IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. CR-2421-2011
	:	NO. CR-2422-2011
GERALD A. SANDUSKY	:	

COMMONWEALTH OF PENNSYLVANIA'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF

TO THE HONORABLE JOHN M. CLELAND, SENIOR JUDGE SPECIALLY PRESIDING:

NOW COMES the Commonwealth of Pennsylvania, by and through its attorneys, who submits this response to petition for post-conviction relief, and, in support thereof, avers as follows:

I. INTRODUCTION

Gerald A. Sandusky ("Sandusky"), convicted of the sexual abuse of 10 pre-teen and teenaged boys, has filed a petition for relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.*, wherein he seeks a new trial. In total, he has submitted 15 claims of ineffective assistance of counsel for this Court's consideration. Many of these claims are premised on variations of his prior challenges and complaints; namely, that he was forced to go to trial too quickly, that the prosecutors committed misconduct and that the thirst for financial gain and media attention prompted fabricated testimony from the victims. Because a review of his petition reveals that all of the claims either lack merit and/or Sandusky fails to establish how the outcome of his trial would have been different absent such alleged errors, the Commonwealth submits that his PCRA petition should be dismissed.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

On June 22, 2012, a Centre County jury found Sandusky guilty of 45 counts[1] relating to the sexual abuse of boys that he met through a non-profit organization that he founded called The Second Mile, an organization with the declared purpose of serving Pennsylvania's underprivileged and at-risk youth. The abuses occurred over the course of a 13 year period from 1995 to 2008. Sandusky was represented at trial by Joseph L. Amendola, Esquire ("Attorney Amendola") and Karl E. Rominger ("Attorney Rominger"). Following his convictions, this Court determined Sandusky to be a sexually violent predator ("SVP") for purposes of Pennsylvania's Megan's Law.[2] He received a total aggregate sentence of imprisonment of 30 to 60 years.

On October 18, 2012, Sandusky, through Attorney Rominger, Attorney Amendola and Norris Gelman, Esquire ("Attorney Gelman") filed post-sentence motions. Following a hearing and briefing by the parties, this Court issued an Opinion wherein it summarized and re-stated the issues as follows:

> I. That the denial of the defense requests for continuance based on the need for counsel to evaluate "the vast amount" (Defendant's brief p. ii) of material received in discovery resulted in a constructive denial of the defendant's Sixth Amendment right to counsel, and the defendant is not required to show that he was prejudiced as a result;
>
> II. That it was error to refuse to give to the jury the requested standard point for charge addressing the failure of the victims to make a

[1] Specifically, he was convicted of eight counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); seven counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); nine counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); 10 counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); 10 counts of endangering the welfare of children, 18 Pa.C.S. § 4304; and one count of criminal attempt to commit indecent assault, 18 Pa.C.S. § 901 (18 Pa.C.S. § 3126).

[2] 42 Pa.C.S.A. § 9799.24

prompt complaint as a factor to be considered in assessing their credibility;

III. That the jury was erroneously instructed regarding its consideration of the defendant's character evidence;

IV. That the failure to give both the prompt complaint instruction and the phrasing of the character evidence instruction impaired the defendant's defense;

V. That the prosecution, in closing argument, improperly commented on the defendant's failure to testify at trial;

VI. That it was error to permit the prosecution to introduce the hearsay statements of James Calhoun; and

VII. That it was error not to dismiss the charges filed against the defendant because of lack of specificity.

Opinion, 1/30/13, pp. 1-2. Concluding that the aforementioned claims lacked any merit, this Court denied the post-sentence motions. Thereafter, Sandusky filed a notice of appeal to the Pennsylvania Superior Court.[3] The issues presented to the court, as phrased by Attorney Gelman, were as follows:

I. Was reversible error committed when the trial court refused to give the standard suggested criminal jury instruction requested by the defense on the failure of the complainants to make a prompt complaint to authorities;

Is the Commonwealth estopped from arguing the instruction was not warranted under principles of judicial estoppel?

Was the refusal to give the failure to make a prompt report jury instruction harmless error?

II. Did reversible error occur when the prosecutor commented adversely on the defendant's not testifying at trial;

Can the prosecutor's adverse comments as to Appellant not having testified be said to have been harmless?

[3] Sandusky was represented on appeal by Attorney Gelman.

III. Did the Court deny Appellant due process of law and impair his Sixth Amendment right to counsel when it denied his motions for three continuances due to the vast amount of material turned over to the defense pursuant to court ordered discovery and service of subpoenas; and

IV. Did the Court commit reversible error when it required the jury to weigh the testimony of Appellant's character evidence against all of the other evidence in the case?

Brief for Appellant, 6/20/13, p. 14. In a published decision filed on October 2, 2013, the Superior Court rejected Sandusky's claims and affirmed the judgment of sentence. *See Commonwealth v. Sandusky*, 77 A.3d 663 (Pa. Super. 2013).

After the Superior Court affirmed his judgment of sentence, Sandusky sought review in the Pennsylvania Supreme Court. By order dated April 2, 2014, his petition for allowance of appeal was denied. *See Commonwealth v. Sandusky*, 81 A.3d 77 (Pa. December 18, 2013) (No. 577 MAL 2013). No petition for writ of certiorari was filed in the United States Supreme Court.

On June 20, 2014, Alexander H. Lindsay, Jr., Esquire entered his appearance on behalf of Sandusky in the Centre County Court of Common Pleas. He filed a petition for post-conviction relief on April 2, 2015 under seal. An amended PCRA petition was thereafter filed on May 6, 2015.[4] The Commonwealth now submits the instant response to Sandusky's PCRA petition.

III. LEGAL STANDARD

The Pennsylvania Supreme Court has long held "[a]lthough a perfectly conducted trial is indeed the ideal objective of our judicial process, the defendant is not necessarily entitled to relief simply because of some imperfections in the trial, so long as he has been accorded a fair trial. *See Commonwealth v. Hill*, 301 A.2d 587 590 (Pa. 1973).

[4] For ease of reference, the Commonwealth will refer to the original and amended petitions collectively as "PCRA petition."

With respect to seeking relief pursuant to the Post-Conviction Relief Act, the universe of challenges available is more limited than in other cases. *See Commonwealth v. Blakeney*, 108 A.3d 739, 749 (Pa. 2014). To prevail on a petition for PCRA relief, a petitioner must plead and prove, by a preponderance of the evidence, that the conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2).[5] In addition, a petitioner must show that the claims of error have not been waived. 42 Pa.C.S. § 9543(a)(3). An issue has been waived "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post-conviction proceeding." 42 Pa.C.S. § 9544(b). Generally speaking, any claim deriving from an event at trial could have been challenged at trial and raised on direct appeal. To the extent such a claim was not raised at trial, it is waived under the PCRA, unless an exception applies. *See Blakeney, supra.*

A petitioner must also establish that the claims of error have not been previously litigated. *See* 42 Pa.C.S. § 9543(a)(3). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2); *see Commonwealth v. Hutchinson,* 25 A.3d 277, 284–85 (Pa. 2011).

With respect to claims of deficient stewardship of counsel, such as the ones raised by Sandusky in his petition, it is important to note that "counsel is presumed effective, and a petitioner bears the burden of proving otherwise." *Commonwealth v. Steele,* 961 A.2d 786, 796 (Pa. 2008) (citing *Commonwealth v. Hall,* 701 A.2d 190, 200–01 (Pa. 1997)). To prevail on an ineffectiveness claim, a petitioner must establish:

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[5] Sandusky contends that his convictions resulted from a violation of the United States Constitution or the Pennsylvania Constitution (42 Pa.C.S. § 9543(a)(2)(i)), and the ineffective assistance of counsel (42 Pa.C.S. § 9543(a)(2)(ii))).

> The underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) [a Petitioner] suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Lesko, 15 A.3d 345, 373–74 (Pa. 2011) (citing *Commonwealth v. Pierce,* 527 A.2d 973, 975 (Pa. 1987)).[6] Where it is clear that a petitioner has failed to meet any of the three, distinct prongs of the *Pierce* test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met. *See Commonwealth v. Basemore,* 744 A.2d 717, 738 n. 23 (Pa. 2000). Further, counsel cannot be deemed ineffective for failing to raise a meritless claim. *See Commonwealth v. Washington,* 927 A.2d 586, 603 (Pa. 2007).

When determining whether counsel's actions or omissions were reasonable, a court does not question whether there were other more logical courses of actions which counsel could have pursued; rather the court must examine whether counsel's decisions had *any* reasonable basis. *See Commonwealth v. Rios,* 920 A.2d 790, 799 (Pa. 2007) (citation omitted) (emphasis added). Further, in order to establish prejudice, a petitioner must demonstrate that "but for the act or omission in question, the outcome of the proceedings would have been different." *Id.* (citing *Commonwealth v. Rollins,* 738 A.2d 435, 441 (Pa. 1999)).

In accordance with this well-established criteria for review, the Commonwealth must emphasize that Sandusky wass required to set forth and individually discuss substantively each prong of the *Pierce* test for each allegation of counsel ineffectiveness in his petition. *See Commonwealth v. (James) Jones,* 876 A.2d 380, 386 (Pa. 2005); *Commonwealth v. Wharton,* 811 A.2d 978, 988 (Pa. 2002) ("Claims of ineffective assistance of counsel are not self-proving .

[6] This test is coextensive with the "performance and prejudice" test first enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984), and recognized in *Pierce* as the proper test under the Pennsylvania Constitution.

. . "); *Commonwealth v. (Michael) Pierce,* 786 A.2d 203, 221 (Pa. 2001) (noting that a defendant cannot prevail on claim of ineffective assistance of counsel when claim is not developed). As will be discussed *infra*, the Commonwealth takes exception to the fact that Sandusky only makes fleeting references to the *Pierce* prongs in many instances, essentially glossing over his burden of proof. The law is clear that claims based upon boilerplate allegations cannot satisfy a defendant's burden of establishing ineffectiveness. *See Jones,* 876 A.2d at 386; *Commonwealth v. Bracey,* 795 A.2d 935, 940 n. 4 (Pa 2001) ("[s]uch an undeveloped argument, which fails to meaningfully discuss and apply the standard governing the review of ineffectiveness claims, simply does not satisfy Appellant's burden of establishing that he is entitled to any relief."). Thus, where a defendant fails to set forth all three prongs of the ineffectiveness test and meaningfully discuss them, the claims can be deemed waived for lack of development.

IV. ARGUMENT

A. Sandusky is Not Entitled to Relief Pursuant to the Post-Conviction Relief Act

Claim 1) [7]

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

Sandusky's chief complaint prior to trial was that he was being forced to proceed to trial too quickly and that there was insufficient time to prepare his case. On direct appeal to the Superior Court, he argued that this Court's refusal to grant his continuance requests effectively deprived him of his Sixth Amendment right to the effective assistance of counsel. As will be discussed in more detail in connection with Claim 2 *infra*, the Superior Court definitively and unequivocally rejected that claim.

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[7] For ease of reference, the Commonwealth adopts the wording and order of Sandusky's claims as set forth in his PCRA Petition.

Undeterred, however, Sandusky renews his lamentations about the "fast-tracking" of his case to trial. This time, however, he avers that the failure to postpone his case deprived him of his right to due process and a fair trial. At the outset, the Commonwealth notes that any stand-alone claim that Sandusky's due process rights were violated due to pre-trial publicity and a hostile environment is waived because it was not raised on direct appeal. *See* 42 Pa.C.S. § 9544(b). Moreover, the allegation is not preserved for review in the context of an ineffective assistance of counsel claim because Sandusky fails to properly develop it.[8]

It is somewhat challenging to discern the exact basis of Sandusky's ineffective assistance of counsel claim(s) here. What is clear, however, is what he is *not* alleging. Sandusky is not asserting that counsel was ineffective for failing to file a motion for change of venire or venue,[9]

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[8] Paragraph 123 of Sandusky's petition alleges that:

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

Amended PCRA Petition, 5/6/15, p. 27. Paragraph 127 alleges that:

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

Id. at 28. "[B]oilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective." *Commonwealth v. Paddy,* 15 A.3d 431, 443 (Pa. 2011).

[9] Footnote 11 states that ". . . Sandusky submits that no change of venue or venire would have reduced the prejudice.") Amended PCRA Petition, 5/6/15, p. 19, n. 11. This footnote is arguably at odds with his averment in Paragraph 125, however, wherein he stated:

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

nor is he asserting that counsel was ineffective for objecting to the Commonwealth's motion for change of venire. From a reading of the petition, it appears that his claims of ineffective assistance of counsel are really limited to the following grounds: 1) Trial counsel was ineffective for failing to include evidence of the pervasive media attention and hostile atmosphere in Centre County in his motion for continuance; and 2) Trial counsel failed to undertake an investigation to determine if the passions against Sandusky had dissipated in Centre County or anywhere else. Taken together, it is Sandusky's position that if his trial counsel had done more investigation and included more evidence of hostility/publicity in a motion for continuance, this Court would have inevitably postponed the trial to allow for a sufficient "cooling off" period of the pervasive, extensive media that surrounded his case in Centre County.

This claim is meritless. There is no doubt, indeed no question at all, that this Court was well aware of the extent of the pre-trial publicity in Sandusky's case. Therefore, Sandusky's suggestion that some further evidence/information from defense counsel was necessary rings hollow. In the Memorandum and Order denying the Commonwealth's motion for change of venire, this Court observed:

> The extensive involvement of Penn State in the life of the citizens of Centre County, and the existence of the extraordinary mass media coverage of this case cannot be denied. ***It is the effect of those influences on the possibility of selecting a fair jury that is in dispute.***

Memorandum & Order, 2/13/12, p. 3 (emphasis added). This Court went on to observe that it would reconsider its denial of the motion should it become apparent during *voir dire* that a jury could not be selected within a reasonable time period. *See id.* at 5.

In determining whether there has been an adequate cooling off period to dissipate the effect of presumptively prejudicial pre-trial publicity, the law is well-settled that:

Id. at 27, ¶ 125.

> [A] court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pretrial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.

Commonweatlh v. Drumheller, 808 A.2d 902-03 (Pa. 2002) Here, Sandusky does not identify any jurors whose fairness and partiality were arguably questionable. In fact, he does not refer to the jury selection process at all. Therefore, even if Sandusky could point to some identifiable, critical piece of evidence regarding pre-trial publicity and media coverage that his counsel should have brought to this Court's attention in a motion for continuance, it would not have changed the outcome of his trial. As such, Sandusky cannot demonstrate that he suffered prejudice under the *Pierce* test.

Sandusky relies heavily upon the case of *Maxwell v. Sheppard*, 384 U.S. 333 (1966). In *Sheppard*, despite the fact that some of the jurors admitted that they heard or read news reports, the trial court never sequestered the jurors and only suggested that they avoid media coverage:

> [T]he *Sheppard* jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's 'admonitions' at the beginning of the trial are representative:
>
> > 'I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds * * *. I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in

> progress. After it is all over, you can read it all to your heart's content * * *.'
>
> At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends . . . .

Id. at 352 (citation omitted). The *Sheppard* case stands in stark contrast to Sandusky's trial wherein this Court entered comprehensive orders governing courtroom decorum (*see* Orders dated 5/30/12, 6/4/12 and 6/21/12) and instructed the jury as follows:

> Now I want to speak with you for just a couple minutes about the importance of not talking about this case with anyone or permitting anyone to talk with you about the case or reading or listening to any news reports about the case.
>
> During *voir dire* you each acknowledged that you understood that obligation and then when I met with each of you individually after you had been selected and before you were released for the day, I talked to you about that again. And you will recall that I emphasized that you could not discuss the case with anyone, even with your own family when you return home at night or even your close friends. There will be an opportunity for that when the case is over, if you want to talk to anybody about it.
>
> But in the meantime, please explain to your family and your friends, if they don't already understand it, that they have a responsibility, too, to see that justice is done in this case and they should not discuss the case in your presence or tell you anything that they have seen or heard about the case.
>
> Now, I use the term discuss in its broadest sense. It includes not just face-to-face conversations, but it means no texting, no telephone or cell phoning, no e-mailing, no updating your Facebook pages, or any other social media.
>
> I have explained to you that if any person who knows you are on the jury talks to you about the case or attempts to give you information or to influence your thinking or deliberations or even asks you questions about the case as you come to and from the courthouse, that that is a matter of the most serious consequence.
>
> Your friends, your family, your colleagues, your strangers, news reporters are all on notice. I will not permit the integrity of our jury system to be tampered with or

> permit even the appearance that during your jury service you have been exposed to outside information or influences.
>
> So why am I so insistent about this that I have repeated it so many times and with such emphasis? Because, of course, you are not sequestered.
>
> Why in a case with so much publicity are you not being sequestered? Because if as a community we can trust you to listen to the evidence and return a just verdict, then I think as a community we can trust you not to listen to the news or talk about the case with others and, of course, thereby spare you and your family the unpleasantness and extreme inconvenience of being held incommunicado in a hotel for a couple weeks.
>
> You're not being sequestered, but I want you and everyone else to know the rules from the start.
>
> So, as jurors you must be separate and apart. If there's some inadvertent contact between you and the attorneys in the court hallways, for example, they'll exchange a greeting but no more. So don't take any offense. Even my communication, as I just explained to you a few minutes ago, will be restricted. And all of that is absolutely to avoid any appearance that your judgments are anyone's but your own.
>
> I will remind you at almost every recess that you should not read, listen to, or watch anything about the case in the newspapers or magazines or on radio or television or try to get any information about the case on your own by making any independent investigation, doing any research, visiting the scene, or conducting any experiments, or googling any terms.

N.T. 6/11/12, pp. 9-12. Sandusky does not allege any errors with respect to decorum, nor does he aver that a juror accessed the media during the course of his trial. Indeed, he could not raise any such issue at this juncture because it would be deemed waived. *See* 42 Pa.C.S. § 9544(b).

Because Sandusky cannot establish a valid claim of ineffective assistance of counsel, Claim 1 should be denied.

Claim 2) Trial Counsels' Failure to Withdraw, and/or Trial Counsels' Failure to Immediately Appeal the Trial Court's Denial of their Motion to Withdraw Fundamentally Prejudiced Mr. Sandusky and Amounted to Ineffective Assistance of Counsel and a Breach of the Rules of Professional Conduct

Sandusky commences his discussion of this claim by stating:

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

Amended PCRA Petition, 5/6/15, p. 28, ¶ 129 (emphasis in original). In doing so, Sandusky blatantly overlooks or chooses to ignore the fact that the Superior Court squarely rejected such a position. On direct appeal, Sandusky had argued that the refusal to postpone his trial constituted a structural defect requiring automatic reversal of his judgment of sentence under the United States Constitution. The Superior Court dismissed such an allegation outright, identifying the issue as being whether this Court's denial of Sandusky's continuance requests deprived him of his Sixth Amendment right to the effective assistance of counsel. The Superior Court summarized the requests made by counsel and this Court's response as follows:

> Here, from January 28, 2012, until June 15, 2012, Sandusky received voluminous supplemental discovery. From the Commonwealth he received 9,450 pages of documentation, 674 pages of Grand Jury transcripts, and 2,140 pages from subpoenas *duces tecum*. Due to the high volume of discovery received so close to the trial date, counsel maintained they were unprepared for trial and requested continuances on March 22, 2012, May 9, 2012, and May 25, 2012.
>
> In orders entered on February 29, 2012, and April 12, 2012, the trial court summarily denied the continuance requests. In an order entered on May 30, 2012, however, the trial court addressed Sandusky's claim regarding the need to postpone the trial due to the volume of material provided in discovery. The trial court explained its denial as follows:
>
> > The amount of material that I have ordered the Commonwealth to provide in discovery has been significant. No doubt sorting the wheat from the chaff has been time consuming. Again, however, the defense team is assuredly capable, even as the trial is ongoing, of sorting through the material to determine what is useful to the defense and what is not.
> >
> > ***
> >
> > While I certainly do not doubt the sincerity of defense counsel in requesting a continuance, the reality of our system of justice is that no date for trial is ever perfect, but some dates are better than others. While June 5th does present its problems, on balance and

> considering all the interests involved—the defendant's right to a fair trial, the alleged victims' right their day in court [*sic*], the Commonwealth's obligation to prosecute promptly, and the public's expectation that justice will be timely done—no date will necessarily present a better alternative.
>
> Order, 5/30/12, at 3–4.

Sandusky, 77 A.3d at 672 (internal footnote omitted). The Superior Court went on to conclude that this Court's explanation denoted a careful consideration of the matter, did not reflect "a myopic insistence upon expeditiousness in the face of Sandusky's request" and was not an arbitrary denial. *Id.* Accordingly, the Superior Court determined that there was no abuse of discretion. The analysis did not end there, however. The court conceded that an error had occurred, for the sake of argument, in order to reach the question of whether such error was harmless. In concluding that Sandusky suffered no prejudice from this Court's denial of his motions for continuance, the Superior Court referenced the testimony elicited during cross-examination of Attorney Amendola at the hearing on Sandusky's post-sentence motions:

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

Id. at 672-673 (internal citation omitted). The Superior Court stated, "As evidenced by counsel's own testimony, Sandusky suffered no prejudice from the trial court's denial of the continuance requests. Therefore, this claim fails." *Id.* at 673.

Unsuccessful on direct appeal, Sandusky now presents a variation on this claim. In his quest for post-conviction relief, Sandusky's argues that because his trial attorneys had a duty to withdraw pursuant to Rule 1.16 of the Pennsylvania Rules of Professional Conduct,[10] they should have pursued an interlocutory appeal to the Superior Court pursuant to Pa.R.A.P. 312 or Pa.R.A.P. 313 after this Court denied their motion to withdraw.

Prior to the start of jury selection on June 5, 2012, Sandusky's counsel presented this Court with a motion to withdraw, averring that they were not prepared to go to trial. Counsel specifically referenced Rule 1.16 during oral argument in support of the motion. This Court denied the motion that same day.

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[10]Rule 1.16 provides in relevant as follows:

> **Rule 1.16. Declining or Terminating Representation**
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> ***
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> ***
>
> (7) other good cause for withdrawal exists.
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Pa.R.P.C. 1.16.

Although Sandusky complains in his PCRA petition that counsel "failed to prepare as reasonably necessary" and that "their representation was in direct violation of the Pa. Rules of Professional Conduct," Amended PCRA Petition, 5/6/15, p. 29, ¶¶ 134, 140, one is left to guess at the factual support for such accusations/allegations. Sandusky's petition is completely devoid of any explanation as to how the quality of counsel's representation was compromised when the trial moved forward as scheduled, let alone compromised to the degree that withdrawal was mandatory under the Rules of Professional Conduct.[11] Indeed, the absence of any identifiable error is quite conspicuous in light of Attorney Amendola's testimony during the hearing on Sandusky's post-sentence motions:

> Q: Mr. Amendola, you would agree that much of the [discovery] material that you requested was frankly irrelevant; would you agree?
>
> A: It turned out to be that way.
>
> ***
>
> Q: What item have you discovered since the conclusion of the trial, in your review of these voluminous documents that you have talked about, that would have altered your conduct at the trial?
>
> ***
>
> A: The answer is none.
>
> Q: None. So there is no item, document, or person that in your review of the documents that you received at any time that would have altered your conduct at trial during the course of trial; isn't that correct?
>
> A: That's correct.
>
> Q: Okay. You knew who the witnesses were prior to trial?
>
> A: Yes.

[11] It should be noted that not only did Sandusky have the services of two attorneys in Pennsylvania, he was also assisted by civil counsel in New Jersey who generated a portion of the 50 discovery requests. N.T. 1/10/13, p. 28-29.

Q: Okay. You had the grand jury testimony at some point before you had to cross-examine them?

A: Yes.

Q: You had the police reports of what they told the state police this defendant did to them; did you not?

A: Yes.

Q: And you knew that was the substance of the case and you were able to cross-examine them based on that, weren't you?

A: Yes.

Q: Okay. You , in fact, said as much that this case - - you said it to the jury in fact, both in your opening and your closing that the rise and fall of this case is the credibility of the witnesses?

A: Yes.

Q: Okay. You were not prescribed or constrained in any way from cross-examination of those witnesses in any area, were you?

A: No.

Q: Okay. In fact, you cross-examined almost every one of them at great length?

A: Yes.

***

Q: In the documents that are the subject matter of this hearing, there's nothing in any of those material that would have altered your approach or the way you addressed the credibility of these witnesses which was the key issue as you said involved in the juror's determination of your client's guilt; isn't that correct?

A: That's correct.

N.T. 1/10/13, pp. 39-41, 42-43. Moreover, it should be noted that in his witness certifications, Sandusky fails to include an explanation of how any lack of preparation impacted the conduct of Attorneys Amendola and Rominger. *See* 42 Pa.C.S. § 9545(d)(1) (A request for an evidentiary

hearing must include a certification, signed by the petitioner, as to each intended witness, identifying . . . the expected substance of his or her testimony).

In summary, while counsel certainly could have pursued an interlocutory appeal to the Pennsylvania Superior Court either by permission or as a collateral order, *see, e.g., Commonwealth v. Reading Group Two Properties, Inc.*, 922 A.2d 1029, 1032 (Pa. Cmwlth. 2007), the reality is that Sandusky cannot establish that but for taking such an appeal, the outcome of his trial would have been any different. Because he cannot establish prejudice, his ineffective assistance of counsel claim fails.

Claim 3) The Prosecutor's Closing Argument Contained an Unconstitutional Reference to Sandusky's Fifth Amendment Right to Remain Silent and a Blatant Misrepresentation of Fact, Warranting a New Trial.

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

During its case-in-chief, the prosecution played a portion of Sandusky's televised interview with Bob Costas wherein Sandusky was questioned about the charges levied against him. While in the course of delivering his closing remarks to the jury, the prosecutor offered the following argument/observations in connection with that interview:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close.
>
> Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining—he offered that his client has a tendency to repeat questions after they're asked. I would think that

> the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question [*sic*]. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He enjoys young children.

N.T. 6/21/12, at 140–142. At the conclusion of closing arguments, counsel for Sandusky lodged an objection to these particular remarks.[12] He stated:

> He [prosecutor] commented on extensively that the client could have come forward and broken his post-arrest silence and added more to his statement. We didn't put this statement in of the defendant. We didn't put any testimony of the defendant in. The Commonwealth is not saying he should have put more things forward, could have identified people in the shower, and done something in his own defense. They have other things on the same vein throughout their argument suggesting the defendant should have come forward with something that would exonerate himself.

Id. at 145. In response, this Court observed that the prosecutor had engaged in fair rebuttal and that the jury had been cautioned "again and again" that Sandusky did not have an obligation to testify nor was he required to present any evidence on his behalf. *Id.* at 136. Out of an abundance of caution, however, this Court instructed the jury once more that Sandusky need not present any evidence in support of his own defense. *See id.* at 138.

Citing the prosecutor's argument set forth above, Attorney Gelman argued on direct appeal that reversible error had occurred because the prosecutor commented adversely on Sandusky's failure to testify. Because trial counsel had merely objected to the prosecutor's argument at trial and did not move for a mistrial or request a curative instruction, however, the Superior Court found the issue to be waived. *See Sandusky*, 77 A.3d at 670 (citing

[12] Pursuant to a court-approved stipulation, counsel agreed to reserve their objections until after closing arguments unless the remarks were "patently egregious." N.T. 6/21/12, p. 5.

Commonwealth v. Jones, 460 A.2d 739, 741 (Pa. 1983) (finding prosecutorial misconduct claim waived where defense counsel immediately objected to the prosecutor's conduct but failed to request mistrial or curative instructions); *cf. Commonwealth v. Rhone,* 619 A.2d 1080, 1083 (Pa. 1993) (declining to find waiver for prosecutorial misconduct where counsel failed to request a curative instruction, but lodged an objection, moved to strike the comment, and requested a mistrial)). In a footnote, the Superior Court further observed:

> As noted, the record indicates that Sandusky agreed with the trial court's decision to "caution the jury again" as counsel indicated he had nothing further when asked by the trial court. Sandusky was apparently satisfied with the trial court's resolution of the alleged prosecutorial misconduct as he did not request any further remedy.

Id., n.2.

Taking his cue from the Superior Court, Sandusky now presents a claim that trial counsel was ineffective for failing to request a mistrial in connection with the prosecutor's remarks in question. He also claims that a mistrial was warranted based upon the following commentary by the prosecutor:

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

N.T. 6/21/12, p. 425.[13]

[13] Sandusky also suggests that by agreeing to reserve objections until after the conclusion of closing arguments, counsel was ineffective *per se.* Amended PCRA Petition, 5/6/15 p. 34, ¶ 153.

A criminal defendant's decision not to testify is protected by the Fifth Amendment of the United States Constitution[14] and Article I, § 9 of the Pennsylvania Constitution.[15F] and the legislature has provided statutory protection from such references since 1887.[16] *See Griffin v. California,* 380 U.S. 609, 611 (1965); *Commonwealth v. Trivigno,* 750 A.2d 243, 248 (Pa. 2000). A prosecutor is not permitted to comment adversely upon a defendant's refusal to testify as to the merits of the charges against him because it compromises the privilege against self-incrimination

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However, as noted by the Superior Court on direct appeal, without a request for a mistrial or curative instruction, any objection to the prosecutor's remarks was essentially meaningless. Therefore, it was not the reservation of objections that posed a problem. Moreover, the parties were free to interrupt the arguments and interpose an objection to any remark that was "patently egregious." N.T. 6/21/12, p. 5. The Commonwealth submits that the prosecutor's remarks that are the subject of Claim 3 certainly did not rise to the level of "patently egregious" argument. Accordingly, Sandusky's counsel was not derelict in his duty for failing to disrupt the prosecutor's closing argument in order to lodge an objection.

[14] The Fifth Amendment in part provides: "No person shall be ... compelled in any criminal case to be a witness against himself . . . " U.S. Const. amend. V.

[15] Article 1, § 9 provides:

> In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself . . . The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

Art. 1, § 9.

[16] Section 5941(a) of Title 42 provides as follows:

> **Persons who may be compelled to testify**
>
> (a) General rule.—Except defendants actually upon trial in a criminal proceeding, any competent witness may be compelled to testify in any matter, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal proceeding, to offer himself as a witness, be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.

42 Pa.C.S. § 5941(a)

and the defendant's constitutional presumption of innocence. *See Commonwealth v. Rolan,* 549 A.2d 553, 556 (Pa. 1988). With respect to a motion for a mistrial based upon alleged improper remarks by the prosecutor, such motion will only be granted "where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." *Commonwealth v. Simpson*, 754 A.2d 1264, 1272 (Pa. 2000)

Here, as this Court previously observed, the prosecutor's remarks constituted fair rebuttal to the interpretation/explanation of the Costas interview that was set forth by the defense in its closing argument. The prosecutor posed perfectly reasonable, unanswered questions that loomed as a result of Sandusky's responses in the interview. He certainly was not suggesting that the jury should draw an adverse inference from the fact that Sandusky failed to take the witness stand to explain his side of the story. Indeed, "the mere revelation of silence does not establish innate prejudice." *Commonwealth v. DiNicola,* 866 A.2d 329, 336–37 (Pa. 2005)); *see also Rolan,* 549 A.2d at 556–57 (prosecutor's comment that jury had heard absolutely no evidence which would indicate someone other than defendant shot the victim was not an impermissible comment on the defendant's failure to testify); *Commonwealth v. Young,* 383 A.2d 899, 901 (Pa. 1978) (prosecutor's closing argument that jurors did not know what was in defendant's mind at the time of the offense or at the time he cooperated with police was not an impermissible comment on the defendant's failure to testify).

It is important to note that there is a long-standing principle that a prosecutor must be free to present argument with logical force and vigor and that courts have permitted vigorous prosecutorial advocacy "as long as there is a reasonable basis in the record for the [prosecutor's] comments." *Commonwealth v. Robinson,* 864 A.2d 460, 516–17 (Pa. 2004). Moreover, any

challenged prosecutorial comment must not be viewed in isolation, but rather must be considered within the context in which it was offered. *See id.* Here, the Commonwealth submits that there was certainly a reasonable basis for the prosecutor's comments and he was careful not exceed the bounds of oratorical flair. In summary, because there was no prosecutorial misconduct, there was no reason for counsel to have requested a mistrial.

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

During Sandusky's trial, the Commonwealth presented the testimony of eight victims who detailed the sexual abuse that they suffered at the hands of Sandusky. Additionally, the Commonwealth called witnesses to establish that Sandusky had abused two other unnamed victims. In total, the jury considered criminal charges as it related to the abuse of 10 individuals. At the conclusion of his closing remarks to the jury, the prosecutor stated:

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

N.T. 6/21/12, p. 111.

Even though the prosecutor was unmistakably referring to the two unnamed victims in his remarks, Sandusky attempts to assign a tortured and improper meaning to those words in order to obtain a new trial. First, he would like this Court to find that the prosecutor's remarks constituted an impermissible "call to the jury to convict [Sandusky] for conduct for which he was not on trial." Amended PCRA Petition, 5/6/15 p. 38, ¶ 171. Should this Court be unpersuaded by that argument, however, Sandusky's next position is that the prosecutor's remarks constituted a blatantly false statement. Specifically, Sandusky audaciously suggests that the prosecutor's

remarks could only have been a reference to Victim 2, and that the identity of Victim 2 was, in fact, known to the Commonwealth at the time of trial. Sandusky then goes on to detail the interviews of Allan C. Myers ("Myers") who denied, then admitted, then denied again that he was Victim 2. Sandusky's theory is that the Commonwealth faced a dilemma because if they called Myers as a witness, Myers could potentially undercut the testimony of Michael McQueary. According to Sandusky, the prosecutor's solution was to simple: Lie to the jury and tell them that the victim was "known to God but not to us." *Id.* at 43, ¶ 192. To suggest that an officer of the court would intentional lie and violate his oath is a serious allegation and one that should only be buttressed with legitimate evidence. Here, Sandusky offers no evidence in support of his position except for self-serving speculation about the prosecutor's mindset and motivations. He can hardly establish that this was a meritorious claim that counsel should have preserved through an objection/request for mistrial if its validity is in such serious doubt. Accordingly, this claim should be dismissed outright without any further analysis.

Claim 4) The Unavailability of Spanier, Curley and Schultz Due to the Commonwealth's Disingenuous Charges Against Them Violated Sandusky's Right to Present Witnesses and Compulsory Process.

Prior to trial, counsel for Sandusky filed a motion in limine seeking this Court's permission to admit the out-of-court statements of Timothy Curley ("Curley"), Gary Schultz ("Schultz") and Graham Spanier ("Spanier") during the defense case-in-chief. Counsel averred that "Curley and Shultz are known to, and Spanier is believed to be likely to, invoke their right against self-incrimination and be unavailable." Motion in Limine to Admit The Out of Court

Statements of Unavailable Witnesses Spanier, Curley & Shultz, 6/11/12, p. 1.[17] Counsel had originally requested this Court to continue Sandusky's trial pending the resolution of Curley and Schultz's prosecutions. That motion was denied. In denying the motion for continuance, this Court observed, *inter alia*, that counsel for Curley and Schultz had informed Sandusky's counsel "that their clients would not testify as witnesses at Sandusky's trial whenever it was scheduled because of the legal complexities in their own pending prosecutions." Memorandum Order, 5/30/12, p. 3. This Court went on to state: "Since there is no possibility the witnesses will testify there is no reason to delay the trial on that basis." *Id.*

On June 18, 2012, this Court entertained argument on Sandusky's motion in limine. Counsel for Sandusky explained that it was necessary for the defense to admit the grand jury testimony of Curley, Schultz and Spanier because their statements exculpated Sandusky and impeached the testimony of Commonwealth witness Michael McQueary. N.T. 6/18/12, p. 163. Specifically, counsel stated:

> MR. ROMINGER: Mr. Curley is going to say it was communicated to him it was horseplay between a man and a boy in the shower and he didn't hear about anything sexual in nature or at least graphically sexual in nature. So it tends to contradict Mr. McQueary and exculpate the defendant. The exculpatory statement of an unavailable witness under 804 and analysis under *Hackett* and the other cases I cite, I think *Hackett* says it's mandatory to be admitted.

Id. This Court, in turn, observed that it was not so much concerned with the introduction of the statement; rather, the concern was with the Commonwealth's response. The record reveals the following relevant discussion:

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[17] On November 7, 2011, the Commonwealth charged Curley and Schultz with the crimes of perjury, 18 Pa.C.S.§ 4902(a), and failure to report suspected child abuse. 23 Pa.C.S. § 6319. *See* Docket No. CP-22-CR-5165-2011 (Curley); Docket No. CP-22-CR-5164-2011 (Schultz).

THE COURT: I'm not so much concerned about permitting you to introduce this statement. I'm more concerned about what the Commonwealth's response is and how I rule on that because clearly the Commonwealth would be permitted to prove at least that they have now been indicted for perjury or at least two of them have.

And then do I say, okay, the Commonwealth, you are restricted. You can't go beyond that, and then you argue to the jury, well, they're indicted for perjury but they are presumed to be innocent and, therefore, until they're proven that they lied to the jury, you are entitled to rely on this statement, which could potentially be misleading to the jury if the Commonwealth in fact has other evidence of perjury. And then that gets us to a – basically trying Curley and Schultz in this case before they have been tried in their own case.

MR. ROMINGER: I would note we did ask for a continuance past the Curley and Schultz cases.

THE COURT: Yeah, you did note I denied that for obvious reasons.

MR. FINA: **They said they would never testify in this case whether acquitted or not.**

THE COURT: **That is the other aspect. There's no assurance they would ever be available.**

MR. ROMINGER: **Right.**

THE COURT: Okay.

***

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

MR. ROMINGER: Correct.

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

> So the question in my mind is not the admission of the statement. It is what restriction, if any, should be placed on the Commonwealth?
>
> **Another concern that I have here is there's some fundamental due process issues, and I'm not suggesting that the Commonwealth has in any way acted improperly. But one could easily see how the Commonwealth could hamstring the defense by issuing target letters or indictments directed toward defense witnesses. Therefore, you know, effectively quieting a witness who has no choice but to exert a Fifth Amendment privilege. I'm not suggesting that was done but I'm trying to figure out how to sort through that problem.**

N.T. 6/18/12, pp. 167-69 (emphasis added). The motion to admit the grand jury testimony was ultimately denied.

In his petition for post-conviction relief, Sandusky seizes upon the concern espoused by the Court during the June 18, 2012 argument and, in audaciously reckless fashion, accuses the Commonwealth of engaging in bad faith. He contends that the Commonwealth never really intended to prosecute Curley, Schultz and Spanier; instead, the Commonwealth merely instituted criminal charges in order to preclude Sandusky from calling them as defense witnesses at trial.

At the outset, the Commonwealth notes that at the time of Sandusky's trial, both Curley and Schultz had outstanding criminal charges pending against them and they indicated that they would exercise their right against self-incrimination if called to testify as defense witnesses. It is axiomatic that a witness who invokes his Fifth Amendment privilege is deemed "unavailable" for the purpose of testifying provided the court first determines that the witness' concern with self-incrimination is legitimate. *See Commonwealth v. Bazemore*, 585 614 A.2d 684, 685 (Pa. 1992). As acknowledged by this Court and the parties, Curley and Schultz were not available to Sandusky as witnesses. A closer question exists, however, with respect to Spanier. Spanier was not charged by the Commonwealth until November 1, 2012, approximately four and one-half

months after the conclusion of Sandusky's trial. While it was represented in the defense motion in limine that Spanier "was believed to be likely to" invoke his right against self-incrimination, Sandusky fails to articulate in his PCRA petition how or why Spanier was unavailable to him at the time of trial. It is Sandusky's burden to establish that Spanier would have been willing and able to testify on his behalf absent the invocation of his Fifth Amendment privilege, and that the absence of Spanier's testimony denied Sandusky the right to a fair trial.[18] *See Commonwealth v. Sneed,* 45 A.3d 1096, 1108–09 (Pa. 2012). Despite this deficiency, the Commonwealth will proceed to address Sandusky's contention that Curley, Schultz and Spanier were all unavailable to testify on his behalf of Sandusky at trial due to the fact that the Commonwealth instituted disingenuous charges against them.

The law is well-settled that in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." United States Constitution, Amendment VI. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . This right is a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19, (1967). *See Chambers v. Mississippi,* 410 U.S. 284, 302, (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). The defendant's Sixth Amendment right to call witnesses favorable to his defense mandates that such witnesses be free to testify without fear of prosecutorial retaliation. *See Commonwealth v. Jennings,* 311 A.2d 720, 722 (Pa. Super. 1973) ("[T]he accused is entitled to protection from the state's abuse of its prosecutorial machinery which tends to 'effectively drive the witness off the stand.' ").

[18] For example, Sandusky does not include any such statement by Spanier in the witness certification section of his PCRA petition. *See* 42 Pa.C.S. § 9545(d)(1).

Under certain circumstances, courts have found that intimidation or threats that dissuade a potential defense witness from testifying may infringe upon the due process rights of a defendant. *See id.* (due process violated where prosecutor's warning to defense witness of right against self-incrimination was given in a manner designed to exert such duress upon witness as to preclude free and voluntary choice whether to testify at defendant's trial); *compare Commonwealth v. DiGiacomo,* 345 A.2d 605 (Pa. 1975) (prosecutor's justifiable warning to potential defense witness of right against self-incrimination did not violate due process where the warning was not in the nature of a threat). *See also Webb v. Texas,* 409 U.S. 95 (1972).

To establish a Fourteenth Amendment due process violation based on the denial of the right to compulsory process, a defendant must establish "more than the mere absence of testimony." *United States v. Valenzuela–Bernal,* 458 U.S. 858, 867 (1982). There must be a plausible showing that an act by the government caused the loss or erosion of testimony that was both material and favorable to the defense. *Id.* Therefore, in order to prevail on such a due process claim, "an accused must, at a minimum, demonstrate some plausible nexus between the challenged governmental conduct and the absence of certain testimony." *United States v. Hoffman,* 832 F.2d 1299, 1303 (1st Cir. 1987).

Sandusky either consciously fails to acknowledge, or intentionally chooses to omit, the evidence that completely undercuts his bad faith argument. First, the Commonwealth filed additional criminal charges against Curley and Schultz *after* the conclusion of Sandusky's trial.[19]

[19] On November 1, 2012, the Commonwealth filed a second criminal complaint against Curley and Schultz, charging each of the defendants with endangering the welfare of children, 18 Pa.C.S. § 4304, obstructing the administration of law or other governmental function, 18 Pa.C.S. § 5101, and criminal conspiracy. *See* Docket No. CP-22-CR-3164-2013 (Curley); Docket No. CP-22-CR-3616-2013 (Schultz).

Criminal charges were also filed against Spanier at that time, as well.[20] The suggestion then that Curley, Shultz and Spanier were only charged in order to prevent them from testifying at Sandusky's trial is therefore absurd.

Secondly, if one follows Sandusky's hypothesis to its logical conclusion, the charges leveled against Curley, Schultz and Spanier - - filed as part of a sham prosecution - - would inevitably be dismissed as bogus and lacking in sufficient evidence. Here, however, the magisterial district judge determined that all charges would be held for trial. The Honorable Todd Hoover of the Dauphin County Court of Common Pleas thereafter reviewed the Commonwealth's evidence and also found that sufficient proof existed to support the charges.[21] Accordingly, Sandusky's hypothesis cannot be proven.

Any stand-alone claim that Sandusky's due process rights were violated by the Commonwealth's gamesmanship is waived for failure to raise it on direct appeal. Sandusky was therefore required to plead and prove that counsel was ineffective for failing to preserve a challenge to the Commonwealth's filing of allegedly specious charges. Sandusky makes no such effort, however, instead simply glossing over the *Pierce* prongs in cursory fashion. However, even if he had properly pleaded this claim, it would still fail because counsel cannot be faulted for failing to raise a meritless issue.

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[20] Spanier was charged with perjury, failure to report suspected child abuse, endangering the welfare of children, obstructing the administration of law or other governmental function and criminal conspiracy. *See* Docket No. CP-22-CR-3165-2013.

[21] Judge Hoover denied Curley and Schultz's motion to dismiss/petition for writ of habeas corpus in connection with the 2011 charges on September 26, 2012. He denied the pre-trial motion to dismiss the 2012 charges of Curley, Schultz and Spanier on January 14, 2015. All three defendants subsequently took an appeal from this order. The cases were assigned docket numbers 299 MDA 2015 (Curley), 280 MDA 2015 (Schultz), and 304 MDA 2015 (Spanier) in the Superior Court. Oral argument was held in front of a panel of the Superior Court on August 11, 2015 in connection with all three cases. A decision is pending.

Claim 5) The Investigating Grand Jury Process as used in This Case Unconstitutionally Deprived Sandusky of his Right to Due Process

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

In recent months, the subject of grand jury leaks has pervaded media coverage in Pennsylvania and Sandusky capitalizes upon this publicity to catapult his next claim into focus.

Sandusky claims that the leak of grand jury information in his case entitles him to an extraordinary remedy: Dismissal of all of the criminal charges pertaining to the victims who were identified after the details of his investigation were published by the media. Conflating principles of federal law, Sandusky would have this Court craft a so-called exclusionary rule that bars the Commonwealth from utilizing the testimony of any witnesses who happened to come forward in the wake of a breach of grand jury secrecy. Because there is no basis in the law for such a remedy, Sandusky is not entitled to relief.

By way of background, the Office of Attorney General ("OAG") submitted an investigation to the Thirtieth Statewide Investigating Grand Jury ("30th SWIGJ) in May, 2009 that involved Sandusky's sexual abuse of a young boy. When the grand jury's term expired in January of 2011, there was still only one victim who had been identified. The investigation was re-submitted to the 33rd SWIGJ. On March 31, 2011, the Harrisburg Patriot-News and the Centre Daily Times published a story about the Sandusky grand jury investigation and Sandusky avers - - without any supporting evidence - - that "the leaking of information, during the time that the Commonwealth's investigation had stalled, was a ***deliberate*** act by the prosecution and its agents, or other agents of the [30th or 33rd SWIGJ] to advance the investigation and spur other alleged victims to come forward." Amended PCRA petition, 5/6/15 p. 54, ¶ 231 (emphasis

added). The leak of grand jury information, his argument follows, had the effect of creating an incentive for people "to fabricate accounts of abuse because of the attention drawn to the investigation and a thirst for financial reward. " *Id.* at 55, ¶ 234. It also "contributed to the 'lynch mob' mentality that grew in Centre County and contributed to the prejudicial atmosphere that warranted a delay in trial." *Id.* at 60, ¶ 257. Sandusky thus appears to contend that the prosecution's misconduct in leaking grand jury information led to the discovery of false testimony of sexual abuse and, as such, deprived him of his right to a fair trial. To the extent that he argues that the misconduct in leaking information created presumptively prejudicial pre-trial publicity, the Commonwealth has already explained why Sandusky was not deprived of his right to a fair trial in that regard. *See* Claim1 discussion, *supra.* Therefore, its arguments will not be repeated here.

To constitute a due process violation, prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."). However, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson,* 467 U.S. 504, 511 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *See Smith v. Phillips,* 455 U.S. 209, 219 (1982).

In his PCRA petition, Sandusky relies upon *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988) for the proposition that prosecutorial misconduct in the context of a grand jury proceeding may warrant dismissal of an indictment if the defendant can establish that he suffered prejudice. Prejudice will be deemed to have occurred only " 'if it is established that the violation

substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id. (quoting United States v. Mechanik,* 475 U.S. 66, 78 (1986)). First, any reliance on case law pertaining to indicting grand juries is wholly inapplicable here as Sandusky's grand jury was merely investigatory in nature. The difference between an indicting and investigating grand jury is significant:

> There are two main types of grand juries, with differing powers and purposes. First, an indicting grand jury hears evidence and has the power to issue a "presentment". The presentment of an indicting grand jury "is a written accusation of a crime," and "[i]t is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser . . . " *Commonwealth v. Silver,* 357 A.2d 612, 614 (Pa. Super. 1976), *citing Lloyd & Carpenter's Case,* 5 Pa.L.J. 55, 59, 3 Clark 188, 193 (Ct. of Qtr. Sess. of Phila. 1845); *see also* 1 *Wharton's Criminal Procedure* § 216 at 470 (12th ed. 1974). The indicting grand jury may receive its information from the prosecutor, *see Commonwealth v. McCloskey, supra,* from the personal knowledge of the jurors, *see McNair's Petition,* 187 A. 498 (Pa. 1936), or from the presentment of an investigating grand jury, *see Commonwealth v. Silver, supra.* Upon the filing of an indicting grand jury's presentment, a defendant is subject to arrest and prosecution.
>
> In contrast, the presentment of an investigative grand jury differs greatly from that of an indicting grand jury. An investigating grand jury presentment is defined as "[a] written formal *recommendation* by an investigating grand jury that specific persons be charged with specific crimes." 42 Pa. C.S.A. § 4542 (emphasis added). A person named in an investigating grand jury presentment "is not 'held to answer' upon the filing of a presentment and the presentment itself is not sufficient to support a prosecution . . . The presentment of the investigating grand jury is nothing more than 'a rather complete summary of the grounds on which the investigating grand jury is making its recommendation.' " *Commonwealth v. Silver, supra,* 357 A.2d at 616 (citations omitted). "The characteristic that distinguishes [investigating grand jury presentments] from other grand jury activity is that they do not formally charge named persons with the ***3*** commission of specific criminal acts." *Id.; see also* 42 Pa. C.S.A. § 4548(c) ("Except for the power to indict, the investigating grand jury shall have every power available to any other grand jury in the Commonwealth"). "Unenviable as his position may be, the accused still has not had a criminal proceeding commenced against him . . . ." *Commonwealth v. Silver, supra,* 357 A.2d at 616.

> Traditionally, the "ordinary" or "regular" grand jury function was to receive complaints and accusations and to find bills of indictment; the investigative duties were considered "special" and occasional. *See Commonwealth v. Hubbs,* 8 A.2d 611 (Pa. Super. 1939). Today, however, the majority of counties have discontinued the indicting grand jury process, replacing it with the filing of a criminal information. The indicting grand jury presentment is becoming obsolete and is little more than a rubber stamp in those counties in Pennsylvania where it is still used; the grand jury has evolved into an almost purely investigative body. *See* D. Savitt and B. Gottleib, *Pennsylvania Grand Jury Practice* 1-7 (1983); *see also* Ranney, *Grand Juries in Pennsylvania,* 37 U.Pitt.L.Rev. 1 (1975).

Commonwealth v. Mallon, 515 A.2d 1, 2-3 (Pa. Super. 1986) (footnote omitted). As the foregoing makes clear, the issuance of a presentment recommending that certain individuals be charged with specific crimes does not mandate the filing of criminal charges, and it is within the prosecutorial discretion of the attorney for the Commonwealth to commence a criminal proceeding following a grand jury presentment. Accordingly, there was no indictment to quash in Sandusky's case. Moreover, pursuant to the Pennsylvania Investigating Grand Jury Act, Sandusky was afforded the opportunity to challenge the evidence against him at a preliminary hearing following the filing of criminal charges based upon the presentment. *See* 42 Pa.C.S. § 4551.[22] Sandusky elected to waive this opportunity. Had Sandusky proceeded to a preliminary

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[22] The Act provides in relevant part:

> **(a) General rule.**--Should the investigating grand jury determine that upon the basis of evidence presented to it a presentment should be returned against an individual, the grand jury shall direct the attorney for the Commonwealth to prepare a presentment which shall be submitted to the investigating grand jury for a vote. Should a majority of the full grand jury vote approval for the presentment it shall then be submitted to the supervising judge. The supervising judge shall examine the presentment, and if it is within the authority of the investigating grand jury and is otherwise in accordance with the provisions of this subchapter, the supervising judge shall issue an order accepting the presentment . . .
>
> ***
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> **(e) Procedure following presentment.**--When the attorney for the Commonwealth proceeds on the basis of a presentment, a complaint shall be filed

hearing with the charges ultimately being held for trial, he would have been afforded yet another avenue of review. Specifically, he could have challenged the sufficiency of the evidence by filing a petition for writ of habeas corpus in the Court of Common Pleas. The foregoing reveals the ample safeguards that are in place in order to ameliorate any prejudice that one may arguably have suffered as a result of an investigative grand jury proceeding.

Sandusky cites to, *inter alia*, *In re Grand Jury Investigation (Appeal of Lance)*, 610 F. 2d 202 (5th Cir. 1980), for the proposition that an evidentiary hearing is warranted whenever grand jury leaks occur in order to discover the source and to determine the prejudice to the defendant. He takes the holding out of context, however. Lance was a target of a federal grand jury investigation and filed a motion with the federal district court in which he requested an order that would require governmental agents and attorneys who were involved in the investigation to show cause why they should not be held in contempt for disclosing grand jury matters in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.[23] He also moved for the dismissal of the

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and the defendant shall be entitled to a preliminary hearing as in other criminal proceedings.

42 Pa.C.S. § 4551 (a),(e)

[23] **Rule 6. The Grand Jury**

(e) Recording and Disclosing the Proceedings.

***

(2) Secrecy.

***

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

grand jury and termination of the investigation. To support his motion, Lance proffered newspaper articles that described the scope and progress of the investigation, the source of which purportedly came from persons falling within the proscriptions of Rule 6. He contended that an evidentiary hearing was necessary in order to prove his allegations. The district court denied Lance's motion, including the request for the evidentiary hearing. On appeal, the United States Court of Appeals for the Fifth Circuit construed Lance's motion as one seeking civil contempt sanctions and articulated five factors to which a court should refer in determining if a *prima facie* case of a Rule 6 violation has been established and whether an evidentiary hearing should be held. Upon consideration of those factors, the court found the news articles to contain sufficient indications of a Rule 6 violation to order to warrant further inquiry by the district court, possibly during an evidentiary hearing.

Sandusky's reliance on the *Lance* five-point test underscores the second flaw with his argument. Although he cries foul on the part of the prosecutors, it is important to observe that his misconduct claim is tied directly to the alleged leak of information to the public and is not buttressed upon an allegation of impropriety that occurred during the course of the presentation of the case to the grand jury itself. In other words, whether a leak occurred is a separate matter, wholly apart from the issue of whether Sandusky's constitutional rights were violated so as to deny him a fair trial. Should it be determined that a prosecutor was responsible for violating grand jury secrecy, the consequence is contempt of court, *see* 42 Pa.C.S. § 4549(b), not dismissal of charges for a criminal defendant.

The Commonwealth observes that any allegation of prosecutorial misconduct in connection with the leak of grand jury information is waived at this juncture. Therefore, the only

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Fed.R.Crim.P. 6(e).

way that Sandusky can obtain review of this claim is to develop it within the context of an ineffective assistance of counsel claim. This is where Sandusky's petition misses the mark. He does not explain what course of action trial counsel should have taken in terms of objections and/or litigation. Moreover, on a more fundamental level, he fails to demonstrate why or how the underlying issue has any merit. To the extent that Sandusky claims that the improper leak prompted individuals with false motivations to come forward, he was afforded the opportunity to thoroughly explore these motivations during cross-examination at trial and then argue the victims' credibility to the jury. In sum, there was no error that entitles Sandusky to post-conviction relief on this claim.

b) Trial Counsel Was Ineffective For Failing to Interview Any Witnesses Who Testified to the Grand Jury

Next, Sandusky claims generally that trial counsel was ineffective because he failed to interview the victims who testified before the grand jury. He does not specify the individuals to whom he is referring, nor does he identify the information/evidence that could have been gleaned from a pre-trial interview that would have changed the outcome of his proceedings. Given that he presents such a boilerplate averment, there should be no further analysis of his claim.

In *Commonwealth v. Washington*, 927 A.2d 586 (Pa. 2007), the defendant argued on appeal that his attorney was ineffective because he failed to interview every Commonwealth witness prior to cross-examining him or her at trial. *See id.* at 598. In rejecting this position, the Pennsylvania Supreme Court stated that, "we have never held that trial counsel is obligated to interview every Commonwealth witness prior to trial." *Id.*; *see also Commonwealth v. Smith,* 17 A.3d 873, 889 (Pa. 2011) (Counsel's conduct was not rendered ineffective solely because of his failure to interview Commonwealth witness where counsel engaged in aggressive defense by cross-examining witness thereby demonstrating that "he chose a particular course of action that

had some reasonable basis designed to effectuate" the defendant's interests). Here, although Sandusky asserts that counsel was unprepared for cross-examination of the victims at trial, the record completely belies such a suggestion. Counsel questioned each victim extensively on their delay in reporting, the variations in their accounts of abuse and the possibility of pecuniary gain. For the foregoing reasons, this sub-claim should be dismissed as meritless.

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

Sandusky received extensive discovery from the Commonwealth prior to trial, including 9,450 pages of documentation, 674 pages of grand jury transcripts, and 2,140 pages from subpoenas *duces tecum*. *See Sandusky*, 77 A.3d at 672. According to Sandusky, his trial counsel also filed a motion for discovery with the Honorable Barry F. Feudale ("Judge Feudale"), Supervising Judge of the 33rd SWIGJ wherein he requested the opportunity to review all of the exhibits that were entered into evidence and utilized throughout the course of the grand jury investigation. Judge Feudale denied the request, purportedly advising counsel that none of the exhibits were exculpatory in nature.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Supreme Court subsequently held that the duty to disclose such evidence is applicable even if there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty may encompass impeachment evidence as well as directly exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676–77 (1985).

On the question of materiality, the Court has noted that "[s]uch evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Strickler v. Greene,* 527 U.S. 263 (1999) (quoting *Bagley,* 473 U.S. at 682). The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Strickler,* 527 U.S. at 290 (quoting *Kyles v. Whitley,* 514 U.S. at 419, 435 (2001). "Thus, there are three necessary components that demonstrate a violation of the *Brady* strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." *Strickler,* 527 U.S. at 281–82.

Importantly, the Court has noted that the duty imposed upon the prosecution under *Brady* is a limited one. *See, e.g., Weatherford v. Bursey,* 429 U.S. 545, 559 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *see also Kyles,* 514 U.S. at 436–37 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense . . . We have never held that the Constitution demands an open file policy . . . "). The Pennsylvania Supreme Court has also recognized *Brady's* limited requirements, and has noted that *Brady* does not grant a criminal defendant unfettered access to the Commonwealth's files. *See Commonwealth v. Edmiston,* 851 A.2d 883, 887 n. 3 (Pa. 2004) (defendant has no general right under the Constitution or *Brady* to search Commonwealth files); *Commonwealth v. Williams,* 732 A.2d 1167, 1176 (Pa. 1999) ("[T]he Commonwealth is, in the first instance, the judge of what

information must be disclosed . . . 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.' ") (quoting *Pennsylvania v. Ritchie,* 480 U.S. 39, 59 (1987)); *Commonwealth v. Counterman,* 719 A.2d 284, 297 (Pa. 1998), *cert. denied,* 528 U.S. 836 (1999) (*Brady* is not a general rule of discovery in criminal cases).

Here, even though the grand jury judge essentially conducted an *in camera* review to determine whether the exhibits needed to be disclosed, Sandusky is still dissatisfied. As noted above, however, Sandusky is not entitled to conduct a fishing expedition in order to argue relevance. *See Edmiston*, 851 A.2d 883, 887 n. 3 ("Even if we were to review the merits of the *Brady* claim, appellant's argument is unavailing because appellant has no right to conduct a fishing expedition for possibly exculpatory evidence, particularly where, as here, the trial court examined the records and determined that they would provide no exculpation. Indeed, the United Stated Supreme Court determined in *Ritchie*, that a defendant seeking precisely the type of records appellant sought is entitled only to an *in camera* inspection by the trial court, which the trial court here performed") (citation omitted). Secondly, even though judicial review was undertaken in his case, Sandusky still accuses the Commonwealth of committing a *Brady* violation. Apparently it is his theory that the Commonwealth and the supervising judge conspired together to suppress critical evidence in order to deprive Sandusky of his right to a fair trial. In support of such an outrageous allegation, Sandusky offers nothing more than innuendo.

As any stand-alone allegation of a *Brady* violation is waived because it was not raised on direct appeal, Sandusky must plead and prove that counsel was ineffective for failing to preserve and litigate this issue. Sandusky's argument consists of one sentence: "[T]rial counsel and direct appellate counsel were ineffective for failing to preserve this issue in pretrial motions, during post sentence motions, or on direct appeal." Because Sandusky has made no effort to

develop this opprobrious claim, it should be dismissed outright. However, even if he had properly developed the claim, it would still fail on the grounds that it lacks any arguable merit.

Claim 6) Trial Counsel Provided Ineffective Assistance of Counsel by Failing to File a Motion in Limine and Seek a Hearing on Repressed and Manufactured Memory and the Effect of Suggestive Questioning

That the victims did not report the sexual abuse by Sandusky right away was an issue that the defense highlighted during trial.[24] In fact, on direct appeal to the Superior Court, Sandusky argued, albeit unsuccessfully, that this Court should have given the jury a prompt complaint instruction. The premise for the prompt complaint instruction is that a victim of a sexual assault would reveal at the first available opportunity that an assault occurred. *See Sandusky*, 77 A.3d at 667 (citing *Commonwealth v. Thomas,* 904 A.2d 964, 970 (Pa. Super. 2006)

In his continued attack on the credibility of the victims, Sandusky now suggests that the witnesses testified regarding "repressed memories" and that there was a question as to whether these memories were the product of serial suggestive interviews by law enforcement and Children and Youth. According to Sandusky, trial counsel should have filed a motion in limine to present expert testimony and to have this Court determine the competency of the victims and whether the victims' statements were the result of improper questioning.[25] The Commonwealth

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[24] There were delays of 16 years, 14 years, 13 years, 12 years, 10 years, six years, and approximately two years. *See Sandusky*, 77 A.3d at 667.

[25] Sandusky also suggests that counsel should have sought a judicial hearing with sworn testimony in order to explore the financial motives that the witnesses may have had to fabricate their testimonies, including any contingent fee agreements with attorneys. Amended PCRA petition, p. 74, ¶ 314; p. 76, ¶ 319(c). Whether or not financial gain motivated the testimony of the victims was exhaustively explored by Sandusky's attorney during cross-examination of the victims at trial. *See* discussion of Claim 7, *infra*. Moreover, there is absolutely no basis for counsel to request a hearing as pecuniary gain goes to the bias/credibility of the victims, not to their competency to testify.

will now address each of Sandusky's contentions separately.

a) Failure to Present Expert Testimony

In order to establish that counsel was ineffective for failing to call an expert witness, a petitioner must establish that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the petitioner. *See Commonwealth v. Chmiel,* 30 A.3d 1111, 1143 (Pa. 2011); *Commonwealth v. Wayne,* 720 A.2d 456, 470 (Pa. 1998). If granted an evidentiary hearing in connection with his PCRA petition, Sandusky indicates that he will present the testimony of Philip W. Esplin, Ed.D. ("Esplin"), a psychologist who would explain the necessity of utilizing expert testimony in cases involving repressed memory and suggestive questioning. Amended PCRA Petition, p. 107. Demonstrably absent from his pleading, however, is any information as to whether Esplin was available and willing to testify at Sandusky's trial in 2012 and how the absence of such testimony prejudiced him. The Commonwealth submits that this undeveloped claim can be rejected outright by this Court without further analysis.

Even if this Court should elect to consider Sandusky's claim of counsel error despite such deficiency in his pleading, it should be noted that in *Commonwealth v. Crawford*, 718 A.2d 768, 773 (Pa. 1998), the Pennsylvania Supreme Court specifically determined that expert testimony on the issue of revived repressed memory[26] improperly invades the province of the jury to assess

[26] An informative compilation of articles regarding repressed memory can be found in a South Carolina case involving an underlying action in, *inter alia,* negligent infliction of emotional distress:

> To cope with the horror of their experiences, many child sexual abuse victims develop dissociative defense mechanisms similar to those observed in combat veterans and victims of other atrocities. Dissociation can take a number of forms,

the credibility of a witness.

> including traumatic amnesia-more commonly known as repressed memory. Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory,* 28 Loy.L.A.L.Rev. 1345 (1995). Childhood sexual abuse is extremely traumatic for the child victim and is therefore especially conducive to the repression of memory. E.A. Foster, Comment, *Repressed Memory Syndrome: Preventing Invalid Sexual Abuse Cases in Illinois,* 21 S.Ill.U.L.J. 169 (1996).
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> The premise of repressed memory is that an event occurs which is so traumatic that, in a desperate effort to cope, one's mind dissociates itself and shuts the memory out. Rola J. Yamini, Note, *Repressed and Recovered Memories of Child Sexual Abuse: The Accused as "Direct Victim,"* 47 Hastings L.J. 551 (1996). This is accomplished in a manner which leaves the victim completely unaware of the abuse, only to have those memories resurface perhaps years later. Joseph A. Spadaro, Comment, *An Elusive Search for the Truth: The Admissibility of Repressed and Recovered Memories in Light of Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 30 Conn.L.Rev. 1147 (1998). When an event has been dissociated, a person represses it not because she does not want to remember it, but because she cannot remember it. Susan J. Hall, *Adult Repression of Childhood Sexual Assault: From Psychology to the Media and into the Courtroom,* 22 N.C.Cent.L.J. 31 (1996). They are unable to bring it to their conscious mind at will. *Id.*
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> When a person experiences a traumatic event and is then unable to function normally in life because the memories are too overwhelming, he or she may repress the memory in order to cope. Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression,* 84 J.Crim.L. & Criminology 129 (1993). Theoretically, repression tends to help victims deal with the trauma during the period of the abusive behavior. Christina J. D'Appolonia, Note, *Nuccio v. Nuccio: The Doctrine of Equitable Estoppel Will Not Bar the Statute of Limitations Defense in a Child Sexual Abuse Case Involving Repressed Memory,* 49 Me.L.Rev. 235 (1997). A person who experiences a particularly traumatic event may find it difficult or impossible to function normally while simultaneously maintaining memories of the event. *Id.* The memories are simply too overwhelming. *Id.* In other words, the victim keeps a secret, even from herself. *Id.*

Moriarty v. Garden Sanctuary Church of God, 511 S.E.2d 699 (S.C. App. 1999), *aff'd,* 534 S.E.2d 672 (S.C. 2000), *overruled on other grounds by State v. Cherry,* 606 S.E.2d 475 (S.C. 2004).

In *Crawford*, the defendant was arrested and charged with second degree murder in connection with the drowning death of the victim in 1971. No arrests were made until a witness contacted the police 20 years later to report that he had witnessed the drowning and that the defendant was responsible. Prior to trial, defense counsel requested that the witness submit to a psychological examination. This motion was granted. The psychiatrist subsequently generated a report that stated, *inter alia*:

> [Witness] claims he had experienced the return of repressed memories of a Mr. Frank Crawford throwing the body of a Pearl May Altman into the Allegheny River in October of 1971, when he was about 18 years old . . . The trigger to this "flashback" is alleged by Mr. Reed to have occurred near an IGA market in Leechburg, Pennsylvania, when he saw a woman who [*sic*] appearance was exactly the same as Pearl May Altman's . . . [M]y history, which was taken in great detail, estimates this delay began between 1989 and 1991 or between 3 and 5 years previously.
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> In summary . . . the internal workings of his [witness'] memory, mind, intelligence and personality fit exactly that type of person who would recall a mistaken screen memory of violence and of terror. It cannot be emphasized enough that, not only is [witness] likely to be wrong but his memory inaccurate and his hallucination of Pearl May decidedly pathological. Moreover, the large majority of repressed memories occurring more than 10 years from a single, acute event are usually wrong. It is my opinion to a high degree of medical certainty that [witness'] return of the repressed should not be used as evidence of murder, because there is more than reasonable doubt this it [*sic*] is wrong.

Id. at 770-771. Prior to trial, the judge ruled that the proffered testimony went to the credibility of the witness and, as such, was inadmissible. Following Crawford's conviction, however, he filed an appeal to the Pennsylvania Superior Court and that court determined that the trial judge had erred in such a determination. *See Commonwealth v. Crawford*, 682 A.2d 323 (Pa. Super. 1995), *reversed*, 718 A.2d 768 (Pa. 1998). The Superior Court concluded that: 1) Since the trial judge admitted the witness' testimony about his revived repressed memory, it was error to exclude the expert's testimony regarding the reliability of revived repressed memories; and 2)

the phenomenon of revived repressed memory would not be within the ordinary training, knowledge, intelligence and experience of the average juror. *See id.* Ultimately, the Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal and reversed the decision of the Superior Court.

The Pennsylvania Supreme Court began its analysis by noting that the determination of the credibility of a witness is within the exclusive province of the jury, and that the expert testimony proffered by the defense counsel was intended to establish that the witness was not credible. *See Crawford*, 718 A.2d at 772-73. The Supreme Court went on to state that:

> Crawford argues, however, that Dr. Himmelhoch's testimony was necessary to explain the phenomenon of revived repressed memory. His argument has no merit because the record demonstrates that revived repressed memory was not truly at issue in this case. While it is true that [witness] offered an explanation for his inordinate delay in reporting what he had observed that suggested revival of repressed memory, and the presence of apparitions urging him to come forward, the Commonwealth did not seek to establish that his explanation was scientifically supported by the phenomenon of revived repressed memory.
>
> No expert testimony was offered by the Commonwealth to explain that revived repressed memory was recognized by the scientific community.[FN2] The Commonwealth did not attempt to prove that [witness] had suffered from memory loss as a result of the trauma of observing the incident, or that any lost memory had been in fact revived.
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> > FN2. We do not address whether expert testimony regarding revived repressed memory would be admissible into evidence under the standard articulated in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

Id. at 773. The Supreme Court therefore concluded that the jury was capable of assessing the witness' credibility without the expert testimony and that the Superior Court had erred by holding that such testimony was admissible to explain the phenomenon when the Commonwealth did not introduce expert testimony of the phenomenon, or argue to the jury that the witness' memory had been revived. *See id.* at 774. In short, the court found that the

reliability of revived repressed memory was never an issue that needed to be resolved and that the assessment of witness credibility was properly left to the jury. *See id.*

Here too in Sandusky's case, the prosecution did not introduce any expert testimony on revived repressed memory, nor make it an issue. The victims explained the reasons why their stories were incomplete and/or varied from the time when they were first interviewed by law enforcement. Sandusky's jury was free to reject or accept those explanations when making credibility determinations. The jury evaluated their credibility in light of this Court's instruction:

> Now, as judges of the facts, you are also the judges of the credibility of the witnesses and of their testimony. This means that you must judge the truthfulness and the accuracy of each witness's testimony and decide whether to believe all of it, part of it, or none of it. So, how you may ask do you go about doing that? Well, there are many factors that you may or should consider when judging credibility and deciding whether or not to believe a witness's testimony.
>
> You might consider, for example, was the witness able to see or hear or know the things about which he or she testified?
>
> How well could the witness remember and describe the things about which he or she testified?
>
> How did the witness look and act and speak while testifying?
>
> Was the witness's testimony uncertain, confused, self-contradictory, argumentative, evasive?
>
> Has the witness ever been convicted of a crime involving dishonesty?
>
> What is the witness's reputation for testifying – or for truthfulness in the community among those who know the witness?
>
> How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence which you believe to be true?
>
> Did the witness have any interest in the outcome of the case, anything to gain or lose by the outcome of the case? Any bias, any prejudice, or any other motive that might affect his or her testimony?

> If you believe that a witness testified falsely about an important issue, then you may keep that in mind in deciding whether to believe the remainder of the witness's testimony.
>
> A person who testifies falsely about one thing may have testified falsely about other things but that is not necessarily so but that's among the factors that you can consider.
>
> And, finally, after thinking about all the testimony and considering some or all of the factors that I had mentioned to you, you draw on your own experience, your own common sense, and you alone, as the sole judges of the facts, should give the testimony of each witness such credibility as you think that it deserves.

N.T. 6/21/12 at 15-17.[27]

In light of the case law and the facts, Sandusky can hardly suggest that his attorney was ineffective for failing to present expert testimony. [28] Therefore, that portion of his ineffective assistance of counsel argument should be dismissed.

b) Failure to File Motion in Limine/Request Hearing on Suggestive Questioning

Every witness is presumed competent. *See* Pa.R.E. 601(a). A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks "the minimal capacity . . . (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth." *Commonwealth v. Delbridge ("Delbridge I"),* 855 A.2d 27, 40 (Pa. 2003).

Although he does not specifically utilize the term, it appears that Sandusky believes that his counsel should have filed a motion in limine requesting a "taint hearing" in order for this

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[27] As noted by Superior Court, these instructions largely tracked the Pennsylvania Suggested Standard Criminal Jury Instructions. *See Sandusky*, 77 A.3d at 668-69.

[28] Sandusky's reliance on *Commonwealth v. Nazarovitch*, 436 A.2d 170 (Pa. 1981) is misplaced. *Nazarovitch* presented the novel issue of whether hypnotically-refreshed testimony is admissible in a criminal trial when the witness has no present recollection of the facts prior to the hypnosis.

Court to determine whether the victims were competent to testify. The concept of taint is particularly concerned with "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement . . . that are so unduly suggestive and coercive as to infect the memory of the child." *Commonwealth v. Davis,* 939 A.2d 905, 911 (Pa. Super. 2007). Within the three-part test described above, "[t]aint speaks to the second prong . . . , the mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that the witness is called upon to testify about." *Delbridge I,* 855 A.2d at at 40 (citation omitted, emphasis in original, brackets omitted).

Pennsylvania courts have clearly and unequivocally stated, however, that taint is only "a legitimate question for examination in cases involving complaints of sexual abuse made by *young children." Id.* at 39 (emphasis added). When a witness is at least fourteen years old, he or she is entitled to the same presumption of competence as an adult witness. *See Rosche v. McCoy,* 156 A.2d 307, 310 (Pa. 1959). In *Commonwealth v. Judd,* 897 A.2d 1224 (Pa. Super. 2006), *appeal denied,* 912 A.2d 1291 (Pa. 2006), this Court held that because the juvenile sexual assault victim "was fifteen years old when she *testified at trial* . . ., any issue with her ability to correctly remember the events in question is properly a question of credibility not of taint." *Judd,* 897 A.2d at 1229 (emphasis added). Further, the concerns underlying the three-part test for evaluating the testimonial competency of minors "become less relevant as the witness's age increases, ultimately being rendered *totally irrelevant as a matter of law by age fourteen.*" *Id.* (emphasis added). In *Commonwealth v. Moore,* 980 A.2d 647 (Pa. Super. 2009), the Superior Court reiterated that the critical age for purposes of conducting a taint hearing is *not the age at the time of the crime but the age at the time of trial. Moore,* 980 A.2d at 648, 652 (where the minor witness was thirteen at the time of the crime but fourteen at the time of trial, the witness

"did not require a competency hearing. Any issues regarding [the witness]'s observation of the incident in question is a question of credibility and does not implicate taint . . . [prior decisions of the Pennsylvania courts] preclude a competency hearing for [a] fourteen-year-old . . . .") (emphasis added).

In Sandusky's case, all of the victims were over the age of 14 at the time that they testified at trial.[29] Accordingly, there was absolutely no basis for counsel to challenge their competency to testify and Sandusky's claim must fail.

Claim 7) Defendant's Constitutional Right to Impeachment Evidence was Infringed by the Failure to Disclose the Alleged Victims' Financial Incentives to Testify Against Sandusky, Including Contingent Fee Agreements With Private Attorneys to Pursue Private Ligation Against Penn State University.

In his petition, Sandusky avers that the victims in his case had a significant financial motive to fabricate their accounts of abuse. He accuses the Commonwealth of violating the dictates of *Brady*, for failing to disclose the existence of the victims' contingent fee agreements with their civil attorneys, and for failing to disclose any other financial incentives that the victims may have had. Second, he faults trial counsel for failing to specifically request the same during the discovery process, and/or for failing to obtain such information through the issuance of subpoenas. The net result of these errors, he claims, is that he was deprived of vital impeachment evidence during the cross-examination of the victims.

a) *Brady* Violation

Any claim that the Commonwealth violated *Brady* could easily have been raised by Sandusky on direct appeal and, as such, it is waived. At this juncture, Sandusky can only seek

[29] Specifically, the victims were 18 years old (Aaron Fisher, Sebastian Paden), 23 years old (Michael Kajak), 25 years old (Ryan Rittmeyer, Zachary Konstas, Jason Simcisko), 27 years old (Dustin Struble) and 28 years old (Brett Houtz).

review of the claim within the context of an allegation that trial counsel was ineffective for failing preserve this objection. Sandusky makes no effort at all to develop any prong of the *Pierce* test as it relates to the underlying *Brady* claim, however. Accordingly, it is the Commonwealth's position that Sandusky is not entitled to its review.

Even if the issue had been properly developed, it would still fail because it is absolutely devoid of merit. To establish a *Brady* violation, a defendant must demonstrate: (1) the prosecution concealed evidence; (2) the evidence was either exculpatory or impeachment evidence favorable to him; and (3) he was prejudiced. *See Commonwealth v. Paddy,* 15 A.3d 431, 450 (Pa. 2011)). To establish prejudice, a defendant must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Commonwealth v. Burke,* 781 A.2d 1136, 1141 (Pa. 2001).

"Impeachment evidence[,] which goes to the credibility of a primary witness against the accused[,] is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness." *Commonwealth v. Strong,* 761 A.2d 1167, 1175 (Pa. 2000)). "However, mere conjecture as to an understanding is not sufficient to establish a *Brady* violation." *Id.* (citation omitted). Finally, "[t]here is no *Brady* violation when the defendant knew or, with reasonable diligence, could have uncovered the evidence in question[.]" *Paddy,* 15 A.3d at 451; *Commonwealth v. Carson*, 913 A.2d 220, 246 (Pa. 2006), cert. denied, 128 S.Ct. 384 (U.S. 2007) ("No *Brady* violation can occur where the evidence is available to the defense through non-governmental sources, or, with reasonable diligence, the defendant could have discovered the evidence.")

During the three years since his convictions, Sandusky has had ample opportunity to investigate any alleged financial motivations on the part of the victims and to subpoena

documents for purposes of his appeal.[30] Despite this opportunity, Sandusky has failed to produce any evidence that contingency fee agreements ever existed between any of the victims and their civil attorneys at the time of his trial.[31] The Commonwealth has certainly not interfered with Sandusky's ability to seek information pertaining to any financial incentives, much less conceal such information from him. Accordingly, the allegation that the Commonwealth failed to disclose favorable impeachment evidence to him is baseless.

b) Failure to Request Financial Agreements in Discovery/Failure to Subpoena Documents

In his opening statement to the jury, Sandusky's counsel stated:

> Folks, I don't know if any of you have been involved in family disputes involvement money and how people, when it comes to money do a lot of things they wouldn't ordinarily do. What's the only saying? Money is the root of all evil.
>
> You know, the evidence is going to show I believe that six of these eight young men that are going to testify have civil lawyers - - have civil lawyers. . .
>
> The question could be asked why? You have to decide that.
>
> What we believe, money is a very big factor in this case. We believe the evidence the evidence will show that these young men have a financial interest in pursuing this case.

N.T. 6/11/12, pp. 16-17.

As the foregoing makes clear, the suggestion that the victims' testimony was fueled by a desire for wealth is certainly not a new theory on Sandusky's part. Indeed, it was a cornerstone theme at his trial. Even though the financial motivations of Sandusky's victims were thoroughly

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[30] There is no indication from the petition or witness certifications that current counsel or his assistants attempted to inquire into the existence of fee arrangements and incentives by attempting to contact the victims' civil attorneys or by issuing subpoenas for records.

[31] The lack of evidence is underscored by the fact that Sandusky has requested the documents in discovery in connection with these PCRA proceedings. Amended PCRA petition, 5/6/15 p. 104, ¶ 469 (b)(e).

explored through cross-examination, Sandusky claims that he is entitled to post-conviction relief because trial counsel did not do "enough." Specifically, Sandusky alleges that counsel was ineffective for failing to obtain hard evidence of contingency fee agreements and other financial incentives to prove that money motivated the testimony. According to Sandusky, counsel's failure to obtain "easily documentable evidence that would impeach the witnesses at trial" lacked any reasonable strategic explanation. PCRA petition, 5/6/15 p. 79, ¶ 337. As noted above, the problem with this argument is that Sandusky cannot establish that any such agreements and/or incentives existed at the time of his trial. Moreover, his claim that the witnesses failed to fully and completely testify as to their fee agreements with counsel is a completely vacuous allegation where he has presented no evidence to the contrary. In sum, counsel cannot be faulted for failing to obtain records the existence of which has never been established.

Secondly, the record completely refutes Sandusky's allegation that counsel's failure to obtain records "left the defense without a significant challenge to the witnesses' credibility." *Id.* at 80, ¶ As set forth below, defense counsel thoroughly cross-examined the victims on the issue of financial motivation:

(Cross-Examination of Brett Houtz)

Q: I want to understand this. This attorney is the attorney who's been with you at police interviews?

A: Yes.

Q: He appeared with you before the grand jury?

A: Yes.

***

Q: And did you ever meet him at his office?

A: Did I ever met him in this office? No.

Q: Have you ever talked to him on the phone?

A: Yes.

Q: You are telling us today you have never paid him any money?

A: Never, not a dime.

Q: Has this attorney ever talked to you about a civil suit?

Mr. McGettigan: Your Honor.

The Court: Excuse me.

Mr. McGettigan: I object…It's privilege what the attorney said.

***

Q: Have there been any discussions about pursuing some sort of civil action?

A: No.

Q: At all?

A: (Witness shakes head side to side)

Q: And this attorney is just representing you without charge?

A: (Witness nods head up and down)

***

Q: Have you ever signed any sort of agreement with this attorney?

A: Yes.

Q: What kind of agreement have you signed, if you know?

A: Basically just for his representation.

Q: Do you know what it says?

A: No, I don't really recall exactly what it says. This was a year ago

***

Q: You lived for a time at Spring Brae apartments?

A: Um-hum.

Q: And did you pay your rent timely there?

A: It depended. Certain times we would fall behind.

Q: When you left, did you owe rent?

A: Yes.

Q: Have you paid it since you left?

A: No.

***

Q: And just so I'm clear about this, you signed an agreement with this attorney, correct, and you've never paid him a penny?

A: Not once.

Q: and you did not know him before he contacted you?

A: I did not know him.

Q: But you don't know the - - don't know the substance of the agreement that you signed with him?

A: No, that he would give me legal advice.

Q: Has he sent you any bills?

A: Has he sent me any bills? No, he's not sent me any bills.

Q: Has he asked you for any money?

A: Never.

N.T. 6/11/12, pp. 207-217.

(Cross-Examination of Aaron Fisher)

Q: Have you, and in the presence of your mom, ever told anybody that you two were going to become rich out of this deal?

A: I'm sorry. Repeat that. I don't understand.

Q: Have you and your mom in your presence - - in her presence and your presence - - ever told anybody that you and she are going to become rich out of this action with Jerry Sandusky?

A: No.

***

Q: Do you have an attorney, a civil attorney, a private attorney?

A: My mom hired one.

Q: To represent you in this situation?

A: Actually, to keep the press away from me...

Q: Not to represent your family in a civil action?

A: According to my mom's boss, who is also a private investigator, he said to her that it would be a good idea to get one because they could help you with the press and put Aaron's mind at ease.

Q: And I'm guessing you probably don't know what type of financial arrangements have been made with this attorney.

A: I don't know anything about that kind of stuff. All I know is I'm here to tell the truth about what happened to me, just like everybody else.

***

Q: Just so we're clear about this, is it your testimony today that you never discussed with anyone else - - or your mom in your presence with anyone else - - that you were going to wind up with a big house and cars and be rich as a result of what's going on with this case?

A: No. I have dreamed about living in a big house. I have dreamed about driving nice cars. I mean, doesn't everybody?

Q: But did you verbalize it to somebody?

A: No.

Q: And your testimony today for sure is that you've never talked about being in a position to buy a nice car and to live in a big house because of what's happening in this case?

A: No, I haven't said that, if that's what you're - - if that is what you're asking.

N.T. 6/12/12, pp. 68-70, 100.

(Cross-Examination of Dustin Struble)

Q: The lawyer that you saw represents you, is he a local lawyer?

A: I believe so, yes.

Q: And are you aware that he advertises representing alleged victims of Penn State sexual abuse?

A: No, I'm not aware no.

Q: He never told you that?

A: No.

Q: Are you aware that he represents at least one other person involved in this case?

A: Yes.

Q: But your testimony today is the only reason that you have retained him is to protect your anonymity in this matter?

A: No, that's not the only reason. I just - - I didn't want to go through this alone. I wanted somebody that could help me, somebody that could help me with some of the behind-the-scenes legal things.

Basically when I went to the grand jury and I did testimony there, I had no idea what was going on. It was a complete surprise to me, and, you know, I didn't know what was happening. It just happened so fast. After that, I started to open my mind towards it and still it wasn't until, you know, my mother had mentioned it that I thought, you know, what can it hurt?

Q: When did that happen, do you know? When did you contact this attorney?

A: I'm not sure exactly. It was probably pretty shortly after the grand jury, coming back from that.

***

Q: did you out of curiosity ever go to his website - - this attorney's website to see what kind of law he practices?

A: No, I didn't.

Q: Didn't ask him what kind of law he practices?

A: No, I have never had a lawyer before for anything.

Q: Have you paid him for anything?

A: No.

Q: Not a penny.

A: No.

***

Q: How many times have you seen him?

A: Maybe 10, 15 times.

Q: And about how much time in terms of minutes or hours that each time you saw him?

A: I think it would vary anywhere from half hour to an hour.

Q: And when you met with him, did he discuss your testimony in court and what you should and shouldn't say?

A: No.

Q: He never talked about your testimony?

A: No.

Q: He's never sent you a bill?

A: No.

***

Q: To your knowledge, have you signed any sort of fee agreement with him?

A: I signed something. I'm not sure what it was.

Q: You have no idea what you signed?

A: No.

Q: Do you have a copy of it?

A: No.

Q: But you signed an agreement with him?

A: Yes.

Q: Are you familiar with the term contingency fee agreement?

A: No.

N.T. 6/13/12, pp. 135-139

Q: Prior to today, did you ever tell members of the Attorney General's Office or any of the investigators in this case that Mr. Sandusky when he drove around with you would put his hand down your pants and touch your penis?

A: Yes, one.

Q: Who did you tell?

A: Joe McGettigan

Q: When did you tell him that?

A: Whenever I had that meeting with him which was - -

Q: A couple months ago?

A: Yeah.

Q: After you retained this private attorney?

A: Yes.

Q: With whom you signed an agreement?

A: Yeah, I guess so, yeah.

***

Q: Today you testified that Mr. Sandusky in the shower grabbed you from behind and put the front of his body against the back of your body; do you recall that?

A: Yes.

Q: Prior to today did you tell any of the members of the Attorney General's Office or any of the investigators in this case that Mr. Sandusky had done that?

A: Yes.

Q: Who was that?

A: Joe McGetttigan.

Q: Is this going back a couple of months again?

A: Yeah.

Q: After you had retained private counsel?

A: Yes.

***

Q: ...Did you tell any of the Attorney General staff or did you tell any of the investigators in this case that Mr. Sandusky touched your nipples or blew on your stomach prior to today?

A: Yes.

Q: Was that Mr. McGettigan again?

A: Yes.

Q: A couple of months ago?

A: Yes.

Q: After you had an attorney?

A: Yes.

N.T. pp. 121, 124, 133

(Cross-Examination of Zachary Konstas))

Q: Do you have private counsel? Have you gotten private counsel involved in your case?

A: Yes, recently I've obtained counsel.

Q: I'm sorry. When did that happen?

A: Are you talking about a psychologist?

Q: no, no, no, legal - - an attorney?

A: Oh, an attorney, Yeah. I've got - - that happened sometime after the November events, maybe December, January. I think it was January.

***

Q: Now, have you paid your attorney any money for the things he's done for you, your private attorney?

A: Zero.

Q: Have you signed any sort of agreement with him in terms of how he is to be paid?

A: I signed something to let him represent me. I don't know legal stuff, so I don't remember what was in that.

Q: You're not aware of the facts or the circumstances behind that agreement?

A: No.

Q: How many times have you seen this private attorney, about?

A: Maybe, twice, maybe once.

***

Q: Yes. Did the change in your attitude, your perception about what happened in that shower back in 1998, have anything to do with hiring an attorney, a civil attorney, and thinking that there might be some financial gain for you in this matter?

A: Zero.

Q: Zero?

A: Zero.

N.T. 6/14/12, pp. 36-37, 45-46

(Cross-Examination of Jason Simcisko)

Q: Can you tell us when you hired private counsel?

A: I didn't really hire then. Well, they approached me because they were representing someone else.

***

Q: When did they approach you?

A: Later on after the - - after the preliminary hearing or - - yeah, it was after the preliminary hearing.

***

Q: How many times have you met with those attorneys since they approached you about representing you?

A: I met with them six times.

Q: And you have met with them?

A: Yes.

Q: Have they talked to you about your testimony?

A: Yes.

Q: What you are going to say in court?

A: Yes.

Q: Have you paid them any money between the first time that they approached you and today?

A: What's that?

Q: Have you paid them any money? Have they given you any fee statements and asked you for money?

A: No.

Q: Have you signed any agreements with them in terms of their representation?

A: Yes.

***

Q: Do you have a copy of that paper?

A: Yes, at home.

Q: Have you ever heard the phrase, "contingency fee agreement?"

A: What's that?

Q: Contingency fee agreement?

A: No.

Q: But your testimony is today you signed some paper?

A: Yes.

Q: You have a copy at home?

A: Yes.
Q: And you've never paid these attorneys any money?

A: I've never paid them, no.

Q: Are they in court today?

A: Yes.

N.T. 6/14/12, pp. 115-119

In addition to cross-examination of the Commonwealth witnesses, the defense attempted to establish the financial motivation theory during its case-in-chief. The defense called Attorney Ben Andreozzi ("Attorney Andreozzi"), counsel for B.H., as a witness and inquired about the impact that a guilty verdict in Sandusky's criminal case would have upon B.H.'s civil case:

> Q: ....Would a verdict of guilty in this case favorably impact your client and you in a civil suit?
>
> A: I think you are asking me to speculate. I don't feel comfortable speculating. That would require that my client give me consent to actually file a civil suit. We haven't even discussed the filing of a civil claim and potential defendants in the case. So what you are asking me would be five steps down the line. We've never had discussions about who we could sue . . .

***

Q: The question is, is your testimony today that a verdict of guilty in this case would not have any impact on anything you might do five steps down the road for you or for Mr. Swisher Houtz financially?

A: It could have impact, yes, it could.

N.T. 6/19/12, pp. 72-74

During closing argument, trial counsel submitted that once a victim came forward and reported that Sandusky had "fondled" him, that victim's mother pushed him to pursue the allegations as part of a scheme to obtain money from Sandusky. *See, e.g.*, N.T. 6/21/12 at 40-41. From that, this initial victim became motivated by money as well. *Id.* at 42. Trial counsel emphasized to the jury that many, if not all, of the victims had attorneys who were present in court which indicated that the victims had a financial interest in the outcome of the litigation. *Id.* at 52-53. Counsel argued that the delay in reporting the abuse was because the abuse never occurred and that the victims made more serious allegations as they realized that more money might be available. *See, e.g.*, *id.* at 55-60.

A review of the foregoing makes clear that the jury was certainly well aware that Sandusky's defense, at least in part, consisted of a theory that the victims should not be believed because they were motivated by money and their revelations were not made until the opportunity for money arose. Accordingly, Sandusky's ineffective assistance of counsel argument must fail.

Claim 8) Trial Counsel Was Ineffective For Failing to Object to Improper Opinion Testimony by an Unqualified Expert

During its case-in-chief, the Commonwealth presented the testimony of Jessica Dershem ("Dershem"), a caseworker employed with Clinton County Children & Youth. Dershem received a referral made by the principal at Central Mountain High School regarding inappropriate contact between Sandusky and Aaron Fisher. N.T. 6/12/12, p. 125. Dershem told

the jury that at the end of her second interview with Aaron Fisher, there was enough evidence to "indicate" the case. *Id.* at 128. She explained that the term "means that we feel that there is enough information to meet the definition of child abuse, child sexual abuse." *Id.* at 128-29. Following her interview with Sandusky, she observed that "there was a lot of consistencies between Aaron, what he talked about and what Mr. Sandusky admitted to." *Id.* at 144. Accordingly, she subsequently submitted a report to ChildLine advising of the indicated report of abuse. *See id.*

In his PCRA petition, Sandusky challenges several statements that Dershem made in response to the prosecutor's questioning on direct examination. By isolating her statements and taking them out of context, Sandusky exaggerates their weight and suggests that she was permitted to offer a "faux expert opinion, without objection." Amended PCRA petition, 5/6/15, p. 82, ¶¶ 345-46. There is no merit to such a claim.

In *Commonwealth v. Alicia*, the Pennsylvania Supreme Court summarized cases in which it held that expert psychiatric or psychological testimony, by providing a generalized explication of human behavior under certain particular circumstances, directly spoke to the issue of whether a witness was being truthful and, as such, was inadmissible:

> For example, in *Commonwealth v. Dunkle,* 602 A.2d 830, 836–38 (Pa. 1992), we held inadmissible expert testimony as to the reasons why child victims of sexual abuse often do not immediately report the abuse and often omit many details thereof.[32] We concluded that the reasons for such behavior in a child are well within the range of common experience, knowledge, and understanding of a jury, and expert testimony on the matter would improperly infringe upon the jury's ability and responsibility to assess the credibility of the child witness; *see also [Commonwealth v.] Balodis,* [747 A.2d 341,] 345–46 [2000] (relying on the same reasoning to reject expert testimony similar to that at issue in *Dunkle*). Similarly, in *Commonwealth v. Seese,* 517 A.2d 920 (Pa. 1986), we held inadmissible expert testimony that young children rarely lie about sexual abuse, reasoning that such

[32] *But see* 42 Pa.C.S.A. § 5920 (Section 2 of 2012, June 29, P.L. 656, No. 75, effective in 60 days [Aug. 28, 2012])

> testimony would opine on the veracity of an entire class of individuals, and thus would encroach on the province of the jury to assess the individual witness's credibility; *see also* [*Commonwealth v.*] *Davis,* [541 A.2d 315,] 316–17 [1988] (citing *Seese* in concluding that expert testimony as to the inability of young children to fantasize about sexual encounters was improper). In *Commonwealth v. Gallagher,* 547 A.2d 355 (Pa. 1988), we held that expert testimony on rape trauma syndrome was improperly admitted at the appellant's trial. The expert in *Gallagher* had opined that the victim was suffering from rape trauma syndrome, and thus her positive, in-court identification of the appellant as her assailant was not incompatible with her inability to identify him shortly after the rape, which had occurred five years earlier. *Id.* at 358. We determined that the only purpose of the *Gallagher* expert testimony was to enhance the credibility of the victim, and we concluded that "[s]uch testimony would invest the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the facility of the ordinary juror to assess." *Id.*

92 A.3d 753, 761 (Pa. 2014). Here, Dershem was not offering an expert opinion on whether Aaron Fisher was credible, and as such, her testimony did not invade the province of the jury. Instead, she was merely explaining her observations and rationale for submitting a report to ChildLine. Moreover, in her employment as a caseworker, she was certainly entitled to offer an opinion on the human behavior that she observed during her interviews with Aaron Fisher and Sandusky. Indeed, Rule 701 of the Pennsylvania Rules of Evidence provides as follows:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa.R.E. 701.

Because the prosecutor did not elicit any improper evidence from Dershem and did not tell jury that they should assign special weight to her testimony because of her skill, knowledge

and experience, there was no basis upon which Sandusky's counsel should have objected. Accordingly, this ineffective assistance of counsel claims fails.

Claim 9) Trial Counsel and Direct Appellate Counsel Were Ineffective For Failing to Appeal Sandusky's Convictions Relating to Victim #8 as lacking Sufficient Evidence

In connection with Victim 8, Sandusky was convicted of the crimes of involuntary deviate sexual intercourse, indecent assault, unlawful contact with minors, corruption of minors and endangering the welfare of children. The evidence supporting the convictions was provided through the testimony of Ronald Petrosky ("Petrosky"). Petrosky testified that he was employed as a janitor at Penn State Univesrity during the fall of 2000. *See* N.T. 6/13/12, p. 222. Petrosky was responsible for, *inter alia*, cleaning the shower areas in the Lasch Building (football building) at night. *See id.* at 223. One evening, as he approached the staff locker room to commence his cleaning duties, he heard water running in the showers. *See id.* at. 226. He could also hear fellow janitor James Calhoun ("Calhoun") cleaning the toilet area. *See id.* As he approached the shower, he saw two sets of legs, "one set of hairy legs and one set of skinny legs." *Id.* at 227. He dropped the hose and went out into the hallway where he waited for the showering to conclude. *See id.* Petrosky stated that while he was standing outside the door, Sandusky emerged from the shower area with a small boy. *See id.* at 228. Both the boy's hair, and Sandusky's hair, were wet and they were carrying gym bags. *See id.* at 229. As Petrosky watched them walk down the hallway, he observed Sandusky and the boy holding hands. *See id.* at 244.

After Sandusky and the boy left, Petrosky encountered Calhoun. He described the encounter for the jury as follows:

> A: Yes, shortly after. I finished the chemicals and I grabbed my bottle and I started in the door and Jim [Calhoun] was coming out. There's double

doors there before you go in to the locker and I met Jim in between the two doors, between the hall and where you entered the locker area.

And I could see he was upset. His face was white. His hands was trembling. I thought it was a medical condition. I said, "Jim, what's wrong?" And this is how he said it to me. He said, "Buck," -- that's my nickname. He said. "Buck, I just witnessed something in there I'll never forget the rest of my life." I said, "What are you talking about, Jim." He said that man that just left, he had this -- the boy up against the shower wall licking on his privates. I said, "Are you sure that man that just left?" He said, "I'm sure." I said, "You know who that is?" I said, "That's Jerry Sandusky." He didn't know who he was but he knows what he seen that night.

Q: Okay. And now how long were you standing there with Jim before you went someplace else, if you did?

A: Probably like five minutes at the most.

Q: Now, where did you go right after that?

A: Well, I told -- I asked Jim if he wanted to call somebody or, you know, and he said he didn't. He was afraid I guess and so I calmed him down. We went down the hall. There was a meeting room off to the right and then the other guys come down from upstairs and took – because Jim was so shook up, you know, I called for other people to –

Q: When you were down there in that meeting room, was Jim still white, shaken, and upset?

A: Yes, he was crying and shaking.

Q: Did he say anything down there?

A: Pardon me?

Q: Did he say anything down at that meeting room about what he seen? Did he talk to you or to Mr. Witherite?

A: Yes. He told the other guys the same story then.

Q: What did he say?

A: He said that he told Jay and them, he said that, you know, he seen Sandusky holding that boy up licking on his privates.

Q: Okay. Did he say anything in addition to that that included a different description? I know you don't want to use the language.

A: Yes. Yeah, he said he was sucking on his dick is what he said.

Q: Was he still shaking and white when he was saying that?

A: Pardon me?

Q: Was he still shaking and white when he said that?

A: Yes, he was. We thought he was going to have a heart attack. We kept people with him all night throughout the night and made sure, you know, he was all right.

N.T. 6/13/12, pp. 229-231. The Commonwealth did not call a witness who identified himself as being Victim 8.

In its closing instructions, this Court explicitly cautioned the jury that the statement of Calhoun, as related by Petroksy, was not sufficient - - standing alone - - to sustain a conviction, explaining that "you must be satisfied that there is other evidence that supports that a crime had been committed besides Mr. Calhoun's hearsay statement." *Id.* at 27. This Court noted that while the jury could consider the statement, they must also be satisfied that there is other evidence, either direct or circumstantial, which satisfied them that a crime has been committed. *See id.*[33]

During closing arguments, counsel for Sandusky attacked the fact that there was no witness who identified himself as Victim 8 and raised questions about the credibility of Calhoun:

> The janitor case. The Commonwealth is asking you to convict Mr. Sandusky of very serious crimes based upon the hearsay testimony of another janitor who testified that a janitor who now suffers from senility told him this is what happened. This is what he saw. But do we know what he saw? Do we know

[33] This Court repeated the instructions verbatim pursuant to a question submitted by the jury during their deliberations. N.T. 6/22/12, pp. 16-19. Absent evidence to the contrary, a jury is presumed to follow the court's instructions. *See Commonwealth v. O'Hannon*, 732 A.2d 1193, 1196 (Pa. 1999).

> what his mental health state was at that time? Do we know anything about the janitor who was the basis of this accusation having told the other janitor?
>
> Do we have a victim? Did someone come forward and say, hey, that was me. I'm the kind in that shower. Do we have any of that? Does that make sense?
>
> The Commonwealth is asking to convict him of something that is so serious, involuntary deviate sexual intercourse, without a victim, without the person who says he saw based upon what another janitor says he saw 11 years later or 12 years later. This is the kind of case they have. This is what we're looking at.

N.T. 6/21/12, p. 84.

In post-sentence motions, Attorney Gelman argued that this Court had erred when it permitted the Commonwealth to introduce Calhoun's statement as an excited utterance. He submitted that the statement was inadmissible as an excited utterance based upon the lapse of time and due to the fact that there was no independent proof that the event in the shower ever occurred. *See* Defendant's Brief in Support of Post-Sentence Motions, p. 37. Counsel did not pursue this issue on direct appeal to the Superior Court, however, and in Claim 10 of his PCRA petition, Sandusky challenges counsel's failure to litigate the admissibility of the statement on appeal.

In addition to failing to pursue the issue of the admissibility of Calhoun's statement, Sandusky faults Attorney Gelman for failing to lodge a challenge to the sufficiency of the evidence underlying his convictions with respect to Victim 8.[34] The test for evaluating the sufficiency of the evidence is whether in viewing all of the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. *See Commonwealth v. Smith*, 956 A.2d 1029, 1035 (Pa. Super. 2008). Moreover, in applying this test, a court:

[34] Counts 36-40 of Criminal Information CR-2422-2011.

> . . . may not weigh the evidence and substitute [its] judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. Furthermore, when reviewing a sufficiency claim, [a court] is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Id. at 1035-36. It is Sandusky's burden to specify the element or elements upon which the evidence was insufficient. *See Commonwealth v. Williams,* 959 A.2d 1252, 1257 (Pa. Super. 2008). Such specificity is of particular importance in cases such as this where a defendant was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt. *Id.,* at 1258 n. 9.

Here, Sandusky not only failed to specify the elements that he was challenging, he never bothered to identify the convictions in dispute. Instead, he appears to believe that he need not develop or discuss any of the crimes/elements as his convictions should simply be reversed because Calhoun "recanted or contradicted" the statement that was admitted at trial. Amended PCRA petition, 5/6/15, p. 84, ¶ 357. The statement of Calhoun, as relayed to the jury, clearly satisfies all of the elements of involuntary deviate sexual intercourse, indecent assault, unlawful contact with minors, corruption of minors and endangering the welfare of children and it was supported by the corroborating testimony of Petrosky who indicated that he saw two sets of legs in the shower and then witnessed Sandusky and the boy emerge from the locker room. Sandusky's complaint is therefore not with the actual *content* of the testimony as it stands; instead, in his quarrel is actually with the admissibility of the statement and its reliability in light

of the alleged recantation/contradiction (the evidence of which was not introduced at trial). However, while it is the province of the trial judge to determine, as a matter of law, whether the prosecution's proof has been sufficient in volume and quantity to present a case to the jury and overcome the presumption of innocence, generally it is for the jury to determine the weight and effect of evidence. *See Commonwealth v. Kibler*, 258 A.2d 681, 682 (Pa. Super. 1969); *See Commonwealth v. Pitts,* 404 A.2d 1305 (Pa. 1979) (jury is free to believe all, part or none of the evidence presented and a court cannot reweigh the evidence and substitute its judgment).

Sandusky's counsel attempted to highlight the weaknesses of the Commonwealth's proof and this Court properly instructed the jury not only once, but twice, on the way in which the evidence should be evaluated. Accordingly, while Attorney Gelman could have challenged the actual admissibility of the Calhoun statement on direct appeal, there was no basis upon which he could argue that the evidence was insufficient to sustain Sandusky's convictions as a matter of law. As such, Sandusky's allegation of ineffectiveness in connection with the sufficiency of the evidence fails here.

Claim 10) Trial Counsel Was Ineffective For failing to Impeach Ronald Petrosky's Hearsay Testimony Regarding Jim Calhoun With a Tape Recorded Statement by Calhoun Specifically Stating He Never Saw Sandusky Assault The Unknown Victim #8, And Direct Appellate Counsel was Ineffective For Failing to Raise The Issue of The Violation of Sandusky's Confrontation Clause Rights Relating to Calhoun on Appeal.

Prior to ruling that the statement of Calhoun would be admissible pursuant to the excited utterance exception to the hearsay rule, this Court entertained argument from both parties. During argument, counsel for Sandusky alluded to the possibility that the introduction of the statement could violate Sandusky's rights under the Confrontation Clause, a position that this Court squarely rejected. N.T. 6/12

Sandusky now revisits this argument in his petition for post-conviction relief wherein he submits that Attorney Gelman was ineffective for failing to raise this specific Confrontation Clause challenge on direct appeal. He also complains that trial counsel was ineffective for failing to impeach Calhoun's statement with recantation evidence. The Commonwealth will now address each of these assertions separately.

a) Violation of the Confrontation Clause

Under the Confrontation Clause,[35] a defendant has the right to confront any witnesses against him. Prior to the decision in *Crawford v. Washington,* 541 U.S. 36 (2004), the United States Supreme Court took the view that "the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule." *Williams v. Illinois,* 132 S.Ct. 2221, 2223 (2012); *see Ohio v. Roberts,* 448 U.S. 56 (1980) (abrogated by *Crawford*). However, the *Crawford* Court held, "Testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford, supra* at 59. The Court overruled *Roberts* as to "testimonial evidence," holding that "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. "Where nontestimonial hearsay is at issue," in contrast, the Court found it "wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.*

[35] Article I, Section 9 of the Pennsylvania Constitution was amended in 2003 to provide, in relevant part: "In all criminal prosecutions the accused hath a right to be confronted with the witnesses against him . . . " to make it identical to the Confrontation Clause of the Sixth Amendment to the United States Constitution. Art. 1, § 9.

In this case, this Court determined that the proper foundation was laid for the introduction of Calhoun's statement to Petrosky as an excited utterance. Rule 803(2) of the Pennsylvania Rules of Evidence permits the admission of an excited utterance as an exception to the general rule that hearsay evidence is inadmissible. The excited utterance exception provides "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and is admissible even if the declarant is available as a witness. Pa.R.E. 803(2).[36] With regard to the excited utterance exception, our Supreme Court recently explained:

> As is well-settled, excited utterances fall under the common law concept of *res gestae*. *Res gestae* statements, such as excited utterances, present sense impressions, and expressions of present bodily conditions are normally excepted out of the hearsay rule, because the reliability of such statements are established by the statement being made contemporaneous with a provoking event. While the excited utterance exception has been codified as part of our rules of evidence since 1998, *see* Pa.R.E. 803(2), the common law definition of an excited utterance remains applicable, and has been often cited by this Court:
>
> > [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties . . . Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event.

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[36] Sandusky makes a passing challenge to the fact that trial counsel was ineffective for failing to demand proof that Calhoun was incompetent or unavailable to testify. Because this Court admitted Calhoun's statement as an excited utterance, however, whether or not the declarant is available is irrelevant. Demanding proof of incompetency/unavailability would therefore not have changed the outcome in this case.

> The circumstances surrounding the statements may be sufficient to establish the existence of a sufficiently startling event.

Commonwealth v. Murray, 83 A.3d 137, 157–158 (Pa. 2013) (citations omitted).

In the case of *Commonwealth v. Jones*, our Supreme Court expressly rejected the argument that Sandusky now advances: "Contrary to Jones' contention, *Crawford* did not abolish the excited utterance exception to the hearsay rule when the declarant is unavailable." 912 A.2d 268, 283 (Pa. 2006) [*Crawford, supra.* at 61] (declining to overrule *White v. Illinois,* 502 U.S. 346 (1992), which held, *inter alia,* that the admission at trial of a spontaneous declaration by an unavailable declarant did not violate the Confrontation Clause). As Calhoun's statement was non-testimonial in nature, it was exempted from any Confrontation Clause scrutiny and therefore Sandusky's argument must be dismissed.

b) Failure to Impeach Excited Utterance

In his PCRA petition, Sandusky complains that counsel should have introduced evidence of Calhoun's tape-recorded statement from May, 2011 in order to impeach the statement that was admitted at trial as an excited utterance. The audio-recording purportedly contained a denial that Calhoun saw Sandusky in the shower with Victim 8.

It is important to note that during his closing argument, defense counsel informed the jury that Calhoun "now suffers from senility." N.T. 6/21/12, p. 84. Therefore to suggest that Calhoun's 2011 statement was somehow a reliable, trustworthy piece of impeachment evidence that would have changed the outcome of the trial appears to be a disingenuous suggestion. Even assuming *arguendo* that counsel could have successfully admitted the 2011 statement, he would have been in the unenviable position of arguing the credibility of an unavailable witness.

The position that counsel advanced at trial appears to be much stronger, comparatively. Counsel's closing remarks reveal a cogent and persuasive argument with respect to the charges

for Victim 8. Because Sandusky cannot establish how the outcome of his trial would have been different but for counsel's failure to impeach Calhoun's excited utterance, his claim of ineffectiveness fails.

Claim 11) Trial Counsel and Direct Appellate Counsel Were Ineffective For Failing to Investigate, Object to, or Preserve Any Arguments Relating to Prosecutorial Misconduct That Deprived Sandusky of a Fair Trial.

Next, it appears that Sandusky may be making an attempt to present a claim of cumulative prejudice with respect to his allegations that counsel was ineffective for failing to object to, preserve, and litigate various instances of alleged prosecutorial misconduct. In *Commonwealth v. Johnson,* 966 A.2d 523 (Pa. 2009), the Pennsylvania Supreme Court recognized that if multiple instances of ineffectiveness are found, the assessment of prejudice properly may be premised upon cumulation." *Id.,* at 532 (citing *Commonwealth v. Perry,* 644 A.2d 705, 709 (1994) (finding multiple instances of ineffectiveness, "in combination," prejudiced defendant)); *see also Commonwealth v. Koehler,* 36 A.3d 121, 161 (Pa. 2012) (to extent claims are rejected for lack or arguable merit, there is no basis for accumulation claim; however, when failure of individual claims is grounded in lack of prejudice, cumulative prejudice from those claims may properly be assessed).

W]here a claimant has failed to prove prejudice as the result of any individual errors, he cannot prevail on a cumulative effect claim unless he demonstrates how the particular cumulation requires a different analysis." *Commonwealth v. Wright,* 961 A.2d 119, 158 (Pa. 2008); *see also Commonwealth v. Small,* 980 A.2d 549, 579 (Pa. 2009) (concluding that a broad and vague claim of the prejudicial effect of cumulative errors did not entitle the appellant to relief). Although cumulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice, nothing in

Pennsylvania precedent relieves a defendant who claims cumulative prejudice from setting forth a specific, reasoned, and legally and factually supported argument for the claim. *See Commonwealth v. Johnson,* 600 Pa. 329, 966 A.2d 523, 532 (2009). Indeed, a bald averment of cumulative prejudice does not constitute a claim.

Here, although Sandusky corrals together some of his ineffective assistance of counsel claims involving prosecutorial misconduct (Improper leak of grand jury information - - Claim 5; Failure to provide *Brady* evidence in the nature of fee agreements between the victims and their private counsel - - Claim 7; and Initiation of criminal charges against Curley, Schultz and Spanier - - Claim 4), he makes no effort to articulate an argument with respect to a cumulative prejudice analysis. Moreover, he includes two entirely new allegations: 1) The inclusion of false information in the grand jury presentment pertaining to the testimony of Michael McQueary; and 2) The Commonwealth's commission of a *Brady* violation by inundating defense counsel with discovery on the eve of trial. Sandusky does not properly develop these new claims within the context of *Pierce,* however.

The Commonwealth is cognizant that Sandusky may be granted to leave to correct his pleading in accordance with of Rule 905 of the Pennsylvania Rules of Criminal Procedure.[37] If

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[37] Rule 905 of the Pennsylvania Rules of Criminal Procedure provides in relevant part as follows:

> (A) The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.
>
> (B) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

Pa.R.Crim.P. 905. This rule indicates the desire of the Supreme Court to provide PCRA

he is afforded the opportunity to correct the presentation of this claim, the Commonwealth respectfully requests the opportunity to provide an additional response.

Claim 12) Trial Counsel Was Ineffective For Failing to Object to Irrelevant Testimony That Bolstered the Commonwealth's Witnesses' Credibility and Prejudiced Mr. Sandusky

Improper bolstering or vouching for witnesses by the Commonwealth occurs in two situation: 1) When the prosecution places the prestige of the government behind the witness by personal assurances of the witness's veracity; and 2) When the prosecution indicates that information which is not before the jury supports the witnesses testimony. *See Commonwealth v. Hartey*, 621 A.2d 1023 (Pa. Super. 1993). In his twelfth claim, Sandusky lists an assortment of eight different instances where witnesses espoused their personal thoughts and/or beliefs during the course of their testimony at trial. According to Sandusky, the "mental impressions" of these witnesses were offered to improperly bolster the credibility of other Commonwealth witnesses and victims. This claim should be dismissed outright on the basis that Sandusky fails to develop any cognizable ineffective assistance of counsel argument for purposes of seeking post-conviction relief. Indeed, he simply notes that: 1) Trial counsel failed to object to any of this testimony; 2) Trial counsel's failure to object was without any reasonable basis, as this testimony was irrelevant and highly prejudicial; 3) Sandusky suffered prejudice because irrelevant evidence was admitted without any adequate foundation of personal knowledge; and 4) The outcome of the proceedings would like have been different had the defense objected to any of this testimony, let alone all of it.[38] Amended PCRA Petition, p. 94, ¶ 414; ¶ 415; ¶ 416; ¶ 417 (emphasis in

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petitioners with a legitimate opportunity to present their claims to the PCRA court in a manner sufficient to avoid dismissal due to a correctable defect in claim pleading or presentation. *See Commonweatlh v. Williams,* 782 A.2d 517, 526-27 (Pa. 2001)

[38] *But see Commonwealth v. Burch*, 374 A.2d 1291, 1293 (Pa. Super. 1977) ("[c]ounsel does not

original). Because an ineffective assistance of counsel claim is not self-proving, and Sandusky's language is in boilerplate fashion, he has waived review here.

Even if this Court should elect to consider this claim despite the pleading deficiency, it easily fails for lack of merit. None of the examples recited involve any significant, objectionable testimony that either together, or separately, would have altered the outcome of the trial.

Claim 13) Trial Counsel Was Ineffective For Promising the Jury That Mr. Sandusky Would Testify at Trial.

Next, Sandusky claims that counsel promised the jury during opening statements that Sandusky would "deny the conduct for which he was charged and explain his interaction with the men involved." PCRA petition, 5/6/15, p. 96 ¶ 423. Obviously, whenever counsel promises the jury that they will hear from the defendant, and the defendant ultimately fails to testify, the danger is that the jury will infer that the defendant was unwilling or unable to deliver the testimony as promised. As will be discussed below, such concerns do not exist in Sandusky's case.

At the outset, the Commonwealth would note that Sandusky fails to pinpoint the exact portion/language of the opening statement to which he is referring.[39] A review of the entire statement, however, reveals the following three instances where counsel intimated that Sandusky may testify:

> By the way, the only reason that Jerry Sandusky was at that CYS hearing with me as counsel was because he wanted to defend against the allegation, because he said I'm innocent. I want to go to that hearing. And that was after, he'll tell you later ***probably***, advice was given don't go because CYS routinely found or finds that these things are illegitimate and you're wasting your time.

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have to raise every possible objection at trial, and he is not ineffective where he does not raise issues at trial that are without merit.")

[39] Sandusky's petition contains references to pages 9 and 26 of the 6/11/12 transcript of counsel's opening statement; however, those pages do not contain any reference to the possibility of Sandusky testifying before the jury.

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> . . . And Jerry got this deep-seeded love for helping kids and he said when I grow up - - you'll hear this on the stand - - when I grow up, I want to help kids who are at risk.
>
> After going to Penn State - - and he'll tell you about his Penn State life.

N.T. 6/11/12, pp. 5, 19, 19 (emphasis added).

In support of his claim that counsel was ineffective for breaking a promise to the jury, Sandusky directs this Court to decisions from three different United States Courts of Appeals. First, Pennsylvania courts are not required "to employ federal law from a foreign jurisdiction in order to interpret Pennsylvania law." *Commonwealth v. Giffin,* 595 A.2d 101, 107 (Pa. Super. 1991). Second, federal court decisions are not generally binding on Pennsylvania courts, even where they concern federal questions. *Id.* Even more significant, however, is that Sandusky's case is much different from other cases wherein a failure to keep a promise to the jury constituted the ineffective assistance of counsel. Contrary to the characterizations in Sandusky's PCRA petition, the record makes clear that counsel did not promise that Sandusky would explain his side of events and deny the conduct for which he was charged. Instead, counsel suggested that Sandusky *may* offer testimony regarding the allegations underlying the CYS hearing.

Moreover, even if this Court should find that counsel did make a promise that he did not deliver, that is not the end of the inquiry in terms of determining whether counsel was ineffective. Instead, the strategic justification for the remarks must be examined. Here, the record indicates that counsel planned to call Sandusky as a witness during the defense case-in-chief until Matt Sandusky approached the Commonwealth and reported that he had been abused by Sandusky. Matt Sandusky's unexpected revelation, and the consequences it held for the Sandusky defense, were presented to this Court as follows:

MR. AMENDOLA: The Commonwealth, as the Court knows, in a conference call with me and the Court, I believe Mr. McGettigan and Mr. Fina last Thursday evening, after the Commonwealth had all but closed, but late hour of the day, asked for permission to remain open pending an investigation that was occurring at that time.

Contacted me by phone somewhere, I believe it was 8:00 or 8:30 p.m., and advised me that Matt Sandusky, Jerry Sandusky's son, had approached them, had interviewed with them, and made a statement that his father had abused him and that they potentially intended to use this testimony, this evidence at trial.

Now, up until that time, Your Honor, Mr. Sandusky had always wanted to testify on his own behalf. He always wanted to tell people his side to the allegations in this case. However, that potential evidence, whether true or not, was so devastating and so is -- I think Mr. Fina has used the term in the past so nuclear to his defense, from that point on we were very concerned whether or not Mr. Sandusky could testify.

Mr. Fina later narrowed the scope of that potential damage by indicating to me that the Commonwealth would agree not to call Matt Sandusky in its case in chief but reserved the right to call him as a rebuttal witness should evidence come out at trial that would allow him to testify and more specifically, obviously, if Mr. Sandusky testified at trial, which still left us with a grave concern.

Subsequently, we also found out there was another part of the interview with Bob Costas when Mr. Sandusky interviewed with him shortly after his arrest in these matters by phone. That interview was by phone, which statement that we anticipated the Commonwealth would cross-examine Mr. Sandusky on, although, in our opinion, it was unclear as to what he was saying and the context of getting a specific answer from him certainly in our opinion would have opened the door for rebuttal testimony from Matt Sandusky.

Because of that situation, as well as the admitted part of Mr. Sandusky's interview with Mr. Costas, specifically relating to the part of are you sexually attracted to young boys, and that was the part that was played twice and the

Court corrected that issue, we felt Mr. Sandusky could give no answer at trial that would not allow the Commonwealth to call Matt Sandusky as a rebuttal witness.

So after many discussions with Mr. Sandusky, based upon that evidence, Mr. Sandusky chose not to testify despite the tact I had at least eluded in my opening statement on a number of occasions to the jury that they would hear from Mr. Sandusky.

Our position on the Matt Sandusky development coming literally at the close of the Commonwealth's case basically took the heart out of our defense, because our defense was going to be Mr. Sandusky testifying.

Today, after we called our last fact and character witness, the Court gave us time to consult with Mr. Sandusky as to whether or not he wanted to testify with all this information before him, and he decided that he did not want to testify for the reasons I have set forth.

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. . . I can assure the Court that we have researched this, Mr. Rominger and I. We discussed it with Mr. Sandusky-- that there's no way we see that we would call him to the stand under the current circumstances and protect him from being exposed to Matthew Sandusky being called as a Commonwealth witness on rebuttal.

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Having said that, I would ask the Court, because it was such a surprise to us and because it was such an integral part of our case that Mr. Sandusky testify that we feel we have really put ourselves in a tough situation with the jury, a situation because we inferred, if not stated specifically, that Mr. Sandusky would testify and they would hear from him at some point in some fashion.

We would as a result of that move for a mistrial because of the extreme prejudice we feel which has occurred to our defense post beginning of trial, not having had an opportunity to cure this and kind of shift strategies prior to the commencement of trial. So our motion would be for a mistrial.

There's a further point of clarification, too. That is, Matt Sandusky had been a part of our defense and actually had told us he would testify for his dad . . .

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> For all those reasons, we feel that we should request -- make a motion for a mistrial and maybe ask the Court and the Commonwealth to address those issues at this time, and then I'll colloquy Mr. Sandusky.
>
> ***
>
> THE COURT: First, with regard to the motion for mistrial, that motion will be denied. It is not an unusual circumstance that the theory of a party is thrown into disarray as the search for truth or the factual developments occur during a trial in ways that are not anticipated pretrial.
>
> Counsel did mention in an earlier discussion of this off the record before Court this morning a concern about the fact that in the defense opening, there had been a reference to the defendant testifying. I don't recall exactly what that was. My impression that at the close of the opening statement was that I wasn't sure whether or not the defendant was going to testify. Of course~ I have no idea what the jury thinks about that.
>
> In any event, I will certainly affirm to the jury that the defendant has no obligation to present any evidence and certainly not to testify himself . . . .

N.T. 6/21/12, pp.

The foregoing makes clear that counsel's opening statement was not the product of any sort of inadequate preparation or inattention; rather, at that time, the defense intended to present Sandusky's testimony. Sandusky's subsequent decision not to testify was an event that was apparently prompted by an unexpected event, an event over which defense counsel had no control. Counsel cannot be faulted for an unforeseen change in circumstance.

Finally, any fleeting references to the possibility that Sandusky may testify should be evaluated in light of the opening instructions wherein this Court informed the jury that Sandusky had no obligation to testify:

> Mr. Sandusky does not have any responsibility to prove anything. He does not need to present any evidence to prove that he is not guilty. In addition, under both the United States and Pennsylvania Constitutions, he has an absolute right not to

testify. If he decides not to testify, you cannot hold that fact against him or infer that he is guilty because he chooses not to testify.

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After the Commonwealth has presented its case, the defense may present evidence for the defendant but, remember, the defendant has no obligation to present any evidence or to testify himself because the responsibility is always on the Commonwealth and only on the Commonwealth to prove its case beyond a reasonable doubt.

N.T. 6/11/12, pp. 5-7. [40] A jury is presumed to follow the court's instructions. *See generally, Commonwealth v. Stokes*, 839 A.2d 226, 230 (Pa. 2003). Based on the foregoing, Sandusky's ineffective assistance of counsel claim must fail.

Claim 14) Trial Counsel Was Ineffective For Eliciting Inculpatory Evidence Against Mr. Sandusky and Evidence That Opened The Door For The Commonwealth to Introduce Additional Rebuttal Evidence.

During his case in chief, Sandusky presented the expert testimony of Elliot Atkins, a licensed psychologist, who opined that Sandusky suffered from histrionic personality disorder. N.T. 6/19/12, p. 145. The express, limited purpose of this testimony was to offer an explanation/interpretation of the letters that Sandusky sent to Brett Houtz that had been characterized as "creepy love letters." The jury was specifically advised that the testimony was not being offered as a defense to the underlying charges. N.T. 6/19/12, p. 140.

Sandusky now regrets presenting the testimony of Dr. Atkins, characterizing the decision as "ill-considered." Amended PCRA petition, 5/6/15, p. 97, ¶ 432. To illustrate his regrettable

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[40] For his part, Sandusky's counsel also reminded the jury of this important tenet when he stated:

> There's two sides of the story, folks, although as the judge told you we don't have to present any evidence, not a single piece of evidence. We can sit at that table, listen to the Commonwealth present testimony, and at that the end of it say, we want you to find Jerry Sandusky not guilty.

N.T. 6/11/12, p. 27.

choice, Sandusky cherry picks one portion of an answer that Dr. Atkins supplied on cross-examination wherein he stated that "If, in fact, the things he [Sandusky] is accused of are true, then he would have a psychosexual disorder." *Id.*, ¶ 431. This answer must be reviewed in its entirety and placed into context, however. During cross-examination, Dr. Atkins agreed with the premise that histrionic personality disorder does not preclude or limit the existence of another clinical diagnosis. N.T. 6/19/12, p. 215. The following exchange then occurred:

> Q: . . . I am asking you if the elements that you saw, that you saw underlie in this defendant what you claim is a histrionic personality disorder also underlie or an congruent with, consistent with, not in everything you saw but in that which you did see, consistent with a psychosexual disorder which involves sex with adolescents; is that correct?
>
> A: I can't go that far. I can't say that. There is no clear pattern or clear diagnosis of a psychosexual disorder without certain behaviors and Mr. Sandusky denied those behaviors.
>
> Q: Oh. So, in part your conclusion is that based on his denial?
>
> A: If, in fact, the things that he is accused of are true, then he would have a psychosexual disorder. I found nothing to support that that's the case.

Id. at 216-17.

In rebuttal, the Commonwealth presented the testimony of John O'Brien, an expert in the area of forensic psychiatry. Dr. O'Brien quarreled with Dr. Atkins' determination that the letters were demonstrative of a person with histrionic personality disorder. *See id.* at 248. He stated:

> And in my opinion, the letters are not consistent with a personality disorder per se. They're actually, in my opinion highly manipulative and utilize different techniques to try to draw the attention of the reader and to sway their intentions or their behavior in certain ways. And I don't see them as anything more than that.

Id. at 292. He went on to testify that his review of the materials revealed the possibility of another diagnosis being present. When asked if that diagnosis would be a psychosexual disorder with a focus on adolescence or preadolescence, he responded:

In my opinion, yes, it would.

> Part of the difficulty is that in doing such an evaluation, you're considering evidence that hasn't been proven, evidence which is still pre-trial evidence. So it's difficult to draw factual conclusions - - impossible to draw factual conclusions from that sort of information.

Id. at 295. Contrary to Sandusky's averment in his PCRA petition, Dr. O'Brien's opinion as to whether Sandusky suffered from a psychosexual disorder was not without caveat. In fact, it was the same qualification referenced by Dr. Atkins; namely, that a diagnosis would depend on whether Sandusky committed the acts with which he was charged.

It is important to remember that the Constitution guarantees the accused a fair trial, not a perfect one. *See, e.g., Commonwealth v. Rasheed,* 640 A.2d 896, 898 (Pa. 1994). Moreover, "[a]lthough hindsight might reveal the comparative worth of alternatives not pursued, an ineffectiveness claim cannot succeed on that basis." *Commonwealth v. Chester*, 587 A.2d 1367, 1384 (Pa. 1991); *see also Commonwealth v. Daniels*, 104 A.3d 267, 285 (Pa. 2014) (When engaging in a *Strickland* assessment, "we appreciate that the task is not to identify various hindsight 'gotcha' scenarios: *i.e.*, counsel could have done this, or he should not have done that."). Here, the decision to call Dr. Atkins as a witness was one of trial counsel strategy. The law is clear that where counsel has made a strategic decision after a thorough investigation of law and facts, it is virtually unchallengeable; strategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. *See Commonwealth v. Rolan,* 964 A.2d 398, 406 (Pa.Super.2008).

Because counsel introduced the testimony for a limited purpose and not as a defense to the charges, the Commonwealth submits that counsel's chosen path was reasonable. Indeed, the limitations on the testimony were made clear by this Court in its closing instructions:

As I noted, Dr. Atkins and Dr. O'Brien seemed to express conflicting opinions. Whether those opinions conflicted is up to you. But they -- but they expressed opinions regarding their diagnosis of Mr. Sandusky. I want to be sure that I have a clear understanding of the purpose of that evidence and how you may consider its effect and apply it during your deliberations.

First, I repeat that you're not required to accept the testimony of a witness simply because he's been qualified as an expert. It's up to you to assess the credibility of the expert and decide whether the testimony is worthy of belief.

Second, Dr. Atkins testified that Mr. Sandusky has a histrionic personality disorder. The purpose of that evidence was to offer an explanation about why he sent letters to Brett Houtz. The Commonwealth has characterized these as love letters and the defense presented Dr. Atkins to offer his contrary opinion that they might also be considered as manifestations of Mr. Sandusky's personality disorder rather than as love letters.

Third, if you believe Mr. Sandusky committed any of the various sexual acts for which he has been charged, you may not use the testimony of Dr. Atkins to justify those acts or to excuse those acts or to conclude that Mr. Sandusky did not have the necessary intent to commit the acts and, therefore, find him not guilty.

So even if you believe Mr. Sandusky suffers from a histrionic personality disorder, that is not a defense to any of the crimes charged. The evidence was not presented for that purpose and may not be used by you for that purpose.

In a case where the defendant offers mental illness as a defense to criminal charges, he must first admit that he committed the offenses and then offer the mental illness as a defense. That did not happen in this case. Mr. Sandusky has not admitted he committed the offenses charged and, therefore, he cannot offer mental illness as a defense.

So I specifically instruct you that even if you believe Mr. Sandusky has been properly diagnosed as having a histrionic personality disorder, you may consider that evidence only to help you to evaluate the purpose and content of his letters to Brett Houtz. Any such diagnosis is not a defense to the charges brought against him. The diagnosis was only offered and may only be considered as an alternative explanation of why he sent the letters that had been introduced
into evidence.

N.T. 6/21/12, pp. 19-21.

Just because Sandusky is not satisfied with the decision to call Dr. Atkins today does not mean that counsel made an error in judgment in 2012. Accordingly, because he cannot carry his

burden of proof, Sandusky's penultimate claim must be dismissed.

Claim 15) Trial Counsel's General Conduct Before And During Trial Demonstrates That He Essentially Abandoned Sandusky, Leaving Him Without Any Defense, And in Reality, Trial Counsel Acted More Like Another Prosecutor Instead of Defense Counsel

In his final claim, Sandusky submits that counsel effectively abandoned him, amounting to a complete denial of his right to counsel pursuant to the Sixth Amendment to the United States Constitution. *See United States v. Cronic,* 466 U.S. 648 (1984). *Cronic* relieves a defendant from the burden of proving prejudice whenever there has been an actual or constructive denial of counsel. *See Florida v. Nixon,* 543 U.S. 175 (2004); *Commonwealth v. Mallory,* 941 A.2d 686, 700 (Pa. 2008); *Commonwealth v. Reaves,* 923 A.2d 1119, 1128 (Pa. 2007). In *Reaves,* the Pennsylvania Supreme Court described the operation of *Cronic's* presumption of prejudice:

> *Cronic* recognized that in some cases, the prejudice inquiry of *Strickland* is not required because there are certain circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658, 104 S.Ct. at 2046. *Cronic* suggested that where there has been a complete denial of counsel or where the circumstances are such that any competent attorney would be unable to provide effective assistance, a defendant need not demonstrate that he was prejudiced by counsel's actions. *Id.* at 659–62, 104 S.Ct. at 2047–48. The presumed prejudice exception to *Strickland* has been found to apply where there was an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest. *See* [*Smith v. Robbins,* 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)].

Reaves, 923 A.2d at 1128. The United States Supreme Court, however, has emphasized that such instances are rare. *See Nixon,* 543 U.S. at 190 (holding that a showing of actual prejudice was required where the defendant claimed that counsel was ineffective for conceding guilt at the guilt phase of a capital trial). Furthermore, the Pennsylvania Supreme Court has stressed that

Cronic is limited to cases where "the acts or omissions of counsel were of the type that are virtually certain to undermine confidence that the defendant received a fair trial or that the outcome of the proceedings is reliable, primarily because they remove any pretension that the accused had counsel's reasonable assistance during the critical time frame." *Mallory,* 941 A.2d at 700 (quoting *Commowealth v. Cousin,* 888 A.2d 710, 718 (Pa. 2005)). *See, e.g., Commonwealth v. Halley,* 870 A.2d 795, 801 (Pa. 2005) (prejudice presumed where counsel failed to file statement of matters complained of on appeal, which led to waiver of all claims); *Commonwealth v. Lantzy,* 736 A.2d 564, 572 (Pa. 1999) (prejudice presumed where counsel's failure to file requested direct appeal was unjustified). In *Nixon,* the High Court reiterated that *Cronic* is limited to situations where counsel's failure is complete, *i.e.,* where "counsel has entirely failed to function as the client's advocate." *Nixon,* 543 U.S. at 189–90, *Accord Cousin,* 888 A.2d at 719 (*Cronic* presumption of prejudice not triggered when trial counsel concedes guilt of lesser crime in closing argument of bench trial).

As evidenced through the examples cited in this response, Sandusky's counsel mounted a vigorous defense on his behalf during pre-trial, trial and post-trial proceedings. The law is clear that *Cronic* only applies when counsel entirely and completely fails to subject the prosecution's case to meaningful adversarial testing and fails to function in any meaningful sense as the government's adversary. Obviously, such is not the case here. The record is replete with evidence that Sandusky's attorneys engaged in a full and meaningful adversarial testing of the Commonwealth's case. *See Bell v. Cone,* 535 U.S. 685 (2002) (*Cronic's* exception to *Strickland* only applies when the defense attorney's failure to oppose the prosecution goes to the trial as a whole, not when the failure occurs only at specific points in the trial).

A review of the alleged counsel errors that Sandusky includes in connection with Claim 15 clearly bring his claim squarely within the *Strickland* prejudice line of cases and not within the limited exception of *Cronic*. As such, Sandusky was required to meaningfully develop each and every allegation according to the *Pierce* test. No such development was undertaken. Rather, Sandusky simply set forth, in laundry list fashion, 12 separate and distinct instances of "abandonment" - - including the incredibly serious allegations that counsel ambushed him with the Bob Costas interview, failed to develop an alibi defense and failed to develop any rational defense or strategy, Given the serious nature of the allegations, the Commonwealth recognizes that this Court may provide Sandusky with an opportunity to amend his petition in order to properly develop these claims. *See* Pa.R.Crim.P. 905. The Commonwealth respectfully requests the opportunity to file an amended response if Sandusky is given the opportunity to correct the defects in this pleading.

B. Sandusky Has Not Demonstrated Exceptional Circumstances Entitling Him to Discovery

In PCRA proceedings, discovery is only permitted upon leave of court after a showing of exceptional circumstances. 42 Pa.C.S.A. § 9545(d)(2); Pa.R.Crim.P. 902(E)(1). The PCRA and the criminal rules do not define the term "exceptional circumstances." Rather, it is for the trial court, in its discretion, to determine whether a case is exceptional and discovery is therefore warranted. *See Commonwealth v. Dickerson,* 900 A.2d 407, 412 (Pa.Super.2006). Of course, mere speculation that exculpatory evidence might exist does not constitute an exceptional circumstance warranting discovery. *See id.* Specifically, Sandusky's request to access the grand jury exhibits that were already reviewed by Judge Feudale and determined to be non-exculpatory in nature should be denied as moot/duplicative. The request to access communications between the prosecutors and supervising judge and to ascertain the circumstances of the grand jury leak in

March and November, 2011 is a request to embark on a fishing expedition as such information is not sought in support of any valid, cognizable PCRA claim as discussed in Claim 5, *supra.*

V. CONCLUSION

In light of the foregoing, the Commonwealth requests that Sandusky's petition be dismissed.

Respectfully submitted,

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Date: September 1, 2015

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. CR-2421-2011
	:	NO. CR-2422-2011
GERALD A. SANDUSKY	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person(s) and in the manner indicated below.

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