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

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

TYPE OF PLEADING:

BRIEF ON NON-EVIDENTIARY HEARING CLAIMS

FILED ON BEHALF OF:

PETITIONER, GERALD A. SANDUSKY

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa.C.S. § 9542.

STANDARD AND SCOPE OF REVIEW

A PCRA court, in determining whether an evidentiary hearing is warranted on an issue must review the entire record to determine if a genuine issue of material fact exists. ***See*** Pa.R.Crim.P. 907; Pa.R.Crim.P. 908; cf. Pa.R.Crim.P. 909. The decisions of the PCRA court on questions of law are not subject to deference and are reviewed *de novo*. ***Commonwealth v. Fahy***, 959 A.2d 312 (Pa. 2008). The decision to deny an evidentiary hearing on a particular claim is considered under an abuse of discretion standard. ***Commonwealth v. Baumhammers***, 92 A.3d 708, 726-727 (Pa. 2014). A PCRA court abuses its discretion when it commits an error of law.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Mr. Sandusky is entitled to an evidentiary hearing and a new trial based on after-discovered evidence in the nature of a recantation statement by Allan Myers, contradicting Mr. McQueary's testimony at trial.

   Suggested Answer: Yes.

2. Whether Mr. Sandusky is entitled to an evidentiary hearing on his claim that trial counsel were ineffective in failing to call Allan Myers to the stand or using Mr. Myers prior statements to police that Mr. Sandusky did not molest him in the 2001 shower incident to impeach Mr. McQueary as well as those and other exculpatory statements as substantive evidence.

   Suggested Answer: Yes.

3. Whether Mr. Sandusky is entitled to an evidentiary hearing to show that trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law.

   Suggested Answer: Yes.

4. Trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance was warranted.

   Suggested Answer: Yes.

5. Was trial counsel ineffective for not requesting a change of venue or venire or seeking a cooling off period prior to the start of trial.

   Suggested Answer: Yes.

6. Whether trial counsel were ineffective during *voir dire* in neglecting to question the jurors specifically about the information they had learned from the media where one of the trial court's opening question to each juror conceded that due to the extensive media coverage the juror had knowledge of highly prejudicial information.

   Suggested Answer: Yes.

7. Whether trial counsel were ineffective in failing to interview the victims, other than Allan Myers, as well as Mr. McQueary, Mr. Petrosky, and Mr. Calhoun.

   Suggested Answer: Yes.

8. Whether trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky.

Suggested Answer: Yes.

9. Whether Mr. Amendola was ineffective for neglecting to adequately review discovery and erroneously stating that nothing in discovery would have changed his trial presentation.

Suggested Answer: Yes.

10. Whether Mr. Sandusky is entitled to an evidentiary hearing to show that the Commonwealth violated ***Brady*** by failing to disclose material impeachment evidence based on the fact that numerous victims not limited to Aaron Fisher, D.S., B.S.H. and J.S. were undergoing repressed memory therapy and, due to patient-doctor privilege, trial counsel could not have learned this information from any other source until trial and the Commonwealth was aware of that information.

Suggested Answer: Yes.

11. Whether Mr. Sandusky is entitled to an evidentiary hearing based on after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky had no independent recollection of the crimes alleged outside of receiving repressed memory therapy, which if presented at trial would have led to a reasonable probability that the outcome of the trial would have been different.

Suggested Answer: Yes.

12. Whether Mr. Sandusky is entitled to an evidentiary hearing to demonstrate that trial counsel were ineffective in failing to present expert testimony that called into question the theory of repressed memory and demonstrated the likelihood of false memories.

Suggested Answer: Yes.

13. Whether Mr. Sandusky is entitled to an evidentiary hearing on his claim that trial counsel rendered ineffective assistance by neglecting to file a motion *in limine* and seeking a hearing to preclude the use at trial of the victims' prior statements to police that were gleaned by suggestive and improper police questioning.

Suggested Answer: Yes.

14. Whether Mr. Sandusky is entitled to an evidentiary hearing to establish that trial counsel were ineffective for failing to introduce a tape-recorded statement by James Calhoun in which he contradicted Mr. Petrosky's testimony and Mr. Calhoun denied observing Mr. Sandusky performing any sex acts with a boy in a shower.

Suggested Answer: Yes.

15. Whether trial counsel were ineffective for failing to argue that under Pa.R.E. 806, Mr. Sandusky had the right to cross-examine James Calhoun about the excited utterance introduced through Mr. Petrosky.

Suggested Answer: Yes.

16. Whether appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony, relative to Mr. Calhoun's hearsay statement, was inadmissible as an excited utterance as there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim.

Suggested Answer: Yes.

17. Whether direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to admission of hearsay statements from Mr. Calhoun via Mr. Petrosky.

Suggested Answer: Yes.

18. Whether direct appeal counsel was ineffective for failing to appeal Mr. Sandusky's convictions relating to Victim #8 as lacking sufficient evidence.

Suggested Answer: Yes.

19. Did Mr. Amendola render ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky.

Suggested Answer: Yes.

20. Were trial counsel ineffective by not seeking a mistrial after the prosecutor improperly made comments based on Mr. Sandusky's silence.

Suggested Answer: Yes.

21. Were trial counsel ineffective for failing to object to improper opinion testimony by an unqualified expert.

Suggested Answer: Yes.

22. Was Mr. Amendola ineffective for promising the jury that Mr. Sandusky would testify at trial and not calling him.

Suggested Answer: Yes.

STATEMENT OF RELEVANT FACTS

Mr. Sandusky has previously detailed the facts of this matter in his prior petitions. Accordingly, rather than repeat that narrative, he incorporates those facts by reference.

SUMMARY OF THE ARGUMENT

Mr. Sandusky is entitled to an evidentiary hearing on his additional claims that the PCRA court has presently declined to award a hearing on or, in the alternative, relief as a matter of law. This is because, taking as true the factual averments in his petitions and considering all of the documents that are part of the record, his claims are neither patently frivolous nor are they the types of claims that if the facts are proven could not, as a matter of law, entitle him to a new trial. Mr. Sandusky's petitions, affidavits, witness certifications, appendix, and other documents that are part of the record give rise to issues that require a hearing.

Rule 907 specifies that in deciding not to grant a hearing, the PCRA court must review the petition, any answer, and "other matters of record relating to the defendant's claim(s)." Pa.R.Crim.P. 907(1). Only after the court conducts this review and determines that no issues of fact exist and that the petitioner could not achieve relief, can a claim be dismissed without a hearing. ***See id.*** Indeed, the Comment to Rule 907 also provides that, "To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record." Only if, "after this review, the judge determines that the petition is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact," can a judge dismiss the claim without a hearing. Comment to Rule 907; **see also *Commonwealth v. Miller***, 102 A.3d 988, 992 (Pa. Super. 2014).

Similarly, Rule 909, which governs dismissal and hearing requirements in capital cases, provides, "the judge shall review the petition, the Commonwealth's answer, if any,

and other matters of record relating to the defendant's claim(s), and shall determine whether an evidentiary hearing is required." Pa.R.Crim.P. 909(B). Thus, it is apparent that a PCRA court must not just consider the petitioner's petition and an answer in determining if a hearing is warranted.

The PCRA court must consider Mr. Sandusky's factual averments as true and find that even assuming them to be true, that either no issue of fact exists or that he is not entitled to relief. When reviewed under this standard it is apparent that he is entitled to an evidentiary hearing on additional claims. Pointedly, with respect to a number of claims, Mr. Sandusky is entitled to relief as a matter of law.

ARGUMENT

The summary dismissal of a claim is only proper "in certain limited cases." ***See*** Comment to Pa.R.Crim.P. 907. Only where the "petition is patently frivolous and without support in the record," or "the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact" can a court dismiss a claim without a hearing. ***Id.***; ***Miller, supra*** at 992; ***see also Commonwealth v. Robinson***, __ A.3d __ (Pa. 2016) (filed 6/20/2016) (remanding for a hearing on a claim pertaining to an alibi). Mr. Sandusky is entitled to an evidentiary hearing on additional claims because his petition and the Commonwealth's answer, as well as additional documents of record, raise genuine issues of material fact. ***See*** Pa.R.Crim.P. 907(1); ***Cf.*** Pa.R.Crim.P. 909(B). Mr. Sandusky's claims are neither frivolous nor do they fail to have support either in the record or other evidence.

The majority of the claims leveled by Mr. Sandusky relate to the ineffective assistance of counsel. To sustain such a claim, a petitioner must demonstrate: (1) The underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Spotz***, 896 A.2d 1191, 1209-10 (Pa. 2006). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" ***Commonwealth v. Stewart***, 84 A.3d 701, 707 (Pa. Super. 2013) (*en banc*). "[*T*]*he 'reasonable probability' test is not a 'stringent one*[.]'" ***Id.*** at 715.

A claim has arguable merit when the facts upon which it is based, if true, could entitle the petitioner to relief. ***Stewart, supra***. Ordinarily, "where matters of strategy and

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

However, as the Pennsylvania Supreme Court noted in ***Colavita***, "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Colavita, supra*** at 887. The converse of the ***Colavita*** ruling is that a chosen strategy can be proven to have lacked a reasonable basis if a petitioner establishes that an alternative that trial counsel failed to pursue did, in fact, offer a potential for success substantially greater than the course that trial counsel pursued. ***Colavita, supra.***

Moreover, while the general rule is that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually," ***Commonwealth v. Washington***, 927 A.2d 586, 617 (Pa. 2007) (internal quotations and citations omitted), the Pennsylvania Supreme Court has recognized that "if multiple instances of deficient performance are found, the assessment of prejudice may be premised upon cumulation." ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). In such circumstances, the court considers "each specific lapse as pertaining to a single, overarching ineffectiveness claim based on trial counsel's failure to adequately investigate and prepare for trial." ***Id.*** Thus, so long as the petitioner's claims have arguable merit, the PCRA court must consider the issues together in determining actual prejudice. ***See id.***

Additionally, even if an underlying claim was previously litigated, it is proper to present any claims for ineffective assistance of counsel related to those claims. ***See***

Commonwealth v. Collins, 888 A.2d 564, 573 (Pa. 2005) (ineffectiveness claim is distinct from the underlying issue being raised). Finally, where the error violated a defendant's constitutional rights, the claim may merit relief even where the claim does not directly implicate the adjudication of guilt or innocence. ***See Commonwealth v. Hackett***, 956 A.2d 978 (Pa. 2008); ***Commonwealth v. Judge***, 916 A.2d 511 (Pa. 2007).

I. Whether Mr. Sandusky is entitled to an evidentiary hearing and a new trial based on after-discovered evidence in the nature of a recantation statement by Allan Myers, contradicting Mr. McQueary's testimony at trial.

In order to deny this claim without a hearing, the PCRA court must assume as true Mr. Sandusky's position that Allan Myers is Accuser #2, and that he has recanted any allegations of abuse and would have testified in contradiction to Mr. McQueary's testimony, but that there is no reasonable probability that the outcome of the trial would have been different. ***See Miller, supra*** at 992 (appropriate to dismiss without a hearing if despite the facts being proven the petitioner would still not be entitled to relief). Mr. Sandusky has provided police reports in his Appendix detailing Mr. Myers' claim to being Victim #2, as well as witness certifications from Mr. Myers and his attorney, Andrew Shubin, and investigator Ken Cummings.

Insofar as the Commonwealth has alleged that Mr. Myers is not Accuser #2, that raises a genuine issue of fact. The PCRA court cannot, without an evidentiary hearing, judge the credibility of Mr. Myers and whether or not he was being truthful when he maintained that he was the child seen by Michael McQueary. ***See Commonwealth v. Johnson***, 966 A.2d 523 (Pa. 2009); ***see Commonwealth v. D'Amato***, 856 A.2d 806 (Pa. 2004) (remanding for evidentiary hearing on after-discovered evidence claim for court to assess credibility of witness). Hence, it is evident that Mr. Sandusky is entitled to a

hearing on this particular claim. Indeed, where a proposed witness' testimony is different from that of a victim or another critical witness, an evidentiary hearing is warranted. ***See Commonwealth v. Khalifah***, 852 A.2d 1238 (Pa. Super. 2004). Instantly, Mr. Myers' proposed testimony is different from that of Mr. McQueary.

Here, Investigator Ken Cummings located and interviewed Mr. Myers. According to Mr. Cummings, Mr. Myers reaffirmed his original denial of being abused to Mr. Amendola's investigator, Curtis Everhart. This was in contrast to his later assertions to law enforcement. Thus, Mr. Myers' recantation is newly-discovered evidence since it occurred after trial and comes under the ambit of the merits based after-discovered evidence provision of the PCRA statute. 42 Pa.C.S. § 9543(a)(2)(vi). The recantation could not have been discovered before trial since it was not made prior to trial. ***See D'Amato, supra*** (Eakin, J., concurring).

The law on after-discovered evidence in Pennsylvania goes back until at least 1819. In ***Moore v. Philadelphia***, 5 Serg. & Rawle 41 (Pa. 1819), the High Court opined that to be entitled to a new trial based on after-discovered evidence a party must show: "1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to want of due diligence, that it did not come sooner; and 3d, that it would probably produce a different verdict, if a new trial were granted."

In ***Commonwealth v. Flanagan***, 7 Watts & Serg. 415 (Pa. 1844), the Supreme Court also reasoned that the after-discovered evidence, testimony in that case, must not be solely for the purpose of impeaching a witness that testified but must go to the merits of the case. More recently, the Superior Court has posited that a petitioner must demonstrate that the evidence "(1) could not have been obtained prior to the conclusion of the trial by

the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Commonwealth v. Padillas***, 997 A.2d 356, 363 (Pa. Super. 2010).

The critical issue for after-discovered evidence is not the availability or existence of the witness, but their testimony. In ***Commonwealth v. Bulted***, 279 A.2d 158 (Pa. 1971), the defendant was convicted of killing his wife. At trial, he alleged that he discovered his wife with Francisco Matos and fought with him. When he returned to his house, he alleged his wife pulled a gun on him and in the struggle she was shot. Matos, who was known, did not testify. He later provided a statement to police corroborating the earlier fight. The statement was considered after-discovered evidence.

In addition, in ***Commonwealth v. Cooney***, 282 A.2d 29 (Pa. 1971), the Supreme Court awarded a new trial based on after-discovered evidence despite the physical evidence technically being known and available. There, the defendant was convicted of first-degree murder. He claimed the victim shot him first and then shot herself during a struggle or in suicidal remorse. An X-ray of the defendant taken after trial confirmed that he had been shot in the head.

In ***Commonwealth v. Bonaccurso***, 625 A.2d 1197 (Pa. Super. 1993), the Superior Court addressed an after-discovered evidence claim. At trial, the defendant alleged he was misidentified. However, a witness who saw the crime, a shooting, but had denied seeing it, came forward after the trial. His description of what transpired could have supported a lesser finding than first-degree murder. Judge Beck, writing in a concurring decision, agreeing with the majority opinion, asserted that the "new witness' testimony. . .was

unavailable at the time of trial." ***Id.*** at 1202. Hence, where the testimony is unavailable it can be after-discovered evidence even where the identity of the person is known at the time of trial.

Here, the Commonwealth itself has argued that Mr. Myers was not available to testify. Thus, the recantation could not have been ascertained during trial by due diligence. Since Mr. Myers did not testify at trial, his recantation testimony is neither cumulative nor corroborative of other testimony. Moreover, the Commonwealth was simply wrong when it asserted in its Second Answer that the recantation evidence would only be used for impeachment purposes. Indeed, it cited the fact that Allan Myers did not testify as a reason that his recantation would only be used for impeachment purposes. This argument is untenable, and the opposite is true. If Allan Myers testified at trial consistent with his recantation, the evidence would be substantive evidence of Mr. Sandusky's innocence. Thus, it would not be used solely for impeachment purposes, and certainly not impeaching character evidence. Simply because evidence would serve as impeachment evidence does not mean that the evidence would only serve that purpose. Exculpatory testimony would not serve solely as impeachment evidence.

In ***Flanagan***, ***supra***, the Pennsylvania Supreme Court first articulated the impeachment aspect of the after-discovered evidence test in criminal cases. ***Flanagan*** relied on ***People ex rel. Oelricks v. Superior Court of City of New York***, 10 Wend. 285, 292 (1833). That decision provided:

> With respect to granting *new trials on the ground of newly discovered testimony,* there are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. **It must go to the merits of the case, and not to impeach the character of a**

> **former witness**. 5. It must not be cumulative. 4 *Johns. R.* 425. 5 *id.* 248. It cannot be denied in this case that the testimony offered was material to sustain the point of defence; and that it is not liable to the objection that it goes to impeach the plaintiff's witness. Russell says nothing about the character of the witness Heckscher, but contradicts the fact sworn to by him.

Id. at 292 (italics in original) (bold added).

While factual testimony that contradicts the testimony of a witness may be impeachment evidence, it is not evidence that impeaches the character of a witness nor is it always evidence that is used SOLELY to impeach a witness. Phrased differently, if the evidence contradicted factual testimony as to a material issue, it was not considered as being used solely for impeachment purposes. ***See id.*** (evidence must go to the merits of the case and not solely to impeach the character of a witness). This nuance has been applied in Pennsylvania in ***Commonwealth v. Mosteller***, 284 A.2d 786 (Pa. 1971), and ***Commonwealth v. Krick***, 67 A.2d 746 (Pa. Super. 1949). The alleged after-discovered evidence in those matters involved recantation from a victim. The testimony in those cases would have impeached the victim's earlier testimony, but also was material factual testimony that contradicted facts sworn by that person and was exculpatory in nature. Similarly, in this case, the evidence would not solely be used for impeachment purposes as it is material exculpatory evidence and would not be used to impeach Mr. Myers himself since he did not testify.

In sum, Mr. Myers recantation could not have been obtained prior to the conclusion of trial based on his civil attorney's secreting of him and his reluctance to state the truth of Mr. Sandusky's innocence regarding the alleged McQueary shower incident. The recantation by Mr. Myers also is not cumulative of any evidence since trial counsel declined to present any evidence of Mr. Myers other statements denying the allegations

made by Mr. McQueary. Further, while the evidence would collaterally impeach Mr. McQueary, that would not be its sole purpose as it is substantive evidence of Mr. Sandusky's innocence. ***See Mosteller, supra; Krick, supra.***

Testimony from an alleged victim that he was not a victim is reasonably likely to lead to a different outcome at trial. Pointedly, the Commonwealth would have been forced to argue at trial that Mr. Myers was not the victim. In this respect, the Commonwealth currently claims that Mr. Myers changes in his stories indicate he is unreliable. Mr. Myers, however, tracked the pattern of other accusers. Were the Commonwealth to apply this same test to the accusers who testified at trial then they also would all be considered unreliable since they too provided numerous inconsistent statements, even some doing so between their direct examination and cross-examination. Assuming the recantation evidence is accurate, there is a reasonable probability that Mr. Sandusky would have been acquitted of additional charges.

Since Mr. Sandusky has provided witness certifications from Mr. Myers, Mr. Cummings, Mr. Shubin, as well as police reports and other evidence relative to Mr. Myers being the person in the shower that was seen by Michael McQueary and that he denied being abused after the trial, this claim has both evidentiary support and raises genuine issues of material fact. Because the issue is neither frivolous nor is it the type of claim that fails as a matter of law, Mr. Sandusky is entitled to a hearing on this claim.

II. Whether Mr. Sandusky is entitled to an evidentiary hearing on his claim that trial counsel were ineffective in failing to use Mr. Myers prior statements that Mr. Sandusky did not molest him in the 2001 shower incident as both impeachment and substantive evidence.

Mr. Sandusky is entitled to an evidentiary hearing on this claim insofar as the Commonwealth has averred that Mr. Myers is not Victim #2. This presents a genuine issue

of material fact. Assuming that Mr. Myers was the person seen by Michael McQueary, which the PCRA court must do in order to deny the claim without a hearing, this claim is not one that Mr. Sandusky cannot show prejudice. Mr. Myers provided several statements in which he denied being abused by Mr. Sandusky. ***See*** PCRA Appendix, at 432-435, 436-437,

For example, on September 20, 2011, Corporal Joseph Leiter and Trooper James Ellis interviewed Mr. Myers and he stated that Mr. Sandusky never did anything to him that was inappropriate or made him feel uncomfortable. A copy of a Pennsylvania State Police Report pages 154-155, dated September 22, 2011 and signed by Corporal Joseph Leiter was attached to the May 6, 2015 Appendix, at 436. This report and the statement therein would have been admissible because the report is admissible under the business records hearsay exception, ***see Commonwealth v. Shaffer***, 763 A.2d 411 (Pa. Super. 2000), and Mr. Myers statement is admissible as a statement against his pecuniary interest. Similarly, Inspector Corricelli interviewed Allan Myers, on February 28, 2012, regarding his relationship with Mr. Sandusky. There was no mention of inappropriate contact with Mr. Sandusky. Mr. Myers was also interviewed by Curtis Everhart, an investigator for Mr. Sandusky. Therein, he denied being abused.

Accordingly, trial counsel should have introduced those statements by Mr. Myers that demonstrated that Mr. Sandusky did not commit any sexual offense against him. The alternative chosen, not impeaching Mr. McQueary with Mr. Myers, nor introducing substantive evidence of his innocence, lacked a reasonable basis. Testimony and evidence that Mr. Myers was not sexually abused in the shower would have led to a reasonable probability that the outcome of the trial would have been different, especially where a

significant portion of the Commonwealth's case rested on allegations regarding shower incidents.

Furthermore, the glue for introducing hearsay evidence by Ronald Petrosky and alleged Victim #8 was the allegation that Mr. Sandusky had engaged in sexual misbehavior in the same Penn State locker room shower on prior occasions. N.T., 6/13/12, at 216-217.[1] Without this evidence of abuse, there is a reasonable probability that the trial court would not have admitted into evidence the Petrosky hearsay testimony. N.T., 6/13/12, at 217. Hence, it is reasonably probable that the outcome of the trial would have been different.

The Commonwealth also has argued that there is no evidence that Mr. Myers was available or willing to testify. If this is accurate, then his recantation statement is classic after-discovered exculpatory evidence that entitles Mr. Sandusky to a hearing and a new trial. More importantly, assuming that Mr. Myers was unavailable to testify entitles Mr. Sandusky to relief as a matter of law. Mr. Myers statements in which he denied being abused by Mr. Sandusky are statements against his pecuniary interest and are admissible under Pa.R.E. 804(b)(3), where he retained Attorney Andrew Shubin to file a civil action against Penn State on his behalf. The relevant rule provided at that time,

> **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to

[1] More specifically, the Court inquired, "Can the jury in evaluating the guilt on these particular counts consider evidence that other crimes may have been committed in the shower room and, therefore, there is a pattern that would sustain a verdict of guilty on count involving Victim 8?" Attorney Fina responded, "I would believe it could, yes, Your Honor, on the theory of course of conduct evidence, yes." As set forth in Mr. Sandusky's Addendum to his PCRA Appendix, the Commonwealth failed to disclose that Mr. Petrosky had changed the physical location of where the incident allegedly occurred until the day of trial in question. ***See*** N.T., 6/13/12, at 199, 201. This failure on the part of the Commonwealth was itself a ***Brady*** violation as it was material impeachment evidence and counsel were ineffective in failing to raise this issue.

> render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Pa.R.E. 804(b)(3).[2]

Thus, counsel was ineffective for not presenting this material exculpatory and impeaching evidence. Since Mr. Myers was unavailable there is arguable merit to the claim because the Commonwealth would not have been able to introduce inconsistent statements by Mr. Myers in his absence since both the Pennsylvania rules of evidence, Pa.R.E. 613, and the respective federal and state confrontation clauses would have precluded it.

Similarly, counsel could have no reasonable basis for not using this material exculpatory evidence and impeachment evidence in light of the Commonwealth's reliance on Michael McQueary to describe the incident with alleged Victim #2, Allan Myers, where the Commonwealth could not, by law, introduce any inconsistent statements by Myers without running afoul of the confrontation clauses or giving Mr. Myers an opportunity to explain any inconsistency. Insofar as the Commonwealth asserts that had counsel introduced Mr. Myers statements to police in which he denied being abused, it would have been able to introduce his statements to the contrary on the same grounds—it is mistaken.

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[2] The current rule reads similarly:

> *Statement Against Interest.* A statement that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability;

Pa.R.E. 804(b)(3)(A).

Mr. Sandusky has confrontation clause rights under both the federal and state constitutions, the Commonwealth does not—statements to law enforcement are classic testimonial statements. ***See Crawford v. Washington***, 541 U.S. 36 (2004). Mr. Myers inculpatory statements could not have been introduced as substantive evidence against Mr. Sandusky because they run afoul of the confrontation clauses. Further, the introduction of Mr. Myers non-exculpatory statements could not be used to rehabilitate Mr. McQueary because they are not prior consistent statements made by Mr. McQueary and Mr. Myers would not have been given an opportunity to explain the statement. ***See*** Pa.R.E. 613. Thus, while Mr. Myer's statements that he was the McQueary shower child and that Mr. Sandusky did not molest him would have been admissible as substantive evidence of innocence as well as to impeach Mr. McQueary, the Commonwealth is incorrect as a matter of law that it could have introduced any contrary statements by Mr. Myers.

Finally, Mr. Sandusky suffered actual prejudice because had there been evidence that there was no Victim #2 in the Penn State shower it would have called into question Mr. McQueary's trial testimony, which was inconsistent with his own prior statements that he made regarding hearing slapping sounds and seeing an arm before seeing Mr. Sandusky and a boy in the shower. Further, evidence from the alleged victim that he was not abused and had in fact lived as an adult with the Sanduskys, asked Mr. Sandusky to stand in as his father on senior night, requested the Sanduskys attend his wedding, and traveled ten hours to attend a funeral in support of Mr. Sandusky would lead to a reasonable probability that one juror would have concluded that Mr. Sandusky was not guilty of the pertinent crimes charged, resulting in a different outcome.

III. Whether Mr. Sandusky is entitled to an evidentiary hearing to show that trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law.

As early as 1642, Lord Edward Coke, in his then influential Institutes, posited that "due process of law" is synonymous with the phrase, "law of the land." Thus, both the federal and Pennsylvania Constitution protect due process of law. ***See also Norman v. Heist***, 5 Watts & Serg. 171 (Pa. 1843). Procedural due process requires the government to follow legal procedures that have been adopted by statute or by rule-making.

Instantly, statutory law, specifically the Child Protective Services Law, was intended to govern the initial investigation into the allegations against Mr. Sandusky. The failure to abide by those procedures is a classic example of violating procedural due process insofar as the government was supposed to follow a certain statutorily mandated procedure, but failed to do so. By not following the law, Mr. Sandusky's rights were seriously infringed insofar as the grand jury investigation resulted in serial leaks, improper police investigative tactics, and the issuance of a presentment by a grand jury without jurisdiction.

Here, Aaron Fisher's initial disclosure did not involve claims of sexual abuse. Mr. Fisher's allegations should have been forwarded to the regional DPW office because the Second Mile was an agent of the Clinton County CYS and a conflict existed with CYS. Despite being the improper agency to investigate, on November 20, 2008, Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky. Again, without statutory authority, Jessica Dershem, a Clinton County caseworker interviewed Aaron Fisher for one hour. That interview was taped. Aaron Fisher did not disclose that sexual intercourse of

any type occurred. Rather, Aaron Fisher posited that Mr. Sandusky cracked his back approximately thirty times.

Apparently frustrated by Aaron Fisher's statements, Ms. Dershem told her supervisor, Mr. Rosamilia, that Aaron Fisher was uncooperative. As a result, they referred Aaron Fisher to psychologist Michael Gillum. Ms. Dershem informed Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing. In doing so she misstated that Aaron Fisher alleged Mr. Sandusky sexually abused or exploited him.

Police then interviewed Aaron Fisher in the presence of Ms. Dershem. It is known that Aaron Fisher denied that Mr. Sandusky touched Aaron Fisher's genitalia and, Ms. Dershem, as detailed in *Silent No More*, reported to Mr. Gillum that Aaron Fisher denied that oral sex occurred. As of December 12, 2008, Aaron Fisher had not made any criminal allegations against Mr. Sandusky to law enforcement. Critically important, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire.

Mr. Sandusky himself was questioned in January of 2009 by Clinton County CYS. This too, however, was in actual violation of the law since Clinton County CYS was not the proper investigating body. Ms. Dershem informed Mr. Sandusky on January 2, 2009, that he was the subject of a report of suspected child abuse. Ms. Dershem and Clinton County CYS solicitor, Michael Angelelli, interviewed Mr. Sandusky. He acknowledged cracking Aaron Fisher's back, as well as hugging him and kissing him on the forehead, but strenuously denied that anything sexual had ever occurred. Ms. Dershem notified Childline. She also apparently misstated to police the next day that Mr. Sandusky had refused to answer questions when informing them of the interview.

When police consulted with the Clinton County District Attorney, it was decided that the matter should be transferred to Centre County where the alleged conduct had happened. Under the CPSL, the district attorney was supposed to transfer the case to the regional DPW office for Centre County because the Centre County CYS office had a conflict. Instead of referring the case to the appropriate investigative agency, the Clinton County District Attorney transferred the case to the Centre County District Attorney. However, the Center County District Attorney had a conflict of interest and referred the case to the Office of Attorney General ("OAG"). Thus, despite the OAG not being the proper investigating authority under established statutory law, the matter arrived before the OAG in March of 2009.

The OAG assumed jurisdiction over the investigation on March 18, 2009. Instead of proceeding under the ordinary process of filing a criminal information, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009. In doing so, however, the OAG submitted the case on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. Of course, Clinton County CYS was not the proper investigating authority due to a conflict, and a founded report would only exist if there had been a judicial determination that Aaron Fisher suffered serious bodily injury, or sexual abuse or exploitation. ***See*** 23 Pa.C.S. § 6303 ("founded report." A child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that child who is subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.").

Here, the proper mode of investigating fell under the ambit of the CPSL. Pursuant to the CPSL.:

- A school administrator, and law enforcement, are required reporters. 23 Pa.C.S. § 6311.
- An oral report is to be made to the Department of Public Welfare and can be made to a county CYS agency. 23 Pa.C.S. § 6313.
- Under 23 Pa.C.S. § 6334, the DPW is to transmit notice of the complaint to the appropriate county agency.
- Where the county agency, in this case, Clinton County CYS, has a conflict, the matter is to be investigated by the regional DPW office, not an investigating grand jury. 55 Pa. Code § 3490.81.

These proceedings are highly secretive; thus, any suggestion by the Commonwealth that grand jury proceedings were warranted to keep the matter secret are without merit. While law enforcement is to work with the investigative agency, this is to be done as part of the investigative team required by the CPSL. This did not occur. ***See*** Moulton Report. As a result, law enforcement officials unfamiliar with appropriate questioning techniques investigated the matter, at times encouraging and almost spoon feeding alleged victims to make ever wilder accusations against Mr. Sandusky. ***See*** N.T., 6/19/12 at 57-58.

Counsel could not have any reasonable basis for not seeking to quash the presentment, where the Commonwealth failed to abide by the CPSL. Frankly, the Commonwealth cannot dispute that the CPSL was violated. Moreover, the very fact that the 1998 investigation had not been expunged was itself a violation of the CPSL and prejudiced Mr. Sandusky. Further, it is apparent that Mr. Sandusky suffered actual

prejudice as the outcome of his trial would have been different had the Commonwealth followed the CPSL and not initiated a grand jury investigation. This is evident from the fact that the Commonwealth refused to seek a presentment and charge Mr. Sandusky based solely on Aaron Fisher's allegations. Only after the release of information from the grand jury investigation and the unlawful use of the 1998 investigation did additional accusers come forward. Hence, rather than face one accuser, Mr. Sandusky faced eight.

IV. Trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance was warranted.

The failure to investigate and adequately prepare pre-trial is a claim of arguable merit. ***See Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994); ***Commonwealth v. Brooks***, 839 A.2d 245, 248 (Pa. 2003) ("counsel's failure to prepare for trial is 'simply an abdication of the minimum performance required of defense counsel.'"). In this case, despite the overwhelming amount of negative pre-trial publicity, counsel elected to try the case in Centre County, the center of the storm.

This strategic choice could not have been made effectively in a high profile case such as this without adequately researching the issue of whether a jury could be selected that was not tainted by the flood of negative media attention. Anecdotal evidence that Mr. Sandusky was a beloved figure in State College overlooks that Centre County extends beyond State College and that Mr. Sandusky was being blamed for the death of Joe Paterno, an even more beloved figure, and the downfall of both Penn State football, and staining the reputation of the larger Penn State University community.

Moreover, trial counsel recognized the importance of a jury consultant by retaining Beth Bochnak to assist in actual jury selection in Centre County. Ms. Bochnak, however,

was involved in a murder trial in Puerto Rico and was unavailable to participate in jury selection in this matter. The trial court denied counsel's continuance request to allow Ms. Bochnak to participate.

Counsel, nevertheless, did not retain the services of a consultant to conduct research or provide a report as to the ability to select an unbiased jury in Centre County that would have aided in determining whether a jury could be selected in Centre County that did not have significant knowledge of highly prejudicial information. While counsel is not ineffective for declining to call an expert witness where he can adequately cross-examine a Commonwealth expert, ***Commonwealth v. Marinelli***, 810 A.2d 1257, 1269 (Pa. 2002), this issue does not relate to calling an expert to testify. Instead, the issue centers on retaining an expert to assist and prepare a report regarding jury bias in a case with extensive prejudicial pre-trial publicity. Thus, trial counsel could not rely on questioning another expert. Additionally, counsel did not undertake any research or investigation into jury bias in high profile cases. Had counsel done so, they would have discovered the compelling research set forth below, which would have resulted in them agreeing to move venue/venire.

Here, a survey of Centre County residents almost certainly would have revealed that, regardless of any proclamations to the contrary, it was impossible to achieve a fair trial in Centre County at that time. The trial court itself began individual *voir dire* of every juror by conceding that EACH juror had heard or read about the case in the media. The information that those jurors would have read or heard involved extraordinarily prejudicial information and involved reports that judged Mr. Sandusky guilty before his trial even began.

Based on similar research done in Dauphin County relative to Tim Curley, Gary Schultz, and Graham Spanier, it is apparent that a Centre County jury could not have dispassionately considered the evidence without a cooling period no matter what type of questioning was engaged in by a court to ameliorate the prejudice. In the alternative, trial counsel would not have objected to the Commonwealth's change of venue request, thereby resulting in the outcome of jury selection being different and thus a reasonable probability that the outcome of the trial would been altered as it would only take one juror to result in a mistrial.

The expert report in the cases involving Tim Curley and Gary Schultz provides a glimpse of what information trial counsel could have learned had they retained such an expert or conducted their own research on the available books and papers on the subject of jury bias. For example, the consultant therein conducted an extensive phone survey of 710 individuals: 410 in Dauphin County, and 100 each in Erie, Chester, and Luzerne Counties. Large majorities in each county believed that Tim Curley, Gary Schultz, and Graham Spanier were definitely or probably guilty of allegedly covering up Mr. Sandusky's actions. Significant majorities, in excess of seventy percent in each of Dauphin, Luzerne, and Chester Counties, had been exposed to television reports. A large percentage were also familiar with newspaper reports and via word of mouth discussions.

The report, citing Neil Vidmar and Valeria P. Hans, *American Juries, The Verdict*, at 113 (2007), asserted,

> A phenomenon known as generic prejudice may also come into play in high-profile cases. Public attention to the issues of child abuse, including child pornography, sexual violations, and physical harm, gained widespread attention in the 1980s that continues to this day. At a 1990 symposium, Judge Abner Mikva coined the term generic prejudice and explained: 'I do not think that you can get a fair child abuse trial before a jury anywhere in

> the country...when they hear that a child has been abused, a piece of their mind closes up.'

See Report of Arthur H. Patterson, PH.D., In Support of Gary Schultz and Timothy Curley Motion to Request Supplemental *Voir Dire* Measures, at 16. Citing an additional source, the report noted,

> In the entire social scientific literature on jury decision-making, spanning many decades, the effect of pretrial publicity (PTP) on a defendant's right to a fair trial is one of the most thoroughly studied subjects. As a result of this extensive research literature, **there is a strong consensus of opinion among leading researchers in the field that such publicity seriously undermines the ability of a defendant to receive a fair trial and is poorly remedied by mitigation measures typically employed by our courts.**
>
> For example, one recent reference work, summarizing decades of research into the effects of and remedies for pretrial publicity concluded, 'In sum, it appears that **the effects of PTP can find their way into the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and can persevere not only through deliberation, but may also actually intensify.**"

Id. at 17 (citing Studebaker & Penrod, *Pretrial Publicity and its Influence on Juror Decision Making*, Psychology and Law, at 265-266 (Brewer & Williams, 2005 ed.)) (emphases added).

Additionally, the report quoted from yet another respected source, stating,

> The belief that voir dire is an effective remedy for the effects of pretrial publicity assumes that prospective jurors are capable of assessing their own biases and that they are willing to admit to such biases during the jury selection process. It also requires that judges and attorneys be able to identify those who should appropriately be challenged for cause. Research suggests that none of these is a safe assumption.

Id. at 17-18 (quoting Posey and Wrightman, *Trial Consulting*, at 58 (2005)). According to the report,

> the conclusion of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.
>
> Instructions from the Court are unlikely to alleviate the problem. **Admonitions from the bench to 'set aside one's biases' have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity**.

Id. at 18 (emphasis added).

That report concluded to a reasonable degree of scientific certainty that, "**The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury**." ***Id.*** at 19-20. This applies with equal if not more force to the actual trial of Mr. Sandusky, who was at the center of the negative media. Counsel had no reasonable basis for not investigating jury bias in light of the extensive negative pre-trial publicity. Had counsel conducted research into the matter themselves, they would have agreed to a change of venue and/or had convincing empirical evidence to continue the trial, thereby leading to a reasonable probability that the outcome of jury selection and trial would have been different.

V. Trial counsel was ineffective for not requesting a change of venue or venire or seeking a cooling off period prior to the start of trial.

The Commonwealth itself argued in support of a change of venue. Specifically, Mr. McGettigan stated, "that the attention and publicity that has accompanied this case is unique in the—certainly in this county's history and perhaps in the Commonwealth's as

well." N.T., 2/20/12, at 4. It added, "There are two things that tend to reduce the impact of publicity on a case and they are time and distance or locale." ***Id.***

Mr. McGettigan continued,

> The publicity that has been attended to this has been completely pervasive. As I read through—I read through, just as I was listening here, to the defendant's own brief and he talked about a cooling-off period. But he cited a case, Commonwealth versus Roberts, that talks about another element that should be considered is the nature, size, population of the county, the nature of the publicity of the defendant's notoriety all those things.
>
> Your Honor, the Commonwealth would not and does not claim that the Commonwealth would be completely incapable of receiving a fair trial here. That's not really the case. It's just whether the trial will be fair in and of itself because of the penetration of information and the interconnection between the jury pool and all the institutions that are an intrinsic element of this case.

Id. at 8-9. Mr. McGettigan candidly acknowledged, "The publicity has been extraordinary conclusory nature, extraordinary[il]y so." ***Id.*** at 11. While the trial court did inquire with Mr. McGettigan why *voir dire* would not be an adequate remedy, as shown above from extensive social science research, which was available without the need for an expert, *voir dire* is a poor method of ensuring a fair jury pool in a high profile sexual abuse case. Mr. Amendola, nonetheless, had done no research into the matter and was unprepared to make such an argument.

Mr. McGettigan also noted that, "I suspect the potential for bias may be greater against the defendant." ***Id.*** at 14. He also posited,

> I am just saying you can see the pervasive nature of the impact of these charges and [the] defendant's crimes on the community at large and the fact that they bring to the—their potential jury service a wealth of information about the crime, about the defendant, about all the parties that make it difficult for them to put aside, I would submit, what may be certainly unconscious biases or inclinations, notwithstanding an effort of great integrity and personal effort to be completely unfair and impartial.

Id. at 17.

Inexplicably, Mr. Amendola, without conducting any research into selecting a jury in this matter in Centre County, argued against the Commonwealth's motion for a change of venue. The trial court then conducted a colloquy of Mr. Sandusky. Mr. Sandusky acknowledged talking with Mr. Amendola about keeping jury selection in Centre County "possibly twice." ***Id.*** at 29. He then asserted, "I trust HIS decision." ***Id.*** (emphasis added). The trial court then informed Mr. Sandusky that he would not be able to argue, relative to this issue, "on a post-conviction proceeding that Mr. Amendola was ineffective because he gave you bad counsel[.]" ***Id.*** at 31-32.

There is, of course, no support for the position that a defendant waives PCRA review of an ineffectiveness claim regarding the advice of counsel pertaining to venue and jury selection by undergoing a colloquy. Although generally a defendant cannot make assertions in contrast to a guilty plea colloquy to attain PCRA relief, the fact that a colloquy was given does not *per se* preclude an evidentiary hearing or relief. In ***Commonwealth v. Nieves***, 746 A.2d 1102 (Pa. 2000), despite the court conducting a colloquy on the issue of the defendant waiving his right to testify, evidence that trial counsel provided bad advice was sufficient to warrant a new trial.

Concomitantly, in a string of post-conviction cases, the Pennsylvania Superior Court directed lower courts to conduct evidentiary hearings on whether counsel's advice caused an invalid guilty plea despite the defendant's admissions in their guilty pleas that the plea was not induced by any promises made by counsel. ***Commonwealth v. Henderson***, 444 A.2d 720 (Pa. Super. 1982); ***Commonwealth v. Farnwalt***, 429 A.2d 664 (Pa. Super. 1981); ***Commonwealth v. McCall***, 406 A.2d 1077 (Pa. Super. 1979);

Commonwealth v. Strader, 396 A.2d 697 (Pa. Super. 1978). Thus, it is evident that counsel's advice may vitiate a colloquy. Instantly, Mr. Sandusky unequivocally indicated that the decision was counsel's and he trusted that decision. However, counsel undertook no investigation or research into determining the ability to select a fair jury in Centre County.

Trial counsels' decision that Mr. Sandusky would benefit from the local Centre County jury pool due to Mr. Sandusky's long time connection to the community was made in spite of the fact that he had retained a jury consultant who was forced to decline the case due to prior federal court commitments. Given the nature of this case, including the ancillary consequences of the charges resulting in Coach Paterno's termination from Penn State University and the stained reputation of that institution, it was not reasonable for a seasoned defense attorney to believe that the Centre County jury could fairly and dispassionately sit in judgment of Jerry Sandusky.

Indeed, as discussed extensively above and incorporated herein, no amount of admonitions from the court could have prevented the prejudicial impact of the pre-trial publicity. The trial court acknowledged the extensive media circus surrounding the trial in its *voir dire* questioning and placed on the record that there were "250-some reporters here and stories are going to be stories." N.T., 6/6/12, at 8. It opined, "With all this press, with all this media, with 240 some reporters that are credentialed and 30-some trucks, why are we not going to sequester you?" N.T., 6/5/12, at 8. Thus, there were 240 to 250 reporters and approximately thirty television trucks at the actual trial. This highlights the pervasive media attention surrounding the case. In fact, two reporters were actually permitted to be present during the individual *voir dire* proceedings. ***See*** N.T., 6/5/12, at 22 ("There are

two pool reporters and a member of the public seated here."); ***Id.*** at 121 ("We have members of the press and public here[.]"). While the court did inform jurors that if they were uncomfortable revealing any information in front of the media that he would ask the media to leave, it is hard to measure how jurors would react to traditional questions of whether they could be fair when media members were listening to the *voir dire*. Indeed, who would say no to that question in the presence of the media?

The court inquired with **every** prospective juror by using a question that in one form or another conceded extensive knowledge of prejudicial information. For example, "Do you know anything about the case **other than what you have read in the newspapers or heard or seen on television or radio TV news**[.]" N.T., 6/5/12, at 23. Similarly, "There's been a lot of information about this case in the newspapers, television, radio, Internet. Do you know anything about the case other than what has been in general circulation." ***Id.*** at 41.[3] The problem is that counsel failed to follow up with additional

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3 ***See also*** N.T., 6/5/12, at 51 ("There's obviously been a lot about this case on the television, radio, Internet. Have you been following it?"); ***Id.*** at 79 ("There has been, obviously, a lot of information out about this case, newspapers, television, radio, Internet, so forth. Do you know anything about the case **beyond what would be in the general news circulation?**") (emphasis added); ***Id.*** at 91 ("Newspapers, radio, television, Internet, **Other than what's generally in the general realm of knowledge, do you have any special knowledge about this case?**") (emphasis added); ***Id.*** at 108 ("There's been an awful lot of this in the newspapers, radio, television, Internet as you know?); ***Id.*** at 121-122 ("There's obviously been a lot written and spoken and talked about this case...Do you know anything about the case **other than what's been in the general universe of the media**?"); ***Id.*** at 132-133("I think I have already discussed the fact that I know that Penn State has a pervasive atmosphere, influence in the community. The defense knew that when they opposed the motion for change of venire."); ***Id.*** at 143 ("Of course, you know, we all know there's been a lot on the radio, television, newspapers, Internet about this. **Beyond what has been in that general discussion, do you know anything about the case or know any of the people involved.**");

Id. at 148 ("other than what you've read in the papers, heard on the radio, television, maybe looked at on the Internet? Do you have any information beyond what is in the

questions, which will be discussed in the next claim, since what was in general circulation included highly prejudicial and damaging evidence ranging from the grand jury presentments, some of which were leaked and inaccurately summarized the evidence that was presented to the grand jury, to negative articles from ESPN, the New York Times, Washington Post, USA Today, as well as news stories blaming Mr. Sandusky for the death of Joe Paterno and ruining the reputation of Penn State University. Indeed, in response to a juror stating he attempted to avoid news stories about the Sandusky case, the court responded, "You must be one of the only people in Centre County." ***Id.*** at 135.

The prosecution in its own opening set forth, "And, you know, up until now, these young men have been known as, in public—some of you read the papers. We all read the paper—Victim No. 1, Victim No. 2, Victim No. 3[.]" N.T., 6/11/12, at 8. While public

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general public?); ***Id.*** at 161-62 (There's been a lot written about this case in newspapers, radios, television, Internet, blogs. Do you know anything about the case beyond that sort of common information?); ***Id.*** at 169 ("There's been, you know, an awful lot written about this and some television, radio, Internet. Do you know anything about the case beyond what has just in that arena?"); ***Id.*** at 180 (There's obviously, been a lot in the newspapers, on television, radio, Internet about this. Beyond the general information that everybody knows about or is there anything unusual particularly you know about the case, any unusual knowledge?").

Id. at 188-189 ("There's been obviously a lot written about the case, television, radio, Internet. Beyond what generally people would know from that, do you know anything else about the case?"); ***Id.*** at 197 ("There has been obviously a lot written about this case. There's been on the radio, television, Internet. Beyond the general information that everybody knows, do you have any other particular unique information about this case?); ***Id.*** at 206 ("There's been an awful lot written in the newspapers, radio, television, Internet, and I suppose you are generally familiar with all of that?); ***Id.*** at 222 ("There's been a lot about this case on radio, television, newspapers, Internet. Beyond what is in the general atmosphere of information, do you know anything about this case?"); ***Id.*** at 233 ("There's been an awful lot written about this case on television, radio, newspaper, radio. Beyond what's generally been circulated, do you have any particular information about this case?"); ***Id.*** at 235; ***Id.*** at 248; ***Id.*** at 265; ***Id.*** at 280; ***Id.*** at 291; ***Id.*** at 301; ***Id.*** at 306; ***Id.*** at 309-311; ***Id.*** at 314.

access to trials is important, the Supreme Court of the United States has cautioned that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." ***Bridges v. California***, 314 U.S. 252, 271 (1941). The High Court has also stated that an accused may not be punished without "a charge fairly made and fairly tried **in a public tribunal free of prejudice, passion, excitement, and tyrannical power**." ***Chambers v. Florida***, 309 U.S. 227, 236-37, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940) (emphasis added). The Court also noted:

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

Estes v. Texas, 381 U.S. 532, 542-43 (1965). Under this rubric, the Supreme Court held in ***Sheppard v. Maxwell***, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), that where a trial is held in a circus-like atmosphere of media attention, where a jury is not sequestered, and no change of venue or venire is granted, when viewed in the totality of the trial court's other rulings, the defendant's due process right to a fair trial was indisputably violated. As in ***Sheppard***, the media coverage was pervasive and virulent, making Jerry Sandusky's name synonymous with child molester. It is impossible to imagine a Pennsylvania case involving more negative and prejudicial media coverage. The ***Sheppard*** Court concluded its decision by noting that even in 1966, media scrutiny of trials was increasing, and trial courts must take proactive efforts to protect an accused's right to fair trial, stating

> **where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity**. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

Id. at 362-63 (emphasis added).

The media has significantly evolved and become more ever present today than in 1966. The Pennsylvania Supreme Court adopted ***Sheppard***, holding that certain circumstances warrant a finding that a trial was inherently lacking in due process. ***Commonwealth v. Pierce***, 303 A.2d 210, 212 (Pa. 1973). ***See also Commonwealth v. Long***, 871 A.2d 1262, 1274 (Pa. Super. 2005) ("The Supreme Court's concerns in *Sheppard* hold true today."), *reversed on other grounds,* 922 A.2d 892 (Pa. 2007).

The Pennsylvania Supreme Court has further noted that in certain circumstances, before a defendant can receive a fair trial, a "cooling off" period may be necessary. ***Commonwealth v. Robinson***, 864 A.2d 460, 484 (Pa. 2004); ***see also Commonwealth v. Briggs***, 12 A.3d 291 (Pa. 2011). In ***Robinson***, the court was faced with the question of whether a cooling off period is necessary where pretrial publicity potentially tainted a jury pool warranting a defense request for a change of venue or venire. In this case, given the statewide interest resulting from the impact and consequences the allegations against Mr. Sandusky had against Penn State University as a whole, its highly popular football program, and one of the all-time icons in collegiate sports, Mr. Sandusky submits that absent a change of venue or venire prejudice was inevitable.

To the extent that the trial court could conclude that pre-trial publicity was equally excessive across Pennsylvania because of the enormous amount of media scrutiny, under ***Sheppard***, trial counsel should have requested that the trial court continue the trial to allow the general animus against Mr. Sandusky and Penn State University to dissipate, and trial counsel was ineffective for failing to make a record of this reasoning to the trial court. This

is all the more true where trial counsel actually filed a motion opposing the change of venue and therein noted the possibility of seeking a cooling-period.

In a case where counsel sought a continuance due to excessive discovery, and the case was only seven months old when it went to trial, there can be no reasonable basis for not, at the very least, seeking a cooling period. In order for the PCRA court to determine that no hearing is warranted it must find no actual prejudice. That is, it must conclude that no matter what argument was made by trial counsel, it would not have awarded a cooling period or changed venue. However, the trial court's own order in this case belies that it would not have changed venue had counsel agreed. In that order the trial court set forth, "the prosecution's request for a change of venue should be much more strictly scrutinized than one by the accused[.]" Trial Court Order, 2/13/12 at 4 (quoting ***Commonwealth v. Reilly***, 188 A. 574, 580 (Pa. 1936)). The court added, "The same standard-establishing the most imperative grounds-has also been applied to a Commonwealth request, as here, for a change of venire." ***Id.*** The court concluded, "I am not persuaded the Commonwealth has established the factual predicate to reach a conclusion that the 'most imperative grounds' support granting its motion, **especially since the Defendant objects.**" ***Id.*** (emphasis added). Hence, it is beyond cavil that one of the critical factors in determining the change of venue motion by the Commonwealth was trial counsel's decision to oppose it.

In Mr. Sandusky's case, it is apparent that given the highly prejudicial pretrial atmosphere, and the attendant circumstances involving Penn State University, the firing and subsequent death of Joe Paterno, the intense scrutiny of the local, national and international media in the case, and the improper leaking of information, including the grand jury presentment itself, Mr. Sandusky's due process right to a fair trial was infringed

based on trial counsel's ineffectiveness. Indeed, in clear violation of the order sealing the presentment, the charges against Mr. Sandusky were posted on a website of the Pennsylvania Unified Judicial System, "apparently by mistake." ***See*** May 6, 2015 Amended Petition, Appendix, at 26. Apparently the only person to discover the mistaken posting of the charges against Mr. Sandusky, prior to the official public release, was Sara Ganim – the reporter who also mysteriously received the leaked confidential grand jury material in March 2011. ***See*** Appendix, at 22, 88. Additionally, in an apparent effort designed to poison the well with misinformation, the initial grand jury presentment, drafted by the prosecution, contained factually false information. To-wit, the initial presentment stated:

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

See Grand Jury Presentment No. 12 at 6. This misrepresentation appeared to be a deliberate act designed to, and having the effect of, further poisoning the atmosphere against Sandusky by sensationalizing, inflating and improperly bolstering what Mr. McQueary actually saw into scandalous and outrageous conduct unsupported by Mr. McQueary's actual testimony.[4]

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[4] The release of the presentment and the inclusion of false information in that presentment was itself prosecutorial misconduct. Trial counsel were or should have been aware that the presentment was unlawfully leaked by being placed online and that Sara Ganim discovered the mistaken posting. Additionally, counsel should have known or did know that the presentment contained factually inaccurate information to the extent that it provided that Mr. McQueary actually observed a victim being subjected to anal intercourse. Mr. McQueary, who had not actually testified before the grand jury that issued the presentment, his prior testimony having been read, did not testify in that manner. Thus, the

Mr. Sandusky was prejudiced by the pervasive media attention in Centre County, and by the fact that the community's overriding sentiment to see Mr. Sandusky convicted based on questionable allegations, and the downfall of Joe Paterno, had not abated. Trial counsel had no reasonable basis for failing to include this relevant information of the pervasive media attention and the hostile atmosphere in Centre County in their motion for continuance. Similarly, trial counsel failed to undertake an investigation or to determine if the passions against Mr. Sandusky had dissipated in Centre County or anywhere else. Had the trial court been presented with this overwhelming community sense of anger at Mr. Sandusky, the trial court would have granted the Commonwealth's motion for a change of venire. Moreover, Mr. Sandusky maintains that had this information been properly presented to the trial court before the trial, the court would have had no choice but to continue the trial to avoid undue prejudice to Mr. Sandusky.

The end result of Mr. Sandusky being tried in an environment already polluted with inappropriate leaks from the grand jury and false information in the grand jury presentment,

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Commonwealth was well aware that the presentment was inaccurate when it was submitted for approval.

The unlawful release of the presentment, with factually incorrect information, created a media firestorm surrounding Mr. Sandusky, resulting in highly prejudicial and inaccurate information being dispersed. Further, that Ms. Ganim was immediately aware of the information being placed online, suggests that one of her sources for prior stories related to the allegations, notified her of the pending presentment being released and therefore was a person within the OAG. Trial counsel could have no reasonable basis for not moving, at least, to quash the charges based on the allegations of S.P. and R.R., which only came after the initial grand jury presentment had been improperly released by the prosecution. This is because the premature release of such incorrect information constitutes prosecutorial misconduct and created the narrative that Mr. Sandusky raped a child in a public shower. The McQueary episode was used by other accusers to make additional allegations not previously made. Had the presentment not been improperly made available, it is possible that the OAG could have corrected the mistaken averments related to what Mr. McQueary did and did not observe.

resulted in a trial that failed to comport with the ideals of modern American jurisprudence. Under ***Sheppard***, the trial court would have had an absolute duty to continue this case to allow the passions of the community to ameliorate prior to letting that same community sit in judgment of Jerry Sandusky had counsel properly addressed the issue.

The Commonwealth itself has cited a case that recognized 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[.]" Commonwealth's Response, at 10 (quoting ***Commonwealth v. Drumheller***, 808 A.2d 902-902 (Pa. 2002)). While the ***Drumheller*** Court added that such a case "would be a most unusual case[,]" no other case in Pennsylvania history can be said to have garnered the type of local, statewide, and national negative media attention. If ever an exceptional case existed, it is this matter. Frankly, if this case is not the type of case that a change of venue should have been awarded, no such case exists.

While the Commonwealth also maintained that Mr. Sandusky did not identify any juror selected whose partiality could be questioned, as the attached expert report delineates and Mr. Sandusky's prior arguments show, the fairness of all the jurors selected can be questioned since they all knew of the negative pre-trial publicity and empirical science and research conclusively demonstrates that no manner of questioning by a court can secure an unbiased jury in a case like Mr. Sandusky's absent an adequate change of venue or cooling period.

Thus, the Commonwealth's reliance on the trial court's jury instruction misses the mark. As has been demonstrated, learned commentators have concluded that in a high profile sex abuse case such as Mr. Sandusky's, jury instructions have a perverse effect.

Moreover, the argument advanced by the Commonwealth ignores that Mr. Sandusky's positions relative to jury selection relate to the very jurors that would have been selected had a change of venue, venire, or cooling period occurred. Had one different juror from another county been selected that believed Mr. Sandusky was not guilty, then there is a reasonable probability that the proceeding would have been different. Further, under the context of these jury selection claims, Mr. Sandusky avers that the outcome of the proceeding is not the trial itself, but the decision of whether to hold the trial in Centre County. ***See Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015) (waiver of right to testify does not require a showing that the outcome of the trial would probably have been different); ***Commonwealth v. Mallory***, 941 A.2d 686 (Pa. 2008) (waiver of jury trial right claim only requires showing that person would not have waived right, not that outcome of trial would have likely been different).

In addition, a Penn State student who stated he had opinions about the case and as a student, "hear[d] everything" was accepted on the jury. Similarly, a retired bus driver explained that she had strong feelings about protecting kids and did not want to see children hurt and only indicated that she "probably could be fair." This juror also was seated. This refutes the Commonwealth's claim that there were not biased jurors.

Mr. Sandusky went to trial at the height of the public anger and community hostility against him, with the Penn State faithful blaming him for the downfall of Joe Paterno and Penn State University's football program. Due to trial counsel's ineffectiveness he was deprived of his right to a fair trial. Since trial counsel failed to support his arguments for continuance with the clear evidence of the community's continued thirst for Jerry Sandusky to be convicted irrespective of the evidence actually introduced against him, and opposed

the motion for a change of venue/venire without any research or investigation, he was ineffective.

VI. Trial counsel were ineffective during *voir dire* in neglecting to question the jurors specifically about the information they had learned from the media where one of the trial court's opening question to each juror conceded that due to the extensive media coverage the juror had knowledge of highly prejudicial information.

Despite counsel electing to keep the case in Centre County, counsel did not *voir dire* the jurors on precisely what information they knew based on the media coverage. Since the "general information" included grand jury presentments, one of which erroneously indicated that Michael McQueary saw anal intercourse, counsel was derelict in neglecting to question the potential jurors further regarding the facts that they knew about the case. For example, counsel should have asked each juror if they had read the grand jury presentments. Concomitantly, counsel also should have probed into whether the jurors had read stories placing blame for the firing and death of Joe Paterno on Mr. Sandusky.

Because counsel elected to try the case in Centre County, and the court's *voir dire* questioning presumed extensive knowledge of the case, trial counsel had no reasonable basis in declining to ask the jurors about the general information that they acknowledged that they had heard and learned from the media. Trial counsel's failure to properly question the proposed jurors about the information that saturated Centre County resulted in the selection of jurors that, despite any statements to the contrary, could not fairly consider the evidence. ***See*** Studebaker & Penrod, *Pretrial Publicity and its Influence on Juror Decision Making* in Psychology and Law, at 265-266 (2005 ed. Brewer & Williams); Posey and Wrightsman, *Trial Consulting*, at 58 (2005). Further, as noted above, the court seated two jurors who, had counsel not been ineffective, would not have made it on the jury.

VII. Trial counsel were ineffective in failing to interview the victims, other than Allan Myers, as well as Mr. McQueary, Mr. Petrosky, and Mr. Calhoun.

Since trial counsel waived the preliminary hearing, it was essential for him to interview various Commonwealth witnesses. "A claim that trial counsel did not conduct an investigation or interview known witnesses presents an issue of arguable merit where the record demonstrates that counsel did not perform an investigation." ***Stewart, supra*** at 712 (collecting cases). "In [***Commonwealth v.***] ***Jones,*** [437 A.2d 281 (Pa. 1981),] our Supreme Court specifically found trial counsel ineffective for failing to interview a witness where the key issue turned on the credibility of the defendant and an undercover police officer." ***Id.***

In ***Perry, supra***, the Pennsylvania Supreme Court held that the "[f]ailure to prepare is not an example of forgoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel." Although ***Perry*** involved a capital matter, the allegations in this case are no less serious. Moreover, "the right to effective counsel attaches to "the capital defendant, the felon, and the misdemeanant alike." ***Stewart, supra*** at 712. As in ***Stewart***, where the *en banc* Superior Court held it was "untenable to conceive a reasonable justification for appearing in a first-degree murder case without thorough preparation," which included failing to interview a known witness, it was ineffective to fail to interview witnesses in this case where counsel waived the preliminary hearing and his opportunity to question those witnesses. The ***Stewart*** Court continued,

> As our Supreme Court said in [***Commonwealth v.***] ***Mabie,*** [359 A.2d 369 (Pa. 1976)],
>
> the question here is the decision not to interview the witnesses, not the decision to refrain from calling them at trial.... the value of the

> interview is to inform counsel of the facts of the case so that he may formulate strategy.

Stewart, supra at 713. Again, Mr. Rominger's affidavit raises questions of fact regarding trial counsel's lack of a trial strategy. Insofar as a question arises as to whether the accusers, or Mr. McQueary, or Mr. Petrosky would have met with trial counsel, a material issue of fact is at issue. Further, even if all of these witnesses would not have met with counsel, this highlights the importance of having conducted a preliminary hearing. Had counsel interviewed the witnesses who testified or conducted a preliminary hearing, they would have learned that many of the victims' allegations changed over time based on having received psychological treatment and that they were claiming to have repressed their memories of abuse. D.S., J.S., B.S.H., Z.K., all testified regarding issues of memory, blocking things out, and therapy. S.P.'s testimony changed radically between his grand jury testimony and his trial testimony.

This would have allowed counsel to prepare for trial by contacting the numerous experts in this country on repressed memory and its extensive problems, file a motion *in limine* regarding repressed memory testimony that, similar to hypnotically refreshed testimony, should have been precluded, and/or sought an expert witness to testify that repressed memory therapy is no longer considered by leading academics to be reliable. These issues will be explored further in separate issues, but must be considered when considering the prejudice with regard to this issue since an interview would have altered the trial strategy and presentation of witnesses.

Mr. Sandusky further posits that counsel's failure to interview Mr. Calhoun had no reasonable basis and resulted in actual prejudice. Mr. Calhoun provided a statement to police that indicated that Mr. Sandusky was not involved in the shower incident described

by Mr. Petrosky. Had trial counsel interviewed Mr. Calhoun, he would have known that Mr. Calhoun denied seeing Jerry Sandusky molest anyone. No claim of a reasonable strategy attaches to a decision not to meaningfully interview the witness before trial. ***Stewart, supra*** at 713. With respect to the unnamed victim, the evidence was not overwhelming and the charge hinged on whether the jury believed Mr. Petrosky accurately relayed Mr. Calhoun's out-of-court statement. Thus, trial counsel's failure to interview Mr. Calhoun and present, at least, his statement to police denying Mr. Sandusky was involved resulted in actual prejudice. ***See id.***; ***see also Commonwealth v. Matias***, 63 A.3d 807 (Pa. Super. 2013) (*en banc*) (counsel ineffective for not calling daughter of defendant to refute testimony of sex assault victim).

Frankly, the Commonwealth itself conceded that even allowing Mr. Petrosky to testify to the hearsay statement by Mr. Calhoun was a close call because there was not significant corroborating evidence. ***See*** N.T., 6/13/12, at 216 (Attorney Fina arguing in favor of introducing the hearsay testimony and stating, "certainly novel, Judge, but I would assert we have gotten the ball over the finish line here. Maybe by a hair."). Indeed, Mr. Petrosky had changed his testimony regarding the location of the alleged shower incident. That is, he testified that the shower incident occurred in one building during his grand jury testimony and then changed it to the same building in which the McQueary shower incident occurred.

However, in violation of ***Brady***, the Commonwealth did not disclose this material change. Had counsel interviewed Mr. Petrosky, it would have learned of this significant change in testimony and been adequately prepared to cross-examine him on this subject as well as argue against the introduction of that testimony. In addition, Mr. Petrosky testified

at the grand jury proceeding that the upper body of the adult and child were not visible. At trial, in contrast, he stated he did not see the upper bodies because he was looking down. Again, this information was ***Brady*** evidence, and had counsel interviewed Mr. Petrosky he would have known of any possible change.

Pointedly, the trial court itself based part of its decision to allow the Petrosky testimony on the fact that the Commonwealth argued a course of conduct in the same shower area. Since counsel had not interviewed Mr. Petrosky, no argument was leveled against the fact that Mr. Petrosky had only recently changed his story and that the Commonwealth did not disclose that fact until the day of trial.

The failure to interview Mr. McQueary was also significant. Mr. McQueary's trial testimony and grand jury testimony were different. At trial, Mr. McQueary maintained that he saw Mr. Sandusky in the shower three times. He previously had not testified in such a manner. Mr. McQueary also testified at trial that he made it clear that he observed sexual conduct. However, neither his father nor Dr. Dranov reported the matter after he told them of what he observed. What is more, Mr. Amendola not only failed to interview Michael McQueary, but he only told co-counsel, Mr. Rominger, that Mr. Rominger would conduct the cross-examination of Mr. McQueary the day of Mr. McQueary's testimony. ***See*** Rominger Affidavit, at 6-7. Accordingly, Mr. Rominger only had his lunch break to prepare to cross-examine one of the Commonwealth's most essential witnesses. Had counsel interviewed Mr. McQueary, they also could have provided pictures for Mr. McQueary to view to determine if he could recognize the child. If Mr. McQueary identified Mr. Myers, then the Commonwealth could not have argued that Victim #2 was known only to God.

Lastly, this issue raises genuine issues of fact as to why counsel neglected to conduct any interviews with the witnesses mentioned above. As the ***Mabie*** Court opined,

> However hostile these witnesses may have appeared to be, there is no basis for the decision neither to interview them nor to attempt to do so. While hostile witnesses at trial may have presented added difficulties to appellant's case, the question here is the decision not to interview them, not the decision to refrain from calling them at trial. Accordingly, there was no danger of hostile witnesses inflaming a jury during an interview to determine what each saw and their degree of potential hostility.

Id. at 374. What is more, in that case, trial counsel based his decision on what occurred at a preliminary hearing. Here, counsel did not even elect to have a preliminary hearing.

By denying a hearing, the PCRA court has concluded that, taking as true all of Mr. Sandusky's averments, that no actual prejudice resulted. However, if counsel had interviewed Mr. Calhoun and Mr. Petrosky they would have learned that Mr. Calhoun denied witnessing Mr. Sandusky commit a crime and that Mr. Petrosky had changed the physical location of the crime. This would have led to a reasonable probability that the outcome of the trial would have been different since it would have altered the admissibility of Mr. Petrosky's testimony and, even if still admitted, would have significantly called into question all of the charges related to Victim 8. Moreover, counsel would have been able to learn of the competence or lack of competence of Mr. Calhoun.

With respect to Mr. McQueary, he was one the linchpins of the Commonwealth's case. Failing to interview him had no strategic purpose. Since the alleged victim himself did not testify, Mr. McQueary's credibility was critical. As in ***Jones***, ***supra***, where credibility was the key factor, it was ineffective to not interview Mr. McQueary.

VIII. Trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky.

Trial counsel could not provide effective assistance in this matter given the extensive discovery that was continually disclosed, especially where the disclosures continued up to the eve of trial.[5] Pointedly, it is evident from the trial record itself that the sheer amount of discovery overwhelmed trial counsel. Cognizant of the fact that they were unprepared to try this case in June 2012, after the trial court denied their request for a continuance, trial counsel moved to withdraw, stating:

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

N.T. Motion to Withdraw, 6/5/12, at 3-5.

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

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5 The Pennsylvania Superior Court in Mr. Sandusky's direct appeal acknowledged that discovery consisted of 9,450 pages of documentation, 674 pages of Grand Jury transcripts, and 2,140 pages from subpoenas *duces tecum* just in the period of January 28, 2012 until June 15, 2012. The time needed to comprehensively review twelve thousand pages of discovery is significant. Both trial attorneys acknowledged that they did not review discovery completely, as it is a matter of record that they did not read Matt Sandusky's grand jury testimony in favor of his father. Further, as discussed, counsel did not listen to the Calhoun tape that exculpated Mr. Sandusky.

Ethics Hotline, which actually indicated that it was reluctant to issue a formal opinion because they suspected which case was involved. The trial court denied the motion.

Under Rule 1.1 of the Pennsylvania Rules of Professional Conduct, "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, **and preparation reasonably necessary for the representation.**" ***Id.*** (emphasis added). Trial counsel failed to prepare as reasonably necessary for representing Mr. Sandusky at trial; indeed, they specifically advised the trial court they could not, to no avail. Rule 1.16 of the Pennsylvania Rules of Professional Conduct also provides:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
> (3) the lawyer is discharged.

When the trial court denied the motion, trial counsel did not request permission for an interlocutory appeal, either by permission under Pa.R.A.P. 312, or as a collateral order under Pa.R.A.P. 313. Even if the trial court would not have certified the question for purposes of a permissive interlocutory appeal, the issue of being compelled to represent Mr. Sandusky in violation of the canons of ethics would have been appealable by right under Pa.R.A.P. 313, and the collateral order doctrine. Rule 313 reads,

> (a) *General Rule.* An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) *Definition.* A collateral order is an order separable from and collateral to the main cause of action where the right

> involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Id.

The question of whether an attorney may be compelled to represent a defendant at trial in violation of the attorney's ethical duties is separable from and collateral to the main cause of action, which is determining Mr. Sandusky's guilt on the charges against him. Second, the right involved is too important to be denied review: those rights are, the constitutional right to effective counsel as well as a due process right to ethical representation. Finally, if the review is postponed until final judgment, the claim is now irreparably lost because Mr. Sandusky was tried and convicted as a result of counsel who had an ethical conflict and could not provide him with effective assistance of counsel. Trial counsel had no reasonable basis for failing to seek review of this question under the collateral order doctrine.

This is especially true since Attorney Rominger invoked the doctrine to appeal the trial court's June 26, 2012 order regarding issues concerning the release of the Matt Sandusky interview. Trial counsel, after failing to seek review of this question under the collateral order doctrine, chose to proceed to represent the defendant even though they were fully cognizant that their representation was in direct violation of the Pennsylvania Rules of Professional Conduct. Mr. Sandusky suffered indisputable prejudice as a result, as he was represented at trial by attorneys who acknowledged that they could not effectively represent Mr. Sandusky and were admittedly proceeding in violation of Rule 1.1 and 1.16 of the Pennsylvania Rules of Professional Conduct.

The Commonwealth's only response has been a bald and cursory statement that Mr. Sandusky cannot establish that the outcome of his trial would have been different had counsel filed such an appeal. It presents no argument aside from this cursory statement. Of course, had Mr. Sandusky been represented by effective lead counsel, there is a reasonable probability that the outcome of his trial would have been different. Further, the critical question is whether there is a reasonable probability that counsel would have been permitted to withdraw by the Pennsylvania Superior Court since the appellate court would have been confronted with attorneys arguing, in good faith, that they could not adequately represent their client.

A finding that counsel could not withdraw would mean that the court determined that Attorney Amendola, an officer of the court, deliberately misled the Court Here, Mr. Sandusky has provided affidavits from Karl Rominger and Lindsay Kowalski who both worked extremely closely with Mr. Amendola and have maintained that he was overwhelmed by the task of defending Mr. Sandusky when he made his motion to withdraw. Mr. Sandusky's additional claims demonstrate that Mr. Amendola was unable to effectively represent Mr. Sandusky. Mr. Amendola has already made a record-based statement that he could not effectively represent Mr. Sandusky.

According to the Rominger Affidavit, the trial court's reason for not permitting counsel to withdraw was based on its belief that Mr. Amendola and Mr. Rominger would have a significant period to review continuing discovery while trial was ongoing. However, that period proved to be illusory because, as it turned out, the time frame the court assumed it would take for the Commonwealth to present its case did not factually materialize. Mr. Amendola was left with far less time to review discovery then had been

anticipated. Thus, the given reason for denying Mr. Amendola's original request is not supported by the facts that transpired.

Issues of fact exist as to why Mr. Amendola elected not to appeal the court's denial of his and Mr. Rominger's withdrawal motion. In light of the affidavit from Ms. Kowalski, it is evident that Mr. Amendola was being forthright with the court regarding his inability to adequately and ethically represent Mr. Sandusky. Had Mr. Amendola appealed, there is a reasonable probability that he would have been permitted to withdraw where the case was not yet a year old at the time (it was only seven months from the filing of the first information to the start of trial), he had not requested serial continuances, the case was highly complex involving eight accusers and ten alleged victims with over forty charges, and in excess of 12,000 pages of discovery.

It is evident that Mr. Amendola did not completely review the discovery in this case. He did not review Matt Sandusky's grand jury testimony nor does it appear he was aware of the interview relative to Mr. Calhoun. There is a reasonable likelihood that the outcome of this case would have been different had trial counsel appealed this order under the collateral order doctrine. Given counsels' own admissions that they could not provide constitutionally effective counsel and would be proceeding in violation of the canons of ethics, there is a reasonable probability that the appellate court would have permitted trial counsel to withdraw from the case rather than violate their ethical duty to their client.

Counsel's failure to seek a collateral appeal of the denial of either the motion to continue or the motion to withdraw, constitutes ineffectiveness, and Mr. Sandusky should be granted a new trial. Since Mr. Sandusky's petition, Mr. Amendola's record based

statements, and the affidavits of Mr. Rominger and Ms. Kowalski raise genuine issues of fact, Mr. Sandusky is entitled to a hearing on this issue.

IX. Mr. Amendola was ineffective for neglecting to adequately review discovery and erroneously stating that nothing in discovery would have changed his trial presentation.

Trial counsel prejudiced Mr. Sandusky when he testified at the hearing on Mr. Sandusky's post-sentence motion. Specifically, Mr. Amendola testified with respect to the lack of ability to prepare due to the mountainous discovery produced by the Commonwealth in a short period of time as follows:

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

N.T., Post-Sentence Motion Hearing, January 10, 2013, at 39-40, Appendix, at 688.[6]

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6 In the Commonwealth's first response, it relied heavily on this statement by Mr. Amendola and the Superior Court decision on direct appeal. What it overlooked was that Mr. Sandusky's position is that Mr. Amendola's representation itself was ineffective assistance and inaccurate. Mr. Rominger's affidavit has raised a material issue of fact by calling into question Mr. Amendola's statement. More importantly, it is plain that Mr. Amendola's statement is inaccurate. As argued, trial counsel did not review discovery fully as they failed to uncover or present Mr. Calhoun's statement denying Mr. Sandusky committed any crime against unidentified Victim 8. Furthermore, trial counsel both acknowledged that they had never reviewed Matt Sandusky's grand jury testimony. ***See Commonwealth v. Sandusky***, 70 A.3d 886 (Pa. Super. 2013). This indicates not only had they not reviewed all of the discovery but that they could not have provided sound advice as to whether Mr. Sandusky should testify.

Trial counsel was ineffective for testifying in this regard because trial counsel did not review, after the trial, all the discovery materials he had lacked time to examine before trial. Indeed, neither trial attorney ever reviewed Matt Sandusky's grand jury testimony, which would have been critical in advising Mr. Sandusky about his right to testify. Since the Superior Court relied on this statement in affirming Mr. Sandusky's convictions, and an issue of material fact exists, as to whether counsel did thoroughly review discovery, including but not limited to Mr. Calhoun's statement to police discussed *infra*, Mr. Sandusky is entitled to a hearing to establish actual prejudice.

Additionally, in light of the Superior Court's decision on direct appeal being premised on this statement to affirm Mr. Sandusky's conviction, it is evident that he suffered prejudice because the statement by counsel was inaccurate. Indeed, Mr. Rominger's affidavit confirms that had he been called at the post-sentence motion hearing, in which Mr. Amendola made the aforementioned statement, he "would have strongly disagreed with Attorney Amendola. We would have in fact presented the case very differently if we had time to review and digest the discovery." Affidavit of Mr. Rominger, at 9. Thus, this claim entitles Mr. Sandusky to an evidentiary hearing.

X. Whether Mr. Sandusky is entitled to an evidentiary hearing to show that the Commonwealth violated *Brady* by failing to disclose material impeachment evidence based on the fact that numerous victims not limited to Aaron Fisher, D.S., B.S.H. and J.S. were undergoing repressed memory therapy and, due to patient-doctor privilege, trial counsel could not have learned this information from any other source until trial and the Commonwealth was aware of that information.

> In ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutorial suppression of evidence that is material to guilt or punishment violates due process. A ***Brady*** claim is specifically cognizable under the PCRA. 42 Pa. C.S. § 9543(a)(2)(vi). ***Commonwealth v. Simpson***, 66 A.3d 253, 264 n.16 (Pa. 2013).

> A ***Brady*** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. No violation occurs if the evidence at issue is available to the defense from non-governmental sources. More importantly, a ***Brady*** violation only exists when the evidence is material to guilt or punishment, *i.e.*, when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'
>
> ***Commonwealth v. Tedford***, 960 A.2d 1, 30 (Pa. 2008) (citations omitted). Evidence is material where it affects the credibility of a witness. ***Commonwealth v. Ly***, 980 A.2d 61 (Pa. 2009). However, evidence is not to be considered exculpatory merely because a petitioner alleges the evidence is exculpatory. ***Commonwealth v. Lambert***, 884 A.2d 848 (Pa. 2005). A ***Brady*** claim, unlike a non-***Brady*** after-discovered evidence issue, can succeed if the after-discovered evidence would have been used solely to impeach a witness. ***Commonwealth v. Galloway***, 640 A.2d 454 (Pa. Super. 1994).

J. Andrew Salemme, *Guilty Until Proven Innocent: A Practitioner's and Judge's Guide to the Pennsylvania Post-Conviction Relief Act (PCRA)*, at 123-124 (2016).

Instantly, evidence that certain accusers did not have independent recollection of any crimes committed by Mr. Sandusky or had materially altered their story based on therapy is material impeachment evidence that should have been disclosed pre-trial or during trial. Any evidence that the accuser's memory had been impaired and was refreshed by psychiatric treatment was material impeachment evidence. Since the Commonwealth possessed this information, and Mr. Sandusky's counsel was unable to learn of this information through a non-governmental source, due to the psychiatrist-patient privilege, it violated ***Brady*** by failing to disclose this evidence.

Mr. Sandusky in his Addendum to his PCRA Appendix provided a link to Attorney General Linda Kelly's press conference immediately following Mr. Sandusky's convictions in which she makes clear reference to recovered memories. Ms. Kelly

expressly stated, "It was incredibly difficult for some of them to unearth long buried memories of the shocking abuse they suffered[.]" https://www.youtube.com/watch?v=czFCQpjD_0o. Mr. McGettigan can be seen standing directly next to Ms. Kelly at the time of the press conference. The PCRA Appendix, the Addendums thereto, and Mr. Sandusky's March 7, 2016 petition, also include specific citations to the trial record in which the accusers testified that therapy enabled them to recall the allegations, and why the accusers trial testimony was different from their prior testimony. These accusers had clearly notified the prosecution of these changes, but, in violation of ***Brady***, the prosecution had failed to provide this information to trial counsel. For example, D.S. testified as follows:

> I had sort of blocked out that part of my life. Obviously, going to football games and those kinds of things, I had chose sort of to keep out in the open, so to speak. And then the more negative things, I had sort of pushed into the back of my mind, sort of like closing a door, closing—putting stuff in the attic and closing the door to it.

N.T., 6/13/12, at 119. The following exchange further demonstrates potential violations of ***Brady*** and the Commonwealth's awareness of therapy enhanced memory. Mr. Amendola asked, after D.S. testified differently from his grand jury testimony about bear hugs and his hair being washed:

> Mr. Amendola: Prior to today, did you tell any of the investigators, any of the representative from the Attorney General that Mr. Sandusky had done that?
>
> D.S.: My lawyers, yes.
>
> Mr. Amendola: No, not your lawyers. I'm saying did you tell members of the Attorney General's Office or any of the investigators prior to today that in the shower Mr. Sandusky would give you bear hugs and wash your hair?
>
> D.S.: Yes. One person.

Mr. Amendola: Do you recall who you told?

D.S.: Joe McGettigan.

N.T., 6/13/12, at 140. Mr. Amendola followed up by asking,

> Mr. Amendola: 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?
>
> D.S.: Yes, one.
>
> Mr. Amendola: Who did you tell?
>
> D.S.: Joe McGettigan.

Id. at 141.

D.S. explained his change in testimony as follows. "That doorway that I had closed has since been reopening more. More things have been coming back and things have changed since that grand jury testimony. Through counseling and different things, I can remember a lot more detail that I had pushed aside than I did at that point." ***Id.*** at 143. He added, "Through counseling and through talking about different events, through talking about things in my past, different things very triggered different memories and have had more things come back, and it's changed a lot about what I can remember today and what I could remember before because I had everything negative blocked out." ***Id.*** at 146. Indeed, he repeated a similar sentiment later, providing, "That testimony is what I had recalled at that time. Through—again through counseling, through talking about things, I have remembered a great deal more things that I had blocked out. And at that time that was, yes, that's what I thought but at this time that has changed." ***Id.*** at 152.

The testimony of J.S. was similar. Mr. Amendola asked about J.S. revealing for the first time that Mr. Sandusky kissed him on the shoulder. Counsel asked, "Do you recall

prior to today ever telling anybody that information?" N.T., 6/14/12, at 119. J.S. responded, "No[,]" and continued, " well, I mean, I told – okay. I told my lawyers and I told Joe, but no one else—" ***Id.*** at 120. With regard to his different testimony concerning Mr. Sandusky allegedly washing J.S.'s buttocks, he stated that the only person he told previously was, "Joe. I told Joe and I told my attorneys, but I had not told family or friends." ***Id.*** at 121. J.S. also testified, "Everything that's coming out now is because I thought about it more. I tried to block this out of my brain for years." N.T., 6/14/12, at 122.

B.S.H. added, "I have spent, you know, so many years burying this in the back of my mind forever." N.T., 6/11/12, at 162-163. Z.K.'s civil attorney made a public statement during the trial that the victims "create a bit of a Chinese wall in their minds. They bury these events that were so painful to them deep in their subconscious." See http://myadvocates.com/in-the-news/howard-janet-the-attorney-for-alleged-victim-6-spoke-with-piers-morgan.

Had this evidence been disclosed, Mr. Sandusky could have filed a motion *in limine* to preclude such testimony under ***Commonwealth v. Nazarovitch***, 436 A.2d 170 (Pa. 1981), and Pa.R.E. 601, and argued that recovered memories based on therapy do not meet the requirements of ***Topa/Frye*** and therefore any testimony based on that non-scientific therapy was improper. Alternatively, counsel could have called an expert to provide expert testimony. Mr. Sandusky provided witness certification that Dr. Phillip Esplin was available to testify. Testimony from an expert would have led to a reasonable probability that the outcome of the trial would have been different. This position is explored in more detail below.

In addition, trial counsel could have sought review of the therapy notes of those accusers, which would not have been precluded by the psychiatrist-patient privilege. In ***Commonwealth v. T.J.W.***, 114 A.3d 1098 (Pa. Super. 2015), the Pennsylvania Superior Court, in a unanimous decision, interpreted that privilege. Therein, the defendant was accused of rape, involuntary deviate sexual intercourse, aggravated indecent assault, and other sex crimes. The accuser was the defendant's daughter. The defendant sought *in camera* inspection of mental health records relative to therapy the accuser had undergone.

The accuser therein allegedly recalled one incident of sexual abuse when she was approximately four and one-half years old, but had blocked out memories of other instances of abuse until she was nineteen, when a professor made a pass at her allegedly triggering memories of her father's abuse. The defendant denied the charges and asserted that these recovered memories were false and the result of her therapy. Additionally, the defendant maintained that the process for recovered repressed memories is unproven and unreliable.

The trial court ordered the accuser's treatment providers to provide to her counsel her records and that counsel prepare a privilege log to be given to the court and defense counsel. The defendant, after receiving a submission from the accuser, filed a motion to strike asserting that the document was not compliant with the trial court's order. The trial court then directed the accuser to supply the court with both redacted mental health records and a privilege log. The accuser appealed that order.

The panel first set forth,

> "the law is clear that a criminal defendant is entitled to know about any information **that may affect the reliability of the witnesses against him.**" ***Commonwealth v. Mejia-Arias***, 734 A.2d 870, 876 (Pa. Super.1999) (quoting ***Commonwealth v. Copeland***, 723 A.2d 1049, 1051–52 (Pa. Super. 1998), appeal denied, 561 Pa. 652, 747 A.2d 897 (1999)). Therefore, absent an applicable claim of privilege, if Appellee T.J.W. were able to articulate

> a reasonable basis for his request, he would have a colorable claim to seek evidence which might show that the complainant's memories were somehow impaired or otherwise unreliable.

T.J.W., ***supra*** at 1103 (emphasis added).

It then found that the accuser's claim of privilege had been waived. Critical to the instant case, it provided, "Moreover, the claim would not merit relief." ***Id.*** In this respect, it highlighted that "evidentiary privileges have been viewed by this Court to be in derogation of the search for truth, and are generally disfavored for this reason." ***Id.*** The panel continued that evidentiary privileges are to be narrowly construed. It then reasoned that the accuser should reasonably have known "that the long delay in reporting the persistent memory of the first incident and the recovery of memories of the intervening incidents, **would, inter alia, raise an issue of the reliability of the recovered memories**." ***Id.*** at 1104 (emphasis added). The Court then remanded for an *in camera* review for a determination of privilege and whether exculpatory material existed. It is evident that issues of recovered memory relate to reliability and not necessarily credibility.

The Commonwealth cited ***Commonwealth v. Crawford***, 718 A.2d 768 (Pa. 1998), for the proposition that expert testimony on the phenomena of false memory/repressed memory therapy was unnecessary because the jury was capable of assessing credibility. That decision did not address whether expert testimony on repressed memory was admissible and expressly opined, "the record demonstrates that revived repressed memory was not truly at issue in this case." ***Id.*** at 773. More importantly, as highlighted above, such expert testimony would relate to the reliability and not credibility of the evidence.

Even absent presentation of an expert on repressed memory therapy and the phenomena of false memories, Mr. Sandusky was prejudiced by the Commonwealth's

failure to disclose this vital impeachment evidence. Had the jury known in clearer detail that numerous victims had no independent recollection of any abuse outside of having therapy, there is a reasonably probability that it would have acquitted Mr. Sandusky as to at least one charge or a mistrial could have resulted.

XI. Whether Mr. Sandusky is entitled to an evidentiary hearing based on after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky had no independent recollection of the crimes alleged outside of receiving repressed memory therapy, which if presented at trial would have led to a reasonable probability that the outcome of the trial would have been different.

In their book, *Silent No More*, published after Mr. Sandusky's trial, Michael Gillum and Aaron Fisher revealed that Mr. Gillum helped Mr. Fisher recover repressed memories of his alleged abuse. Importantly, prior to Mr. Fisher's therapy with Mr. Gillum, he had never acknowledged any sexual abuse. The book suggests that Mr. Gillum used suggestive questioning to ferret out Mr. Sandusky's alleged abuse. Mr. Fisher admitted that "Mike just kept saying that Jerry was the exact profile of a predator. When it finally sank in, I felt angry." *Silent No More*, at 71-72. Mr. Gillum was improperly permitted to attend Mr. Fisher's grand jury testimony, was present for most police interviews, and was the primary person responsible for Mr. Fisher's claim of improper back-cracking changing to claims of sexual abuse. He also counseled B.S.H. and perhaps another accuser.

In an interview following Mr. Sandusky's trial, D.S. admitted that before he entered into therapy he had no memory of being abused. He admitted that before the allegations of abuse surfaced, he considered Mr. Sandusky to be a good friend. In one interview, post-trial, D.S. candidly admitted that his therapists suggested that he had repressed memories. In an e-mail exchange with the interviewer, he further provided, "Yes, actually both of my therapists have suggested that I have/had repressed memories, and thats why we have been

working on looking back on my life for triggers. My therapist has suggested that I may still have more repressed memories that have yet to be revealed, and this could be a big cause of the depression that I still carry today. We are still currently working on that."

E-mail exchange between D.S. and M.P., 10/14/15, attached.

Following trial, it was also revealed that Matt Sandusky claimed that he remembered his father's abuse because of repressed memory therapy. http://usnews.nebcnes.com/_news/2012/06/26/12417694-nbc-exclusive-matt-sandusky-details-alleged-sex-abuse-by-his-father?lite. He repeated this claim to Oprah Winfrey, adding that he now remembered his dad performing oral sex. www.oprah.com/own-oprahprime/Matthew-Sandusky-on-Hearing-Victim-Testimony-Video. At one point, Matt Sandusky proclaimed, "I didn't have the memory of—I didn't have these memories of the sexual abuse...All of these things start coming back to you, yes, [and] it starts to become very confusing for me and you try and figure out what is real and what you're making up." ***Id.***

This information, since it was not revealed until after trial, constitutes after-discovered evidence that would warrant a new trial. As previously delineated, to succeed on an after-discovered evidence claim, a petitioner must generally show that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Padillas, supra*** at 363. While due diligence does not exist where counsel could have questioned or investigated an obvious available source of information, in this case, the doctor-patient privilege precluded counsel from questioning

the accusers' therapists regarding whether they were engaged in assisting the accusers recover memories.

To the extent the Commonwealth or PCRA court would contend that counsel could have learned this information by interviewing the accusers or having a preliminary hearing, Mr. Sandusky has already alleged that counsel were ineffective in this regard. Thus, if the court determines counsel could have learned the specific statements made by Aaron Fisher, D.S., and Matt Sandusky, counsel was ineffective in failing to uncover this information as detailed.

As delineated previously, the critical issue for after-discovered evidence is not the availability or existence of the witness, but their testimony. ***Bulted, supra***; ***Cooney, supra***; ***Bonaccurso, supra***. Further, the evidence related to Aaron Fisher, D.S. and Matt Sandusky would not be used solely for impeachment purposes since had this evidence been revealed, trial counsel could have presented expert testimony on repressed memory therapy/false memories or filed a motion *in limine* to preclude any testimony based on recovered memories. ***See Nazarovitch***; ***compare also Commonwealth v. Henkel***, 938 A.2d 433 (Pa. Super. 2007). In this regard, those who undergo repressed memory therapy are not actually lying, they simply are relaying false memories.

That the alleged victims actually had no independent recollection of the abuse or certain aspects of the abuse is exculpatory evidence and would have altered counsel's trial strategy regarding the filing of motions or presentation of expert witnesses. This after-

discovered evidence is not mere impeachment evidence and it would likely have changed the outcome of the case.[7]

XII. Whether Mr. Sandusky is entitled to an evidentiary hearing to demonstrate that trial counsel were ineffective in failing to present expert testimony that called into question the theory of repressed memory and demonstrated the likelihood of false memories.

Mr. Sandusky further alleges that counsel were ineffective in not seeking to preclude the testimony of the accusers that was based on therapy or present expert testimony on false memories/repressed memory therapy. If the PCRA court has concluded that evidence of the use of therapy was recoverable by Mr. Sandusky's attorney's through due diligence or from a source outside the government, then it is evident that counsel were ineffective. Moreover, if the PCRA court has determined that trial counsel could not have learned of the specific after-discovered statements made above, there was still sufficient testimony from the victims to warrant trial counsel exploring the fact that numerous victims were claiming that therapy helped them to remember the abuse and present expert testimony.

In ***Nazarovitch, supra***, the Pennsylvania Supreme Court recognized the importance of having the trial court make the preliminary determination of whether evidence concerning a repressed or recovered memory is sufficiently reliable to permit admission at trial in the case of testimony "recovered" by hypnosis. The Supreme Court of the United States has acknowledged that certain circumstances warrant a court's pretrial assessment

[7] The Commonwealth without even a solitary reference to law also stated that it disputes that the statements that arose after trial are evidence. Evidence is defined by Black's Law Dictionary as something that tends to prove the existence of an alleged fact. A statement that the accusers were undergoing repressed memory therapy and that is what helped them to recall the alleged abuse plainly falls within that definition.

of a witness's reliability as a predicate to admissibility of evidence. ***See e.g., Jackson v. Denno***, 378 U.S. 368 (1964) (authorizing a pretrial determination as to whether a defendant's confession was voluntary); ***Manson v. Brathwaite***, 432 U.S. 98 (1977) (pretrial hearing into reliability of identification in cases involving suggestive lineups). Repressed memory therapy is analogous to hypnosis and in fact hypnosis is a technique sometimes used in that type of therapy. Both hypnosis and repressed memory therapy have their origin and derive from psychologists and psychiatrists and treatment of patients. The Superior Court in ***T.J.W.***, ***supra*** confirmed that issues regarding repressed or recovered memory relate to reliability.

Repressed memory therapy has been called into question by numerous scholarly works. Dr. Paul McHugh, a director at the Department of Psychiatry at Johns Hopkins University of Medicine has opined, "Mountains of evidence has demonstrated that shocking and frightening traumatic experiences are difficult to forget rather than difficult to remember. Dr. Richard McNally of Harvard has called repressed memories a "piece of psychiatric folklore devoid of convincing empirical support." Richard McNally, *Remembering Trauma* (2005).

Similarly, Dr. Harrison Pope, Jr., and Dr. James Hudson have opined, "Decades of research on victims of trauma have shown that individuals remember traumatic events very well, and often much more vividly than non-traumatic events." Modern Scientific Evidence: The Law and Science of Expert Testimony (2011-2012), *Repressed Memories: Scientific Status*, (ed. Faigman et al.), at 850.[8] That work contains a table of 33 scientific

[8] Other leading scholars have published works questioning and debunking the pseudoscientific theory of repressed memory. ***See*** Richard Ofshe and Ethan Watters, Making Monsters (1994); Elizabeth Loftus, The Myth of Repressed Memory (1994); Dr.

publications that question the validity of repressed and recovered memory. ***See*** Attachment C to March 7, 2016 Amended Petition.

Thus, had counsel presented a motion *in limine* with supporting citations to the numerous scholarly books, learned treatises, and articles,[9] on the unreliability of refreshed memory through therapy there is a reasonable probability that the court would have precluded any testimony based on memories that were offered only after undergoing such therapy. ***See also State v. King***, 733 S.E.2d 535 (N.C. 2012); ***State v. Hungerford***, 697 A.2d 916 (N.H. 1997); ***State v. Quattrocchi***, 1999 WL 284882, at *13 (R.I. Super. 1999); ***U.S. v. D.W.B.***, 74 M.J. 630, 644 (Navy-Marine Crim. App. 2015); ***Isely v. Capuchin Province***, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995) ("[T]here is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst.").

Absent this therapeutically refreshed testimony, the outcome of the trial would likely have been different since the accusers had little to no independent recollection of criminal behavior, and only remembered events such as showering with Mr. Sandusky and Mr. Sandusky putting his hand on their knee. Insofar as the Commonwealth asserts that the victims did not undergo this type of therapy, it is inconsistent with the testimony at trial, Attorney General Linda Kelly's statements, and after-discovered evidence, and material issues of fact would exist. Additionally, if the Commonwealth acknowledges that it knew such therapy occurred, then it is in essence conceding a ***Brady*** violation.

Paul Simpson, Second Thoughts (1996). Mark Pendergrast's acclaimed work, *Victims of Memory*, (1996), is also a comprehensive and detailed account of the dubious practice of repressed memory therapy.

9 Mr. Sandusky attached a small sampling at the end of his March 7, 2016 Petition at Attachment C.

Of course, once the accusers testified at trial as to being able to remember abuse after undergoing therapy when they had no independent recollection during prior statements, trial counsel should have presented an expert on false memory and repressed memory to opine that repressed memory therapy is not an accepted science. The test for ineffectiveness for failing to call a witness requires the petitioner show that the witness exists, was available to testify, counsel knew of or should have known of the witness, the witness was willing to testify, and the absence of the testimony was so prejudicial that there is a reasonable probability that the outcome of the trial would have been different. ***Commonwealth v. Chmiel***, 30 A.3d 1111 (Pa. 2011).

Instantly, such an expert exists; indeed, numerous experts on the subject exist. Dr. Esplin, at an evidentiary hearing, can testify to the necessity of using expert testimony in cases involving repressed or recovered memory, manufactured memory and suggestive questioning and questioning protocol in cases of alleged sexual abuse. Counsel should have or through reasonable diligence could have discovered this witness. Finally, such testimony would have likely led to a different outcome at trial.

Here, Mr. Sandusky's expert would be testifying that recovered memories are neither scientific nor are the results reliable; however, he would not be testifying to an ultimate issue in the case nor attacking the actual accusers' beliefs that they are telling the truth. Expert testimony on false memories does not improperly infringe on the jury's credibility determining function any more than using prior inconsistent statements and is beyond the ken of the ordinary training, knowledge, intelligence, and experience of a lay person. ***See*** Pa.R.E. 702. The expert testimony would not have improperly infringed on the jury's credibility determining function as the testimony would have been limited to

repressed memory therapy and how it can lead to false memories and, in fact, as set forth in more detail below could have been introduced pre-trial.

This testimony does not indicate that a person is not telling the truth; instead, the expert would acknowledge that the person who underwent the therapy is not lying and believes in the memory. In this case, the expert testimony would have been helpful and relevant with respect to the accuser's allegations that they had blocked out the abuse. The expert testimony would be to establish what repressed memory therapy is and how it can lead to false memories. Phrased differently, expert testimony on false memory does not directly speak to whether an accuser is untrustworthy because the expert is not rendering an opinion on whether a specific witness is lying. ***Compare Commonwealth v. Alicia***, 92 A.3d 753, 760 (Pa. 2014) (concluding that expert testimony on false confessions was inadmissible and opining, "We have consistently maintained that a lay jury is capable of determining whether a witness is lying, and thus expert testimony is not permissible as to the question of witness credibility."); ***see also id.*** 762 n.12 ("In assessing the reliability of an eyewitness identification, **the issue is generally not whether the victim or witness is telling the truth—the victim or witness is often entirely and honestly convinced**, and convincing to the fact-finder, that he or she has correctly identified the true perpetrator. The issue is rather whether the witness's identification is indeed accurate.") (emphases added).

Here, the issue is not whether the accusers who underwent repressed memory therapy were telling the truth about recovered memories, as they are honestly convinced, but the issue is whether the memory is accurate. Unlike eyewitness expert testimony, which was not authorized in Pennsylvania until ***Commonwealth v. Walker***, 92 A.3d 766

(Pa. 2014), after Mr. Sandusky's trial, there was no case prohibiting expert testimony on the **lack of scientific basis for repressed memory**. ***Compare Commonwealth v. Crawford, supra*** (reliability of repressed memory not at issue).

Had counsel presented expert testimony on the unreliability of memories that are the result of therapy, the stories of the accusers would have been brought into better focus. Counsel could not have had any reasonable basis for not presenting such testimony once a number of the accusers indicated that they recalled the abuse based on therapy—several of whom were seeing the same therapist. Knowledge that the accusers did not have an independent recollection of the abuse prior to undergoing therapy and that such therapy is highly controversial and not generally accepted in the scientific community could have convinced at least one juror to find Mr. Sandusky not guilty.

Moreover, this testimony could have been presented at a pre-trial hearing on the reliability of therapy enhanced memory. While the Commonwealth has argued that a "taint-hearing" only applies to child witnesses, this is not wholly accurate. ***See Commonwealth v. Kosh***, 157 A. 479, 482 (Pa. 1931) (in a case not involving a child witness, the High Court opined, "If a party knows before trial that a witness is incompetent on account of his mental condition, he must make his objection before the witness has given any testimony.").

Although the Commonwealth is correct that it is presumed that an adult witness is competent to testify, that presumption can be rebutted. Although ***Commonwealth v. Delbridge***, 855 A.2d 27 (Pa. 2003), dealt with competency hearings for child witnesses, it also noted that competency hearings are appropriate when a witness's memory "may have been corrupted by insanity, mental retardation or hypnosis," the Court added, "we see no

reason to alter it in cases where the memory of the witness is allegedly compromised by tainted interview techniques." ***Id.*** at 40. The ***Delbridge*** Court added, "An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." ***Id.***

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

In this case, the witnesses' testimony concerned issues of therapy enhanced memories ***See*** pgs. 61-62 of this brief (quoting from trial transcripts); ***see also*** N.T., 6/11/12, at 162, 168 (Appendix, P. 462); N.T., 6/12/12, at 71 (Appendix, P. 464); N.T., 6/13/12, at 146, 152 (Appendix, P. 465); N.T., 6/14/12, at 122 (Appendix, P. 467). The rules of evidence do not limit the court to determining that a witness has an impaired memory to child victims or child witnesses. Pa.R.E. 601; ***see also Baker***, ***supra*** ("whether the witness...has the ability to remember the event which was observed or perceived"). There are material questions of fact regarding whether the accusers' memories were impaired and refreshed through therapy. The Commonwealth does not address the plain language of the rule of evidence and case law regarding expert testimony on impaired

memories because it is plain that the rule does not *per se* preclude a separate hearing when there is evidence of impaired memory and tainted investigative techniques.

Nothing in the Commonwealth's Second Answer refutes the evidence demonstrating improper police questioning and impaired memory and that the accusers' statements were unreliable (which is distinct from credibility).[10] Indeed, numerous accusers testified at trial that the reason their testimony changed was based on having remembered additional facts between their police interviews, grand jury testimony and trial.

In direct contradiction to statements made on the record, and after-discovered statements made by D.S., as well as Matt Sandusky, the Commonwealth maintains that there is no evidence that a number of the accusers underwent therapy that brought forth alleged repressed memories. Mr. Sandusky has presented evidence via citations to the record and after-discovered evidence in his petition that various accusers did undergo therapy to improve their memory of abuse and that is why they testified at trial as to why their stories changed over time. Since the Commonwealth disputes that the victim's therapy enhanced their memories, a genuine issue of material fact exists. ***See*** Pa.R.Crim.P. 908.

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[10] As discussed, a witness may believe that they are telling the truth, which relates to credibility. However, they may be mistaken, which pertains to reliability. The distinction was fully fleshed out by the Pennsylvania Supreme Court in discussing expert testimony regarding eyewitness identifications. ***See Commonwealth v. Walker***, 92 A.3d 766 (Pa. 2014). As set forth in ***Commonwealth v. Delbridge***, 855 A.2d at 40 (Pa. 2003), "a competency hearing is not concerned with credibility."

The Commonwealth's claim that there was no reason for counsel to retain an expert because it was not at issue in trial and the Commonwealth itself never offered expert testimony on the subject reveals a misunderstanding of Mr. Sandusky's claims and the law. An example will demonstrate the incoherence of the argument. Simply because the Commonwealth does not call an expert on eyewitness identification would not preclude a defense attorney from presenting eyewitness expert testimony where a person testifies as an eyewitness and identifies the defendant.

That the Commonwealth did not present expert testimony does not preclude a defendant from doing so. Here, Z.K. testified to blacking things out, B.S.H. testified to remembering events that he had forgot, Aaron Fisher and Mike Gillum have made statements in their book that infer that Mr. Gillum helped Aaron Fisher remember being abused. Although the Commonwealth maintains that Matt Sandusky's revelations are irrelevant because he did not testify, this demonstrates a flawed view of the Commonwealth's obligations under ***Brady***. Once Matt Sandusky came forward against his father with his repressed memory claims, the Commonwealth would have had a duty to inform counsel that his change of heart was based on therapy if that is what he told them. This would have affected the advice trial counsel provided to Mr. Sandusky regarding his decision to testify. Further, the revelations by Matt Sandusky raise the distinct possibility that other accusers who did testify were undergoing the same therapy since Matt Sandusky had spoken with the same attorney that had been involved with other accusers before going to the Commonwealth.

The Commonwealth cannot dispute that the accusers underwent therapy that aided their memory nor does it even set forth that it was unaware of this therapy. Pointedly, it

cannot do so because Attorney General Linda Kelly, immediately after Mr. Sandusky's convictions, stated at her press conference that the victims' had unearthed long buried memories. While the Commonwealth has posited that Mr. Sandusky is manufacturing his claim and baldly averred that several accusers did not have an independent recollection of the abuse prior to therapy, Mr. Sandusky has outlined those accusers that originally denied any allegations of oral sex or other types of sexual abuse. These stories changed over time after many of the accusers entered into therapy, sometimes at the behest of their civil attorneys. The Commonwealth's failure to aver that the accusers did not undergo such therapy or that it was not aware that they were undergoing that therapy is telling.

As noted, Matt Sandusky, D.S., and Aaron Fisher have all made statements regarding therapy and possible repressed memories. An attorney for Z.K. publicly stated that the alleged victims had buried the events deep in their subconscious. Phrased succinctly, Mr. Sandusky has set forth numerous genuine issues of material fact regarding the accusers' ability to recall the alleged abuse, which undisputedly significantly changed over time. Mr. Sandusky is entitled to a hearing on this claim.

XIII. Trial counsel rendered ineffective assistance by neglecting to file a motion *in limine* and seeking a hearing to preclude the use at trial of the victims' prior statements to police that were gleaned by suggestive and improper police questioning.

As mentioned, the alleged victims had given multitudes of inconsistent statements throughout the course of the investigation during interviews, grand jury testimony, media accounts, and ultimately at trial. The variety of inconsistent statements rendered these witnesses' testimony so unreliable that any probative value of the testimony was significantly outweighed by the prejudice suffered by the defense. ***See*** Pa.R.E. 403.

Further, as discussed above, any witness may be deemed incompetent if he has "an impaired memory." Pa.R.E. 601(b)(3).

Moreover, there is a material question of fact as to whether the "memories" in this case were manufactured for either financial motive or the product of serial suggestive interviews by law enforcement, psychiatric professionals and other authorities from the Clinton County Office of Children, Youth, and Families. As outlined above, trial counsel should have either sought to preclude testimony regarding repressed memories as lacking any scientific basis or presented expert testimony on the phenomenon known as repressed memories and its lack of scientific support.

On April 5, 2011, following the leaking of the grand jury investigation to Sara Ganim, B.S.H.'s attorney, Ben Andreozzi, met with investigators and told them he had a client who may have information relevant to the case. Two days later, on April 7, 2011, B.S.H. and Attorney Andreozzi met with Pennsylvania State Police and gave some statements, though the content of those initial statements is unknown.[11] On April 21, 2011, B.S.H. again met with investigators and described conduct of inappropriate touching, but he denied that oral sex or any penetration occurred. In light of this statement, it appears that whatever B.S.H. told investigators on the prior occasion is material ***Brady*** evidence. Almost a month later, on May 19, 2011, B.S.H. testified to the grand jury, and his story cascaded to include tales of oral sex, an attempted anal penetration and two attempts at digital penetration. ***See*** N.T. Grand Jury, May 19, 2011, testimony of B.S.H. at 25-32, 53-60, 85-88 at Appendix, P.698.

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11 Any statement by B.S.H. that was not consistent with his trial testimony is impeachment evidence that must be turned over pursuant to ***Brady***.

This progression is important, as the investigators recorded the April 21, 2011, interview with B.S.H. During a break in the interview, when the police believed the recorder was off, the police disclosed circumstances of other assaults to B.S.H. telling him, "We need you to tell us this is what happened." Indeed, Corporal Leiter spoon fed details of the investigation to B.S.H. and Mr. Leiter suggested testimony to B.S.H. stating:

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

See N.T. , 6/19/12 at 57-58 at Appendix, at.468.

This portion of the interview was not supposed to be recorded. ***See id.*** at 83, 99-100, Appendix, P. 470. Moreover, this is also consistent with Corporal Leiter's

conversation with Attorney Andreozzi during the unintentional recording, which was recounted during Corporal Leiter's cross-examination as follows:

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

N.T. , 6/19/12, at 55-56 (Appendix, at 473-74).

The actual tape reveals the following:

> Mr. Andreozzi: Can we at some point in time say to him, Listen, we've interviewed other kids, other kids have told us that there was intercourse, and that they've admitted this, you know, um, is there anything else you want to tell us?
>
> Trooper Leiter: We do that with all the other kids, say, 'Hey listen. This is what we've found so far, you fit the same pattern as all the others, it's the way he operates, and we know the progression of the way he operates, and the other kids we've dealt with have told us that this has happened after this and that. Did that happen to you?
>
> Mr. Andreozzi: And I need to tell him, too, yeah, Ok.

This case marks the rare occasion where the defense had audio recording where the Commonwealth planted the seed for B.S.H.'s ultimate testimony. The testimony greatly conflicted with all of his prior interviews and statements, but yet B.S.H.'s trial testimony lined up exactly with the details that Corporal Leiter provided to him. This fact pattern is consistent with the other victims as well. To wit:

> a. Aaron Fisher gave statements in 2008 that no direct sexual activity occurred; after six months of interviews, and therapy with Mr. Gillum, Aaron Fisher claims that oral sex occurred. A copy of Jessica Dershem's Child Protective Services Investigation Report dated November 20, 2008, at Appendix, at 475. **In the grand jury testimony on November 16, 2009, Aaron Fisher denies that oral sex occurred until the prosecutor reminded Aaron Fisher that he previously stated it occurred.** ***See*** Transcript of Grand Jury, November 16, 2009, at pgs. 2-9, Appendix, P. 703. Thus, Aaron Fisher's story began with not being uncomfortable with Mr. Sandusky to claims of giving and receiving oral sex**. Aaron Fisher further specifically admits that his "memories" developed as his therapist, Mike Gillum, asked suggestive questions.** ***See*** Aaron Fisher, *Silent No More*, at p. 71 at Appendix, at 481. This admission occurred after Mr. Sandusky's trial.
>
> b. Allan Myers was interviewed in September 2011, and confirmed that there was never any inappropriate contact between he and Sandusky. A copy of Corporal Joseph Leiter's Pennsylvania State Police Report dated September 22, 2011, is attached at Appendix, at 436. Additionally, he indicated that he was uncomfortable with his feeling that the Pennsylvania State Police were trying to put words in his mouth, and that the police became angry when he did not respond the way they hoped he would. A copy of Allan Myers Interview with Curtis Everhart, dated November 9, 2011, is attached at Appendix, P. 433. After several more interviews, in March 2012, Allan Myers claimed he was abused at some point. A copy of Inspector M. J. Corricelli's Memorandum of Interview, dated March 8, 2012, at Appendix, at 441. Following trial, Mr. Myers recanted. He was never called to testify.
>
> c. J.S. was first interviewed on July 19, 2011, and he denied that any inappropriate or sexual contact occurred. A copy of Trooper Mark Yakicic's Pennsylvania State Police Report, dated July 19, 2011, was attached at Appendix, at 482. On August 18, 2011, he stated that some inappropriate contact occurred, but there was no abuse. ***See*** Transcript of Grand Jury, August 18, 2011 at pgs. 10-14, 17-19, 21-23, Appendix, P. 706. When J.S. testified at trial, he claimed of the 50 nights he spent at the

Sandusky residence, sexual contact occurred on almost every occasion. N.T., 6/14/12, at 108 at Appendix, at 483.

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

e. Z.K. was initially interviewed in 1998 and stated that no inappropriate contact occurred. A copy of Z.K.'s interview with Ronald Schreffler, dated May 4, 1998, was included in the PCRA Appendix, at 488. In January 2011, Z.K. was interviewed again, and he denied that any sexual contact occurred. In June of 2011, Z.K. testified to the grand jury that although Sandusky made him uncomfortable, they did not have sexual contact. ***See*** N.T. Grand Jury, June 17, 2011, at 11-21 at Appendix, P. 720. When Z.K. testified at trial, he still did not state he was abused, but suggested that he may have blocked it out. ***See*** N.T., 6/14/12, at 8, 15-17, and 26-27 at Appendix, at 507.

f. D.S. was first interviewed in February 2011, and he stated that Mr. Sandusky never actually touched his genitals. A copy of Corporal Leiter's Pennsylvania State Police report, dated February 4, 2011, is attached at Appendix, at 513. When he testified to the grand jury in April 2011, he stated he recalled no actual sexual contact. At trial, D.S. testified that memories that were essentially repressed were being recovered, and that he now recalled Mr. Sandusky assaulted him as well. ***See*** N.T., 6/13/12, at 95, 98, 101-103, 105-113, 116, 118-119, 140-146, 152, and 155 at Appendix, at 515. Following trial, D.S. was interviewed[12] and admitted that he initially only recalled spending the night with Mr. Sandusky and Mr. Sandusky putting his hand on his leg while driving. After his police interview, he contacted therapists for psychological assistance. Only after seeking therapy did D.S. make any allegations of sexual misconduct. In the same post-trial interview, he stated that his therapy sessions helped him to remember the alleged abuse. The interview suggests that D.S. had no independent recollection of sexual abuse until he sought therapy. D.S. also

12 A transcript of that audio interview has been made part of the record.

asserted that even after remembering some type of abuse on one occasion after going to a football game with Mr. Sandusky, he again forgot.

g. S.P. was first interviewed in November 2011, and denied being sexual with Mr. Sandusky. A copy of Christina Short's written statement regarding S.P. was attached at Appendix, P. 541. In December 2011, he testified to the grand jury that he engaged in oral sex with Mr. Sandusky, but not anal intercourse, although Mr. Sandusky attempted anal intercourse.[13] ***See*** Transcript of Proceedings of Grand Jury, dated December 5, 2011, Witness S.P., at 17-20, 31-32, Appendix, P. 715. At trial, S.P.'s story evolved to include an allegation that he and Sandusky actually engaged in anal intercourse. ***See*** N.T., 6/14/12, at 217-18, 221, 232-33, 236, and 245 at Appendix, at 545.

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

The history of how the stories evolved due to continued interviews was consistent with essentially all of the witnesses against Mr. Sandusky. With the inadvertent recording of the interview with B.S.H., it is evident that law enforcement officers were engaged in suggestive interviewing that tainted the victims' testimony. Trial counsel possessed this information before trial, nevertheless, counsel did not file a motion *in limine* to either preclude introduction of prior consistent statements based on the suggestive questioning or present expert testimony and have the Court make the initial determination as to whether the purported victims' statements were the result of improper suggestive interviewing. Indeed, during his grand jury testimony, D.S., another accuser, openly acknowledged that

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

Corporal Leiter had told him that Mr. Sandusky had "basically went further and actually got very sexual with some of them." N.T., 4/11/11, at 41.

Moreover, the timeline above establishes that most of these alleged victims did not come forward with stories of alleged abuse until after the leak of grand jury investigation to Sara Ganim, and some did not occur until after Mr. Sandusky's arrest. Given the national press attention to Sandusky case, the ongoing lawsuits against Penn State University, and the book contracts that several of the purported victims' received, the motive to fabricate was so significant that trial counsel should have sought a judicial hearing with sworn testimony to explore the financial motives the witnesses may have had to fabricate their testimonies, including any contingent fee agreements with plaintiffs' lawyers. [14]

Trial counsel should also have sought a hearing at which expert testimony on the reliability of these witnesses' memories would have been explored since reliability relates to the competency of the witness. Had counsel done so, counsel could have moved to preclude the Commonwealth from being able to rehabilitate the witnesses with consistent statements that were the result of improper suggestive interviewing techniques.

In the instant case, the suggestive interviewing by law enforcement and the Clinton County Office of Children, Youth, and Family caseworkers, combined with the witnesses'

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14 At trial, Attorney Andreozzi testified that his practice largely consisted of representing crime victims in civil lawsuits. N.T., 6/19/12 at 71-72. He also testified that he had not discussed filing a lawsuit with B.S.H. However, as the record in the PCRA case indicates, he had filed a lawsuit against The Second Mile on behalf of B.S.H. in November of 2011. Moreover, upon information and belief Allan Myers, J.S., D.S., and R.R. were all represented by Attorney Andrew Shubin, who also had a financial incentive in recruiting claimants against Mr. Sandusky. Mr. Sandusky avers that Attorney Shubin, as well as the attorneys representing all of the other victims, received significant payment as a result of civil settlements with Penn State University, and Mr. Sandusky requests an evidentiary hearing to determine if the taint and interference with the witnesses extended to their civil counsel.

evolving tales warranted a pretrial hearing into whether the evidence was even reliable before a fact finder could pass on the question of credibility. Given the overwhelming number of prior inconsistent statements by the witnesses, trial counsel should have filed a motion *in limine* asserting that the purported victims' testimonies were precluded by Pa.R.E. 403 and Pa.R.E. 601, for the following reasons:

> a. Due to faulty or impaired memory, the witnesses' competency was at issue, and the trial court should have passed on the preliminary question of whether the witnesses were competent to testify;
>
> b. Due to the contradictory statements, viewed in the context of the cascading descriptions of illegal conduct that combined with continued suggestive interviewing by law enforcement, the witnesses' testimony was sufficiently unreliable that the trial court should make the initial determination under ***Nazarovitch***, ***supra***;
>
> c. With the strong financial incentives for the witnesses to pursue private action against Penn State University, the trial counsel should have requested a hearing to determine if the witnesses' motivation to fabricate their tales rendered their testimonies far more prejudicial than probative, warranting exclusion under Pa.R.E. 403.

This claim is clearly of arguable merit, based on the development of the interviews and testimony of the witnesses and the clearly suggestive statements made on the tape to B.S.H. ***See also State v. Michaels***, 642 A.2d 1372 (N.J. 1994). Trial counsel's failure to at least file the motion *in limine* and request a hearing to develop the record on these issues lacks any reasonable strategic basis. There is a reasonable probability that the outcome of the trial in this case would have been different, as a hearing on this issue would likely have either excluded the testimony of at least some of the purported victims, if not all, leaving the Commonwealth with no evidence on numerous charges, or prevented the

Commonwealth from bolstering their trial testimony after having been impeached with their numerous prior inconsistent statements.

In this regard, Mr. Sandusky submits that the Commonwealth's case was built on establishing a pattern or practice by Mr. Sandusky, whereby each victim's credibility was bolstered by other victims' testimony. Moreover, even if none of the witnesses were excluded, trial counsel, at a minimum, could have obtained relevant evidence for impeaching the witnesses at trial, including the fee arrangements with private counsel, ongoing book contract negotiations, and other evidence establishing a motive to fabricate their testimony. Instead, trial counsel "flew blind" on cross examining these witnesses without any real evidence to support allegations of motive or bias to cause them to testify falsely.

Indeed, despite the assertions of the media and Mr. Sandusky's trial counsel that the evidence against Mr. Sandusky was "overwhelming," once the witnesses' competency and reliability are properly questioned, before even passing on the question of their credibility, the evidence in this case was highly questionable. The Commonwealth's entire case rested on testimony that trial counsel should have exposed as incompetent, unreliable, and inadmissible. As a result, trial counsel was ineffective for failing to file a motion *in limine* and seek the trial court's preliminary ruling on the competency of the witnesses, and Mr. Sandusky is entitled to a new trial.

XIV. Trial counsel were ineffective for failing to introduce a tape-recorded statement by James Calhoun in which he contradicted Mr. Petrosky's testimony and Mr. Calhoun denied observing Mr. Sandusky performing any sex acts with a boy in a shower.

In the present case, two alleged victims in this matter did not come forward to testify. One of those alleged victims was a child described by Mr. Petrosky, a janitor at

Penn State University to testify as to a hearsay statement Jim Calhoun made to him. Over trial counsel's objection to introduction of Mr. Calhoun's statement to Mr. Petrosky as an excited utterance, Mr. Petrosky testified that Mr. Calhoun told him that Mr. Calhoun saw Jerry Sandusky performing oral sex on a minor child. Despite Mr. Calhoun having informed police that he did not observe Mr. Sandusky molest a child, trial counsel failed to present this impeachment evidence.

Specifically, in discovery in this matter, the Commonwealth disclosed a tape recorded interview Mr. Calhoun gave to the Commonwealth's investigator, Trooper Yakicik, on May 15, 2011. In the interview, Trooper Yakicic asks Mr. Calhoun about a time he observed an older man committing sexual assault on a young boy. After Mr. Calhoun describes seeing the assault in graphic detail, the following exchange occurs:

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

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

Mr. Rominger has represented that, due to the massive discovery, he was unaware of this evidence. Certainly, had counsel been aware of this evidence it would have had to have been presented. This therefore belies Mr. Amendola's statement relied on by the Superior Court in Mr. Sandusky's prior direct appeal that had he had adequate time to review discovery his trial strategy and presentation would not have been different. This issue will be discussed in more detail *infra*.[15]

Failing to present this critical evidence, which directly contradicted the Commonwealth's sole evidence as to that unnamed victim, is a claim of arguable merit. ***See Khalifah***, ***supra*** (evidence that directly contradicted testimony of a victim warranted evidentiary hearing); ***Shaffer***, ***supra*** (counsel ineffective for failing to introduce a police report as a business record that demonstrated that the victim's testimony was inconsistent with information in the report). In addition, counsel could have no reasonable basis for not using this evidence when both trial attorneys opposed the very introduction of Mr. Petrosky's testimony. ***See also Commonwealth v. Murphy***, 591 A.2d 278 (Pa. 1991) (failing to impeach a prosecution eyewitness held to be ineffective assistance). It is beyond cavil that there is a reasonable probability of a different outcome as to the unnamed shower victim had a statement from the witness who allegedly viewed the crime been presented

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15 Direct appellate counsel was also ineffective for failing to ask questions of Attorney Amendola on re-direct examination, wherein Attorney Amendola would have stated that he would have done many things differently had the Court granted a continuance, including increased investigation, and he would have had expert testimony from an expert who simply could not render an opinion for the defense in the time frame required by the trial court. Since the Superior Court relied so heavily on Mr. Amendola's statement in affirming Mr. Sandusky's convictions, it is apparent that Mr. Sandusky's claim has both arguable merit and he can establish actual prejudice. If appellate counsel had properly questioned Mr. Amendola, there is a reasonable probability that the Superior Court would have found prejudice in the trial court's denial of trial counsel's continuance motion.

that was in direct opposition to the Commonwealth's evidence. ***See Stewart, supra*** (failure to present alibi witness that would have directly contradicted Commonwealth's evidence was ineffective assistance); ***Matias, supra***; ***Shaffer, supra***; ***Murphy, supra.***

The Commonwealth submits that it subjected Mr. Calhoun to the interview in which he provided that answer while Mr. Calhoun was suffering from dementia. Whether Mr. Calhoun was not cognitively lucid at the time the Commonwealth interviewed him and had a compromised mental state would have gone to the weight of the evidence. It does not dispel that he factually stated something directly contradictory to what Mr. Petrosky testified. As discussed previously, no attorney would choose not to present evidence that directly contradicts the sole basis on which the government seeks a conviction. Mr. Sandusky is entitled to relief on this claim as a matter of law. In the alternative, an evidentiary hearing is warranted. As to prejudice, the preponderance of evidence standard is not particularly heightened and in light of the exceptionally meager evidence of the Commonwealth regarding Victim #8, there is a reasonable probability that the jury would have found that the unidentified victim was not assaulted by Mr. Sandusky had the statement been provided.

XV. Trial counsel were ineffective for failing to argue that under Pa.R.E. 806, Mr. Sandusky had the right to cross-examine James Calhoun about the excited utterance introduced through Mr. Petrosky.

Pursuant to Pa.R.E. 806,[16] when a hearsay statement is admitted into evidence, the credibility of the declarant, in this case Mr. Calhoun, can be attacked by any evidence

16 The Pennsylvania Supreme Court promulgated new rules of evidence that took effect March 18, 2013, after Mr. Sandusky's trial. The rules did not make substantive changes. ***See Schmalz v. Manufacturers & Traders Trust Co.***, 67 A.3d 800, 804 (Pa. Super. 2013).

which would be admissible as if the witness testified. Further, under the rule, evidence of an inconsistent statement is admissible even if the declarant was not afforded an opportunity to deny or explain it. In ***Commonwealth v. Haber***, 505 A.2d 273 (Pa. Super. 1986),[17] the Superior Court held that it was error for the trial court to preclude a defendant from calling a child witness in a sex case in order to cross-examine her, after she had been held incompetent to testify, but her mother testified regarding what the victim had told the mother. Thus, Mr. Sandusky had the absolute right to present Mr. Calhoun to testify, despite the Commonwealth's representation that he was not competent. Accordingly, Mr. Sandusky would have been able to establish that Mr. Calhoun did not identify Mr. Sandusky as the perpetrator of any sex crime as alleged by Mr. Petrosky.

Because Rule 806 and ***Haber*** establish that Mr. Sandusky could have presented Mr. Calhoun and his prior statement to police denying that Mr. Sandusky committed the atrocity he was accused of, his claim has arguable merit. Further, the issue raises a genuine issue of fact as to the reason trial counsel did not present this evidence. Pointedly, trial counsel had no reasonable basis to fail to contest Mr. Petrosky's testimony because the "need to cross-examine [Mr. Calhoun] concerning [his] accusation against [Mr. Sandusky] was greater than if [he] had made it from the witness stand, because [he] made it without benefit of oath, not subject to the penalty of perjury, and without the presence of the trier of fact." ***Haber, supra*** at 276-277. Furthermore, Mr. Sandusky suffered actual prejudice because there is a reasonable probability that had evidence been introduced refuting Mr.

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17 ***Haber*** was superseded by statute with respect to child victims, but not as it relates herein.

Petrosky's testimony, Mr. Sandusky would not have been convicted of the charges relative to that victim.

The Commonwealth submitted that it is wildly speculative as to what Mr. Calhoun would have testified. This is less than accurate. Mr. Calhoun's memory could have been refreshed by the playing of the tape in which he denied seeing Mr. Sandusky commit the crime in question or by having him read the transcript. This testimony would obviously have been helpful to Mr. Sandusky. The Commonwealth certainly could have chosen to grill Mr. Calhoun regarding what he told Mr. Petrosky, but that does not make what Mr. Calhoun would have testified to after having his memory refreshed wildly speculative. Had Mr. Calhoun been presented and his recollection refreshed, there is a reasonable probability that the outcome of Mr. Sandusky's trial, at least as it related to Victim #8, would have been different.

XVI. Appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony, relative to Mr. Calhoun's hearsay statement, was inadmissible as an excited utterance as there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim.

Trial counsel objected to allowing Mr. Petrosky to testify regarding the alleged hearsay statement from Mr. Calhoun, citing ***Commonwealth v. Barnes***, 456 A.2d 1037 (Pa. Super. 1983). That case held that, "[w]here there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule." ***Barnes***, ***supra*** at 1040; ***see also Commonwealth v. Keys***, 814 A.2d 1256 (Pa. Super. 2003) (lack of corroboration of hearsay statement by a spousal abuse victim was inadmissible). In ***Barnes***, the victim alleged that someone had broken into his home and beaten and robbed him. Here, there is no evidence that Mr. Sandusky performed oral sex on an unidentified victim other than the hearsay statement itself. The

Commonwealth acknowledged the issue was close, stating it had presented enough evidence based on a course of conduct theory and that Mr. Petrosky saw Mr. Sandusky leave the building with a young boy.

However, the critical inquiry is whether there was corroboration of the crime, not innocuous and innocent behavior. Taking a shower with a child in a locker room and walking out with a child is not criminal behavior. The only evidence of the crime was the hearsay evidence. Since the Commonwealth could not corroborate that a crime occurred outside of the hearsay evidence, admission of Mr. Petrosky's testimony was in error and had counsel raised this issue on direct appeal there is a reasonable probability that Mr. Sandusky would have been entitled to a new trial at least as to that alleged victim. ***See Barnes, supra.***

XVII. Direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to admission of hearsay statements from Mr. Calhoun via Mr. Petrosky.

"[T]he Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. ***Commonwealth v. Brown***, 2016 PA Super 98. Similarly, Article I, § 9 provides, "In all criminal prosecutions the accused hath a right. . .to be confronted with the witnesses against him[.]"

In opposing Mr. Petrosky's testimony, trial counsel opposed Mr. Petrosky testifying as to Mr. Calhoun's hearsay statement, in part, on the grounds that the testimony violated Mr. Sandusky's rights confrontation clause. ***See*** N.T., 6/13/12, at 207-209. In that argument, trial counsel erroneously conceded that Mr. Calhoun's hearsay statement was not "testimonial" hearsay for purposes of a confrontation clause argument under

Crawford v. Washington, supra, and its progeny. ***Id.*** Mr. Calhoun's statement was clearly hearsay offered for the truth of the matter asserted; and Mr. Sandusky was never afforded the opportunity to cross-examine Mr. Calhoun. Irrespective of whether a hearsay statement meets an exception to the general rule against hearsay, a statement may not be admitted if it would violate a defendant's constitutional right to confront the witnesses against him. ***See e.g. Crawford v. Washington, supra.***

In ***Crawford***, the U.S. Supreme Court noted that the crux of the inquiry concerns whether the statement against the accused is "testimonial" in nature, such that the accused has a right to test the statement "in the crucible of cross-examination." ***Id.*** at 61. In ***Davis v. Washington***, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court developed one, non-exhaustive test for determining whether a statement is "testimonial" to-wit, the question turns on whether the admission of the statement is a "weaker substitute for live testimony." In ***Commonwealth v. Allshouse***, 985 A.2d 847 (Pa. 2009), the Pennsylvania Supreme Court interpreted ***Davis*** as creating a "primary purpose test," and that a statement is not "testimonial" if it "is made with the purpose of enabling police to meet an ongoing emergency." ***Id.*** at 854. Alternatively, a statement is testimonial if it is not made in the context of an ongoing emergency and if the primary objective of the questioning is to "to establish or prove past events." ***Id.*** In ***Commonwealth v. Abrue***, 11 A.3d 484 (Pa. Super. 2010), the Superior Court recognized that the ***Davis/Allshouse*** primary purpose test is not always decisive on whether a statement is testimonial; indeed, ***Davis*** expressly stated so. 11 A.3d at 492 (***citing Davis***, 547 U.S. at 822 n.1 and ***Allshouse***, 985 A.2d at 854). Rather, the totality of the circumstances must be examined.

Recently, the Superior Court opined,

> A document or statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." A document or statement has such a primary purpose if it is created or given "under circumstances which would lead an objective witness reasonably to believe that the [document or] statement would be available for use at a later trial[.]" If a document or statement is testimonial, then the witness who prepared it must testify at trial, unless he or she is unavailable and the defendant had a prior opportunity for cross-examination.

Brown, ***supra*** at *2 (internal citations omitted) (brackets in original).

An objective witness hearing a claim that a person observed seeing a sex crime would reasonably believe that the statement would be available for use at a trial. The statement accused an individual of a specific and particularly heinous crime. Certainly, under the circumstances presented herein, the statement made to a private citizen would lead an objective witness reasonably to believe that the statement would be available for use at a subsequent criminal prosecution. Moreover, in the instant case, the hearsay statement from Mr. Calhoun was used as a weaker substitute for live testimony identifying Mr. Sandusky as the perpetrator of a crime.

Given that Mr. Calhoun's hearsay statement was the **only** direct evidence of the charges related to Victim #8, this issue should have been raised on direct appeal, and if it had, the Superior Court likely would have reversed Mr. Sandusky's convictions on all charges relating to Victim #8. Since the hearsay statement of identification was a weaker substitute for live testimony, it could only be used if Mr. Calhoun was unavailable and the accused had a prior opportunity to cross-examine him. ***See e.g. Crawford***, 541 U.S. at 68; ***Abrue***, 11 A.3d at 493. Since Mr. Sandusky was not afforded an opportunity to cross-examine Mr. Calhoun, his confrontation clause rights were violated.

XVIII. Trial counsel and Direct Appellate Counsel were ineffective for failing to appeal Mr. Sandusky's convictions relating to Victim #8 as lacking sufficient evidence.

In post-sentence motions, trial counsel raised a vague, boilerplate allegation that the evidence against Sandusky was insufficient to sustain the guilty verdicts. Nevertheless, especially with respect to the charges relating to unidentified Victim #8, the alleged boy in the shower viewed by Mr. Calhoun, direct appellate counsel failed to raise a claim on appeal that those convictions were supported by insufficient evidence. Moreover, no victim ever came forward and asserted that Mr. Sandusky committed this assault against him in the incident to which Mr. Petrosky testified. The conviction, based on a statement that was either recanted or contradicted by the witness who provided the only evidence against him, lacked sufficient evidence to be sustained by the Superior Court.

Indeed, the trial court expressly recognized the potential problem with the convictions relating to Victim #8 in his sentencing statement. The Court stated:

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

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

Nevertheless, direct appellate counsel inexplicably abandoned this claim on appeal without any rational basis. Had this claim been preserved, it likely would have resulted in a reversal of those convictions since the Pennsylvania Supreme Court has recognized that "[f]undamental due process requires that no adjudication be based solely on hearsay

evidence." ***Commonwealth ex rel. Buchanan v. Verbonitz***, 581 A.2d 172, 174 (Pa. 1990) (plurality).[18]

The Commonwealth in its Second Answer relied on a decision that does not support its position, in submitting that a conviction can be based solely on hearsay evidence. Indeed, **the rules of criminal procedure had to be changed to authorize hearsay alone to be considered for the much lower *prima facie* burden at a preliminary hearing.** ***See Commonwealth v. Ricker***, 120 A.3d 349 (Pa. Super. 2015) (discussing change in law and rule of procedure with respect to hearsay at a preliminary hearing), *allowance of appeal granted*, 135 A.3d 175 (Pa. 2016).

The case cited by the Commonwealth is ***Commonwealth v. Sanford***, 580 A.2d 784 (Pa. Super. 1990). Reliance on that case is misplaced. ***Sanford*** did not involve a case where the sole evidence of a crime was hearsay. Therein, a doctor had examined the child and there was corroborating physical evidence. Thus, the very case the Commonwealth relied on in its Answer did not state what it alleges. Instantly, there was no corroborating physical evidence as to Victim #8. The Commonwealth's discussion of ***Sanford*** does not support its conclusion because ***Sanford*** involved evidence beyond the hearsay.

Since the elements of the crimes could only be established based on hearsay testimony, the evidence was insufficient and deprived Mr. Sandusky of due process. As a result, Mr. Sandusky should be awarded a new trial based on the ineffectiveness of trial

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18 Although a plurality decision, a majority of justices agreed with this proposition since the secondary opinion in that case, authored by Justice Flaherty and joined by Justice Cappy, relied on a due process analysis to conclude that hearsay alone could not be used at a preliminary hearing. That aspect of the case is no longer valid due to the adoption of Pa.R.Crim.P. 543(e).

and appellate counsel for failing to preserve this issue, and this Court should enter judgment of acquittal on the charges relating to Victim #8.

XIX. Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky.

Mr. Amendola opened to the jury by stating, "This is a daunting task. I'll be honest with you. I'm not sure how to approach it. The Commonwealth has overwhelming evidence against Mr. Sandusky." N.T. Opening Remarks, 6/11/12, at 3. This statement was prejudicial and inaccurate. While the Commonwealth had a large number of alleged victims, they did not have overwhelming evidence. There was no physical evidence and in the instance in which there was an alleged eyewitness, the victim himself did not testify, and the eyewitness did not see a sexual assault but simply assumed that was what occurred. Further, with respect to the charges related to a second unidentified victim, only hearsay testimony was provided.

This case primarily involved testimony from the alleged victims, victims who had provided multiple inconsistent statements, including repeatedly indicating that Mr. Sandusky had not abused them. The evidence was far from overwhelming. To the contrary, this case rested on the credibility of the alleged victims. Mr. Amendola himself stated in his closing summation, "there is absolutely no direct evidence other than what came from the mouths of those individuals who testified in court, the eight young men, about these allegations. There's no physical evidence, not one piece of physical evidence. In two of the cases the Commonwealth brought, we don't even have victims—not a victim in two of the cases." N.T., 6/21/12, at 37.

Mr. Amendola's opening statement stands in stark contrast to his closing argument. "The purpose of an opening statement is to apprise the jury how the case will develop, its

background and what will be attempted to be proved[.]" ***Commonwealth v. Montgomery***, 626 A.2d 109, 113 (Pa. 1993). In ***Commonwealth v. Parker***, 919 A.2d 943, 950 (Pa. 2007), the High Court posited that "as a practical matter **the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case.**" ***See also Montgomery, supra*** at 113 (emphasis added).

While the decision on whether to provide an opening statement is one of trial strategy, at the very least an issue of material fact exists as to why Mr. Amendola would incorrectly tell the jury that the Commonwealth had overwhelming evidence. Precisely at the moment that the jury was forming its first and lasting impression of the case, ***see Parker, supra***, Mr. Amendola erroneously conceded that the Commonwealth had strong evidence of guilt. There can be no reasonable basis for making this statement when it was inaccurate, ***cf. Commonwealth v. Reed***, 42 A.3d 314 (Pa. Super. 2012) (trial counsel's mistake of law was not reasonable); ***Commonwealth v. Moore***, 715 A.2d 448, 452 (Pa. Super. 1998) (trial counsel ineffective for introducing defendant's criminal history on mistaken interpretation of law); ***Commonwealth v. Hull***, 982 A.2d 1020 (Pa. Super. 2009) (trial counsel ineffective when decision not to call character witnesses based on a misunderstanding of the role of character evidence in defense). and counsel knew of the deficiencies of the Commonwealth's case as evidenced by his closing remarks. Mr. Amendola's statement could not have been reasonably calculated to advance Mr. Sandusky's interests.

Equally important, Mr. Amendola's statement prejudiced Mr. Sandusky because, at the most critical stage of the trial, instead of vigorously contesting the strength of the Commonwealth's case, he incorrectly aided the Commonwealth by saying it had

overwhelming evidence. Mr. Rominger, in his affidavit, articulates the obvious, "Mr. Amendola's statement during opening that there was overwhelming evidence against our client cast Mr. Sandusky as guilty in the minds of the jurors and that by the end of the testimony by the third witness our defense was largely crippled." Affidavit of Karl Rominger, at 6 ¶ 12. This gaffe is even more problematic when considered in the context of Mr. Amendola stating that Mr. Sandusky would testify and then electing not to present Mr. Sandusky's testimony. Moreover, Mr. McGettigan actually projected a slide of the transcript of Mr. Amendola's opening statement during his closing and repeated Mr. Amendola's prejudicial statement. ***See*** N.T., 6/21/12, at 100. In sum, this claim has arguable merit and counsel could have no reasonable basis for erroneously telling the jury that the Commonwealth had overwhelming evidence at perhaps the most critical part of the trial, which thereby caused actual prejudice.

XX. Trial counsel were ineffective by not seeking a mistrial after the prosecutor improperly made comments based on Mr. Sandusky's silence.

Writing almost fifty years ago, Justice Musmanno discussed the impropriety of commenting on a defendant's silence, stating,

> A defendant is not required to deny any accusation levelled at him in a trial no matter how inculpatory. He may be charged with the most serious of offenses, including murder and high treason. A cloud of witnesses may testify to circumstances, events, episodes which wrap him in a serpent's embrace of incrimination, but no inference of guilt may be drawn from his failure to reply or to take the witness stand. Indeed, and properly so, ***if the prosecuting attorney*** or the judge ***makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him,*** and a verdict of guilt follows, ***a new trial is imperative.***
>
> . . . .
>
> A tacit admission is still an unwilling performance. It is more gentle because it is silent, but it is as insidious as monoxide gas which does not proclaim its presence through sound or smell. A forced confession is a steam-

> chugging locomotive moving down the track, blowing its whistle and clanging its bell with the victim tied to the rails. A tacit admission is a diesel locomotive silently but relentlessly moving forward without audible signals and striking the victim unawares. The approach is different, the effect is the same.

Commonwealth v. Dravecz, 227 A.2d 904, 906-907 (Pa. 1967) (emphasis added). In his carefully crafted summation, the prosecutor in this case attempted to skillfully infer Mr. Sandusky was guilty because of what he did not say to Bob Costas and because he did not testify. A "new trial is imperative." ***Id.*** at 906.

The Fifth Amendment provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. In similar fashion, Article I, § 9 of the Pennsylvania Constitution reads that a person "cannot be compelled to give evidence against himself[.]" This provision was contained in the original 1776 Pennsylvania Constitution, over a decade before the federal bill of rights was ratified.

During closing arguments, the prosecution inappropriately referenced the fact that Mr. Sandusky elected not to testify at trial in this matter while simultaneously commenting on the fact that Mr. Sandusky participated in an ill-advised pre-trial media interview with Bob Costas of NBC Sports. It is axiomatic that in Pennsylvania, "defendants have an 'absolute right to remain silent and not to present evidence at trial' and that prosecutors cannot comment on a defendant's refusal to testify." ***Commonwealth v. Molina***, 104 A.3d 430, 435 (Pa. 2014) (hereinafter "***Molina II***") (*citing* ***Griffin v. California***, 380 U.S. 609, 615 (1965)) (internal quotations omitted).

A court may grant a new trial on the basis of improper commentary by a prosecutor if "the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would then prevent them

from properly weighing the evidence and rendering a true verdict." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004). In ***Molina II***, the Pennsylvania Supreme Court recently conclusively and unequivocally ruled that the jurisprudence and public policy of Pennsylvania, as embedded in the Pennsylvania Constitution, "prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense." ***Id.*** at 451. The Pennsylvania Superior Court in ***Commonwealth v. Molina***, 33 A.3d 51 (Pa. Super. 2011) (*en banc*), ("***Molina I***"), ruled similarly with regard to the Fifth Amendment.

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

> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question [sic]. **I wouldn't know. I only heard him on TV. Only heard him on TV.** So that's his explanation there. He just enjoys young children.

N.T., 6/21/12 at 140-142 (emphasis added). The prosecutor again improperly commented on Mr. Sandusky's refusal to testify throughout his closing argument as follows:

> The defendant's explanation on television, is there anything else you missed? Mr. Amendola read it with great animation. I'm not sure if there was anything – any other important information communicated **because he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today**.
>
> ...
>
> One thing he didn't which he could have provided to Bob Costas, **he could have provided it to anybody at any time**
>
> ...

> **But he didn't provide that name to anybody, ever,** certainly not to Bob Costas, no. He forgot that.

Id. at 145-46. (emphases added).

Although trial counsel objected to this statement at the close of the prosecutor's summation, based on an approved agreement regarding holding objections, counsel failed to move for a mistrial. As a result, the Superior Court determined that the claim was waived. Mr. Sandusky submits that the Commonwealth would be hard pressed to commit more egregious conduct in its closing argument than to comment on the defendant's right to remain silent at trial. The clear intent of these statements was to prejudice Mr. Sandusky to the jury based on the fact that he did not testify at trial in light of giving his pretrial interviews. Specifically, the Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to this jury directly.

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

In fact, the prosecutor's comment was not "fair rebuttal" to a defense argument; rather, it was an effort to bolster the Commonwealth's own evidence regarding the interviews and to draw attention to the fact that Mr. Sandusky did not to testify at trial in this matter. ***Compare Commonwealth v. Culver***, 51 A.3d 866, 876 (Pa. Super. 2012) (recognizing that an improper comment by a prosecutor may be appropriate if it amounts

to a fair rebuttal to a defense comment or argument or is merely "oratorical flair") *with* ***Poplawski, supra*** (holding that statements were improper commentary by a prosecutor invoking the jury to consider issues of general community interest beyond the facts of the case by "sending a message").[19]

Here, the prosecutor's repeated comments to the fact that Mr. Sandusky failed to testify crossed the line from fair rebuttal or oratorical flair to highlighting Mr. Sandusky's silence and directly pleading to the jury to draw an adverse inference from his failure to testify. As such, the commentary is beyond the pale, and a new trial would have been warranted on direct appeal had trial counsel properly preserved an objection. This conduct was more prejudicial than that in ***Molina***, as the silence in ***Molina*** concerned pre-arrest silence – in other words, silence at a time before a defendant is required to be advised of his ***Miranda*** rights. In the instant case, the commentary was a direct attack on Mr. Sandusky's right not to testify at trial, coupled with his pre-trial media statements, as substantive evidence of his guilt. Indeed, the prosecutor impugned Mr. Sandusky for not clarifying any of his statements in court to the jury. There can be no greater infringement on his right to remain silent at trial than these statements.

In ***Commonwealth v. DiPietro***, 648 A.2d 777 (Pa. 1994), the Supreme Court reversed a conviction based on a prosecutor's summation commenting on a defendant's

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19 The Commonwealth in its first Answer asserted that the prosecutor's argument was fair rebuttal. However, it did not cite to anywhere in the record where trial counsel made any statements that would allow for the prosecution to comment on Mr. Sandusky's silence. Even if the Commonwealth could cite to such a place, opening the door to such commentary would be ineffective. While a prosecutor is permitted to argue with force, such argument is not to include references to a defendant's silence. The added argument that the prosecutor's comments were oratorical flair is obviously a boilerplate position since it ignores that references to silence are highly improper. It is evident that the Commonwealth was attempting to infer guilt by Mr. Sandusky's silence.

silence. In ***DiPietro***, after an argument inside a bar, the defendant drove his car over a curb, striking the victim. DiPietro did not inform police that he hit the victim by accident. There the prosecutor stated,

> [W]hy doesn't he tell that man, Trooper Harriman, My golly, good grief, what did I do? It was a terrible, terrible accident. I've been having this car problem. The brakes are bad. It kept stalling.
>
> When do we hear that? We hear that today from the witness stand. We didn't hear that from any of the police officers. Doesn't common sense simply tell you that if you're in that kind of situation, that would be the first thing out of your mouth?
>
> [Objection]
>
> I would suggest that that would be the first thing out of a man's mouth when he's talking to this officer about this specific incident.

DiPietro, ***supra*** at 778 (brackets in original). Here, the prosecutor's comment is even more significant because the comment pertains to Mr. Sandusky's silence at trial.

Pointedly, Mr. Sandusky is entitled to a new trial even without an evidentiary hearing relative to this claim. As a matter of law, the prosecutor's statements that he only heard Mr. Sandusky on television along with his three references that Mr. Sandusky could have provided the jury with answers that would have solved many problems are grounds for a new trial. Specifically, unaddressed by the Commonwealth in its Answers was the prosecutor's statement that Mr. Sandusky, "didn't provide you with something that could have been enormously helpful to us, could have solved many problems today," N.T., 6/21/12, at 145. Nor does the Commonwealth acknowledge that the prosecutor also posited, "he could have provided it to anybody at anytime," and, "he didn't provide that name to anybody, ever[.]" ***Id.*** at 146. Thus, at least five separate times, the prosecutor

pointed out to the jury that Mr. Sandusky had not testified or provided information to anyone that would have showed his innocence.

Trial counsel had no reasonable strategic basis for failing to move for a mistrial or request **any** remedy for the Commonwealth's misconduct. Had trial counsel not waived this issue for appellate review, given the violation of Mr. Sandusky's right to remain silent, there is a reasonable probability that the Superior Court would have vacated Mr. Sandusky's conviction and remanded this matter for a new trial. Since the Commonwealth violated Mr. Sandusky's rights under Article I, Section 9 of the Pennsylvania Constitution, ***Molina II, supra***, and the Fifth Amendment to the Constitution of the United States, ***Molina I***, and since trial counsel had no reasonable basis for failing to move for a mistrial based on the inappropriate argument, this Court must grant Mr. Sandusky a new trial.

XXI. Trial counsel were ineffective for failing to object to improper opinion testimony by an unqualified expert.

At trial, the Commonwealth elicited the testimony of Jessica Dershem, a caseworker with Clinton County Children and Youth Services. N.T., 6/12/12 at 123-24. During her direct examination, Ms. Dershem testified to numerous unfounded and irrelevant facts, and she was permitted to render an expert "professional" opinion, as well as her own personal opinion, without being qualified or offered as an expert in any particular field of expertise. Specifically, Ms. Dershem testified to the following inadmissible or irrelevant facts:

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

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

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

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

Inexplicably, this information came from a leading question from trial counsel. Moreover, Ms. Dershem was permitted to express an expert opinion without having been offered or qualified as an expert in the following matters:

a. Ms. Dershem stated as a "trained professional" that she believed there was an "inappropriate" relationship between a middle aged adult and a small child. N.T., 6/12/12, at 181, Appendix, P. 636.

b. The Commonwealth asked Ms. Dershem, "in both [her] professional opinion and personal opinion, does the first portion of those things that I have read to you wrapped up in Aaron for three years, blowing on his stomach, lying on top, can't honestly answer if my hands were below his pants, sounds like someone who has an inappropriate relationship?" N.T., 6/6/12, at 182-183 at Appendix, P. 637.

First, Ms. Dershem was not offered as an expert and not qualified to give her "professional opinion" or her personal opinion on any matter at issue, and second, the issue of an "inappropriate relationship" was not only legally irrelevant, but highly prejudicial as the entire line of questioning seeks to prejudice Mr. Sandusky with the jury to convict him on the grounds of inappropriate conduct. Despite the impropriety of this testimony, trial counsel failed to object to this highly prejudicial and totally irrelevant line of questioning. By permitting Ms. Dershem to testify as to her faux "expert" opinion, without objection,

trial counsel gave significance and weight to the notion that Mr. Sandusky could be convicted of "inappropriate" conduct.

The Pennsylvania Superior Court has noted that "Pennsylvania Rule of Evidence 701 limits a lay witness's opinion testimony to "those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge[.]'" ***Cominsky v. Donovan***, 846 A.2d 1256, 1259 (Pa. Super. 2004). Here, Ms. Dershem was presented as a lay witness, but the Commonwealth asked her to present opinion testimony based on her specialized knowledge, training, and experience as a caseworker with the Clinton County Office of Children and Youth Services. Had trial counsel made an objection, the trial court would not have permitted her unfounded expert opinion.

Mr. Sandusky was prejudiced because Ms. Dershem was never offered as an expert, but the jury was permitted to consider her as if she were an expert because trial counsel allowed her improper testimony to come in without any opposition. Since trial counsel can have no rational basis for failing to object to this issue, trial counsel was ineffective for failing to object to this issue. Trial counsel was ineffective for failing to preserve this issue.

XXII. Mr. Amendola was ineffective for promising the jury that Mr. Sandusky would testify at trial and not calling him.

During Mr. Amendola's opening statement, Mr. Amendola made several promises to the jury that Mr. Sandusky would testify. ***See*** N.T. , 6/11/12, Vol. 2, at 9, 26.[20]

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20 The Commonwealth contended in its First Answer that the only statement in Mr. Amendola's opening that suggests Mr. Sandusky would testify is when he set forth, "[Mr. Sandusky] will tell you later probably, advice was given don't go[,]" to a CYS proceeding.

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

The Commonwealth overlooks that counsel also averred, "What you're going to hear is that Jerry Sandusky grew up in Washington, PA. That's a little town in the southwest part of the state southwest of Pittsburgh. He grew up in Washington, PA. He grew up an only child. His parents loved kids but they only had Jerry. And growing up his mom and dad loved kids so much they agreed to take over a recreation center." N.T., Opening Statement, 6/11/12, at 18. Counsel continued relating matters that clearly were items that Mr. Sandusky would have testified to. In fact, counsel added, "After going to Penn State---and he'll tell you about his Penn State life." ***Id.*** at 19. It is evident from the entire context of Mr. Amendola's argument that he was maintaining that Mr. Sandusky would testify. To the extent the Commonwealth claims otherwise, it raises a genuine issue of material fact that warrants an evidentiary hearing.

In the present case, trial counsel promised the jury that they would hear Mr. Sandusky deny the conduct for which he was charged and explain his interaction with the men involved. Trial counsel, having promised the jury that Mr. Sandusky would speak to them and explain his side of events, broke that promise, undermining the defense and completely destroyed the defense's credibility. Mr. Sandusky was prejudiced by the broken promise. ***See Harris, supra; McAleese, supra.***

Here, counsel had no reasonable basis not to present Mr. Sandusky, where the sole reason given was that Matt Sandusky would be offered in rebuttal. However, the Commonwealth in its Second Answer claimed that Matt Sandusky would not testify in rebuttal. Nonetheless, assuming the Commonwealth is mistaken, and that it did inform trial counsel that it would call Matt Sandusky, Matt Sandusky would not have been a proper rebuttal witness unless trial counsel opened the door to such testimony on direct examination. Succinctly put, Matt Sandusky could not rebut testimony from his father in which Mr. Sandusky denied abusing the accusers. In addition, the Commonwealth could not cross-examine Mr. Sandusky on non-charged alleged prior bad acts that the Commonwealth never provided notice of prior to trial because cross-examination is limited to the scope of direct examination and it runs afoul of Pa.R.E. 404(b).

Had Mr. Sandusky testified, as promised, there is a reasonable probability that the jury would not have convicted him of at least one of the charges in this matter that they ultimately found him guilty. Mr. Sandusky would have testified that he did not abuse any of the accusers who testified, or Victim 2, or Victim 8. He would have indicated that his basement was not sound proof and that he never drove a silver convertible. Mr. Sandusky would have testified to his schedule as a coach, and provided evidence of that schedule,

factually precluding his ability to have committed some of the allegations. He would have testified to the reasons for his retirement in 1999 and that it had nothing to do with being forced out due to suspicion that he engaged in wrongdoing. Mr. Sandusky would have asserted that he grew up in a recreation center and that using a public shower with others was common place. He would maintain that he never sexually abused any of the accusers in a shower.

He would have stated that Allan Myers was the person seen by Michael McQueary and that he did not sexually abuse him. In this regard, the Commonwealth could not have called Mr. Myers to rebut this testimony in light of the fact that they have asserted that they did not believe Allan Myers was Victim 2. Mr. Sandusky would have explained that he actually sought out S.P. to testify on his behalf and that S.P. initially agreed to be a witness for Mr. Sandusky and that he had continued to visit the Sanduskys until two months before the first presentment. This is but a sampling of the testimony that Mr. Sandusky would have offered.

CONCLUSION

For reasons more fully outlined *supra*, Mr. Sandusky has raised genuine issues of material fact regarding those claims that he has not yet been afforded an evidentiary hearing. Mr. Sandusky, therefore, is entitled to an evidentiary hearing on those claims, or, in the alternative, is entitled to relief in the form of a new trial as a matter of law.

Respectfully submitted:

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

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

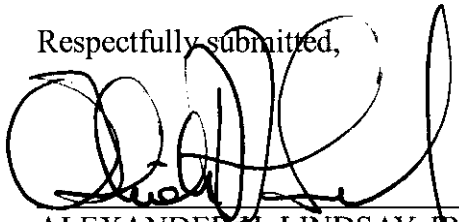
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of July, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

Via First Class Mail

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

Respectfully submitted,



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