.	)	

OBJECTIONS AND RESPONSES BY GEORGE SCOTT PATERNO, AS DULY APPOINTED REPRESENTATIVE OF THE ESTATE AND FAMILY OF JOSEPH PATERNO, TO THE FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS BY NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno ("the Estate"), by and through its counsel, submits the following as its objections and response to the first requests for production of documents by defendant the National Collegiate Athletic Association (the "NCAA") in the above-captioned matter.

GENERAL OBJECTIONS

1. The Estate objects to these Requests to the extent the Definitions and Instructions purport to impose obligations greater than the requirements of the Pennsylvania Rules of Civil Procedure.

2. The Estate objects to Requests 1-7, 10, 12-14, 22-23, 28-32 and 34 on grounds that these Requests seek information that is protected from disclosure by the attorney-client privilege and work product doctrine. The Estate will produce non-privileged documents responsive to these Requests and will provide a log of privileged documents withheld, subject to agreement with counsel for Defendants as to mutual provision of privilege logs for any documents withheld on grounds of privilege.

3. The Estate objects to these Requests to the extent that they seek information from someone other than the Estate, including George Scott Paterno individually, or any other member of the Paterno family.

4. The Estate objects to the Instructions in these Requests to the extent that they call for production of documents and information in the constructive possession, custody or control of the Estate of Coach Paterno, but to which the Estate lacks actual access. The Estate currently lacks access to files containing documents and information potentially responsive to the requests that were in Coach Paterno's offices at The Pennsylvania State University at the time of his termination as head football coach in November 2011. The Estate objects to the extent such documents and information are deemed to be in its constructive possession, because the Estate has been unable to review them for responsiveness.

5. The Estate objects to the direction in the Instructions that the time period covered by the Requests is not limited, but continues from January 1, 2011 through the present. The Estate will produce responsive documents up to the date of the filing of this action on May 30, 2013.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1:

All Documents Concerning the Consent Decree, including but not limited to any of the sanctions set forth in the Consent Decree, any purported attempt to seek an appeal regarding the Consent Decree, or the Athletics Integrity Agreement.

RESPONSE:

The Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 2:

All Documents Concerning the Freeh Report.

RESPONSE:

The Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 3:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees, including, without limitation, Documents Concerning the retention of FSS by the Special Investigations Task Force of the Penn State Board of Trustees, the investigation conducted by FSS, the Freeh Report, and Penn State.

RESPONSE:

The Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 4:

All Documents Concerning Mr. Richard Thornburgh or research and preparation for, the drafting of, or the final version of Mr. Thornburgh's February 2013 *Review of the Freeh Report Concerning Joseph Paterno*, including, without limitation, all Communications with Mr. Thornburgh, all Communications regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

The Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 5:

All Documents Concerning King & Spalding's February 2013 *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno*, including, without limitation, all Documents regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

The Estate objects to this Request to the extent it calls for production of documents protected by attorney work product or the attorney-client privilege. Subject to the foregoing objections, the Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 6:

All Documents Concerning James T. Clemente or the February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization* by James T. Clemente, including all Communications with James T. Clemente.

RESPONSE:

The Estate objects to this Request to the extent it calls for production of documents protected by attorney work product or the attorney-client privilege. Subject to the foregoing objections, the Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 7:

All Documents Concerning Fred S. Berlin or the February 6, 2013 letter from of the National Institute for the Study, Prevention and Treatment of Sexual Trauma to J. Sedwick Sollers, III, including all Communications with Fred S. Berlin.

RESPONSE:

The Estate objects to this Request to the extent it calls for production of documents protected by attorney work product or the attorney-client privilege. Subject to the foregoing objections, the Estate will produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 8:

From January 1, 2000 to present, All Documents Concerning Sandusky or The Second Mile.

RESPONSE:

The Estate will produce documents responsive to this Request.

REQUEST NO. 9:

All Documents from January 1, 1996 to present Concerning Sandusky's retirement, interaction or involvement with children, sexual abuse, and/or Penn State privileges and benefits.

RESPONSE:

The Estate will produce documents responsive to this Request.

REQUEST NO. 10:

All Communications between or among any of the Plaintiffs (including Coach Paterno or You) and one or more of the following: Sandusky, Graham Spanier, Tim Curley, Gary Schultz, and former Penn State assistant coach Michael McQueary.

RESPONSE:

The Estate objects to this Request because it is overly broad, unduly burdensome, and calls for production of documents and information not relevant to the pending action. Subject to the foregoing objections, the Estate will produce non-privileged documents, if any, responsive to this Request that relate to the investigation of Jerry Sandusky, actions by the NCAA and Penn State following his indictment in November 2011, and the effects of those actions.

REQUEST NO. 11:

All Communications with the Pennsylvania Attorney General's Office.

RESPONSE:

The Estate objects to this Request because it is overly broad and calls for the production

of documents and information not relevant to the pending action. Subject to the foregoing objections, the Estate will produce responsive documents, if any, that relate to the investigation of Jerry Sandusky, actions by the NCAA and Penn State following his indictment in November 2011, and the effects of those actions.

REQUEST NO. 12:

All Documents Concerning (i) institutional control over Penn State's football team, (ii) the level of deference or reverence provided to the Penn State football program, players, or coaches by Penn State students, faculty, staff, alumni, and fans, or (iii) the allegations in Paragraphs 99-101 of the Amended Complaint.

RESPONSE:

The Estate objects to this Request on grounds that it is vague, ambiguous and overly broad. The terms used in this Request and in the referenced paragraphs from the Amended Complaint come from statements by Defendants, including the Consent Decree, which adopted and incorporated them from the Freeh Report. Subject to the foregoing objections, and based upon further refinement of these terms, the Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 13:

All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, or Plaintiffs Al Clemens, Joseph V. Paterno, or William Kenney, including, without limitation, any public opinion surveys or polls.

RESPONSE:

The Estate objects to this Request on grounds that it is vague and overly broad. The Estate also objects to this Request to the extent it calls for production of documents protected by attorney work product or the attorney-client privilege. Subject to the foregoing objections, the Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 14:

All Communications involving You or Coach Paterno and a public relations or media consultant or specialist.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for production of information not relevant to the subject matter of the pending action. During his long tenure at Penn State University, Coach Paterno regularly dealt with public relations specialists for the University, primarily in his capacity as head football coach. Penn State University would have records related to Coach Paterno's communications with its public relations consultants, most of which would have no relevance to the pending action. The Estate also objects to this Request to the extent it calls for documents protected by attorney-client privilege and attorney work product. Subject to the foregoing objections, the Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 15:

All Communications Concerning the value of Coach Paterno's assets, financial net worth, or the financial net worth of Coach Paterno's Estate.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for the production of information not relevant to the subject matter of the pending action. Subject to the foregoing objections, the Estate will produce responsive documents sufficient to show the value or net worth of the Estate.

REQUEST NO. 16:

Documents sufficient to identify all sources of income, revenue or other money earned by Coach Paterno or the Estate from January 1, 2006 to present.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for the production of information not relevant to the subject matter of the pending action. Subject to the foregoing objections, the Estate will produce documents sufficient to show sources of income earned by Coach Paterno or the Estate .

REQUEST NO. 17:

Coach Paterno's pay-stubs, federal and state income tax returns, and any statement or record of other income received from 2006 to the present.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, and unduly burdensome. The Estate objects to the Request for tax returns on grounds that they are not relevant to its claims in the pending action. Subject to the foregoing objections, the Estate will produce documents sufficient to show income received, but the Estate has no "pay stubs" because Coach Paterno's salary was paid electronically during the relevant time period.

REQUEST NO. 18:

All Documents Concerning the transfer of assets to or from Coach Paterno or his Estate since January 1, 2006.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for production of documents that are not relevant to the pending action.

REQUEST NO. 19:

Documents sufficient to identify all investments and their monthly and annual values made by or in Coach Paterno's name or the name of his Estate since January 1, 2006.

RESPONSE:

The Estate objects to this Request because it is overly broad, unduly burdensome, and calls for production of documents that are not relevant to the pending action.

REQUEST NO. 20:

Documents sufficient to identify all corporate entities and business partnerships in which Coach Paterno or his Estate has a partial or whole ownership or beneficial interest at any point between January 1, 2006 and the present.

RESPONSE:

The Estate objects to this Request because it is overly broad, unduly burdensome, and calls for production of documents that are not relevant to the pending action. Subject to the foregoing objections, the Estate will produce documents sufficient to identify corporate entities or business partnerships in which Coach Paterno or the Estate have an ownership interest that relate to the Estate's claims in this action.

REQUEST NO. 21:

All Documents Concerning the actual or contemplated sale of any goods from which Coach Paterno or his Estate had a possibility of earning money or did earn money, from January 1, 2006 to present.

RESPONSE:

The Estate will produce non-privileged responsive documents.

REQUEST NO. 22:

All draft and final contracts or agreements that had the possibility of generating income or other money for Coach Paterno or his Estate, including, without limitation, licensing contracts and contracts for television appearances, from January 1, 2006 to present.

RESPONSE:

The Estate will produce non-privileged responsive documents.

REQUEST NO. 23:

All Communications regarding deliberations or negotiations about, the decision to enter into, the benefits of, or the terms of, any contract or agreement produced in response to Request No. 22.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for the production of documents and information not relevant to the pending action. Subject to the foregoing objections, the Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 14 [*sic*] [*recte* 24]:

Documents sufficient to fully demonstrate the monthly and annual sales performance of all merchandise or other goods sold from which Coach Paterno or his Estate has a financial interest, including, without limitation, royalty or licensing payments from January 1, 2006 to present.

RESPONSE:

The Estate will produce non-privileged responsive documents.

REQUEST NO. 15[*sic*] [*recte* 25]:

All Documents Concerning any naming rights options offered to Coach Paterno or his Estate from January 1, 2006 to present.

RESPONSE:

The Estate will produce relevant non-privileged responsive documents, if any.

REQUEST NO. 26:

All Documents Concerning any books contemplated, drafted, or published by Coach Paterno, his Estate, or any other member of the Paterno family.

RESPONSE:

The Estate objects to this Request because it is overly broad and calls for production of

documents and information not relevant to the pending action. In addition, the Estate objects to the extent that this Request seeks material not in the custody or control of the Estate. Subject to the foregoing objections, the Estate has no responsive documents.

REQUEST NO. 27:

Invitations, contracts, agendas, speeches, awards, or information about payment received for any event in which You, Coach Paterno, Sue Paterno, or any other member of the Paterno family was invited to speak or attend as a celebrity guest or honoree from 2008 to present.

RESPONSE:

The Estate objects to this Request because it is vague, overly broad, unduly burdensome, and calls for production of documents and information not relevant to the pending action. In addition, the Estate objects to the extent that this Request calls for production of documents and information not in the actual custody or control of the Estate, because such invitations or offers typically came to Coach Paterno through Penn State University. Subject to the foregoing objections, the Estate will produce responsive documents, if any.

REQUEST NO. 16 [*sic*] [*recte* 28]:

All Communications Concerning negotiations or discussions with Penn State regarding Coach Paterno's salary, employment benefits, title, job responsibilities, or contract from January 1, 2006 to present.

RESPONSE:

The Estate will produce non-privileged responsive documents.

REQUEST NO. 29:

Any other Documents Concerning the claim of financial or pecuniary loss from January 1, 2006 to the present brought on behalf of the Estate and Family of Coach Paterno.

RESPONSE:

The Estate objects to this Request on grounds that it currently lacks access to certain files

that may contain responsive documents and information. Subject to the foregoing objection, the Estate will produce non-privileged responsive documents.

REQUEST NO. 30:

All Documents Concerning the damages the Estate and Family of Coach Paterno is seeking in this action from the Defendants, including, without limitation, all Documents Concerning Your claims for "substantial injuries, economic loss, opportunity loss; reputational damage, emotional distress, and other damages."

RESPONSE:

The Estate objects to this Request on grounds that it currently lacks access to files that may contain responsive documents and information. Subject to the foregoing objection, the Estate will produce responsive documents.

REQUEST NO. 17[*sic*] [*recte* 31]:

All non-privileged Communications between or among any of the Plaintiffs (including Coach Paterno and You) Concerning this lawsuit, or any and all facts or circumstances related to the allegations in the Amended Complaint, including the Consent Decree, the Freeh Report, the reputation of any Plaintiff (including Coach Paterno), Coach Paterno's termination or departure from Penn State, Sandusky, and Rodney Erickson.

RESPONSE:

The Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 18[*sic*] [*recte* 32]:

All Communications with any current or former Penn State (i) football coach or player, (ii) staff member, (iii) faculty, or (iv) Penn State trustee not party to this lawsuit, Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, or Rodney Erickson.

RESPONSE:

The Estate objects to this Request because it is overly broad and unduly burdensome. Subject to the foregoing objections, the Estate will produce responsive non-privileged

documents, if any, that relate to the investigation of Jerry Sandusky, actions by the NCAA and Penn State following his indictment in November 2011, and the effects of those actions.

REQUEST NO. 19[*sic*] [*recte* 33]:

All Communications, commentary, or other content from Facebook, Twitter, an Internet "blog," MySpace, Instagram, or any other social media source created, sent, received, forwarded, or otherwise transmitted by You Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

The Estate will produce responsive documents, if any.

REQUEST NO. 20[*sic*] [*recte* 34]:

All text messages You sent or received Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

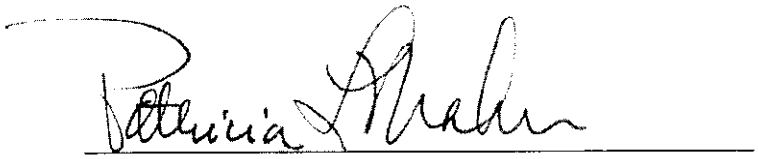
The Estate objects to this Request to the extent it calls for production of documents protected by attorney work product or the attorney-client privilege. Subject to the foregoing objection, the Estate will produce non-privileged responsive documents, if any.

REQUEST NO. 21[*sic*] [*recte* 35]:

All Documents that You believe support, confirm, rebut, or contradict any fact or conclusion in the Amended Complaint, including all Documents referred to or relied upon in the Amended Complaint.

RESPONSE:

The Estate objects to this Request on grounds that it currently lacks access to files that may contain responsive documents and information. Subject to the foregoing objection, the Estate will produce responsive documents.



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Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno

VERIFICATION

I, George Scott Paterno, am the Personal Representative of the Estate of Joseph Paterno. I have reviewed the foregoing Objections and Responses to the First Requests for Production of Documents by the National Collegiate Athletic Association, and they are true and correct to the best of my information, knowledge and belief.

George Scott Paterno
Personal Representative of the Estate of Joseph Paterno

Dated: June 20, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **OBJECTIONS AND RESPONSES BY GEORGE SCOTT PATERNO, AS DULY APPOINTED REPRESENTATIVE OF THE ESTATE AND FAMILY OF JOSEPH PATERNO, TO THE FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS BY NATIONAL COLLEGIATE ATHLETIC ASSOCIATION** was served this 20th day of June, 2014 by first class mail and email to the following:

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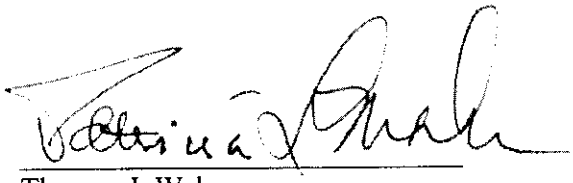

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Counsel for Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno

EXHIBIT 6

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LATHAM & WATKINS LLP

July 16, 2015

VIA EMAIL

Patricia L. Maher
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Re: *Paterno, et al. v. NCAA, et al.*, Civ. No. 2013-2082

Dear Trish:

I am writing to memorialize the matters discussed during our July 10, 2015 teleconference regarding various discovery issues. During the call, we primarily discussed (1) the subpoenas for production of documents issued by the NCAA to Fred Berlin, James Clemente, and K&L Gates LLP; (2) Jay Paterno's amended responses to the NCAA's First Set of Interrogatories; and (3) Scott Paterno's objections and responses to the NCAA's subpoena for documents.[1] Each of these topics is addressed below.

As an initial matter, however, we asked whether Plaintiffs would be providing a privilege log. You indicated that they would do so. We appreciate these efforts and look forward to receiving the log at the earliest possible opportunity.

A. Subpoenas to Berlin, Clemente, and K&L Gates

Near the outset of our conversation, we asked for an update on the status of productions in response to the subpoenas for documents issued by the NCAA to Fred Berlin and James Clemente. Their responses to these subpoenas were due June 4 and June 8, respectively.

Much to our surprise, you indicated—for the first time—that Plaintiffs now intend to designate Dr. Berlin and Mr. Clemente as testifying experts. As a result, you explained that neither Dr. Berlin nor Mr. Clemente will produce *any* documents requested by the NCAA's subpoenas, notwithstanding your prior communications to the contrary; instead, they will produce only those materials required to be produced by Rule 4003.5. We note that Plaintiffs, Mr. Clemente, and Dr. Berlin are able to attempt to reverse course now *only* by virtue of the fact that Dr. Berlin and Mr. Clemente have failed to timely comply with the subpoenas.

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[1] In this letter, "Coach Paterno" refers to the late Joe Paterno. References to "Mr. Paterno" in Part B refer to Jay Paterno; in Part C, they refer to George Scott Paterno.

We do not agree that any designation of Dr. Berlin and/or Mr. Clemente as experts is a proper basis for withholding documents requested by the NCAA's subpoenas. The subpoenas exclusively seek non-privileged materials generated *prior* to their engagements as expert witnesses in this litigation. Dr. Berlin and Mr. Clemente rendered opinions on matters relevant to this litigation—through their publicly released "reports" on the Freeh Report—*before* Plaintiffs filed their complaint, and for purposes related self-evidently to public relations. Pennsylvania Rule 4003.5 is not intended to permit parties to shield from disclosure otherwise discoverable materials, and Plaintiffs should not be permitted to conceal highly relevant evidence by deciding to designate Dr. Berlin and Mr. Clemente "experts" over two years after the requested materials were generated. Accordingly, the NCAA requests that Dr. Berlin and Mr. Clemente fully comply with the subpoenas, and that they do so as soon as possible. Please advise whether they intend to maintain this position and refuse to comply with the subpoena so that the NCAA may seek the Court's assistance.

You further indicated that Plaintiffs have not yet determined whether they also intend to designate Richard Thornburgh as an expert. We request that Plaintiffs notify the NCAA of their decision on that issue at the first possible opportunity. In any event, if Plaintiffs instruct K&L Gates to withhold materials responsive to the NCAA's subpoena on the grounds that they have retained or may retain Mr. Thornburgh as an expert witness, then the NCAA's same objection as discussed above will apply.

Finally, we inquired into whether the Paterno Estate intended to produce materials related to the various "expert" reports, including the publicly-released, February 2013 "Critique of the Freeh Report" prepared by Wick Sollers of King & Spalding. In response, you stated that the Estate will not provide *any* communications with the purported "experts," nor will it provide documents related to Mr. Sollers' Critique.[2] You justified this refusal, in part, on grounds of attorney-client privilege. Although we acknowledged that some communications may be properly subject to the privilege, Plaintiffs have likely waived privilege over documents and communications related to the publicly released "expert" reports, including the Sollers Critique. In addition, we have requested certain documents—such as engagement letters, internal drafts, comments received from the public, and notes regarding interviews conducted for purposes of the public reports—that are likely not subject to the attorney-client privilege at all. We appreciate your cooperation in producing responsive materials, and we trust that any materials the Estate believes are subject to the attorney-client privilege or some other protection will be identified on its forthcoming privilege log.

B. Jay Paterno's Amended Responses to the NCAA's First Set of Interrogatories

With regard to Jay Paterno's amended responses to the NCAA's First Set of Interrogatories, we discussed the following on our call:

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[2] You confirmed, however, that the Paterno Estate *would* produce communications with King & Spalding and the Freeh Firm, the Pennsylvania Attorney General's Office, and other third parties not engaged by or on behalf of the Paterno Estate. We appreciate your cooperation and look forward to receiving these materials.

Interrogatory No. 1. We noted that this Interrogatory seeks information regarding, *inter alia*, Mr. Paterno's annual salary from each position he has held since graduating from college. Although Mr. Paterno's response is relatively complete, we pointed out that he has not provided salary information for each year of his tenure at Penn State. You explained that Penn State has not provided Mr. Paterno with records of the salary he received and that such records are not included in his personnel file. However, you agreed that you would seek to obtain such information from Mr. Paterno's own records.[3] We appreciate your willingness to do so, and to facilitate these efforts, we offered to narrow the scope of the Interrogatory to annual salary information dating back only to 2006.

Interrogatory Nos. 2-3. We expressed concern that Mr. Paterno's responses to these Interrogatories—which seek various types of information regarding alleged lost employment opportunities—are incomplete. Although Mr. Paterno identified particular positions for which he applied, he failed to consistently provide all requested information—in particular, information regarding whether, when, and with whom he interviewed; the date he was offered a position or informed that he was rejected; the reasons provided for any rejection; the names of representatives with whom he communicated; and a description of any such communications regarding various issues relevant to this litigation.

For example, Mr. Paterno's response to Request No. 2 stated that he discussed a position as an on-air college football commentator with a producer for ESPN in March 2012, but that, in April 2012, "ESPN informed [Mr.] Paterno that they wanted to postpone his work." Mr. Paterno did not identify who communicated this message to him or state what reasons, if any, were offered for the decision. Similarly, although Mr. Paterno indicated that he applied for the head football coach position at James Madison University in December 2013, and that "[h]e was not hired," he did not state when he received notification of his rejection, who provided that notification, or what reasons, if any, were offered. Information regarding the other positions Mr. Paterno's response identified was similarly incomplete.

For each position Mr. Paterno has identified, we emphasized the importance of his providing, at a minimum, information regarding when he was told he would not be hired, who told him he would not be hired, and the reasons, if any, provided for the decision. In the Complaint, Mr. Paterno asserts that he was denied these employment opportunities because of the NCAA. This information is relevant to test these allegations. You agreed to discuss our questions with Mr. Paterno and to supplement his responses with any further information he can provide. We appreciate your willingness to do so and look forward to receiving this information as soon as possible.[4]

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[3] During our call, you indicated that Mr. Paterno has already produced tax returns dating back to 2011; however, we have examined your productions and are unable to locate any such records. We therefore respectfully request that you direct us to any of Mr. Paterno's tax returns you have already produced and that you produce all of his tax returns dating to 2006.

[4] We also noted that in response to Interrogatory No. 2, Mr. Paterno refers to communications with a search firm. We asked if he intends to produce those communications.

Interrogatory No. 4. The second paragraph of Mr. Paterno's response to this Interrogatory referred to "an assistant to Mark Emmert." You agreed to discuss this request with Mr. Paterno to see if he could identify the assistant.

Interrogatory No. 7. We asked whether Mr. Paterno's response to Interrogatory No. 7 is a complete recitation of the relevant facts. In particular, we noted that although Mr. Paterno's response referred to "hate mail" he has received, we believe the only such mail he has produced pre-dates the Consent Decree. You agreed to determine whether Mr. Paterno has any additional "hate mail" in his possession.

Interrogatory No. 10. Mr. Paterno's one-sentence response to this Interrogatory is incomplete. You explained that Mr. Paterno does not believe he was ever officially terminated from Penn State; he was simply informed that he would no longer be a part of the coaching staff and that Penn State simply stopped paying him. He appears to be engaging in a game of semantics with the meaning of the term "termination." That is not a good faith basis to avoid responding to the Interrogatory. Moreover, this position is flatly inconsistent with the position he has taken in his federal litigation, *Paterno v. The Pennsylvania State University*, Civ. A. No. 14-4365-LS, where he, in fact, *defined* "the Termination" as the "prematur[e] releas[e] from Penn State's employment [of] the majority of the Penn State football coaching staff, including the employment of Paterno and Kenney, all of whom had acted as assistant coaches for the Penn State football team for many years." Am. Compl. ¶ 3.

As we explained on the call, whether or not his termination was handled through formal procedures, there is no dispute that Mr. Paterno is no longer a paid employee at Penn State or a member of the football coaching staff. The NCAA continues to believe that Mr. Paterno's communications with Coach O'Brien, among other facts, are responsive to this Interrogatory. However, in order to resolve his concerns, we are willing to reword the Interrogatory as follows:

> State all facts regarding your release from the Penn State football coaching staff, including without limitation, when You were notified that you would not be retained on the football coaching staff, and any information communicated to You by Coach Bill O'Brien or any other Penn State representative or employee regarding Your release.

Presumably with this modification, Mr. Paterno will thoroughly respond to Interrogatory No. 10.

Interrogatory No. 11. Mr. Paterno's response to this Interrogatory provided only one reason for his withdrawal from the 2014 Pennsylvania Lieutenant Governor's race. We asked whether there were additional reasons for Mr. Paterno's withdrawal, and you agreed to discuss this Interrogatory with him further.

You stated that you believed they were primarily oral. If he does have any written communications with a search firm, the NCAA would expect that he would produce them.

C. Scott Paterno's Objections and Responses to the NCAA's Subpoena

With respect to Scott Paterno's objections and responses to the NCAA's subpoena, we first asked whether Mr. Paterno would provide his own privilege log, separate from that of the Paterno Estate. Please advise when the NCAA can expect to receive a privilege log for Mr. Paterno. We also discussed the following issues:

Request Nos. 5-7. Mr. Paterno objected to these Requests on attorney-client privilege and attorney work product grounds, but indicated that he would produce any non-privileged, responsive documents. We expressed doubt that any of the requested materials could be privileged given that, among other things, the "reports" were designed for public release. You also indicated that you did not believe Mr. Paterno has additional material related to these "experts" "separate from the Estate." To the extent that the Estate is withholding materials on the grounds that Dr. Berlin, Mr. Clemente and Mr. Thornburgh may be called as testifying experts—a position with which the NCAA would disagree—Scott Paterno, in his individual capacity, is not a party to this litigation and lacks standing to withhold materials on the same grounds.[5] We acknowledged that Mr. Paterno has produced at least some documents responsive to these Requests, but we ask that you please clarify whether Mr. Paterno is withholding any responsive materials.

Request No. 10. Mr. Paterno objected to this Request on the grounds that it is overly broad and unduly burdensome. Although you expressed concern that the Request did not include a time-period limitation, we clarified that the general time-period limitation of January 1, 2011 to present provided in the subpoena's instructions apply to this Request. We further clarified that the Request covers *only* communications that involve *both* Mr. Paterno or one of the other Plaintiffs *and* one of the specified individuals. In light of these clarifications, we do not believe that the Request is either overly broad or unduly burdensome. You agreed to provide us with an estimate of the volume of communications covered by the Request as it stands in order to properly evaluate Mr. Paterno's overbreadth objection.

Request No. 11. Mr. Paterno objected to this Request on the grounds that it is overly broad, unduly burdensome, and calls for irrelevant material. In response, the NCAA offered to limit the scope of this Request to "Communications with the Pennsylvania Attorney General's Office Concerning Sandusky, the NCAA, the Consent Decree, the Freeh Report, and/or Coach Paterno." We look forward to receiving any documents responsive to the revised Request.

Request No. 12. Mr. Paterno objected to this Request on grounds that it is overly broad, unduly burdensome, and calls for irrelevant material. We clarified that the request is already

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[5] The NCAA is troubled by the Estate's position that Scott Paterno is not its representative in this litigation and that, among other things, the Estate is not subject to a deposition. Given that Pennsylvania law requires an estate to have a representative in litigation, we find that contention surprising. *See, e.g., Gasbarini's Estate v. Med. Ctr. of Beaver Cnty., Inc.*, 487 Pa. 266, 271, 409 A.2d 343, 346 (1979) ("It is well settled that a decedent's estate cannot be a party to litigation unless a personal representative exists."). Moreover, we do not agree that the Estate is somehow immune from deposition.

limited by subject matter and noted the relevance of the information requested. Indeed, the reputation, popularity, and public support of the Plaintiffs and Coach Paterno are central to the merits of Plaintiffs' claims. You agreed to confirm with Mr. Paterno that he intends to stand on his objections. Please let us know if does so that we may seek judicial assistance.

Request No. 13. Mr. Paterno objected to this Request on grounds that it is overly broad, unduly burdensome, and calls for irrelevant communications. During our call, you explained that these objections were based on the large volume of communications Mr. Paterno had with a public relations consultant employed by Penn State. You asked us to narrow the scope of the Request. The NCAA does not intend to unduly burden Mr. Paterno, but it is not in a position to narrow the scope of this Request without additional information regarding the volume of potentially responsive communications and types of responsive communications that Mr. Paterno believes would not be relevant to the present litigation. You also noted that some of these communications may be privileged. We trust that such materials would appear on a privilege log.

Request No. 14. Mr. Paterno objected to this Request on grounds that it is overly broad and calls for irrelevant communications. After taking your objections under advisement, we agreed that Mr. Paterno need not produce documents already produced by other individuals in this case—including any documents already produced by Jay Paterno concerning his book, Paterno Legacy. We hope (and expect) that Mr. Paterno will produce all other responsive documents.

Request Nos. 15-27. Each of these Requests relates to assets, income, or financial information for Coach Paterno and/or the Paterno Estate. As with Request No. 14, we clarified that Mr. Paterno need not reproduce documents already produced by the Paterno Estate or another individual in this case. You confirmed that Mr. Paterno conducted a reasonable search for responsive materials and has no additional materials.

Request Nos. 30 & 35. Mr. Paterno asserted objections to each of these Requests, but stated that he would produce any responsive, non-privileged documents. You confirmed that he is not withholding any responsive documents on grounds other than privilege.

Request No. 32. Mr. Paterno objected to this Request on grounds that it is overly broad, unduly burdensome, and calls for irrelevant information. After considering Mr. Paterno's objection, we offered to narrow this Request to include only "All Documents provided to or received from, and all Communications with, any member or representative of a media outlet Concerning Sandusky, Louis Freeh, FSS, the NCAA, the Consent Decree, and this Litigation."

Request No. 33. Mr. Paterno objected to this Request on grounds that it is overly broad and unduly burdensome. During our conversation, you explained that the cost of imaging Mr. Paterno's mobile phone (as well as reviewing the messages) would be unduly burdensome and expensive. To accommodate that concern, the NCAA is willing to permit Mr. Paterno to forego formal imaging and production pursuant to traditional ediscovery protocols and instead make use of a less costly method for producing these messages. Specifically, the NCAA is familiar with "apps," such as "SMS Export," that permit a user to instantaneously export all text messages to a

spreadsheet. This method would be acceptable to the NCAA, provided that Plaintiffs agree not to challenge the use of any text message from this system on the grounds that they were not collected or produced in a traditionally accepted fashion.

Request No. 34. Mr. Paterno objected to this Request on grounds that the term "public statement" is vague and ambiguous. With one exception regarding Twitter noted below, the NCAA is willing to narrow this Request to transcripts, notes, outlines, and other documents reflecting public speeches or other orally delivered public statements by Mr. Paterno. The NCAA is willing to exclude from this Request media reports of public statements made by Mr. Paterno.

However, the NCAA still expects Mr. Paterno to produce responsive "tweets" from Twitter, excluding those tweets intentionally created for purposes of inflating the volume of materials responsive to the present subpoena. Mr. Paterno plainly abused the discovery process when he publicly encouraged people to send superfluous tweets in order to artificially increase the volume of his responsive material, solely for the purpose of increasing the cost of this litigation for the NCAA.[6] That is completely inappropriate. Mr. Paterno should bear the expense of correcting these abuses, and identify and remove such "tweets" from the forthcoming production.

* * *

We appreciate your time and cooperation in attempting to work through these issues. If we have misunderstood or misstated any of the Plaintiffs' positions, please let us know. We believe we made significant progress, and we are optimistic that we can jointly resolve the remaining issues.

Very truly yours,

Sarah M. Gragert
of LATHAM & WATKINS LLP

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[6] On June 3, 2015, one week after Mr. Paterno was served with his subpoena, he issued the following tweet, "Remember, the @NCAA has to pay a lawyer to read my tweets. So send me good ones and I will RT. Make @NCAA pay a lawyer to read your thoughts."

EXHIBIT 7

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S NOTICE OF INTENT TO SERVE A SUBPOENA TO FRED S. BERLIN TO PRODUCE DOCUMENTS AND THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21

The National Collegiate Athletic Association intends to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena may be served.

Date: April 22, 2015

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886

Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice,* DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice,* DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

GEORGE SCOTT PATERNO ET AL.

VS : File No. 2013-2082

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: FRED S. BERLIN
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See Exhibit A, attached.

at Killian & Gephart, LLP, 218 Pine St., PO Box 886, Harrisburg, PA 17108-0886
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Thomas W. Scott
ADDRESS: 218 Pine St., PO Box 886
Harrisburg, PA 17108-0886
TELEPHONE: (717) 232-1851
SUPREME COURT ID #15681
ATTORNEY FOR: National Collegiate Athletic Association

DATE:
Seal of the Court

CC 126

EXHIBIT A

DEFINITIONS

1. "You," "your," and "yours" shall refer to Fred S. Berlin, and all other persons acting on behalf of Fred S. Berlin, including but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of Fred S. Berlin.

2. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

3. "All" or "any" shall mean "each and every."

4. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

5. "Document" or "documents" is defined as broadly as possible, and is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or

records of any sort.

6. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

7. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

8. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

9. The "Paterno Family" shall refer to the family of Joseph Paterno, the decedent represented in this Action by George Scott Paterno, including but not limited to George Scott Paterno and Joseph V. ("Jay") Paterno, Jr.

10. "FSS" shall mean the firm of Freeh, Sporkin & Sullivan LLP.

11. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

12. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

13. The "Berlin Report" shall mean Your February 6, 2013 letter to J. Sedwick Sollers, III

RE: Joseph Paterno.

INSTRUCTIONS

1. In accordance with the Maryland Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.
2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.
3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these Requests shall be promptly supplemented.
4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.
    a. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this Request should be

produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. The fact that another witness or that a party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

8. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

9. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

10. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Communications Concerning the Freeh Report.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

REQUEST NO. 3:

All Documents Concerning the Berlin Report.

REQUEST NO. 4:

All drafts of the Berlin Report, including electronic versions of such drafts maintained on any computer.

REQUEST NO. 5:

All Documents contained in Your client file or equivalent for Your work Concerning the Berlin Report.

REQUEST NO. 6:

All Documents used in the course of Your work on the Berlin Report, including, without limitation, all correspondence, agreements, exhibits, physical evidence, and expert reports.

REQUEST NO. 7:

All Documents Concerning preparation of the Berlin Report including, without limitation, comments to, revisions of, outlines for, research for, and/or possible content of the February 2013 Analysis.

REQUEST NO. 8:

All Documents relied upon in drafting the Berlin Report.

REQUEST NO. 9:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the Berlin Report, including the conclusions contained therein.

REQUEST NO. 10:

All Documents Concerning any compensation or benefits, financial or otherwise, you were offered and/or received from the Paterno Family or any of its agents from January 1, 2005 to present.

REQUEST NO. 11:

All invoices You submitted for Your work Concerning the Berlin Report, including all backup and supporting documentation.

REQUEST NO. 12:

All Communications, and Documents Concerning Your Communications, with Dr. Graham Spanier, Gary C. Schultz, Timothy M. Curley, and/or Joseph Paterno, including but not limited to Communications with counsel for any of the aforementioned persons.

REQUEST NO. 13:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action.

REQUEST NO. 14:

All Documents Concerning Communications involving You and James T. Clemente, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 15:

All Documents Concerning Communications involving You and K&L Gates LLP, including but not limited to current or former principals, representatives and/or employees of K&L Gates LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 16:

All Documents Concerning Communications involving You and King & Spalding LLP,

including but not limited to current or former principals, representatives and/or employees of King & Spalding LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 17:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the Berlin Report.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

TO: FRED S. BERLIN

You are required to complete the following Certificate of Compliance with producing documents or things pursuant to the Subpoena. Send the documents or things, along with this Certificate of Compliance (with your original signature), to the person at whose request the subpoena was issued (see address on the reverse).

Do not send the documents or things, or the Certificate of Compliance, to the Prothonotary's Office.

Certificate of Compliance with Subpoena to Produce Documents or Things Pursuant to Rule 4009.23

I, _____

certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on _____ have been produced.

Date: _____

_____

(Signature of Person Served with Subpoena)

NOTE: STAMPED SUBPOENA IS NOT TO BE USED TO OBTAIN MEDICAL RECORDS FROM HOSPITALS

Circuit Court for Baltimore City

Frank M. Conaway, Clerk

111 N. Calvert Street - Room 462

Baltimore, MD 21202

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al.

Case Number: _____

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.

TO:

Fred S. Berlin

SUBPOENA

YOU ARE HEREBY COMMANDED TO:

- ☐ Personally appear;
- ☑ Produce documents and/or objects only;
- ☐ Personally appear and produce documents and/or objects:

at: Killian & Gephart, LLP

218 Pine Street, Harrisburg, PA 17101

on: _____

YOU ARE COMMANDED to produce the following documents or objects:

See Exhibit A, attached

Subpoena requested by ☐ Plaintiff; ☑ Defendant, and any questions should be referred to:
Thomas W. Scott
Killian & Gephart, LLP, P.O. Box 886, Harrisburg, PA 17108-0886
Telephone: (717) 232-1851

Date Issued: _____

_____
Frank M. Conaway, Clerk

NOTICE: 1. YOU ARE LIABLE TO BODY ATTACHMENT AND FINE FOR FAILURE TO OBEY THIS SUBPOENA
2. This subpoena shall remain in effect until you are granted leave to depart by the Court of by an officer acting on behalf of the Court.
3. If this subpoenaa is for attendance at a deposition and the party served is an organization, notice is herby given that the organization must designate a person to testify pursuant to Md. Rule 2-412(d).

SHERIFF'S RETURN

( ) Served and copy delivered on the date indicated below.

( ) Unserved, by reason of: _____

_____

Date: _____ Fee: _____ By: _____

_____
Sheriff / Deputy Sheriff

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the *National Collegiate Athletic Association's Notice of Intent to Serve a Subpoena to Fred S. Berlin* on the following by First Class Mail and email:

Thomas J. Weber, Esquire
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
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Counsel for Plaintiffs

Daniel I. Booker, Esquire
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Michael T. Scott, Esquire
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Three Logan Square
Suite 3100
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Joseph P. Green, Esquire
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Dated: April 22, 2015

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT 8

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S NOTICE OF INTENT TO SERVE A SUBPOENA TO JAMES T. CLEMENTE TO PRODUCE DOCUMENTS AND THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21

The National Collegiate Athletic Association intends to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena may be served.

Date: April 22, 2015

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886

Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice,* DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice,* DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

GEORGE SCOTT PATERNO ET AL.

VS

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

File No. 2013-2082

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: JAMES T. CLEMENTE
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See Exhibit A, attached.

at Killian & Gephart, LLP, 218 Pine St., PO Box 886, Harrisburg, PA 17108-0886
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Thomas W. Scott
ADDRESS: 218 Pine St., PO Box 886
Harrisburg, PA 17108-0886
TELEPHONE: (717) 232-1851
SUPREME COURT ID # 15681
ATTORNEY FOR: National Collegiate Athletic Association

DATE:
Seal of the Court

CC 126

EXHIBIT A

DEFINITIONS

1. "You," "your," and "yours" shall refer to James T. Clemente, and all other persons acting on behalf of James T. Clemente, including but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of James T. Clemente.

2. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

3. "All" or "any" shall mean "each and every."

4. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

5. "Document" or "documents" is defined as broadly as possible, and is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or records of any sort.

6. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

7. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

8. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

9. The "Paterno Family" shall refer to the family of Joseph Paterno, the decedent represented in this Action by George Scott Paterno, including but not limited to George Scott Paterno and Joseph V. ("Jay") Paterno, Jr.

10. "FSS" shall mean the firm of Freeh, Sporkin & Sullivan LLP.

11. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

12. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

13. The "February 2013 Analysis" shall mean Your February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization.*

INSTRUCTIONS

1. In accordance with the California Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.

2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.

3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these Requests shall be promptly supplemented.

4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.

   a. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this Request should be produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described

consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. The fact that another witness or that a party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

8. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

9. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

10. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Communications Concerning the Freeh Report.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

REQUEST NO. 3:

All Documents Concerning the February 2013 Analysis.

REQUEST NO. 4:

All drafts of the February 2013 Analysis, including electronic versions of such drafts maintained on any computer.

REQUEST NO. 5:

All Documents contained in Your client file for Your work Concerning the February 2013 Analysis.

REQUEST NO. 6:

All documents used in the course of Your work on the February 2013 Analysis, including, without limitation, all correspondence, agreements, exhibits, physical evidence, and expert reports.

REQUEST NO. 7:

All Documents Concerning preparation of the February 2013 Analysis including, without limitation, comments to, revisions of, outlines for, research for, and/or possible content of the February 2013 Analysis.

REQUEST NO. 8:

All Documents relied upon in drafting the February 2013 Analysis.

REQUEST NO. 9:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the February 2013 Analysis, including the conclusions contained therein.

REQUEST NO. 10:

All Documents Concerning any compensation or benefits, financial or otherwise, you were offered and/or received from the Paterno Family and/or any of its agents from January 1,

2005 to present.

REQUEST NO. 11:

All invoices You submitted for Your work Concerning the February 2013 Analysis, including all backup and supporting documentation.

REQUEST NO. 12:

All Communications, and Documents Concerning Your Communications, with Dr. Graham Spanier, Gary C. Schultz, Timothy M. Curley, and Joseph Paterno, including but not limited to Communications with counsel for any of the aforementioned persons.

REQUEST NO. 13:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action.

REQUEST NO. 14:

All Documents Concerning Communications involving You and Fred S. Berlin, regarding the Paterno Family or any of its members, the Freeh Report and/or the February 2013 Analysis.

REQUEST NO. 15:

All Documents Concerning Communications involving You and K&L Gates LLP, including but not limited to current or former principals, representatives and/or employees of K&L Gates LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the February 2013 Analysis.

REQUEST NO. 16:

All Documents Concerning Communications involving You and King & Spalding LLP, including but not limited to current or former principals, representatives and/or employees of King & Spalding LLP, regarding the Paterno Family or any of its members, the Freeh Report

and/or the February 2013 Analysis.

REQUEST NO. 17:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the February 2013 Analysis.

SUBP-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Thomas W. Scott (PA No. 15581) Killian & Gephart, LLP P.O. Box 886, Harrisburg, PA 17108-0886 TELEPHONE NO.: (717) 232-1851 FAX NO. (Optional): E-MAIL ADDRESS (Optional): tscott@killiangephart.com ATTORNEY FOR (Name): Defendant National Collegiate Athletic Association	
Court for county in which discovery is to be conducted: **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** Los Angeles STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Court in which action is pending: **Name of Court:** Court of Common Pleas of Centre County, Pennsylvania STREET ADDRESS: 102 South Allegheny Street MAILING ADDRESS: CITY, STATE, AND ZIP CODE: Bellefonte, PA 16823 COUNTRY: USA	
PLAINTIFF/PETITIONER: GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al. DEFENDANT/RESPONDENT: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.	CALIFORNIA CASE NUMBER (If any assigned by court)
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California): 2013-2082

1. Applicant *(name)*: National Collegiate Athletic Association is *(check one)*:
   ☐ Plaintiff ☐ Petitioner ☑ Defendant ☐ Respondent ☐ Other *(specify)*:
   in the above action.

2. Applicant requests that this court issue a subpoena for discovery under Code of Civil Procedure sections 2029.100 – 2029.900 to *(name and address of deponent or person in control of property)*:

   James T. Clemente, 4730 Brynhurst Avenue, Los Angeles, CA 90043

3. Attached is *(check one)*: ☐ the original ☐ a true and correct copy of the document from the court in which the action is pending that requires the person in 2 to *(check all that apply)*:
   a. ☐ attend and give testimony at a deposition;
   b. ☑ produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent;
   c. ☐ permit the inspection of premises under the control of the deponent.

4. Applicant submits with this application a proposed subpoena that includes terms identical to those in the document from the out-of-state court. (Code of Civil Procedure section 2029.300(d).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Thomas W. Scott
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)

Note: This application must be accompanied by the fee specified in Government Code section 70626.
A discovery subpoena must be personally served on the deponent in compliance with California law, including Code of Civil Procedure section 1986.

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-030 [New January 1, 2010]
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA
Code of Civil Procedure §§ 2029.100–.900
www.courtinfo.ca.gov

SUBP-035

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Thomas W. Scott (PA No. 15681) Killian & Gephart, LLP P.O. Box 886, Harrisburg, PA 17108-0886 TELEPHONE NO.: (717) 232-1851 FAX NO.: E-MAIL ADDRESS: tscott@killiangephart.com ATTORNEY FOR (Name): Defendant National Collegiate Athletic Association	
Court for county in which discovery is to be conducted: SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: MAILING ADDRESS: CITY, STATE, AND ZIP CODE: BRANCH NAME:	
Court in which action is pending: Name of Court: Court of Common Pleas of Centre County, Pennsylvania STREET ADDRESS: 102 South Allegheny Street MAILING ADDRESS: CITY, STATE, AND ZIP CODE: Bellefonte, PA 16823 COUNTRY: USA	
PLAINTIFF/PETITIONER: GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al. DEFENDANT/RESPONDENT: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.	CALIFORNIA CASE NUMBER (If any assigned by court):
SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California): 2013-2082

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known):*

James T. Clemente, 4730 Brynhurst Avenue, Los Angeles, CA 90043

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

To *(name of deposition officer):* Thomas W. Scott
On *(date):* At *(time):*
Location *(address):* Killian & Gephart LLP, 218 Pine Street, Harrisburg, PA 17101

Do not release the requested records to the deposition officer prior to the date and time stated above.

a. [✓] by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

b. [ ] by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).

c. [ ] by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.

2. *The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records must be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*

3. The records to be produced are described as follows *(If electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):*

See Exhibit A, attached

[ ] Continued on Attachment 3 *(use form MC-025).*

4. Attorneys of record in this action or parties without attorneys are *(name, address, telephone number, and name of party represented):*

See Exhibit A, attached

[ ] Continued on Attachment 4 *(use form MC-025).*

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-035 [Rev. January 1, 2012]

Code of Civil Procedure, §§ 2029.100–2029.900, 2020.410–2020.440; Government Code, § 68097.1
www.courts.ca.gov

PLAINTIFF/PETITIONER: GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al. DEFENDANT/RESPONDENT: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.	CASE NUMBER (of action pending outside California): 2013-2082

5. **If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedure section 1985.6 *and* a motion to quash or an objection has been served on you, a court order or agreement of the parties, witnesses, and consumer or employee affected must be obtained before you are required to produce consumer or employee records.**
6. ☐ Other terms or provisions from out-of-state subpoena, if any *(specify)*:

☐ Continued on Attachment 6 *(use form MC-025)*.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

Thomas W. Scott
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for Defendant National Collegiate Athletic Association
(TITLE)

PROOF OF SERVICE OF SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Subpoena for Production of Business Records in Action Pending Outside California* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery: d. Time of delivery:
   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: ..... $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: $ _____
   f. Fee for service: ..... $ _____
2. I received this subpoena for service on *(date)*:
3. ☐ I also served a completed *Proof of Service of Notice to Consumer or Employee and Objection* (form SUBP-025) by personally delivering a copy to the person served as described in 1 above.
4. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.
Date:

▶ _____
(SIGNATURE)

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the *National Collegiate Athletic Association's Notice of Intent to Serve a Subpoena to James T. Clemente* on the following by First Class Mail and email:

Thomas J. Weber, Esquire
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
pmaher@kslaw.com
aparrish@kslaw.com

Counsel for Plaintiffs

Daniel I. Booker, Esquire
Jack B. Cobetto, Esquire
Donna M. Doblick, Esquire
William J. Sheridan, Esquire
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Email: dbooker@reedsmith.com
jcobetto@reedsmith.com
ddoblick@reedsmith.com
wsheridan@reedsmith.com

Michael T. Scott, Esquire
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Telephone: (215) 851-8100
Email: mscott@reedsmith.com

Joseph P. Green, Esquire
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Dated: April 22, 2015

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT 9

CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

George Scott Paterno, as duly appointed representative of the Estate of Joseph Paterno, et al.	
Plaintiff	**Case No.: 24-C-15-002503**
v.	
National Collegiate Athletic Association, et al.	
Defendant	

AFFIDAVIT OF SERVICE

I, Vincent A. Piazza, a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Subpoena Duces Tecum with Exhibit A and Attachments in the above entitled case.

That I am over the age of eighteen years and I am not a party to or otherwise interested in this matter.

That on May 15, 2015 at 3:00 PM, I served Fred S. Berlin with the Subpoena Duces Tecum with Exhibit A and Attachments at The National Institute, 104 E. Biddle Street, Baltimore, Maryland 21202 by serving Denise Sawyer, Chief Administrator, authorized to accept.

Denise Sawyer is described herein:
Gender: Female Race/Skin: White Hair: Brown Age: 60 Height: 5'6" Weight: 175

I declare under penalty of perjury that I have read the foregoing information contained in the Affidavit of Service and that the facts stated in it are true and correct.

5/22/15
Executed on:

Vincent A. Piazza
CAPITOL PROCESS SERVICES, INC.
1827 18th Street, NW
Washington, DC 20009-5526
(202) 667-0050

ID: 15-123068

Client Reference: N/A

Circuit Court for Baltimore City

Lavinia G. Alexander, Clerk

111 N. Calvert Street - Room 462

Baltimore, MD 21202

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE of JOSEPH PATERNO, et al.

Case Number: 24-C-15-002503

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.

TO:

Fred S. Berlin

SUBPOENA

YOU ARE HEREBY COMMANDED TO:

( ) Personally appear;

(x) Produce documents and/or objects only;

( ) Personally appear and produce documents and/or objects:

at: Killian & Gephart, LLP

218 Pine Street, Harrisburg, PA 17101

on: _____

YOU ARE COMMANDED to produce the following documents or objects:

See Exhibit A, attached

Subpoena requested by ( ) Plaintiff; (x) Defendant, and any questions should be referred to:

Thomas W. Scott

Killian & Gephart, LLP, P.O. Box 886, Harrisburg, PA 17108-0886 Telephone: (717) 232-1851

Date Issued: 05-15-2015

LAVINIA G. ALEXANDER, CLERK

Lavinia G. Alexander, Clerk

CIRCUIT COURT FOR BALTIMORE CITY

NOTICE:

1. YOU ARE LIABLE TO BODY ATTACHMENT AND FINE FOR FAILURE TO OBEY THIS SUBPOENA.
2. This subpoena shall remain in effect until you are granted leave to depart by the Court or by an officer acting on behalf of the Court.
3. If this subpoena is for attendance at a deposition and the party served is an organization, notice is hereby given that the organization must designate a person to testify pursuant to Md. Rule 2-412(d).

SHERIFF'S RETURN

( ) Served and copy delivered on the date indicated below.

( ) Unserved, by reason of: _____

_____

Date: _____ Fee: _____ By: _____

Sheriff / Deputy Sheriff

SUPERIOR COURT FOR LOS ANGELES COUNTY, CALIFORNIA

George Scott Paterno, et al.	
Plaintiff	**Case No.: 2013-2082**
v.	
National Collegiate Athletic Association, et al.	
Defendant	

AFFIDAVIT OF SERVICE

I, Carlos Canas, a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Subpoena Duces Tecum with Attachments in the above entitled case.

That I am over the age of eighteen years and not a party to or otherwise interested in this matter.

That on May 17, 2015 at 9:41 AM, I served James T. Clemente with the Subpoena Duces Tecum with Attachments at 4730 Brynhurst Avenue, Los Angeles, California 90043 by serving James T. Clemente, personally.

James T. Clemente is described herein as:
Gender: Male Race/Skin: White Hair: Bald Age: 45 Height: 5'7" Weight: 160

I do solemnly declare and affirm under penalty of perjury that the information set forth herein is correct to the best of my knowledge, information and belief.

D. AZMI
Commission # 2032663
Notary Public - California
Orange County
My Comm. Expires Jul 6, 2017

Carlos Canas, Lic. #4571
CAPITOL PROCESS SERVICES, INC.
1827 18th Street, NW
Washington, DC 20009-5526
(202) 667-0050

Subscribed and sworn to before me, a notary public, on this 21st day of May, 2015.

D. Azmi
Notary Public

My Commission Expires: 07/06/2017

ID: 15-123073

Client Reference: N/A

EXHIBIT 10

From: Gragert, Sarah (DC)
Sent: Thursday, July 02, 2015 12:14 PM
To: Maher, Trish; Doran, Samuel
Cc: Wisniewski, Drew (DC); Kowalski, Brian (DC)
Subject: RE: Paterno v NCAA - document subpoenas

Trish,

Dr. Berlin's and Mr. Clemente's responses were due one month ago. Please advise us this week when we can expect a complete production.

In addition, we would like to meet and confer on Jay Paterno's interrogatory responses and Scott Paterno's subpoena objections and responses. Please advise if you are available Tuesday at 4 pm or Wednesday after 2 pm.

Thank you,
Sarah

From: Maher, Trish [mailto:PMaher@KSLAW.com]
Sent: Friday, June 05, 2015 3:29 PM
To: Kowalski, Brian (DC); Gragert, Sarah (DC)
Cc: Doran, Samuel
Subject: Paterno v NCAA - document subpoenas

Brian,

Dr. Berlin's office has told us they are working on collecting materials to respond to the document subpoena he received, but they are going to need at least another week to respond.

We also learned from Jim Clemente that someone left what appears to be the missing list of documents at his house while he was out of town. So he is just beginning to collect responsive materials.

Trish

Trish Maher | King & Spalding LLP
1700 Pennsylvania Ave., N.W. | Washington, D.C. 20006
pmaher@kslaw.com | 202-626-5504

King & Spalding Confidentiality Notice:

This message is being sent by or on behalf of a lawyer. It is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged or confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not

authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately by e-mail and delete all copies of the message.

EXHIBIT 11

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants.	Civil Division Docket No. 2013-2082 **Objection To Subpoena Pursuant to Rule 4003.5** Filed on Behalf of Plaintiff Estate of Joseph Paterno Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

OBJECTION BY PLAINTIFF ESTATE OF JOSEPH PATERNO PURSUANT TO RULE 4003.5 TO BERLIN SUBPOENA

Pursuant to Rule 4003.5 of the Pennsylvania Rules of Civil Procedure, Plaintiff Estate of Joseph Paterno (the "Estate"), by and through its undersigned counsel, objects to the subpoena served by Defendant National Collegiate Athletic Administration on Fred S. Berlin ("Berlin"), a copy of which is attached hereto as Exhibit A.

In September 2012, one of the undersigned counsel for the Estate, King & Spalding LLP ("King & Spalding"), retained Berlin in connection with its representation of the family of Joseph Paterno, as the living representatives of the Estate, for his expertise evaluating, identify, and treating individuals with sexual disorders, particularly pedophilia. Berlin was retained to consult with King & Spalding in anticipation of possible litigation, and to assist in the preparation of a response to the findings of the Freeh Report and the NCAA's Consent Decree. Berlin produced a report that was incorporated into the *Critique of the Freeh Report: the Rush to Injustice Regarding Joe Paterno* issued by King & Spalding in February 2013 on behalf of the Estate.

The Estate objects to the requests in the subpoena to Berlin, which call for production of documents related to his work for the Estate, including drafts of his report and communications with members of the Paterno family or their counsel. Under Pa. R. C. P. No. 4003.5, a party may not discover facts known or opinions held by a consulting expert. A party may obtain only limited discovery, in the form of interrogatories and expert reports, from an expert witness who is expected to testify at trial.[1]

---

[1]Pa. R. C. P. No. 4003.5 provides in relevant part:

Discovery of Expert Testimony. Trial Preparation Material.

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(B) subject to the provisions of subdivision (a)(4), the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

. . . . . .

The Estate has not yet determined which expert witnesses, if any, may be called at trial. Once such determination is made all information properly discoverable pursuant to Pa. R. C. P. No. 4003.5 shall be provided in a seasonable manner. Even if he is not ultimately designated as a testifying expert at trial, Berlin is and has been a consulting expert for the Estate. Accordingly, pursuant to Pa. R. C. P. No. 4003.5, the Estate objects to Berlin producing the documents called for in the subpoena served by the NCAA.

Date: July 21, 2015

By: _____

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 201
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel *for Plaintiffs*

---

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

GEORGE SCOTT PATERNO ET AL.

VS : File No. 2013-2082

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: FRED S. BERLIN
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See Exhibit A, attached.

at Killian & Gephart, LLP, 218 Pine St., PO Box 886, Harrisburg, PA 17108-0886
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Thomas W. Scott
ADDRESS: 218 Pine St., PO Box 886
Harrisburg, PA 17108-0886
TELEPHONE: (717) 232-1851
SUPREME COURT ID #15681
ATTORNEY FOR: National Collegiate Athletic Association

DATE: _____
Seal of the Court

CC 125

EXHIBIT A

DEFINITIONS

1. "You," "your," and "yours" shall refer to Fred S. Berlin, and all other persons acting on behalf of Fred S. Berlin, including but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of Fred S. Berlin.

2. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

3. "All" or "any" shall mean "each and every."

4. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

5. "Document" or "documents" is defined as broadly as possible, and is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or

records of any sort.

6. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

7. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

8. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

9. The "Paterno Family" shall refer to the family of Joseph Paterno, the decedent represented in this Action by George Scott Paterno, including but not limited to George Scott Paterno and Joseph V. ("Jay") Paterno, Jr.

10. "FSS" shall mean the firm of Freeh, Sporkin & Sullivan LLP.

11. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

12. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

13. The "Berlin Report" shall mean Your February 6, 2013 letter to J. Sedwick Sollers, III

RE: Joseph Paterno.

INSTRUCTIONS

1. In accordance with the Maryland Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.
2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.
3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these Requests shall be promptly supplemented.
4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.
    a. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this Request should be

produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. The fact that another witness or that a party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

8. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

9. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

10. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Communications Concerning the Freeh Report.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

REQUEST NO. 3:

All Documents Concerning the Berlin Report.

REQUEST NO. 4:

All drafts of the Berlin Report, including electronic versions of such drafts maintained on any computer.

REQUEST NO. 5:

All Documents contained in Your client file or equivalent for Your work Concerning the Berlin Report.

REQUEST NO. 6:

All Documents used in the course of Your work on the Berlin Report, including, without limitation, all correspondence, agreements, exhibits, physical evidence, and expert reports.

REQUEST NO. 7:

All Documents Concerning preparation of the Berlin Report including, without limitation, comments to, revisions of, outlines for, research for, and/or possible content of the February 2013 Analysis.

REQUEST NO. 8:

All Documents relied upon in drafting the Berlin Report.

REQUEST NO. 9:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the Berlin Report, including the conclusions contained therein.

REQUEST NO. 10:

All Documents Concerning any compensation or benefits, financial or otherwise, you were offered and/or received from the Paterno Family or any of its agents from January 1, 2005 to present.

REQUEST NO. 11:

All invoices You submitted for Your work Concerning the Berlin Report, including all backup and supporting documentation.

REQUEST NO. 12:

All Communications, and Documents Concerning Your Communications, with Dr. Graham Spanier, Gary C. Schultz, Timothy M. Curley, and/or Joseph Paterno, including but not limited to Communications with counsel for any of the aforementioned persons.

REQUEST NO. 13:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action.

REQUEST NO. 14:

All Documents Concerning Communications involving You and James T. Clemente, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 15:

All Documents Concerning Communications involving You and K&L Gates LLP, including but not limited to current or former principals, representatives and/or employees of K&L Gates LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 16:

All Documents Concerning Communications involving You and King & Spalding LLP,

including but not limited to current or former principals, representatives and/or employees of King & Spalding LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the Berlin Report.

REQUEST NO. 17:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the Berlin Report.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

TO: FRED S. BERLIN

You are required to complete the following Certificate of Compliance with producing documents or things pursuant to the Subpoena. Send the documents or things, along with this Certificate of Compliance (with your original signature), to the person at whose request the subpoena was issued (see address on the reverse).

Do not send the documents or things, or the Certificate of Compliance, to the Prothonotary's Office.

Certificate of Compliance with Subpoena to Produce Documents or Things Pursuant to Rule 4009.23

I, _____

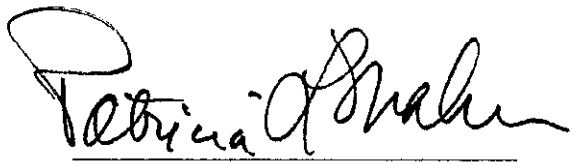
certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on _____ have been produced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **OBJECTION BY PLAINTIFF ESTATE OF JOSEPH PATERNO PURSUANT TO RULE 4003.5 TO BERLIN SUBPOENA** was served this 21 day of July, 2015 by first class mail and email to the following:

Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Email: tscott@killiangephart.com

Everett C. Johnson, Jr.
Brian E. Kowalski
Sarah Gragert
Latham & Watkins LLP
555-11th Street, N.W.
Suite 1000
Washington, D.C. 20004-1304
Email: everett.johnson@lw.com
brian.kowalski@lw.com
sarah.gragert@lw.com



Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiffs

EXHIBIT 12

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants.	Civil Division Docket No. 2013-2082 **Objection To Subpoena Pursuant to Rule 4003.5** Filed on Behalf of the Plaintiff Estate of Joseph Paterno Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

OBJECTION BY PLAINTIFF ESTATE OF JOSEPH PATERNO PURSUANT TO RULE 4003.5 TO CLEMENTE SUBPOENA

Pursuant to Rule 4003.5 of the Pennsylvania Rules of Civil Procedure, Plaintiff Estate of Joseph Paterno (the "Estate"), by and through its undersigned counsel, objects to the subpoena served by Defendant National Collegiate Athletic Administration on James T. Clemente ("Clemente"), a copy of which is attached hereto as Exhibit A.

In September 2012, one of the undersigned counsel for the Estate, King & Spalding LLP ("King & Spalding"), retained Clemente in connection with its representation of the family of Joseph Paterno, as the living representatives of the Estate, for his expertise as a former FBI profiler in investigating, evaluating and identifying pedophiles. Clemente was retained to consult with King & Spalding in anticipation of possible litigation, and to assist in the preparation of a response to the findings of the Freeh Report and the NCAA's Consent Decree. Clemente produced a report that was incorporated into the *Critique of the Freeh Report: the Rush to Injustice Regarding Joe Paterno* issued by King & Spalding in February 2013 on behalf of the Estate.

The Estate objects to the requests in the subpoena to Clemente, which call for production of documents related to his work for the Estate, including drafts of his report and communications with members of the Paterno family or their counsel. Under Pa. R. C. P. No. 4003.5, a party may not discover facts known or opinions held by an consulting expert. A party may obtain only limited discovery, in the form of interrogatories and expert reports, from an expert witness who is expected to testify at trial.[1]

---

[1] Pa. R. C. P. No. 4003.5. provides in relevant part:

Discovery of Expert Testimony. Trial Preparation Material.

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

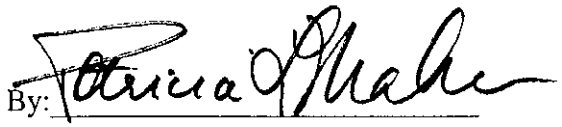
(A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(B) subject to the provisions of subdivision (a)(4), the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

. . . . . .

The Estate has not yet determined which expert witnesses, if any, may be called at trial. Once such determination is made all information properly discoverable pursuant to Pa. R. C. P. No. 4003.5 shall be provided in a seasonable manner. Even if he is not ultimately designated as a testifying expert at trial, Clemente is and has been a consulting expert for the Estate. Accordingly, pursuant to Pa. R. C. P. No. 4003.5 the Estate objects to Clemente producing the documents called for in the subpoena served by the NCAA.

Date: July 21, 2015

By: 

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 201
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel *for Plaintiffs*

---

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

GEORGE SCOTT PATERNO ET AL.

VS

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

File No. 2013-2082

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: JAMES T. CLEMENTE
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See Exhibit A, attached.

at Killian & Gephart, LLP, 218 Pine St., PO Box 886, Harrisburg, PA 17108-0886
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Thomas W. Scott
ADDRESS: 218 Pine St., PO Box 886
Harrisburg, PA 17108-0886
TELEPHONE: (717) 232-1851
SUPREME COURT ID # 15681
ATTORNEY FOR: National Collegiate Athletic Association

DATE:
Seal of the Court

CC 126

EXHIBIT A

DEFINITIONS

1. "You," "your," and "yours" shall refer to James T. Clemente, and all other persons acting on behalf of James T. Clemente, including but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of James T. Clemente.
2. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.
3. "All" or "any" shall mean "each and every."
4. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.
5. "Document" or "documents" is defined as broadly as possible, and is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or records of any sort.

6. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

7. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

8. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

9. The "Paterno Family" shall refer to the family of Joseph Paterno, the decedent represented in this Action by George Scott Paterno, including but not limited to George Scott Paterno and Joseph V. ("Jay") Paterno, Jr.

10. "FSS" shall mean the firm of Freeh, Sporkin & Sullivan LLP.

11. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

12. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

13. The "February 2013 Analysis" shall mean Your February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization.*

INSTRUCTIONS

1. In accordance with the California Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.

2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.

3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these Requests shall be promptly supplemented.

4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.

   a. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this Request should be produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described

consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. The fact that another witness or that a party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

8. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

9. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

10. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Communications Concerning the Freeh Report.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

REQUEST NO. 3:

All Documents Concerning the February 2013 Analysis.

REQUEST NO. 4:

All drafts of the February 2013 Analysis, including electronic versions of such drafts maintained on any computer.

REQUEST NO. 5:

All Documents contained in Your client file for Your work Concerning the February 2013 Analysis.

REQUEST NO. 6:

All documents used in the course of Your work on the February 2013 Analysis, including, without limitation, all correspondence, agreements, exhibits, physical evidence, and expert reports.

REQUEST NO. 7:

All Documents Concerning preparation of the February 2013 Analysis including, without limitation, comments to, revisions of, outlines for, research for, and/or possible content of the February 2013 Analysis.

REQUEST NO. 8:

All Documents relied upon in drafting the February 2013 Analysis.

REQUEST NO. 9:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the February 2013 Analysis, including the conclusions contained therein.

REQUEST NO. 10:

All Documents Concerning any compensation or benefits, financial or otherwise, you were offered and/or received from the Paterno Family and/or any of its agents from January 1,

2005 to present.

REQUEST NO. 11:

All invoices You submitted for Your work Concerning the February 2013 Analysis, including all backup and supporting documentation.

REQUEST NO. 12:

All Communications, and Documents Concerning Your Communications, with Dr. Graham Spanier, Gary C. Schultz, Timothy M. Curley, and Joseph Paterno, including but not limited to Communications with counsel for any of the aforementioned persons.

REQUEST NO. 13:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action.

REQUEST NO. 14:

All Documents Concerning Communications involving You and Fred S. Berlin, regarding the Paterno Family or any of its members, the Freeh Report and/or the February 2013 Analysis.

REQUEST NO. 15:

All Documents Concerning Communications involving You and K&L Gates LLP, including but not limited to current or former principals, representatives and/or employees of K&L Gates LLP, regarding the Paterno Family or any of its members, the Freeh Report and/or the February 2013 Analysis.

REQUEST NO. 16:

All Documents Concerning Communications involving You and King & Spalding LLP, including but not limited to current or former principals, representatives and/or employees of King & Spalding LLP, regarding the Paterno Family or any of its members, the Freeh Report

and/or the February 2013 Analysis.

REQUEST NO. 17:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the February 2013 Analysis.

SUBP-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Thomas W. Scott (PA No. 15681) Killian & Gephart, LLP P.O. Box 886, Harrisburg, PA 17108-0886 TELEPHONE NO.: (717) 232-1851 FAX NO. (Optional): E-MAIL ADDRESS (Optional): tscott@killiangephart.com ATTORNEY FOR (Name): Defendant National Collegiate Athletic Association	
Court for county in which discovery is to be conducted: SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Court in which action is pending: Name of Court: Court of Common Pleas of Centre County, Pennsylvania STREET ADDRESS: 102 South Allegheny Street MAILING ADDRESS: CITY, STATE, AND ZIP CODE: Bellefonte, PA 16823 COUNTRY: USA	
PLAINTIFF/PETITIONER: GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al. DEFENDANT/RESPONDENT: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.	CALIFORNIA CASE NUMBER (if any assigned by court):
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California): 2013-2082

1. Applicant *(name)*: National Collegiate Athletic Association is *(check one)*:
   ☐ Plaintiff ☐ Petitioner ☑ Defendant ☐ Respondent ☐ Other *(specify)*:
   in the above action.
2. Applicant requests that this court issue a subpoena for discovery under Code of Civil Procedure sections 2029.100 – 2029.900 to *(name and address of deponent or person in control of property)*:

   James T. Clemente, 4730 Brynhurst Avenue, Los Angeles, CA 90043

3. Attached is *(check one)*: ☐ the original ☐ a true and correct copy of the document from the court in which the action is pending that requires the person in 2 to *(check all that apply)*:
   a. ☐ attend and give testimony at a deposition;
   b. ☑ produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent;
   c. ☐ permit the inspection of premises under the control of the deponent.
4. Applicant submits with this application a proposed subpoena that includes terms identical to those in the document from the out-of-state court. (Code of Civil Procedure section 2029.300(d).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Thomas W. Scott
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)

Note: This application must be accompanied by the fee specified in Government Code section 70626.
A discovery subpoena must be personally served on the deponent in compliance with California law, including Code of Civil Procedure section 1985.

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-030 [New January 1, 2010]

APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA

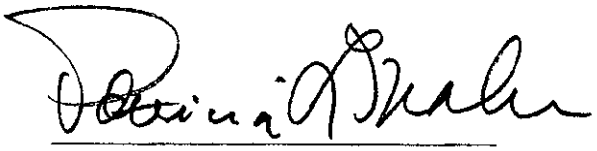
Code of Civil Procedure §§ 2029.100–.900
www.courtinfo.ca.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **OBJECTIONS TO SUBPOENA TO JIM CLEMENTE PURSUANT TO RULE 4003.5** was served this 21 day of July, 2015 by first class mail and email to the following:

Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Email: tscott@killiangephart.com

Everett C. Johnson, Jr.
Brian E. Kowalski
Sarah Gragert
Latham & Watkins LLP
555-11th Street, N.W.
Suite 1000
Washington, D.C. 20004-1304
Email: everett.johnson@lw.com
brian.kowalski@lw.com
sarah.gragert@lw.com



Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiffs

EXHIBIT 13

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S NOTICE OF INTENT TO SERVE A SUBPOENA TO K&L GATES LLP TO PRODUCE DOCUMENTS AND THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21

The National Collegiate Athletic Association intends to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena may be served.

Date: April 22, 2015

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886

Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice*, DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice*, DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

GEORGE SCOTT PATERNO ET AL.

VS

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

File No. 2013-2082

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: K&L GATES, LLP
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See Exhibit A, attached.

at Killian & Gephart, LLP, 218 Pine St., PO Box 886, Harrisburg, PA 17108-0886
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Thomas W. Scott
ADDRESS: 218 Pine St., PO Box 886,
Harrisburg, PA 17108-0886
TELEPHONE: (717) 232-1851
SUPREME COURT ID # 15681
ATTORNEY FOR: National Collegiate Athletic Association

DATE:
Seal of the Court

CC 126

EXHIBIT A

DEFINITIONS

1. "You," "your," and "yours" shall refer to K&L Gates LLP, and all other persons acting on behalf of K&L Gates LLP, including but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of K&L Gates LLP.

2. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

3. "All" or "any" shall mean "each and every."

4. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

5. "Document" or "documents" is defined as broadly as possible, and is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or records of any sort.

6. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

7. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

8. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

9. The "Paterno Family" shall refer to the family of Joseph Paterno, the decedent represented in this Action by George Scott Paterno, including but not limited to George Scott Paterno and Joseph V. ("Jay") Paterno, Jr.

10. "FSS" shall mean the firm of Freeh, Sporkin & Sullivan LLP.

11. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

12. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

13. The "February 2013 Review" shall mean the February 2013 *Review of the Freeh Report Concerning Joseph Paterno,* principally authored by Dick Thornburgh.

14. "February 2013 Review Participants" shall mean any current or former K&L Gates

attorney or employee who contributed to the research, preparation, drafting, and/or revision of the February 2013 Review, including without limitation, Richard ("Dick") Thornburgh, Michael J. Missal, Erin Ardale Koeppel, Noam A. Kutler, and Adam C. Pollet.

INSTRUCTIONS

1. In accordance with the Pennsylvania Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.
2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.
3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these Requests shall be promptly supplemented.
4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.

a. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this Request should be produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created, used, sent or received during the period from **January 1, 2011** through present.

6. Except as otherwise noted, this Request seeks the production of only those Documents sent to; created, modified, received, or controlled by; or in the possession of any of the **February 2013 Review Participants**.

7. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

8. Pursuant to Pennsylvania Rules of Civil Procedure Nos. 4009.21, 4009.23, and 4009.24, You must fully respond to each Request. Objections to any part of these requests shall be stated in full with a brief statement setting forth the grounds for such objections.

9. The fact that another witness or that a party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

10. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

11. Each paragraph, subparagraph, clause and word herein should be construed

independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

12. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Communications and Documents Concerning the Freeh Report.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

REQUEST NO. 3:

All Documents Concerning the February 2013 Review.

REQUEST NO. 4:

All drafts of the February 2013 Review, including electronic versions of such drafts maintained on any computer.

REQUEST NO. 5:

All Documents contained in Your client file for Your work Concerning the February 2013 Review, including, without limitation, all correspondence, agreements, exhibits, physical evidence, expert reports, and other Documents used in the course of Your work on the February 2013 Review.

REQUEST NO. 6:

All Documents relied upon in drafting the February 2013 Review, including but not limited to all Documents listed on page 8 of the February 2013 Review.

REQUEST NO. 7:

All Documents created in preparation of the February 2013 Review including, without limitation, comments to, revisions of, outlines for, research for, and/or Communications regarding possible content of the February 2013 Review.

REQUEST NO. 8:

All Documents or Communications Concerning, or forming the basis for, the February 2013 Review's conclusion that "the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno." *See* February 2013 Review at 2.

REQUEST NO. 9:

All "contrary evidence that Mr. Paterno did not" know "about the 1998 incident involving Mr. Sandusky at or about the time that it occurred," and all Documents or Communications Concerning, or forming the basis for, the February 2013 Review's conclusion that "the Freeh Report ignored" such evidence. *See* February 2013 Review at 2.

REQUEST NO. 10:

All "other documents and information" the February 2013 Review Participants purportedly reviewed "to evaluate the Report's findings and to discover other potentially relevant information." *See* February 2013 Review at 8.

REQUEST NO. 11:

All Documents, including without limitation, notes, memoranda, audio recordings, and email, Concerning communications between the February 2013 Review Participants and "counsel for Messrs. Curley and Schultz" as referenced on page 8 of the February 2013 Review.

REQUEST NO. 12:

All Documents evidencing or forming the basis for the February 2013 Review's

conclusion that "Mr. Paterno never had the opportunity" to speak to FSS. *See* February 2013 Review at 10.

REQUEST NO. 13:

All Documents Concerning, or forming the basis for, the February 2013 Review's statement that "the only relevant pre-2004 emails discovered and reviewed by FSS were e-mails retained voluntarily by Mr. Schultz, who directed the University's information technology personnel to migrate the historic messages he had saved at the time of the change to Penn State's new e-mail system." *See* February 2013 Review at 16.

REQUEST NO. 14:

All Documents evidencing, or forming the basis for, the February 2013 Review's (i) statement that Mr. Sandusky had proposed starting a football team at Penn State's Altoona campus, and (ii) opinion that Exhibit 2B of the Freeh Report may have related to that proposal. *See* February 2013 Review at 25-26.

REQUEST NO. 15:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the February 2013 Review, including the conclusions contained therein.

REQUEST NO. 16:

All Documents Concerning compensation for the February 2013 Review and any work related to it.

REQUEST NO. 17:

All invoices You submitted for Your work Concerning the February 2013 Review, including all backup and supporting documentation.

REQUEST NO. 18:

All Documents Concerning any compensation or benefits, financial or otherwise, you

were offered and/or received from the Paterno Family, or any of its agents from January 2005 to present.

REQUEST NO. 19:

All Communications, and Documents Concerning Communications, involving You and Dr. Graham Spanier, Gary C. Schultz, and/or Timothy M. Curley, including, but not limited to, Communications with counsel for any of the aforementioned persons.

REQUEST NO. 20:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action or Communications with counsel for any of the aforementioned persons.

REQUEST NO. 21:

All Communications, and Documents Concerning Communications, involving You and King & Spalding LLP, including but not limited to King & Spalding LLP's current or former principals, representatives and/or employees, Concerning the Freeh Report, any member(s) of the Paterno family, and/or the February 2013 Review.

REQUEST NO. 22:

All Communications, and Documents Concerning Communications, involving You and James T. Clemente, Concerning the Freeh Report and/or the February 2013 Review.

REQUEST NO. 23:

All Communications, and Documents Concerning Communications, involving You and Fred S. Berlin, Concerning the Freeh Report and/or the February 2013 Review.

REQUEST NO. 24:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the February 2013 Review.

REQUEST NO. 25:

From January 1, 2000 to present, all articles, publications, speeches, training materials or other similar documents Concerning the processes and procedures for conducting investigations authored, developed, prepared, contributed to, or given by any of the February 2013 Review Participants.

REQUEST NO. 26:

From January 1, 2000 to present, all reports, presentations, or other Documents summarizing or containing conclusions of an investigation, (i) for which any of the February 2013 Review Participants participated in the investigation and/or in the preparation of the Document, and (ii) which are no longer subject to a valid claim of the attorney-client privilege or attorney work product doctrine.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082

TO: **K&L GATES LLP**

You are required to complete the following Certificate of Compliance with producing documents or things pursuant to the Subpoena. Send the documents or things, along with this Certificate of Compliance (with your original signature), to the person at whose request the subpoena was issued (see address on the reverse).

Do not send the documents or things, or the Certificate of Compliance, to the Prothonotary's Office.

Certificate of Compliance with Subpoena to Produce Documents or Things Pursuant to Rule 4009.23

I, _____

certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on _____ have been produced.

Date: _____

_____

(Signature of Person Served with Subpoena)

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the *National Collegiate Athletic Association's Notice of Intent to Serve a Subpoena to K&L Gates, LLP* on the following by First Class Mail and email:

Thomas J. Weber, Esquire
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
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mjensen@kslaw.com
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Counsel for Plaintiffs

Daniel I. Booker, Esquire
Jack B. Cobetto, Esquire
Donna M. Doblick, Esquire
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Michael T. Scott, Esquire
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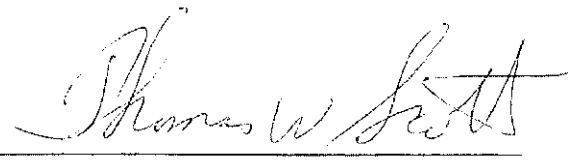
Joseph P. Green, Esquire
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Dated: April 22, 2015



Thomas W. Scott
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Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT 14

THOMAS W. SCOTT
TERRENCE J. McGOWAN
MICHAEL J. O'CONNOR
ROBERT J. DANIELS*
RICHARD H. KATSIFIS

* NEW JERSEY BAR

THE LAW FIRM OF
KILLIAN & GEPHART, LLP
218 PINE STREET
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Of Counsel:
JOHN D. KILLIAN

SMITH B. GEPHART
1927-2013

To: K&L Gates LLP

From: Thomas W. Scott

RE: Paterno v. NCAA, Centre County Docket No.: 2013-2082;

Subpoena to produce documents and things

Date: May 13, 2015

Attached, constituting service upon the law firm of K&L Gates LLP, is an original subpoena bearing the seal of the court directing you to produce documents and things in the above matter. Notice of Intent to Serve this subpoena was served on counsel for all parties pursuant to Pa.R.Civ.P. 4009.21; a Certificate of Compliance pursuant to Pa.R.Civ.P. 4009.22 has been filed with the court.

TWS

Enclosure

Copies to all counsel of record

EXHIBIT 15

From: Tea, Charles <Charles.Tea@klgates.com>
Sent: Tuesday, October 20, 2015 10:32 AM
To: Kowalski, Brian (DC)
Cc: Gragert, Sarah (DC)
Subject: RE: Estate of Paterno v. NCAA

Correct

From: Brian.Kowalski@lw.com [mailto:Brian.Kowalski@lw.com]
Sent: Tuesday, October 20, 2015 10:23 AM
To: Tea, Charles
Cc: Sarah.Gragert@lw.com
Subject: Estate of Paterno v. NCAA

Chip –

Nice speaking with you this morning. Just to confirm, based on our conversation, I understand that your team in DC has been collecting materials that are responsive to the subpoena, and which they are preparing for production. You are going to follow up with your team in DC to determine the status of the production, but expect that a production will be forthcoming shortly, as early as this week.

I also understand that the production will be accompanied by a set of objections that set forth the privilege position. You indicated that your team in DC has been coordinating directly with King & Spalding concerning the production, including the extent to which documents will be withheld on privilege grounds. As I mentioned, I understand from King & Spalding that they are asserting privilege over a significant amount of the documents we have requested.

As to a deposition, we agreed that I'd provide some potential date ranges, and you would see what works on your end.

Regards,

Brian

Brian E. Kowalski

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Latham & Watkins LLP

This electronic message contains information from the law firm of K&L Gates LLP. The contents may be privileged and confidential and are intended for the use of the intended addressee(s) only. If you are not an intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please contact me at Charles.Tea@klgates.com.

EXHIBIT 16

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and. EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

K&L GATES LLP'S OBJECTIONS AND RESPONSES TO THE REQUESTS FOR PRODUCTION OF DOCUMENTS OF DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Pursuant to Rule 2009.21 of the Pennsylvania Rules of Civil Procedure, non-party K&L Gates LLP ("K&L Gates") hereby submits its Objections and Responses to the Requests for Production of Documents of Defendant National Collegiate Athletic Association ("NCAA"), served May 13, 2015 (the "Requests" or individually "Request").

GENERAL OBJECTIONS

1. K&L Gates generally objects to the Requests to the extent they are vague, ambiguous, overly broad, unduly burdensome, and/or not reasonably calculated to lead to the

discovery of admissible evidence, and would require K&L Gates to search for, collect, review, produce, and log documents that may not be relevant to the claims or defenses of the parties to the above-captioned action and/or otherwise may be beyond the scope of permissible discovery.

2. K&L Gates generally objects to the Requests to the extent they purport to require K&L Gates to produce documents that are or may be protected from disclosure, including on the basis of attorney-client privilege, attorney work product doctrine, common interest privilege, and any other applicable bases for protection under Pennsylvania or other applicable law, absent definitive waiver of such basis for protection by all holders thereof. Given the broad nature of the Requests and because the majority of responsive documents are protected from disclosure, K&L Gates further objects to the Requests to the extent they call for such a vast amount of protected documents without any basis therefor and are unduly burdensome insofar as they would require K&L Gates to identify all such protected documents and to list them in a log.

3. K&L Gates generally objects to the Requests, addressed as they are to a third-party not involved in the above-captioned action, to the extent they are unduly burdensome in terms of their scope, time period, the volume of potentially responsive material to be reviewed, and the anticipated cost of responding thereto.

4. K&L Gates generally objects to the Requests to the extent they purport to require the production of documents in the possession, custody, or control of entities other than K&L Gates because such documents or information are not within its possession, custody, or control.

5. K&L Gates generally objects to the Requests to the extent they purport to impose obligations on K&L Gates outside the scope of the Pennsylvania Rules of Civil Procedure or any other applicable rules.

6. K&L Gates reserves the right to supplement, modify, or revise its objections or responses to the Requests, although K&L Gates does not hereby undertake to agree to do so except to the extent required by the Pennsylvania Rules of Civil Procedure and/or court order.

OBJECTIONS AND RESPONSES TO SPECIFIC REQUESTS

In addition to and without waiving the foregoing General Objections, which are hereby specifically incorporated into each of the following specific Responses, K&L Gates provides the following specific objections and responses.

REQUEST NO. 1:

All Communications and Documents Concerning the Freeh Report.

RESPONSE TO REQUEST NO. 1:

K&L Gates objects to Request No. 1 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 1 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 2:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees.

RESPONSE TO REQUEST NO. 2:

K&L Gates objects to Request No. 2 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, K&L Gates states that no documents responsive to this Request are in its possession, custody, or control.

REQUEST NO. 3:

All Documents Concerning the February 2013 Review.

RESPONSE TO REQUEST NO. 3:

K&L Gates objects to Request No. 3 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 3 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 4:

All drafts of the February 2013 Review, including electronic versions of such drafts maintained on any computer.

RESPONSE TO REQUEST NO. 4:

K&L Gates objects to Request No. 4 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 4 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 5:

All Documents contained in Your client file for Your work Concerning the February 2013 Review, including, without limitation, all correspondence, agreements, exhibits, physical evidence, expert reports, and other Documents used in the course of Your work on the February 2013 Review.

RESPONSE TO REQUEST NO. 5:

K&L Gates objects to Request No. 5 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 5 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 6:

All Documents relied upon in drafting the February 2013 Review, including but not limited to all Documents listed on page 8 of the February 2013 Review.

RESPONSE TO REQUEST NO. 6:

K&L Gates objects to Request No. 6 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 6 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. K&L Gates further objects to Request No. 6 to the extent it seeks documents or information that are publicly available and equally accessible by the NCAA. Subject to the foregoing objections, K&L Gates will produce non-privileged documents responsive to this Request.

REQUEST NO. 7:

All Documents created in preparation of the February 2013 Review including, without limitation, comments to, revisions of, outlines for, research for, and/or Communications regarding possible content of the February 2013 Review.

RESPONSE TO REQUEST NO. 7:

K&L Gates objects to Request No. 7 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 7 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 8:

All Documents or Communications Concerning, or forming the basis for, the February 2013 Review's conclusion that "the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno." See February 2013 Review at 2.

RESPONSE TO REQUEST NO. 8:

K&L Gates objects to Request No. 8 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 8 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 9:

All "contrary evidence that Mr. Paterno did not" know "about the 1998 incident involving Mr. Sandusky at or about the time that it occurred," and all Documents or Communications Concerning, or forming the basis for, the February 2013 Review's conclusion that "the Freeh Report ignored" such evidence. See February 2013 Review at 2.

RESPONSE TO REQUEST NO. 9:

K&L Gates objects to Request No. 9 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 9 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 10:

All "other documents and information" the February 2013 Review Participants purportedly reviewed "to evaluate the Report's findings and to discover other potentially relevant information." See February 2013 Review at 8.

RESPONSE TO REQUEST NO. 10:

K&L Gates objects to Request No. 10 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 10 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 11:

All Documents, including without limitation, notes, memoranda, audio recordings, and email, Concerning communications between the February 2013 Review Participants and "counsel for Messrs. Curley and Schultz" as referenced on page 8 of the February 2013 Review.

RESPONSE TO REQUEST NO. 11:

K&L Gates objects to Request No. 11 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

K&L Gates further objects to Request No. 11 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 12:

All Documents evidencing or forming the basis for the February 2013 Review's conclusion that "Mr. Paterno never had the opportunity" to speak to FSS. See February 2013 Review at 10.

RESPONSE TO REQUEST NO. 12:

K&L Gates objects to Request No. 12 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 12 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 13:

All Documents Concerning or forming the basis for, the February 2013 Review's statement that "the only relevant pre-2004 emails discovered and reviewed by FSS were e-mails retained voluntarily by Mr. Schultz, who directed the University's information technology personnel to migrate the historic messages he had saved at the time of the change to Penn State's new e-mail system." See February 2013 Review at 16.

RESPONSE TO REQUEST NO. 13:

K&L Gates objects to Request No. 13 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 13 to the extent it seeks documents or information

protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 14:

All Documents evidencing, or forming the basis for, the February 2013 Review's (i) statement that Mr. Sandusky had proposed starting a football team at Penn. State's Altoona campus, and (ii) opinion that Exhibit 2B of the Freeh Report may have related to that proposal. See February 2013 Review at 25-26.

RESPONSE TO REQUEST NO. 14:

K&L Gates objects to Request No. 14 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 14 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 15:

All Documents and Communications Concerning questions, concerns, or criticism of any aspect of the February 2013 Review, including the conclusions contained therein.

RESPONSE TO REQUEST NO. 15:

K&L Gates objects to Request No. 15 to the extent it is overly broad, unduly burdensome, duplicative of other Requests, and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 16:

All Documents Concerning compensation for the February 2013 Review and any work related to it.

RESPONSE TO REQUEST NO. 16:

K&L Gates objects to Request No. 16 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 16 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. Subject to the foregoing objections, K&L Gates will produce all bills and/or invoices for its work relating to the February 2013 Review with any privileged portions redacted.

REQUEST NO. 17:

All invoices You submitted for Your work Concerning the February 2013 Review, including all backup and supporting documentation.

RESPONSE TO REQUEST NO. 17:

K&L Gates objects to Request No. 17 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 17 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. Subject to the foregoing objections, K&L Gates will produce all bills and/or invoices for its work relating to the February 2013 Review with any privileged portions redacted.

REQUEST NO. 18:

All Documents Concerning any compensation or benefits, financial or otherwise, you were offered and/or received from the Paterno Family, or any of its agents from January 2005 to present.

RESPONSE TO REQUEST NO. 18:

K&L Gates objects to Request No. 18 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to the term "benefits" as vague and ambiguous. K&L Gates further objects to Request No. 18 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. Subject to the foregoing objections, K&L Gates will produce all bills and/or invoices for its work relating to the February 2013 Review with any privileged portions redacted.

REQUEST NO. 19:

All Communications, and Documents Concerning Communications, involving You and Dr. Graham Spanier, Gary C. Schultz, and/or Timothy M. Curley, including, but not limited to, Communications with counsel for any of the aforementioned persons.

RESPONSE TO REQUEST NO. 19:

K&L Gates objects to Request No. 19 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, K&L Gates states that no documents responsive to this Request are in its possession, custody, or control.

REQUEST NO. 20:

All Communications, and Documents Concerning Communications, involving You and any member of the Paterno Family, including but not limited to the Plaintiffs in this action or Communications with counsel for any of the aforementioned persons.

RESPONSE TO REQUEST NO. 20:

K&L Gates objects to Request No. 20 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 20 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 21:

All Communications, and Documents Concerning Communications, involving You and King & Spalding LLP, including but not limited to King & Spalding LLP's current or former principals, representatives and/or employees, Concerning the Freeh Report, any member(s) of the Paterno family, and/or the February 2013 Review.

RESPONSE TO REQUEST NO. 21:

K&L Gates objects to Request No. 21 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. K&L Gates further objects to Request No. 21 to the extent it seeks documents or information protected by attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege.

REQUEST NO. 22:

All Communications, and Documents Concerning Communications, involving You and James T. Clemente, Concerning the Freeh Report and/or the February 2013 Review.

RESPONSE TO REQUEST NO. 22:

K&L Gates objects to Request No. 22 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, K&L Gates states that no documents responsive to this Request are in its possession, custody, or control.

REQUEST NO. 23:

All Communications, and Documents Concerning Communications, involving You and Fred S. Berlin, Concerning the Freeh Report and/or the February 2013 Review.

RESPONSE TO REQUEST NO. 23:

K&L Gates objects to Request No. 23 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, K&L Gates states that no documents responsive to this Request are in its possession, custody, or control.

REQUEST NO. 24:

Any engagement letter, or reasonably equivalent contract, agreement, or other Document containing the terms by which You would prepare the February 2013 Review.

RESPONSE TO REQUEST NO. 24:

Subject to its general objections, K&L Gates will produce the engagement letter relating to its legal representation of the Paterno Family in preparing the February 2013 Review.

REQUEST NO. 25:

From January 1, 2000 to present, all articles, publications, speeches, training materials or other similar documents Concerning the processes and procedures for conducting investigations authored, developed, prepared, contributed to, or given by any of the February 2013 Review Participants.

RESPONSE TO REQUEST NO. 25:

K&L Gates objects to Request No. 25 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, K&L Gates will produce non-privileged documents responsive to this Request.

REQUEST NO. 26:

From January 1, 2000 to present, all reports, presentations, or other Documents summarizing or containing conclusions of an investigation, (i) for which any of the. February 2013 Review Participants participated in the investigation and/or in the preparation of the Document, and (ii) which are no longer subject to a valid claim of the attorney-client privilege or attorney work product doctrine.

RESPONSE TO REQUEST NO. 26:

K&L Gates objects to Request No. 26 to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, K&L Gates will produce non-privileged documents responsive to this Request.

Dated: October 22, 2015

Respectfully submitted,

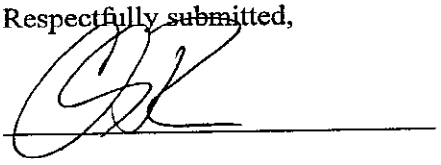

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EXHIBIT 17

In The

Superior Court of Pennsylvania

NO. 877 MDA 2015

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

PEPPER HAMILTON LLP,

Non-Party-Appellant.

Appeal from the May 8, 2015 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J., sitting by special assignment)

BRIEF FOR APPELLEES

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QUESTIONS INVOLVED

1. Did the trial court abuse its discretion in concluding that Penn State waived the attorney-client privilege and work product protection where information underlying a report was shared with law enforcement authorities and other third parties; the report was never intended to be maintained in confidence; the report was released to the public, without Penn State's review, with an express waiver of any relevant privilege; and the report was used to attack other parties for public-relations purposes?

Suggested Answer. No.

2. Does the attorney-client privilege apply to materials relating to a publicly disclosed report that was prepared for public-relations purposes, was never intended to be maintained in confidence, was not reviewed by the client before being publicly disclosed, and does not reflect confidential legal advice?

Suggested Answer. No.

3. Does the attorney work product doctrine apply to materials that were prepared for public-relations purposes and not in anticipation of litigation, especially where the party seeking protection has not come forward with any privilege log identifying the specific documents it claims are protected?

Suggested Answer. No.

INTRODUCTION

This appeal, like the appeal filed by the Pennsylvania State University ("Penn State" or "PSU") in No. 1709 MDA 2014, is an extraordinary effort to cover up the truth and undermine basic principles regarding the attorney-client privilege and the attorney work-product doctrine. The attorney-client privilege is essential to protecting confidential information exchanged between a lawyer and his client when a lawyer is retained to provide legal advice; the work-product doctrine allows attorneys to prepare confidential information in connection with litigation. Neither doctrine protects information and materials gathered to prepare a publicly available report that is shared with law enforcement and others outside the attorney-client relationship and used for public relations purposes as a sword to attack innocent third parties.

The relevant facts of this case are easily summarized. In 2011, under pressure from the National Collegiate Athletics Association ("NCAA") and in the glare of harsh publicity, Penn State hired the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), headed by former FBI Director Louis Freeh,[1] to conduct an independent and purportedly transparent investigation into the horrific crimes committed by former assistant football coach Gerald Sandusky. The investigation's stated purpose was to look into Penn State's alleged failures to

[1] The Freeh Firm provided in its Engagement Letter that it would retain a separate investigative and consulting group, Freeh Group International Solutions, LLC ("Freeh Group" or "FGIS"), in which Louis Freeh was also a partner, "to assist in this engagement." R.36.

report various criminal conduct and to provide public recommendations for ensuring that any failures would never occur again.

The engagement between Penn State and the Freeh Firm was no typical attorney-client relationship. From the beginning, everyone knew the report prepared by the Freeh Firm (the "Freeh Report") would be released to the public. And the engagement was structured to support Penn State's public-relations objectives. The Freeh Firm conducted its investigation independent from Penn State and expressly reserved the right to share information gathered with law enforcement authorities, without the need for its client's consent. Moreover, throughout its investigation, the Freeh Firm coordinated and was authorized to, and did, share information with the NCAA and the Big Ten, two organizations that govern athletics at Penn State.

When the Freeh Firm released its lengthy Report, the release occurred without any advance review by Penn State. The Report did not contain or reflect confidential legal advice. Nor did it purport to have been prepared in anticipation of litigation. Instead, the Report included scandalous and baseless allegations directed at Coach Joe Paterno and other leaders of the Penn State community, which the Report announced were being disclosed under a waiver of the attorney-client privilege by Penn State. Having coordinated closely with the Freeh Firm, the NCAA then capitalized on the Report's findings to "bluff" Penn State into

accepting a Consent Decree that, in furtherance of the NCAA's own objectives, deployed the Report as a basis for imposing crushing penalties on Penn State, distracted attention from the NCAA's ongoing misconduct, and destroyed the reputations of numerous individuals.

Having used the Freeh Report as its own publicity tool and for the NCAA's benefit, Penn State now seeks to rescind its previous commitment to transparency. Arguing that Penn State selectively and conveniently waived the privilege only for the Report itself and not for any related or underlying materials, Penn State and Pepper Hamilton contend that the Estate of Coach Paterno and others defamed by the Report are prohibited from examining the basis for its allegations. In doing so, Penn State and Pepper Hamilton are not only attempting to use the attorney-client privilege and the work-product doctrine improperly as both a shield and a sword; they are also urging the Court to cast aside the principles of fair play on which our justice system depends. Having publicly released the results of the Freeh Firm's investigation, which was used by the NCAA and Penn State for their own purposes and to the severe detriment of Appellees, Pepper Hamilton and Penn State are now seeking to block any effort to understand who was involved in developing the Freeh Report, who influenced its conclusions, and what—if anything—provided the basis for its scurrilous accusations. And they seek to do all of this without ever

having provided a privilege log or listing of the information that they seek to withhold.

The trial court did not abuse its discretion in rejecting Pepper Hamilton's and Penn State's duplicitous position. As the court recognized, Penn State waived the attorney-client privilege by allowing the Freeh Firm to share information about the investigation with law enforcement and other third parties. Moreover, the court correctly rejected Penn State's efforts to selectively waive the privilege and held that publication of the Report resulted in a subject-matter waiver; Penn State should not be permitted to wield the Freeh Report as a weapon for its own public-relations purposes while simultaneously shielding the Report from scrutiny. The court also correctly concluded that the attorney-client privilege and the work-product protection do not apply because it was understood from the beginning that the Freeh Report would be publicly released. Indeed, it was precisely because the Freeh Report was publicly released—and not held in confidence—that Appellees' reputations were so severely damaged. Having chosen to make the Freeh Report public before even reviewing it, and having expressly waived any privilege with regard to any matters that the Freeh Firm chose to include in the Report, Penn State cannot prevent the people attacked in the Report from defending themselves and seeking to discover the factual basis for the Report and the full nature of the investigation underlying its claims.

STATEMENT OF THE CASE

A. The "Independent" Freeh Report Publicly Accused Appellees of Terrible Crimes.

On November 4, 2011, the Attorney General of Pennsylvania charged Jerry Sandusky, a former assistant football coach, with appalling crimes relating to child abuse. Following a jury trial, Sandusky was convicted and, on October 9, 2012, sentenced to 30 to 60 years in prison. *See Jerry Sandusky sent to prison*, Associated Press (Nov. 1, 2012), *available at* http://espn.go.com/college-football/story/_/id/8577643/jerry-sandusky-moved-prison-death-row-inmates.

The NCAA had no authority to investigate that criminal matter. Nonetheless, the NCAA decided to leverage the situation to its own advantage. Within days of the announcement of charges against Sandusky, the NCAA notified Penn State that it would open an investigation into Penn State's exercise of institutional control over its athletic programs and that it expected Penn State's complete cooperation. Over time, the NCAA repeatedly threatened Penn State with suspension of play—the "death penalty" for a college athletic program—and other enormous sanctions if the University did not come to heel.

Around the same time, the Penn State Board of Trustees, under intense pressure from the NCAA and in the glare of harsh publicity, formed a Special Investigations Task Force. In November 2011, the Task Force hired the Freeh Firm to conduct an independent and purportedly transparent investigation into

Sandusky's crimes. Specifically, Penn State retained the Freeh Firm to prepare a report that would assess and publicly disclose certain information, including "i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff." R.32, Engagement Letter. In addition, the Freeh Report would "provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again." *Id.*

From the outset, everyone understood that the Freeh Firm's investigation and its subsequent Report would be out of Penn State's control and released to the public. Penn State said so expressly when it announced the hiring of the Freeh Firm. *See* Penn State Press Release, *Former FBI director Freeh to conduct independent investigation* (Nov. 21, 2011) ("PSU Press Release"), *available at* http://news.psu.edu/story/153530/2011/11/21/former-fbi-director-freeh-conduct-independent-investigation ("The special committee and Freeh said that the findings and recommendations of this work, when completed, will be made available to the public."). In announcing Penn State's decision to have the Freeh Firm conduct a public, independent investigation, Trustee and Task Force Chairman Kenneth C. Frazier emphasized that "Freeh has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to

make recommendations that ensure that it never happens again." R.99. Consistent with that mandate, and far from any normal relationship between a client and outside counsel, the Freeh Firm was allowed to operate with "total independence" from Penn State. R.99, 100. It was also authorized to share (and ultimately did share) the information it gathered and the results of its investigation with law-enforcement agencies without prior review or approval by Penn State. R.99, 361. Freeh and his team also coordinated closely with both the NCAA and the Big Ten throughout the investigation. R.357.

In July 2012, the Freeh Firm published its 150-plus-page Report. The publication occurred without any advance review of the Report by Penn State. The Report boasted that it was revealed "to the Board of Trustees and the general public at the same time." R.100. Mr. Freeh held a televised press conference to discuss the Report. And the Report specifically stated that it was being publicly released "pursuant to the appropriate waiver of the attorney-client privilege by the Board." R.98.

The Report asserted that Coach Paterno and the other Appellees were guilty of terrible misconduct—concealing, facilitating, and allowing over a decade of child abuse. R.102. The Report claimed, among other things, that Coach Paterno and other officials had known about Sandusky's conduct before Sandusky retired as an assistant coach in 1999 but had failed to take action. R.105. According to

the Report, Penn State officials, including Coach Paterno, concealed critical facts relating to Sandusky's abuse from law-enforcement authorities, the Penn State community, and the public at large. The Report claimed that these individuals had "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program." R.103.

The Freeh Report was a shoddy, unprofessional piece of work that has since been thoroughly discredited, including in public statements by the new President of Penn State. *See, e.g., PSU prez: Not a fan of Freeh Report*, Associated Press (Jan. 29, 2015), *available at* http://espn.go.com/college-football/story/_/id/12244739/penn-state-president-says-freeh-report-sandusky-scandal-not-useful. In their rush to judgment, the Report's authors did not interview crucial individuals with knowledge of the relevant facts. R.100. Individuals named in the Report, who were accused of being significantly involved in the alleged misconduct, were not given any opportunity to be heard or to challenge the Report's conclusions. The Freeh Firm failed to interview key witnesses and, instead of supporting the Report's conclusions with evidence, relied heavily on speculation and innuendo.

The Report also relied on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or

support for the opinions they provided. R.97–98. And its main conclusions were either unsupported by evidence or supported by only anonymous, hearsay statements. Prominent experts have concluded that the Report was deeply flawed and that many of its key conclusions were wrong, unsubstantiated, and unfair. *See, e.g.*, Armen Kateyian, *Sandusky Prosecutors: Penn State Put School's Prestige Above Abuse*, CBS News (Sept. 3, 2013), *available at* http://www.cbsnews.com/8301-18563_162-57601201 (no evidence supported conclusion that Coach Paterno concealed Sandusky's crimes, according to the chief prosecutor in the case against Sandusky); Dick Thornburgh, *Review of the Freeh Report Concerning Joseph Paterno* at 4–5, 34 (Feb. 6, 2013), *available at* http://paterno.com/resources/docs/Thornburgh_final_report_2-7-2013.pdf (the Report was a "rush to injustice" and its conclusion "that Mr. Paterno lacked empathy for the victims of Mr. Sandusky's abuse is unfounded and offensive"). Instead of searching for the truth and supporting its conclusions with evidence, the Freeh Firm wrote the report to track speculation in the media and with the goal of satisfying the NCAA.

Having coordinated closely with the Freeh Firm throughout the investigation, the NCAA moved quickly to capitalize on the Report as part of its own carefully crafted public relations campaign. Instead of helping to uncover the truth, the NCAA and its leadership viewed the Sandusky scandal and the Freeh Report as an opportunity: to deflect attention from mounting criticisms of the

NCAA, to shore up the NCAA's faltering reputation, to broaden the NCAA's authority far beyond its defined limits, and to impose enormous monetary sanctions for its own benefit.

Although the NCAA ordinarily takes years to conduct and complete an investigation, and although the Freeh Report did not come close to satisfying the basic investigative requirements of the NCAA's own rules (and did not even purport to address any NCAA rule or regulation), the NCAA moved to sanction Penn State almost immediately after the Freeh Firm released its Report by imposing a binding Consent Decree on Penn State based on the Report's findings. The Consent Decree, with the full force of the NCAA behind it, claimed that certain parties (including Appellees) were guilty of covering up decades of horrendous child abuse. Violating its own rules, the NCAA stripped those parties of their rights to challenge the Consent Decree's conclusions. Nonetheless, NCAA President Emmert considered the Freeh Report "to be more than sufficient to impose" penalties. *See* Erin Burnett OutFront, *Interview of Mark Emmert*, CNN (July 23, 2012), *available at* http://www.cnn.com/TRANSCRIPTS/1207/23/ebo.01.html. As the NCAA intended, the Consent Decree was extensively discussed by the national television, radio, and print media. And although it is unfair and wrong, the Consent Decree destroyed the reputations of the innocent people it blamed and whose conduct it claimed justified massive penalties.

B. Appellees Have Been Trying for More than 20 Months To Obtain Documents Related to the Freeh Report.

Appellees brought this lawsuit to redress the enormous damage that the NCAA's wrongful actions have inflicted on their reputations and the Penn State community, and to shed a light on the truth that the NCAA, working with the Freeh Firm, has tried to distort and conceal. *See* Second Amend. Compl. ¶¶ 1, 87–88.

To defend themselves against the unfair and defamatory conclusions published in the NCAA-imposed Consent Decree, and to prove their claims of commercial disparagement, defamation, interference with contract, and conspiracy, Appellees sought discovery into the Freeh Report. In particular, Appellees wish to learn who was involved in preparing the Report, who influenced its reckless conclusions, and what facts (if any) provided a basis for those conclusions. Appellees thus sought communications between the Freeh Firm or the Freeh Group and the NCAA regarding Joe Paterno or the other Appellees, *see* R.25, communications between the Freeh Firm or the Freeh Group and Penn State, *see* R.26, documents maintained in the Freeh Firm's files, *see id.*, and documents relating to the basis for the Freeh Report's conclusion that Coach Paterno, among others, not only "'failed to protect against a child sexual predator harming children for over a decade,'" but also helped to conceal those activities, R.26–27. Appellees began that process more than 20 months ago, in February 2014, by serving a notice of intent to issue a subpoena on Pepper Hamilton LLP (the law

firm that Freeh and other members of the Freeh Firm joined after issuing the Report). R.15.

Faced with the prospect that Appellees might look behind the scandalous statements in the Consent Decree and discover the absence of actual support, Penn State's earlier commitment to transparency and public disclosure evaporated. Under pressure from the NCAA, which even in this litigation continued to threaten Penn State with the "death penalty," Penn State asserted numerous objections, including invoking attorney-client privilege and attorney work-product protection. Notably, Penn State asserted those objections wholesale, without making any effort to produce a privilege log or to identify any particular documents that it claimed were privileged or protected. R.382. In short, having used the Report for its own public-relations reasons, and having allowed the NCAA to use the Report as a basis for publicly skewering Coach Paterno and other former leaders of the University, Penn State sought to drop an iron curtain around the Freeh Firm's work, invoking the privilege as a comprehensive shield to prevent any meaningful examination of the Report's contents.

The trial court overruled nearly all of Penn State's objections. It first held that Penn State had waived the attorney-client privilege. The court observed "that the Freeh Firm was communicating with third parties during the investigation—specifically, [t]he Big Ten Athletic Conference and the NCAA," and that "[i]t is

unquestioned that . . . with respect to all documents—source and non-source—that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived." R.483, Sept. 11 Opinion & Order. The court also held that "voluntary disclosure waives the privilege as to remaining documents of that same subject matter." R.482–83 Even if Penn State had not waived the privilege, the court held, the privilege did not apply in the first place because Penn State had not engaged the Freeh Firm to provide legal services. *Id.* The court rejected Penn State's assertion of work product protection because the work product doctrine must be asserted by the professional and because the Freeh Report was not prepared in anticipation of litigation. R.484–85. Penn State appealed the trial court's ruling to this Court. That appeal is pending as No. 1709 MDA 2014.

As permitted by the trial court's September 11 order, Appellees served the subpoena on Pepper Hamilton on September 16, 2014. R.430. Pepper Hamilton refused to comply and instead moved for a stay of its obligations under the subpoena pending a ruling on Penn State's appeal of the trial court's September 11 order, and for a protective order. R.415. In its motion, Pepper Hamilton purported to raise a work-product objection, even though it had not served a response to the subpoena in which it could assert that objection. *See* R.422, Motion for Stay Pending Appeal and for Protective Order. Consistent with Penn State's blanket

approach, Pepper Hamilton made no effort to log the specific documents that it contended qualified as work product.

On November 20, 2014, the trial court declined to issue a stay because Pepper Hamilton had not made the required showing that Penn State was likely to prevail in its appeal. R.440. In another opinion two weeks later, the trial court explained that "[b]ecause Pepper Hamilton did not attempt to assert their work product doctrine privilege until after the instant appeal was filed, this Court has not had the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal." R.505. Pepper Hamilton appealed the trial court's ruling, but neither Pepper Hamilton nor Penn State requested a stay from this Court. Pepper Hamilton therefore had no colorable legal basis for continuing to withhold documents responsive to the subpoena.

Nevertheless, after its stay motion was denied, Pepper Hamilton continued to refuse to comply with the subpoena. Instead, on December 16, 2014—three months after service of the subpoena, two months after the extended return date, and a month after the trial court denied Pepper Hamilton's motion for a stay—Pepper Hamilton served an untimely written response objecting generally to the subpoena but failing to identify or log any specific documents as to which it claimed privilege. *See* R.508 (objecting to the subpoena "to the extent [it] seek[s]

the production of documents protected from disclosure by the attorney-client privilege, [or] the attorney work-product doctrine").

On January 23, 2015, following unsuccessful efforts to secure Pepper Hamilton's compliance, Appellees moved for enforcement of the subpoena. The trial court granted that motion on May 8, 2015, explaining that it had already "overruled the discovery objections based upon attorney-client privilege and work-product doctrine." May 8 Opinion & Order at 4 (attached to Pepper Hamilton Br.). Moreover, because those objections were the subject of Penn State's pending appeal of the September 11 order, the trial court held that it lacked jurisdiction to consider them further while the appeal was pending. *Id.*; *see* Pa. R. App. P. 1701(a)–(b) ("[A]fter an appeal is taken . . . the trial court . . . may no longer proceed further in the matter" except as necessary to "preserve the status quo" and "[e]nforce any order entered in the matter").

Pepper Hamilton and Penn State each appealed the May 8 order enforcing the subpoena, even though the order did not contain any substantive rulings on the privilege issues and merely required compliance with the trial court's earlier rulings. (Penn State's appeal is pending as No. 878 MDA 2015.) Without seeking a stay of that order from the trial court, Penn State and Pepper Hamilton moved this Court for a stay of the May 8 order pending appeal. This Court denied that motion on June 19, 2015.

Meanwhile, in connection with the resolution of another lawsuit involving the NCAA and Penn State, the Consent Decree that incorporated the findings of the Freeh Report was repealed. That resolution, however, did not repudiate the Freeh Report or criticize any aspect of it. Nor did it include an apology or provide any remedy for the NCAA's egregious and unlawful misconduct. Although the sanctions on Penn State have been lifted going forward, the NCAA made sure that the substantial harms inflicted on Appellees remain unaddressed. In fact, on April 29, 2015, in its filing of a New Matter in this case below, the NCAA asserted that the statements in the Consent Decree based on the Freeh Report were true or substantially true. This litigation has thus continued with the NCAA continuing to stand by the statements contained in its unlawful Consent Decree.

SUMMARY OF ARGUMENT

The trial court's decision should be affirmed and the subpoena enforced because Penn State deliberately and strategically waived any privilege or protection that might once have applied. The Freeh Report expressly states that it was released to the public because Penn State waived the attorney-client privilege. And Penn State authorized the Freeh Firm to disclose information to law enforcement authorities, which Freeh did. If that were not enough to establish waiver, the Freeh Firm also shared information about the investigation with the NCAA and the Big Ten, which were not its clients. Penn State allowed those

disclosures because they served the institution's public relations interests, including kowtowing to the NCAA, portraying itself as undergoing a period of reflection, and scapegoating others (including Appellees in this case).

Having expressly waived the attorney-client privilege and the work product protection for its own advantage, Penn State and Pepper Hamilton are now trying to prevent those unjustly maligned from challenging the bases for the Freeh Report, which served as the justification for the NCAA's unlawful Consent Decree. But if one principle of privilege law is clear, it is that an evidentiary privilege may not be used as both a sword and a shield. When a party elects to disclose *some* privileged information in order to launch attacks on another party, elementary notions of fairness demand that the party disclose all communications regarding the subject matter of what was disclosed. It is outrageous for Penn State and Pepper Hamilton to attempt to prevent Appellees from defending themselves against the Freeh Report's extremely damaging accusations.

Even if the attorney-client privilege and work-product protection had not been waived, neither would apply in the circumstances of this case. The attorney-client privilege protects only *confidential* communications, and the Engagement Letter and the Freeh Report both make clear that Penn State always intended to release the Report and its findings to the public. Moreover, Penn State did not engage the Freeh Firm for the purpose of securing legal advice; it hired the Freeh

Firm to investigate failures in the University's reporting processes, to make independent findings, and to propose the Freeh Firm's independent recommendations for preventing those failures from happening again. Neither the attorney-client privilege nor the work-product doctrine is relevant to that arrangement.

Even if it were not waived, the work-product protection would not apply either, and it certainly does not provide a blanket basis for withholding the information sought. The Freeh Report was not created in anticipation of litigation; it was a public-relations document designed to placate the NCAA and to demonstrate to the public that Penn State was doing something about Sandusky's crimes. The purposes of the work-product doctrine would not be served by allowing Penn State and Pepper Hamilton to shield the information underlying the Freeh Report's very public accusations against Appellees. And neither Penn State nor Pepper Hamilton has made any effort to demonstrate which documents, if any, subject to the subpoena could possibly constitute protectable "work product." In Pennsylvania, moreover, documents for which work-product protection is claimed must have been created in anticipation of the same litigation in which they are sought, and there is no suggestion that the Freeh Firm generated its report in anticipation of *this* litigation.

STANDARD OF REVIEW

The "question of '[w]hether attorney-client privilege protects a particular communication from disclosure is a question of law.'" *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 581 (Pa. Super. 2007). But where, as here, a party has not filed a privilege log or claimed protection for any particular communication or document, but is instead seeking a blanket protection for an entire category of documents, the trial court's discretion to control the discovery process should be respected. *See generally Schenck v. Twp. of Ctr., Butler Cty.*, 975 A.2d 591, 597 (Pa. 2009) (Saylor, J., dissenting from dismissal of appeal as improvidently granted) ("[F]ew courts have been willing to accept blanket assertions of privilege with respect to an entire category of information."); *see also* Pa. R. Civ. P. 4009.12(b)(2). "'Generally, in reviewing the propriety of a discovery order, [this Court's] standard of review is whether the trial court committed an abuse of discretion.'" *Gallo v. Conemaugh Health Sys., Inc.*, 114 A.3d 855, 860 (Pa. Super. 2015); *see also Commonwealth v. Melvin*, 103 A.3d 1, 35 (Pa. Super. 2014).

ARGUMENT

Pepper Hamilton's attempt to "incorporate by reference" the arguments made by Penn State in its appeal in No. 1709 MDA 2014—a separate appeal with which Pepper Hamilton's appeal has not been consolidated—is improper. The Pennsylvania Supreme Court "has categorically rejected incorporation by reference as a means of presenting an issue." *Commonwealth v. Veon*, 109 A.3d 754, 774 (Pa. Super. 2015); *see also Commonwealth v. Briggs*, 12 A.3d 291, 342 (Pa. 2011) (calling incorporation by reference "an unacceptable manner of appellate advocacy"). An argument that is not made in an appellate brief, but is merely "incorporated by reference," is forfeited. *See, e.g., Commonwealth v. Jones*, 876 A.2d 380, 387 (Pa. 2005); *Veon*, 109 A.3d at 774; *Commonwealth v. Rodgers*, 605 A.2d 1228, 1239 (Pa. Super. 1992). For completeness, Appellees will respond as if Pepper Hamilton had made the arguments that it purports to "incorporate by reference." The reality, however, is that Pepper Hamilton has forfeited any argument not actually set forth in its opening brief. The few arguments it has preserved, which are noted below, are meritless.

I. The Trial Court Did Not Abuse Its Discretion In Concluding that Any Attorney-Client Privilege or Work-Product Protection Has Been Waived.

Even if some portion of the documents subject to the subpoena might otherwise have been privileged, Penn State deliberately and strategically waived

any privilege or protection that might once have applied to the materials sought in the subpoena by "attempting to invoke the Attorney-Client Privilege as both a shield and [a] sword." R.441, Nov. 20 Opinion & Order. Penn State hired the Freeh Firm to conduct an "independent" investigation the results of which were to be (and in fact were) disclosed to the public and to law enforcement (not to mention third parties, including the NCAA) *without any prior review or control by Penn State.* Penn State allowed those disclosures because they served the institution's public-relations interests, including kowtowing to the NCAA, portraying itself as undergoing a period of reflection, and scapegoating others (including Appellees). Having expressly waived the attorney-client privilege and the work-product protection for its own advantage, Penn State cannot prevent those unjustly maligned from discovering and challenging the bases for the Freeh Report's scandalous accusations.

A. Penn State Repeatedly and Deliberately Waived the Attorney-Client Privilege and Work-Product Protection.

"A privilege can be waived," *Commonwealth v. T.J.W.*, 114 A.3d 1098, 1103 (Pa. Super. 2015), and there is no doubt that it was waived here. The Freeh Report expressly states that it "sets forth the essential findings of the investigation, *pursuant to the appropriate waiver of the attorney-client privilege by the Board.*" R.98 (emphasis added). The Report states that it was "revealed . . . to the Board of Trustees and the general public at the same time" and that "[n]o advance copy was

provided to the Board." R.100. And the widely disseminated Consent Decree imposed by the NCAA lauds Penn State for "agree[ing] to waive [the] attorney-client privilege." Consent Decree at 4 (July 23, 2012), *available at* http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf.

In addition to disclosing the results of its investigation to the public, the Freeh Firm also shared information about its investigation with law-enforcement officials. The Freeh Firm's Engagement Letter reserved to the firm, and the firm alone, the right to disclose "any discovered evidence of criminality to the appropriate law enforcement authorities" without any advance review by Penn State. R.33, Engagement Letter. Acting under that authority, the Freeh Firm did not hesitate to disclose emails from senior University officials to law enforcement. R.99, Freeh Report.

If that were not enough, the Freeh Firm also shared information about its investigation with the NCAA and the Big Ten. A letter from Big Ten Commissioner James E. Delaney to the NCAA's President refers to "an agreeable process of collaboration on *gathering and sharing information*" between the NCAA, the Big Ten, and the Freeh Group. R.357, Ltr. from Comm'r J. Delany to M. Emmert (Dec. 8, 2011).

Penn State's and the Freeh Firm's repeated disclosures waived both the attorney-client privilege and work-product protection, to the extent either existed.

"[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. 2001); *see also Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005) ("[T]he work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived."). For these reasons, the trial court was correct that "[a] client disclosing protected communications to a third party has long been considered inconsistent with an assertion of the privilege." R.483, Sept. 11 Opinion & Order.

B. Subject-Matter Waiver Is Appropriate Because Penn State Cannot Use the Privilege as Both a Sword and a Shield.

As the trial court recognized, Penn State's selective disclosures were part of a deliberate and carefully planned strategy. In one of the most difficult periods in the University's history, and in an effort to placate the NCAA and others, Penn State sought to highlight the independence of the Freeh Firm's investigation and its review of allegations of child abuse on the University campus. Any effort to limit or control what the Freeh Firm could share—a step that would have been taken if the report had been prepared for litigation purposes—would have undermined that strategy. Instead, the broad scope of the Freeh Firm's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing the investigation: "'No one is above scrutiny,' Frazier said," and he "assured the [Freeh Firm] that the investigation would be expected to operate with *complete independence* and

would be empowered to investigate University staff, senior administrators, and the Board of Trustees." R.99, Freeh Report (emphasis added). The "independent" Freeh Report became the basis for the NCAA-imposed Consent Decree, which announced to the world that it was pinning the blame for Sandusky's crimes on Coach Paterno and others in the Penn State community.

In a cruelly ironic twist, Penn State's commitment to transparency—which served the University's and the NCAA's purposes for almost three years—has now disappeared. Having used the Freeh Firm's work to try, convict, and sentence Coach Paterno and others in absentia "without subpoena power, without identifying accusers, without guidance from sexual abuse experts, without putting anyone under oath and without testimony from Joe Paterno or anyone in his defense," *see* Joe Posnanski, *What's in a Name? Joe Paterno's family won't quit the fight to restore his legacy*, NBC Sports (Apr. 21, 2015), *available at* http://sportsworld.nbcsports.com/joe-paterno-family-fight-after-penn-state-scandal/, Penn State now seeks to block any review of the Report's factual basis.

But Penn State cannot avoid the consequences of its strategic decision to publicize the Freeh Report and use it as a sword for its own public-relations purposes. It is a foundational principle of privilege law that the attorney-client privilege may not be used as both a sword and a shield: "A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of

favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007), *aff'd by an equally divided court*, 992 A.2d 65 (Pa. 2010) (per curiam). When a party elects to disclose *some* privileged information in order to launch attacks on another party, elementary notions of fairness demand that the party disclose all communications regarding the same subject matter. The trial court therefore did not abuse its discretion in holding that "the scope of an attorney-client privilege waiver applies to the subject matter of the privileged documents disclosed" and that "voluntary disclosure waives the privilege as to [the] remaining documents of the same subject matter." R.483–84, Sept. 11 Opinion & Order.

Just as the attorney-client privilege is "deeply rooted in our common law," *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (internal quotation marks omitted), the subject-matter waiver doctrine is no less fundamental. When a party selectively discloses privileged information in an effort to obtain a tactical advantage, fairness requires giving the injured party access to the information. *See, e.g.*, *Adhesive Specialists, Inc. v. Concept Scis. Inc.*, 59 Pa. D. & C. 4th 244, 263 (C.C.P. 2002) ("[D]elivery of [an internal] memorandum to the Pennsylvania State Police constituted a voluntary disclosure to a third party" and "a waiver of

the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else"); *Minatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C. 4th 1, 18–21 (C.C.P. 1995) (voluntary disclosure of confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject).

The federal courts of appeals unanimously agree with Pennsylvania on this basic principle of privilege law. *See, e.g.*, *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) ("The client cannot be permitted . . . to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.") (internal quotation marks omitted); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage"); *In re Qwest Commc'ns Int'l, Inc.*, 450

F.3d 1179, 1185 (10th Cir. 2006) (noting that disclosure to a third party usually waives privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (holding that waiver of privilege as to one party serves to waive as to others); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and extending the waiver to the work-product doctrine).

In the face of this overwhelming authority, Penn State and Pepper Hamilton have at times disputed whether the well-established principle of subject-matter waiver applies at all in Pennsylvania. *See* Stay Application at 21. That is incorrect, and Pepper Hamilton's instant brief wisely declines to make the argument. The unsupported statement in *Bagwell v. Pennsylvania Department of Education*, that "Pennsylvania courts have not adopted subject-matter waiver," 103 A.3d 409, 419 (Pa. Commw. 2014), is wrong and refuted by *Bagwell*'s own citation of *Nationwide Mutual Insurance Co.*, in which a panel of this Court recognized that "considerations of fairness . . . preclude a party from disclosing only those privileged materials that support its position, while simultaneously concealing as privileged those materials that are unfavorable to its position." 924 A.2d at 1265. And even if it were true that Pennsylvania courts had not yet adopted subject-matter waiver, Penn State and Pepper Hamilton offer no reason why this Court should not apply that widely accepted principle in this case.

Penn State has argued—in a portion of its brief in No. 1709 that Pepper Hamilton purports to "incorporate by reference"—that the subject-matter waiver doctrine does not apply here because Penn State's selective disclosures were not made "to achieve a tactical advantage in any litigation." PSU Br. 37. That is both wrong and irrelevant. It is wrong because Penn State relied on the Freeh Report as a principal defense *in this litigation*. Indeed, acting in concert, the NCAA and Penn State have repeatedly referred to the Report to justify the egregious actions taken against Appellees. *See, e.g.*, NCAA Reply in Supp. Prelim. Objs. at 4 ("To date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report."). It is irrelevant because the subject-matter waiver doctrine applies whenever a party attempts to use selective disclosure as an offensive weapon in litigation or otherwise; it is not limited to the narrow situation where the disclosing party sought to obtain a tactical advantage in litigation. *See In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that privilege can be waived when a party "made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). By selectively disclosing supposedly privileged material to impugn Coach Paterno and others for its own public-relations purposes, and then invoking the privilege to resist discovery into the Freeh investigation,

Penn State runs afoul of one of the most fundamental principles of fairness that informs the law of privilege.

Penn State's refusal to acknowledge this point further underscores why its reliance on *Bagwell v. Pennsylvania Department of Education* is so misplaced. That case involved a Pennsylvania Open Records Act request for certain information related to Sandusky's crimes. Although the Commonwealth Court declined to find that Penn State's selective waivers of confidentiality resulted in a subject-matter waiver, the court took pains to emphasize that Penn State was "not using its selective disclosures as weapons to the detriment of Requester. Unlike a party seeking waiver of the privilege in a discovery dispute or otherwise in litigation, Requester claims no punitive effect from [Penn State's] selective disclosure." 103 A.3d at 419. The court accordingly reasoned that "the 'fairness' reasons for imposing a broad subject-matter waiver" were not present. *Id.*

In this case, fairness concerns point emphatically in the other direction. Indeed, if there is any case where fairness requires subject-matter waiver, it is this one. By knowingly and publicly disclosing information about the Freeh investigation and Report for its own tactical purposes and to the extreme prejudice of Coach Paterno and other Appellees, Penn State waived both the attorney-client privilege and the work-product protection with respect to the subject matter of the Freeh investigation. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d at 184

(privilege waived "where a corporation has disseminated information to the public that reveals parts of privileged communications or relies on privileged reports"). Courts have repeatedly recognized this common-sense distinction, ordering the production of documents when entities publicly release otherwise confidential information and declining to order production when they do not. *Compare Allied Irish Banks, p.l.c. v. Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y. 2007) (bank ordered to produce documents generated during internal investigation of fraudulent trading scheme by one of its traders when bank announced report of investigation at press conference and published the report to address critical public accountability concerns and restore confidence for customers and shareholders), *with In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015) (materials related to internal investigation into company's product defect and recall were privileged when report was presented confidentially to GM Board of Directors and not used affirmatively "as a sword," even though the report ultimately had to be disclosed in federal investigation and later in civil litigation).

II. Even If Penn State Had Not Waived the Privilege, the Attorney-Client Privilege Does Not Apply.

Because Penn State waived any privilege, there is no need to inquire into whether the attorney-client privilege applies in the first place. But even if such an inquiry were appropriate, it is clear that the privilege does not apply. Penn State

failed to properly invoke the privilege, as it has never provided a privilege log explaining the basis for its efforts to withhold particular documents. (Nor, for that matter, has Pepper Hamilton, which as noted above lacks standing to litigate Penn State's privilege claim.) R.382; *see T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party invoking the privilege has the burden to "produce sufficient facts to show that the privilege was properly invoked"). It is undisputed that much of the material underlying the Freeh Report came from third parties, and even for communications that could be considered to have come from "clients," there has been no identification of any privileged communications there were expected to be maintained in confidence. Indeed, given that the Freeh Report was never intended to be confidential, there could have been no reasonable expectation of privacy in any communications with the Freeh Firm.

A. The Freeh Report Was Not Intended To Be Confidential.

Penn State's (and Pepper Hamilton's) efforts to cover up the factual bases for the Freeh Report run afoul of the basic principle that the attorney-client privilege protects only *confidential* communications. *See, e.g., Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011); *Prison Health Servs., Inc.*, 782 A.2d at 31; *Commonwealth v. Boyd*, 580 A.2d 393, 394 (Pa. Super. 1990) (per curiam).

The engagement between Penn State and the Freeh Firm was far from a typical attorney-client relationship. From the beginning, everyone knew the Freeh

Report would be released to the public. The process was so public, in fact, that the Freeh Firm emphasized that it "revealed this report and the findings herein to the Board of Trustees and the general public at the same time," R.100, and noted that the Freeh Firm "operated with total independence as it conducted this investigation," R.99. The Freeh Firm conducted its investigation independently of Penn State and expressly reserved the right to share information gathered with law enforcement authorities, without the need for its client's consent. Moreover, throughout its investigation, the Freeh Firm coordinated and shared information with the NCAA and the Big Ten. Penn State never had any say about what would go into the Report, and it was understood that Freeh could investigate whatever he wished and that his Report would not be reviewed by Penn State before publication. Penn State thus had no reasonable expectation of confidentiality in any of its communications with the Freeh Firm.

Penn State has never denied that it always intended to reveal the Freeh Report and its findings to the general public. That is dispositive. The point of the Report was to prove to the world that Penn State was engaged in a transparent process of self-review and reflection, not to provide Penn State with confidential advice. That theme of transparency and public disclosure—and the concomitant lack of confidentiality—was consistent throughout the investigation. On November 21, 2011, Penn State issued a press release announcing that the Board of

Trustees had engaged "Louis J. Freeh to lead an *independent* investigative review into all aspects of the University's actions. . . . The Special Committee and [Judge] Freeh said that the findings and recommendations of this work, when completed, *will be made available to the public.*" PSU Press Release. Six months later, the Chairman of the Task Force reiterated Penn State's intention to disclose the "full findings and recommendations" in the Report to the public. R.361–62. Having boasted repeatedly about commissioning a public report that was outside Penn State's power to control, Penn State cannot now insist on confidentiality.

There is no danger that the trial court's decision, in the unique circumstances of this case, will threaten the ability of organizations to hire outside counsel to conduct internal investigations into alleged misconduct. Organizations that conduct proper internal investigations do not authorize the investigators to release their findings publicly and to law-enforcement officials without any client review. Nor do they allow other interested parties access to or input into the process, as Penn State did. Certainly, companies commissioning proper internal investigations do not selectively waive the privilege to pin blame on third parties, and then assert the same privilege as a defense when those third parties try to defend themselves.

Moreover, and importantly, any documents produced in the trial court are subject to a protective order and can only be used in the litigation subject to specified conditions on which all parties, including Penn State, have agreed. The

trial court's determination that the documents are not privileged with respect to Appellees—the parties directly harmed by the NCAA and the Freeh Report's baseless conclusions—will allow Appellees access to the documents they need to litigate this case and shine light on the truth behind the unsupported Freeh Report and the NCAA's unlawful conduct. Any sensitive but non-privileged information included in the documents will remain protected from general public disclosure under the terms of the trial court's protective order except when used in court filings or court proceedings.

B. Penn State Did Not Hire the Freeh Firm To Provide Confidential Legal Advice.

Even if Penn State had intended to keep the Freeh Report confidential, it was not the kind of legal advice that is protected by the attorney-client privilege. Although the Report asserts that information "was gathered under the applicable attorney-client privilege and attorney work product doctrine," R.97, those privileges do not apply merely because information is gathered by a law firm conducting an investigation. Nor do they attach simply because a document or a party says they do.

The attorney-client privilege extends only to confidential communications between a client and her attorney in connection with providing legal services or advice. 42 Pa. C.S.A. § 5928; *see also Nationwide Mut. Ins.*, 924 A.2d at 1264. The party asserting the privilege has the burden to prove that it is properly invoked.

Joyner v. Se. Pa. Transp. Auth., 736 A.2d 35, 38 n.3 (Pa. Commw. 1999). Moreover, the privilege protects only disclosure of communications, not the disclosure of underlying facts. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 392 (W.D. Pa. 2005).

Neither Penn State nor Pepper Hamilton has come close to satisfying that burden. The Freeh Report was not a legal document in the slightest; it was an effort to satisfy the NCAA and the public by broadcasting a mea culpa and scapegoating Coach Paterno and others. The investigation Penn State commissioned the Freeh Firm to perform, and the recommendations the Freeh Firm made, could just as easily have been performed by former law-enforcement officials, educators, or other non-lawyers.

Both the Engagement Letter and the Report itself make this clear. Although bare references to "legal services" are sprinkled throughout the Engagement Letter, the Scope of Engagement section belies that characterization by clarifying that the Freeh Firm's mission was to present factual "findings concerning i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff," and to recommend "actions to be taken to attempt to ensure that those and similar failures do not occur again." R.32. As the trial court aptly observed, "[a]t no point does

the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." R.482, Sept. 11 Opinion & Order.

The published Report is entirely consistent with the Scope of Engagement. It declares that Penn State hired the Freeh Firm to investigate past conduct and make recommendations for reforms. In a section entitled "Scope of Review and Methodology," the Report explains that the Freeh Firm "was asked to perform an independent, full and complete investigation of: The alleged failure of [Penn State] personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky" and "[t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth." R.96. The Report made its recommendations public. *See* R.215–32, Freeh Report Ch. 10 ("Recommendations for University Governance, Administration, and the Protection of Children in University Facilities and Programs"). Nothing in the Report suggests that Penn State hired the Freeh Firm to provide confidential legal advice.

C. Pepper Hamilton Lacks Standing To Litigate Penn State's Claim of Attorney-Client Privilege, and Its Arguments Add Nothing Meaningful on that Subject.

Pepper Hamilton devotes most of the argument section of its brief (nine pages out of twelve) to arguing that "the trial court erred in rejecting *Penn State's* claim of attorney-client privilege." Br. 15 (emphasis added and capitalization

omitted). This attempt to argue Penn State's attorney-client privilege claim as part of Pepper Hamilton's appeal is improper. "[T]he right to assert the [attorney-client] privilege is that of the client." *Commonwealth v. McKenna*, 213 A.2d 223, 226 (Pa. Supcr. 1965); *see also Bd. of Supervisors of Milford Twp. v. McGogney*, 13 A.3d 569, 574 (Pa. Commw. 2011) ("The attorney-client privilege belongs to the client."). Consequently, "Pennsylvania courts have held that only the client has standing to assert the privilege." *Burkert v. Equitable Life Assur. Soc'y of Am.*, No. Civ. A. 99-1, 2000 WL 419988, at *5 (E.D. Pa. Apr. 18, 2000) (citing cases).

To be sure, an attorney can raise (or waive) an attorney-client privilege claim *on behalf of a client.* But Pepper Hamilton does not represent Penn State in this matter, and Penn State is litigating its claim of attorney-client privilege in its own appeal, through its own counsel. There is no basis for letting Pepper Hamilton pursue a duplicative appeal of Penn State's claim of attorney-client privilege.

Even if Pepper Hamilton had standing to raise Penn State's claim of attorney-client privilege (which it does not), and even if it had preserved the arguments advanced by Penn State in support of that claim (which it has not), the claim is meritless for the reasons set forth above. Moreover, the few arguments that Pepper Hamilton's brief actually makes in support of Penn State's privilege claim are of little value.

First, Pepper Hamilton recites a variety of unsupported references in the Engagement Letter to "legal services" or the attorney-client privilege. *See* Br. 15–17. But as explained above, the privilege cannot be called into existence merely by reciting magic words, and the prerequisites for the privilege to attach are not satisfied here. Moreover, the letter's scattered references to "legal services" are contradicted by its Scope of Engagement section, which makes clear that the work the Freeh Firm was retained to perform was entirely factual.

Second, Pepper Hamilton argues that the Freeh Firm took "significant steps" to protect the confidentiality of its investigation *while the investigation was ongoing*. *See* Br. 17–18. But that is irrelevant, as Pepper Hamilton does not contest that when the investigation concluded, the Freeh Firm disclosed its report to the public with no prior review by Penn State. Nor does Pepper Hamilton deny that the Freeh Firm was authorized to, and did, share information it gathered with law enforcement without any review by Penn State.

Third, Pepper Hamilton disputes the extent to which the Freeh Firm shared information about its investigation with the NCAA and the Big Ten and argues that any disclosures to those entities were not intended to give Penn State a "tactical advantage." *See* Br. 18–22. Whether those disclosures served such a purpose is an issue for the trial court to determine after all the facts are known. But Pepper Hamilton does not raise any question about—indeed, it does not even address—the

far more significant disclosures to law enforcement and to the public. It is above all the publication of the Report, in which Penn State sought to scapegoat Appellees for its own public-relations purposes, that establishes Penn State's waiver of privilege as to the materials sought in the subpoena.

III. Even If It Had Not Been Waived, the Work-Product Protection Would Not Apply.

Waiver of any work-product protection aside, the work-product doctrine would not apply in any event (and certainly not as a wholesale excuse not to produce the documents and materials subject to the subpoena). The Freeh Firm's work and files encompass far more than "work product," and Pepper Hamilton to this day has not identified specific documents that it contends qualify as protected work product. Moreover, the Freeh Report was not prepared in anticipation of litigation, and manifestly not in anticipation of *this* litigation, where the information is especially relevant.

A. Pepper Hamilton Failed To Follow Proper Procedure In Raising Its Work-Product Objections.

The appropriate way for Pepper Hamilton to have raised its work-product objections would have been to submit a timely written response to the subpoena, which was served on September 16, 2014. *See* R.442, Nov. 20 Opinion & Order (declining to consider Pepper Hamilton's work-product objections because "Pepper Hamilton has not yet responded to the subpoena"). Instead, Pepper

Hamilton did not serve a response with objections to the subpoena until December 16—three months after the subpoena was served, and almost a month after the trial court denied a stay. That response was untimely. And even if it had been timely, it was entirely inadequate. To this day, Pepper Hamilton has never identified or logged the specific documents that it claims warrant protection under the work-product doctrine. *See T.M.*, 950 A.2d at 1062.

Pepper Hamilton tries to shift the blame for its failures to the trial court. In a footnote, it argues (without explanation and without citing any authority) that the trial court committed several "procedural and jurisdictional errors," but that this court should bypass any procedural issues in order to resolve the merits of the work-product claim. Br. 12 n.10. But Pepper Hamilton cannot explain why, to this day, it has never identified a single document that it claims constitutes protected work product. Instead, it has insisted that the trial court, and now this Court, resolve its work-product claim in the abstract without regard for circumstances surrounding any particular document—for example, the extent to which the document contains attorney mental impressions versus factual information, or the importance of the document to Appellees' case. The trial court acted well within its discretion in rejecting this blanket assertion of the work-product doctrine.

B. The Freeh Firm's Files Are Not Work Product Prepared in Anticipation of Litigation.

Even setting aside Pepper Hamilton's failure to properly raise its work-product arguments, the record is clear that the Freeh Firm's work and files encompass far more than "work product." The work-product protection is narrow: "work product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. 2000). "Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." Pa. R. Civ. P. 4003.3, Explanatory Note.

Given this narrow protection, there is little doubt that the vast majority of what the subpoena seeks is not attorney work product. The Report describes its methodology as including over 430 interviews; review of 3.5 million pieces of electronic data and documents; review of applicable Penn State policies, guidelines, practices, and procedures; and the establishment of a hotline to receive information relevant to the investigation. R.97. At a minimum, Appellees are entitled to production of the factual information collected by the Freeh Firm as part of its investigation, as well as any signed witness statements or factual statements or summaries in the firm's files and any other information that the firm obtained

from witnesses. Similarly, work-product protection would not extend to any communications between the Freeh Firm, Penn State, the NCAA, the Big Ten, or others. "The 'protective cloak' of the qualified work product privilege 'does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'" *Commonwealth v. Harrell*, 65 A.3d 420, 431 (Pa. Super. 2013) (quoting *Commonwealth v. Brinkley*, 480 A.2d 980, 984 (Pa. 1984)); *see also Brinkley*, 480 A.2d at 983 (affirming a trial court's order to disclose "substantially verbatim statements of the witnesses").

Even information about the Freeh Firm's opinions and mental impressions would not necessarily qualify as protected attorney work product. "[T]he work product doctrine seeks to promote the adversary system . . . 'by protecting the confidentiality of papers prepared by or on behalf of attorneys *in anticipation of litigation.*'" *Commonwealth v. Williams*, 86 A.3d 771, 782 n.7 (Pa. 2014) (emphasis added); *see also Gillard*, 15 A.3d at 59 n.16 ("Rule 4003.3, on its overall terms, manifests a particular concern with matters arising in anticipation of litigation."); *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. 2014) (work-product protection provides "a privileged area within which [the attorney] can analyze and prepare his client's case") (internal quotation marks omitted).

Here, Pepper Hamilton and Penn State cannot escape the undeniable (if inconvenient) fact that the Freeh Report was prepared for the express purpose of

making available for public consumption the Freeh Firm's mental impressions and conclusions regarding what happened at Penn State and who was responsible. It had nothing to do with strategy, tactics, or preparing Penn State's case in anticipation of litigation. The Engagement Letter contains *no* reference to litigation and states that the Freeh Firm's "services are limited at this time to the specific matter described herein," R. 32, *i.e.*, performing a factual investigation and preparing an "independent" report for public disclosure. Publicly disclosing such a report, with no prior review by the client, would be an extremely odd way to prepare for litigation, but a very strategic way to deflect responsibility by blaming others. And, in any event, this Court has held that materials that "pre-dated any litigation . . . fall outside any reasonable definition of the phrase 'acquired or developed in anticipation of litigation.'" *Katz v. St. Mary Hosp.*, 816 A.2d 1125, 1127 (Pa. Super. 2003) (internal quotation marks omitted).

To be sure, the anticipation-of-litigation requirement is not a hard and fast rule. But even Pepper Hamilton and Penn State have acknowledged that "the attorney work product doctrine is especially protective of material prepared by an attorney in anticipation of litigation." PSU Br. 25; Mem. in Support of Stay Application at 26–27. Penn State's own cases, moreover, make clear that "the line between what work product is discoverable and what work product is protected is" drawn at matters involving "'value,' 'merit,' 'strategy,' or 'tactics,'" which "are

protected unless they have evidentiary value." *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 30 (C.C.P. 1996). Pepper Hamilton cannot reasonably contend that the Freeh Firm was strategically gathering information in order to defend Penn State against litigation, or that the Freeh Firm's files as a whole meet the stringent test for work-product protection. As the Report and Penn State have repeatedly declared, the point of the investigation and the Freeh Firm's work was to conduct an independent review into failures related to Sandusky that would be disclosed in a public report.

C. The Work-Product Protection Applies Only in the Litigation for Which the Materials Were Prepared.

In Pennsylvania, the work-product protection "is applicable only to the litigation of the claim for which the impressions, conclusions and opinions were made." *Reusswig v. Erie Ins.*, 49 Pa. D. & C. 4th 338, 349 (C.C.P. 2000); *see also Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 249 (C.C.P. 2007); *Yohe v. Nationwide Mut. Life Ins. Co.*, 7 Pa. D. & C. 4th 300, 303–04 (C.C.P. 1990); *Little v. Allstate Ins. Co.*, 16 Pa. D. & C. 3d 110, 112 (C.C.P. 1980). Even if Penn State foresaw litigation on the horizon generally, that would still not provide a basis to resist disclosure in *this* case.

Moreover, "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Indep. Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003); *see*

also Lane v. Hartford Accident & Indem. Co., 5 Pa. D. & C. 4th 32, 41–42 (C.C.P. 1990); *Executive Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410, 425–26 (C.C.P. 2006). Here, the Freeh Report sought to lend credence to its conclusions—including its scandalous accusations against Appellees—by citing the extensive scope of the Freeh Firm's investigation. R.97–100. The basis for those accusations, and the extent to which the information uncovered by the Freeh Firm's investigation actually supports them, is directly at issue in this case. Accordingly, for documents or information responsive to the subpoena that might arguably constitute work product, the protection should give way to Appellees' substantial need for the information.

D. Pepper Hamilton's Arguments Add Nothing Meaningful on the Subject of Work-Product Protection.

Pepper Hamilton's brief purports to "incorporate[] by reference" Penn State's arguments concerning the work-product claim, Br. 12—which, as noted above, is improper and results in a forfeiture—and devotes less than three full pages to actually arguing that claim on the merits, *see* Br. 12–14. The arguments Pepper Hamilton has actually preserved on that issue are meritless.

First, Pepper Hamilton contends that the trial court erred in holding that Penn State lacked standing to assert the work-product protection. Br. 12–13. While it is well established that in Pennsylvania, "the protection stemming from the work product doctrine belongs to the professional, rather than the client,"

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 866 (3d Cir. 1994), arguments about *Penn State's* standing are out of place in this appeal *by Pepper Hamilton*. And Pepper Hamilton's claim for work-product protection suffers from the same flaws as Penn State's, among them the fact that Pepper Hamilton has never identified or logged the specific documents that it claims warrant protection.

Second, Pepper Hamilton argues that the Commonwealth Court's recent rulings in *Bagwell v. Pennsylvania Department of Education* establish that work-product protection is not limited to records that are prepared in anticipation of litigation. Br. 13–14. Even if that were so, it would not change the reality that the vast majority of materials responsive to the subpoena consist of unprotected factual information, not attorney mental impressions (nor the reality that Pepper Hamilton has made no effort to separate the two categories of materials). And Pepper Hamilton's interpretation of the *Bagwell* decisions, which are not binding on this Court, *see, e.g.*, *Lowe v. Lowe*, 110 A.3d 211, 214 n.4 (Pa. Super. 2015), is inconsistent with the controlling precedent cited above.

Third, Pepper Hamilton argues that the *Bagwell* decisions establish that "the release to the public of a final report by attorneys conducting an investigation does not result in a waiver of the work product privilege for matters not revealed in the public report." Br. 14. As explained above, however, the *Bagwell* court emphasized that "fairness" did not require a "broad subject-matter waiver" *in that*

case because the "selective disclosures" in the Freeh Report had not been used as "weapons to the detriment of" the plaintiff, and it distinguished a situation where "a party seeking waiver of the privilege in a discovery dispute or otherwise in litigation" could claim a "punitive effect" from those selective disclosures. 103 A.3d at 419. In this case, there is no doubt that the selective disclosures in the Freeh Report were used as "weapons" to impose a "punitive effect" on Appellees, who became scapegoats in order to shift public opprobrium away from Penn State and others. It is fundamentally unfair for Penn State to parade the Freeh Report's defamatory conclusions in front of the trial court and the public while depriving Appellees of discovery relevant to challenging those conclusions.

* * * *

Accepting Pepper Hamilton's arguments and overruling the trial court in this case would not further the important policies that underlie the attorney-client privilege or the attorney work-product doctrine. Those protections apply, as they should, in cases where parties undertake confidential investigations or retain outside counsel to provide legal advice in anticipation of litigation. But the only way to protect those privileges is to ensure that they are not abused or stretched to a breaking point in cases where they do not apply.

In this case, Penn State retained the Freeh Firm to undertake an independent investigation over which Penn State relinquished control and to publish the results

of that investigation in a public report that Penn State never reviewed and that was subject to an express waiver of all applicable privileges. The Freeh Firm had complete discretion to share—and did in fact share—the results of its investigation with law enforcement authorities and with third parties, and no one ever intended that the report would remain confidential. Moreover, Penn State has used that report for its own advantage and as a public relations document to appease the NCAA and to take blame away from the University as a whole by pinning it on Coach Paterno and other Appellees. In these circumstances, for all the reasons set forth above and as the trial court correctly determined, Coach Paterno and the other Appellees are entitled to discovery into the Freeh Report and the bases for its outrageous conclusions. The information produced in discovery is subject to a protective order, but it is not protected by either the attorney-client privilege or the attorney work-product doctrine.

CONCLUSION

The trial court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa. R. App. P. 2135(a)(1).

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I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF FOR THE APPELLEES was served this 30th day of October, 2015 by first class mail and email to the following:

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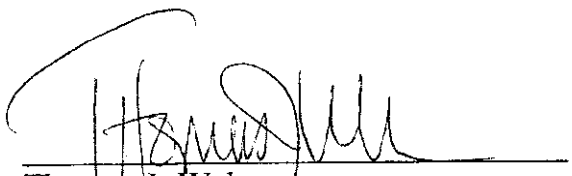

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EXHIBIT 18

In The

Superior Court of Pennsylvania

NO. 877 MDA 2015
NO. 878 MDA 2015

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant-Appellant (No. 878 MDA 2015),

and

PEPPER HAMILTON LLP,

Non-Party-Appellant (No. 877 MDA 2015).

Appeal from the September 11, 2014 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J., sitting by special assignment)

OPPOSITION TO APPLICATION FOR STAY OF TRIAL COURT'S MAY 8, 2015 ORDER PENDING APPEAL

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Plaintiffs-Appellees respectfully submit this memorandum in opposition to the application for stay of the trial court's May 8, 2015 order pending appeal filed by Pepper Hamilton LLP ("Pepper Hamilton") and by Pennsylvania State University ("Penn State").

INTRODUCTION

The stay application filed by non-party Pepper Hamilton and joined by Penn State is both procedurally improper and substantively meritless.

First, the application comes far too late. Plaintiffs-Appellees have been trying to obtain the documents at issue for more than 15 months. It has been more than eight months since Plaintiffs-Appellees served a subpoena requiring Pepper Hamilton to produce those documents, and more than six months since the trial court refused to grant a stay of Pepper Hamilton's obligations under the subpoena. There is no legitimate excuse for Pepper Hamilton's having waited until now to seek a stay from this Court. Nor should the Court tolerate Pepper Hamilton's improper and ongoing attempts to delay litigation. Instead, the Court should exercise its equitable discretion to decline the stay request.

Second, neither Pepper Hamilton nor Penn State will suffer any harm, much less irreparable harm, absent a stay. There is already a protective order in place that will prevent Plaintiffs-Appellees from using documents produced in response to the subpoena for any purpose other than preparing and prosecuting this case.

Moreover, if the Court deems it necessary, Plaintiffs-Appellees would be willing to agree that if any such documents need to be attached to a pleading before this Court rules on Penn State's appeal of the trial court's order rejecting Penn State's claims of privilege, the documents will be filed under seal, further ensuring that no harm will result from denying the stay request. Under these circumstances, it is strongly in the public interest to require Pepper Hamilton to comply with its discovery obligations and to allow Plaintiffs-Appellees to begin reviewing the documents subject to the subpoena so that resolution of this case is not further and unnecessarily delayed.

Third, Pepper Hamilton and Penn State are not likely to succeed on the merits of their appeals. The independent investigative report to which the documents relate was prepared for public-relations purposes subject to an express waiver of any applicable privilege, and underlying information was shared with law-enforcement authorities and other third parties. Moreover, to the extent any of the documents subject to the subpoena might arguably have remained privileged, Penn State waived that privilege when it publicized the results of the investigation for its own benefit. Penn State cannot selectively waive the privilege when parading scandalous accusations against Plaintiffs-Appellees and then invoke the privilege to deprive Plaintiffs-Appellees of the information needed to defend themselves. In any event, it is unlikely that attorney-client privilege or work-

product protection ever attached to these documents, or at least to the vast majority of them — and neither Pepper Hamilton nor Penn State has ever provided a privilege log to identify any specific documents that they believe are protected from disclosure.

For all these reasons, the Court should deny the application for a stay.

PROCEDURAL AND FACTUAL BACKGROUND

The relevant facts in this case are easily summarized. For the last 15 months, Plaintiffs-Appellees have been trying to gain access to documents underlying a report that was prepared for public-relations purposes and released to the public subject to an express waiver of any relevant privilege. The report was never intended to be maintained in confidence and does not reflect confidential legal advice, and documents underlying the report were shared with law-enforcement authorities and other third parties. But the report does contain numerous scurrilous accusations that have severely damaged the reputations and lives of Plaintiffs-Appellees. The discovery that Plaintiffs-Appellees seek is important to correcting the record and uncovering the truth about the egregious misconduct of the National Collegiate Athletic Association ("NCAA") and others in connection with the scandal involving former Penn State assistant football coach Gerald Sandusky.

A. Plaintiffs-Appellees Were Unjustly Accused By The "Independent" Freeh Report.

In 2011, under intense pressure from the NCAA and in the glare of harsh publicity, Penn State hired the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm") to conduct an independent and purportedly transparent investigation into the horrific crimes committed by Sandusky. The investigation's stated purpose was (i) to look into Penn State's alleged failures to report criminal conduct to authorities and (ii) to provide public recommendations for ensuring that any failures would never happen again. *See generally* Ex. A, at 8–12 (Freeh Report); Engagement Letter, Stay App. Ex. 1, at 1.

From the outset, everyone understood that the Freeh Firm's investigation and its subsequent Report (the "Freeh Report") would be out of Penn State's control and released to the public. Penn State said so directly when it announced the hiring of the Freeh Firm. *See* Ex. B (Nov. 21, 2011 press release). In announcing Penn State's decision to have the Freeh Firm conduct a public, independent investigation, Trustee and Task Force Chairman Kenneth C. Frazier emphasized that "Freeh has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again." Ex. A, at 11. Consistent with that mandate, and far from any normal relationship between a client and outside counsel, the Freeh Firm was allowed to operate with "total

independence" from Penn State. *Id.* at 11–12. It was also authorized to share (and ultimately did share) the information it gathered and the results of its investigation with law-enforcement agencies without prior review or approval by Penn State. *Id.* at 11. The Freeh Firm also shared information with the NCAA and other third parties.

When the Freeh Firm issued its lengthy Report, the release occurred without any advance review by Penn State. Ex. A, at 12. The Report did not contain or reflect confidential legal advice. Nor did it purport to have been prepared in anticipation of litigation. Instead, the Report included scandalous and baseless allegations directed at Coach Joe Paterno and other leaders of the Penn State community, which the Report announced were being disclosed under a waiver of the attorney-client privilege by Penn State. The NCAA then used the Freeh Report's findings to "bluff" Penn State into accepting a Consent Decree that adopted the Report as the basis for imposing massive sanctions, including destroying the reputations of Plaintiff-Appellees, while distracting attention from the NCAA's ongoing misconduct.

B. Plaintiffs-Appellees Have Been Trying For More Than 15 Months To Obtain Documents Related To The Freeh Report.

Plaintiffs-Appellees began the process of seeking documents related to the Freeh Report from Pepper Hamilton more than 15 months ago, in February 2014, by serving a notice of intent to issue a subpoena. In response, Penn State raised

numerous objections, which the trial court considered at a hearing on May 19, 2014. On September 11, 2014, the trial court issued an Opinion and Order with 15 pages of analysis devoted to addressing Penn State's objections, which it almost entirely overruled. *See* Opinion and Order, Stay App. Ex. 3 ("Sept. 11 Opinion and Order"). Penn State appealed the September 11 order, *see Paterno v. NCAA*, No. 1709 MDA 2014, but it did not then seek a stay of that order (from either the trial court or this Court).

As permitted by the trial court's September 11 order, Plaintiffs-Appellees served the subpoena on Pepper Hamilton on September 16, 2014. The subpoena states that the recipient must comply within 20 days, which, for Pepper Hamilton, would have been by October 6. Pepper Hamilton instead obtained Plaintiffs-Appellees' consent to an enlargement of time until October 13. On October 13, Pepper Hamilton moved for a stay of its obligations under the subpoena pending a ruling on Penn State's appeal of the trial court's September 11 order, and for a protective order. In its request for a stay, Pepper Hamilton purported to raise a work-product objection even though it had not served a response to the subpoena in which it could have asserted that objection. Penn State joined Pepper Hamilton's stay motion on October 22.

On November 20, 2014, the trial court declined to issue the stay because Pepper Hamilton had not made the required showing that Penn State was likely to

prevail in its appeal. *See* Opinion and Order Regarding Stay During Appeal, Stay App. Ex. 5 ("Nov. 20 Opinion and Order"). Pepper Hamilton appealed the November 20 Opinion and Order on December 19, 2014, *see Paterno v. NCAA*, No. 2168 MDA 2014, but it did not file an application in this Court for a stay pending Penn State's appeal of the September 11 order, which would have been the proper course. *See* Pa. R. App. P. 1732; *Swendsen v. Swendsen*, 22 Pa. D. & C. 4th 481, 482 (C.C.P. 1994) ("[A]n order denying [an] application for stay or supersedeas pending appeal is an inappropriate order from which to appeal. . . . [A] plain reading of the Pennsylvania Rules of Appellate Procedure indicate[s] that the applicant's remedy for denial of his application for stay or supersedeas pending appeal is with an application to the Superior Court.").

Since the trial court denied its stay motion on November 20 — more than six months ago — Pepper Hamilton has had no colorable legal basis for continuing to withhold documents responsive to the subpoena. Yet it has refused to comply. Instead, on December 16, 2014 — three months after service of the subpoena, two months after the extended return date, and a month after the Court denied Pepper Hamilton's motion for a stay — Pepper Hamilton served an untimely written response objecting generally to the subpoena but failing to identify or log any specific documents as to which it claimed privilege. *See, e.g.*, Resp. to Subpoena, Stay App. Ex. 6, at 2 (objecting to the subpoena "to the extent [it] seek[s] the

production of documents protected from disclosure by the attorney-client privilege [or] the attorney work-product doctrine").

On January 23, 2015, following unsuccessful efforts to secure Pepper Hamilton' compliance, plaintiffs moved for enforcement of the subpoena. The trial court granted that motion on May 8, 2015, explaining that it had already "overruled the discovery objections based upon attorney-client privilege and work-product doctrine." Opinion and Order on Plaintiffs' Motion for Enforcement of Subpoena, Stay App. Ex. 7, at 4 ("May 8 Opinion and Order"). Moreover, because those objections were the subject of Penn State's pending appeal of the September 11 order, the trial court held that it lacked jurisdiction to consider them further while the appeal was pending. *Id.*; *see* Pa. R. App. P. 1701(a)–(b) ("[A]fter an appeal is taken . . . the trial court . . . may no longer proceed further in the matter" except as necessary to "preserve the status quo" and "[e]nforce any order entered in the matter").

Pepper Hamilton and Penn State each appealed the May 8 order enforcing the subpoena, even though the order did not contain any substantive rulings on the privilege issues and merely required compliance with the trial court's earlier rulings. *See Paterno v. NCAA*, No. 877 MDA 2015; *Paterno v. NCAA*, No. 878 MDA 2015. They did not seek a stay of that order from the trial court. Instead, even though the trial court had given them 30 days from May 8 to comply with the

subpoena, they waited 19 days — until May 27, 2015 — to move this Court for a stay of the May 8 order pending appeal. They requested that this Court consider their application on an expedited basis because, as a result of their delay, only 11 days remained until the deadline set by the trial court to complete compliance with the long-pending subpoena.

ARGUMENT

A stay is "not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). It is instead "an exercise of judicial discretion" that should be granted only if the party requesting the stay carries its burden to show "that the circumstances justify an exercise of that discretion." *Id.* at 433–34 (internal quotation marks omitted). Here, Pepper Hamilton and Penn State have not come close to justifying their request for a stay pending appeal. Their request is procedurally improper and comes far too late. They have not demonstrated irreparable harm. Nor have they demonstrated any likelihood of success on the merits.

I. The Stay Application Comes Far Too Late.

An application for a stay pending appeal is addressed to the court's equitable discretion, *In re Estate of Hartman*, 582 A.2d 648, 653 (Pa. Super. 1990), and a court may properly consider the "last-minute nature" of such an application in

denying the equitable relief of a stay, *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Here, the subpoena was served on Pepper Hamilton on September 16, 2014, and required compliance by October 6, 2014 — almost eight months ago. At no time has any court revoked the subpoena or stayed its effect. Yet Pepper Hamilton has consistently refused to comply with the subpoena, in willful defiance of its discovery obligations. This Court should not reward that behavior by sanctioning further delay.

It is disingenuous for Pepper Hamilton to suggest that it was under no obligation to comply with the subpoena until the trial court issued its May 8 enforcement order. A subpoena duces tecum is *itself* a court order that is binding on the recipient unless and until the subpoena is revoked by the court. Indeed, the subpoena served on Pepper Hamilton, consistent with the form required by the Pennsylvania Rules of Civil Procedure, advised Pepper Hamilton that it was "ordered by the Court to produce" the requested documents "[w]ithin twenty (20) days after the service of this subpoena." Subpoena, Stay App. Ex. 4, at 1; *see* Pa. R. Civ. P. 4009.26; *see also* Pa. R. Civ. P. 4009.23 (recipient of subpoena "shall . . . deliver" the requested documents "to the party serving the subpoena within twenty days of service").

It is hornbook law that a "subpoena is a lawfully issued mandate of the court issued by the clerk thereof" and that "[i]t is the responsibility of every citizen to

respond to this mandate." *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975); *see Maness v. Meyers*, 419 U.S. 449, 458–59 (1975) (subpoena duces tecum is among the "orders and judgments of courts" that "must be complied with promptly and completely"). Pepper Hamilton recognized as much when it asked the trial court for (in its words) "a stay of [Pepper Hamilton's] obligations to produce documents for which [Penn State] had asserted a privilege." Mem. in Supp. of Stay App. at 5.

When the trial court refused to grant a stay, however, neither Pepper Hamilton nor Penn State sought a stay from this Court pursuant to Pennsylvania Rule of Appellate Procedure 1732(b). Instead, Pepper Hamilton noticed an appeal of the trial court's order denying its request for a stay — an appeal that was procedurally improper, as the denial of a stay is not subject to interlocutory review, *see, e.g.*, *Farmers First Bank v. Wagner*, 687 A.2d 390, 391–92 (Pa. Super. 1997) — and continued to ignore its obligations under the subpoena. Only months after the deadline to comply with the subpoena had passed did Pepper Hamilton provide an untimely written response to the subpoena. But even then, Pepper Hamilton failed to identify or log any specific documents as to which Pepper Hamilton and/or Penn State claimed protection.

Plaintiffs-Appellees were then forced to move for enforcement of the subpoena, which led to several months of additional delay. Even after the trial

court ordered Pepper Hamilton to "provide Plaintiffs with all documents requested in their Subpoena Duces Tecum within 30 days" of May 8, 2015, Opinion and Order at 6, Pepper Hamilton and Penn State waited *another 19 days* before finally applying to this Court for an eleventh-hour stay. In doing so they forced Plaintiffs-Appellees to respond to, and this Court to consider, their stay request on an unnecessarily expedited basis.

What is more, even though a stay application "must ordinarily be made in the first instance to the lower court," Pa. R. App. P. 1732(a), Pepper Hamilton and Penn State never asked the trial court to stay its May 8, 2015 order enforcing the subpoena. They insist that it would be "futile" for them to do so because "[i]n the November 20 Order, the trial court already has rejected Pepper Hamilton's and Penn State's effort to stay discovery obligations as they related to privileged materials while this Court addresses the privilege arguments." Mem. in Supp. of Stay App. at 8. In other words, Pepper Hamilton and Penn State recognize that the trial court rejected their privilege arguments and denied their stay request more than six months before they filed their current stay application with this Court.

This sort of gamesmanship and delay is incompatible with sound judicial administration. A subpoena is not "an invitation to a game of hare and hounds, in which" the recipient must comply "only if cornered at the end of the chase." *United States v. Bryan*, 339 U.S. 323, 331 (1950). Pepper Hamilton's and Penn

State's inexcusable delay in filing their stay application until more than six months after the trial court "rejected [their] effort to stay discovery obligations," Mem. in Supp. of Stay App. at 8, is sufficient basis for denying the requested relief.

II. Pepper Hamilton And Penn State Will Not Suffer Irreparable Harm Absent A Stay, But A Stay Will Harm Plaintiffs-Appellees And Is Not In The Public Interest.

As Pepper Hamilton and Penn State concede, an applicant for a stay must show "that without the requested relief, he will suffer irreparable injury." *Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808 (Pa. 1983). Pepper Hamilton and Penn State cannot make that necessary showing. Neither entity will be *irreparably* harmed if Pepper Hamilton is required to comply with the subpoena while their appeals are pending.

The trial court has entered a protective order providing that "[a]ll pre-trial discovery materials in this litigation . . . shall be used solely for the purpose of preparing and prosecuting the Parties' respective cases, and shall not be used or disclosed for any other purpose." Sept. 11 Opinion and Order at 31–33. The protective order means that any materials disclosed pursuant to the subpoena will not be made public. Accordingly, the only "harm" Pepper Hamilton and Penn State could possibly suffer as a result of such disclosure would arise from Plaintiffs-Appellees' use of materials in this litigation that are ultimately ruled to be privileged and exempt from disclosure.

But there has been no ruling that any of the materials subpoenaed are privileged. It is undoubtedly the case that many of the documents subject to the subpoena were never privileged under any theory — they constitute merely the underlying documents, including emails and other raw materials, that were collected and reviewed by the Freeh Firm. Moreover, Pepper Hamilton has never even attempted to carry its burden to identify or log any specific documents that it believes are privileged. *See, e.g., T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2008) ("it is impossible for this Court to determine whether any privilege applies when [party] has failed to identify or describe any such documents that may be protected"). In any event, if the Court deems it necessary, Plaintiffs-Appellees are willing to agree that any documents produced in response to the subpoena that are used in this litigation (as an attachment to any pleading) will be filed under seal until this Court rules on Penn State's appeal of the trial court's September 11, 2014 order rejecting its claims of privilege.

In these circumstances, unlike the harm that could result from public disclosure of arguably privileged materials, any potential harm resulting from the use of arguably privileged materials in this litigation is not irreparable. If this Court were to determine that the materials in question are privileged, it could order that "the protected material and its fruits [be] excluded from evidence." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009). In fact, the parties' protective order

includes provisions that govern the return and destruction of privileged materials produced to the other side. *See* Stipulated Confidentiality Agreement and Protective Order, ¶ 14, Ex. C at 13–14. If any document is ultimately determined to be privileged, the document would need to be returned and could not be relied on in litigation. But there is no reason at this juncture that this Court should further delay discovery or prevent this case from proceeding.

The Pennsylvania Supreme Court has held that an exclusionary remedy is inadequate "[o]nce putatively privileged material *is in the open*." *Commonwealth v. Harris*, 32 A.3d 243, 249 (Pa. 2011) (emphasis added). But that conclusion does not apply where, as here, the supposedly privileged material would be subject to a protective order barring its disclosure to the public (and where Plaintiffs-Appellees are willing to file materials under seal until this Court resolves Penn State's appeal regarding the trial court's September 11, 2014 discovery order). Pepper Hamilton and Penn State fail to take account of the restrictions of the protective order, and the cases on which they rely are inapposite because they concern the harm a party suffers when it is forced to disclose allegedly privileged materials *without* such comprehensive protection against dissemination.

In short, because the only potential harm from disclosure in this case is adverse use in the litigation at hand, and because that type of harm is remediable on appeal, Pepper Hamilton and Penn State will not suffer irreparable injury absent

a stay. As a result, they have not made the showing required to be entitled to a stay pending appeal, even assuming their stay request had been timely filed.

In contrast, a stay will "substantially harm other interested parties" and "adversely affect the public interest." *Process Gas*, 467 A.2d at 809. This case has been pending in the trial court for more than two years and the pleadings were closed approximately a month ago. Moreover, it has been more than 15 months since Plaintiffs-Appellees provided notice of their intent to subpoena the records at issue. During that time, progress in the litigation has been bogged down by non-party Pepper Hamilton's delaying tactics. Those tactics have prejudiced, and continue to prejudice, Plaintiffs-Appellees and the public, both of which have a strong interest in moving this matter toward a resolution.

Nor will the delay end when Pepper Hamilton complies with the subpoena. Because the disclosures are likely to be extensive,[1] Plaintiffs-Appellees will need substantial time to review and analyze them before proceeding with the case. Pepper Hamilton and Penn State offer no persuasive reason why that review process should not get underway now, subject to the trial court's protective order prohibiting public dissemination of the records at issue and to this Court's ability

[1] To date, Pepper Hamilton has produced 640 documents, but the Freeh Report indicates that the Freeh Firm considered 3.5 million items of electronic data, and conducted over 430 interviews to prepare the Report.

to declare those records inadmissible if it determines that they should not have been disclosed.

III. No Stay Is Warranted Because Pepper Hamilton And Penn State Are Not Likely To Prevail on the Merits of Their Appeals.

To obtain a stay, an applicant ordinarily must make "a strong showing that he is likely to prevail on the merits." *Process Gas*, 467 A.2d at 808. Pepper Hamilton and Penn State cannot make that showing here. Neither the attorney-client privilege nor the work-product doctrine protects information and materials gathered to prepare a publicly available, "independent" report that is shared with law-enforcement authorities and others outside the attorney-client relationship and used for public-relations purposes as a sword to attack innocent third parties.

A. Any Attorney-Client Privilege Or Work-Product Protection Has Been Waived.

Even if some portion of the documents subject to the subpoena might otherwise be privileged, Penn State deliberately and strategically waived any privilege or protection that might once have applied to the materials sought in the subpoena by "attempting to invoke the Attorney-Client privilege as both a shield and [a] sword." Nov. 20 Opinion and Order at 4. Penn State hired the Freeh Firm to conduct an "independent" investigation the results of which were to be (and in fact were) disclosed to the public and to law enforcement (and third parties, including the NCAA) *without any prior review or control by Penn State.* Penn

State allowed those disclosures because they served the institution's public-relations interests, including kowtowing to the NCAA, portraying itself as undergoing a period of reflection, and scapegoating others (including Plaintiffs-Appellees). Having expressly waived the attorney-client privilege and the work-product protection for its own advantage, Penn State cannot prevent those unjustly maligned from discovering and challenging the bases for the Freeh Report's scandalous accusations.

If one principle of privilege law is clear, it is that the attorney-client privilege may not be used as both a sword and a shield: "A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007), *aff'd by an equally divided court*, 992 A.2d 65 (Pa. 2010) (per curiam). When a party elects to disclose *some* privileged information in order to launch attacks on another party, elementary notions of fairness demand that the party disclose all communications regarding the subject matter of what was disclosed. The trial court therefore did not abuse its discretion in holding that "the scope of an attorney-client privilege waiver applies to the subject matter of the privileged documents disclosed" and that "voluntary

disclosure waives the privilege as to the remaining documents of that same subject matter." Sept. 11 Opinion and Order at 21–22.

Just as the attorney-client privilege is "deeply rooted in our common law," *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (internal quotation marks omitted), the subject-matter waiver doctrine is no less fundamental. When a party selectively discloses privileged information in an effort to obtain a tactical advantage, fairness requires giving the injured party access to the information. *See, e.g.*, *Adhesive Specialists, Inc. v. Concept Scis., Inc.*, 59 Pa. D. & C. 4th 244, 263 (C.C.P. 2002) ("[D]elivery of [an internal] memorandum to the Pennsylvania State Police constituted a voluntary disclosure to a third party" and "a waiver of the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else"); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C. 4th 1, 18–21 (C.C.P. 1995) (voluntary disclosure of confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject).

The federal courts of appeals unanimously agree with Pennsylvania on this basic principle of privilege law. *See, e.g.*, *In re Columbia/HCA Healthcare Corp.*

Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002) ("The client cannot be permitted . . . to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.") (internal quotation marks omitted); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage"); *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (noting that disclosure to a third party usually waives privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (holding that waiver of privilege as to one party serves to waive as to others); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and extending the waiver to the work-product doctrine).

In the face of this overwhelming authority, Pepper Hamilton and Penn State argue that Pennsylvania courts have "not adopted" the principle of subject-matter waiver. Mem. in Supp. of Stay App. at 21. For that dubious proposition, they cite only *Bagwell v. Pennsylvania Department of Education*, 103 A.3d 409 (Pa.

Commw. 2014). *Bagwell*'s unsupported statement that "Pennsylvania courts have not adopted subject-matter waiver," *id.* at 419, is simply wrong and is refuted by *Bagwell*'s own citation of *Nationwide Mutual Insurance Co.*, in which a panel of this Court recognized that "considerations of fairness . . . preclude a party from disclosing only those privileged materials that support its position, while simultaneously concealing as privileged those materials that are unfavorable to its position." 924 A.2d at 1265. And even if it were true (it is not) that Pennsylvania courts had not yet adopted subject-matter waiver, Pepper Hamilton and Penn State offer no reason why this Court should not do so here.

Next, Pepper Hamilton and Penn State contend that subject-matter waiver does not apply because Penn State's voluntary disclosures were not made "to achieve a tactical advantage in any litigation." Mem. in Supp. of Stay App. at 21. That is both wrong and irrelevant. It is wrong because Penn State has relied on the Freeh Report as a principal defense *in this litigation*; acting in concert, the NCAA, Penn State, and other defendants have used the Report to justify the egregious actions taken against Plaintiffs-Appellees. It is irrelevant because the subject-matter waiver doctrine applies whenever a party attempts to use selective disclosure as an offensive weapon; it is not limited to the narrow situation where the disclosing party sought to obtain a tactical advantage in litigation. *See In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that privilege

can be waived when a party "made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). By selectively disclosing supposedly privileged material to impugn Coach Paterno and others for its own public-relations purposes, and then invoking the privilege to resist discovery into the Freeh investigation, Penn State runs afoul of one of the most fundamental principles of fairness that informs the law of privilege.

B. Even If It Had Not Been Waived, The Attorney-Client Privilege Would Not Apply.

Because Penn State waived any privilege, there is no need to inquire into whether the attorney-client privilege applies in the first place. But even if such an inquiry were appropriate, it is clear that the privilege does not apply. Penn State failed to properly invoke the privilege, as it has never provided a privilege log explaining the basis for its efforts to withhold particular documents. *See T.M.*, 950 A.2d at 1063. Moreover, as discussed below, the Freeh Report was never intended to be confidential and the Freeh Firm was not retained to provide confidential legal advice.

The engagement between Penn State and the Freeh Firm was no typical attorney-client relationship. From the beginning, everyone knew the Freeh Report would be released to the public. The process was so public, in fact, that the Freeh Firm emphasized that it "revealed this report and the findings herein to the Board

of Trustees and the general public at the same time," Ex. A, at 12, and noted that the Freeh Firm "operated with total independence as it conducted this investigation," *id.* at 11. The Freeh Firm conducted its investigation independently of Penn State and expressly reserved the right to share any information gathered with law-enforcement authorities, without the need for its client's consent. Moreover, throughout its investigation, the Freeh Firm coordinated and shared information with the NCAA and the Big Ten. Penn State never had any say about what would go into the Report, and it was understood that Freeh could investigate whatever he wished and disclose whatever he investigated. Penn State thus had no reasonable expectation of confidentiality in any of its communications with the Freeh Firm.

Even if Penn State had intended to keep the Freeh Report confidential, it was not the kind of legal advice that is protected by the attorney-client privilege. Although the Report asserts that information "was gathered under the applicable attorney-client privilege and attorney work product doctrine," *id.* at 9, those privileges do not apply simply because a document says they do. Rather, the attorney-client privilege extends only to confidential communications between a client and her attorney in connection with providing legal services or advice. 42 Pa. C.S.A. § 5928; *see also Nationwide Mut. Ins. Co.*, 924 A.2d at 1264. The party asserting the privilege has the burden to prove that it is properly invoked. *Joyner*

v. Se. Pa. Transp. Auth., 736 A.2d 35, 38 n.3 (Pa. Commw. 1999). Penn State has not come close to satisfying that burden. The Report was not a legal document in the slightest; it was an effort to satisfy the NCAA and the public by broadcasting a mea culpa and scapegoating Coach Paterno and others. The investigation Penn State commissioned the Freeh Firm to perform, and the recommendations the Freeh Firm made, could just as easily have been performed by former law-enforcement officials, educators, and other non-lawyers.

Both the Engagement Letter and the Report itself make this clear. Although unsupported references to "legal services" are sprinkled throughout the Engagement Letter, the Scope of Engagement Section belies that characterization by clarifying that the Freeh Firm's mission was to present factual "findings concerning: i) failures that occurred in the reporting process; ii) the causes for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff," and to recommend "actions to be taken to attempt to ensure that those and similar failures do not occur again." Engagement Letter, Stay App. Ex. 1, at 1. As the trial court aptly observed, "[a]t no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." Sept. 11 Opinion and Order at 20. The published Report is entirely consistent with the Scope of Engagement; nothing in it suggests

that Penn State hired the Freeh Firm to provide confidential legal advice, and its recommendations are set forth in Chapter 10 of the published Report. Ex. A at 127–144.

C. Even If It Had Not Been Waived, the Work-Product Protection Would Not Apply.

Waiver of any work-product protection aside, the work-product doctrine would not apply in any event (and certainly not as a wholesale excuse not to produce documents and materials subject to the subpoena).

In their stay application, Pepper Hamilton and Penn State make much of the fact that the trial court did not rule on the merits of any work-product objection by Pepper Hamilton. *E.g.*, Mem. in Supp. of Stay App. at 14. No such ruling exists because Pepper Hamilton failed to follow proper procedure in raising its work-product objections. The appropriate way to raise those objections would have been to submit a timely written response to the subpoena, which was served on September 16, 2014. *See* Nov. 20 Opinion and Order at 5 (declining to consider Pepper Hamilton's work-product objections because "Pepper Hamilton has not yet responded to the subpoena"). Instead, Pepper Hamilton did not serve a response with objections to the subpoena until December 16 — three months after the subpoena was served, and almost a month after the trial court denied a stay. That response was untimely. And even if it had been timely, it was entirely inadequate. To this day, Pepper Hamilton has never identified or logged the specific documents

that it claims warrant protection under the work-product doctrine. *See T.M.*, 950 A.2d at 1062.

Even setting aside Pepper Hamilton's failure to properly raise its work-product arguments, the record is clear that the Freeh Firm's work and files encompass far more than "work product." The work-product protection is narrow: "[W]ork product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. 2000). Given this narrow protection, there is little doubt that the vast majority of what the subpoena seeks is not protected work product. The Freeh Report describes its methodology as including over 430 interviews; review of 3.5 million pieces of electronic data and documents; review of applicable Penn State policies, guidelines, practices and procedures; and the establishment of a hotline to receive information relevant to the investigation. Ex. A, at 9. At a minimum, Plaintiffs-Appellees are entitled to production of the factual information collected by the Freeh Firm as part of its investigation, as well as any signed witness statements or factual statements or summaries in the Firm's files and any other information that the Firm obtained from witnesses. *See* Pa. R. Civ. P. 4003.3, Explanatory Note ("Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file."); *Commonwealth v. Harrell*, 65 A.3d 420, 431 (Pa. Super. 2013) (work-product protection "'does not

extend to information which an attorney secures from a witness'" (quoting *Commonwealth v. Brinkley*, 480 A.2d 980, 984 (Pa. 1984))).

Even information about the Freeh Firm's opinions and mental impressions would not necessarily qualify as protected attorney work product. "[T]he work product doctrine seeks to promote the adversary system . . . 'by protecting the confidentiality of papers prepared by or on behalf of attorneys *in anticipation of litigation*.'" *Commonwealth v. Williams*, 86 A.3d 771, 782 n.7 (Pa. 2014) (emphasis added). To be sure, the anticipation-of-litigation requirement is not a hard and fast rule, but even Pepper Hamilton and Penn State are forced to acknowledge that "the attorney work product doctrine is *especially protective of* material prepared by an attorney in anticipation of litigation." Mem. in Supp. of Stay App. at 26–27. Here, Pepper Hamilton and Penn State cannot escape the undeniable (if inconvenient) fact that the Report was prepared for the express purpose of making available for public consumption the Freeh firm's mental impressions and conclusions regarding what occurred at Penn State and who was responsible. It had nothing to do with strategy, tactics, or preparing Penn State's case in anticipation of litigation. The Engagement Letter contains *no* reference to litigation and states that the Freeh Firm's "services are limited at this time to the specific matter described herein," Stay App. Ex. 1, at 1, *i.e.*, performing a factual investigation and preparing an "independent" report for public disclosure. Publicly

disclosing such a report, with no prior review by the client, would be an extremely odd way to prepare for litigation, but a very strategic way to deflect responsibility by blaming others.

Further, in Pennsylvania, the work-product protection "is applicable only to the litigation of the claim for which the impressions, conclusions and opinions were made." *Reusswig v. Erie Ins.*, 49 Pa. D. & C. 4th 338, 349 (C.C.P. 2000); *see also Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 249 (C.C.P. 2007); *Yohe v. Mut. Life Ins. Co.*, 7 Pa. D. & C. 4th 300, 303–04 (C.C.P. 1990); *Little v. Allstate Ins. Co.*, 16 Pa. D. & C. 3d 110, 112 (C.C.P. 1980). Even if Penn State foresaw litigation on the horizon generally, that would still not provide a basis to resist disclosure in *this* case.

Finally, "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Indep. Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003); *see also Lane v. Hartford Accident & Indem. Co.*, 5 Pa. D. & C. 4th 32, 41–42 (C.C.P. 1990); *Executive Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410, 425–26 (C.C.P. 2006). Here, the Freeh Report sought to lend credence to its conclusions — including its scandalous accusations against Plaintiffs-Appellees — by citing the extensive scope of the Freeh Firm's investigation. Ex. A, at 8–12. The basis for those accusations, and the extent to which the information uncovered by the

Freeh Firm's investigation actually supports them, is directly at issue in this case. Accordingly, for documents or information responsive to the subpoena that might arguably constitute work product, the protection should give way to Plaintiffs-Appellees' substantial need for the requested information.

CONCLUSION

The stay application should be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa. R. App. P. 2135(a)(1).

Thomas J. Weber

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing OPPOSITION TO APPLICATION FOR STAY OF TRIAL COURT'S MAY 8, 2015 ORDER PENDING APPEAL was served this 2nd day of June, 2015 by first class mail and email to the following:

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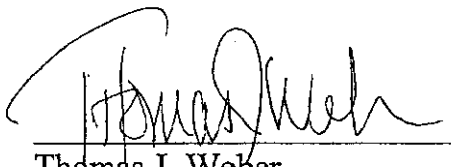

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EXHIBIT 19

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August 11, 2015

Brian Kowalski, Esquire
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Re: *Paterno et al., v. NCAA, et al.,* Civil Div. No. 2013-2082

Dear Brian,

We are producing today through King & Spalding's FTP site copies of communications between King & Spalding and third parties related to our representation of Coach Paterno and his Estate, that pre-date the filing of the Complaint in the above-referenced action. These documents are Bates numbered: JVPE_NCAA_0003843 - JVPE_NCAA_0004167. We are also producing copies of King & Spalding's retainer letters with Dr. Fred Berlin, Jim Clemente and McGinn & Co. related to our representation of the Paterno Estate. Those documents are Bates numbered: JVPE_NCAA_0004168 - JVPE_NCAA_0004176. Finally, we are producing one additional document responsive to the NCAA's subpoena to Mary Kay Paterno Hort that is Bates numbered: MKPH_0000600 - MKPH_0000602.

I have enclosed instructions to our FTP site, and will send you the password for this production separately.

Please contact me if you have any questions.

Sincerely,

Patricia L. Maher

Enclosure

EXHIBIT 20

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May 11, 2015

VIA HAND DELIVERY

Joseph D. Seletyn, Esq.
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Re: Estate of Joseph Paterno, et al. v. National Collegiate Athletic Association, et al.
No. 1709 MDA 2014

Dear Mr. Seletyn:

Enclosed for filing in the above-referenced matter are eight copies of the Brief of Appellees in the Appeal from the Order of The Honorable J. Leete of the Centre County Court of Common Pleas dated September 11, 2014, as well as Appellees' Designation of Record Excerpts. Kindly date stamp the additional copies of each document and return them with the courier.

Thank you for your attention to this matter.

Very truly yours,

Thomas J. Weber

TJW/jlb
Enclosures

cc: All counsel of record (via email and U.S. Mail)

In The

Superior Court of Pennsylvania

NO. 1709 MDA 2014

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant-Appellant.

Appeal from the September 11, 2014 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J., sitting by special assignment)

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Thornburgh, Dick,
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QUESTIONS INVOLVED

1. Did the trial court abuse its discretion in concluding that Penn State waived the attorney-client privilege and work product protection where information underlying a report was shared with law enforcement authorities and other third parties; the report was never intended to be maintained in confidence; the report was released to the public, without Penn State's review, with an express waiver of any relevant privilege; and the report was used to attack other parties for public-relations purposes?

Suggested Answer. No.

2. Does the attorney-client privilege apply to materials relating to a publicly disclosed report that was prepared for public-relations purposes, was never intended to be maintained in confidence, was not reviewed by the client before being publicly disclosed, and does not reflect confidential legal advice?

Suggested Answer. No.

3. Does the attorney work product doctrine apply to materials that were prepared for public-relations purposes and not in anticipation of litigation, especially where the doctrine is not invoked by the professional who prepared the materials and where the party seeking protection has not come forward with any privilege log identifying the specific documents it claims are protected?

Suggested Answer. No.

INTRODUCTION

Penn State's appeal is an extraordinary effort to reinvent and undermine basic principles regarding the attorney-client privilege and the attorney work product doctrine. The attorney-client privilege is essential to protecting confidential information exchanged between a lawyer and his client when a lawyer is retained to provide legal advice; the work product doctrine allows attorneys to prepare confidential information in connection with litigation. Neither doctrine protects information and materials gathered to prepare a publicly available report that is shared with law enforcement and others outside the attorney-client relationship and used for public-relations purposes as a sword to attack innocent third parties.

The relevant facts in this case are easily summarized: In 2011, under pressure from the National Collegiate Athletics Association ("NCAA") and in the glare of harsh publicity, Penn State hired the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), headed by former FBI Director Louis Freeh,[1] to conduct an independent and purportedly transparent investigation into the horrific crimes committed by former assistant football coach Gerald Sandusky. The investigation's stated purpose was to look into Penn State's alleged failures to

[1] The Freeh Firm provided in its engagement letter that it would retain a separate investigative and consulting group, Freeh Group International Solutions, LLC ("Freeh Group" or "FGIS"), in which Louis Freeh was also a partner, "to assist in this engagement." R.36.

report criminal conduct to authorities and to provide public recommendations for ensuring that any failures would never occur again.

The engagement between Penn State and the Freeh Firm was no typical attorney-client relationship. From the beginning, everyone knew the report prepared by the Freeh Firm (the "Freeh Report") would be released to the public. And the engagement was structured to support Penn State's public-relations objectives. The Freeh Firm conducted its investigation independent from Penn State and expressly reserved the right to share any information gathered with law enforcement authorities, without the need for its client's consent. Moreover, throughout its investigation, the Freeh Firm coordinated and shared information with the NCAA and the Big Ten, two organizations that govern athletics at Penn State.

When the Freeh Firm released its lengthy Report, the release occurred without any advance review by Penn State. The Report did not contain or reflect confidential legal advice. Nor did it purport to have been prepared in anticipation of litigation. Instead, the Report included scandalous and baseless allegations directed at Coach Joe Paterno and other leaders of the Penn State community, which the Report announced were being disclosed under a waiver of the attorney-client privilege by Penn State. Having coordinated closely with the Freeh Firm, the NCAA then capitalized on the Report's findings to "bluff" Penn State into

accepting a Consent Decree that, in furtherance of the NCAA's own objectives, deployed the Report as a basis for imposing crushing penalties on Penn State, detracted attention from the NCAA's ongoing misconduct, and destroyed the reputations of numerous individuals.

Having used the Freeh Report as its own publicity tool and for the NCAA's benefit, Penn State now seeks to rescind its previous commitment to transparency. Arguing that it selectively waived the privilege only for the Report itself and not for any related or underlying materials, Penn State argues that the Estate of Coach Paterno and the others defamed by the Report are prohibited from examining the basis for its allegations. In doing so, Penn State is not only attempting to use the attorney-client privilege and the work product doctrine improperly as both a shield and a sword, it is also urging the Court to cast aside the principles of fair play on which our justice system depends. Having publicly released the results of the Freeh Firm's investigation, which was used by the NCAA and Penn State for their own purposes and to the severe detriment of plaintiffs-appellees, Penn State is now seeking to block any effort to understand who was involved in developing the Freeh Report, who influenced its conclusions, and what — if anything — provided the basis for its scurrilous conclusions.

The trial court did not abuse its discretion in rejecting Penn State's duplicitous position. As the court recognized, Penn State waived the attorney-

client privilege by allowing the Freeh Firm to share information about the investigation with the NCAA and the Big Ten, not to mention the underlying information that it chose to release to law enforcement during the investigation. Moreover, the court correctly concluded that Penn State's efforts to selectively waive the privilege by releasing the Report publicly resulted in a subject matter waiver; Penn State should not be permitted to wield the Freeh Report as a weapon for its own public relations purposes while simultaneously shielding the Report from scrutiny. The court also concluded that the attorney-client privilege and the work product protection do not apply because it was understood from the beginning that the Freeh Report would be publicly released. Having chosen to make the Freeh Report public before even reviewing it, and having expressly waived any privilege with regard to the matters covered by the Report, Penn State could not prevent the people attacked in the Report from defending themselves and seeking to discover the factual basis for the Report and the full nature of the investigation underlying its claims.

STATEMENT OF THE CASE

A. The Freeh Report

On November 4, 2011, the Attorney General of Pennsylvania charged Jerry Sandusky, a former assistant football coach, with horrific crimes relating to child abuse. Following a jury trial, Sandusky was convicted and, on October 9, 2012, sentenced to 30 to 60 years in prison. *See Jerry Sandusky sent to prison*, Associated Press (Nov. 1, 2012), *available at* http://espn.go.com/college-football /story/_/id/8577643/jerry-sandusky-moved-prison-death-row-inmates.

The NCAA had no authority to investigate that criminal matter. Nonetheless, the NCAA decided to leverage the situation to its own advantage. Within days of the announcement of charges against Sandusky, the NCAA notified Penn State that it would open an investigation into Penn State's exercise of institutional control over its athletic programs and that it expected Penn State's complete cooperation. Over time, the NCAA repeatedly threatened Penn State with exclusion — the "death penalty" for a college athletic program — and enormous other sanctions if the University did not come to heel.

Around the same time, faced with a serious public relations problem, the Penn State Board of Trustees formed a Special Investigations Task Force. In November 2011, the Task Force engaged the Freeh Firm to conduct an "independent, full and complete investigation of the recently publicized allegations

. . . and the alleged failure" of certain Penn State personnel to respond to and report allegations against Sandusky. Specifically, Penn State retained the Freeh Firm to prepare a report that would assess and publicly disclose certain information, including "(i) failures that occurred in the reporting process; (ii) the cause for those failures; (iii) who had knowledge of the allegations of sexual abuse; and (iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff." R.32, Engagement Letter. In addition, the Freeh Report would "provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again." *Id.*

From the outset, everyone understood that the Freeh Firm's investigation and its subsequent Report would be out of Penn State's control and released to the public. Penn State said so directly when it announced the hiring of the Freeh Firm. *See* Penn State Press Release, *Former FBI director Freeh to conduct independent investigation* (Nov. 21, 2011) ("PSU Press Release"), *available at* http://news.psu.edu/story/153530/2011/11/21/former-fbi-director-freeh-conduct-independent-investigation ("The special committee and Freeh said that the findings and recommendations of this work, when completed, will be made available to the public."). In announcing Penn State's decision to conduct a public investigation, Trustee and Task Force Chairman Kenneth C. Frazier emphasized that "Freeh has complete rein to follow any lead, to look into every corner of the University to get

to the bottom of what happened and then to make recommendations that ensure that it never happens again." R.99. Consistent with that mandate, and far from any normal relationship between a client and outside counsel, the Freeh Firm was allowed to operate with "total independence" from Penn State. R.99, 100. It was also authorized to share (and ultimately did share) the information it gathered and the results of its investigation with law enforcement agencies. R.99, 361.

The NCAA took advantage of this situation. Although the Freeh Firm operated independently from Penn State, the NCAA (and the Big Ten) influenced the Freeh Firm's investigation and shaped its report. It is clear that, even though Penn State is resisting discovery into the full extent of their interactions, Freeh and his team coordinated closely with both the NCAA and the Big Ten throughout the investigation. R.357.

In July 2012, Freeh published a 150 plus page Report that had never been shared with — much less studied by — the officials at Penn State who retained him. The Report boasted that it was revealed "to the Board of Trustees and the general public at the same time." R.100. Mr. Freeh held a televised press conference to discuss the Report. And the Report specifically stated that it was being publicly released "pursuant to the appropriate waiver of the attorney-client privilege by the Board." R.98.

The Report asserted that Coach Paterno and other top University officials were guilty of horrific misconduct — concealing, facilitating, and allowing over a decade of child abuse. R.102. The Report claimed, among other things, that Coach Paterno and other officials had known about Sandusky's conduct before Sandusky retired as an assistant coach in 1999 but failed to take action. R.105. According to the Report, Penn State officials, including Coach Paterno, concealed critical facts relating to Sandusky's abuse from authorities, the Penn State community, and the public at large. The Report claimed that these individuals "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program." R.103.

The Freeh Report was a shoddy, unprofessional piece of work that has since been thoroughly discredited, including in public statements by the new President of Penn State. *See, e.g.*, *PSU prez: Not a fan of Freeh Report*, Associated Press (Jan. 29, 2015), *available at* http://espn.go.com/college-football/story/_/id/12244739 /penn-state-president-says-freeh-report-sandusky-scandal-not-useful. In its rush to judgment, the Report's authors did not interview crucial individuals with knowledge of the relevant facts. R.100. Individuals named in the Report, who were accused of being significantly involved in alleged misconduct, were not given

any opportunity to be heard or to challenge its conclusions. The Freeh Firm did not complete a proper investigation, failed to interview key witnesses, and instead of supporting the Report's conclusions with evidence, relied heavily on speculation and innuendo.

The Report also relied on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided. R.97–98. And its main conclusions were either unsupported by evidence or supported by only anonymous, hearsay information. Prominent experts have concluded that the Report was deeply flawed and that many of its key conclusions were wrong, unsubstantiated, and unfair. *See, e.g.*, Armen Kateyian, *Sandusky Prosecutors: Penn State Put School's Prestige Above Abuse*, CBS News (Sept. 3, 2013), *available at* http://www.cbsnews.com/8301-18563_162-57601201 (no evidence supported conclusion that Coach Paterno concealed Sandusky's crimes, according to the chief prosecutor in the case against Sandusky); Dick Thornburgh, *Review of the Freeh Report Concerning Joseph Paterno* at 4–5, 34 (Feb. 6, 2013), *available at* http://paterno.com/resources/docs/thornburgh_final_report_2-7-2013.pdf (the Report was a "rush to injustice" and its conclusion "that Mr. Paterno lacked empathy for the victims of Mr. Sandusky's abuse is unfounded and offensive").

Having coordinated closely with the Freeh Firm throughout the investigation, the NCAA moved quickly to capitalize on the Report as part of its own carefully crafted public relations campaign. Instead of helping to uncover the truth, the NCAA and its leadership viewed the Sandusky scandal and the Freeh Report as an opportunity: to deflect attention from mounting criticisms of the NCAA, to shore up the NCAA's faltering reputation, to broaden the NCAA's authority far beyond its defined limits, and to impose enormous monetary sanctions for its own benefit.

Although the NCAA ordinarily takes years to conduct and complete an investigation, and although the Freeh Report did not come close to satisfying the basic investigative requirements of the NCAA's own rules (and did not even purport to address any NCAA rule or regulation), the NCAA moved to sanction Penn State almost immediately after the Freeh Firm released its Report by imposing a binding Consent Decree on Penn State based on the Report's findings. The Consent Decree, with the full force of the NCAA behind it, claimed that certain parties (including plaintiffs) were guilty of covering up decades of horrendous child abuse. Violating its own rules, the NCAA stripped those parties of their rights to challenge the Consent Decree's conclusions. Nonetheless, NCAA President Emmert considered the Freeh Report "to be more than sufficient to impose" penalties. *See* Erin Burnett OutFront, *Interview of Mark Emmert*, CNN

(July 23, 2012), *available at* http://www.cnn.com/TRANSCRIPTS/1207/23/ebo.01.html. As the NCAA intended, the Consent Decree was extensively discussed by the national television, radio, and print media. And although it is unfair and wrong, the Consent Decree destroyed the reputations of the innocent people it blamed and whose conduct it claimed justified massive penalties.

B. This Litigation

Plaintiffs-Appellees brought this lawsuit to redress the enormous damage that the NCAA's wrongful actions have inflicted on their reputations and the Penn State community, and to shine a light on the truth that the NCAA, working with the Freeh Firm, has tried to distort and conceal. *See* Second Amended Complaint ¶¶ 1, 87–88.

To defend themselves against the unfair and defamatory conclusions published in the NCAA-imposed Consent Decree, and to prove their claims of commercial disparagement, defamation, interference with contract, and conspiracy, plaintiffs sought discovery into the Freeh Report. In particular, plaintiffs wish to learn who was involved in preparing the Report, who influenced its reckless conclusions, and what facts (if any) provided a basis for those conclusions. Plaintiffs thus sought communications between the Freeh Firm or the Freeh Group and the NCAA regarding Joe Paterno or the other plaintiffs, *see* R.25, communications between the Freeh Firm or the Freeh Group and Penn State, *see*

R.26, documents maintained in the Freeh Firm's files, *see id.*, and documents relating to the basis for the Freeh Report's conclusion that Coach Paterno, among others, "failed to protect against a child sexual predator harming children for over a decade," *id.* Plaintiffs began that process more than a year ago, in February 2014, by serving a notice of intent to issue a subpoena on Pepper Hamilton LLP (the law firm that Freeh and other members of the Freeh Firm joined after issuing the Report). R.15.

Faced with the prospect that the plaintiffs might look behind the scandalous statements in the Consent Decree, Penn State's earlier commitment to transparency and public disclosure evaporated. Under pressure from the NCAA, which even in this litigation has continued to threaten Penn State with the death penalty, and desperate to prevent any inquiry into the Freeh Report, Penn State asserted extensive objections, including the attorney-client privilege and attorney work product protection. Notably, Penn State asserted those objections wholesale, making no effort to produce a privilege log or to identify any particular documents that it claimed were privileged or protected. R.382. In short, having used the Report for its own public-relations reasons, and having allowed the NCAA to use the Report as a basis for publicly skewering Coach Paterno and other former leaders of the University, Penn State sought to drop an Iron Curtain around the

Freeh Firm's work, invoking the privilege as a wholesale shield to prevent any meaningful examination of the Report's contents.

Recognizing Penn State's gambit, the trial court overruled nearly all of Penn State's objections. It first held that Penn State had waived the attorney-client privilege. The court observed "that the Freeh Firm was communicating with third parties during the investigation — specifically, the Big Ten Athletic Conference and the NCAA," and that "[i]t is unquestioned that . . . with respect to all documents — source and non-source — that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived." PSU Br., Ex. A, at 21–22. The court also held that "voluntary disclosure waives the privilege as to remaining documents of that same subject matter." *Id.* Even if Penn State had not waived the privilege, the trial court held that the attorney-client privilege did not apply in the first place because Penn State had not engaged the Freeh Firm to provide legal services. *Id.* at 20. The trial court rejected Penn State's assertion of work product protection because the work product doctrine must be asserted by the professional and because the Freeh Report was not prepared in anticipation of litigation. *Id.* at 22–23. Penn State appealed the trial court's ruling to this Court, and filed a statement of matters complained of on appeal in the trial court. PSU Br., Ex. B.

After the trial court's ruling, plaintiffs promptly served the subpoena on Pepper Hamilton. R.430. Pepper Hamilton refused to comply and instead moved for a stay pending a ruling on Penn State's appeal. R.415. In its request for a stay, Pepper Hamilton purported to raise a work product objection, even though it had not served a response to the subpoena in which it could assert that objection. *See* R.422, Mot. for Stay Pending Appeal and for Protective Order. Consistent with Penn State's blanket approach, Pepper Hamilton made no effort to log the specific documents that it contended qualified as work product.

On November 20, 2014, the trial court denied Pepper Hamilton's request for a stay. R.440. In another opinion two weeks later, the trial court explained that "[b]ecause Pepper Hamilton did not attempt to assert their work product doctrine privilege until after the instant appeal was filed, this Court has not had the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal." PSU Br., Ex. C, at 4. Pepper Hamilton appealed the trial court's ruling, but neither Pepper Hamilton nor Penn State requested a stay from this Court. Nevertheless, after its stay motion was denied, Pepper Hamilton continued to refuse to comply with the subpoena. On December 16, 2014 — three months after service of the subpoena, two months after the extended return date, and a month after the trial court denied Pepper Hamilton's motion for a stay — Pepper Hamilton filed an untimely written response objecting to the subpoena.

Meanwhile, in connection with the resolution of another lawsuit involving the NCAA and Penn State, the Consent Decree that incorporated the findings of the Freeh Report was repealed. That resolution, however, did not repudiate the Freeh Report or criticize any aspect of it. Nor did it apologize or provide any remedy for the NCAA's egregious and unlawful misconduct. Although the sanctions on Penn State have been lifted going forward, the NCAA made sure that the substantial harms inflicted on the plaintiffs remain unaddressed. In fact, on April 29, 2015, in its filing of a New Matter in this case below, the NCAA asserted that the statements in the Consent Decree based on the Freeh Report were true or substantially true.

SUMMARY OF ARGUMENT

The trial court's decision should be affirmed and the subpoena enforced because Penn State deliberately and strategically waived any privilege or protection that might once have applied. The Freeh Report expressly states that it was released to the public because Penn State waived the attorney-client privilege. And Penn State authorized the Freeh Firm to disclose information to law enforcement authorities, which Freeh did. If that were not enough to establish waiver, the Freeh Firm also shared information about the investigation with the NCAA and the Big Ten, which were not its clients. Penn State allowed those disclosures because they served the institution's public relations interests, including kowtowing to the NCAA, portraying itself as undergoing a period of self-reflection, and scapegoating others (including plaintiffs in this case).

Having expressly waived the attorney-client privilege and the work product protection for its own advantage, Penn State is now trying to prevent those unjustly maligned from challenging the bases for the Freeh Report, which served as the justification for the NCAA's unlawful Consent Decree. But if one principle of privilege law is clear, it is that the attorney-client privilege may not be used as both a sword and a shield. When a party elects to disclose *some* privileged information in order to launch attacks on another party, elementary notions of fairness demand that the party must disclose all communications regarding the subject-matter of

what was disclosed. It is outrageous for Penn State to attempt to prevent plaintiffs from defending themselves.

Even if Penn State had not waived the attorney-client privilege and the work product protection, neither would apply in the circumstances of this case. The attorney-client privilege protects only *confidential* communications, and the Engagement Letter and the Freeh Report both make clear that Penn State always intended to release the Report and its findings to the public. Moreover, Penn State did not engage the Freeh Firm for the purpose of securing legal advice; it hired the Freeh Firm to investigate failures in the University's reporting processes, to make independent findings, and to propose the Freeh Firm's independent recommendations for preventing those failures from happening again. Neither the attorney-client privilege nor the work product doctrine is relevant to that arrangement.

Even if Penn State had not waived it, the work product protection would not apply either, and certainly does not provide a blanket basis for withholding the information sought. The Freeh Report was not created in anticipation of litigation; it was a public relations document designed to placate the NCAA and to demonstrate to the public that Penn State was doing something about Sandusky's crimes. And neither Penn State nor Pepper Hamilton has made any effort to demonstrate which documents, if any, subject to the subpoena could possibly

constitute proper "work product." In Pennsylvania, moreover, the documents must be created in anticipation of the same litigation in which they are sought, and there is no suggestion that the Freeh Firm generated its Report in anticipation of *this* litigation. Finally, Penn State cannot assert the work product protection because that protection belongs to the professional, not to the client.

STANDARD OF REVIEW

The "question of '[w]hether attorney-client privilege protects a particular communication from disclosure is a question of law.'" *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 581 (Pa. Super. 2007) (citations omitted). But where, as here, a party has not filed a privilege log or claimed protection for any particular communication or document, but is instead seeking a blanket protection for an entire category of documents, the trial court's discretion to control the discovery process should be respected. *See generally Schenck v. Twp. of Ctr., Butler Cty*, 975 A.2d 591, 597 (Pa. 2009) (Saylor, J., dissenting from dismissal of appeal as improvidently granted) ("few courts have been willing to accept blanket assertions of privilege with respect to an entire category of information"); *see also* Pa. R. Civ. P. 4009.12(b)(2). "Generally, in reviewing the propriety of a discovery order, [this Court's] standard of review is whether the trial court committed an abuse of discretion." *Gallo v. Conemaugh Health Sys., Inc.*, ___ A.3d ___, 2015 WL 1743117, at *2 (Pa. Super. Apr. 17, 2015) (internal quotation marks omitted); *see also Commonwealth v. Melvin*, 103 A.3d 1, 35 (Pa. Super. 2014).

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion In Concluding That Penn State Waived the Attorney-Client Privilege and Work Product Protection.

Although Penn State does not bother to address the issue until the last three pages of its brief, the key issue in this appeal is Penn State's knowing and deliberate waiver of the attorney-client privilege and the work product protection. By hiring a firm to conduct an "independent" investigation that it committed would become public, and then by making multiple, voluntary disclosures for its own benefit, Penn State repeatedly and deliberately waived any privilege that might arguably have protected the documents and information assembled in connection with the Freeh Report. Well-established principles of privilege law, not to mention elementary notions of fairness, prevent Penn State from parading the Freeh Report's defamatory conclusions in front of the trial court and the public while depriving those unfairly maligned by the Report of discovery relevant to challenging the basis for it.

A. Penn State Repeatedly and Deliberately Waived the Attorney-Client Privilege and Work Product Protection.

"A privilege can be waived," *Commissioner v. T.J.W.*, __ A.3d __, 2015 WL 1874596, at *4 (Pa. Super. Apr. 24, 2015), and there is no doubt that it was waived here. The Freeh Report expressly states that it "sets forth the essential findings of the investigation, *pursuant to the appropriate waiver of the attorney-client privilege by the Board.*" R.98 (emphasis added). The Report also discloses that Penn State authorized the Freeh Firm to turn over "any discovered evidence of criminality to the appropriate law enforcement authorities" without any advance review from Penn State. R.33, Engagement Letter. Acting under that authority, the Freeh Firm did not hesitate to disclose e-mails from senior University officials to law enforcement. R.99, Freeh Report.

The widely disseminated Consent Decree imposed by the NCAA recognizes that Penn State waived the attorney-client privilege. Lauding Penn State's cooperation, it says that "[t]he University has never before had NCAA major violations, accepted these penalties and corrective actions, has removed all of the individual offenders identified by [the Freeh Firm] from their past senior leadership roles, has itself commissioned the [Freeh Firm] investigation and provided unprecedented access and openness, in some instances, *even agreed to waive attorney-client privilege*, and already has implemented many corrective actions." Consent Decree at 4 (July 23, 2012), *available at* http://s3.amazon

aws.com/ncaa/files/20120723/21207236PDF.pdf (emphasis added). Penn State has nothing to say in response to any of these waivers.

The Freeh Firm also shared information about the investigation with non-clients, including law enforcement officials, the NCAA, and the Big Ten. The Freeh Firm's engagement letter reserved to the firm, and the firm alone, the right to disclose any information that it thought would be relevant to law enforcement. R.33. And although Penn State insists that the record contains no evidence that the Freeh Firm "shared *even one* otherwise privileged document with either the NCAA or the Big Ten," PSU Br. 36, that is an extraordinary and implausible claim. A letter from Big Ten Commissioner James E. Delaney to Penn State's President refers to "an agreeable process of collaboration on *gathering and sharing information*" between the NCAA and the Freeh Group, and notes the Big Ten's expectation that it "will be accorded the same treatment as the NCAA in this collaborative process." R.357, Ltr. from Comm. J. Delany to R. Erickson (Dec. 8, 2011). Moreover, Penn State has failed to identify any "otherwise privileged document" that it contends existed, asserting instead that "[t]he Requests in the subpoena [to Pepper Hamilton] all seek, to some extent, the production of documents that are protected from discovery by virtue of the attorney-client privilege and the work product doctrine." R.45.

Penn State and the Freeh Firm's repeated disclosures waived both the attorney-client privilege and work product protection. "[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. 2001); *see also Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005) ("the work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived"). For these reasons, the trial court was correct that "[a] client disclosing protected communications to a third party has long been considered inconsistent with an assertion of the privilege." PSU Br., Ex. A, at 21.

B. Subject-Matter Waiver is Appropriate Because Penn State Cannot Use The Privilege As Both a Sword and a Shield.

As the trial court recognized, Penn State's selective disclosures were part of a deliberate and carefully planned strategy. In "one of the most difficult periods in the University's history," PSU Br. 3–4, and in an effort to placate the NCAA and others, Penn State sought to highlight the independence of the Freeh Firm's investigation and its review of allegations of child abuse on the University campus. Any effort to limit or control what the Freeh Firm could share — a step that would have been taken if the report had been prepared for litigation purposes — would have undermined that strategy. Instead, the broad scope of the Freeh Firm's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing the investigation: "'No one is above scrutiny,' Frazier said," and he

"assured the Special Investigative Counsel that the investigation would be expected to operate with *complete independence* and would be empowered to investigate University staff, senior administrators, and the Board of Trustees." R.99, Freeh Report (emphasis added). The "independent" Freeh Report became the basis for the NCAA-imposed Consent Decree, which announced to the world that it was pinning the blame for Sandusky's crimes on Coach Paterno and others in the Penn State community.

In a cruelly ironic twist, Penn State's commitment to transparency — which served the University's and the NCAA's purposes for almost three years — has now disappeared. Having used the Freeh Firm's work to try, convict, and sentence Coach Paterno and others in absentia "without subpoena power, without identifying accusers, without guidance from sexual abuse experts, without putting anyone under oath and without testimony from Joe Paterno or anyone speaking in his defense," *see* Joe Posnanski, *What's in a Name? Joe Paterno's family won't quit the fight to restore his legacy*, NBC Sports (Apr. 21, 2015), *available at* http://sportsworld.nbcsports.com/joe-paterno-family-fight-after-penn-state-scandal/, Penn State now seeks to block any review of the Report's factual basis.

But Penn State cannot avoid the consequences of its strategic decision to publicize the Freeh Report and use it as a sword for its own public-relations purposes. "A litigant attempting to use attorney-client privilege as an offensive

weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007). The trial court therefore did not abuse its discretion in holding that "the scope of an attorney-client privilege waiver applies to the subject-matter of the privileged documents disclosed" and that "voluntary disclosure waives the privilege as to remaining documents of that same subject matter." PSU Br., Ex. A, at 21–22.

That principle is fundamental to our legal system. While the attorney-client privilege is "deeply rooted in our common law" and "the most revered of our common law privileges," *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (internal quotation marks omitted), the waiver doctrine is just as well entrenched. When a party selectively discloses privileged information in an effort to obtain a tactical advantage, fairness requires giving the injured party access to the information. *See, e.g., Adhesive Specialists, Inc. v. Concept Scis. Inc.*, 59 Pa. D. & C. 4th 244, 263 (C.C.P. 2002) ("delivery of [an internal] memorandum to the Pennsylvania State Police constituted a voluntary disclosure to a third party" and "a waiver of the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else"); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C. 4th 1, 18–21 (C.C.P. 1995) (voluntary disclosure of

confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject).

The federal courts of appeals unanimously agree with Pennsylvania on this basic principle of privilege law. In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, for example, the Sixth Circuit held that "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." 293 F.3d 289, 303 (6th Cir. 2002) (internal quotation marks omitted); *see also Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *United States v. Mass. Inst. of Tech*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage"); *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (noting that disclosure to a third party

usually waives privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (holding that waiver or privilege as to one party serves to waive as to others); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and extending the waiver to the work-product doctrine).

In the face of this overwhelming authority, Penn State argues that the subject-matter waiver doctrine does not apply because the Estate has purportedly failed to show that the selective disclosures were made "to achieve a tactical advantage in any litigation." PSU Br. 37. That is both wrong and irrelevant.

It is wrong because Penn State has relied on the Freeh Report as a principal defense *in this litigation*; acting in concert, the NCAA, Penn State, and other defendants have used the Report to justify the egregious actions taken against plaintiffs. *See, e.g.*, NCAA Reply in Supp. Prelim. Objs. at 4 ("To date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report."). Moreover, to avoid liability and to keep the litigation focused on the NCAA, Penn State has refused to take any position on the factual validity of the Freeh Report's findings, asserting "that it accepted the Freeh Report for the purposes of the Consent Decree only and agreed to the Consent Decree to avoid harsher sanctions [imposed by the NCAA], including a possible 'death penalty' . . . ." PSU Answer ¶ 70.

It is irrelevant because the subject-matter waiver doctrine applies whenever a party attempts to use selective disclosure as an offensive weapon; it is not limited to the narrow situation where the disclosing party sought to obtain a tactical advantage in litigation. *See In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that privilege can be waived when a party "made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). By asserting the privilege as a weapon against Coach Paterno for its own public-relations purposes and as a shield to resist discovery into the Freeh investigation, Penn State runs afoul of one of the most fundamental principles of fairness that informs the law of privilege. *See* R.441, Opinion and Order Regarding Stay During Appeal ("Because Penn State is attempting to invoke the Attorney-Client privilege as both a shield and sword, *Murray [v. Gemplus Int'l]* is applicable[.]").

Penn State's refusal to acknowledge this point underscores why its reliance on *Bagwell v. Pennsylvania Department of Education* is so misplaced. That case involved a Pennsylvania Open Records Act request for certain information related to Sandusky's crimes. Although the Commonwealth Court declined to find that Penn State's selective waivers of confidentiality resulted in a subject-matter waiver, the court took pains to emphasize that there Penn State was "not using its selective disclosures as weapons to the detriment of Requester. Unlike a party

seeking waiver of the privilege in a discovery dispute or otherwise in litigation, Requester claims no punitive effect from [Penn State's] selective disclosure." 103 A.3d 409, 419 (Pa. Commw. 2014). The court accordingly reasoned that "the 'fairness' reasons for imposing a broad subject-matter waiver do not exist here." *Id.*

In this case, fairness concerns point emphatically in the other direction. Indeed, if there is any case where fairness requires subject-matter waiver, it is this one. By knowingly and publicly disclosing information about the Freeh investigation and Report for its own tactical purposes and to the extreme prejudice of Coach Paterno and other plaintiffs, Penn State waived both the attorney-client privilege and the work product protection with respect to the subject-matter of the Freeh investigation. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d at 184 (privilege waived "where a corporation has disseminated information to the public that reveals parts of privileged communications or relies on privileged reports"). Courts have repeatedly recognized this common sense distinction, ordering the production of documents when entities publicly release otherwise confidential information and declining to order production when they do not. *Compare Allied Irish Banks, p.l.c. v Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y. 2007) (bank ordered to produce documents generated during internal investigation of fraudulent trading scheme by one of its traders when bank announced report of investigation

at press conference and published the report to address critical public accountability concerns and restore confidence for customers and shareholders), *with In re General Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015) (materials related to internal investigation into company's product defect and recall are privileged when report was presented confidentially to GM Board of Directors and not used affirmatively ("as a sword"), even though the report ultimately had to be disclosed in federal investigation and later in civil litigation).

II. Even if Penn State Had Not Waived the Privilege, the Attorney-Client Privilege Does Not Apply.

Because Penn State waived any privilege, there is no need to inquire into whether the attorney-client privilege applies in the first place. But even if an inquiry were appropriate, it is clear that the privilege does not apply. Penn State failed to properly invoke the privilege, as it did not provide a privilege log explaining the basis for its efforts to withhold particular documents. R.382; *see T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party invoking the privilege has the burden to "produce sufficient facts to show that the privilege was properly invoked") (internal quotation marks omitted). Moreover, as discussed below, the Freeh Report was never intended to be confidential and the Freeh Firm was not retained to provide confidential legal advice.

A. The Freeh Report Was Not Intended to Be Confidential.

Penn State's efforts to cover up the factual bases for the Freeh Report run afoul of the basic principle that the attorney-client privilege protects only *confidential* communications. "[I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect *confidential* client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011) (emphasis added). "Application of the privilege requires *confidential* communications made in connection with providing legal services." *Joe*, 782 A.2d at 31 (emphasis added); *see also Commonwealth v. Boyd*, 580 A.2d 393, 394 (Pa. Super. 1990) (per curiam) ("the attorney-client privilege is confined to confidential communications").

Penn State's opening brief makes no effort to dispute that Penn State always intended to reveal the Freeh Report and its findings to the general public. That is dispositive. The point of the Report was to prove to the world that Penn State was engaged in a transparent process of self-review and reflection. The process was *so* public, in fact, that the Freeh Firm emphasized that it "revealed this report and the findings herein to the Board of Trustees and the general public at the same time," R.100, and noted that the Freeh Firm "operated with total independence as it conducted this investigation." R.99. Penn State never had any say about what

would go into the Report, and it was understood that Freeh could investigate whatever he wished and disclose whatever he investigated.

That theme of transparency and public disclosure — and the concomitant lack of confidentiality — was consistent throughout the investigation. On November 21, 2011, Penn State issued a press release announcing that the Board of Trustees had engaged "Louis J. Freeh to lead an *independent* investigative review into all aspects of the University's actions. . . . The Special Committee and [Judge] Freeh said that the findings and recommendations of this work, when completed, *will be made available to the public.*" PSU Press Release. Six months later, the Chairman of the Task Force reiterated Penn State's intention to disclose the "full findings and recommendations" in the Report to the public. R.361–62. Having boasted repeatedly about commissioning a public report that was outside Penn State's power to control, Penn State cannot now insist on confidentiality.

For this reason, *amicus* Association of Corporate Counsel's concern that the trial court's decision will threaten "the ability of organizations — including universities, corporations, non-profit associations, *etc.* — to conduct internal investigations into alleged misconduct" is wildly mistaken. *Amicus* Br. 1. One is forced to wonder if the Association even bothered to read the trial court's opinion or the Freeh Report itself before submitting its amicus brief. Confidential internal investigations are not typically undertaken for public-relations purposes or to

publicly target defenseless third parties. Organizations that conduct proper internal investigations do not authorize the investigators to release their findings publicly and to law enforcement officials without any client review. Nor do they allow other interested parties access to or input into the process.

Certainly, companies commissioning proper internal investigations do not selectively waive the privilege to pin blame on third parties, and then assert the same privilege as a defense when those third parties try to defend themselves. *See In re Columbia/HCA*, 293 F.3d at 303–05 (recognizing the decision to waive attorney-client privilege or attorney work product as tactical decisions, and rejecting the need for selective waivers to encourage corporate self-policing and cooperative exchanges of information with the Government). The unique circumstances of this case pose no threat to the ability of "organizations and their employees" to "communicate fully and candidly with their attorneys." *Amicus* Br. 8. The trial court's decision recognizes simply that if an organization chooses to retain a firm to prepare a non-confidential report that is publicly released, neither the report nor the facts allegedly supporting it are privileged.

B. Penn State Did Not Hire the Freeh Firm to Provide Legal Advice.

Even if Penn State had intended to keep the Freeh Report confidential, it was not the kind of legal advice that is protected by the attorney-client privilege. Although the Report asserts that information "was gathered under the applicable

attorney-client privilege and attorney work product doctrine," R.97, those privileges do not apply merely because information is gathered by a law firm conducting an investigation. Nor do they attach simply because a document or party says they do.

The attorney-client privilege extends only to confidential communications between a client and her attorney in connection with providing legal services or advice. 42 Pa. C.S.A. § 5928; *see also Nationwide Mut. Ins. Co.*, 924 A.2d at 1264. The party asserting the privilege has the initial burden to prove that it is properly invoked. *Joyner v. Se. Pa. Transp. Auth.*, 736 A.2d 35, 38 n.3 (Pa. Commw. 1999). Moreover, the privilege protects only disclosure of communications, not the disclosure of underlying facts. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 392 (W.D. Pa. 2005).

Penn State has not come close to satisfying its burden. The Report was not a legal document in the slightest; it was an effort to satisfy the NCAA and the public by providing a public mea culpa and by scapegoating Coach Paterno and other senior University officials. The investigation Penn State commissioned the Freeh Firm to do, and the recommendations the Freeh Firm made, could just as easily have been performed by former law enforcement officials, educators, and other non-lawyers. Both the Engagement Letter and the Report itself make this clear.

Although Penn State emphasizes that the Engagement Letter sprinkles references to "legal services" throughout, *see* PSU Br. 32, the Scope of Engagement Section belies that characterization:

> [The Freeh Firm] has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of [The Freeh Firm's] investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. . . . The report will contain [The Freeh Firm]'s findings concerning: i) failures that occurred in the reporting process; ii) the causes for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. [The Freeh Firm]'s report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not happen again.

R.32. As the trial court aptly observed, "[a]t no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." PSU Br., Ex. A, at 20.[2]

The Freeh Report itself is in accord. It declares that Penn State hired the Freeh Firm to investigate past conduct and make recommendations for reforms. In a section entitled "Scope of Review and Methodology," the Report explains that

[2] Penn State contends that the trial court's conclusion that the Freeh Group was providing legal services to Penn State is an "inaccurate assumption." PSU Br. 34. But that conclusion is based directly on the language of the engagement letter: "*For the purpose of providing legal services to the Task Force*, [the Freeh Firm] will retain Freeh Group International Solutions, LLC (FGIS") to assist in this engagement." PSU Br., Ex. A, at 20 (emphasis added).

the Freeh Firm "was asked to perform an independent, full and complete investigation of: The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ("Sandusky"); [and] [t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth." R.96. The Report made its recommendations public. *See* R.215–32, Freeh Report Ch. 10 ("Recommendations for University Governance, Administration, and the Protection of Children in University Facilities and Programs."). And nothing in the Report suggests that Penn State hired the Freeh Firm to provide confidential legal advice.

III. Even if Penn State Had Not Waived the Protection, The Work Product Protection Does Not Apply.

Penn State also claims sweeping protection under the attorney work product doctrine. Penn State's waiver of any work product protection aside, the work product doctrine would not apply in any event (and certainly not as a wholesale excuse not to produce the documents and materials subject to the subpoena). The Freeh Firm's work and files encompass far more than "work product"; moreover, the Freeh Report was not prepared in anticipation of litigation and manifestly not in anticipation of *this litigation*, where the information is especially relevant. Finally, under Pennsylvania law, Penn State does not have the right to assert the privilege on Pepper Hamilton's behalf.

A. The Freeh Firm's Files Are Not Work Product Prepared in Anticipation of Litigation.

In Pennsylvania, "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa. R. Civ. P. 4003.3. The work product protection is narrow: "work product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. 2000). "Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." Pa. R. Civ. P. 4003.3, Explanatory Note.

Given this narrow protection, there is little doubt that the vast majority of what the Estate seeks is not attorney work product. The Report describes its methodology as including over 430 interviews; review of 3.5 million pieces of electronic data and documents; review of applicable Penn State policies, guidelines, practices and procedures; and the establishment of a hotline to receive information relevant to the investigation. R.97. In particular, the Estate is entitled at least to the production of factual information that supports statements in the Report, as well as any signed witness statements in the Freeh Firm's files and any

other information that the Freeh Firm obtained from witnesses. Similarly, work product protection would not extend to the communications between the Freeh Firm, the NCAA, the Big Ten, Penn State, or others. "The 'protective cloak' of the qualified work product privilege 'does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'" *Commonwealth v. Harrell*, 65 A.3d 420, 431 (Pa. Super. 2013) (quoting *Commonwealth v. Brinkley*, 480 A.2d 980, 941 (Pa. 1984)); *see also Brinkley*, 480 A.2d at 983 (affirming a trial court's order to disclose "substantially verbatim statements of the witnesses.").

Nor does anything else mentioned in the Freeh Report qualify as attorney work product. The Report was an independent investigation that was to be used for public purposes. The Freeh Firm is not counsel to Penn State in any litigation, and did not purport to offer advice in the Report about any litigation. "[T]he work product doctrine seeks to promote the adversary system . . . 'by protecting the confidentiality of papers prepared by or on behalf of attorneys *in anticipation of litigation.*'" *Commonwealth v. Williams*, 86 A.3d 771, 782 n.7 (Pa. 2014) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 962 (3d Cir. 1997) (emphasis added). "The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *Levy*, 94 A.3d at 443 (internal quotation marks omitted).

"Rule 4003.3, on its overall terms, manifests a particular concern with matters arising in anticipation of litigation." *Gillard*, 15 A.3d at 59 n.16.

Penn State's principal response is that the work product doctrine applies because the Engagement Letter says it does. PSU Br. 21. If that were the rule, a party could shield anything from disclosure. But the question is not what a party unilaterally decrees, it is whether the work product protection applies in substance. Penn State struggles mightily to connect the Freeh Report to anticipated litigation, but it cannot escape the inconvenient fact that the Report was prepared for public consumption. It had nothing to do with strategy, tactics, or with "prepar[ing] [Penn State's] case" in anticipation of litigation. Indeed, publicly disclosing such a report would be an odd way to prepare for litigation. The engagement letter contains *no* reference to litigation. None of the circumstances cited by Penn State as evidence of the threat of litigation, *see* PSU Br. 26, is mentioned in the engagement letter, which provides that the Freeh Firm's "services are limited at this time to the specific matter described herein." R.32. And, in any event, this Court has held that materials that "pre-dated any litigation . . . fall outside any reasonable definition of the phrase 'acquired or developed in anticipation of litigation.'" *Katz v. St. Mary Hosp.*, 816 A.2d 1125, 1127 (Pa. Super. 2003) (citing *Neal by Neal v. Lu*, 530 A.2d 103, 108 (Pa. Super. 1987)).

Although Penn State is correct that the anticipation of litigation requirement is not a hard-and-fast rule, it is also forced to acknowledge that "the attorney work product doctrine is *especially protective* of material prepared by an attorney in anticipation of litigation." PSU Br. 25. Penn State's own cases, moreover, make clear that "the line between what work product is discoverable and what work product is protected is" drawn at matters involving "'value,' 'merit,' 'strategy,' or 'tactics,'" which "are protected unless they have evidentiary value." *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 30 (C.C.P. 1996). Penn State cannot reasonably contend that the Freeh Firm was strategically gathering information in order to defend Penn State against litigation, or that the Freeh Firm's files as a whole meet the stringent test. As the Report and Penn State have repeatedly declared, the point of the investigation and the Freeh Firm's work was to conduct an independent review into failures relating to Sandusky that would be disclosed in a public report.

B. The Work Product Protection Applies Only in the Litigation For Which the Materials Were Prepared And Must be Invoked by the Professional.

In Pennsylvania, "the protection found in Rule 4003.3 is applicable only to the litigation of the claim for which the impressions, conclusions and opinions were made." *Reusswig v. Erie Ins.*, 49 Pa. D. & C. 4th 338, 349 (C.C.P. 2000); *see also Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 249 (C.C.P. 2007)

(the "protections [recognized under Pennsylvania law] apply only to the litigation of the claims for which the impressions, conclusions, and opinions were made"); *Yohe v. Mut. Life Ins. Co.*, 7 Pa. D. & C. 4th 300, 303–04 (C.C.P. 1990); *Little v. Allstate Ins. Co.*, 16 Pa. D. & C.3d 110, 112 (C.C.P. 1980). Even if Penn State foresaw litigation on the horizon generally, that would still not provide a basis to resist disclosure in *this* case.

Moreover, "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Indep. Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003). It may also give way where the requesting party needs the requested material. *Lane v. Hartford Acci. & Indem. Co.*, 5 Pa. D. & C. 4th 32, 41–42 (C.C.P. 1990). "[W]ork product is discoverable where the legal opinion of an attorney or another representative is a relevant issue in an action . . . If legal opinions, conclusions, memoranda, notes or summaries, legal research or legal theories are specifically relevant to issues in a case, the requesting party is not even required to show undue hardship to obtain discovery elsewhere." *Executive Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410, 425–26 (C.C.P. 2006).

Here, the extensive scope of the investigation was cited as support for the authoritative nature of the Freeh Report. R.97–100. Plaintiffs-Appellees could not reasonably duplicate that effort in trying to determine the basis for statements in

the Report. Accordingly, for documents or information responsive to the subpoena that might arguably constitute work product, the protection should give way to the plaintiffs-appellees' substantial need for the requested information.

Finally, Penn State may not assert the work product privilege on Pepper Hamilton's behalf. In Pennsylvania, "the protection stemming from the work product doctrine belongs to the professional, rather than the client." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 866 (3d Cir. 1994). Penn State tries to distinguish *Rhone-Poulenc* on the grounds that there "the privilege was not the client's to *waive*." PSU Br. 24. But it would make no sense to hold that an assertion from both the attorney and the client is required to *waive* the protection, but an assertion by either alone is enough to *invoke* the protection. When it comes to a privilege or a protection, the party or parties who may waive it are the same as the party or parties who may invoke it.

Penn State claims that "this Court *regularly* entertains appeals from discovery ruling [sic] which a client-litigant — not the attorney — is asserting the attorney work product doctrine." PSU Br. 23 (emphasis in original). But none of those cases holds that the client may assert the work product protection in the absence of an assertion by the professional. Although Pepper Hamilton has now belatedly asserted work product on its own behalf and filed its own appeal to this Court, its claim for protection suffers from the same flaws as Penn State's. Indeed,

like Penn State, Pepper Hamilton has never identified or logged the specific documents that it claims warrant protection.

* * * *

Accepting Penn State's arguments and overruling the trial court in this case would not further the important policies that underlie the attorney-client privilege or the attorney work product doctrine. Those protections apply, as they should, in cases where parties undertake confidential investigations or retain outside counsel to provide legal advice in anticipation of litigation. But the only way to protect those privileges is to ensure that they are not abused or stretched to a breaking point in cases where they do not apply.

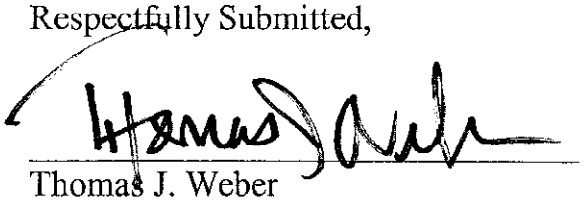
In this case, Penn State retained the Freeh Firm to undertake an independent investigation over which Penn State relinquished control and to publish the results of that investigation in a public report that Penn State never reviewed and was subject to an express waiver of all applicable privileges. The Freeh Firm shared the results of its investigation with law enforcement authorities and with third parties, including the NCAA, and no one ever intended that the report would remain confidential. Moreover, Penn State has used that report for its own advantage and as a public relations document to appease the NCAA and to take blame away from the University as a whole by pinning it on Coach Paterno and other plaintiffs. In these circumstances, for all the reasons set forth above and as

the trial court correctly determined, Coach Paterno and the other plaintiffs are entitled to discovery into the Freeh Report and the bases for its outrageous conclusions.

CONCLUSION

The trial court's decision should be affirmed.

Respectfully Submitted,



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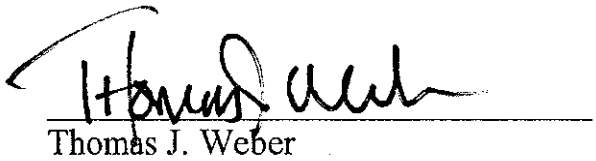
CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa. R. App. P. 2135(a)(1).



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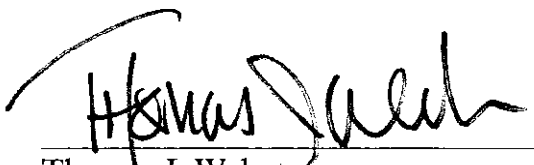

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IN THE

Superior Court of Pennsylvania

No. 1709 MDA 2014

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

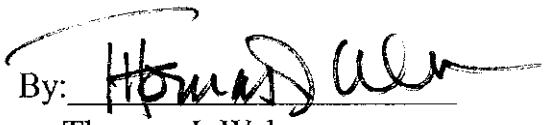
Defendant-Appellant.

APPELLEES' DESIGNATION OF RECORD EXCERPTS

Pursuant to Pennsylvania Rule of Appellate Procedure 2154, Plaintiffs-Appellees hereby designate the following materials for inclusion in the reproduced record:

1. Excerpts of Transcripts of 5/19/14 Hearing (pp. 111-122) ;
2. Plaintiffs' Response to Motion for Stay Pending Appeal, Exhibits C - I (10/23/2014);
3. Opinion and Order on Plaintiffs' Motion for Enforcement of Subpoena (May 8, 2015).

Respectfully submitted,

By: 

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Dated: May 11, 2015

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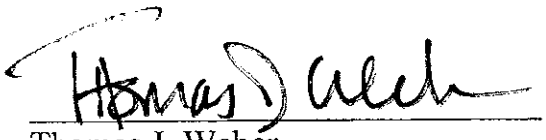

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Telephone: (202) 737-0500

Counsel for Plaintiffs-Appellees

EXHIBIT 21

From: Wisniewski, Drew (DC)
Sent: Tuesday, August 04, 2015 4:32 PM
To: jhwalker@kslaw.com
Cc: Kowalski, Brian (DC)
Subject: Paterno v. NCAA

Mr. Walker –

I spoke with Sam on Friday and he suggested that I reach out to you about the *Paterno* matter going forward. I wanted to introduce myself and touch base on a couple of issues that we talked about Friday.

Sam and I discussed the status of privilege logs for Jay Paterno, William Kenney, and the Estate. Sam said that the logs were being prepared. Please let me know when we can expect to receive these logs. In addition, my understanding is that the log for Jay Paterno will include any responsive communications involving Dan McGinn. Please confirm that is correct.

Second, I asked for any engagement letters with Messrs. McGinn, Berlin, and Clemente, which are non-privileged and necessary for us to assess plaintiffs' privilege claims. Could you please let us know when we should expect that production?

Regards,

Drew

From: Doran, Samuel [mailto:SDoran@KSLAW.com]
Sent: Friday, July 31, 2015 11:25 AM
To: Wisniewski, Drew (DC)
Subject: Paterno contact

Drew,

Here is contact info for Johnny Walker, who should be able to work with you going forward:

http://www.kslaw.com/people/Johnny-Walker

Best,

Samuel Doran
Associate

KING & SPALDING
T: +1 202.626.5517 | F: +1 202.626.3737 | E: sdoran@kslaw.com
1700 Pennsylvania Ave., NW | Washington, DC 20006

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EXHIBIT 22

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LATHAM & WATKINS LLP

November 16, 2015

VIA EMAIL

Patricia L. Maher
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Re: *Paterno, et al. v. NCAA, et al.*, Civ. No. 2013-2082

Dear Trish:

I am writing to follow up on various outstanding discovery requests. At the outset, however, I want to revisit an issue discussed some time ago regarding the time period for determining responsive documents for production. The NCAA's requests for the production of documents instructed Plaintiffs to produce documents created, used, sent or received from January 1, 2011 through present, unless otherwise noted. During our March 27, 2015 teleconference we agreed that Plaintiffs could, as an initial matter and to facilitate timely production of documents, produce documents for the time period of January 1, 2011 to May 30, 2013. At that time, the NCAA expressly reserved the right to seek full compliance with the discovery requests, including the production of documents after May 30, 2013. As discovery has progressed, it is now evident that documents created after May 30, 2013 are critical to evaluating the merits of certain of Plaintiffs' claims, such as the purported financial harm the Estate suffered from alleged commercial disparagement and Jay Paterno's and Bill Kenney's attempts to obtain employment since their termination at Penn State. Accordingly, identified in Exhibit A are a subset of prior NCAA requests directed to Plaintiffs, George Scott Paterno, or Mary Kay Paterno-Hort. We ask that these individuals comply fully with the NCAA's original requests and produce all documents responsive to those requests that were created in, used, sent or received ***through present.***[1] The NCAA is sensitive to imposing any burden on these individuals. As such, it has narrowly tailored the list of requests contained in Exhibit A.

---

[1] The NCAA has always expected William Kenney and Jay Paterno to produce documents through *present* that are responsive to the document requests propounded on October 16 and October 19, 2015, respectively. By the nature of the requests, we assume Plaintiffs understood that expectation. If Plaintiffs understood otherwise, then by receipt of this letter, please be advised of the intended time scope of these requests.

As the close of discovery is rapidly approaching, we request that such documents be produced within thirty (30) days, or by December 16, 2015.

In addition, there are various other outstanding discovery matters to address:

Agreement of Limited Partnership of JVP Properties, LP. At Mary Kay Paterno-Hort's deposition, you agreed to search for and produce a signed final version of the Agreement of Limited Partnership of JVP Properties (JVPE_NCAA_0002721). Please produce any signed final agreements from 2010 and 2012.

Jay Paterno's Production. Thank you for the materials Mr. Paterno recently produced, including the certification and privilege log. We are analyzing these materials and will follow up with any additional questions. In the meantime, we noted in an October 19, 2015 email that Jay Paterno states in the documentary *Happy Valley* that "Monday I spent eight hours going through [Clemente's work] and made a lot of notes and learned a hell of a lot." You did not respond to this email and Mr. Paterno has not produced these notes. Please confirm that they do not exist or promptly produce these notes.

William Kenney's Emails. We are still waiting to receive the email addresses for a few of Mr. Kenney's employment-related emails, which we requested on October 14, 2015. Last month, you indicated that Mr. Kenney is getting the information from his wife. We look forward to receiving this information in the near term.

Estate's Privilege Log. We have made repeated requests for the Estate to produce a privilege log. Most recently, on October 29, we again asked when we can expect to receive a log. We have not received a response. Please confirm by the end of the week that the Estate will produce a privilege log by December 4, 2015. Likewise, if Jay Paterno or Bill Kenney have withheld any other responsive materials not yet identified on a privilege log, please provide such log(s) at that time as well.

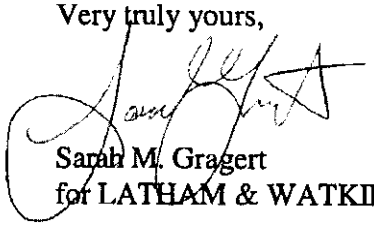
Scott Paterno's Documents. On October 29, you indicated that Scott Paterno's responsive texts would be ready for production the following week. We have not received this production. Please produce these materials by the end of the week.

Third Party Subpoenas. Thank you for serving us with a copy of Plaintiffs' recent subpoena for the production of documents to Penn State. We expect that Plaintiffs will provide to the NCAA any documents produced by Penn State in response to that subpoena, as well as documents produced by any other third party pursuant to a subpoena. Please advise us if you do not plan to do so.

* * *

We appreciate your continued willingness to work with us regarding discovery issues. If you have questions about any of the issues addressed above, please do not hesitate to call me directly.

Very truly yours,



Sarah M. Gragert
for LATHAM & WATKINS LLP

Exhibit A

Paterno Estate

REQUEST NO. 13:

All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, or Plaintiffs Al Clemens, Joseph V. Paterno, or William Kenney, including, without limitation, any public opinion surveys or polls.

REQUEST NO. 15:

All Communications Concerning the value of Coach Paterno's assets, financial net worth, or the financial net worth of Coach Paterno's Estate.

REQUEST NO. 21:

All Documents Concerning the actual or contemplated sale of any goods from which Coach Paterno or his Estate had a possibility of earning money or did earn money, from January 1, 2006 to present.

REQUEST NO. 22:

All draft and final contracts or agreements that had the possibility of generating income or other money for Coach Paterno or his Estate, including, without limitation, licensing contracts and contracts for television appearances, from January 1, 2006 to present.

REQUEST NO. 23:

All Communications regarding deliberations or negotiations about, the decision to enter into, the benefits of, or the terms of, any contract or agreement produced in response to Request No. 22.

REQUEST NO. 14[1]:

---

[1] This Request should have been numbered 24.

Documents sufficient to fully demonstrate the monthly and annual sales performance of all merchandise or other goods sold from which Coach Paterno or his Estate has a financial interest, including, without limitation, royalty or licensing payments from January 1, 2006 to present.

Jay Paterno

REQUEST NO. 13:

All Documents from January 1, 2000 to the present Concerning Your past and present efforts to secure employment or income as a football coach (whether as a head coach or in a subordinate role), media commentator, sports columnist, or any other position, including, without limitation, all draft and final job application materials such as cover letters and resumes, and any Communications with ESPN, CBS Sports, Fox Sports, the University of Colorado, Boston College, the University of Connecticut, James Madison University, or any other prospective employer.

REQUEST NO. 14:

All Communications Concerning open football coaching positions or Communications with other universities or schools Concerning football coaching employment.

REQUEST NO. 21:

All Documents Concerning Your evaluation or consideration of whether to run for public office or withdraw from a public office election race.

REQUEST NO. 22:

All Documents Concerning any polls or surveys You conducted, were conducted on Your behalf, or pertained to You.

REQUEST NO. 23:

All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, George Scott Paterno, or Plaintiffs Al Clemens or William Kenney.

REQUEST NO. 25 (REVISED):

All Documents Concerning Your book, *Paterno Legacy*, that Concern this litigation, the allegations contained in the Second Amended Complaint, the Freeh Report, FSS, the Consent Decree, the Athletics Integrity Agreement, the NCAA, Coach Paterno's reputation, Your reputation, Sandusky, the Second Mile, the Sandusky grand jury investigation or Presentment, any Person's reaction to the Sandusky scandal (including the media), Graham Spanier, Tim Curley, or Gary Schultz.

REQUEST NO. 25[2]:

Any other Documents Concerning Your claim of pecuniary or financial loss from January 1, 2006 to the present.

William Kenney

REQUEST NO. 13:

All Documents from January 1, 2000 to the present Concerning Your past and present efforts to secure employment or income as a football coach (whether as a head coach or in a subordinate role) or any other position, including, without limitation, all draft and final job application materials such as cover letters and resumes, and any Communications with the University of Illinois, the University of Wisconsin, Purdue University, Virginia Polytechnic Institute and State University, Florida State University, the University of Massachusetts, North Carolina State University, Boston College, the University of Arizona, the University of

---

[2] This Request should have been numbered 30.

Delaware, Syracuse University, or Western Michigan University, or any NFL franchise, including the New York Giants, Indianapolis Colts, Cleveland Browns, or any other prospective employer.

REQUEST NO. 14:

All Communications Concerning open football coaching positions or Communications with other universities or schools Concerning football coaching employment.

REQUEST NO. 26:

Any other Documents Concerning Your claim of pecuniary or financial loss from January 1, 2006 to the present.

George Scott Paterno

REQUEST NO. 12:

All Documents discussing the reputation or popularity of, or public support for, You, any other member of the Paterno family, Coach Paterno, or Plaintiffs Al Clemens, Joseph V. Paterno, or William Kenney, including, without limitation, any public opinion surveys or polls.

REQUEST NO. 23:

All Documents Concerning the actual or contemplated sale of any goods from which Coach Paterno or his Estate had a possibility of earning money or did earn money, from January 1, 2006 to present.

REQUEST NO. 24:

All draft and final contracts or agreements that had the possibility of generating income or other money for Coach Paterno or his Estate, including, without limitation, licensing contracts and contracts for television appearances, from January 1, 2006 to present.

REQUEST NO. 25:

All Communications regarding deliberations or negotiations about, the decision to enter into, the benefits of, or the terms of, any contract or agreement produced in response to Request No. 22.

REQUEST NO. 26:

Documents sufficient to fully demonstrate the monthly and annual sales performance of all merchandise or other goods sold from which Coach Paterno or his Estate has a financial interest, including, without limitation, royalty or licensing payments from January 1, 2006 to present.

Mary Kay Paterno-Hort

REQUEST NO. 1:

All Communications Concerning the value of Coach Paterno's assets, financial net worth, or the financial net worth of Coach Paterno's Estate.

REQUEST NO. 7:

All Documents Concerning the actual or contemplated sale of any goods from which Coach Paterno or his Estate had a possibility of earning money or did earn money, from January 1, 2006 to present.

REQUEST NO. 8:

All draft and final contracts or agreements that had the possibility of generating income or other money for Coach Paterno or his Estate, including, without limitation, licensing contracts, royalty agreements, and contracts for television appearances, from January 1, 2006 to present.

REQUEST NO. 9:

All Communications Concerning any contract or agreement produced in response to Request No. 11, including, without limitation, deliberations or negotiations about, the decision to enter into, the benefits of, or the terms of such contracts or agreements.

REQUEST NO. 10:

Documents sufficient to fully demonstrate the monthly and annual sales performance of all merchandise or other goods sold from which Coach Paterno or his Estate has a financial interest, including, without limitation, royalty or licensing payments from January 1, 2006 to present.

REQUEST NO. 12:

All Communications with Maureen Riedel or any other current or former employee of Penn State University regarding Coach Paterno or licensing.

REQUEST NO. 20:

Any other Documents Concerning the claim of financial or pecuniary loss from January 1, 2006 to the present brought on behalf of the Estate of Coach Paterno.

EXHIBIT 23

IN THE

Superior Court of Pennsylvania

NO. 1709 MDA 2014

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant-Appellant.

Appeal from the September 11, 2014 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J., sitting by special assignment)

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STATEMENT OF JURISDICTION

The trial court has jurisdiction over this matter pursuant to 42 Pa. C.S. § 931(a). This Court has jurisdiction over this appeal pursuant to Pa. R. App. P. 313, because this is an appeal from a collateral order in which the trial court rejected The Pennsylvania State University's assertion of the attorney-client privilege and the attorney work product doctrine. *See Gillard v. A.I.G. Ins.*, 15 A.3d 44 (Pa. 2011); *Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117 (Pa. Super. 2007). The trial court's order was entered on the docket on September 11, 2014. RR.9. The Pennsylvania State University ("Penn State" or "the University") filed a timely notice of appeal on October 8, 2014. RR.9.

THE ORDER IN QUESTION

The trial court's September 11, 2014, Order (the "Order") provides, in relevant part:

> Penn State's Discovery Objection based on Attorney-Client / Work Product / Self Examination Privilege and Limited Waiver is SUSTAINED for non-source documents between Penn State and Freeh Group International that are not of the same subject matter Penn State disclosed to third parties. The Objection is OVERRULED for all other documents.

A copy of the Order and accompanying Opinion is attached hereto as Exhibit A.

THE SCOPE AND STANDARD OF REVIEW

The trial court's determination that a privilege does not apply is subject to a *de novo* standard of review and a plenary scope of review. *Carbis Walker, LLP v.*

Hill, Barth and King, LLC, 930 A.2d 573, 581 (Pa. Super. 2007); *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259 (Pa. Super. 2007), *aff'd on other grounds by an equally divided court*, 992 A.2d 65 (Pa. 2010); *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.,* 39 A.3d 372, 377 (Pa. Super. 2012).

THE QUESTIONS INVOLVED

1. Did the trial court err when it overruled Penn State's objection to the issuance of a subpoena to Penn State's outside counsel on the ground that the plaintiff is seeking documents that are protected from disclosure by the attorney work product doctrine, including the court's conclusions that:

   (a) Penn State lacks "standing" to assert the attorney work product doctrine; and

   (b) the protection of the attorney work product doctrine is not available unless the materials are prepared specifically in anticipation of the particular litigation in which disclosure of the materials is sought?

Suggested answer. Yes, the trial court erred in both respects.

2. Did the trial court err when it overruled Penn State's objection to the issuance of a subpoena to its outside counsel on the ground that the plaintiff is seeking documents that are protected by the attorney-client privilege, including the court's conclusions that:

(a) Penn State did not seek an opinion of law, legal services, or assistance in a legal matter from the law firm it retained;

(b) the law firm did not provide an opinion of law, legal services, or assistance in a legal matter to Penn State;

(c) Penn State waived the attorney-client privilege because the law firm or its affiliate allegedly produced privileged communications to representatives of athletic governing bodies during the course of their investigation; and

(d) the appropriate scope of any waiver of the attorney-client privilege that may have occurred are the four "subject matters" outlined in the engagement letter between Penn State and its outside counsel?

Suggested answer: Yes, the trial court erred in all of these respects.

STATEMENT OF THE CASE

In this appeal, Penn State challenges the trial court's ruling on a proposed subpoena to the law firm of Pepper Hamilton LLP, specifically, the court's overruling of Penn State's objections to the issuance of that subpoena on the basis that it seeks documents that are protected from disclosure by the attorney work product doctrine and/or the attorney-client privilege. Pepper Hamilton employs attorneys who formerly were with the law firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm" or "FSS"). As more fully described herein, Penn State retained

the Freeh Firm as its legal counsel during one of the most difficult periods in the University's history.

One of the plaintiffs, George Scott Paterno, as Representative of the Estate of Joseph Paterno (the "Estate") seeks the production of the Freeh Firm's entire file, including the attorneys' and investigators' notes of their interviews of hundreds of individuals who cooperated with the investigation on the promise of confidentiality.

1. Penn State retains Louis Freeh's law firm to investigate and report on matters relating to the child sexual abuse perpetrated by Jerry Sandusky.

On November 5, 2011, the Office of the Attorney General of Pennsylvania made public a presentment of the Thirty-Third Statewide Grand Jury of the Commonwealth of Pennsylvania (the "Grand Jury Presentment"). The Grand Jury Presentment raised allegations of the sexual abuse of children by former Penn State football coach Gerald Sandusky and allegations that Penn State personnel failed to report that abuse to the appropriate police and governmental authorities. RR.45. The Grand Jury Presentment also charged two high-ranking University officials with perjury concerning their testimony before the grand jury. RR.101.

In addition, as indicated in a letter dated November 9, 2011, sent to the then-President of the University, the Grand Jury Presentment prompted the U.S. Department of Education ("DOE") to review the University's compliance with

federal crime reporting obligations under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act, 20 U.S.C. § 1092(f) (the "Clery Act"). *See* Penn State's Brief in Support of Response to Motion to Overrule Objections, p. 2 (5/9/14) (RR.8). The first of several of Sandusky's victims, "John Doe A," filed a civil suit against the University in the Court of Common Pleas of Philadelphia County on November 30, 2011. *Id.* On November 17, 2011, the NCAA also announced its intent to investigate Penn State for potential violations of the NCAA's Constitution and Bylaws. *See* First Amended Complaint ¶ 57 (2/5/14) (RR.5). The Big Ten Conference also advised the University that it intended to investigate as well. *Id.*, ¶ 60.

In this intense environment of criminal charges, civil litigation, administrative investigations, and a media frenzy, the University retained the Freeh Firm to advise it as "external legal counsel" and to conduct an investigation into the criminal allegations of child sexual abuse on the University's campus and the alleged failure of University personnel to report that abuse to the appropriate police and governmental authorities. RR.32. The Freeh Firm, in turn, retained Freeh Group International Solutions ("FGIS"), an affiliated investigative and consulting group, to assist with the investigation and with the provision of "legal services to" the University. RR.36 § 5.

Penn State entered into a formal engagement letter with the Freeh Firm on November 18, 2011 (the "Engagement Letter"). RR.32. The Scope of Engagement, set forth in § 1 of the Engagement Letter, provides:

> FSS has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and governmental authorities. The results of FSS's investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and (iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.[1]

Id. § 1.

The Engagement Letter is replete with references indicating that, in providing those services to the University, members of the Freeh Firm would be acting as lawyers and would be providing legal services to Penn State. *See* RR.36 § 5 ("For the purpose of *providing legal services* to the Task Force, FSS will retain Freeh Group International Solutions, LLC ('FGIS') to assist in this engagement.")

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[1] The "Task Force" is a reference to the Special Investigative Task Force formed by the University's Board of Trustees. RR.32. For convenience, because the Board's Task Force functioned on behalf of the University, Penn State will simply refer to itself as "the University" throughout this brief.

(emphasis added); RR.36 § 7 ("FSS will provide the above-described *legal services* for the Task Force's benefit, for which the Trustees will be billed in the manner set forth above.") (emphasis added); RR.37 § 8 ("Our agreement to represent the Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to [you] in any matters (whether involving the same substantive *areas of law for which you have retained us* . . . which do not involve the same factual and *legal issues as matters for which you have retained us* . . .") (emphasis added); RR.38 § 10 ("FSS may *terminate its legal services* and withdraw from this engagement in the event our invoices are not paid in a timely manner") (emphasis added); RR.38 § 11 ("In the course of our representation . . ., we will maintain a file . . . . We may also place in such file documents containing *our attorney work product, mental impressions or notes, drafts of documents*, and internal accounting records") (emphasis added); RR.38 ("FSS, of course, is delighted to be asked to *provide legal services* to the Task Force") (emphasis added); *id.* ("should the Task Force ever wish to discuss any matter relating to *our legal representation,* please do not hesitate to call me directly") (emphasis added).

Consistent with the parties' understanding that the Freeh Firm was engaged to provide legal services to the University, the Engagement Letter also provides:

> The work and advice which is provided to the Task Force under this engagement by FSS, and any third party working on behalf of FSS to

> perform services in connection with this engagement, *is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges,* unless appropriately waived by the parties or otherwise determined by law.

RR.36 § 6 (emphasis added).

2. Consistent with the terms of the engagement, the Freeh Firm lawyers and the FGIS investigators conduct a confidential investigation, taking great pains not to waive the attorney-client privilege or the protections of the attorney work product doctrine.

The Freeh Firm conducted a lengthy and comprehensive investigation of the allegations. As part of its investigation, it collected over 3.5 million emails and other documents from the University and third parties (the "Source Documents"). RR.97. It placed those documents in an electronic database (the "Freeh Firm Database"). The Freeh Firm also conducted over 430 interviews of University personnel and other knowledgeable individuals, and created reports of those interviews and other significant attorney work product. *Id.* The Freeh Firm gathered that information with an understanding with cooperating individuals that the information was subject to the attorney-client privilege and the attorney work product doctrine. *Id.* (... the information "was gathered under the applicable attorney-client privilege and work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed."); *see also* RR.428 ¶ 8.

The working papers of the Freeh team were secured and kept confidential, and they worked in a secure facility. The team maintained their papers in an

evidence locker, they worked on secured and encrypted laptops, and they directed staff not to share work product with outsiders. RR.97-98; *see also* RR.428 ¶ 8.

3. The University authorizes the Freeh Firm to release its Report to the public, but does not otherwise waive the attorney-client privilege or the protections of the attorney work product doctrine.

On July 12, 2012, in accordance with the University's limited waiver of the otherwise applicable privileges, the Freeh Firm set forth its findings, opinions, and recommendations in a written report entitled "Report of Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse committed by Gerald A. Sandusky" (the "Freeh Report"). RR.89. With the University's consent and agreement, and pursuant to an agreed-upon limited waiver of the attorney-client privilege and the attorney work product doctrine, the Freeh Report was made public without any advance review by the University. *See* RR.98 ("[t]his report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege"). Consistent with its practice of advising individuals that the information they provided in the course of the investigation would be treated as privileged and confidential, when the Freeh Firm released the Report, it first redacted the names of all individuals whose interview notes are cited therein, referring instead only to the date of the interview. *See, e.g.*, RR.233 (p. 145 nn. 33-35); *see also* RR.98

("[c]itations in this report have been redacted to protect the identity of people who spoke with" the Freeh Firm).[2]

The Freeh Report contains a detailed legal analysis of the provisions of the Clery Act and Pennsylvania's reporting requirements with respect to child sexual abuse. RR.198-207 . The Freeh Report also contains extensive recommendations. RR.215-232. Those recommendations relate to:

> the University's administrative structure, policies and procedures and the Office of General Counsel; the responsibilities and operations of the Board; the identification of risk; compliance with federal and state statutes and reporting misconduct; the integration of the Athletic Department into the greater University community; the oversight, policies and procedures of the University's Police Department; and the management of programs for non-student minors and access to University facilities.

RR.216.

Other than authorizing the release of the Freeh Report, the University has never authorized the Freeh Firm to waive the attorney-client privilege or the attorney work product doctrine in any other respect. Moreover, there is no evidence that the Freeh Firm or FGIS ever disclosed even a single privileged communication or a single piece of attorney work product to the representatives of the NCAA or the Big Ten Conference.

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[2] Only a small portion of the 430 interviews the Freeh Firm conducted are cited in the Report. RR.396 (Tr. 131:18-132:1).

On July 23, 2012, shortly after the Freeh Report was made public, the University accepted the Consent Decree that the NCAA imposed on it. RR.22 ¶ 19. In this litigation, the plaintiffs challenge the NCAA's authority to impose the Consent Decree. *See generally* First Amended Complaint (2/5/14) (RR.5). The plaintiffs also allege, *inter alia,* that the NCAA and two of its high-ranking officials (Mark Emmert and Edward Ray) defamed them and intentionally interfered with their current and prospective contractual relations by imposing the Consent Decree on the University and making various disparaging statements about them in that document. *Id.*

Plaintiff Al Clemens also alleges that he is an intended third-party beneficiary of the NCAA's Constitution and Bylaws, and that the NCAA breached its Constitution and Bylaws by imposing the Consent Decree on the University.[3] *Id.* Because the plaintiffs sought to invalidate the Consent Decree – which imposed obligations on the University – the court concluded that Penn State must participate in the litigation. *See* Opinion and Order, p. 24 (1/7/14) (RR.5).

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[3] The Estate also asserted a breach of contract claim. The trial court sustained the defendants' objections to that claim. The trial also dismissed the claims of many of the other plaintiffs. *See generally* Ex. A, pp. 34-37. However, because this appeal was taken at a time when the older caption was still in effect, those individuals still appear in the caption of this appeal as plaintiffs and appellees.

Accordingly, the plaintiffs filed a First Amended Complaint that named Penn State as a "nominal defendant." *See* First Amended Complaint, ¶ 17 (2/5/14) (RR.5).

4. The Estate seeks to serve a broad subpoena on Pepper Hamilton.

In September 2012, several months after the Freeh Report was issued and the Consent Decree was signed, the attorneys from the Freeh Firm became affiliated with the Pepper Hamilton law firm. RR.45. Pepper Hamilton also acquired FGIS. *Id.*

On February 25, 2014, pursuant to Pa. R. Civ. P. 4009.21, the Estate filed a notice of intent to serve a subpoena *duces tecum* on Pepper Hamilton. RR.15. The proposed subpoena is extraordinarily broad. The Estate seeks from Pepper Hamilton, *inter alia*:

- communications between the Freeh Firm/FGIS and Penn State, its client (Request No. 2) (RR.26);
- the Freeh Firm's entire "client file" with respect to its work for Penn State (Request No. 3) (*id.*);
- drafts of the Freeh Report (Request No. 22) (RR.30);
- documents relating to "question[s] or concerns within the Freeh Firm or [FGIS]" about "any aspect of" the investigation or the conclusions reached in the Report (Request No. 25) (*id.*); and
- documents that evidence, reflect, or relate to services provided by any person the Freeh Firm or FGIS retained to work with them in connection with the investigation (Request No. 16) (RR.78).

The Estate also seeks documents that "evidence, reflect, or relate in any way to" the factual bases for various statements the Freeh Firm made in its Report and

the conclusions, opinions, and recommendations set forth therein, including the statements in the Report that:

- Joe Paterno, among others, "failed to protect against a child sexual predator harming children for over a decade" (Request No. 5) (RR.26);
- the University's Board of Trustees "did not perform its oversight duties" and "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable" (Request No. 6) (*id.*);
- Joe Paterno, among others, concealed Jerry Sandusky's activities from the University's Board of Trustees (Request No. 7) (RR.27); *see also* Request No. 8 (*id.*) (seeking "all documents that evidence, reflect, or relate in any way to whether Joe Paterno concealed critical facts regarding Jerry Sandusky from the authorities, the Penn State Board of Trustees, the Penn State community, and the public at large"); Request No. 9 (*id.*) (seeking "all documents that evidence or reflect that, at the time of Jerry Sandusky's resignation from the coaching staff at Penn State, Joe Paterno suspected or believed that Sandusky was a sexual predator");
- "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behavior and no one warned the public about him" (Request No. 10) (*id.*);
- an individual described Timothy Curley to the Freeh Firm in the course of its investigation as "Joe Paterno's errand boy" (Request No. 12) (RR.28);
- Joe Paterno, among others, was kept informed of an investigation by Penn State Police and/or the Department of Public Welfare into a possible sexual assault by Jerry Sandusky in the Lasch Building in May 1998 (Request No. 13) (*id.*);
- individuals told the Freeh Firm in the course of its investigation that Joe Paterno knew "everything that was going on" at the Penn State football facilities" (Request No. 14) (*id.*); and

- all documents that support every conclusion and every recommendation set forth in the Freeh Report (Request No. 19) (RR.29).

In short, the requests seek all of the Freeh Firm's work product, including the notes of the more than 430 interviews conducted during the course of their investigation.

Penn State served timely objections to the proposed subpoena on March 14, 2014. RR.43. Among other objections, Penn State asserted that the subpoena improperly seeks documents protected from disclosure by the attorney work product doctrine and the attorney-client privilege. RR.45. The Estate filed a Motion to Overrule the University's Objections (RR.62), Penn State filed a Response to the Estate's Motion, and the parties briefed the issues.

5. The court largely overrules Penn State's work product and attorney-client privilege objections to the issuance of that subpoena.

The court heard oral argument on May 19, 2014. *See* RR.373 (relevant portion of the transcript). Then, On September 11, 2014, the court issued the Order that is the subject of this appeal. Ex. A hereto. Among other rulings, the court overruled Penn State's assertions of the attorney work product doctrine and the attorney-client privilege.[4]

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[4] This appeal addresses only those aspects of the trial court's September 11, 2014, order that overruled Penn State's invocation of the attorney-client privilege and the work product doctrine, because only those rulings are immediately appealable as of right under the collateral order doctrine. *See Berkeyheiser,* 936

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With respect to Penn State's assertion of the attorney-client privilege, the court quoted the "Scope of Engagement" provision of the Engagement Letter and concluded that "[a]t no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." *Id.*, p. 20. From there, the court concluded that:

> communications between Penn State and the Freeh Firm were not sought pursuant to seeking legal services; as such they are not subject to the attorney client privilege. As a result, any source documents Penn State turned over to the Freeh Firm for the purpose of conducting the investigation are not privileged. Likewise, any non-source documents created by either Penn State or the Freeh Firm [are] non privileged.

The court then qualified its holding, noting that because:

> *Freeh Group International* was providing legal services to Penn State, communications between Penn State and the Freeh Group International may be subject to attorney-client privilege. As such, any non-source documents created by the Freeh Group International may be privileged, and any non-source documents created by Penn State communicated to the Freeh Group International may also [be] privileged, but that privilege may have been waived.

Id., p. 21. (emphasis added). Specifically, the court noted the four categories of the engagement set forth in the Scope of Engagement, and concluded that "any

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A.2d 1117. Penn State preserves all of its other objections to the issuance of the subpoena and reserves the right to appeal those aspects of the court's September 11, 2014, order following the entry of a final judgment.

documents shared with the Big Ten or NCAA regarding any of the aforementioned categories would constitute a subject-matter waiver." Id., p. 22.

The court then addressed Penn State's assertion of the attorney work product doctrine. The court concluded, first, that "Penn State does not have standing" to assert that objection because "the work product doctrine is asserted by the attorney," not by the client. *Id.* Then, despite concluding that Penn State lacked standing to assert a work product objection, the court proceeded to address that objection on the merits. Specifically, the court concluded that: (a) "in Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared;" and (b) "the Scope of Engagement did not contemplate legal advice or legal services in conjunction *with the case at bar*." *Id.*, pp. 22-23 (emphasis added).

Following the issuance of the Court's September 11, 2014, Opinion and Order, the Estate served the subpoena on Pepper Hamilton. RR.430. Pepper Hamilton filed a Motion for Stay Pending Appeal and for Protective Order (RR.415), and a memorandum of law in support thereof, seeking to stay its obligations to produce documents for which it and/or the University claimed a privilege pending the outcome of this appeal and a protective order against the compelled disclosure of privileged materials. Penn State joined in Pepper Hamilton's motion. RR.432. In an order and opinion docketed November 20,

2014, the court denied Pepper Hamilton's motion for a stay and a protective order. RR.438. In so doing, the court disclaimed having ruled on the merits of Penn State's attorney work product objection in its September 11, 2014, Opinion:

> Pepper Hamilton has not yet responded to the subpoena, and there has been no ruling on its work product objections. The Superior Court is tasked with determining whether or not this Court committed an error of law. Because *there has been no ruling on Pepper Hamilton's objection*, there is no issue for the Superior Court to decide.

RR.442 (emphasis added).

The court's November 20, 2014, order is the subject of a separate appeal by Pepper Hamilton (pending at No. 2168 MD 2014). Noting that the appeals are related, this Court has directed that they be listed consecutively for argument.

At the court's direction, Penn State filed a timely Concise Statement of Matters Complained of on Appeal. Ex. B hereto. On December 5, 2014, the trial court issued a supplemental opinion pursuant to Pa. R. App. P. 1925(a). Ex. C hereto. With respect to its analysis of the attorney-client privilege, the court elected to rely on its September 11, 2014, Opinion. Ex. C. pp. 2-3. With respect to its analysis of the attorney work product doctrine, the court cited Pepper Hamilton's Motion for Stay Pending Appeal and for Protective Order, and reiterated that the court had "not had the opportunity to consider" the merits of the work product objection. *Id.*, p. 4. The court otherwise relied on its September 11, 2014, opinion with respect to its conclusions that (a) Penn State lacked "standing"

to assert the work product objection, and (b) the protections of the work product doctrine are not available unless the materials were prepared in specific anticipation of the litigation in which they are sought. *Id.*, pp. 4-5.

SUMMARY OF ARGUMENT

The trial court's order contains fatal legal errors and rests on demonstrably inaccurate premises. As a threshold matter, the court fundamentally erred when it concluded that Penn State lacked "standing" to object to the subpoena on the ground that it seeks documents protected by the attorney work product doctrine. This Court, and other courts in the Commonwealth, regularly entertain work product objections asserted by the client, without requiring the client's attorney to intervene to assert the objection. There is no authority (the trial court cites none) to support the court's conclusion that Penn State lacked standing to assert this objection. In addition, to the extent the trial court ruled on the merits of the attorney work product doctrine, its conclusion that it does not protect the mental impressions of members of the Freeh Firm because their work was not done specifically in anticipation of *this case* simply is not a correct application of Pennsylvania law. Indeed, in a recent decision involving the Freeh Firm's work product, *Bagwell v. Dep't of Educ.*, 103 A.3d 409 (Pa. Commw. 2014), *reargument denied* (Pa. Commw. Dec. 18, 2014), a panel of the Commonwealth Court reached precisely the opposite conclusion, holding that the materials *need not be* prepared

in anticipation of litigation *at all* in order for the protection of the work product doctrine to attach.

The trial court's conclusion that the Freeh Firm was not providing legal services to the University, and, therefore, that no attorney-client privilege ever attached to communications between members of that firm and the University, also is untenable. The Freeh Firm plainly was acting as external legal counsel to the University and was retained to provide, and did in fact provide, extensive legal services, including an analysis of the University's obligations to report child abuse under federal and state law and recommendations as to how the University could strengthen its compliance with the laws going forward. Moreover, because the record is completely devoid of evidence that the University, the Freeh Firm, or FGIS shared even a single privileged document with the NCAA or the Big Ten Conference, the court's conclusion that the University has waived the protections of the attorney-client privilege simply is not defensible.

Accordingly, this Court should reverse the trial court's September 11, 2014, Opinion and Order to the extent it overruled Penn State's privilege objections to the issuance of the subpoena to Pepper Hamilton.

ARGUMENT

A. The Trial Court's Conclusions With Respect To The Attorney Work Product Doctrine Flatly Misstate Pennsylvania Law.

Penn State's objection to the issuance of the subpoena as calling for the production of materials protected by the attorney work product doctrine is well-founded, and the trial court erred when it concluded otherwise.

1. The attorney work product doctrine is a broad privilege that protects an attorney's mental impressions.

The attorney work product doctrine, which is codified in the Pennsylvania Rules of Civil Procedure, provides even broader protections than the attorney-client privilege. *Commonwealth v. Noll,* 662 A.2d 1123, 1126 (Pa. Super. 1995); *Bagwell,* 103 A.3d at 415. Specifically, Pa. R. Civ. P. 4003.3 provides:

> Subject to the provisions of Rule 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. *The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.* With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

(emphasis added). As set forth in Rule 4003.3 itself, the essential purpose of the work product doctrine is to immunize from discovery the lawyer's mental

impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories.

The work product doctrine also protects "materials prepared by agents for the attorney." *Bagwell,* 103 A.2d at 416; *Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005); *Commonwealth v. Hetzel,* 822 A.2d 747, 757 (Pa. Super. 2003). "This includes an attorney's investigator's or other agent's opinions, theories, or conclusions . . . ." *Bagwell,* 103 A.3d at 416 (quotation omitted).

2. The Estate's subpoena seeks broad categories of documents that are protected by the attorney work product doctrine, including but not limited to interview notes the Freeh Firm prepared.

Section 6 of the Engagement Letter expressly acknowledges that the work of the Freeh Firm would constitute attorney work product. RR.36 § 6 ("The work and advice which is provided to [Penn State] under this engagement by FSS, and any third party working on behalf of FSS . . . is subject to the confidentiality and privilege protection of the . . . attorney work product" doctrine).

The vast majority of the requests in the Estate's proposed subpoena to Pepper Hamilton expressly seek the production of documents that are protected by the attorney work product doctrine. For example, Request Nos. 5-10, 12-14, and 19 all seek documents evidencing, referring, or relating to various statements, conclusions, and recommendations that appear in the Freeh Report—without

excluding documents that evidence the Freeh Firm's mental impressions, opinions, notes, or the like. RR.26-28.

Moreover, as the Freeh Firm noted in its Report, it interviewed more than 430 individuals in the course of its investigation. RR.97. The lawyers' notes of these interviews plainly are protected as attorney work product. In fact, the Explanatory Note to Rule 4003.3 expressly notes that "a lawyer's notes and memoranda of an oral interview of a witness, who signs no written statement, are protected" as attorney work product.[5] Pa. R. Civ. P. 4003.3, Explanatory Comment – 1978. As the U.S. Supreme Court noted in *Upjohn Co. v. United States,* 449 U.S. 383, 400 (1981), interview memoranda will be discoverable only in rare situations, in part because they may reveal the attorney's mental processes and have limited utility, especially where the witness is available; *see also In re Grand Jury Investigation,* 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (E.D. Pa. 1976) (an attorney's memorandum of a telephone conversation is "so much a product of the lawyer's thinking and so little probative of the witness's actual words that [it is] absolutely protected from disclosure").

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[5] The record is devoid of any evidence that the interview notes are signed by any witness.

Drafts of the Freeh Report (*see* Request No. 22) (RR.30) also are protected attorney work product, as are communications among members of the Freeh Firm and FGIS (or with others those firms may have retained to work with them in connection with the investigation) (Request Nos. 16, 25) (RR.28, RR.30).

3. Penn State has "standing" to assert the protections of the attorney work product doctrine on its attorneys' behalf.

The trial court's conclusion that Penn State lacked "standing" to assert the attorney work product doctrine (Ex. A p. 22) is not a correct statement of Pennsylvania law. Indeed, the court does not cite a single Pennsylvania case that so holds. Quite to the contrary, this Court *regularly* entertains appeals from discovery ruling which a client-litigant – not the attorney – is asserting the attorney work product doctrine. *See, e.g., Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity,* 32 A.3d 800, 811-12 (Pa. Super. 2011), *aff'd*, 91 A.3d 680 (Pa. 2014) (appeal of plaintiff); *T.M. v. Elwyn, Inc.,* 950 A.2d 1050, 1062-63 (Pa. Super. 2008) (appeal of defendants); *Gocial v. Independence Blue Cross,* 827 A.2d 1216, 1222 (Pa. Super. 2003); (appeal of plaintiffs); *Commonwealth v. Noll,* 662 A.2d 1123, 1126-27 (Pa. Super. 1995) (appeal of defendant).

Indeed, not even the federal case on which the trial court relied, *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.,* 32 F.3d 851 (3d Cir. 1994), holds that *only* an attorney may assert the work product doctrine. In *Rhone-Poulenc*, the Third Circuit reversed the district court's conclusion that, because the client had

waived the attorney-client privilege, the client also necessarily waived the protections of the work product doctrine. 32 F.3d at 861. It was in *that* context that the Third Circuit observed that "the protection stemming from the work product doctrine belongs to the professional, rather than the client" – in other words, the privilege was not the client's to *waive*. *Id.*

In fact, in stark contrast to the trial court's holding here, federal courts (including the Third Circuit) regularly conclude that a client may assert the protections of work product doctrine. *E.g.*, *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979) ("not realistic" to hold that only the attorney may assert the work product doctrine; "[t]o the extent a client's interest may be affected, he, too, may assert" it); *In re Grand Jury (00-2H)*, 211 F. Supp. 2d 555, 561 n.6 (M.D. Pa. 2001) ("Unlike the attorney client privilege, both client and lawyer may assert work product protection.").

4. The attorney work product doctrine applies even if the materials were not prepared in anticipation of litigation *at all*, much less in anticipation of this particular litigation.

As discussed *supra,* pp. 16-18, there is considerable ambiguity as to whether the trial court rejected the attorney work product objection on the merits, or simply on the basis that Penn State lacked standing to raise it. To the extent the court held that "the work product protection is not available unless the requests are made in

connection with the litigation for which the material was prepared" (Ex. A p. 22), that holding misstates Pennsylvania law.

Pennsylvania courts have recognized that the attorney work product doctrine is *especially protective of* material prepared by an attorney in anticipation of litigation. *Nat'l R.R. Passenger Corp. v. Fowler,* 788 A.2d 1053, 1065 (Pa. Commw. 2001); *Gillard,* 15 A.3d at 59 n. 16; *Heavens v. Pennsylvania Dep't of Environmental Protection,* 65 A.3d 1069, 1077 (Pa. Commw. 2013). Pennsylvania does not, however, *require* that material be prepared in anticipation of litigation in order to qualify for protection by the attorney work product doctrine. *Bagwell,* 103 A.2d at 415. On its face, Pa. R. Civ. P. 4003.3 includes no such limitation. *Sedat, Inc. v. Department of Environmental Resources,* 641 A.2d 1243, 1245 (Pa. Commw. 1994) (anticipation of litigation was not required as a prerequisite to application of the attorney work product doctrine because Rule 4003.3's protection of an attorney's mental impressions "is unqualified"); *Mueller v. Nationwide Mut. Ins. Co.,* 31 Pa. D. & C.4th 23 (C.C.P. Allegheny Cty. May 22, 1996) (Wettick, J.) (also rejecting the contention that Rule 4003.3 only protects material produced in anticipation of litigation; "Rule 4003.3 protects any mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense. Rule 4003.3 does not refer to information prepared in anticipation of litigation.").

Indeed, in a case involving a request for the Freeh Firm's files under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, the Commonwealth Court squarely rejected — as "novel" and inconsistent with the language of Rule 4003.3 — the requestor's argument that the work product doctrine applies only to materials prepared in anticipation of litigation. *Bagwell,* 103 A.3d at 416-17. As the Commonwealth Court aptly noted in *Bagwell,* such a "confined construction" of Rule 4003.3 "would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared in a transactional or any non-litigation capacity, susceptible to discovery or disclosure." *Id.* at 417.

5. In any event, the Freeh Firm plainly performed its work in anticipation of litigation.

The Freeh Firm plainly did its work in anticipation of litigation. Indeed, the threat of litigation at the time Penn State retained the Freeh Firm was both real and imminent. The Office of the Attorney General had made the Grand Jury Presentment public on November 5, 2011. That document indicated, in connection with Sandusky's indictment, that several of the University's high-ranking executives were facing allegations that they, too, had violated the law. The Presentment charged two high-ranking University executives with failing to report allegations of child abuse and committing perjury concerning their testimony before the grand jury. The Grand Jury Presentment also prompted the DOE to

review the University's compliance with federal crime reporting obligations under the Clery Act, as revealed in a letter sent to the University's then-President on November 9, 2011. And, the first of many of Sandusky's victims filed a civil suit against Penn State on November 30, 2011. In short, any contention that the work of the Freeh Firm was not performed in anticipation of litigation simply is not well-grounded in the undisputed facts of record.

The court's reliance on *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.C.P. Centre Cty. 2007) for the notion that the work product doctrine does not apply unless Penn State (or Pepper Hamilton) could establish that the Freeh Firm did its work specifically in anticipation *of this case* is misplaced. *Graziani* involved a "bad faith" claim a policyholder asserted against an insurance company. In that context, courts have held that the protection for work product materials prepared in the underlying litigation *against the insured* does not justify the insurance company withholding those documents *from the insured* when it sues the insurer for the bad faith handling of its claim. The crux of *Graziani* is that the work product protection afforded to the materials in the underlying litigation is lost in subsequent "bad faith" litigation because the work product becomes directly relevant to that later, derivative claim. Neither *Graziani* nor any of the other cases in this line stands for the proposition that the work product doctrine applies only to

materials prepared for the particular litigation in which the protection of the work product doctrine is claimed.

This Court's decision in *Rhodes v. USAA Casualty Ins. Co.*, 21 A.3d 1253 (Pa. Super. 2011), illustrates the fatal flaw in the trial court's reasoning here. In *Rhodes,* the trial court had ordered the *plaintiffs-insureds* in a "bad faith" case to turn over to the insurer the contents of their attorney's file in the underlying case (in which the insureds were the defendants). The insurer, relying on cases like *Graziani,* attempted to justify that order on the ground that the work product protection no longer applied because the material was not specifically prepared *for the bad faith case*. 21 A.3d at 1256-57. This Court rejected that approach and reversed, explaining that the reason why the work product protection is lost in bad faith cases where *insurers* are ordered to turn over their attorney's files is because the content of those files is relevant to determining whether the insurer acted in good faith. Indeed, the Explanatory Note to Rule 4003.3 expressly provides that attorney work product may be discoverable where the legal opinion of an attorney becomes a relevant issue.[6] *Id.* at 1261.

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[6] Specifically, the Comment provides:

> There are . . . situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action: for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a

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The considerations animating the decision in *Graziani* simply have no parallel whatsoever in this litigation. The trial court's construction of Rule 4003.3 simply cannot be squared with this Court's jurisprudence. Accordingly, this Court should sustain Penn State's objection to the subpoena on the grounds that it seeks documents protected by the attorney work product doctrine.

B. The Trial Court's Conclusions With Respect To The Attorney-Client Privilege Also Are Fatally Flawed.

As reflected *supra,* many of the categories of documents the Estate seeks are protected from disclosure by the attorney-client privilege. Several of the requests in the Estate's subpoena are *a frontal assault on* the attorney-client privilege (*e.g.*, Request No. 2, which seeks all communications between Penn State and the Freeh Firm/FGIS). (RR.26). The trial court's conclusion that the attorney-client privilege never attached because the Freeh Firm was not retained to provide legal services is wrong as a matter of law.

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> relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it is immune from pre-trial disclosure to the plaintiff.

Pa. R. Civ. P. 4003.3, Explanatory Comment – 1978.

1. The attorney-client privilege protects communications between a lawyer and his client.

In Pennsylvania, the attorney-client privilege is codified at section 5928 of the Judicial Code, which provides:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928. The Supreme Court of Pennsylvania has confirmed that the attorney-client privilege "operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011).[7] Furthermore, communications between an agent of an attorney (FGIS) and the client (Penn State) also are protected by the attorney-client privilege where, as here, the agent is assisting the attorney in giving advice to the client. *Commonwealth v. Noll,* 662 A.2d 1123, 1126 (Pa. Super. 1995).

The attorney-client privilege is "deeply rooted in our common law" and is "the most revered of our common law privileges." *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013). The privilege recognizes that "sound legal advice" . . . depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S.

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[7] *Gillard* overturned highly-criticized precedent holding that the privilege was available only for confidential communications made by the client.

at 389. As the Supreme Court of Pennsylvania has recognized, the central animating principle of the privilege is that "a client may be reluctant to disclose to his lawyer all facts necessary to obtain informed legal advice, if the communications may later be exposed to public scrutiny." *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 216 (Pa. 2014).

The attorney-client privilege requires that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and (4) the client has claimed, and has not waived, the privilege. *Commonwealth v. Mrozek,* 657 A.2d 997, 998 (Pa. Super. 1995). All of those elements are satisfied here, and the trial court erred in concluding otherwise.

2. Penn State retained the Freeh Firm to perform legal services.

The trial court concluded that the attorney-client privilege does not apply because Penn State did not engage the Freeh Firm to perform legal services. Ex. A p. 21. That conclusion simply cannot be squared with the express language of the

Engagement Letter, the parties' own understandings of the nature of the Freeh Firm's work, and the work product the Freeh Firm generated.

As explained *supra,* pp. 6-8, the November 18, 2011, Engagement Letter between Penn State and the Freeh Firm notes *repeatedly* that the Freeh Group would be rendering legal services to Penn State. In fact, the "Scope of Engagement" section of the Engagement Letter itself notes that "FSS has been engaged to serve as *independent, external legal counsel* to the Task Force." (emphasis added) (RR.32 § 1). Section 6 of the Engagement Letter also specifically contemplates that the work of the Freeh Group would be subject to the attorney-client privilege. RR.36 ("work and advice which is provided to the Task Force under this engagement by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, *is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges,* unless appropriately waived by the parties or otherwise determined by law") (emphasis added).

Moreover, the Freeh Report contains extensive legal analysis (including an analysis of the reporting requirements of the Clery Act), as well as recommendations designed to help ensure that the crimes and reporting violations that took place on Penn State's campus would not happen again. RR.198-207; RR.215-232.

Against this backdrop – Penn State retained lawyers to investigate allegations of criminal conduct, help it assess its potential legal liability, and make recommendations designed to ensure better compliance with the law going forward – the trial court's conclusion that the Freeh Firm was not retained to provide, and did not provide, "legal services" to Penn State is untenable and cannot be allowed to stand.

To the extent the trial court's conclusion to the contrary was premised on the notion that the provision of legal services needed to be the sole or primary purpose of the engagement, that premise is false. "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes" for the work. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758-59 (D.C. Cir. 2014) (investigation into allegations of fraud was privileged because it was performed "to gather facts and ensure compliance with the law after being informed of potential misconduct"); *In re General Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 221057 *5 (S.D.N.Y. Jan. 15, 2015) (an investigation into a company's product defect and the delays in recalling them was privileged because it was conducted as part of the company's request for legal advice "in light of possible misconduct and accompanying governmental investigations and civil litigation;" court notes that "[r]are is the case that a troubled corporation will

initiate an internal investigation solely for legal, rather than business, purposes"). Providing legal services and advice plainly was one of the significant purposes of the Freeh Firm's engagement.

The trial court's opinion also appears to rest on the palpably inaccurate assumption that it was FGIS, not the Freeh Firm, that was "providing legal services to Penn State." Ex. A p. 21. The court had it backwards: "FSS is a law firm and FGIS is a separate investigative and consulting group" that the Freeh Firm retained "[f]or the purpose of providing legal services to the Task Force . . . ." RR.36 § 5.

In sum, because Penn State did in fact retain the Freeh Firm to provide legal services, all communications between Penn State and the Freeh Firm are protected by the attorney-client privilege. *Gillard,* 15 A.3d at 59. And, because FGIS was acting as the Freeh Firm's agent in helping to provide those legal services to Penn State, all of Penn State's communications with FGIS are protected as well.[8] *Noll,* 662 A.2d at 1126.

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[8] Penn State is *not* taking the position that the vast majority of the 3.5 million Source Documents the Freeh Firm gathered from Penn State and elsewhere in the course of its investigation are protected by the attorney-client privilege.

It is conceivable, however, that the Freeh Firm Database contains *some* documents that are protected by the attorney-client privilege, but for reasons different than those discussed *supra*, namely, communications between a University official and the University's Office of General Counsel or the University's outside counsel (*e.g.*, an opinion letter the General Counsel wrote on

Continued on following page

3. The record is devoid of evidence that either the Freeh Firm or FGIS waived the attorney-client privilege by sharing privileged documents with the NCAA or the Big Ten Conference.

The court also erred when it concluded that any privilege that may have attached to the communications between Freeh/FGIS and the University was waived. Specifically, the court concluded that Penn State may have waived the protection of the attorney-client privilege because, according to the Estate, "the Freeh Firm was communicating with third parties during the investigation – specifically, The Big Ten Athletic Conference and the NCAA." Ex. A p. 21.

To resolve allegations of waiver, courts must employ the two-part inquiry pronounced in *In re Investigating Grand Jury of Philadelphia County No. 88-00-3503,* 593 A.2d 402, 406-07 (Pa. 1991). Under this two-part test, a court must determine: (1) whether the attorney-client privilege applies to the particular communication in question; and if so; (2) whether an exception or waiver applies that overcomes the privilege. *Id.* Notably, the burden shifts during this two-part inquiry. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1265-66 (Pa. Super. 2007). Here, once Penn State established that the attorney-client privilege was properly invoked, the burden shifted to the Estate to establish that Penn State waived that privilege. *Id.* at 1266. Then, if the court determines that a particular

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Continued from previous page
an unrelated real estate matter). As the trial court correctly noted, such materials "certainly would not be discoverable." RR.391 (Tr. 126:13-14).

disclosure effectuated a waiver, it then may turn to the question of how far the waiver extends.

Here, as discussed *supra*, the University satisfied its burden of establishing that the attorney-client privilege applies, both with respect to its communications with the Freeh Firm and with FGIS. The Estate, however, failed to satisfy *its* burden of establishing that the privilege has been waived with respect to *any* communication, much less that it has been waived on a global, "subject matter" basis. Indeed, the record is *devoid* of evidence that the Freeh Firm (or FGIS) shared *even one* otherwise privileged document with either the NCAA or the Big Ten during the course of the investigation.

Furthermore, in order to establish a subject matter waiver, the Estate was required to show, but failed to show, that Penn State (or Freeh) voluntarily disclosed otherwise confidential information to the NCAA or the Big Ten in order "*to gain a tactical advantage.*" *Nationwide Mut. Ins. Co. v. Fleming,* 992 A.2d 65, 68 (Pa. 2010) (emphasis added). *Accord Murray v. Gemplus Int'l S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (applying Pennsylvania law and finding that "[w]here one party attempts to utilize the privilege as an offensive weapon, selectively disclosing communications *in order to help its case*, that party should be deemed to have waived the protection otherwise afforded it by the privilege it misused") (emphasis added). Here, even if one assumes, counter-factually, that the Freeh

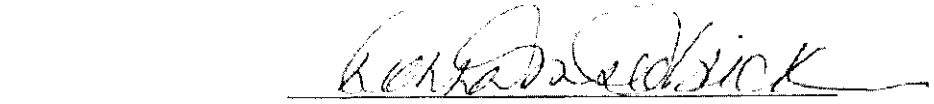
Firm *did* divulge privileged materials to representatives of the NCAA and the Big Ten, the Estate has not shown that the Freeh Firm did so in order for Penn State to achieve a tactical advantage in any litigation, including this one.

In sum, because the Estate has not established, and cannot establish, that any subject matter waiver of the attorney-client privilege occurred, the applicability of the privilege, and the determination of whether it was waived with respect to any particular document, must, of necessity, be evaluated on a document-by-document basis, with the Estate bearing the burden of proof. The University's assertion of the attorney-client privilege was wholly appropriate and this Court should reverse the trial court's order to the extent it overruled that objection.

CONCLUSION

For all of the foregoing reasons, this Court should: (a) reverse the trial court's September 11, 2014, order to the extent it overruled Penn State's assertion of the attorney work product doctrine and the attorney-client privilege;
(b) conclude that the mental impressions of the lawyers working on the Freeh Firm investigation, including but not limited to their interview notes, are protected from disclosure by the attorney work product doctrine; and (c) conclude that communications between Penn State and the Freeh Firm/FGIS are protected by the attorney-client privilege.

Respectfully submitted,



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The Pennsylvania State University

CERTIFICATION OF WORD COUNT

The undersigned, one of the attorneys for Appellant The Pennsylvania State University, hereby certifies that this Brief complies with the type/volume limitation contained in Pa. R. App. P. 2135(a)(1). The brief contains 8,877 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications which are exempted by Pa. R. App. P. 2135(b).

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellant The Pennsylvania State University, hereby certify that I caused two true and correct copies of the foregoing Appellant's Opening Brief to be served upon the following by U.S. mail, first class, postage prepaid, and via email, this 10th day of April, 2015:

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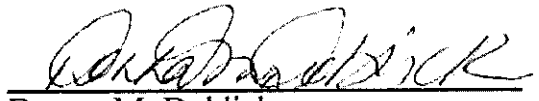

Donna M. Doblick

EXHIBIT 24

SHARE

Paterno family statement in response to the Freeh report

7/16/2012

Paterno Family Statement

Following the release of the Grand Jury findings last fall, Joe Paterno called for a thorough, fair and transparent investigation. Like everyone else, Joe was stunned at the charges that were filed against Jerry Sandusky. At the same time, Joe cautioned against a rush to judgment on Penn State and its senior officials and reminded everyone that we owed it to the victims to uncover the full truth.

The announcement of the findings by the Freeh Group is yet another shocking turn of events in this crisis. We are dismayed by, and vehemently disagree with, some of the conclusions and assertions and the process by which they were developed. Mr. Freeh presented his opinions and interpretations as if they were absolute facts. We believe numerous issues in the report, and his commentary, bear further review.

Our interest has been and remains the uncovering of the truth. We have never tried to run from this crisis or shift all responsibility to others. To help prevent this sort of tragedy from happening again at Penn State or any other institution, it is imperative that the full story be told.

After the report was released, we instructed our attorneys and their experts to conduct a comprehensive review of the materials released by the Freeh Group as well as Mr. Freeh's presentation and press conference. We have also asked them to go beyond the report and identify additional information that should be analyzed. And we have asked the Freeh Group to preserve all records, notes and other materials related to the investigation and the presentation of their findings as we expect they will be the subject of great interest in the future.

To those who are convinced that the Freeh report is the last word on this matter, that is absolutely not the case. Since various investigations and legal cases are still pending, it is highly likely that additional critical information will emerge. With that said, we want to take this opportunity to reiterate that Joe Paterno did not shield Jerry Sandusky from any investigation or review.

The 1998 incident was fully and independently investigated by law enforcement officials. The Freeh report confirms this. It is also a matter of record that Joe Paterno promptly and fully reported the 2001 incident to his superiors. It can certainly be asserted that Joe Paterno could have done more. He acknowledged this himself last fall. But to claim that he knowingly, intentionally protected a pedophile is false.

The process of reviewing the report and other relevant information is going to be a complicated and time consuming exercise. It took the Freeh Group roughly seven months to conduct more than 400 interviews and review three million documents. We do not expect or intend to duplicate this effort but we are going to be as thorough as reasonably possible. In the meantime, our attorneys have asked that we not make any further comment on this matter until they are ready to provide an update on their progress.

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Contact Us: info@paterno.com

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EXHIBIT 27

SHARE

Statement from the Paterno family regarding the State of Pennsylvania lawsuit

1/4/2013

As we have not yet had an opportunity to review the lawsuit filed by Governor Corbett today, we cannot comment on the specifics of the litigation. What we do know, however, is that this matter is far from closed. The fact that Governor Corbett now realizes, as do many others, that there was an inexcusable rush to judgment is encouraging.

Joe Paterno's only guidance to us was to seek the truth. Consequently, last July when the Freeh report was released and the subsequent unprecedented and unjustified actions were taken by the Penn State University Board and the NCAA, we stated that we would engage a team of experts to conduct a careful and thoughtful review of the Freeh inquiry and the actions of the Board and the Administration. That process is nearing completion. We expect to release the analysis of the experts in the near future. At that time we will address all of the issues of the past year in a comprehensive manner.

SHARE

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EXHIBIT 28

From: Dana [danadonut@gmail.com]
Sent: Sunday, February 10, 2013 7:53 AM
To: Scott Paterno
Subject: Re: reports

Thanks

Sent from my iPad

On Feb 10, 2013, at 7:35 AM, Scott Paterno <quincylion@me.com> wrote:

> The website is PATERNO.com and will be live at 9am.
>
> Sent from my iPhone. Any and all bits of excessive bluntness are
> unintended and the consequence of the little keyboard.
>
> On Feb 10, 2013, at 7:34 AM, Dana <danadonut@gmail.com> wrote:
>
>> When will this be online and do you have the website? When can I send the link out?
>> These reports are a delight to read, thanks for sharing!
>>
>> Sent from my iPad
>>
>> On Feb 9, 2013, at 9:01 PM, GEORGE SCOTT PATERNO <quincylion@me.com> wrote:
>>
>>> Please, these are just for you and Franco for now. Mom wanted me to share. I have to keep everyone else in the dark as long as possible on content - including Anthony. Please hold off commenting until after 9 am tomorrow.
>>>
>>> And we are off...
>>>
>>> <FINAL THORNBURGH 2-7-2013.pdf>
>>> <FINAL CLEMENTE 2-7-2013.pdf>
>>> <FINAL BERLIN 2-7-2013.pdf>
>>> <EMBARGOED DRAFT KS Critique 2-5-2013.pdf>

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EXHIBIT 30

PATERNO The Record

Family Statements | Fresh Response | In The Media | Resources



Family Statements

Statement by Wick Sollers, Counsel to the Paterno Family

Statement by the Paterno Family Regarding Settlement with the NCAA

Statement by Scott Paterno

Statement by Scott Paterno

Statement by Wick Sollers

Statement from Wick Sollers on Judge Leete's Opinion and Order

View All

In The Media

Penn State Football: Nittany Lions to Remove Names from Jerseys

Judge strikes down Pepper argument in Paterno suit

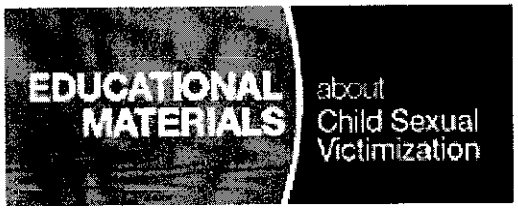
Happy Valley could be anywhere, and that's the scariest part

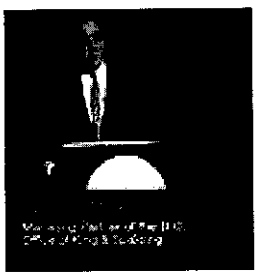
Dem. other Pa. lawmakers ask NCAA to release all Penn State emails

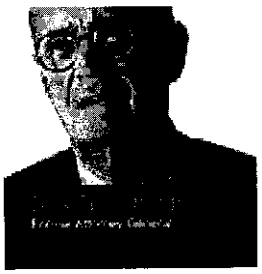
Penn State President will review Freeh Report

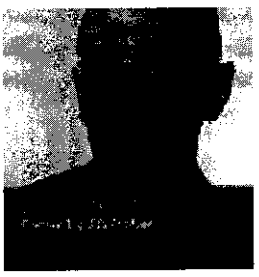
View All

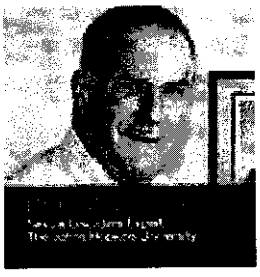












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Summary of Findings:
King & Spalding

CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE REGARDING JOE PATERNO

After the Freeh Group, which had been retained as Special Investigative Counsel ("SIC") by the Penn State Board of Trustees to investigate the Jerry Sandusky child sex abuse scandal, released its report in July 2012, the Paterno family asked King & Spalding to conduct a comprehensive review of both the report and Joe Paterno's conduct. They authorized us to engage preeminent experts and to obtain their independent analyses as an essential part of that review. This Critique of the Freeh report, which incorporates and attaches those independent analyses in full, sets the record straight. We conclude that the observations as to Joe Paterno in the Freeh report are unfounded, and have done a disservice not only to Joe Paterno and to the Penn State University community, but also to the victims of Jerry Sandusky and the critical mission of educating the public on the dangers of child sexual victimization.

THE FULL SOLLERS REPORT

Download The Full Sollers Report

SOLLERS BIO



For a complete account of experience and professional background, view the full bio

MORE>

EXHIBIT 32

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VIA E-MAIL AND FIRST CLASS MAIL

November 10, 2015

Brian E. Kowalski, Esquire
Latham & Watkins LLP
555 Eleventh Street, N.W.
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Re: Estate of Paterno v. NCAA et al.

Dear Brian,

This responds to your letter of October 29 regarding the *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno* and your subpoenas to the experts who contributed to it. Your letter starts from a fundamental misconception about the relationship of the *Critique* to the litigation. The *Critique* was compiled by counsel to the late Coach Joe Paterno and his family in response to the publication of the Freeh Report. The *Critique* is a compilation of critical analyses of the Freeh Report by experts in three subject areas (investigations, profiles of child sex abusers, and pedophilia) with an introduction and summary by counsel to the Estate of Joseph Paterno and the Paterno family. The documents the NCAA has requested from the Estate related to the *Critique* are protected by the attorney-client privilege or as attorney work product.

Unlike the Freeh Report, which provided the factual basis for the NCAA's decision to impose the Consent Decree on Penn State, and thus contributed directly to the damage that our clients sustained and for which they are suing, the *Critique* is not a document that we contend is admissible in the case. Likewise, we assume that the NCAA does not intend to offer the *Critique* in evidence. Thus, when we get to trial, Plaintiffs will be required to offer proof on the factual elements of their claims, but we do not envision that the *Critique* would provide that proof, unless of course your client wants to offer it in evidence, which seems very unlikely.

Instead, we will be required to offer evidence independent of the *Critique*. And while that evidence may come in part from experts who were involved in the *Critique*, they will be testifying as litigation experts and will be required to support their opinions and be subject to the discovery rights that the NCAA has with regard to any expert.

In short, the *Critique* addresses the flaws in the methodology of the Freeh investigation and the resulting weaknesses in the conclusions of the Freeh Report, but it does not directly form a basis for any claims in the litigation. In that regard, it is totally inapposite to the Freeh Report, which disclosed the results of an internal investigation pursuant to an express waiver of attorney-client privilege by Penn State, the client that commissioned that investigation. The *Critique* does not disclose facts compiled as a result of an internal investigation as the Freeh Report did. Nor does it disclose otherwise privileged, attorney-client information pursuant to a waiver of the attorney-client privilege as the Freeh Report expressly did. Your letter inaccurately states that the *Critique* "publicly discloses certain materials, such as notes from Wick Sollers' interview of Joe Paterno and communications with counsel for Messrs. Curley and Schultz." The Summary of Key Points in the *Critique* refers to things that were *not* said in interviews or communications with counsel or Penn State administrators, but it does not publicly disclose interview notes or communications with other counsel as you contend.

As to your statements regarding the contributors to the *Critique*, we have objected to your subpoenas to James Clemente and Dr. Fred Berlin because they are consulting experts to the Estate and have not at this point been designated testifying experts in this case. In the event they are designated as testifying experts, we have made clear that we will provide a summary of the facts and opinions as to which they are expected to testify, and a summary of the grounds for their opinions pursuant to Pa. R. C. P. No. 4003.5. As we indicated in Plaintiffs' Separate Statement Regarding Case Management Schedule, we do not favor expert depositions as we understood the NCAA does. But it is not up to either Plaintiffs or the NCAA to dictate whether expert depositions will be allowed, and Judge Leete has not yet ruled on the issues on which the parties failed to reach agreement.

Regarding your summary of Plaintiffs' responses to the NCAA's requests concerning the *Critique* itself, we have produced documents reflecting communications with third parties, as agreed. Beyond that, as stated above, the requested materials are privileged and the Estate has not waived its attorney-client privilege with King & Spalding as it relates to the *Critique*.

For all of these reasons, we do not believe that there is any inconsistency between our position on the *Critique* and our discovery requests related to the Freeh Report. We would be happy to discuss this further so there is no misunderstanding of our position.

Sincerely,

Patricia L. Maher

cc: Thomas W. Scott, Esq.
Everett C. Johnson, Esq
Sarah M. Gragert, Esq.

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *Exhibits to The National Collegiate Athletic Association's Brief in Support of its Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas*, as well as the supporting exhibits and proposed orders, on the following by First Class Mail and email:

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Counsel for Plaintiffs
Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
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Dated: December 30, 2015

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