IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

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

COMMONWEALTH OF PENNSYLVANIA'S RESPONSE TO 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 response 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, filed a petition for relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"),[1] 42 Pa.C.S. § 9541 *et seq.*, wherein he requested that this Court grant him a new trial. In total, he submitted 15 claims of ineffective assistance of counsel for this Court's consideration. The Commonwealth, in turn, filed a response to the PCRA petition wherein it acknowledged that Sandusky may be granted to leave to correct his pleading in accordance with Rule 905 of the Pennsylvania Rules of Criminal Procedure.[2] By Order dated February 19,

[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. For ease of reference, the Commonwealth will refer to these filings collectively as the first PCRA petition.

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

> (A) The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

2016, this Court provided Sandusky with the opportunity to submit a second amended PCRA petition.

The second amended PCRA petition was filed on March 7, 2016. The petition opens with a factual and procedural narrative replete with Sandusky's own personal assessment of the credibility of victims and witnesses, and the casting of aspersions upon school officials, Children and Youth Services ("CYS") workers, law enforcement, the judiciary, his trial counsel and the Office of Attorney General ("OAG"). Through no fault of his own he claims, he was transformed into one of the country's most infamous child predators. But his continued proclamations of innocence and preference for revisionist history do not offset the fact that he now stands convicted of eight counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); seven counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); nine counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); 10 counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); 10 counts of endangering the welfare of children, 18 Pa.C.S. § 4304; and one count of criminal attempt to commit indecent assault, 18 Pa.C.S. § 901 (18 Pa.C.S. § 3126). The burden now rests squarely upon Sandusky's shoulders to prove by a preponderance of the evidence that his sentence resulted from one or more of the enumerated errors or defects listed in 42 Pa.C.S. § 9543(a)(2). This he cannot do.

> (B) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

Pa.R.Crim.P. 905. This rule indicates the desire of the Supreme Court of Pennsylvania to provide PCRA petitioners with a legitimate opportunity to present their claims to the PCRA court in a manner sufficient to avoid dismissal due to a correctable defect in claim pleading or presentation. *See Commonweatlh v. Williams,* 782 A.2d 517, 526-27 (Pa. 2001)

In Sandusky's latest filing, he rehashes many of the same complaints contained within his first PCRA petition, but submits new issues, as well. To the extent that the second amended PCRA petition contains the same arguments that were previously submitted to this Court, the Commonwealth would incorporate by reference its September 1, 2016 response.[3]

II. ARGUMENT

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

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

On pages 88-91 of his current petition, Sandusky resubmits his prior claim that his trial counsel had a duty to withdraw pursuant to Rule 1.16 of the Pennsylvania Rules of Professional Conduct[4] and that they should have pursued an interlocutory appeal to the Superior Court

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[3] In his second amended PCRA petition, Sandusky organizes his claims topically/categorically. The Commonwealth submits this response utilizing the sequential numbering system set forth in his first PCRA petition. To the extent that Sandusky is expanding upon an existing claim, the Commonwealth identifies the new sub-part by utilizing the next alphabetical letter (*e.g.*, Claim 1 (a), (b), (c) . . .). In his first PCRA petition, Sandusky submitted 15 distinct claims. To the extent that Sandusky is submitting an entirely new claim in his latest petition, the Commonwealth assigns it the next sequential number (*e.g.*, Claim 16, 17, 18 . . .).

[4] Rule 1.16 provides in relevant as follows:

> **Rule 1.16. Declining or Terminating Representation**
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> (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:
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> (1) the representation will result in violation of the Rules of Professional Conduct or other law;

pursuant to Pa.R.A.P. 312 or Pa.R.A.P. 313 after this Court denied their motion to withdraw. Indeed, his current petition tracks the language of the former petition verbatim except for the inclusion of the following excerpt from the trial transcript:

> Mr. Rominger advised the court that he had contacted and consulted with the Pennsylvania Ethics Hotline, which actually indicated that it was reluctant to issue a formal opinion because they suspected which case was involved. [FN 45]
>
> FN 45: Mr. Amendola, in exasperation, exclaimed, "My staff is ready to quit."

Second Amended PCRA Petition, p. 89

As the Commonwealth noted in its September 1, 2015 response, while counsel certainly could have pursued an interlocutory appeal to the Pennsylvania Superior Court either by permission or as a collateral order, *see, e.g., Commonwealth v. Reading Group Two Properties, Inc.*, 922 A.2d 1029, 1032 (Pa. Cmwlth. 2007), the reality is that Sandusky cannot establish that but for taking such an appeal, the outcome of his trial would have been any different. Sandusky offers no new evidence, argument or facts in his current petition that provide an answer to this

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> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
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> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
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> (7) other good cause for withdrawal exists.
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> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Pa.R.P.C. 1.16.

question. Because he cannot establish any prejudice, his ineffective assistance of counsel claim fails.

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

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

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

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close.
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> Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining—he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?
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> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question [*sic*]. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He enjoys young children.

N.T. 6/21/12, at 140–142. At the conclusion of closing arguments, counsel for Sandusky lodged an objection to these particular remarks,[5] but did not move for a mistrial. *Id.* at 134. In response, this Court observed that the prosecutor had engaged in fair rebuttal and that the jury had been cautioned "again and again" that Sandusky did not have an obligation to testify nor was he required to present any evidence on his behalf. *Id.* at 136. Out of an abundance of caution, however, this Court instructed the jury once more that Sandusky need not present any evidence in support of his own defense. *See id.* at 138.

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

In his first PCRA petition, Sandusky presented the claim that trial counsel was ineffective for failing to request a mistrial in connection with the prosecutor's remarks in question. He also claimed that a mistrial was warranted based upon the following commentary by the prosecutor:

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

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

N.T. 6/21/12, p. 425.

When the Commonwealth previously addressed this issue in its September 1, 2015 response, it noted that the prosecutor had posed perfectly reasonable, unanswered questions that loomed as a result of Sandusky's responses in the interview and that the prosecutor was most certainly not suggesting that the jury should draw an adverse inference from the fact that Sandusky failed to take the witness stand to explain his side of the story. The Commonwealth further submitted that there was certainly a reasonable basis for the prosecutor's comments and he was careful not exceed the bounds of oratorical flair.

A review of Sandusky's second amended PCRA petition reveals that he has failed to adduce any new evidence or argument as to why a mistrial would have been granted if counsel had requested one. Instead, he simply incorporates all of his previous averments from the first petition. Because the Commonwealth addressed these initial averments in its previous response, it will not reiterate them here.

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

Sandusky opens his second amended PCRA petition by revisiting his previously lodged complaint that the prosecutor engaged in misconduct when he submitted the following argument to 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. According to Sandusky, "this statement was a lie, as both the prosecution and defense well knew . . . that Victim 2 was an individual whose name was Allan Myers

("Myers")." Second Amended PCRA Petition, p. 33. By way of relevant background, when the jury convicted Sandusky of the abuse of 10 boys, two of those boys were unidentified: Victim 2 and Victim 8. Sandusky has maintained throughout his post-conviction pleadings that Myers was Victim 2 and that the prosecution was aware of this fact.

A review of Sandusky's latest filing reveals that he has failed to produce any new evidence or argument that would compel the granting of relief.[6] As such, this particular claim still suffers from the same defects that were identified by the Commonwealth in its response to Sandusky's first PCRA petition: 1) Sandusky is merely assuming for self-serving purposes that the prosecutor was referring to Myers and that the prosecutor deliberately lied to the jury in that regard; 2) Sandusky ignores the fact that the Commonwealth called witnesses to establish that Sandusky had abused two unnamed victims; and, 3) There is no basis upon which a court could conclude that the argument constituted prosecutorial misconduct.[7]

In apparent support of this position, Sandusky has attached an affidavit from trial counsel, Karl E. Rominger ("Mr. Rominger"),[8] to his most recent filing wherein Mr. Rominger relayed that "everyone knew the identity of the second victim." *See* Second Amended PCRA Petition, Attachment A, p. 8. However, Mr. Rominger also acknowledged the significant credibility problems with respect to Myers, noting that both parties had misgivings about putting him on the stand. *See id.* Therefore, the idea that "everyone knew the identity of the second victim" is certainly questionable. With the defense itself having doubts about the veracity of

[6] Indeed, for the most part his second amended PCRA petition incorporates *in toto* the same averments that were set forth at pages 37-45 of his first PCRA petition.

[7] It should be noted that any stand-alone claim of prosecutorial misconduct is waived for failure to present it on direct appeal. *See* 42 Pa.C.SA. § 9544(b). Accordingly, the only cognizable claim is one that is grounded in ineffective assistance of counsel.

[8] Mr. Rominger was disbarred by the Supreme Court of Pennsylvania on April 11, 2014.

Myers' account, it is simply nonsensical and disingenuous to suggest that trial counsel should have automatically assigned a nefarious motivation to the prosecutor's argument and lodged an objection thereto. Although Sandusky included an affidavit from Mr. Rominger,[9] he failed to include any affidavit or averment regarding the mindset of his other trial counsel, Joseph Amendola, Esquire ("Attorney Amendola"), who was responsible for providing the closing argument on behalf of Sandusky. Therefore, at this juncture, there are two levels of speculation surrounding this claim: 1) That the prosecutor was deliberately making a false statement;[10] and 2) That trial counsel knew, or should have known, that the prosecutor was deliberately making a false statement, but failed to object.

In order to succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial misconduct, Sandusky must 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.,*

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[9] Mr. Rominger's assertion in his affidavit that "Mr. McGettigan lied during his closing summation and, in my opinion, despite an obligation to be candid, was not truthful to the tribunal," Second Amended PCRA Petition, Attachment A, p. 8, is an outrageous suggestion.

[10] Sandusky has conceded that such an interpretation is merely speculative. He stated as much in his request for discovery, he stated:

> Of course, the Defendant must speculate about the prosecutor's mindset in his petition and that is why the Defendant wishes to take the prosecutor's sworn statement to determine, with precision, what his mindset and motivations were.

List of Specific Discovery Requests, 9/29/15, p. 10.

"[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.* Thus, in order to prevail, Sandusky must demonstrate that: 1) That the argument of the prosecutor was not a reasonable inference from the evidence adduced at trial; 2) That the prosecutor lied to the jury; and 3) That his trial counsel knew, or should have known, that the prosecutor was making a false statement to the jury and had no reasonable basis for objecting thereto. Simply stringing together a series of assumptions falls far short of satisfying such a burden.

In short, Sandusky's prosecutorial misconduct claim is nothing more than a "claim in search of a basis." As such, it should be dismissed.

c) After-Discovered Evidence in the Nature of a Recantation of Allan Myers and Trial Counsel's Failure to Ascertain Such a Recantation Statement.[11]

As noted above, Myers provided conflicting accounts as to whether he was a victim of Sanudusky's abuse. Here, in a newly articulated claim centered on Myers' statements, Sandusky argues that he is entitled to post-conviction relief due to the fact that he is in possession of "after discovered evidence;"[12] namely, a recent statement that Myers provided to Ken Cummings

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[11] As listed in Sandusky's first PCRA petition, Claim 3 contained two sub-parts. For east of reference, the Commonwealth will refer to his latest allegation as the third sub-part.

[12] Under the PCRA, a petitioner must plead and prove that:

> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
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> > (i) currently serving a sentence of imprisonment, probation or parole for the crime;
> >
> > (ii) awaiting execution of a sentence of death for the crime; or

("Cummings"), an investigator for Sandusky's current counsel. Sandusky avers that Myers told Cummings that his original statement to trial counsel's investigator (wherein Myers denied any wrongdoing on the part of Sandusky) was true.[13] *See* PCRA Petition, p. 43, ¶ 189; Second Amended PCRA Petition, p. 39. Conspicuously absent from both his first and second amended PCRA petitions, however, is any type of report or affidavit that memorializes this allegedly new statement by Myers.[14] As such, one is left to speculate as to the specifics of the statement.

There are multiple problems with Sandusky's after-discovered evidence claim. First, since he has failed to produce a report or affidavit regarding the interview of Myers, there is no indication of the date of the interview. Sandusky must prove that this after-discovered claim was raised within 60 days of its discovery. As the explanatory comment to Rule 720 provides:

> Unlike ineffective counsel claims, which are the subject of *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), [Pa.R.Crim. 720](C) requires that any claim of after-discovered evidence must be raised promptly after its discovery. Accordingly, after-discovered evidence discovered during the post-sentence stage must be raised promptly with the trial judge at the post-sentence stage; after-discovered evidence discovered during the direct appeal process must be raised

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> (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
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> (2) That the conviction or sentence resulted from one or more of the following:
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> **(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.**
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> ***

42 Pa.C.S. § 9543(a)(emphasis added)

[13] Investigator Curtis Everhart intereviewed Myers on November 9, 2011 at the law office of Attorney Amendola. *See* PCRA Appendix, p. 433. Myers would subsequently disavow this statement in March, 2012. *See id.* at 441-451.

[14] If Sandusky's investigator already spoke with Myers, it is curious that Sandusky would ask this Court for permission to depose Myers. *See* List of Specific Discovery Requests, 9/29/15, p. 4.

> promptly during the direct appeal process, and should include a request for a remand to the trial judge; and **after-discovered evidence discovered after completion of the direct appeal process should be raised in the context of the PCRA. *See* 42 Pa.C.S. § 9545(b)(1)(ii) and (b)(2) (PCRA petition raising after-discovered evidence must be filed within 60 days of date claim could have been presented).** *Commonwealth v. Kohan,* 825 A.2d 702 (Pa.Super.2003), is superseded by the 2005 amendments to paragraphs (A) and (C) of the rule.

Pa.R.Crim. 720 comment, *miscellaneous* (emphasis added)

Second, assuming that the claim was in fact filed within 60 days of discovery, after-discovered evidence must still meet a four-prong test: 1) The evidence could not have been obtained before the conclusion of the trial by reasonable diligence; 2) The evidence is not merely corroborative or cumulative; 3) The evidence will not be used solely for purposes of impeachment; and 4) The evidence is of such a nature and character that a different outcome is likely. *See Commonwealth v. Dennis*, 715 A.2d 404, 415 (Pa. 1998). In addition, "the proposed new evidence must be producible and admissible." *Commonwealth v. Chamberlain,* 164, 30 A.3d 381, 414 (Pa. 2011) (citation omitted). The foregoing test is conjunctive. Accordingly, a defendant must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted. *See Commonwealth v. Rivera,* 939 A.2d 355, 359 (Pa. Super. 2007), *appeal denied,* 958 A.2d 1047 (Pa. 2008).

Sandusky cannot establish the first, third or fourth prongs outlined above. To the extent that Myers simply re-affirmed a statement that he made to the investigator for trial counsel indicates that this "evidence" was certainly not "new." Next, despite his protestations to the contrary, and his reliance on concurring and dissenting opinions from judges of the Superior Court of Pennsylvania, Myers' latest statement could only be used to impeach the testimony of Michael McQueary ("McQueary"). This is not a case, such as *Commonwealth v. Mosteller*, 284 A.2d 786 (Pa. 1971) (cited by Sandusky in his petition), wherein the after-discovered evidence of

a recantation by the Commonwealth's only witness at trial warranted relief. Myers never testified at Sandusky's trial. Accordingly, the only use of this "new" evidence would be for the impeachment of McQueary. The law is well settled that whenever a party offers a witness to provide evidence that contradicts other evidence previously given by another witness, it constitutes impeachment. See *Commonwealth v. Weis,* 611 A.2d 1218, 1229 (Pa. Super. 1992).

Finally, before granting a new trial, this Court must assess whether the alleged after-discovered evidence is of such nature and character that it would likely compel a different verdict if a new trial is granted. *See Commonwealth v. Pagan,* 950 A.2d 270, 292 (Pa. 2008). In making that determination, a court should consider the integrity of the alleged after-discovered evidence, the motive of those offering the evidence, and the overall strength of the evidence supporting the conviction. *See Commonwealth v. Parker,* 431 A.2d 216, 218 (Pa. 1981) (stating conflicting accounts are inherently unreliable and would not compel different verdict in new trial). *See also Argyrou v. State,* 709 A.2d 1194, 1202 (Md. 1998) (noting "cases that have addressed [newly-discovered evidence] have focused not simply on the credibility of the person offering the exculpatory evidence, but on the credibility or trustworthiness of the evidence itself, as well as the motive, or other impeaching characteristics, of those offering it") Here, the Commonwealth submits that the recent statement of Myers, a man who has repeatedly changed his account of his relationship with Sandusky, is hardly reliable. Because Sandusky's after-discovered evidence claim fails, his derivative ineffective assistance of counsel argument fails as counsel cannot be deemed ineffective for failing to raise a meritless claim. *See Commonwealth v. Fears,* 86 A.3d 795 (Pa. 2014)

d) Trial Counsel Was Ineffective in Neglecting to Inform Mr. Sandusky of The Agreement Between Mr. Amendola and the Commonwealth That Neither Side Would Call Myers at Trial][15]

According to the affidavit of Mr. Rominger, there was an agreement between Attorney Amendola and former Chief Deputy Attorney General Frank G. Fina ("Attorney Fina") that neither side would call Myers as at witness at trial. Second Amended PCRA Petition, Attachment A, p. 8.[16] Sandusky now claims that had counsel advised him of this agreement, "there is a reasonable probability" that he would have insisted on Myers being presented. Second Amended PCRA Petition, p. 42. Simply insisting on Myers' presence alone, however, would have absolutely no impact on the outcome of any trial. Accordingly, there is no merit to this claim.

e) Trial Counsel Was Ineffective in Failing to Call Myers to The Stand or Using Myers' Prior Statement to Police That Sandusky Did Not Molest Him in The 2001 Shower Incident to Impeach McQueary[17]

In a new claim, Sandusky avers that counsel was ineffective for failing to present Myers' testimony, even in light of the fact that Myers had provided inconsistent statements. According to Sandusky, Myers' testimony would have not only impeached that of McQueary, it would have demonstrated Sandusky's innocence of "the McQueary shower allegation." Second Amended PCRA Petition, p. 43. Again, this allegation presupposes that Myers was in fact Victim 2.

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[15] As listed in Sandusky's first PCRA petition, Claim 3 contained two sub-parts. For ease of reference, the Commonwealth will refer to his latest allegation as the fourth sub-part.

[16] A reading of the affidavit and Sandusky's pleading suggests that this was an oral agreement that was not placed of record.

[17] As listed in Sandusky's first PCRA petition, Claim 3 contained two sub-parts. For ease of reference, the Commonwealth will refer to his latest allegation as the fifth sub-part.

Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the petitioner's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the petitioner. *See Commonwealth v. Chmiel,* 30 A.3d 1111, 1143 (Pa. 2011) (*quoting Commonwealth v. Wayne,* 720 A.2d 456, 470 (Pa. 1998)). Thus, trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the petitioner that the witness's testimony would have been helpful to the defense. *Commonwealth v. Auker,* 681 A.2d 1305, 1319 (Pa. 1996). "A failure to call a witness is not per se ineffective assistance of counsel for such decision usually involves matters of trial strategy." *Id.; Commonwealth v. Jones,* 652 A.2d 386 (Pa. Super. 1995), *appeal denied,* 63 A.2d 688 (Pa. 1995) (where trial counsel is alleged to have been ineffective for failing to call witnesses but there is no positive evidence that witness would have provided testimony helpful to the defense there is no evidentiary basis for grant of new trial). Generally, 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 designed to effectuate his client's interests." *Commonwealth v. Miller,* 819 A.2d 504, 517 (Pa. 2002) (internal quotation marks omitted).

Here, the content of Sandusky's latest petition completely undercuts any argument that counsel was ineffective for failing to call Myers. As evidenced by Mr. Rominger's affidavit, both the defense and prosecution had difficulty locating Myers and were skeptical of his testimony. Thus, with no evidence that Myers was available, willing and able to appear and with absolutely no proffer as to what his purported testimony would have been at trial, Sandusky is not entitled to relief.

Sandusky attempts to salvage this claim by arguing that even if Myers was unavailable due to the actions of his civil attorney, trial counsel could have utilized the out-of-court statements that Myers provided to police and others as impeachment evidence and possibly substantive evidence at trial. Sandusky then proceeds to cherry-pick the two statements wherein Myers indicated that he was not the victim of Sandusky's abuse, theorizing that the statements would have been admissible pursuant to the business records exception to the hearsay rule. Pa.R.E. 803(6).[18] It is axiomatic, however, that if this Court would have permitted Sandusky to introduce the statements that were favorable to his position, the Commonwealth would have been able to introduce the statements that were unfavorable to him, under the same theory. Finally, common sense dictates that the testimony of McQueary could hardly be undercut by the inconsistent statements of a non-testifying witness. This particular sub-claim should be denied.

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[18] Rule 803(6) provides as follows:

> **(6) Records of a Regularly Conducted Activity.** A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,
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> (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Pa.R.E. 803(6)

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

a) Ineffective Assistance of Counsel For Failing to File a Motion to Quash The Grand Jury Presentment And Charges Arising Therefrom relative to at Least Victims 2 Through 10 Based on Governmental Misconduct in Tainting the Grand Jury Process.[19]

Sandusky devotes 13 pages of his current petition to simply rehashing the same arguments and averments that he presented in Claim 5 (a) in his first petition; namely, that his criminal charges should be dismissed due to an improper leak of grand jury information to former Patriot-News reporter. Sara Ganim. Because the Commonwealth has already addressed the allegation set forth in Claim 5(a) in its September 1, 2015 response, it need not repeat its argument here. However, the Commonwealth would highlight once again that Sandusky's allegation of an improper leak is based on a faulty premise; namely, he presumes that the information was provided by individual(s) who had been subject to grand jury secrecy restrictions. At the time that Ms. Ganim's article was published in March of 2011, however, the witnesses were not subject to a non-disclosure order.[20] Accordingly, the information could have been disseminated by witnesses, their family members, friends or attorneys. Moreover, Penn State officials and Second Mile board members were also aware of the investigation. Secondly,

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[19] In his first PCRA petition, Sandusky articulated Claim 5(a) as whether the statewide investigating grand jury process amounted to an abuse of his due process rights. He has expanded upon this claim with his most recent filing and therefore the Commonwealth utilizes the new articulation of the claim.

[20] According to the official report issued by H. Geoffrey Moulton, Jr., Special Deputy Attorney General ("Moulton Report"), the OAG obtained an order on April 14, 2011 that directed the witnesses not to publicly disclose their testimony. *See* Report to the Attorney General on The Investigation of Gerald A. Sandusky, 5/30/14, p. 154

the Commonwealth would like to point out that contrary to Sandusky's assertions, the report of H. Geoffrey Moulton, Jr., Special Deputy Attorney General ("Special Deputy Attorney General Moulton"), did not indicate that a breach of grand jury secrecy had occurred; rather, the report merely stated that there was a ***prospect*** of a grand jury leak.[21] The Commonwealth will now address the only new averments in Sandusky's second amended PCRA petition: 1) Defense counsel should have filed a motion to quash the grand jury presentments based upon an improper leak of grand jury information; and 2) Grand jury leaks and governmental misconduct constituted after-discovered evidence.

With respect to counsel's failure to file a motion to quash the grand jury presentments, it is clear that such a claim is meritless. Only a special prosecutor can investigate whether there have been leaks. A defense attorney cannot *sua sponte* file a motion to quash based upon his own deduction that there must have been a breach of grand jury secrecy. As the Pennsylvania Supreme Court observed in the case of *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491 (Pa. 2011):

> The very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings" and . . . when there are colorable allegations or indications that the sanctity of the grand jury process has been breached and those allegations warrant investigation, the appointment of a special prosecutor to conduct such an investigation is appropriate.

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[21] The report stated, in relevant part:

> The publication of Ganim's story had two almost immediate consequences. First, it raised within the investigation the alarming prospect of a leak of grand jury information. Second, it generated two significant leads on additional criminal conduct by Sandusky.

Report to the Attorney General on The Investigation of Gerald A. Sandusky, 5/30/14, p. 70. Of significant note, however, Special Deputy Attorney General Moulton observed the following in a footnote: "Subsequent efforts within OAG to determine whether anyone within law enforcement had violated their grand-jury-secrecy obligations were unsuccessful." *Id.* at n. 134.

Id. at 503–04. This position was re-affirmed in the case of *In re Thirty–Fifth Statewide Investigating Grand Jury*, 112 A.3d 624, 630-31 (Pa. 2015).

Secondly, even if a special prosecutor had determined that the OAG had violated grand jury secrecy, the consequence is contempt of court, *see* 42 Pa.C.S. § 4549(b), not dismissal of charges for a criminal defendant. Therefore, in order to seek a quashal of the presentments Sandusky would have to establish much more than the fact that a leak had occurred. He would need to show that misconduct by the prosecutors somehow interfered with the grand jury's ability to exercise its judgment when returning the presentments against him. To illustrate this point, the Commonwealth cites to the decision in *In Re: County Investigating Grand Jury VIII, 2003*, 2005 WL 3985351 (Lack. Com. Pl. 2005). That case involved a motion to quash a presentment issued by a Lackawanna County Grand Jury that recommended that criminal charges be filed against four Lackawanna County prison guards for conduct relating to abuse of inmates. In the motion to quash the presentment, it was alleged that the District Attorney's Office had exchanged e-mail communications with a newspaper reporter that divulged grand jury information, and that a grand jury witness was contacted by the reporter shortly after the witness appeared before the grand jury and was questioned about matters that had been disclosed only to the grand jury. *See id.* at *8. A special prosecutor was subsequently appointed and ultimately issued a report. *See id.* at *9. Upon review, the common pleas court concluded that, even if such an improper disclosure had occurred, quashal of the presentment would not have been appropriate unless the defendant could demonstrate actual prejudice by establishing that such misconduct substantially influenced the grand jury's decision to issue a presentment and to recommend the filing of criminal charges. *See id.* at *15. The court determined that there was no evidence that any purported grand jury

leak or any information contained in the reporter's articles substantially influenced the grand jury's decision to issue a presentment, or caused actual prejudice to the defendant. *See id.*[22]

Pennsylvania has adopted the *Bank of Nova Scotia* standard[23] in deciding whether to dismiss a grand jury presentment due to prosecutorial misconduct. In *Commonwealth v. Williams,* 565 A.2d 160 (Pa. Super. 1989), the Superior Court reasoned that dismissal is "proper where the defendant can show that the conduct of the prosecution caused him prejudice," which "will have occurred only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the

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[22] Of note, the court also stated:

> In denying Tolan's amended motion to quash due to an absence of cognizable prejudice, we are mindful of the procedural differences between federal grand jury and state grand jury practice. In the federal system, the grand jury indictment itself constitutes probable cause for the initiation of a criminal proceeding without the necessity of an independent judicial review in a preliminary hearing setting. Under state grand jury practice, the issuance of a presentment recommending that certain people be charged with specific crimes does not mandate the filing of criminal charges, and it is within the prosecutorial discretion of the attorney for the Commonwealth to commence a criminal proceeding following a grand jury presentment. *See* Savitt, *Pennsylvania Grand Jury Practice, supra* at § 39.04. Moreover, the Pennsylvania Investigating Grand Jury Act entitles a defendant to a preliminary hearing following the filing of criminal charges based upon the presentment, *see* 42 Pa.C.S. § 4551(e), and as a result, Tolan's criminal charges must withstand an independent review by a Magisterial District Judge. Since Tolan's criminal charges must survive a preliminary hearing, any alleged prejudice suffered by him will be further ameliorated. Consequently, Tolan simply has not established the prejudice required to warrant the dismissal of the Presentment.

In Re: County Investigating Grand Jury VIII, 2003, 2005 WL 3985351 *16.

[23] In *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988), the Supreme Court of the United States found that the trial court erred in dismissing the grand jury's indictment based upon the prosecution's misconduct, including grand jury leaks, and stated that "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256.

substantial influence of such violations." *Id.*, at 160, 565 A.2d at 164 (citing *Bank of Nova Scotia*). In the event that no actual prejudice is shown, dismissal may be warranted on alternate grounds only "if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit." *Williams,* 565 A.2d at 164 (quoting *United States v. Rosenfield,* 780 F.2d 10, 11 (3rd Cir.1985)).

Because Sandusky's stand-alone theory of a leak (as opposed to a lawful disclosure to Sara Ganim), is insufficient to warrant the filing of a motion to quash the presentments, counsel cannot be faulted for failing to do so.

Secondly, to the extent that Sandusky suggests that evidence of the grand jury leak and governmental misconduct could not have been discovered until after the release of the Moulton Report, this position is equally unavailing. Special Deputy Attorney General Moulton never identified any grand jury leak or governmental misconduct associated therewith. Because he has misrepresented the underlying facts, no further analysis of this argument is needed. The after-discovered evidence claim can be rejected outright.

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

In connection with Claim 5 (c), Sandusky regurgitates verbatim all of the averments and arguments set forth in his first PCRA petition at pages 66-67. Because the Commonwealth answered these averments in its September 1, 2015 response, it need not repeat them here.

The only new allegation contained within Sandusky's second amended PCRA petition is his averment that questions of [former supervising judge of the statewide investigating grand

jury] Barry F. Feudale's ("Judge Feudale") impartiality have arisen. In order to support this claim, Sandusky references an electronic mail communication between Judge Feudale and Craig McCoy of the Philadelphia Inquirer on July 14, 2013 wherein Judge Feudale voices his frustration, ostensibly about the Moulton investigation. Sandusky ascribes a tortured interpretation to this exchange; specifically, he claims that it illustrates that Judge Feudale "hardly served as an impartial judge during the grand jury process." Second Amended PCRA Petition, p. 65. From there, he makes a completely illogical leap to conclude that "[i]t is therefore highly questionable" if Judge Feudale's decision on whether the Sandusky grand jury exhibits constituted *Brady* material "can be considered reliable." *Id.* Contrary to Sandusky's assertion, this e-mail exchange is hardly evidence that raises a genuine issue of material fact for purposes of warranting an evidentiary hearing. As such, this claim should be denied.

d) Ineffective Assistance of Counsel For Failing to Raise a Structural Due Process Claim Where The Commonwealth Violated Sandusky's Due Process Rights by Neglecting to Abide by the Child Protective Services Law And Seeking to Quash The Grand Jury Presentment Based on The Grant Jury Lacking Subject Matter Jurisdiction[24]

Turning to his most recent criticism of the use of the grand jury that ultimately recommended that criminal charges be filed against him, Sandusky now complains that: 1) The OAG was not the proper investigating authority; and 2) The OAG did not have statutory authority to conduct a grand jury investigation based upon the allegations of Aaron Fisher. According to Sandusky, counsel was ineffective for failing to file a motion to quash the grand jury presentments on these grounds. Not only does his filing demonstrate marked confusion

[24] As listed in Sandusky's first PCRA petition, Claim 5 contained three sub-parts. For ease of reference, the Commonwealth will refer to his latest allegation as the fourth sub-part.

about the distinct roles/responsibilities of child services workers and law enforcement officers (and the attendant court proceedings), it also illustrates confusion about the jurisdiction of a statewide investigating grand jury.

With respect to the first allegation, it appears that Sandusky's complaint centers on the manner in which the report of Aaron Fisher's abuse made its way from Clinton County CYS to the OAG.[25] His argument would suggest that law enforcement authorities cannot investigate allegations of child abuse unless and until the authorities charged with operating under the Child Protective Services Act, 23 Pa.C.S.A. § 6301 *et seq.* ("CPSL")[26] have properly discharged their duties. This is not the law. Although CYS and law enforcement may initially work in tandem when there are allegations of child abuse, compliance with the CPSL does not impact whether or not criminal charges can be filed:

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[25] The OAG received the case pursuant to the Commonwealth Attorney's Act due to a conflict on the part of the Centre County District Attorney's Office.

[26] Section 6302(b) of the CPSL states:

> (b) Purpose—It is the purpose of [the CPSL] to encourage more complete reporting of suspected child abuse; to the extent permitted by this chapter, to involve law enforcement agencies in responding to child abuse; and to establish in each county protective services for the purpose of investigating the reports swiftly and competently, providing protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve, stabilize and protect the integrity of family life wherever appropriate or to provide another alternative permanent family when the unity of the family cannot be maintained. It is also the purpose of this chapter to ensure that each county children and youth agency establish a program of protective services with procedures to assess risk of harm to a child and with the capabilities to respond adequately to meet the needs of the family and child who may be at risk and to prioritize the response and services to children most at risk.

23 Pa.C.S. § 6302(b)

> While there is little doubt that the Crimes Code and the CPSL are linked in some ways, it is clear, as acknowledged by our Supreme Court in *P.R.*,[27] that the Crimes Code standard applies in criminal proceedings, while the CPSL standard applies to administrative proceedings.

F.R. v. Department of Public Welfare, 4 A.3d 779, 785 (Pa. Cmwlth. 2010).

Next, Sandusky claims that the OAG had no statutory authority to conduct a grand jury investigation based upon the allegation of Aaron Fisher. Citing the statute at 42 Pa.C.S. § 4544,[28] Sandusky avers:

> Here, a multi-county grand jury was not competent and without power to investigate a child abuse allegation since it did not involve public corruption or organized crime. The proper mode of investigating fell under the ambit of the CPSL.

Second Amended PCRA Petition, p. 49. Here, Sandusky conflates the empanelment of a statewide investigating grand jury with the power of the grand jury to investigate criminal offenses. As the Pennsylvania Supreme Court recognized in *In Re*: *Twenty–Fourth Statewide Investigating Grand Jury*, the two matters are separate and distinct:

> [W]e agree with the Attorney General that such framework simply does not require that every matter submitted to a multi-county or statewide investigating grand jury needs to independently meet each one of the criteria that are threshold to the convening of the investigative body in the first instance. As the Attorney General observes, the statutory requirements relative to the empaneling of a

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[27] *P.R. v. Department of Public Welfare*, 801 A.2d 478 (Pa. 2002).

[28] The statute provides as follows:

> **(a) General rule.--**Application for a multicounty investigating grand jury may be made by the Attorney General to the Supreme Court. In such application the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth and that, in his judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543 (relating to convening county investigating grand jury).

42 Pa.C.S. § 4544(a).

> statewide investigating grand jury and the statutory powers of the grand jury to inquire into criminal offenses once empaneled are different. *Compare* 42 Pa.C.S. § 4544(a), *with* 42 Pa.C.S. § 4548(a).[29]

907 A.2d 505, 512 (Pa. 2006). Because the law belies Sandusky's claim, counsel cannot be faulted for failing to move to quash the presentments issued by the statewide investigating grand jury.

Claim 6) Trial Counsel Provided Ineffective Assistance of Counsel by Failing to File a Motion in *Limine* and Seeking a Hearing on Repressed and Manufactured Memory and the Effect of Suggestive Questioning, the Commonwealth Violated *Brady*[30] by Failure to Disclose That "Numerous" Victims Were Undergoing Repressed Memory Therapy[31] and Post-Trial Statements of Victims Constituted After-Discovered Evidence

That the victims did not report the sexual abuse by Sandusky right away was an issue that the defense highlighted during trial. In fact, on direct appeal to the Superior Court, Sandusky argued, albeit unsuccessfully, that this Court should have given the jury a prompt complaint instruction. The premise for the prompt complaint instruction is that a victim of a sexual assault would reveal at the first available opportunity that an assault occurred. *See Commonwealth v.*

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[29] The statute provides as follows:

> **(a) General rule.**--The investigating grand jury shall have the power to inquire into offenses against the criminal laws of the Commonwealth alleged to have been committed within the county or counties in which it is summoned. Such power shall include the investigative resources of the grand jury which shall include but not be limited to the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth. Such alleged offenses may be brought to the attention of such grand jury by the court or by the attorney for the Commonwealth, but in no case shall the investigating grand jury inquire into alleged offenses on its own motion.

42 Pa.C.S. § 4548(a)

[30] *Brady v. Maryland,* 373 U.S. 83 (1963)

[31] For ease of reference, the Commonwealth has combined the two new claims with existing Claim 6 as they are inter-related.

Sandusky, 77 A.3d 663, 667 (Pa. Super. 2013) (citing *Commonwealth v. Thomas,* 904 A.2d 964, 970 (Pa. Super. 2006)

In his first PCRA petition, Sandusky continued his attack on the credibility of the victims, suggesting that they testified regarding "repressed memories" and that there was a question as to whether these memories were the product of serial suggestive interviews by law enforcement and CYS. According to Sandusky, trial counsel should have filed a motion in *limine* to present expert testimony and to have this Court determine the competency of the victims and whether the victims' statements were the result of improper questioning.

A review of his most recent filing reveals that he has renewed these same complaints and added two new ones : 1) The Commonwealth violated its obligations under *Brady* by failing to disclose that "numerous" victims were undergoing repressed memory therapy; and 2) After-discovered evidence demonstrates that Aaron Fisher, Dustin Struble and Matthew Sandusky had no independent recollection of the crimes outside of receiving repressed memory therapy.

a) Failure to Present Expert Testimony

In response to the allegations in Sandusky's first PCRA petition, the Commonwealth directed this Court's attention to the case of *Commonwealth v. Crawford*, 718 A.2d 768, 773 (Pa. 1998). In *Crawford,* the Pennsylvania Supreme Court noted that the determination of the credibility of a witness is within the exclusive province of the jury, and that the expert testimony proffered by the defense counsel was intended to establish that the witness was not credible. *See Crawford*, 718 A.2d at 772-73. The Supreme Court went on to state that:

> Crawford argues, however, that Dr. Himmelhoch's testimony was necessary to explain the phenomenon of revived repressed memory. His argument has no merit because the record demonstrates that revived repressed memory was not truly at issue in this case. While it is true that [witness] offered an explanation for his inordinate delay in reporting what he had observed that suggested revival of repressed memory, and the presence of apparitions urging him to come forward,

> the Commonwealth did not seek to establish that his explanation was scientifically supported by the phenomenon of revived repressed memory.
>
> No expert testimony was offered by the Commonwealth to explain that revived repressed memory was recognized by the scientific community.[FN2] The Commonwealth did not attempt to prove that [witness] had suffered from memory loss as a result of the trauma of observing the incident, or that any lost memory had been in fact revived.
>
> > FN2. We do not address whether expert testimony regarding revived repressed memory would be admissible into evidence under the standard articulated in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

Id. at 773. The Supreme Court therefore concluded that the jury was capable of assessing the witness' credibility without the expert testimony and that the Superior Court had erred by holding that such testimony was admissible to explain the phenomenon when the Commonwealth did not introduce expert testimony of the phenomenon, or argue to the jury that the witness' memory had been revived. *See id.* at 774. In short, the court found that the reliability of revived repressed memory was never an issue that needed to be resolved and that the assessment of witness credibility was properly left to the jury. *See id.*

Although Sandusky desperately wants revived repressed memories to be at issue in his case, the reality is that there is no evidence to support such a position. While he goes to great lengths in his current petition to explain why repressed memory therapy is not an accepted science, the point is moot. There was no reason for counsel to retain an expert to explain the unreliability of the therapy because it was never an issue at his trial.

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

In his first PCRA petition, Sandusky alleged that because the victims had provided a multitude of inconsistent statements throughout the course of the investigation, their testimony was so unreliable that any probative value of their testimony was significantly outweighed by the

danger of unfair prejudice. He averred that suggestive interviewing by law enforcement and the Clinton County CYS, combined with the victims' "evolving tales" required a pre-trial hearing into whether the evidence was reliable. PCRA Petition, p. 75, ¶ 319.

In its September 1, 2015 response, the Commonwealth observed that every witness was presumed to be competent, *see* Pa.R.E. 601(a), and that a party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks "the minimal capacity . . . (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth." *Commonwealth v. Delbridge ("Delbridge I"),* 855 A.2d 27, 40 (Pa. 2003). The Commonwealth then stated that it appeared that Sandusky believed that his counsel should have filed a motion in *limine* requesting a "taint hearing" in order for this Court to determine whether the victims were competent to testify. The concept of taint is particularly concerned with "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement . . . that are so unduly suggestive and coercive as to infect the memory of the child." *Commonwealth v. Davis,* 939 A.2d 905, 911 (Pa. Super. 2007). Within the three-part test described above, "[t]aint speaks to the second prong . . . , the mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that the witness is called upon to testify about." *Delbridge I,* 855 A.2d at at 40 (citation omitted, emphasis in original, brackets omitted). However, the Commonwealth pointed out that Pennsylvania courts have clearly and unequivocally stated that taint is only "a legitimate question for examination in cases involving complaints of sexual abuse made by *young children." Id.* at 39 (emphasis added). When a witness is at least fourteen years old, he or she is entitled to the same presumption of competence as an adult witness. *See Rosche v. McCoy,* 156 A.2d 307, 310 (Pa. 1959). Because all of the victims were over the age of 14 at the time that

they testified at trial, [32] the Commonwealth submitted that there was absolutely no basis for counsel to challenge their competency to testify.

A review of Sandusky's second amended PCRA petition reveals that he has incorporated the averments and arguments that were previously advanced in his first petition. He does not include any new facts, evidence or law to support his claim that a motion in *limine*/pre-trial hearing on the issue of competency should have been pursued by counsel. Accordingly, there is nothing new to which the Commonwealth can respond.

c) The Commonwealth Violated *Brady* by Failing to Disclose 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 of This Information From Any Other Source

In his first PCRA petition, Sandusky attacked the credibility of his victims on multiple fronts: 1) That their accounts were fabricated by sheer desire for financial gain; 2) That their accounts were the product of repeated, suggestive questioning by law enforcement and CYS; and, 3) That their accounts were unreliable because they were the product of repressed memories.

In his latest filing, Sandusky takes his attack on the victims to yet another level. Now, he asserts that the Commonwealth violated its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) when it failed to disclose that numerous victims were undergoing repressed memory therapy. The great lengths that Sandusky will go through to manufacture ammunition to attack his victims is extraordinary. Now without any real basis whatsoever, he baldly avers that the victims "did not have independent recollection of any crimes committed" by him, that the

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

victims' memories were refreshed by psychiatric treatment, and, that the Commonwealth possessed this information. Second Amended PCRA Petition, p. 95. This is yet another example of one of Sandusky's "claims in search of a basis." Without any support, he cries misconduct on the part of the prosecution for failing to provide him with the victims' psychological/psychiatric records.

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

Here, there is absolutely no evidence that a *Brady* violation occurred; it is simply a reckless accusation by Sandusky. Accordingly, the claim should be dismissed.

d) Sandusky is Entitled to Relief Based on After-Discovered Evidence That Demonstrates That Aaron Fisher And D.S. And Matt Sandusky Had no Independent Recollection of The Crimes Alleged Outside of Receiving Repressed Memory Therapy

Sandusky includes a new claim in his second amended PCRA petition wherein he posits that post-trial statements of Aaron Fisher, Dustin Struble and Matthew Sandusky[33] have revealed that they had no independent recollection of Sandusky's crimes. According to Sandusky, had

[33] Because Matthew Sandusky did not testify at trial, the Commonwealth will not discuss the statements attributable to him in Sandusky's petition as they are irrelevant.

counsel been aware of this "evidence," they could have presented expert testimony on repressed memory therapy or filed a motion in *limine* to preclude any testimony based on repressed memory therapy.

It is Sandusky's position that these statements constitute after-discovered evidence that warrant a new trial. First, the Commonwealth disputes that the statements to which he refers are "evidence." Second, even if they could arguably considered as such, this after-discovered evidence must meet a four-prong test: 1) The evidence could not have been obtained before the conclusion of the trial by reasonable diligence; 2) The evidence is not merely corroborative or cumulative; 3) The evidence will not be used solely for purposes of impeachment; and 4) The evidence is of such a nature and character that a different outcome is likely. *See Dennis, supra.* Clearly, Sandusky cannot meet the third prong and therefore this claim can be easily dismissed.

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

During its case-in-chief, the Commonwealth presented the testimony of Jessica Dershem ("Dershem"), a caseworker employed with Clinton County CYS. Dershem received a referral made by the principal at Central Mountain High School regarding inappropriate contact between Sandusky and Aaron Fisher. N.T. 6/12/12, p. 125. Dershem told the jury that at the end of her second interview with Aaron Fisher, there was enough evidence to "indicate" the case. *Id.* at 128. She explained that the term "means that we feel that there is enough information to meet the definition of child abuse, child sexual abuse." *Id.* at 128-29. Following her interview with Sandusky, she observed that "there was a lot of consistencies between Aaron, what he talked about and what Mr. Sandusky admitted to." *Id.* at 144. Accordingly, she subsequently submitted a report to ChildLine advising of the indicated report of abuse. *See id.*

In his first PCRA petition, Sandusky challenged several statements that Dershem made in

response to the prosecutor's questioning on direct examination. By isolating her statements and taking them out of context, Sandusky exaggerated their weight and suggested that she was permitted to offer a "faux expert opinion, without objection." First PCRA petition, p. 82, ¶¶ 345-46. In its September 1, 2015 response, the Commonwealth argued that the prosecutor did not elicit any improper evidence from Dershem and did not tell jury that they should assign special weight to her testimony because of her skill, knowledge and experience. Accordingly, there was no basis upon which Sandusky's counsel should have objected.

A review of Sandusky's most recent filing reveals that he has simply rehashed verbatim all of the same averments and arguments that he submitted in his first PCRA petition. Accordingly, there is no need for the Commonwealth to present any additional argument here.

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

The evidence supporting Sandusky's convictions in connection with Victim 8 was provided through the testimony of Ronald Petrosky ("Petrosky"). Petrosky told the jury that during the fall of 2000, he was employed as a janitor at Penn State and was responsible for, *inter alia*, cleaning the shower areas in the Lasch Building (football building) at night. He recalled that on one evening, as he approached the showers in the staff locker room, he saw two sets of legs, "one set of hairy legs and one set of skinny legs." N.T. 6/13/12, p. 194. He immediately went out into the hallway. While he was standing there, Sandusky emerged from the shower area with a small boy. *See id.* at 195. Their hair was wet and they were carrying gym bags. *See id.* at 196. Petrosky watched as the two of them walked down the hallway holding hands. *See id.* at 209.

Petrosky thereafter encountered fellow janitor James Calhoun ("Calhoun") who was emerging from the locker room. *See id.* Petrosky told the jury that a crying and shaking Calhoun stated that he saw Sandusky licking a boy's privates in the shower. *See id.* Sandusky was ultimately convicted of the crimes of involuntary deviate sexual intercourse, indecent assault, unlawful contact with minors, corruption of minors and endangering the welfare of children in connection with this incident.

In his first PCRA petition, Sandusky submitted that because his convictions in connection with Victim 8 were based on a statement by Calhoun that was subsequently either recanted or contradicted, there was insufficient evidence to sustain those convictions and that counsel should have challenged them on appeal. The Commonwealth takes exception to Sandusky's claim that Calhoun subsequently recanted or contradicted the statement that he made to Petrosky in 2000. At the time when he was interviewed by law enforcement in 2011, Calhoun was suffering from dementia. His statements can hardly be classified as a contradiction or a recantation if they were the product of a compromised mental state.

In his most recent filing, Sandusky cites to the case of *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990) (plurality) for the proposition that fundamental due process requires that no adjudication be based solely upon hearsay evidence. He then goes on to state that because the elements of the crimes could only be established through hearsay testimony, the evidence was insufficient and deprived him of due process. *Buchanan* is easily distinguishable, however. In *Buchanan*, the issue was whether the Commonwealth met its burden of establishing a *prima facie* case at the preliminary hearing when it relied solely upon hearsay testimony provided by an investigating police officer. There, the police officer

recounted an alleged criminal incident related to him by the victim, a seven year old child. The victim did not testify. All charges were subsequently held for trial.

On appeal, the Supreme Court of Pennsylvania stated:

> In this case it is clear that the Commonwealth did not meet its burden. As Justice Flaherty stated in his concurring opinion in *Commonwealth, Unemployment Compensation Board of Review v. Ceja,* 493 Pa. 588, 619, 427 A.2d 631, 647 (1981) "[f]undamental due process requires that no adjudication be based solely on hearsay evidence". If more than "rank hearsay" *id.* is required in an administrative context, the standard must be higher in a criminal proceeding where a person may be deprived of his liberty. The testimony of a witness as to what a third party told him about an alleged criminal act is clearly inadmissible hearsay, *Commonwealth v. Maybee,* 429 Pa. 222, 239 A.2d 332 (1968), *Commonwealth v. Whitner,* 444 Pa. 556, 281 A.2d 870 (1971) and thus, does not constitute legally competent evidence. In this case the Commonwealth has failed to establish prima facie that a crime has been committed and that Buchanan committed that crime.
>
> Additionally, a criminal defendant has a right to confront and cross-examine the witnesses against him: this right being secured by the United States Constitution; the Pennsylvania Constitution; and the Pennsylvania Rules of Criminal Procedure.

Buchanan, 581 A.2d at 174 (footnote omitted). Sandusky's case is completely different insofar as Calhoun's statement was properly introduced through a firmly rooted exception to the hearsay rule, namely, as an excited utterance. Accordingly, Calhoun's statement was not the type of "rank hearsay" that the Supreme Court was concerned about in *Buchanan.*

Contrary to Sandusky's assertion, a conviction can be based on hearsay evidence alone, provided that the evidence falls within a firmly rooted exception to the hearsay rule . The case of *Commonwealth v. Sanford*, 580 A.2d 784 (Pa. Super. 1990) illustrates this point. In *Sanford*, the defendant was convicted of attempted rape, indecent assault and corruption of minors in connection with an assault on a three year old child. The child did not testify at trial; instead, the Commonwealth's evidence consisted of statements that the child made to her mother and to an examining physician. On appeal to the Superior Court, the defendant argued that he was deprived

on his constitutional right to cross-examine and confront his accuser since his conviction was based on hearsay testimony alone. In rejecting this claim, the Superior Court stated:

> This argument is meritless. It is well-settled that the [Confrontation] Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. Because we have determined that the child's statements, with the exception of the statements to [the doctor] identifying the defendant as the perpetrator of the assault against her, were properly admitted under firmly rooted exceptions to the hearsay rule, the Confrontation Clause was not violated.

Id. at 793 (internal citations omitted)

In light of the foregoing, Sandusky's claim should be dismissed.

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

a) Ineffective Assistance of Counsel For Failing to Introduce The Tape Recorded Statement of James Calhoun in Which He Contradicted Mr. Petrosky's Hearsay Testimony

During the discovery process, the Commonwealth provided Sandusky's counsel with a copy of a tape recording of a May 15, 2011 interview of Calhoun by Pennsylvania State Police ("PSP") Trooper Yakicik. During the interview, Calhoun recounted the sexual assault that he had observed in the shower area. However, on this occasion, he indicated that he did not think it was Sandusky whom he observed. The problem here is that in 2011, Calhoun was suffering from dementia. As such, the reliability of such a statement is certainly called into question. Counsel cannot be faulted for failing to introduce the 2011 statement where the Commonwealth

would certainly respond with introduction of evidence regarding his current medical condition.

b) Ineffective Assistance of Counsel For Failing to Argue That Under Pa.R.E. 806, Sandusky Had The Right to Cross-Examine James Calhoun About The Excited Utterance Introduced Through Mr. Petrosky

Citing to Rule 806 of the Pennsylvania Rules of Evidence, Sandusky laments that trial counsel should have called Calhoun as a witness during the trial, apparently in order to impeach himself. He retreats to his fall-back position that the Commonwealth never presented any evidence of Calhoun's incompetence at the time of trial. This assertion is completed belied by the record. The prosecutor specifically placed the following stipulation on the record during the trial: That Calhoun was rendered incompetent to testify as of an evaluation of June 11, 2012 which was performed by Dr. Bharat Adroja and that [Dr. Adroja] would have testified consistently with such a statement had it been necessary. N.T. 6/18/12, pp. 59-60.[34]

Although he claims that he would have been able to establish that Calhoun did not identify him as the perpetrator of any sexual crimes, this is a wildly speculative and baseless self-serving averment because he cannot articulate what, if anything, Calhoun would have testified to at the time of trial in 2012, especially in light of his medical condition. As noted *supra*, trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the petitioner that the witness's testimony would have been helpful to the defense. *See Auker, supra.*

c) 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 Because There Was no

[34] Moreover, during the discovery process, defense counsel was provided with a copy of Trooper Yakicic's October 13, 2011 report wherein a copy of letter from Dr. Adroja was attached. *See* Attachment "A." Dr. Adroja advised, *inter alia*, that Calhoun could not make any decisions on his own. *See id.*

Corroborating Evidence That Sandusky Sexually Abused The Alleged Victim

With technically a "new" claim, in reality it is really just a conglomeration of the complaints set forth at Claims 9 and 10(d) wherein Sandusky faults direct appeal counsel for failing to challenge the admission of Calhoun's statement as well as the sufficiency of the evidence underlying his convictions which were based, in part, on the admission of that statement. While Sandusky avers that the Commonwealth was required to corroborate Calhoun's statement; that is not the state of the law. As noted above, his conviction could properly stand on hearsay evidence that is admitted through a firmly-rooted exception to the hearsay rule.

d) Direct Appeal Counsel Was Ineffective For Failing to Raise The Issue of The Violation of Sandusky's Federal and State Confrontation Clause Rights Relating to Mr. Calhoun on Appeal

A review of Claim 10(d) reveals that Sandusky has adopted wholesale all of the same arguments and averments that he previously submitted in his first PCRA petition. *See* PCRA Petition, pp. 86-88. When it addressed this claim in its September 1, 2015 response, the Commonwealth set forth argument as to how and why Calhoun's statement was non-testimonial and nature, and, as such, was exempted from any Confrontation Clause scrutiny. Because Sandusky presents no new facts or argument in his latest petition, there is nothing additional to which the Commonwealth can respond.

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

In his first PCRA petition, Sandusky complained that counsel was ineffective because he promised the jury during opening statements that Sandusky would "deny the conduct for which he was charged and explain his interaction with the men involved." PCRA petition, 5/6/15, p. 96

¶ 423. In its September 1, 2015 response, the Commonwealth observed that whenever counsel promises the jury that they will hear from the defendant, and the defendant ultimately fails to testify, the danger is that the jury will infer that the defendant was unwilling or unable to deliver the testimony as promised. However, the Commonwealth's position was that those concerns did not exist in Sandusky's case as counsel's opening statement was not the product of any sort of inadequate preparation or inattention; rather, at that time, the defense did intend to present Sandusky's testimony. Sandusky's subsequent decision not to testify was an event that was prompted by an unexpected event, an event over which defense counsel had no control, and, accordingly, counsel could not be faulted for an unforeseen change in circumstance.

While he revisits this claim in his latest filing, he has simply incorporated all of the same averments and arguments that were set forth in his first PCRA petition. Accordingly, there is nothing new to which the Commonwealth can respond.

a) Trial Counsel Were Ineffective For Not Making a Motion to Preclude Matt Sandusky From Testifying as a Rebutttal Witness And Failing to Advise Sandusky Regarding Any Strategy regarding if Sandusky Would Testify After The Commonwealth Indicated It Would Call Matt Sandusky

In a new claim, Sandusky faults trial counsel for failing to argue that Matthew Sandusky could not serve as a proper rebuttal witness for the Commonwealth should Sandusky testify in his own defense. Further, he submits that his waiver of his right to testify was not knowing and intelligent because counsel did not explain that Matthew Sandusky could not testify in rebuttal or that if he did, how counsel would have approached cross-examining him and impeaching him with both his own and his sibling's testimony. Because Sandusky's version of the facts is incorrect, this claim can be easily dismissed.

Contrary to the assertions in Sandusky's latest petition, the Commonwealth agreed that it

would ***not*** call Matthew Sandusky as a rebuttal witness should Sandusky elect to testify. The record reveals the following developments as it pertained to the use of Matthew Sandusky's testimony:

> 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.
>
> ***
>
> Because of that situation, as well as the admitted part of Mr. Sandusky's interview with Mr. Costas, specifically relating to the part of are you sexually attracted to young boys, and that was the part that was played twice and the Court corrected that issue, we felt Mr. Sandusky could give

> no answer at trial that would not allow the Commonwealth to call Matt Sandusky as a rebuttal witness.
>
> So after many discussions with Mr. Sandusky, based upon that evidence, Mr. Sandusky chose not to testify despite the tact I had at least eluded in my opening statement on a number of occasions to the jury that they would hear from Mr. Sandusky.
>
> Our position on the Matt Sandusky development coming literally at the close of the Commonwealth's case basically took the heart out of our defense, because our defense was going to be Mr. Sandusky testifying.
>
> Today, after we called our last fact and character witness, the Court gave us time to consult with Mr. Sandusky as to whether or not he wanted to testify with all this information before him, and he decided that he did not want to testify for the reasons I have set forth.
>
> 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-exmination 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 (emphasis added). 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 ono 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.

Id. at 73. Since trial counsel cannot be faulted for failing to raise a meritless claim, Sandusky's claim should be dismissed.

b) Ineffective Assistance of Counsel For Not Calling Sandusky to Testify And Inadequately Advising Him Regarding Testifying After The Commonwealth Provided That it Would Seek to Call Matt Sandusky For Rebuttal Purposes

Similar to the previous claim, Sandusky relies on a factually incorrect statement of events in order to seek post-conviction relief. In this particular claim, Sandusky argues that the waiver of his right to testify at trial was not knowing and intelligent because counsel "incorrectly" told him that Matthew Sandusky would be permitted to rebut his testimony. That is incorrect. As noted above, the Commownealth expressly agreed not to call Matthew Sandusky as a rebuttal witness.

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

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

In the filing of his first PCRA petition, Sandusky made it clear that he now regrets presenting the testimony of Dr. Atkins, characterizing the decision as "ill-considered." PCRA petition, 5/6/15, p. 97, ¶ 432. To illustrate his regrettable choice, Sandusky cherry-picked one portion of an answer that Dr. Atkins supplied on cross-examination wherein he stated that "If, in fact, the things he [Sandusky] is accused of are true, then he would have a psychosexual disorder." *Id.*, ¶ 431.

In its response to Sandusky's PCRA petition, the Commonwealth argued that the decision to call Dr. Atkins as a witness was one of sound trial counsel strategy. Moreover, the Commonwealth pointed out that because counsel introduced the testimony for a limited purpose and not as a defense to the charges, counsel's chosen path was reasonable.

A review of Sandusky's second amended PCRA petition reveals that he has simply adopted *in toto* all of the averments contained in his PCRA petition at pages 97-99. Accordingly, the Commonwealth need not submit any additional response here.

Claim 15) Trial Counsel's General Conduct Before And During Trial Demonstrates That He Essentially Abandoned Sandusky, Leaving Him Without Any Defense, And in Reality, Trial Counsel Acted More Like Another Prosecutor Instead of Defense Counsel[35]

a) Trial Counsel Was Ineffective in Waiving Sandusky's Preliminary Hearing And Failing to Use That Proceeding For Both Discovery And to Cross-Examine The Witnesses Who Had Given Numerous Prior Inconsistent Statements

There is no constitutional right, federal or state, to a preliminary hearing. *See Commonwealth v. Ruza,* 511 A.2d 808, 810 (Pa. 1986). 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.

[35] As originally presented in his first PCRA petition, this claim contained a laundry list of 12 separate and distinct instances of "abandonment." Sandusky has expanded upon several of these instances in his latest filing.

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)

Here too, Sandusky fails to articulate and establish how the waiver of the preliminary hearing prejudiced him. Although he claims he could have learned potential information regarding the victims' therapy and how repressed memory therapy caused them to come forward, this is merely speculative. Moreover, credibility is not an issue at a preliminary hearing and so trial counsel would not have even been permitted to cross-examine the victims on that issue. *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). Sandusky's claim should be denied.

b) Trial Counsel Was Ineffective For Neglecting to Adequately Review Discovery And Erroneously Stating That Nothing in Discovery Would Have Changed His Trial Presentation

During Sandusky's post-sentence motion hearing, the following exchange occurred between the prosecutor and Attorney Amendola:

Q: Mr. Amendola, you would agree that much of the [discovery] material that you requested was frankly irrelevant; would you agree?

A: It turned out to be that way.

***

Q: What item have you discovered since the conclusion of the trial, in your review of these voluminous documents that you have talked about, that would have altered your conduct at the trial?

***

A: The answer is none.

Q: None. So there is no item, document, or person that in your review of the documents that you received at any time that would have altered your conduct at trial during the course of trial; isn't that correct?

***

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

A: That's correct.

N.T. 1/10/13, pp. 39-41, 42-43. Stating the obvious, Sandusky is displeased with the testimony of Attorney Amendola because it has foreclosed his ability to pursue certain avenues of relief on appeal. Therefore, in an attempt to try to undo such testimony, Sandusky has procured an affidavit from former co-counsel, Mr. Rominger, who appeared to be all too willing to disparage the performance of Attorney Amendola. In his affidavit, Mr. Rominger states:

> I was not called to testify at the post sentencing hearing, but I 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.

Second Amended PCRA Petition, Attachment A, p. 9. Sandusky then goes on to state in his recent filing that "it is plain that Mr. Amendola's statement [during the post-sentence motion hearing] is inaccurate." *Id.* at 92, n. 47. Statements that the case would have been presented "very differently" and that Attorney Amendola's testimony was "inaccurate" are not self-proving, however. Instead, there must be evidence to support such statements. Notably, Mr. Rominger fails to articulate how the case should have been presented in his opinion. Secondly, Sandusky cannot explain the inaccuracies in Attorney Amendola's statement that there was nothing in discovery that would have changed his trial presentation. This vacuous claim should be dismissed.

c) Mr. Amendola Rendered Ineffective Assistance by Erroneously Stating in His Opening Statement That There Was Overwhelming Evidence Against Sandusky

In his next claim, Sandusky severs one phrase from Attorney Amendola's opening statement - - "The Commonwealth has overwhelming evidence against Mr. Sandusky" - - and decries it as prejudicial, thereby entitling him to a new trial due to the ineffective assistance of counsel. Evaluating the phrase in proper context, however, reveals that there was no error.

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).

Here, counsel stated the following, in relevant part, during his opening statement:

> 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. There's been a tidal wave of media coverage labeling these young men, now young men, as victims, a title wave of consensus among the public of how could someone be innocent with so many accusers? I'll be honest. I never had a case like this in my life, and I can assure you I never will again.
>
> But I'm here to make an opening statement and to tell you - - to tell you what Mr. Sandusky feels why he's here in this courtroom. We can pack it in now and say, gee whiz, we don't have a chance.
>
> You know, I have used phrases throughout the course of my representation that this is a task similar to climbing Mount Everest from the bottom of the hill. It's David and Goliath. It's the government with all its resources prosecuting one individual with limited resources. Boxes and boxes of materials to go through since this case was brought, trying to figure out how we can present Mr. Sandusky's case to you so **that you will understand that he's innocent**.
>
> In the opening statement presented by Mr. McGettigan, an outstanding prosecutor and an outstanding attorney, he referred to the pictures on the screen as pictures of victims. Ladies and gentlemen, let me say this - - and I've been saying this from November 5th of last year. There are no victims in this case. The only way and the only time there will be victims in this case will be if, after you hear all the evidence, you listen to all the arguments, you hear the judge's instructions, and you deliberate,you determine beyond a reasonable doubt that Jerry Sandusky is guilty of some or all of the offenses will there be victims. **And it you don't get to that point, if you decide, after hearing all the evidence, that there's a reasonable doubt, then there will never be victims because victims only come about after you 12 determine they're victims.**
>
> ***

> The accusers. You saws those eight photos. Cute kids. Why would they lie? Folks, I don't know if any of you have been involved in family disputes involving money and how people, when it comes to money do a lot of things they wouldn't ordinarily do. What's the old saying? Money is the root of all evil.
>
> ***
>
> **What we believe, money is a very big factor in this case.** We believe the evidence will show that these young men have a financial interest in this case in pursuing this case.
>
> ***
>
> There's another aspect to this case and I think it will become apparent throughout the trial. Even the accusers were questioned multiple times. We believe when they were questioned and initially said nothing happened, the government went back until they got an answer they wanted to hear.
>
> ***
>
> **We have all had occasions where if you keep telling somebody something, after a while it's simpler and easier to say, yeah, that's what happened.**

N.T. 6/11/12, pp. 4,16-17, 26-27 (emphasis added)

Evaluated in its proper context, it is clear that counsel's initial remark was simply a way of stating that while at first blush the evidence against Mr. Sandusky appeared to be overwhelming, the defense would demonstrate his innocence over the course of his trial. Because there was no error, Sandusky is not entitled to relief.

d) Trial Counsel Was Ineffective in Permitting Sandusky to be Interviewed by Bob Costas Without Adequately Advising Him And Preparing Him For The Interview And Thereby Providing The Commonwealth With Additional Information

Next, Sandusky claims that Attorney Amendola did not adequately prepare him for his televised interview with Bob Costas ("Costas"). According to Sandusky, he was advised that that Costas was only going to speak with Attorney Amendola. Without any affidavit from Attorney Amendola, the Commonwealth is unable to respond as to whether Sandusky's averment is an accurate representation.

Claim 16) 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 a Cooling Period Was Warranted

In his second amended PCRA petition, Sandusky presents a new issue for this Court's consideration: Were trial counsel were ineffective for failing to investigate juror bias in Centre County and failing to obtain an expert report? According to Sandusky, counsel should have retained the services of a jury consultant expert for purposes of conducting research or providing a report as to the ability to select an unbiased jury in Centre County. By the very nature of this argument, Sandusky appears to insinuate that it is a jury consultant, and not this Court, who would be in the best position to determine whether venue was appropriate in Centre County. Such a suggestion is absurd.

To the extent that Sandusky relies on the report of Arthur H. Patterson, Ph.D., attached to his current filing as "Attachment B," this report hardly provides any support for his argument. To the contrary, it undercuts his position. The "survey" undertaken in preparation for the trials of Timothy Curley ("Curley") and Gary Schultz ("Schultz") simply states the obvious: Pre-trial publicity surrounding the Sandusky matter was far-reaching and intense across the state of Pennsylvania. Trial counsel and this Court were fully aware of this fact. Indeed, in the answer to the Commonwealth's motion for change of venire, counsel averred in relevant part:

> **4.** . . . The Defendant submits the Centre County community is as capable of providing a fair and objective jury pool from which a fair and objective jury can be selected to hear the defendant's cases as any other area in the state, or, for that matter, in the country given the complete saturation of the entire population of the United States and abroad by media coverage of the Defendant's cases since he was first arrested on November 5, 2011.
>
> **5.** . . . While the Defendant agrees the media coverage of these matters has been spectacular in its breadth and intensity, the media coverage has encompassed the entire nation as well as many areas outside our national borders. For these reasons, the Defendant submits there is no better community than Centre County

to be found in the entire Commonwealth of Pennsylvania or outside its borders from which a fair and impartial jury can be selected to hear the Defendant's cases.

6. . . . While the Defendant concedes local, state, national, and international reporters have produced the kind of publicity which must represent the very definition of extensive, sustained, and pervasive coverage of the Defendant's cases, the Defendant denies that this coverage is limited solely to Centre County or for that matter even the Commonwealth of Pennsylvania. To the contrary, this coverage extends beyond the borders of our nation as a result of which the Defendant submits there is no better community than Centre County to be found in the entire Commonwealth of Pennsylvania or even outside its borders from which a fair and impartial jury can be selected to hear his cases.

7. . . . While the Defendant agrees with the Commonwealth that the media has been focused on his case to an unprecedented degree in our Commonwealth, nevertheless, the media's coverage of his cases has extended well beyond the borders of Centre County, the Commonwealth, and even our nation as a result of which the Defendant believes there is no better community than Centre County to be found anywhere in the Commonwealth from which a fair and impartial jury can be selected to hear his cases.

8. . . . While the Defendant agrees with the Commonwealth that publicity alone does not require a change of venire, he disagrees with and denies the Commonwealth's representation that the combination of the pervasive publicity and the unique nature of the Penn State community requires that a non-Centre County jury be selected to hear his cases. To the contrary, given the extensive, sustained, and pervasive media coverage of these cases on a statewide, national, and even international level, the Defendant submits a jury selected from the Centre County community will be uniquely best suited to hear his cases.

11. . . . The Defendant has no intention of requesting a change in venue or venire in his cases and reiterates his belief that a fair and impartial jury can be selected from the Centre County community.

12. . . . [T]he Defendant again reiterates his belief that the publicity in these cases has been so pervasive and penetrating on a statewide, national, and international level, that the same challenges the Commonwealth alleges will be faced in selecting a jury of citizens from Centre County, will likewise be faced in selecting a jury of citizens from any other county in Pennsylvania.

Answer to Commonwealth's Motion For Change of Venire, pp. 1-12. Accordingly, there was no reason for trial counsel to retain an expert in jury selection to tell them what they already knew.

Sandusky further posits that had counsel retained an expert and received a report, they

could have moved for a change of venue. The result, according to Sandusky, was a reasonable probability that the outcome of jury selection and trial would have been different. First, with respect to the motion for change of venue, such a motion would have been denied by this Court. *See* Claim 18, *infra*). Second, Sandusky's belief that the outcome of jury selection and trial would have been different rests on a faulty premise, namely, that the jury selection process in his case was flawed in some manner and that this infected his entire trial. As the Commonwealth noted in its September 1, 2015 response, Sandusky fails to identify any jurors whose fairness and impartiality were arguably even questionable, however. As the Supreme Court noted in the case of *Commonwealth v. Briggs*:

> [T]he pivotal question in determining whether an impartial jury may be selected is not whether prospective jurors have knowledge of the crime being tried, or have even formed an initial opinion based on the news coverage they had been exposed to, but, rather, whether it is possible for those jurors to set aside their impressions or preliminary opinions and render a verdict solely based on the evidence presented to them at trial.

12 A.3d 291 (Pa. 2011) In light of the foregoing, Sandusky's claim should be denied.

Claim 17) Trial Counsel Were Ineffective For Not Requesting a Change of Venue or Venire or Seeking a Cooling Off Period Prior to the Start of Trial

Prior to a substantive discussion of this claim, the Commonwealth would make two observations. First, the latter portion of this claim, namely, that counsel were ineffective for failing to seek a cooling off period prior to the start of trial, fails outright due to the simple fact that counsel **did** request a continuance of Sandusky's trial. Although the express reason for the continuance request may not have been articulated as a desire to seek a "cooling off period," that is of no moment. This Court would have denied any such request. Indeed, prior to commencement of jury selection, this Court stated:

> This case has been on track of this trial date since at least January. It's no surprise

> to anybody. I never ever suggested or made any indication that there would be a continuance, except as requested by Judge Feudale and as a courtesy to him. I have never, I do not believe, misled or given any indication that I had any intention of scheduling this case except when it was scheduled and we're going to proceed.

N.T. 6/5/12, pp. 6-7.

Second, to the extent that Sandusky has taken the liberty of resubmitting, practically verbatim, the language and arguments found at pages 16-21 and 25-28 of his first PCRA petition in support of Claim 1,[36] the Commonwealth will provide no additional response here as it has already addressed Claim 1 in its September 1, 2015 response.

With respect to his venue/venire claim, Sandusky states:

> 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, and one of the all-time icons in collegiate sports, Mr. Sandusky submits that absent ***a change of venue or venire prejudice was inevitable.***"

Second Amended PCRA Petition, p. 75 (emphasis added). The Commonwealth would like to point out here that Sandusky is advancing inconsistent positions in his quest for post-conviction relief. Significantly, he included the exact language quoted above in his first PCRA petition, except there was a notable difference in the fourth line:

> 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, and one of the all-time icons in collegiate sports, Sandusky ***submits that no change of venue or venire would have reduced the prejudice*** . . . the trial court should have continued the trial.

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[36] Claim 1(a) is identified by Sandusky as follows:

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

PCRA Petition, p. 15

PCRA Petition, p. 19, n. 11 (emphasis added). Such inconsistent positions undercut the validity of his instant claim regarding venue/venire.

Turning to the merits of venue/venire claim, it is quire curious that Sandusky fails to acknowledge in either his first or second amended PCRA petitions that he had in fact agreed with the position of his trial counsel when they argued against the Commonwealth's motion for change of venire. As this Court noted in its February 13, 2012 Memorandum and Order:

> The Commonwealth argues, in short, that a constellation of factors alight to prevent the selection of a fair and impartial jury in Centre County and the interests of justice require that a jury be selected elsewhere.
>
> The Defendant disagrees. At the hearing on the Commonwealth's motion, he took the witness stand and, under oath, testified that he understood the risks that the pretrial publicity and the connections of the Pennsylvania State University to the community presented to his defense. He testified that he agreed with the argument of his defense counsel; and he believed a fair and impartial jury could as easily be selected in Centre County as in other counties of the state, given the pervasive statewide impact of both the University and the publicity surrounding his case.

Memorandum & Order, 2/13/12, p. 3. Apparently now in an effort to obtain a new trial at any price, Sandusky has abandoned his earlier position.

At this juncture, it should be noted that a claim alleging that a change of venue/venire was warranted is only cognizable as one sounding in the ineffective assistance of counsel. That being said, Sandusky makes no real effort to analyze it as such. He merely submits a boilerplate argument that "it was not reasonable for a seasoned defense attorney to believe that the Centre County jury could fairly and dispassionately sit in judgment" of him. Second Amended PCRA Petition, p. 71. However, even if he had properly developed this claim, it would still fail.

When asserting a claim of ineffective assistance of counsel, a petitioner is required to make the following showing: 1) that the underlying claim is of arguable merit; 2) counsel had no reasonable strategic basis for his action or inaction; and, 3) 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. Kimball,* 24 A.2d 326 (Pa. 1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. *See Commonwealth v. Gonzalez,* 858 A.2d 1219, 1222 (Pa. Super. 2004), *appeal denied,* 871 A.2d 189 (Pa. 2005). "The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit . . . ." *Commonwealth v. Pierce,* 645 A.2d 189, 194 (Pa. 1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." *Commonwealth v. Poplawski,* 852 A.2d 323, 327 (Pa. Super. 2004).

Here Sandusky's claim fails on the first prong as this Court has already determined that there was no merit to the Commonwealth's pre-trial motion for change of venire. Accordingly, even if trial counsel had filed a pre-trial motion to change venue or venire, it would have been denied.[37] In denying the Commonwealth's motion, this Court stated:

> The extensive involvement of Penn State in the life of the citizens of Centre County, and the existence of the extraordinary mass media coverage of this case cannot be denied. It is the effect of those influences on the possibility of selecting a fair jury that is in dispute.
>
> The Commonwealth argues that the effect of the influence of the University and the publicity surrounding this case cannot be overcome. The Defendant argues, on the other hand, that he would prefer to be tried by a jury selected from Centre County despite all the associated risks that entails for him.
>
> Both the Commonwealth and the Defendant are entitled to a trial conducted

[37] Indeed, as this Court noted in its February 13, 2012 Memorandum and Order, "the prosecution's request for a change of venue should be much more strictly scrutinized than one by the accused; before the court is moved to act, there should be the most imperative grounds." *Commonwealth v. Reilly*, 188 A.574, 580 (Pa. 1986). The same standard - - establishing the most imperative grounds - - has also been applied to a Commonwealth request for a change of venire. *Commonwealth v. McCaigue*, 450 A.2d 1374 (Pa. Super. 1982). Accordingly, it is axiomatic that if this Court's denied the Commonwealth's motion for change of venire, it would most certainly have denied any defense motion for change of venue/venire.

before a fair and impartial jury . . .

As defense counsel points out, the answer to whether a juror can be fair and impartial, despite the myriad of influences to which he or she may be exposed, cannot be known until the juror is actually asked . . .

The presumption should be in favor of at least making an effort to select a fair and impartial jury in the county where the Defendant has been charged.

It is certainly obvious, however, that jury selection will present its challenges and if, after a reasonable attempt it is apparent that a jury cannot be selected within a reasonable time, then I will reconsider this ruling.

Memorandum & Order, 2/13/12, p. 3. This Court's determination with respect to a motion for change of venue/venire is entitled to great deference. Indeed, the law is well-settled that:

The trial court's decision on appellant's motions for change of venue/venire rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion. In reviewing the trial court's decision, our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity.

A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury. In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice.

Pretrial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.

Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the defendant also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated. In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is

> conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. ***Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.***

Commonwealth v. Drumheller, 808 A.2d 893, 902 (Pa. 2002) (internal citations omitted), *cert. denied,* 539 U.S. 919 (2003) (emphasis added).

In light of the foregoing, counsel cannot be deemed ineffective for failing to file a motion for change of venue or venire. The Commonwealth would further observe that the report by Arthur H. Patterson, Ph.D., on which Sandusky relies in support of Claim 16, also supports such a conclusion:

> 36. Ordinarily, a change of venue or venire might offer the best opportunity for reducing the threat to the defendants' rights to a fair trial, but the findings summarized above, from counties all around Pennsylvania, suggests these options would do little to reduce that threat. Given the feelings expressed in this survey by potential jurors from one end of Pennsylvania to the other, neither changing venue nor using an imported venire would be effective . . .

Second Amended PCRA Petition, Attachment B, p 18. Instead, Dr. Patterson recommended, *inter alia*, the creation of a specialized juror questionnaire.

Claim 18) Trial Counsel Were Ineffective During *Voir Dire* in Neglecting to Question The Jurors Specially About The Information They Had Learned From The Media Where The Trial Court's Opening Question To each Witness Conceded That Due to The Extensive Media Coverage The Juror Had Knowledge of Highly Prejudicial Information

In their answer to the Commonwealth's motion for change of venire, trial counsel observed that local, state, national, and international reporters had produced extensive and pervasive publicity with respect to Sandusky's case. Despite this well-known fact, Sandusky now complains that his attorney should have questioned each juror on exactly *what* information they had learned through exposure to the media. The disconnect with this claim is that Sandusky

cannot demonstrate that it is meritorious.

The sole legitimate purpose of *voir dire* is to ensure selection of a competent, fair, and impartial jury. *Commonwealth v. Drew,* 459 A.2d 318, 320 (Pa. 1983); *Commonwealth v. Hathaway,* 500 A.2d 443, 447 (Pa. Super. 1985). It is the trial judge who must interpret the answers and demeanor of all potential jurors to evaluate their ability and willingness to render a fair verdict. *See Commonwealth v. Lane,* 555 A.2d 1246 (Pa. 1989). There is no evidence in the record or allegation suggesting that this Court abused its discretion in this regard. Because Sandusky can point to no discernable errors in the jury selection process, counsel cannot be faulted for failing to ask different questions.[38]

Claim 19) Trial Counsel Was Ineffective in Failing to Interview The Victims Who Testified, James Calhoun, And Critical Commonwealth Witnesses Such as Ronald Petrosky and Michael McQueary[39]

According to Sandusky, "it was essential" for trial counsel to interview "various Commonwealth witnesses." Second Amended PCRA Petition, p. 85. Misleadingly, he cites to the case of *Commonwealth v. Stewart,* 84 A.3d 701, 712 (Pa. Super. 2013) for the proposition that "a claim that trial counsel did not conduct an investigation or interview witnesses presents an issue of arguable merit where the record demonstrates that counsel did not perform an investigation." Second Amended PCRA Petition, p. 85. *Stewart*, however, involved defense counsel's failure to investigate and interview alibi witnesses, not Commonwealth witnesses. Likewise, Sandusky's reliance on *Commonwealth v. Perry* is misplaced. In *Perry*, defense

[38] Sandusky avers in his recent filing that two reporters were permitted to take part in the individual *voir dire* proceedings. Second Amended PCRA Petition, p. 72. This is not accurate. The reporters were simply present in the courtroom. They certainly were not active participants in the process.

[39] Although this claim technically encompasses Claim 5(b), the Commonwealth has listed in separately to minimize confusion.

counsel was determined to be ineffective for failing to, *inter alia*, interview character witnesses discovered by his investigator, nor subpoena them to testify for his client. Again, that case did not involve the failure to interview Commonwealth witnesses.

As the Commonwealth noted in its September 1, 2015 response, the Supreme Court of Pennsylvania has stated that, "we have never held that trial counsel is obligated to interview every Commonwealth witness prior to trial." *Commonwealth v. Washington*, 927 A.2d 586, 598 (Pa. 2007). Although he specifically references McQueary and Petrosky in the title of his claim, Sandusky does not explain how or why counsel was ineffective for failing to speak with those two gentlemen prior to trial. Rather, he focuses on the victims, bemoaning the fact that his counsel 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." Second Amended PCRA Petition, p. 86. First, it is extremely unlikely that any of the victims would have spoken with counsel prior to trial. Second, Sandusky cannot point to any evidence in the cross-examination of the victims that illustrate counsel's lack of preparation. Finally, to the extent that Sandusky complains that his counsel should have interviewed Calhoun prior to trial, this complaint is moot as Calhoun was unable to testify due to his medical condition. *See* Claim, *supra*.

Claim 20) Counsel Were Ineffective in Failing to Present The Grand Jury Testimony of Tim Curley and Graham Spanier[40]

Prior to trial, counsel for Sandusky filed a motion in limine seeking this Court's permission to admit the out-of-court statements of Timothy Curley ("Curley"), Gary Schultz ("Schultz") and Graham Spanier ("Spanier") during the defense case-in-chief. Counsel averred

[40] Although Sandusky does not list Gary Schultz in the title of this claim, this appears to be an oversight. The Commonwealth presumes that he is included for purposes of this issue.

that "Curley and Shultz are known to, and Spanier is believed to be likely to, invoke their right against self-incrimination and be unavailable." Motion in Limine to Admit The Out of Court Statements of Unavailable Witnesses Spanier, Curley & Shultz, 6/11/12, p. 1.[41] The motion averred that their out-of-court statements in the nature of grand jury testimony was admissible pursuant to Rule 804(b)(3) of the Pennsylvania Rules of Evidence.[42]

On June 18, 2012, this Court entertained argument on Sandusky's motion in limine. Counsel for Sandusky explained that it was necessary for the defense to admit the grand jury

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

[42] **Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness**

> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> ***
>
> **b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> ***
>
> **(3) 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; and
>
> **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Pa.R.E. 803(b)(3).

testimony of Curley, Schultz and Spanier because their statements exculpated Sandusky and impeached the testimony of Commonwealth witness Michael McQueary. N.T. 6/18/12, pp. 139-140. Specifically, counsel stated:

> MR. ROMINGER: Mr. Curley is going to say it was communicated to him it was horseplay between a man and a boy in the shower and he didn't hear about anything sexual in nature or at least graphically sexual in nature. So it tends to contradict Mr. McQueary and exculpate the defendant. The exculpatory statement of an unavailable witness under 804 and analysis under *Hackett* and the other cases I cite, I think *Hackett* says it's mandatory to be admitted.
>
> ***
>
> MR. FINA: I don't have a file here, Judge, but I'll just throw out some thoughts, if that's all right.
>
> I would actually largely agree with the legal analysis in the sense that I think that this is outside of Crawford. Whether or not it's an exception though to hearsay and those issues, I think is something else. I mean, I think this reliability analysis is the proper, one of the proper analysis that should be conducted and it does seem though that the notion that a statement given that was not cross-examined before a grand jury that resulted in perjury charges on the very essence of why it would be presented here, which is the issue of how McQueary characterized what he saw, those are the – that's the only information they want to present, I think is the exact opposite effect; that it vests in unreliability in the statement.
>
> Again, if we're going down this road of putting in prior statements, I mean a statement written by Schultz on the sate --- it's dated February 21, 2001 --- on the date that he had the discussion with Paterno and then immediately with Curley. I mean, I'm not sure what would be more reliable than that in his own hand. We have the actual physical note, and we can verify his handwriting and its placement in his office.
>
> So we get into an area here, Judge, that's awfully --- I mean awfully far from I think the normal standard rule of evidence. And I think once we go in that area, I think there

would be a lot of objections from the defense to introducing that information. Then we get into e-mails.

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MR. FINA: And we can forensically ---- we can authenticate those e-mails as having come from Curley and Shultz and Spanier.

And again, I think, Judge, that that information really inures to the benefit of the Commonwealth. I'm in the strong posture that if we go down this road, I think it's something that we really benefit from but I'm not sure what the evidentiary basis for any of that would be.

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

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

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

***

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

convicted of perjury or some related count, then your issue becomes basically moot.

MR. ROMINGER: Correct.

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

So the question in my mind is not the admission of the statement. It is what restriction, if any, should be placed on the Commonwealth?

***

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THE COURT: Now, if the defense puts these statements in, are you asking that you be permitted to do something more than inform the jury that the people have been indicted for perjury?

MR. FINA: Yes.

MR. McGETTIGAN: Yes.

MR. FINA: Yes, Your Honor. We would ask to essentially impeach their grand jury statements with their own writings, at the very least, their own e-mails contemporaneous with the events by the way, not two years later in front of the grand jury --- their own e-mails and their own notes. The handwritten notes are all those of Schultz but at least one of them involves a conversation between Schultz and Curley as he writes it out.

***

MR. ROMINGER: I believe that the father says that he told Curley that, you know, he saw something, at best inappropriate, possibly more. But it was very equivocal and that my point on that was just going to get out his son had been very equivocating with him as well.

I think Dr. Dranov is going to say that as well. Curley may become cumulative at that point.

MR. FINA: I'm not in the business of handicapping defense cases, but, again, depending what happens but if the Curley and Schultz statements come in and then we're permitted to provide any response, either they have been charged with perjury and/or if we put in their handwritten e-mails, I think it's actually like a minus 20 for them. I think they lose ground on that. Again, I'm not---

THE COURT: If it's important enough to get in, it's probably going to be important enough to impeach. How you're going to go about impeaching it, we don't need to talk about that now but --- and whether you want to risk your case against Curley and Schultz to save your case against victim 2 would be something maybe for you to consider. I am thinking out loud.

N.T. 6/18/12, pp. 143-146 (emphasis added). The motion to admit the grand jury testimony was ultimately denied.

In his first PCRA petition, Sandusky accused the Commonwealth of engaging in bad faith, contending that the Commonwealth never really intended to prosecute Curley, Schultz and Spanier; instead, according to Sandusky, the Commonwealth merely instituted criminal charges in order to preclude Sandusky from calling them as defense witnesses at trial. At the time of Sandusky's trial, both Curley and Schultz had outstanding criminal charges pending against them and they indicated that they would exercise their right against self-incrimination if called to testify as defense witnesses. Accordingly, Curley and Schultz were not available to Sandusky as witnesses. A closer question existed, however, with respect to Spanier. Spanier was not charged by the Commonwealth until November 1, 2012, approximately four and one-half months after the conclusion of Sandusky's trial. While it was represented in the defense motion in limine that Spanier "was believed to be likely to" invoke his right against self-incrimination, Sandusky failed to articulate in his first PCRA petition how or why Spanier was unavailable to him at the time of trial.

In his second amended PCRA petition, Sandusky does not expand upon his claim that the Commonwealth engaged in bad faith; rather, his new complaint is that counsel were ineffective in failing to present the grand jury testimony of Curley, Schultz and Spanier on the theory that the testimony was admissible pursuant to another exception to Rule 804, specifically, the exception for "former testimony:"

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

***

b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Pa.R.E. 804.

With respect to Spanier, Sandusky's latest filing suffers from the same shortcoming as his previous one insofar as he failed to aver and establish that Spanier would have been willing and able to testify on his behalf absent the invocation of his Fifth Amendment privilege, and that the absence of Spanier's testimony denied Sandusky the right to a fair trial. *See Commonwealth v. Sneed,* 45 A.3d 1096, 1108–09 (Pa. 2012). Despite this deficiency, the Commonwealth will proceed to address Sandusky's contention that the testimony of Curley, Schultz and Spanier should have been admitted pursuant to Pa.R.E. 804 because they were all unavailable to testify on his behalf at trial.

With respect to admissibility pursuant to Pa.R.E. 804, Sandusky has simply substituted the "former testimony" exception for the "statement against interest" exception as the proposed basis for introduction of the grand jury testimony. The problem is that he fails to articulate how

the result would have been any different had the "former testimony" exception been utilized. As noted above, the problem with the introduction of the grand jury testimony was that it would open up the door for the Commonwealth to introduce impeachment evidence in the nature of electronic mail messages and handwritten notes. Sandusky fails to make any argument as to how or why counsel's strategy in failing to pursue the introduction of such testimony was unreasonable under these circumstances.

Secondly, although Sandusky observes that the Commonwealth had the opportunity to explore the testimony of Curley, Schultz and Spanier on direct examination during the grand jury proceedings, Rule 804(b)(1)(B) requires that he establish that the Commonwealth not only had an opportunity to explore the testimony, but a similar motive to develop it by direct, cross-examination or redirect examination. [43] Here, the prosecutor's motivation for examining a

[43] The following is a summary of reasons why there may be a difference in how the prosecutor questions the witness before the grand jury and at trial:

> When a defendant seeks to admit grand jury testimony, the prosecution typically can raise several arguments to demonstrate its lack of a similar motive and opportunity to cross-examine. Several factors attendant to a grand jury proceeding may limit a prosecutor's motive to cross-examine an exonerating witness. First, the prosecutor often will refrain from compromising the secrecy of the grand jury proceeding by confronting a witness with evidence that would reveal the identity of confidential sources or the status of an ongoing investigation. Second, because a grand jury proceeding may take place during the preliminary phases of an investigation, the issues before the grand jury may be different from those at trial. Third, the prosecutor may not possess all the evidence with which to impeach a witness because that evidence may only come to light during later phases of the investigation. Fourth, because the prosecutor's burden in the grand jury is only to establish probable cause, a prosecutor who has met that burden will not have as strong a motive to cross-examine an exonerating grand jury witness as he would at trial, where the prosecutor must prove guilt beyond a reasonable doubt. Finally, grand jury proceedings are nonadversarial in nature, and therefore lack the competitive climate which exists at trial, where the defendant, defense counsel and the prosecutor are all present.

witness before the grand jury is far different from the motivation for examining a witness at trial. In light of the foregoing, Sandusky's claim should be denied.

Claim 21) Counsel Were Ineffective in Neglecting to Object to the Trial Court's Erroneous Guilt Instruction as Part of Its Character Evidence Instruction

Next, Sandusky asserts that trial counsel was ineffective to failing to lodge an objection to that part of this Court's charge regarding consideration of character evidence[44] wherein the Court stated:

> Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being law abiding, peaceable, nonviolent individual.
>
> The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.
>
> So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. ***However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find - that he is guilty, you should find him guilty.*** But in making that determination, you may consider evidence of good character which you believe to be true.

N.T. 6/21/12, p. 22. With respect to the italicized language, it thus appears that either the Court misspoke, or there was an error in transcription by the court reporter. Regardless, this technical inaccuracy is not fatal to the charge. As our appellate courts have stated:

> We review a jury charge in its entirety to determine if it "clearly, adequately and accurately reflects the law." *Commonwealth v. Johnson,* 572 Pa. 283, 313, 815 A.2d 563, 580 (2002). The trial judge has broad discretion to choose the wording

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Valerie A. DePalma, United States v. DiNapoli: *Admission of Exculpatory Grand Jury Testimony Against the Government Under Federal Rule of Evidence 804(b)(1),* 61 Brook. L. Rev. 543, p. 572 (1995)(footnotes omitted)

[44] Any stand-alone claim of trial court error is waived for failure to raise it on direct appeal.

> by which he explains legal concepts to the jury. *Id.* We therefore do not "rigidly inspect a jury charge, finding reversible error for every technical inaccuracy . . . rather [we] evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Jones,* 858 A.2d 1198, 1200 (Pa. Super. 2004) (*quoting Commonwealth v. Thompson,* 674 A.2d 217, 218–19 (Pa. 1996)).

Commonwealth v. Battle, 883 A.2d 641, 645 (Pa. Super. 2005), *abrogated on other grounds by, Commonwealth v. Jette,* 23 A.3d 1032 (Pa. 2011).

Reviewing this Court's charge on character evidence, it is clear there are two portions that benefit Sandusky: 1) "The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty;" and, 2) "So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty." N.T. 6/21/12, p. 22. Both portions were correctly stated. Accordingly, a lone, one word error in the following sentence cannot constitute reversible error in this case.

Claim 22) **Based on The Aforementioned Claims That Raise Issues of Arguable Merit, The Cumulative Effect of These Errors And Those Raised in His Prior Petitions resulted in Actual Prejudice to Sandusky**

In his final claim, Sandusky summarizes all of his allegations of counsels' alleged ineffectiveness. In *Commonwealth v. Johnson,* 966 A.2d 523 (Pa. 2009), the Pennsylvania Supreme Court recognized that if multiple instances of ineffectiveness are found, the assessment of prejudice properly may be premised upon cumulation." *Id.,* at 532 (citing *Commonwealth v. Perry,* 644 A.2d 705, 709 (1994) (finding multiple instances of ineffectiveness, "in combination," prejudiced defendant)); *see also Commonwealth v. Koehler,* 36 A.3d 121, 161 (Pa. 2012) (to extent claims are rejected for lack of arguable merit, there is no basis for accumulation

claim; however, when failure of individual claims is grounded in lack of prejudice, cumulative prejudice from those claims may properly be assessed).

W]here a claimant has failed to prove prejudice as the result of any individual errors, he cannot prevail on a cumulative effect claim unless he demonstrates how the particular cumulation requires a different analysis." *Commonwealth v. Wright,* 961 A.2d 119, 158 (Pa. 2008); *see also Commonwealth v. Small,* 980 A.2d 549, 579 (Pa. 2009) (concluding that a broad and vague claim of the prejudicial effect of cumulative errors did not entitle the appellant to relief). Although cumulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice, nothing in Pennsylvania precedent relieves a defendant who claims cumulative prejudice from setting forth a specific, reasoned, and legally and factually supported argument for the claim. *See Commonwealth v. Johnson,* 600 Pa. 329, 966 A.2d 523, 532 (2009).

The Commonwealth submits that Sandusky's cumulative prejudice claim fails due to the fact that all of his claims can be rejected for lack or arguable merit.[45]

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

In PCRA proceedings, discovery is only permitted upon leave of court after a showing of exceptional circumstances. 42 Pa.C.S.A. § 9545(d)(2); Pa.R.Crim.P. 902(E)(1). The PCRA and the criminal rules do not define the term "exceptional circumstances." Rather, it is for the trial court, in its discretion, to determine whether a case is exceptional and discovery is therefore warranted. *See Commonwealth v. Dickerson,* 900 A.2d 407, 412 (Pa.Super.2006). Of course, mere speculation that exculpatory evidence might exist does not constitute an exceptional

[45] The only exception is Claim 15(d) as the Commonwealth is without sufficient information to respond to this claim.

circumstance warranting discovery. *See id.* Specifically, Sandusky's renewed request for the fee agreements between the victims and their private counsels his request to access the grand jury exhibits that were already reviewed by Judge Feudale and determined to be non-exculpatory in nature, his request to access communications between the prosecutors and supervising judge and to ascertain the circumstances of the grand jury leak in March and November, 2011 should be denied as this Court has already determined that no exceptional circumstances exist that warrant disclosure of such information. Sandusky's request for the therapy notes pertaining to any of the victims should be dismissed as it is akin to a fishing expedition and the notes are not sought in support of any valid, cognizable PCRA claim.

III. CONCLUSION

In light of the foregoing, the Commonwealth requests that Sandusky's petition be dismissed.[46]

Respectfully submitted,

BRUCE R. BEEMER
First Deputy Attorney General

LAWRENCE M. CHERBA
Executive Deputy Attorney General
Criminal Law Division

AMY ZAPP
Chief Deputy Attorney General
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(717) 783-0158

Date: March 24, 2016

[46] The only exception is Claim 15(d) as the Commonwealth is without sufficient information to respond to this claim

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
110 East Diamond Street
Suite 301
Butler, PA 16001-5982
(*Counsel for Gerald A. Sandusky*)

Jennifer A. Peterson pc

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

Date: March 24, 2016

ATTACHMENT "A"

SP 7-0051 (3-96)

PENNSYLVANIA STATE POLICE

CONTINUATION SHEET ☐
SUPPLEMENTAL INVESTIGATION REPORT ☒

REPORT TYPE
☒ INCIDENT
☐ OTHER

DATE(S)/DAY(S) OF INCIDENT: 08/01/06-11/20/08

INCIDENT NO.: G07-1146135

TIME(S) OF INCIDENT: 0001-2400

JUVENILE: ☐

DOMESTIC VIOLENCE: ☐

ATTACHMENTS:
☐ MISSING PERSON CHECKLIST
☐ FELONY CRIMES AGAINST THE PERSON
☐ STATEMENT FORM(S)
☐ VICTIM/WITNESS ASSISTANCE GUIDE RECEIPT
☐ RIGHTS WARNING AND WAIVER
☐ PROPERTY RECORD
☐ OTHER

DISP.: ☐ CLEARED BY ARREST ☐ UNFOUNDED ☐ EXCEPTIONALLY CLEARED- DATE
A ☐ DEATH OF ACTOR
D ☐ VICTIM REFUSED TO COOPERATE
B ☐ PROSECUTION DECLINED
E ☐ JUVENILE/NO CUSTODY
C ☐ EXTRADITION DENIED
N ☐ NOT APPLICABLE
☐ MULTIPLE CLEAR-UP

1. ORI/STATION: PAPSP7400 / Rockview-2370

2. DATE OF REPORT: 10/13/11

3. OFFENSE: Indecent Assault

4. VICTIM: Aaron Scott FISHER

5. NARRATIVE

On 10/13/11,this officer received a request from Jonelle ESHBACH to obtain a diagnosis from James CALHOUN's doctor regarding his condition (dementia, etc.). On this date, this officer contacted James CALHOUN's daughter, Trudy CALHOUN relative obtaining a written diagnosis of her father's condition. Trudy CALHOUN stated that she would attempt to obtain the diagnosis from his doctor in the near future.

On 10/29/11, this officer proceded to Lock Haven, PA and met with Trudy CALHOUN. CALHOUN provided this officer with a letter from her father's doctor regarding his medical diagnosis.

On 10/29/11, this officer met with Cpl. LEITER in Bellefonte, PA and provided him with the letter from CALHOUN's doctor.

6. OFFICER'S NAME/SIGNATURE: Trooper Robert E. YAKICIC — PAPSP1101/ BCI West - Ebensburg — BADGE NO. 6017

7. INVEST. RECM. ☒ CONT. ☐ TERM.

8. SUPV. INIT./BADGE NO.

9. ☑ CONCUR ☐ NONCONCUR

10. PAGE 198

STATION

ATTACHMENT

Letter from Dr. Bharat ADROJA

Regarding James CALHOUN

Trooper Robert E. YAKICIC

Reference page 198

Lock Haven Medical Center, Inc.
BHARAT ADROJA, M.D.
JENNIFER PENLAND, PA-C
930 Bellefonte Ave., Ste 105
Lock Haven, PA 17745
Phone: (570) 748-1550 Fax: (570) 748-1510

October 13, 2011

Re: James Calhoun
DOB: 12/24/1928

To Whom It May Concern:

My patient, James Calhoun, is being treated by me for weakness, unsteady gait, hypertension and dementia. Mr. Calhoun is not medically able to attend any court sessions and also can not make any decisions on his own. I feel that this situation could be detrimental to his overall health and should be excused from any court appearances. Please contact my office if I can be of further assistance. Thank you.

Sincerely,

Bharat Adroja, MD