IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

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

COMMONWEALTH OF PENNSYLVANIA'S FINAL BRIEF IN OPPOSITION TO SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF

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

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

I. INTRODUCTION

Gerald A. Sandusky ("Sandusky"), convicted of the sexual abuse of 10 pre-teen and teenaged boys, is seeking post-conviction in the form of a new trial based upon allegations of ineffective assistance of counsel. Upon review and consideration of Sandusky's first and second amended petitions for relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.*,[1] and the Commonwealth's responses thereto, this Court granted Sandusky's request for an evidentiary hearing on claims 1, 3, 6, 12, 26, 27, 29, 31, 32, and 33. The evidentiary hearing commenced on August 12, 2016 and continued on August 22, 2016, August 23, 2016, and November 4, 2016. During the course of the hearing, Sandusky presented the testimony of Joseph Amendola, Esquire ("Attorney Amendola"), Jonelle Eshbach, Esquire, Frank Fina, Esquire, Joseph McGettigan, Esquire ("Attorney McGettigan"), Andrew Shubin,

[1] Specifically, Sandusky filed a petition for post-conviction relief on April 2, 2015 under seal. An amended petition was thereafter filed on May 6, 2015. A second amended petition was filed on March 7, 2016

Esquire ("Attorney Shubin"), Office of Attorney General Special Agent Anthony Sassano, Pennsylvania State Police Corporal Scott Rossman, Joseph Leiter, Michael Gillum, Lindsay Kowalski, Allan Myers ("Mr. Myers") and Karl Rominger ("Mr. Rominger"). Sandusky also testified on his own behalf. Following the conclusion of the hearing, this Court offered the parties an opportunity to submit final briefs on any of the issues identified in Sandusky's second amended PCRA petition. The Commonwealth now submits additional, brief argument in opposition to claims 1, 3, 12, 26 and 32 based upon the evidence, or lack thereof, adduced at the evidentiary hearing in connection with those claims. The Commonwealth's arguments in opposition to all remaining claims have already been set forth in its prior responses and briefs and will not be repeated again here.

II. SANDUSKY FAILED TO ESTABLISH THAT COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION AND THEREFORE HIS PETITION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED

Testimony at the evidentiary hearing conclusively established that Attorney Amendola, a veteran criminal defense attorney, believed in Sandusky's innocence and tirelessly fought for him. Having had the opportunity to represent Sandusky since late 2008 or early 2009 through the time of his trial in 2012, Attorney Amendola was in constant communication with Sandusky, answering Sandusky's questions and providing legal guidance. Each of Attorney Amendola's decisions that Sandusky now attacks were made after careful measure, dutiful consideration and in consultation with Sandusky. At the evidentiary hearing, Attorney Amendola explained:

> ...Jerry and I had many many meetings about these - - about the charges and the witnesses and the discovery materials. I would go over to his house - - he was on in-house detention at the time, I would go over to his house, we'd talk on the phone, I'd say, and Dottie probably and Jerry have a better recollection, but I think it was at least once or twice a week I would visit. And the visits usually lasted between one, one and a half to two hours.

N.T. 8/12/16, p. 150. Attorney Amendola testified that after Sandusky's arrest, Sandusky's case was "virtually the only thing" on which he focused and that he worked "almost exclusively" on Sandusky's case. N.T. 8/12/16, p. 171. He spoke with Sandusky daily, sometimes more than once a day. N.T. 8/12/16, p. 172.

In order to prevail on an ineffectiveness claim, a petitioner must establish:

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

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

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

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

With respect to Sandusky's allegations, claims 1 and 3 can be dismissed for lack of merit. Claims 12, 26 and 32 can be dismissed because counsel's actions were premised on reasonable, logical bases and Sandusky cannot establish prejudice.

A. The Prosecutor Did Not Make a False Statement to The Jury During Closing Argument And Therefore Attorney Amendola Cannot be Deemed Ineffective For Failing to Lodge an Objection (Claim 1)

During the course of Sandusky's trial, the Commonwealth presented evidence that Sandusky had assaulted two young men who were unidentified: Victim 2 and Victim 8. In closing argument, Attorney McGettigan told the jury:

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

N.T. 6/21/12, p. 111. In his pleadings, Sandusky leveled an outrageous accusation against the seasoned prosecutor, claiming that "this statement was a lie, as both the prosecution and defense well knew . . . that Victim 2 was an individual whose name was Allan Myers." Second Amended PCRA Petition, p. 33. During the course of the present litigation, the above-quoted passage has been reinvented and mischaracterized, with Sandusky claiming that the prosecutor stated that "Victim 2 was known to God but not to us." Sandusky was given the opportunity to explore his claim in the evidentiary hearing, however. This opportunity demonstrated the predictable outcome of Sandusky failing to adduce any credible evidence in support of his claim.

In order to obtain PCRA relief, Sandusky was required to prove that his trial counsel was ineffective for failing to object to the prosecutor's closing argument as a stand-alone claim of prosecutorial misconduct was waived for failure to present it on direct appeal. *See* 42 Pa.C.SA. § 9544(b). Accordingly, Sandusky had to establish the following factual bases: 1) Attorney

McGettigan believed that Mr. Myers was Victim 2 at the time of trial; and 2) Attorney Amendola knew that Attorney McGettigan believed that Mr. Myers was Victim 2, but failed to lodge an objection to the prosecutor's statement. This Court made clear that the focus of the hearing was on what Attorney McGettigan **believed** to be true when he made the statement. The hearing was not to determine whether Mr. Myers actually was, or was not, Victim 2.

In terms of a legal basis, in order to succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial misconduct, Sandusky was required to demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right, or a constitutional interest such as due process. *See Commonwealth v. Hanible,* 30 A.3d 426, 464–65 (Pa. 2011). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 465 (quoting *Greer v. Miller,* 483 U.S. 756, 765 (1987)). The touchstone is fairness of the trial, not the culpability of the prosecutor." *Id.* Finally, "[n]ot every intemperate or improper remark mandates the granting of a new trial;" *id.,* "[r]eversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict." *Id.*

The evidence adduced at the hearing established that prior to Sandusky's arrest, Mr. Myers told the Pennsylvania State Police that Sandusky never sexually assaulted him. Upon Sandusky's arrest, Mr. Myers then went to Attorney Amendola's office and stated that he was Victim 2 and that no inappropriate contact had occurred that evening. N.T. 8/12/16, p. 144. Shortly thereafter, however, Attorney Amendola received a letter from Attorney Shubin indicated that he (Attorney Shubin) represented Mr. Myers. N.T. 8/12/16, p. 145 Attorney

Amendola then encountered Attorney Shubin at the courthouse where Attorney Shubin reported that Mr. Myers was a victim and that "he's probably the worst victim. He's been victimized by Jerry for years." N.T. 8/12/16, p. 146.

When he testified, Attorney McGettigan explained how efforts to interview Mr. Myers were frustrated by Attorney Shubin:

> We couldn't locate him [Mr. Myers]. Mr. Shubin was unhelpful in allowing us to speak with his client. In fact, he was [*sic*] impediment to allowing us to speak to his client. Prior to the preliminary hearing in which Mike McQueary testified, Mr. Shubin would not make his client available. We couldn't speak with him. We couldn't locate him. Despite our efforts.

N.T. 8/23/16, p. 57. Finally, Attorney McGettigan was asked the ultimate question, namely, whether he believed at the time of trial that Mr. Myers was Victim 2. He explained why he would answer that question in the negative:

> For a variety of reasons. And I can tell you. First of all, Mr. Myers, I believe, was born in 1987. And that would - - the young boy described by Michael McQueary was 10 years old. At the time of the incident, Myers would have been at least 14. Mr. Myers, subsequently, was unable to describe the location in which the attack occurred. He drew a diagram which did not match. Mr. Myers, on the first interview, denied any untoward contact with the defendant over there. He denied it in an interview with state police. He subsequently, as I understand now, arrived at Mr. Amendola's office and against denied untoward contact with the defendant. And he only - - frankly I never spoke with him.
>
> The only information I had that alleged that he was, in fact, a victim of Mr. Sandusky, more specifically Victim Number 2, came from Mr. Shubin, who refused to allow us to contact him and confirm whatever his client had to say until after Mike McQueary testified. And I believe at that hearing, that one of Mr. Shubin's associates was present to listen to the details of Mike McQueary's observations, after which Mr. Shubin attempted to force Allan Myers on us because he now had, as some would say, an opportunity to conform the testimony to that of Mr. McQueary. So there are many reasons why Allan Myers was not, to me in my mind, then or now Victim Number 2. At any time.

N.T. 8/23/16, pp. 57-58. In light of the foregoing, Sandusky has no facts to support his contention that Attorney McGettigan believed that Mr. Myers was Victim 2. Accordingly, his meritless ineffective assistance of counsel claim easily fails.

Sandusky clings to the testimony of the now-disbarred Mr. Rominger as convincing evidence to establish Attorney McGettigan's deceit. Specifically, Mr. Rominger cast aspersions upon Attorney McGettigan's character, stating that the reference to victims known to God "was a factual misstatement and a lack of candor to the Court." N.T. 8/12/16, p. 75. The Commonwealth respectfully requests that this Court reject Mr. Rominger's testimony as lacking in credibility.

The Commonwealth would like to make clear once again that it is not advancing the position that Mr. Myers was not a victim of Sandusky's abuse. Whether or not Mr. Myers was a victim is not in question here. The only issue is whether Attorney McGettigan lied to the jury based upon the information he knew and believed at the time of trial with respect to the identity of the boy that Michael McQueary observed in the showers. Attorney McGettigan never had the opportunity to meet with Mr. Myers due to the obstacles he described above. This was through no fault of Mr. Myers. As Mr. Myers testified to at the evidentiary hearing, he hired Attorney Shubin to look out for his best interests and provide advice and guidance to him. Mr. Myers was not present for the conversations between Attorney Shubin and Attorney McGettigan.

B. There Was no Secret Agreement Between Attorney Amendola And The Prosecution That Neither Side Would Call Allan Myers as a Witness; Attorney Amendola Cannot be Deemed Ineffective For Failing to Advise Sandusky of a Pact That Did Not Exist (Claim 3)

Sandusky also alleges that there was an agreement between Attorney Amendola and the prosecution that neither side would call Mr. Meyers as a witness. He claims that Attorney Amendola should have pursued calling Mr. Myers as a defense witness because Mr. Myers

would have recanted his allegations of abuse. In a witness certification from Ken Cummings that was offered in support of Sandusky's quest for post-conviction relief, it was specifically averred that Mr. Myers:

> [S]tated that his statements to Everhart [Attorney Amendola's investigator] were truthful and accurate, reaffirming that Mr. Sandusky did not molest him and that he was the McQueary shower teenager, in essence, recanting several statements he made to law enforcement after retaining Attorney Andrew Shubin that suggested that Jerry Sandusky molested him.

Amended Witness Certifications, 5/16/16, pp. 16-17. However, when given the opportunity to provide affirmative, legitimate proof of Mr. Myers' supposed recantation at the evidentiary hearing, Sandusky could offer no such evidence.

Although Sandusky has claimed that there was a "secret" agreement between Attorney Amendola and the Commonwealth that neither side would call Mr. Myers - - and that this agreement somehow, in some manner, prejudiced him - - the only evidence of such a "secret" pact came from the testimony of Mr. Rominger who stated:

> I wanted to call him [Mr. Myers], or at least suggested that I wanted to call him. I was told that there was a détente and an understanding that both sides would simply not identify Victim Number 2. It was explained to me by Attorney Amendola that the understanding was that if the Commonwealth called him, they were going to have a victim on their hands who recanted or changed his story. After getting a plaintiff's attorney, had originally said nothing happened, it was very clear with the statement obtained from a very skilled investigator, Mr. Everhart, that'd be a problem for them.
>
> The flip side from the defense side aspect, the problem was that this would add some corroboration to Mr. McQueary's story albeit perhaps a challenged witness. The two together could be problematic for the defense, and so they decided to use an analogy, punt, on that and simply not tell the jury who Victim Number 2 was.

N.T. 8/12/16, pp. 70-71. Although Mr. Rominger appears to have been attempting to try to assist Sandusky in his quest for post-conviction relief, he actually underscored the reason why neither the prosecution nor Attorney Amendola would benefit from calling Mr. Myers as a witness. The

Commonwealth submits that this Court should credit the testimony of Attorney Amendola who definitively stated that "there was never any discussion about us agreeing to not call Allan Myers or anybody else." N.T. 8/12/16, p. 175.

C. Trial Counsel Employed Reasonable Strategy in Advising Sandusky to Waive His Preliminary Hearing And Sandusky Cannot Establish That He Suffered Prejudice as a Result Therefrom (Claim 12)

The purpose of a preliminary hearing is to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime. *See Commonwealth v. Wodjak* 466 A.2d 991 (Pa. 1983). Its purpose is not to prove defendant's guilt. Once a defendant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial. *See Commonwealth v. Tyler,* 587 A.2d 326, 328 (Pa. Super. 1991).

Sandusky complains that his trial counsel was ineffective for advising him to waive his preliminary hearing. According to Sandusky, because there was no preliminary hearing, his trial counsel were unprepared to cross-examine the victims who testified against him at trial. Sandusky claims that "[t]he purpose of a preliminary hearing with respect to defense counsel is most often to discover what the witnesses will testify to at trial." Second Amended PCRA Petition, p. 82.

The case of *Commonwealth v. McBride*, 570 A.2d 539 (Pa. Super. 1990) stands in stark contrast to Sandusky's position. In *McBride*, the defendant advanced the same complaint as Sandusky on appeal. He contended that his defense was hampered because he had not previously heard the Commonwealth's witnesses testify. *See id.* at 541. The Superior Court of Pennsylvania disagreed stating:

> This is too general to entitle appellant to relief. Counsel will not be found ineffective in a vacuum, and we will not consider claims of ineffectiveness

> without some showing of a factual predicate upon which counsel's assistance may be evaluated. In the absence of a more specific allegation regarding the prejudice suffered by appellant due to the waiver of a preliminary hearing, we find no basis upon which to find trial counsel ineffective with respect thereto.

Id. (internal quotations and citations omitted); *see also Commonwealth v. Blystone*, 617 A.2d 778, 785-86 (Pa. Super. 1992) ("The record contains a waiver of the preliminary hearing signed by Blystone and his attorney. In signing the waiver, Blystone acknowledged that he was informed of his right to a preliminary hearing. The law presumes that an attorney acts in the interest of his client. In the absence of an offer of proof supporting Blystone's allegation, we cannot say counsel was ineffective when he advised Blystone to waive the preliminary hearing.")(citations and footnote omitted)

At the evidentiary hearing, Attorney Amendola explained that he was concerned that additional charges would be filed against Sandusky and that Sandusky's bail would be increased. N.T. 8/12/16, p. 120. In light of these concerns, he approached the prosecution to discuss a proposed agreement for Sandusky to waive his preliminary hearing in exchange for Sandusky's guaranteed freedom from incarceration. Attorney Amendola explained:

> . . . And I thought it was critical to our defense that Jerry not be incarcerated. As you know, when people are incarcerated, all their phone calls are recorded, all their visits are recorded except for privacy with their attorneys.
>
> And the last thing I needed was Jerry in a jail cell perhaps really really disabled in terms of helping himself prepare his defense. And Jerry obviously didn't want to be in jail, so I proposed to McGettigan if we waived the preliminary hearing, could we have a commitment from the Commonwealth, in the event there were other charges, other alleged victims, there be no increase in bail. And he came back, not right away, maybe the next day I believe and said he could make that commitment. So that was part one of it.
>
> But part two of that process was that we knew that the preliminary hearing was only going to be for Commonwealth witnesses to say what they said happened. We were not going to be able to expose or explore their motives. And it was going to be an ugly day in an ugly case where people had already been

> convinced that Jerry was guilty. So we saw it from two standpoints a, kind of, win win for us.

N.T. 8/12/16, pp. 121-122. Attorney Amendola emphasized that he discussed these issues with Sandusky and explains the "pros and cons" of waiving the hearing. N.T. 8/12/16, p. 123. He stated:

> . . . [W]e discussed the fact that if we had a preliminary hearing, every witness would be subjected to our cross-examination, we would be able to ask them questions, and there would be a record made that if it later was determined that it was different than testimony that came out in a grand jury proceeding or in statements to the police, that we could use that at trial.
>
> Our goal was to keep him out of jail. And Jerry very much wanted to be out of jail because it was critical that Jerry participate in adequate preparation for his trial and defense. And so this was a balancing test. If you're asking me under ordinary circumstances would I have just out of blue said let's waive the hearing? No. We got something that was tangible and important to Jerry and me and the case, and that was assurance that he was not going to be incarcerated even if they brought 32 more charges against him.

N.T. 8/12/16, pp. 133-34. Additionally, Attorney Amendola noted that another gain for the defense was that the Commonwealth agreed to provide discovery as soon as possible. N.T. 8/12/16, p. 174. Attorney Amendola stated that Sandusky never expressed any confusion about the decision to waive the preliminary hearing. N.T. 8/12/16, p. 173. He went on to state:

> . . . As a matter of fact, ironically, after that waiver, all the media was here, I had about a two-hour press conference out front of the courthouse. And Jerry was home at that time with his family. And Jerry called me that night to say what a great job, it was fantastic to finally see our side getting out. Jerry was very pleased with the way that day went.

N.T. 8/12/16, pp. 173-74. Significantly, Attorney Amendola specifically disavowed Mr. Rominger's testimony that he [Mr. Rominger] had advised that waiving the preliminary hearing was a mistake. N.T. 8/12/16, p. 173. When weighing the credibility of Mr. Rominger versus

Attorney Amendola, the Commonwealth respectfully requests this Court to accept Attorney Amendola's version of what transpired in connection with the waiver of the preliminary hearing.

Because counsel's actions were certainly reasonable and strategic, Sandusky's ineffective assistance of counsel claim fails on the second prong of the *Pierce* test. Moreover, Sandusky cannot articulate how he suffered any prejudice as a result of counsel's advice. Credibility is not an issue at a preliminary hearing and so Attorney Amendola would not have been permitted to cross-examine the victims on any biases or financial motivations. *See Commonwealth v. Fox,* 619 A.2d 327 (Pa. Super. 1993)("Since the Commonwealth merely bears the burden of establishing a *prima facie* case against the defendant, credibility is not an issue at at preliminary hearing."); *see also Barber v. Page,* 390 U.S. 719, 725 (1968) (removing credibility as an issue at a preliminary hearing and limiting defense actions to negating the existence of a prima facie case conforms to the fact that a preliminary hearing is a much less searching exploration into the merits of the case); *Tyler, supra* at 328 (credibility is not an issue at a preliminary hearing); *Liciaga v. Court of Common Pleas of Lehigh County,* 566 A.2d 246, 248 (Pa. 1989) (magistrate is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing). Additionally, because Attorney Amendola had not yet received discovery, he would not have been privy to the victims' prior statements. Accordingly, he would not have been in a position to compare earlier statements with the testimony at the preliminary hearing to determine whether they differed significantly for purposes of impeachment. In light of the foregoing, Sandusky's claim should be denied.

D. Attorney Amendola Advanced a Reasonable Strategy When he Permitted Sandusky to be Interviewed by Bob Costas And Therefore He Cannot be Deemed Ineffective (Claim 26)

Pennsylvania courts scrupulously follow the presumption that attorneys act in the interests of their clients. *See Commonwealth v. Breakiron*, 729 A.2d 1088, 1101 (Pa. 1999). A petitioner must bear the burden of proving that his attorney could not have possessed any reasonable basis for his action. *Id.* Trial counsel cannot be found ineffective unless his course of action was so lacking in reason that, in light of all the alternatives available, no competent attorney would have chosen it. *See Commonwealth v. Albrecht*, 511 A.2d 764, 776 (Pa. 1986), *cert. denied,* 480 U.S. 951 (1987).

During the evidentiary hearing, the testimony of Attorney Amendola made clear that his strategy was to advance an innocence campaign on Sandusky's behalf due to the overwhelmingly negative media attention and court of public opinion that had already adjudged Sandusky guilty. This was not a strategy that was undertaken lightly. Attorney Amendola explained that he began representing Sandusky in late 2008 or early 2009 when Aaron Fisher's abuse was reported to Clinton County Children & Youth and, in all the years that he represented Sandusky, Sandusky had always insisted on his innocence.

Attorney Amendola explained that days after Sandusky was arrested on November 5, 2011, legendary Pennsylvania State University football coach Joseph Paterno was fired. N.T. 8/12/16, p. 105. Thereafter, riots erupted in State College followed by a candlelight vigil for the victims on November 11, 2011. N.T. 8/12/16, p. 105. Attorney Amendola described the atmosphere as follows:

> And what I was being told by media people was that Jerry was even above people like Adolph Hitler, most despised people in the world. And so, I said to Jerry, 'We have to try to get our side out. We have to try to do something.' And we talked about options.

I was being, at that point, approached by numerous people, I didn't even know who they were at the time. Anderson Cooper, I now know who he is, but I didn't even know these names at the time. But Bob Costas, his people called. And I said, you know, here's a sports person, Jerry is a sports icon, I said if we're ever going to get a fair shake, here's the chance to get it. Jerry and I talked about, how do we handle that? Because Jerry agreed, let's get our side out, let's try to say to people we're innocent.

And we talked about him potentially giving an interview. He was reluctant. And I said, 'Well, it's not mandatory, obviously. I can go to New York, I can do the interview.' But when I got to New York, during the course of the afternoon of Monday, which would have been I think November 14th, it became apparent that everybody, everybody who came up to me and approached me, was saying, well yeah, your client's guilty as heck, used different words.

And I said at some point, you know, maybe it would be great, because Jerry and I had been together now - - you have to understand, this wasn't a situation where I was just brought into the case by Jerry a week earlier, Jerry and I had been together fighting Number 1 for the last couple of years. And he had always maintained his innocence and he always wanted to testify, he always wanted to give statements, he always wanted to explain that he was innocent. And I said, 'Here's a golden opportunity. All you have to say, if you go through with this interview,' when I called him the night before, before the interview but on the same night, I said, 'All you have to say is I'm innocent, we're going to prove my innocence at trial.' And although Jerry had some, I think, reservations, he agreed to do that.

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. . . I thought about Jerry and his ability to express his innocence which he had done to me many times, that this was a golden opportunity for him to tell the national media, to tell the public that I'm not guilty, to hear it from him rather than his spin doctor, which was what most people think an attorney is.

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This was a trial in a case unlike any one I've ever had where the entire public and media was convinced he was guilty. And yes, I said this would be a great time with Bob Costas to say I'm innocent and I intend to prove my innocence. It was a golden opportunity.

N.T. 8/12/16, pp. 105-107, 110, 117. Attorney Amendola acknowledged that one part of the interview - - when there was a pregnant pause after Mr. Costas asked Sandusky whether he was sexually attracted to young boys - - did not go well for Sandusky. He stated:

And I wanted to jump out of my chair when there was a pause because the obvious answer, and Jerry and I have talked about this many times, 'Of course

not. I love kids, but I'm not sexually attracted to kids.' Never in the world did I anticipate that kind of response.

N.T. 8/12/16, p. 112. He stated that he spoke with Sandusky 30 – 45 minutes prior to the interview over the telephone. N.T. 8/12/16, p. 110.

It is clear that Attorney Amendola did not force Sandusky to agree to be interviewed by Mr. Costas. It is also equally clear that Sandusky wanted his innocence narrative out in the media. In fact, his desire to utilize the media to broadcast his innocence continues today. The record reveals the following pertinent exchange:

Q: Is it your testimony then that you did not want to speak to the media?

A: That I did not want - - no, I was willing to do what he wanted me to do.

Q: In fact, after the interview with Bob Costas, you did an interview with the New York Times?

A: Correct. At his suggestion.

Q: It was your choice; correct?

A: Certainly. I could have refused to go. But again, I was a novice in this and that he was recommending that I do it, just like he recommended that I spoke with Mr. Costas.

Q: And to this day, Mr. Sandusky, you still use the media to get your side of the story out; correct?

A: Very, very little.

Q: Do you recall in May of this year sending several letters to a television station in Pittsburgh?

A: I recall Courtney Brennan contacting me and stating that she was anxious to present a different side of the story. And I responded saying that I believed we had a compelling argument that we could present to her. I never met with her, I just corresponded a couple of times with short letters.

Q: And in those letters, you urged her to get your side of the story out.

A: . . . Here was somebody that recognized that there was another side of the story. Why wouldn't I have wanted her to do that?

N.T. 8/12/16, pp. 49-50. In light of the circumstances of this high profile case and the hostility that surrounded Sandusky, Attorney Amendola's advice that Sandusky speak to Mr. Costas can certainly be considered a reasonable strategy. Again, it was the plan for Sandusky to simply proclaim his innocence, a task that Attorney Amendola believed would be relatively easy for Sandusky to accomplish given the fact that Sandusky had been professing his innocence to Attorney Sandusky for years. Accordingly, Sandusky's ineffective assistance of counsel claim should be denied.

D. Sandusky's Decision to Forego Testifying at Trial Was Not Due to Deficient Stewardship of Counsel; Sandusky Made a Knowing, Intelligent and Voluntary Decision After Consultation With Counsel Who Provided Reasonable Advice (Claim 32)

Sandusky elected not to testify in his own defense at his trial. The trial record reveals the following discussion that precipitated Sandusky's waiver colloquy:

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

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

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

term in the past so nuclear to his defense, from that point on we were very concerned whether or not Mr. Sandusky could testify.

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

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Because of that situation, as well as the admitted part of Mr. Sandusky's interview with Mr. Costas, specifically relating to the part of are you sexually attracted to young boys, and that was the part that was played twice and the Court corrected that issue, we felt Mr. Sandusky could give no answer at trial that would not allow the Commonwealth to call Matt Sandusky as a rebuttal witness.

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

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

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

Following a recent conference, within the last 20 minutes or so, the Commonwealth advised us - - advised counsel for Mr. Sandusky that the Commownealth would agree not to call Matthew Sandusky if Mr. Sandusky wanted to testify. As a follow-up and a clarification of that information, which we conveyed to Mr. Sandusky when we returned to chambers, I asked Mr. McGettigan, counsel for the

> Commonwealth, would that include cross-examination references or cross-examination of Mr. Sandusky as to Matthew Sandusky? He indicated it would not; that he would still leave the door open to cross-examine Mr. Sandusky about Matt Sandusky, I imagine any sort of inappropriate contact he had with him.
>
> ***
>
> . . . I can assure the Court that we have researched this, Mr. Rominger and I. We discussed it with Mr. Sandusky-- that there's no way we see that we would call him to the stand under the current circumstances and protect him from being exposed to Matthew Sandusky being called as a Commonwealth witness on rebuttal.

N.T. 6/21/12, pp. 65-69. The prosecutor then took the opportunity to clarify the Commonwealth's position with respect to the use of Matthew Sandusky's testimony:

> MR. FINA: In addition, Your Honor, I would just clarify, at least from the Commonwealth's perspective, what happened here today. We certainly have represented to Attorney Amendola, I personally did, that we would not use Mr. Matt Sandusky's testimony in our case in chief; that we would reserve him for rebuttal and use him only if his testimony would be admissible and relevant to rebuttal.
>
> After discussions here today regarding the potential testimony of Defendant Sandusky, we agreed that we would not use Matt Sandusky in rebuttal. After that agreement, I believe Attorney Amendola spoke with his client, came back, and wanted further conditions on Mr. Sandusky's testimony. Wanted us to agree in addition to not putting Matt Sandusky on in rebuttal that we would not ask any questions of Defendant Sandusky about Matt Sandusky, and that was an agreement that we could not comply with. So I just wanted to clarify that.

N.T. 6/12/12, p. 73. Thereafter, a full colloquy was conducted wherein Sandusky indicated that he was making the decision to forego testifying without any coercion. Now, however, he faults counsel for his advice in connection with this decision.

The decision whether to testify in one's own behalf is ultimately to be made by the accused after full consultation with counsel. *See Commonwealth v. Rawles,* 462 A.2d 619, 624 n. 3 (Pa. 1983); *Commonwealth v. Fowler,* 523 A.2d 784, 787 (Pa. Super. 1987). In order to support a claim that counsel was ineffective for "failing to call the appellant to the stand", a petitioner must demonstrate either that: 1) Counsel interfered with his client's freedom to testify; or 2) Counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf. *See Fowler, supra* at 87, 523 A.2d at 787. In Sandusky's case, neither ground exists.

At the evidentiary hearing, Attorney Amendola testified that prior to trial "Jerry was looking forward to testifying." N.T. 8/12/16, p. 149. However, after the Commonwealth revealed that Matthew Sandusky had advised that he was a victim, Attorney Amendola had several conversations with Sandusky about the pros and cons of moving forward with Sandusky's plan to testify. N.T. 8/12/16, pp. 153-154, 176. Contrary to Sandusky's assertion, Attorney Amendola denied that Sandusky's decision not to testify was the product of a single conversation in the car on the way to the courthouse. N.T. 8/12/16, p. 176. In explaining his advice to Sandusky, Attorney Amendola testified that he was concerned about how Sandusky would fare under cross-examination by the prosecutor:

> . . . It would have been exposing Jerry to cross-examination by Mr. McGettigan who was quite good, as even himself said many times, quite good on cross-examination, almost as good as Bob Costas. But the point is, the point is he would have been subjected to cross-examination generally. And in the course of that cross-examination generally, I was concerned, and I expressed my concern to Jerry, that he could open the door quite easily to them getting Matt's testimony in. And if Matt's testimony came in, in my opinion, and I explained this to Jerry and he agreed with me, it would be absolutely catastrophic to his case. And this was after we had established that the police had not been truthful about coaching these witnesses.

N.T. 8/12/16, pp. 154-155. Attorney Amendola continued, explaining that:

> He [Attorney McGettigan] wouldn't agree not to do it on cross-examination, that's what made the whole deal fall apart. On cross-examination, he walked out of the room, as I recall, because he got very irritated. And I said, you're also going to include not asking any questions on cross-examination. And at that point he said no. He said this deal is not going to work. That was not - - that was the problem.

N.T. 8/12/16, p. 156. Because Sandusky has failed to establish that Attorney Amendola impermissibly interfered with his freedom to testify or that the legal advice was so unreasonable as to vitiate an otherwise knowing, voluntary and intelligent waiver of his right to testify, Sandusky's claim must be denied.

III. CONCLUSION

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

Respectfully submitted,

BRUCE R. BEEMER
Attorney General

LAWRENCE M. CHERBA
Executive Deputy Attorney General
Criminal Law Division

JAMES P. BARKER
Chief Deputy Attorney General
Appeals and Legal Services Section

BY: Jennifer A. Peterson
JENNIFER A. PETERSON
Deputy Attorney General
Attorney ID No. 84357
jpeterson@attorneygeneral.gov

Pennsylvania Office of Attorney General
Appeals & Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-0158

Date: November 14, 2016

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

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

CERTIFICATE OF SERVICE

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

Service by facsimile and first class mail addressed as follows:

Alexander H. Lindsay, Jr., Esquire
J. Andrew Salemme, Esquire
110 East Diamond Street
Suite 301
Butler, PA 16001-5982
(*Counsel for Gerald A. Sandusky*)

Jennifer A. Peterson

JENNIFER A. PETERSON
Deputy Attorney General
Attorney ID No. 84357
jpeterson@attorneygeneral.gov

Date: November 14, 2016