



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

COMMONWEALTH OF

v.

GERALD A. SANDUSKY,

PETITIONER.

CP-14-CR-2421-2011

CP-14-CR-2422-2011

HONORABLE SENIOR JUDGE  
JOHN M. CLELAND

*TYPE OF PLEADING:*

BRIEF RE: SUBJECT MATTER  
JURISDICTION CLAIM

*FILED ON BEHALF OF:*

PETITIONER, GERALD A. SANDUSKY

*COUNSEL FOR PETITIONER:*

ALEXANDER H. LINDSAY, ESQUIRE  
Pa. Supreme Court Id. No. 15088

J. ANDREW SALEMME, ESQUIRE  
Pa. Supreme Court Id. No. 208257

THE LINDSAY LAW FIRM  
110 EAST DIAMOND STREET, STE. 300  
BUTLER, PENNSYLVANIA 16001  
PHONE 724.282.6600  
FAX: 724.282.2672  
Email: al.lindsay186@gmail.com

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## TABLE OF CITATIONS

### Cases

*Commonwealth v. Atwood*, 601 A.2d 277 (Pa. Super. 1991)

*Commonwealth v. Bethea*, 828 A.2d 1066 (Pa. 2003)

*Commonwealth v. Bradfield*, 508 A.2d 568 (Pa. Super. 1986)

*Commonwealth v. Hale*, 85 A.3d 570 (Pa. Super. 2014), *affirmed*, 128 A.3d 781 (Pa. 2015)

*Commonwealth v. Iacino*, 415 A.2d 61 (Pa. 1980)

*Commonwealth v. Little*, 314 A.2d 270 (Pa. 1974)

*Commonwealth v. McCauley*, 588 A.2d 941 (Pa. Super. 1991)

*Commonwealth v. Sarapa*, 13 A.3d 961, 962 (Pa. Super. 2011)

*Commonwealth v. Whanger*, 30 A.3d 1212 (Pa. Super. 2011) (Bowes, J., concurring)

*In re: County Investigating Grand Jury of October 18, 1982 (Appeal of Stout)*, 460 A.2d 249 (Pa. 1983)

*In re C.S.*, 63 A.3d 351 (Pa. Super. 2013)

*In re Melograne*, 812 A.2d 1164 (Pa. 2002)

*In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006)

*Riedel v. Human Relations Comm'n of Reading*, 739 A.2d 121 (Pa. 1999)

### Statutes

1 Pa.C.S. § 1921

1 Pa.C.S. § 1922

23 Pa.C.S. § 6303

42 Pa.C.S. § 4542

42 Pa.C.S. § 4548

42 Pa.C.S. § 9542

42 Pa.C.S. § 9543(a)(2)(i) and (viii)

Rule

Pa.R.Crim.P. 556.4(B)(1)(c)

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this issue under 42 Pa.C.S. § 9542 and 42 Pa.C.S. § 9543(a)(2)(i) and (viii).

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## STATEMENT OF THE QUESTION INVOLVED<sup>1</sup>

1. Whether the allegations by Aaron Fisher were improperly submitted to the original grand jury in this matter, which lacked subject matter jurisdiction to consider crimes that did not arise out of and/or were unrelated to an investigation into public corruption or organized crime, nor did testimony before the grand jury during an ongoing investigation into public corruption and organized crime reveal the alleged crime.

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<sup>1</sup> In Mr. Sandusky's Second Amended Petition, he raised the following issue:

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 and not seeking to quash the grand jury presentment based on the grand jury lacking subject matter jurisdiction.

*See* Second Amended PCRA Petition, 3/7/16, at 25.

Mr. Sandusky's argument in the latter respect was premised on the initial submission of Aaron Fisher's allegations and was argued in the petition as a stand-alone non-waivable subject matter jurisdiction issue and an ineffective assistance of counsel claim. The PCRA Court in its order directing counsel to file a brief on the issue of subject matter jurisdiction did not refer to the first aspect of Mr. Sandusky's claim regarding deprivation of his due process rights and failing to abide by the CPSL nor reference that aspect of the claim that pertains to ineffective assistance of counsel. The order specifically states, "that defense counsel shall, on or before May 20, 2016, submit a brief on the issue of whether the grand jury lacked subject matter jurisdiction to investigate the allegations regarding the Defendant." Accordingly, this brief is limited to that aspect of Mr. Sandusky's claim. As claims related to subject matter jurisdiction cannot be waived, and the Court's order related to the pure subject matter jurisdiction issue it is unnecessary to plead the issue as an ineffective assistance of counsel claim in this brief.

## STATEMENT OF THE RELEVANT FACTS

Following a disagreement with his mother regarding her insistence that he go with Mr. Sandusky to an event rather than with his friends, Aaron Fisher, then fifteen, told his mother that Mr. Sandusky touched him inappropriately overtop his clothing. Aaron Fisher's mother contacted the Central Mountain High School principal and guidance counselor on or about November 18, 2008.<sup>2</sup> On or about November, 19, 2008, Aaron Fisher met with the principal and guidance counselor. He did not allege that Mr. Sandusky engaged in oral or anal sex or any sexual conduct.

Jessica Dershem, a twenty-five year old Clinton County caseworker, subsequently interviewed Aaron Fisher for one hour. That interview was taped. Aaron Fisher did not disclose that sexual intercourse of any type occurred. Instead, Aaron Fisher stated that Mr. Sandusky cracked his back approximately thirty times. Ms. Dershem apparently reported to Mr. Rosamilia that Aaron Fisher was uncooperative because he did not actually disclose any sexual abuse. The pair then sent Aaron Fisher to Michael Gillum, a psychologist.

On November 20, 2008, Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky. In her report, Ms. Dershem wrote that Mr.

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<sup>2</sup> Central Mountain High School is located in Clinton County, Pennsylvania.

Sandusky was involved in ten back cracking episodes and she notified Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing. In that report, she misstated that Aaron Fisher alleged to her that Mr. Sandusky sexually abused or exploited him. Michael Gillum would acknowledge in his book with Aaron Fisher, *Silent No More*, that he wrote the report and provided it to Ms. Dershem. It appears that while Mr. Fisher made no allegations of sexual misconduct to Ms. Dershem, upon questioning by Mr. Gillum, he indicated sexual abuse transpired.

Police then interviewed Aaron Fisher, specifically Trooper Joseph Cavanaugh and Joseph Akers. Also present was Ms. Dershem. Trooper Cavanaugh did not tape-record the interview because he believed that such a recording would aid a defense attorney. However, 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 still had yet to inform law enforcement authorities that Mr. Sandusky had sexually abused him. In fact, Aaron Fisher told state police that Mr. Sandusky had not touched his penis



nor did oral sex transpire. Trooper Cavanaugh's interviews with four additional students with ties to Mr. Sandusky revealed no sexual allegations.

Mr. Sandusky himself was questioned in January of 2009 by Clinton County CYC. Ms. Dershem informed Mr. Sandusky on January 2, 2009, that he was the subject of a report of suspected child abuse. Aaron Fisher had not at this time made any allegations relative to sexual misconduct. Ms. Dershem and Clinton County CYC solicitor, Michael Angelelli, interviewed Mr. Sandusky. He acknowledged cracking Aaron Fisher's back, as well as hugging him and kissing him on the forehead the way a father does with a child. However, he adamantly denied that anything sexual had ever occurred.

Ms. Dershem, after a conference with service director Gerald Rosamalia and Angelelli, notified Childline. Ultimately, Trooper Cavanaugh met with Clinton County District Attorney Michael Salisbury regarding the allegation of inappropriate touching. District Attorney Salisbury transferred the case to Centre County because the alleged conduct occurred in that county. The Center County District Attorney had a conflict of interest based on his wife being the sister of the adopted daughter of Mr. Sandusky. Accordingly, he referred the case to the Office of Attorney General ("OAG"). The OAG assumed jurisdiction over the matter on March

18, 2009. Rather than pursue the case as a prosecution for sexual misconduct 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.

Significantly, the matter was submitted on the grounds that a “founded” report of sexual abuse had been determined by the Clinton County CYC. However, a founded report could only exist where there had been a judicial determination that Aaron Fisher had been abused. 23 Pa.C.S. § 6303. At the time the case was submitted, the grand jury had not, through another investigation, learned of any information implicating Mr. Sandusky in criminal wrongdoing.

## SUMMARY OF THE ARGUMENT

42 Pa.C.S. § 4542 necessarily limits the jurisdiction of an investigating grand jury. In contrast, § 4548 governs the powers of a grand jury, which are broad. However, jurisdiction and power are distinct legal concepts. The correct reading of § 4548, in conjunction with § 4542, is that an investigating multi-county grand jury has power to investigate any crime occurring within those counties, when it has jurisdiction, because the crimes are related to an inquiry into public corruption or organized crime, or, if during the investigation into public corruption or organized crime that investigation reveals other crimes unrelated to public corruption and organized crime, then the grand jury may investigate those crimes.

However, a multi-county grand jury has no jurisdiction to investigate into a crime totally unaffiliated with organized crime or public corruption simply because it occurred in one of the counties. Taking this position to its logical conclusion would mean that an investigating grand jury could investigate DUI crimes entirely unrelated to organized crime or public corruption as well as countless other crimes that transpired in the counties regardless of any connection to organized crime or public corruption. This was not the intent of the General Assembly in promulgating the Grand Jury Act and would have the potential effect of eviscerating the traditional

criminal complaint process in those counties where a grand jury sits. The intent of the General Assembly is paramount and is determined by the language of the statute. The language of the statute does not give a grand jury *carte blanche* to investigate all crimes that occur in a county once a grand jury is impaneled.

## ARGUMENT

In this case, the Commonwealth referred the original allegations by a single victim, Aaron Fisher, to a statewide investigating grand jury. Ordinarily, the grand jury process is used to investigate public corruption and organized crime. By its very definition, a multi-county grand jury only has jurisdiction to inquire into public corruption and organized crime. 42 Pa.C.S. § 4542.

Specifically, that portion of the statute reads, “A Statewide or regional investigating grand jury convened by the Supreme Court upon the application of the Attorney General **and having jurisdiction to inquire into organized crime or public corruption or both** under circumstances wherein more than one county is named in the order convening said investigating grand jury.” Subject matter jurisdiction relates to competency and can never be waived. *Commonwealth v. Bethea*, 828 A.2d 1066 (Pa. 2003); *Commonwealth v. Little*, 314 A.2d 270 (Pa. 1974) (“An objection to lack of subject-matter jurisdiction can never be waived; it may be raised at any stage in the proceedings by the parties or by a court in its own motion.”); *Commonwealth v. Whanger*, 30 A.3d 1212, 1220 (Pa. Super. 2011) (Bowes, J., concurring).

Section 4548 provides a grand jury with power to investigate any crime, such as murder, drug dealing, prostitution, etc... that is related to or arose out of public corruption and organized crime. It does not have jurisdiction to investigate crimes untethered from its inquiry into public corruption or organized crime. *See* 42 Pa.C.S. § 4542. To interpret the Grand Jury Act in another manner would render language of the statute surplusage. *See also* 1 Pa.C.S. § 1922 (presumption exists “That the General Assembly intends the entire statute to be effective and certain.”).

“Statutory interpretation presents a question of law and is evaluated *de novo*.” *In re C.S.*, 63 A.3d 351, 354 (Pa. Super. 2013); *Commonwealth v. Sarapa*, 13 A.3d 961, 962 (Pa. Super.2011). “In interpreting a statute, [courts] are called to ‘ascertain and effectuate the intention of the General Assembly.’” *Commonwealth v. Hale*, 85 A.3d 570, 580 (Pa. Super. 2014), *affirmed*, 128 A.3d 781 (Pa. 2015). “Every statute shall be construed, if possible, **to give effect to all its provisions**. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* (emphasis added). A court “may not render language superfluous or assume language to be mere surplusage.” *Id.*

Where the words of a statute are not explicit, a court discerns the original intent of the General Assembly by looking to:

(1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other statutes upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such statute. 1 Pa.C.S. § 1921.

*In re C.S.*, *supra* at 355.

Instantly, § 4542 must be read together with § 4548. The plain language of Section 4542 explicitly defines a multi-county grand jury as having jurisdiction to inquire into organized crime and public corruption. In this respect, the maxim *expressio unis est exclusio alterius*, which translated means that the expression of one thing is the exclusion of another, applies. Having explicitly expressed that a multi-county grand jury has jurisdiction to inquire into organized crime and public corruption it necessarily does not have jurisdiction to inquire into areas that do not arise out of its investigation into organized crime and public corruption.

As explained in *In re Melograne*, 812 A.2d 1164 (Pa. 2002), there is an important difference between subject matter jurisdiction and the power to act. The *Melograne* Court set forth,

some litigants, while believing they are raising a claim of subject matter jurisdiction, are actually posing a challenge to

the tribunal's authority, or power, to act. *See Riedel v. Human Relations Comm'n of Reading*, 559 Pa. 34, 739 A.2d 121, 124 (1999). This confusion between the meaning of the terms “jurisdiction” and “power” is not surprising. While the terms are not synonymous, they are often used interchangeably by judges and litigants alike. *Id.* In *Riedel*, we teased out the distinctions between these terms, explicating that

[j]urisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result.

*Id.*

*Melograne, supra* at 1167. While it is true that, “[w]here properly impaneled, the purpose for which a grand jury is convened does not restrict the grand jury from investigating actions which constitute either criminal activity or probable violations of the criminal laws of the Commonwealth,” *McCauley, supra* at 945, citing *In re: County Investigating Grand Jury of October 18, 1982 (Appeal of Stout)*, 460 A.2d 249 (Pa. 1983), that investigation must be as a result of an inquiry into public corruption or organized crime for the grand jury to have jurisdiction.

Moreover, to the extent that one could conclude that the plain language of the statute is ambiguous, the occasion and necessity for the statute and the circumstances for which it was enacted relate specifically to investigations into public corruption and organized crime. The Investigating



Grand Jury Act was not intended to supplant the ordinary criminal process. In this respect, it must be noted that the case relied on by the Commonwealth in its Answer, *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006), rejected a newspapers argument, as specifically framed therein, which did not invoke or discuss Section 4542. The Pennsylvania Supreme Court explicitly stated that it rejected the argument therein “as it is presently framed.” *Id.* at 512.

Furthermore, therein, a newspaper was trying to avoid a subpoena to turn over hard drives, and in doing so asserted that claims that public corruption and organized crime were involved were false. The issue herein does not involve the issuance of subpoenas to investigate potential public corruption nor is the argument that claims of public corruption or organized crime are false.

Rather, Mr. Sandusky's position is that the investigation was wholly unrelated to any allegation of organized crime or public corruption or an inquiry into such areas. Section 4542 plainly provides that a multi-county grand jury only has jurisdiction over investigations into crimes that arise out of public corruption and/or organized crime. This is consistent with the empanelment aspect of the statute and the statutory section relied upon by the Commonwealth. Since the crimes being investigated in the case cited by

the Commonwealth in its Answer were related to an investigation into public corruption, it is inapposite.

Mr. Sandusky adds that he is not arguing that police or law enforcement could not investigate the alleged sex offenses. Nor does Mr. Sandusky assert that the Office of Attorney General (“OAG”) cannot investigate crimes. The position that is leveled is that the grand jury investigation into Aaron Fisher's allegation was improper because the crime alleged did not involve an inquiry into public corruption or organized crime.

To the extent that the Commonwealth in its Answer suggested that Mr. Sandusky conflates the empanelment of a grand jury with its power to investigate crimes, Mr. Sandusky does not dispute that a grand jury can be impaneled to investigate public corruption and organized crime and that it has broad power to investigate crimes that occur in the respective counties in question arising out of its inquiry into such areas. However, Aaron Fisher's allegations hardly could have been considered to amount to public corruption or organized crime, nor was the grand jury inquiring into another matter involving public corruption and organized crime when, through that investigation, it learned of Aaron Fisher allegations. *See Commonwealth v. Iacino*, 415 A.2d 61 (Pa. 1980) (grand jury did not exceed its authority in issuing indictment against defendant regarding improper sale of state

property where grand jury had been impaneled to investigate corruption of supervisory personnel of PennDOT, and evidence of improper sale arose in the course of that investigation, and the sale had been made possible by the submission of false report by defendant, a maintenance supervisor).

The OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009. In doing so, the OAG submitted the case on the grounds that a “founded” report of sexual abuse had been determined by the Clinton County CYS. 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.”).

In short, the OAG had no statutory authority to conduct a grand jury investigation based on the allegations by Aaron Fisher and the report was not founded. Aaron Fisher’s statements at the time the grand jury investigation began did not give rise to the suggestion of crimes involving public corruption or organized crime. Therefore, the grand jury had no

subject matter jurisdiction to investigate. Mr. Sandusky recognizes that, “If, during an investigation of ongoing criminal activity, a grand jury comes upon criminal activity which has been completed, it is not required to close its eyes thereto.” *Commonwealth v. McCauley*, 588 A.2d 941, 945 (Pa. Super. 1991) citing *Commonwealth v. Bradfield*, 508 A.2d 568 (Pa. Super. 1986).

However, in this case, the grand jury did not come upon criminal activity during an investigation of ongoing criminal activity. Further, it must be highlighted that the *McCauley* Court was not faced with an argument regarding the interplay of § 4542, which speaks of jurisdiction, and 4548, which discusses powers. As previously articulated, those concepts are legally distinct.

Furthermore, in both *Appeal of Stout* and *Bradfield, supra*, the cases relied on by *McCauley*, public corruption was at issue. Since *McCauley* did not consider an argument relative to § 4542, and only considered an argument relative to the distinct claim of the power of a grand jury and not jurisdiction, that case is not dispositive. Similarly, the case of *Commonwealth v. Atwood*, 601 A.2d 277 (Pa. Super. 1991), does not support the Commonwealth’s position. Therein, the court did not consider § 4542. Furthermore, the allegations of theft and fraud in that matter fit the

statutory definition of organized crime, *i.e.*, “any continuing criminal conspiracy or other unlawful practice which has as its objective: (1) large economic gain through fraudulent or coercive practices”.

Additionally, the Supreme Court in *In re Twenty-Fourth Statewide Investigating Grand Jury*, *supra*, did not consider § 4542; therefore, that case is not controlling. As the learned Justice Nix opined in his concurring opinion in *Appeal of Stout*, *supra* at 251(emphasis added),

It should be made clear, however, that **neither that Act nor our case law supports the notion that an application for empanelment, once approved, is license to submit any investigation** through a notice of submission. Subsequent submissions must be shown either to be within the original application for empanelment **or meet the jurisdictional predicate for subject matter to be considered by a grand jury.**

It is evident from the plain language of the Grand Jury Act and case law that there is a distinction between power and jurisdiction. A multi-county grand jury only has jurisdiction to inquire into public corruption and organized crime and may, if during the course of an investigation into those areas, issue a presentment relative to a crime that it learns of during the course of investigations into public corruption and/or organized crime. *See* 42 Pa.C.S. § 4542; *Bradfield*, *supra*; *Iacino*, *supra*. Since Aaron Fisher’s allegations were unrelated to public corruption and organized crime nor did the grand jury learn of his allegations while investigating/inquiring into

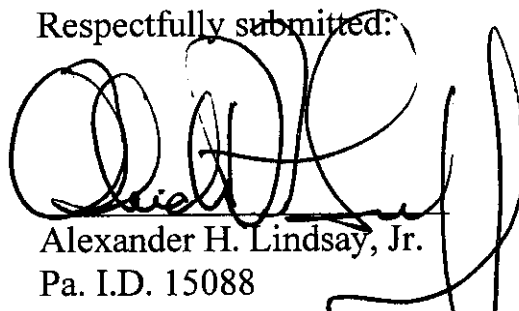
public corruption or organized crime, the original grand jury lacked subject matter jurisdiction to investigate.

### CONCLUSION

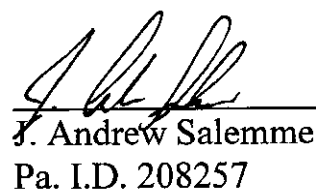
Instantly, the initial grand jury in this matter lacked subject matter jurisdiction to investigate the allegations made by Aaron Fisher. That improper grand jury investigation was subsequently used as the basis for the grand jury presentment by the 33<sup>rd</sup> Statewide Grand Jury. Because the original grand jury lacked subject matter jurisdiction to investigate Aaron Fisher's allegations, the charges against Mr. Sandusky that arose from that improper investigation must be dismissed. *Compare Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. 1971); *Commonwealth v. Curley*, 2016 WL 285707; *Commonwealth v. Schultz*, 2016 WL 285506 (Pa. Super. 2016); *Commonwealth v. Spanier*, 2016 WL 285663; *Commonwealth v. Cohen*, 289 A.2d 96 (Pa. Super. 1972) (plurality) (quashal of charges arising out of grand jury presentment is proper where presentment is based on improperly received information); *Bradfield, supra* at 573 (quashal of presentment is appropriate where the court is convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights); *cf. Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228, (1988) (grand jury indictment may be dismissed where

prosecutorial misconduct substantially influenced the decision to indict); *Commonwealth v. Brownmiller*, 14 A.2d 907, 911 (Pa. Super. 1940) (same);<sup>3</sup> Pa.R.Crim.P. 556.4(B)(1)(c) (criminal information may be dismissed where a grand jury vote to indict occurred but the indicting grand jury lacked jurisdiction).

Respectfully submitted:



Alexander H. Lindsay, Jr.  
Pa. I.D. 15088



J. Andrew Salemme  
Pa. I.D. 208257

110 East Diamond Street, Suite 300  
Butler, Pennsylvania 16001  
Phone: 724.282.6600  
Fax: 724.282.2672  
Email:  
[al.lindsay186@gmail.com](mailto:al.lindsay186@gmail.com)  
[andrew@lindsaylawfirm.com](mailto:andrew@lindsaylawfirm.com)

*Attorneys for Petitioner Gerald A.  
Sandusky*

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<sup>3</sup> A grand jury indictment is distinct from a grand jury presentment.

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,	:	
	:	
PETITIONER.	:	HONORABLE SENIOR JUDGE JOHN M. CLELAND

CERTIFICATE OF SERVICE

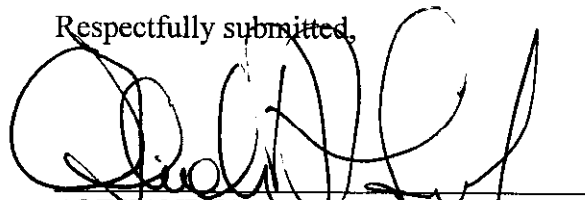
The undersigned hereby certifies that on the 19<sup>th</sup> day of May, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

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

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

Respectfully submitted,



ALEXANDER H. LINDSAY, JR., ESQ.  
Pa. Supreme Court Id. No. 15088  
110 East Diamond Street, Suite 301  
Butler, Pennsylvania 16001  
Phone: 724.282.6600  
Fax: 724.282.2672  
*Attorney For Gerald A. Sandusky*