

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

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

**DEFENDANT'S LIST OF SPECIFIC DISCOVERY REQUESTS AND LEGAL  
AUTHORITY IN SUPPORT OF EACH REQUEST**

INTRODUCTION

The Defendant, pursuant to Pa.R.Crim. P.902 (E)(1), in paragraph 469 of his Amended Petition for Post Conviction Relief stated that this case presents extraordinary circumstances that warrant discovery in various areas. This Court, by order of September 15, 2015 ordered that counsel for the Defendant should within two weeks submit a list of specific discovery requests and legal authority in support of each request. The following is filed pursuant to that order.

As stated, this request is filed pursuant to Rule 902 (E)(1) which reads as follows:

(E) Requests for Discovery

(1) Except as provided in paragraph (E)(2), no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances.

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Obviously, the question for this Court is what are “exceptional circumstances” as meant by this rule. At the outset, it appears that there is a dearth of authority concerning the meaning of “exceptional circumstances”.

Our Superior Court in the case of *Commonwealth v. Frey*, 41 A.3d 605, 611 (2011) stated the following:

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. *Commonwealth v. Dickerson*, 900 A.2d 407, 412 (Pa.Super.2006).

We will not disturb a court’s determination regarding the existence of exceptional circumstances unless the court abused its discretion. *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 591 (2000). An abuse of discretion is not a mere error in judgment. *Commonwealth v. Riley*, 19 A.3d 1146, 1149 (Pa.Super.2011). Instead, it is a decision based on bias, ill will, partially, prejudice, manifest unreasonableness, or misapplication of law. *Id.* Moreover, we recall that the appellant has the duty to convince us an abuse occurred. *Commonwealth v. Bennett*, 19 A.3d 541, 543 (Pa.Super.2011).

Thus, it appears that the Trial Court is given very broad discretion concerning whether or not “exceptional circumstances” exist. Furthermore, there appears to be no guidance in the rule or case authority concerning what is the appropriate scope of discovery or the type of discovery which may be taken. At the outset, the Defendant urges this Court to exercise its discretion in a manner commensurate with the profound significance of this case.

This case is exceptional to say the least. It cannot be argued that this is a “run of the mill” sexual abuse case. At the outset, with this in mind, the Defendant asks this Court to be mindful of certain factors:

1. The Defendant, a highly esteemed community member and renowned football coach at Pennsylvania's largest educational institution, and who has consistently maintained his innocence, has received what amounts to a life sentence;
2. There are other cases, especially, *Commonwealth v. Spanier*, *Commonwealth v. Curley*, and *Commonwealth v. Shultz*, also involving highly esteemed members of the Penn State academic community, have been significantly and will be significantly affected by what occurs in this case and with what will occur in this case;
3. This case, which the Defendant obviously believes has resulted in a profound injustice, has besmirched the reputation of a previously esteemed educational institution, Penn State University;
4. The allegations as set forth in the Amended Petition for Post Conviction Relief are strong. The Commonwealth's response to the Defendant's Amended Petition for Post Conviction Relief is peppered with such language as, "audacious" and "outrageous". As the Court noted in a pretrial conference, the Defendant is alleged that the behavior of certain individuals involved in his prosecution was unethical and perhaps criminal. The investigation of these allegations may be far better suited to a sworn statement setting as opposed to open court;
5. The number of allegations set forth in the Defendant's Amended Petition for Post Conviction Relief, all of which the Defendant believes to be legitimate, would require a substantial amount of this Court's time merely to hold an evidentiary hearing. By permitting the Defendant to conduct discovery, it is anticipated that there would be streamlining of the evidentiary hearing, if granted by this Court;
6. It is anticipated that many of those individuals from whom the Defendant seeks information, will resist cooperating with the Defendant. Therefore, subpoena power is of significant importance.

The specific requests and authorities are as follows.

## SPECIFIC REQUESTS FOR DISCOVERY AND AUTHORITIES

### **I. Defendant's Discovery Requests Regarding the Defendant's Amended Petition for Post Conviction Relief IV C2, Discovery Related to Trial Counsel's Failure to Object and Demand a Mistrial when the Prosecutor Made a Blatantly False Statement to the Jury**

These specific discovery requests are related to Trial Counsel's failure to object and demand a mistrial when the prosecutor made a blatantly false statement to the jury in his summation. The allegations in question commenced at paragraph 169 of the Defendant's Petition on page 37 and continues to paragraph 204 on page 45. This discovery request was also referred to in paragraph 469(f) in the Defendant's Amended Petition wherein the Defendant requested discovery concerning whether the Defendant's constitutional rights were violated by activities of law enforcement and private attorneys regarding Allan C. Myers.

#### **A. Specific Discovery Requests**

1. The Defendant requests authority from this Court to issue compulsory process, subpoenas to the following individuals and to take statements under oath from each of the following individuals:

- a. Allan C. Myers;
- b. Corporal Joseph Leiter, Pennsylvania State Police;
- c. Trooper James Ellis, Pennsylvania State Police;
- d. Inspector Corricelli, United States Postal Inspection Service;
- e. Attorney Joseph McKettigan.

2. Petitioner seeks discovery of the following information:

- a. Any and all documents reflecting communications between any attorney, officer, investigator, agent, or other Commonwealth personnel or persons working with Commonwealth personnel (including but not limited to United States Postal Inspectors) and Allan C. Meyers and/or any agent, representative, or attorney of Allan C. Myers relating to Mr. Myers's potential testimony at trial in this matter;

- b. Any and all documents reflecting communications between any attorney, officer, investigator, agent, or other Commonwealth personnel and Allan C. Myers and/or any agent, representative, or attorney of Allan C. Myers relating to Mr. Myers's availability to testify at trial in this matter;
- c. Any and all documents in the Commonwealth's possession relating to efforts to serve a subpoena for trial upon Allan C. Myers, either directly or through his counsel;
- d. Any and all notes of oral communication between any attorney, officer, investigator, agent, or other Commonwealth personnel or persons working with Commonwealth personnel (including but not limited to United States Postal Inspectors) and Allan C. Myers and/or any agent, representative, or attorney of Allan C. Myers relating to Mr. Myers's potential appearance, availability, and testimony at trial in this matter.

### B. Argument

The Defendant, at paragraph 170 of his Amended Petition for Post Conviction Relief states that during the prosecutor's closing argument, he stated the following:

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.

In paragraph 173 of the Amended Petition, the Defendant states:

Alternatively, this statement was a lie, as the only potential victim who was presented at trial to which this statement could apply was Victim #2, the individual in the shower, supposedly the victim witnessed by the star witness for the prosecution, Michael McQueary.

In paragraph 174 it is stated:

Victim #2 was, as both the prosecution and defense well knew, an individual whose name was Allan C. Myers.

What makes this misstatement of fact by the prosecutor particularly insidious is that it was made in conjunction with another statement made by the prosecutor in this case. As stated by the Defendant in paragraph 150 of his Amended Petition for Post Conviction Relief,

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

\* \* \*

One thing he didn't which he could have provided to Bob Costas, **he could have provided it to anybody at any time. 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 to Bob Costas, no. He forgot that.

Thus, the Defendant was subjected to a preverbal, ethical "double whammy". That is, the prosecutor in his summation, lied to the jury about his knowledge of who "Victim #2" was and then suggested in no uncertain terms that the Defendant should have come forward and given the name.

The Commonwealth in its response to the Defendant's Amended Petition for Post Conviction Relief was indignant in its response. More specifically the Commonwealth stated, "To suggest that officer of this court would intentionally lie and violate his oath is a serious allegation and one that should only be buttressed with legitimate evidence. Here Sandusky offers no evidence in support of his position except for self-serving speculation about the prosecutor's mindset and motivations. He can hardly establish that this was a meritorious claim that counsel should have preserved through an objection/request for mistrial if its validity in is

such serious doubt. Accordingly, this claim should be dismissed outright without any further analysis.”

Curiously, it was with this allegation that Sandusky in his Petition, offers very specific evidence. The history of Victim #2, Allan C. Myers, is set forth in great detail in paragraphs 175 through 193 of the Defendant Sandusky’s Petition. At the beginning of the investigation, Myers appeared to be a staunch supporter of Jerry Sandusky. As noted in paragraph 176 of the Defendant’s Amended Petition, on May 6, 2011, Allan C. Myers submitted a letter to a publication, wherein he stated:

I am one of those many Second Mile kids who became a part of Jerry’s “family.” He has been a best friend, tutor, workout mentor and more. We’ve worked together, competed together, travelled together and laughed together. I lived with Jerry and Dottie for three months. Jerry’s been there for me for 13 years and stood beside me at my senior parent’s football night.

I drove 12 hours to attend his mom’s funeral. I don’t know what I would have done without him

As stated in paragraph 177, prior to the trial the Defendant engaged an investigator, Curtis Everhart, who interviewed Allan C. Myers about the allegations relating to the Defendant Jerry Sandusky. This information was reduced to a summary of the interview and is set forth in some length in paragraph 179 of the Amended Petition on page 39. In subparagraph E of paragraph 179, Everhart states, “I asked Myers about a specific time period in 2002 when he would work out with Jerry. Myers stated it would have been the night that was described as alleged Victim Number Two (2) in the grand jury report. “The day was March 1, 2002, I am very positive”. As noted in subparagraph F, Everhart noted:

Myers stated he and Jerry had just finished a workout and went into the shower area to shower and leave. “I would usually work out one or two days a week, but this particular night is very clear in my mind. We were in the shower and Jerry and I were slapping

towels at each other trying to sting each other. I would slap the walls and would slide on the shower floor, which I am sure you could have heard from the wooden locker area. While we were engaged in fun as I described, I heard the sound of a wooden locker close, a sound I have heard before. I never saw who closed the locker. The grand jury report says Coach McQueary said he observed Jerry and I engaged in sexual activity. This is not the truth and McQueary is not telling the truth. Nothing occurred that night in the shower.”

As noted in subparagraph G, Everhart noted:

I asked, “How did you know this was the night McQueary described?” Myers stated, “I heard the wooden locker close. McQueary said he went to the locker room to obtain items from a locker. I know what the door sounds like when it is closed, as I said before. I never saw McQueary look into the shower that night. I am sure.” I asked Myers, “Can you be more specific if possible?” Myers said, “That same week Jerry either told me in person or on the phone that the night we were in the showers, Coach McQueary reported that he saw us engaged in sexual acts and reported this to school officials. Jerry told me to expect a call from PSU officials about that night. To be more specific, the last night that Jerry and I showered at the PSU Complex was March 1, 2002, I am certain.”

As noted in subparagraph H, Everhart noted:

I asked Myers, “Did PSU officials ever contact you?” Myers said, “Never. The next contact I had was when PSP troopers interviewed me regarding the Sandusky case.” Myers again stated, “At no time that night, March 1, 2002, did Jerry sexually assault me with anal or oral intercourse, nor did I perform such on Jerry. This is wrong not to tell the truth.” Myers said again, “I am alleged Victim Number Two (2) on the grand jury report as the events described match that night in exact details except that Jerry never sexually assaulted me. I would be very sure if something like that happened and I would have called the police. What McQueary said he observed is wrong. I can’t understand why this was said. It is not the truth.”

As noted in subparagraph I, Everhart noted:



Myers described, "I told PSP about numerous trips I would take with Jerry and nothing ever happened except Jerry putting his right hand on my left knee. I described that I would stay at Jerry's home, sometimes have meals, sometimes stay overnight. I would shower separate from Jerry at this home. I felt very uncomfortable with the PSP interview process as they would try to put words in my mouth, take my statement out of context. The PSP investigators were clearly angry and upset when I would not say what they wanted to hear. My final words to the PSP were, "I will never have anything bad to say about Jerry."

Myers, as set forth in paragraph 180, was interviewed by two State Police Officers, Joseph Leiter and James Ellis. The State Police report is found in the Appendix at page 436. No mention is made of any inappropriate conduct on the part of the Defendant Sandusky by Allan Myers. On February 28, 2002 Inspector Corricelli interviewed Allan Myers concerning his relationship with Jerry Sandusky. Once again there was no mention of any inappropriate contact with Mr. Sandusky. A copy of this memorandum is found in the Appendix at page 438. On March 8, 2012, Inspector Corricelli again interviewed Mr. Myers. On this occasion Mr. Myers related that he was ready to discuss his alleged sexual abuse. He further alleged he was abused on at least three trips he took with Mr. Sandusky outside of Pennsylvania. A copy of this memorandum is found in the Appendix at page 441. On March 16, 2002 Inspector Corricelli again interviewed Allan Myers wherein he indicated that the only time there was sexual conduct by Sandusky was at the Lasch Building on the Pennsylvania State University campus. He noted that Michael McQueary was present. A summary of this interview is found on page 443 of the Appendix.

In paragraph 186 of the Petition it is indicated that Trial Counsel Karl Rominger was informed by the prosecutors in the case that in order to keep law enforcement officers from interviewing Allan Myers outside of his attorney's presence, a private attorney sequestered Myers in an undisclosed location so that he was unable to be contacted by law enforcement officials.

From the foregoing, it is clear that the Commonwealth was aware that Allan C. Myers claimed he was "Victim #2". The Commonwealth in its brief suggests that Sandusky, in his petition, "Goes on to detail the interviews of Allan C. Myers ("Myers") who denied, then admitted, then denied again he was Victim Two." This isn't true. The Defendant Sandusky is not aware of any statement given by Allan C. Myers wherein he denied he was Victim #2.

There are two points made in the Commonwealth's response to Defendant's petition to which Sandusky agrees. First of all, at the bottom of page 23 of the Commonwealth's response, the Commonwealth concedes that "the Prosecutor was unmistakably referring to the two unnamed victims in this remarks." The second point is that the allegation made by the defense is a very serious one. Rather than respond to this very serious allegation which, in and of itself, should result in a new trial for the Defendant, the Commonwealth seems to suggest to this Court that the allegation is so serious that it should be dismissed outright "without any further analysis". The Commonwealth suggests that Sandusky offers no evidence in support of his position "except for self-serving speculation about the prosecutor's mindset and motivations". 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.

Whatever his mindset was, it is clear he had motivation to misrepresent to the jury the existence of Allan C. Myers. If Myers testified consistently with his earlier statements, and indeed his last statement, the credibility of the Commonwealth's star witness would have been significantly undermined. McQueary was, as was noted in the Commonwealth's summation, an extremely significant part of the Commonwealth's case. Furthermore, if Allan C. Myers testified consistently with his earlier statements (with which he would have undoubtedly been

cross-examined by the defense at trial) it would have undermined not only the Sandusky case but also the prosecutions of Curley, Schultz and Spanier, as McQueary would have to be considered the star witness in those cases. Finally, it was on McQueary's reported statement in the leaked grand jury presentment, which turned out to be incorrect, that led to the highly publicized, and profoundly unjust, termination of Penn State icon Joe Paterno and his subsequent disgrace.

The Defendant Sandusky vigorously disagrees with the Commonwealth that this claim should be dismissed outright without any further analysis. Analysis of this very serious matter is requested and indeed, from the evidence, demanded. The only way this analysis can occur is if the Defendant can receive the discovery which he has requested.

Finally, the Defendant asks the Court to be mindful of Rule 500 of the Pennsylvania Rules of Criminal Procedure. This rule deals with the preservation of testimony after institution of criminal proceedings. Under Rule 500 (A)(1) at any time after the institution of a criminal proceeding, upon motion of any party, and after notice of hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interest of justice that the witness' testimony be preserved. Certainly, there are questions, based on the history of this case concerning whether Allan C. Myers will be available for trial. For this reason, it is requested that his testimony be preserved by taking of his sworn statement.

**II. Defendant's Discovery Requests Regarding the Defendant's Amended Petition for Post Conviction Relief IV G, the claim that the Defendant's Constitutional Right to Impeachment Evidence was Infringed by the Failure to Disclose the Alleged Victims' Financial Incentives to Testify Against Sandusky, Including Contingent Fee Agreements with Private Attorneys Pursuant to Private Litigation Against Penn State University.**

**A. Specific Discovery Requests**

The Defendant requests copies of any signed agreements between certain government witnesses and their private civil attorneys. These witnesses include the following:

- a. Brett Houtz;
- b. Aaron Fischer;
- c. Dustin Struble;
- d. Zachary Konstas;
- e. Allan C. Myers
- f. Jason Simcisko

**B. Argument**

As noted in paragraph 327 of the Defendant's Amended Petition for Post Conviction Relief, page 77, it is stated that upon information and belief, many if not all of the purported victims who testified in this matter have pursued civil lawsuits against Pennsylvania State University, with many settling with the University. According to an October 28, 2013 press release from Penn State University, the University reached a settlement agreement with 26 alleged victims for a total settlement of approximately 59.7 million. This equates to an average settlement of approximately 2.29 million per victim. See Penn State University's settlements announced for Sandusky victims, a copy of the press release can be found at page 572 of the

Appendix. If the witness, purporting to be victims, who testified at the Defendant's trial, had engaged private civil attorneys to pursue financial claims against Penn State University, this information would have been highly significant to a jury evaluating their credibility. Obviously if they had a financial incentive to testify favorably to the Commonwealth, the jury should have known this.

It is the position of the Defendant there is ample reason to believe that these witnesses had contingent fee agreements with private counsel. The Commonwealth, in its response to the Defendant's Amended Petition for Post Conviction Relief, conveniently for the Defendant, sets forth specific excerpts of the testimony of these witnesses. On page 52 of its response, the following is clear from reviewing these statements:

1. These witnesses had a private attorney;
2. These witnesses did not pay the lawyer any money at the time they testified;
3. These witnesses signed an agreement;
4. These witnesses consistently claimed not to have known the terms of the agreement.

If these witnesses signed contingent fee agreements wherein the attorney would be paid a percentage of what the individual would recover in a civil suit, it would directly contradict the testimony of these witnesses and would be highly probative of the lack of credibility of these witnesses.

More specifically, the testimony of Brett Houtz can be found at page 52 of the Commonwealth's response to the Defendant's Amended Petition. He admits that he had an attorney who was with him at police interviews and appeared before the Grand Jury. He denies that he ever paid the lawyer anything. He was asked: Q. Have there been any discussions about

pursuing some sort of civil action? A. No. He admits that he signed an agreement with his attorney, "Basically just for his representation." He denies that he knows exactly what it says. If in fact the agreement that he signed was a contingent fee agreement it would directly contradict his testimony.

Aaron Fisher's significant testimony on this subject can be found on page 54 of the Commonwealth's response to the Defendant's Amended Petition. He states that his mother hired an attorney to keep the press away from him. When asked, "And I'm guessing you probably don't know what type of financial arrangements have been made with this attorney." His answer was, "I don't know anything about that kind of stuff. All I know is I'm here to tell the truth about what happened to me, just like everybody else." This of course would be contradicted if he in fact had signed a contingent fee agreement.

The significant cross examination of Dustin Struble may be found at page 56 of the Commonwealth's response to the Defendant's Amended Petition. Dustin Struble states that he has a local lawyer representing him. He denies that he was aware that the lawyer advertises that represented alleged victims of Penn State sexual abuse. When asked if the only reason he retained him was to protect his anonymity in this matter he replied, "No, that's not the only reason. I just – I didn't want to go through this alone. I wanted somebody that could help me. Somebody that could help me with some of the behind-the-scenes legal things." He denies that he paid him anything. When asked if he signed any sort of fee agreement with him. He replies, "I signed something. I'm not sure what it was." Once again, if Struble signed a contingent fee agreement, it would directly contradict his testimony.

Zachary Konstas' cross-examination can be found at page 59 of the Commonwealth's response to the Defendant's Amended Petition. He states that had recently obtained counsel.

When asked if he paid his attorney any money for the things that the attorney did for him. He replied, "Zero." When asked if he signed any sort of agreement with him in terms of how he was to be paid. He replied, "I signed something to let him represent him. I don't know legal stuff, so I don't remember what was in that." Once again, if Konstas signed a contingent fee agreement, which in all probability he did, this would make clear to the jury what his purpose in testifying was.

Jason Simcisko's cross-examination can be found at page 61 of the Commonwealth's response to the Defendant's Amended Petition. He was asked whether he hired private counsel. He replied, "I didn't really hire them. Well, they approached me because they were representing someone else." He denied that he paid the attorney any money. He admitted that he signed an agreement with them in terms of their representation.

In the Commonwealth's response, it seems to be suggested that because the jury was aware that Sandusky's defense, at least in part, consisted of a theory that the victims should not be believed because they were motivated by money this is sufficient impeachment of the witnesses. The purpose of impeachment is not to make the jury aware of a potential defense. The purpose of impeachment is to establish that the witnesses were not telling the truth about their motivation for giving testimony. These witnesses, because of the ineffective cross-examination and impeachment, were able to convey the false theory that the attorneys in question were not hired for the purpose of obtaining settlements on behalf, but were just there to help them through a difficult ordeal.

The Commonwealth also in its response, at page 52 states that the problem with the Defendant's argument is that the Defendant Sandusky cannot establish that any such agreements and/or incentives existed at the time of the trial. This argument essentially is that the

Commonwealth has no obligation to reveal the existence of the agreements in questions until the Defendant proves that these documents existed. Obviously the Defendant is asking the Commonwealth to reveal whether they exist or not. If the Commonwealth candidly answers that it doesn't know, then the defense should be permitted to subpoena these specific documents from the attorney's in question. These attorneys can hardly claim attorney/client privilege in light of the testimony given by their clients at trial that the agreements do in fact exist.

The Commonwealth concedes at page 50 that the evidence in question is critical wherein it is stated the following:

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

As stated by the Commonwealth, there is no *Brady* violation when the Defendant knew or, with reasonable diligence, could have uncovered the evidence in question. Of course this is our point. Defense counsel at trial made no effort to subpoena these documents or even request them from the Commonwealth.

Curiously, the Commonwealth suggests that during the three years since his convictions, Sandusky has had ample opportunity to investigate any financial motives on the part of the victims and to subpoena documents for purposes of his appeal. The defense is unfamiliar with



any procedure that would permit a petitioner in a post conviction relief act petition to subpoena documents without leave of court. If there is such a procedure it would obviate a necessity for this argument. All we are asking for in this item is for the Court to sanction Sandusky's use of compulsory process.

**III. Defendant's Discovery Requests Regarding the Investigating Grand Jury Process as Used in this Case as an Unconstitutionally Deprived Sandusky of his Right to Due Process.**

**A. Specific Discovery Requests**

1. The Defendant requests authority from this Court to issue compulsory process, that is Subpoenas, to obtain the report, if any exists, of Attorney James M. Reeder, who was appointed by Judge Barry F. Feudale to investigate and prosecute leaks coming from the Grand Jury that recommended charges against the Defendant, Jerry Sandusky.

2. The Defendant requests authority from this Court to issue compulsory process, Subpoenas to the following individuals and take statements under oath from each of them:

- a. Attorney Frank Fina;
- b. Attorney Jonelleh Eshbach;
- c. Sara Gannim;
- d. Michael Gillum, Psychologist;
- e. Aaron Fisher;
- f. Dawn Hennessy;
- g. Deb McCord;
- h. Any other individual who had access to the proceedings before the Grand Juries investigating the activities of the Defendant, Jerry Sandusky.

3. Any and all records, documents, and correspondence, including e-mails, that were transmitted between any and all members of the judiciary, and any representative, agent, officer, or employee of the Pennsylvania Office of Attorney General, including but not limited to Frank Fina, Jonelle Eshbach, Richard Sheetz, Joseph McGettigan, Anthony Sassano, Randy Feathers, and/or Timothy Shaffer, which communications occurred in the timeframe during which the Sandusky investigation was before any grand jury empanelled by the Commonwealth.

### B. Argument

In the Commonwealth's response to the Defendant's Petition for Post Conviction Relief, the Commonwealth suggests that the Defendant Sandusky is capitalizing upon the publicity surrounding the subject of Grand Jury leaks which has pervaded media coverage in Pennsylvania to catapult his next claim into focus. (Page 31 of Commonwealth's Response). This is not true. On the contrary it is the Defendant Sandusky's intention to capitalize on the recent Supreme Court ruling in the case of *In Re: The thirty-Fifth Statewide Investigating Grand Jury; Petition of: Attorney General Kathleen g. Kane No. 197 MM 2014 decided March 31, 2015*. The Defendant Sandusky suggests to this Court that the ruling of the Supreme Court in the *Kane* case totally changed the landscape of Pennsylvania Law regarding the seriousness with which the Pennsylvania Supreme Court views widespread abuses of investigating Grand Juries by prosecutors in this state.

On Page 31 of the Commonwealth's Response, the Commonwealth states this:

Sandusky claims that the leak of grand jury information in this case entitles him to an extraordinary remedy: Dismissal of all of the criminal charges pertaining to the victims who were identified after the details of his investigation were published by the media. Conflating principles of federal law, Sandusky would have this Court craft a so-called exclusionary rule that bars the

Commonwealth from utilizing the testimony of any witnesses who happened to come forward in the wake of a breach of grand jury secrecy. Because there is no basis in the law for such a remedy, Sandusky is not entitled to relief.

The Commonwealth correctly states Sandusky's claim. Sandusky does indeed claim that the leak of grand jury information in his case entitles him to an extraordinary remedy: dismissal of all the criminal charges pertaining to the victims who were identified after the details of his investigation were published by the media. Sandusky would indeed have this Court craft an exclusionary rule that bars the Commonwealth from utilizing the testimony of any witnesses who happened to come forward in the wake of a breach of grand jury secrecy. As will be more fully set forth in what follows, the time has come for such relief to breaches of grand jury secrecy.

Paragraphs 227 (page 50) through 234 of the Defendant's Amended Petition for Post Conviction Relief sets forth the basis for the Defendant's position that the Attorney General's Office or its agents deliberately leaked grand jury information to certain members of the press and others. These paragraphs of the Defendant's Amended Petition for Post Conviction Relief are based on information found at pages 40 through 56 of the Moulton Report, which was commissioned by Attorney General Kane herself.

As stated in Paragraph of 229 of the Sandusky's Amended Petition for Post Conviction Relief "the undisputed change of facts show that the Commonwealth's case, which had remained essentially stalled since it opened in May of 2009, rapidly advanced in the Summer of 2011 after the fact of the investigation was leaked to Gannon". As stated in Paragraph 231 of the Defendant's Petition for Post Conviction Relief, the Defendant believed that the leaking of the information, during the time that the Commonwealth's investigation had stalled, was a deliberate act by the Prosecution and its agents, or other agents of the Thirtieth and/or Thirty-Third Statewide Investigating Grand Jury to advance the investigation and spur other alleged victims to

come forward. Indeed, as stated in Paragraph 232 of the Amended Petition, Eshbaugh had expressly stated that the Prosecution was unlikely to identify any additional witnesses until the investigation became public.

From the clear allegations in the Moulton report, commissioned by Attorney General Kane, it appears that, at a minimum, there are colorable allegations or indications that the sanctity of the grand jury process was breached. In Paragraph 238 of the Amended Petition for Post Conviction Relief, it is noted that in the case of *In Re: The Thirty-Fifth Statewide Investigating Grand Jury; Petition of: Attorney General Kathleen G. Kane No. 197 MM 2014 decided March 31, 2015* at Page 3, citing *In Re: Dauphin County Fourth Investigating Grand Jury, 610 Pa. 296, 19 A.3d 491 (2011)*:

There, this Court recently observed that “[t]he 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 indicated that, “[w]hen there are colorable allegations or indications that the sanctity of the grand jury process has been breached those allegations warrant investigation, the appointment of a special prosecutor to conduct such an investigation is appropriate.” *Id.* at 318, 19 A.3d at 503-04. Further, the supervising judge commented:

The Supervising Judge of a Statewide Investigating Grand Jury must have inherent authority to investigate a grand jury leak, when there is a conflict of interest as there is here. Clearly, Attorney General Kane could not investigate herself. Otherwise potentially serious violations of grand jury secrecy could go unaddressed. *Id.*  
*at Page 4*

In Paragraph 242 of the Amended Petition for Post Conviction Relief, the Defendant Sandusky notes that based on the foregoing, very recent opinion of the Pennsylvania Supreme Court it is clear that, to the extent the investigating grand jury system had been abused by unauthorized leaks, it falls on the role of the supervising Judge to monitor for abuses and in the appropriate case appoint a special prosecutor; however, in the present case, the supervising Judge

did not appoint a special prosecutor. Indeed, from the record, it is apparent that the supervising Judge apparently did nothing with respect to the leaks.

This brings us to the curious case of Attorney James M. Reeder and his investigation. As stated, the position of the Defendant Sandusky in his Petition was that it appeared that the supervising Judge apparently did nothing with respect to the leaks. Subsequent to the filing of the Petition, Counsel for the Defendant learned the Supervising Judge apparently did indeed do something with respect to the leaks. Attached hereto and marked Exhibit "A" is a news story from the Pittsburgh Post Gazette, dated February 28, 2013 wherein it had indicated the supervising Judge of the Statewide Grand Jury that recommended charges against Jerry Sandusky had appointed a special prosecutor to investigate the leaks coming from it and to other panels. According to the news account, Judge Barry F. Feudale signed the four-page Order appointing Attorney James M. Reeder on February 8, 2013. It goes on to note that Reeder, a former lawyer from the State Attorney General's Office was to investigate and prosecute any illegal disclosure of information protected by the rules of Grand Jury secrecy, as well as any "breach of official duty or other unlawful act."

The story noted that Judge Feudale issued the Order because a preliminary investigation led him to believe a deeper probe into violations of grand jury secrecy was needed. At the conclusion of Mr. Reeder's work, he was to submit a report to the State with recommendations on preserving grand jury secrecy, Judge Feudal wrote.

One of the major thrusts of the Defendant Sandusky's argument regarding the investigating grand jury process depriving him of his right to Due Process was the failure of Judge Feudale to appoint a special prosecutor. Counsel anticipated being severely chided by the Commonwealth for its failure to be aware that a special prosecutor had, indeed, been appointed

by Judge Feudale. In the Response filed by the Commonwealth to the Amended Petition Post Conviction Relief, there was nothing regarding the appointment of Attorney James M. Reeder, not one word.

Counsel for Defendant Sandusky had a paralegal, James M. Smith, contact Attorney James M. Reeder on September 22, 2015 to ascertain what had occurred with regard to his investigation and subsequent report. Mr. Reeder informed Mr. Smith, in no uncertain terms, that he would not even speak with anyone regarding his investigation without a Court Order.

It needs to be emphasized that at this stage of the proceedings Sandusky is not seeking this Court to order dismissal of all of the criminal charges. We are merely asking that we be permitted to inquire into those allegations made in the Moulton Report. On Page 31 of its Response, the Commonwealth notes that Sandusky avers - - ***without any supporting evidence*** - - that “the leaking of information, during the time of Commonwealth’s investigation had stalled, ***was a deliberate act*** by the Prosecution and its agents, or other agents of the [Thirtieth or Thirty-Third SWIGJ] to advance the investigation and spur the other alleged victims to come forward.” The obvious question arises, how in the world would Sandusky be able to produce the supporting evidence without having the opportunity to question, under oath, the players involved in the leaking of the information.

It is important to emphasize that Sandusky in his Petition is claiming, not only he was a victim of malicious behavior on the part of the Attorney General’s Office in leaking information from the investigating grand juries in question to further their investigation, he is alleging that these leaks were part of the systemic break down of the grand jury process as over time by the Attorney General’s Office and supervising Judges. As noted in Paragraph 237 of the Petition, it is apparent that the jury system has irreparably broken down in Pennsylvania by irresponsible

prosecutors and lack of oversight by supervising Judges. Indeed, the citizens of Pennsylvania are now being confronted with the unseemly spectacle of leaks from an investigating grand jury charge with investigating leaks from another grand jury. Paragraph 237. *See* Wallace McKelvey, *Kathleen Kane Should Be Charged in Connection with Leaks, Grand Jury Says: Report*, Harrisburg Patriot-News, January 8, 2015, available at [http://www.pennlive.com/politics/index.ssf/2015/01/kathleen\\_kane\\_leaked\\_secret\\_in.html](http://www.pennlive.com/politics/index.ssf/2015/01/kathleen_kane_leaked_secret_in.html). See Appendix, P. 459. It is believed by Sandusky that it is this systemic breakdown precipitated the Supreme Court's opinion in the Kane case, *Supra*.

It needs to be emphasized by the Defendant in this case that, at this stage of the proceeding, we are not asking for the application of the exclusionary rule barring the Commonwealth from utilizing the testimony of any witnesses who happen to come forward in the wake of the breach of grand jury secrecy, nor are we asking a dismissal of all the criminal charges pertaining to the victims who were identified after the details of the investigation was leaked to the media. We are asking the Court to defer any such decision until a point when the evidentiary record can be developed and to confer upon the Defendant the ability to develop that evidence.

Finally, attached as Exhibit "B" is correspondence between the undersigned and the Attorney General's Office with regard to communications between representatives of the Attorney General's Office and supervising judges of the grand jury investigation involving Mr. Sandusky. Prior to the filing of the Defendant's Amended Petition for Post Conviction Relief, then Chief Deputy Attorney General James P. Barker declined to provide the documents requested.

As noted in counsel for Sandusky's letter, the Defendant and counsel learned through various news accounts that there were a number of inappropriate emails and communications between members of the Attorney General's staff and various members of the judiciary. The Defendant believes that these might have included inappropriate communications of an "*ex parte*" nature between members of the Attorney General's staff conducting the investigation and the supervising judge or judges of the grand jury investigation. This would of course result in a "tainting" of the grand jury investigation and would have likely had significance in the grand jury presentment accusing the Defendant of various criminal acts and subsequent prosecution.

As the Attorney General declined to provide this information, we are requesting that the Court order certain information to be transmitted to the Defendant. This includes:

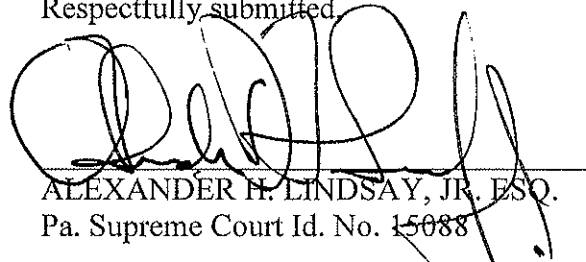
1. Any and all records, documents, and correspondence, including e-mails, that were transmitted between any and all members of the judiciary, and any representative, agent, officer, or employee of the Pennsylvania Office of Attorney General, including but not limited to Frank Fina, Jonelle Eshbach, Richard Sheetz, Joseph McGettigan, Anthony Sassano, Randy Feathers, and/or Timothy Shaffer, which communications occurred in the timeframe during which the Sandusky investigation was before any grand jury empanelled by the Commonwealth.



CONCLUSION

For the foregoing reasons it is requested that the Defendant be permitted to go forward with the requested discovery.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Alex Lindsay', is written over a horizontal line.

ALEXANDER H. LINDSAY, JR. ESQ.  
Pa. Supreme Court Id. No. 15088

THE LINDSAY LAW FIRM  
110 East Diamond Street, Suite 301  
Butler, Pennsylvania 16001  
Phone: 724.282.6600  
Fax: 724.282.2672  
*Attorney For Gerald A. Sandusky*



2013

**post-gazette.com**  
Pittsburgh Post-Gazette

# Special prosecutor assigned to probe Pa. grand jury leaks

February 28, 2013 12:00 AM

By Paula Reed Ward Pittsburgh Post-Gazette

The supervising judge of the statewide grand jury that recommended charges against Jerry Sandusky has appointed a special prosecutor to investigate leaks coming from it and two other panels.

Judge Barry F. Feudale signed the four-page order appointing attorney James M. Reeder on Feb. 8.

It gives the former lawyer from the state attorney general's office until Aug. 8 to investigate and prosecute any illegal disclosure of information protected by the rules of grand jury secrecy, as well as any "breach of official duty or other unlawful act."

Judge Feudale issued the order, he wrote, because a preliminary investigation led him to believe a deeper probe into violations of grand jury secrecy was needed.

At the conclusion of Mr. Reeder's work, he is to submit a report to the state with recommendations on preserving grand jury secrecy, Judge Feudale wrote.

The order includes three grand juries: the 33rd Statewide Investigating Grand Jury, the 36th Statewide Investigating Grand Jury and the Dauphin County Fourth Investigating Grand Jury.

The 33rd Statewide Investigating Grand Jury handled the child sex abuse case against former Penn State University assistant football coach Sandusky, as well as three top administrators there. The still-pending case involving those administrators — former Penn State president Graham Spanier, former athletic director Timothy Curley and former vice president for business and finance Gary Schultz — is listed among the case captions on the order.

Their charges of perjury, conspiracy and endangering welfare of children are on hold while Judge Feudale attempts to resolve motions by the defendants regarding their representation by former Penn State general counsel Cynthia Baldwin. 205

The defendants argue that testimony provided by Ms. Baldwin against their clients that led to new charges should not have been permitted because they believed she represented them before the grand jury in January 2011. Ms. Baldwin has said she was representing Penn State, not the men.

Judge Feudale, in his recent order, said the special prosecutor should also investigate a rule in the Pennsylvania Code as "Who May be Present During Session of an Investigating Grand Jury." In that rule, people permitted to attend include the attorney for the witness being examined.

Charles DeMonaco, the attorney representing Ms. Baldwin, said Judge Feudale's order "has nothing to do with Cynthia Baldwin or any of the pending motions regarding Cynthia Baldwin."

As for the 36th Statewide Investigating Grand Jury listed in the order, Judge Feudale notes that it has "yet to be empaneled."

The Dauphin County Fourth Investigating Grand Jury was empaneled in 2006 and was tasked with investigating the slot machine license sought by Scranton businessman Louis A. DeNaples. Perjury charges against him were dropped in 2009.

A special prosecutor appointed in May 2009 to probe grand jury secrecy violations in the case reported a year later that he was unable to determine where media leaks originated.

In an April 2011 opinion, Supreme Court Chief Justice Ronald Castille wrote that the special prosecutor's "ultimate inability to determine the source of any breach of grand jury secrecy does not necessarily end the matter."



**THE LINDSAY LAW FIRM, P.C.**

110 EAST DIAMOND STREET, SUITE 301 BUTLER, PENNSYLVANIA 16001

ALEXANDER H. LINDSAY, JR.  
CHAD P. DOMAN  
JAMES K. PAULICK

PHONE: 724/282-6600  
FAX: 724/282-2672

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OF COUNSEL  
JOHN J. VIERTHALER  
THOMAS R. CERASO (1934 - 2009)

December 4, 2014

Senior Deputy Attorney General James P. Barker  
Office of the Attorney General of Pennsylvania  
16<sup>th</sup> Floor – Strawberry Square  
Harrisburg, Pennsylvania 17120

Re: Commonwealth v. Gerald A. Sandusky  
Centre County Court of Common Pleas  
CP-14-CR-0002421-2011 & CP-14-CR-0002422-2011

Dear Mr. Barker:

As you know, this law firm represents the Defendant Gerald A. Sandusky with respect to the filing of his PCRA Petitions at the above numbers. In conducting the research for the PCRA Petition, we have come to the conclusion that there may be discovery not disclosed prior to this date which would constitute after discovered evidence or even "**Brady**" materials.

In reviewing the report of H. Geoffrey Moulton, Jr. concerning the investigation conducted by Mr. Moulton into the investigation of the Defendant's activities, it appears not only that the grand jury investigation played a significant role in the investigation and prosecution of the Defendant but also that a number of very significant decisions were made by the supervising judge or judges of the grand juries in questions. These decisions may have included the following:

1. The report details an apparent leak of grand jury information to a reporter from the *Patriot News* and is the *Centre Daily Times*. Nowhere in the report does it indicate that an investigation was done concerning the leaks of grand jury information or, if there was an investigation, what the result of that investigation revealed;
2. On page 73 of the report there is reference to Deputy Attorney General Frank Fina seeking and obtaining a protective order from the supervising grand jury judge, directing the witnesses not to

disclose the fact or substance of their testimony to anyone other than their own attorney;

3. On page 79 of the report there is reference made to an execution of a search warrant which was signed by the supervising grand jury judge;
4. While it does not appear to be referenced in the Moulton Report, it appears that a psychologist, Michael Gillum, appeared with a witness, A.F., during A.F.'s grand jury testimony. Having such an individual appear with a witness in front of the grand jury would be highly irregular and could have only occurred with court approval;

The Defendant, and counsel, have learned through various news accounts that there were a number of inappropriate emails and other communications between members of the Attorney General's staff and various members of the judiciary. The Defendant believes that these might have included improper communications of an "*ex parte*" nature between members of the Attorney General's staff conducting the grand jury investigation and the supervising judge or judges of the grand jury investigation. This would, of course, result in a "tainting" of the grand jury investigation and would have likely had significance in the grand jury presentment accusing the Defendant of various criminal acts and also his subsequent prosecution.

Accordingly, I ask that you provide this office with the following:

1. Any and all records, documents, and correspondence, including e-mails, that were transmitted between any and all members of the judiciary, including but not limited to Judge Barry Feudale, Judge Norman Krumenacker, and/or Judge Todd Hoover; and any representative, agent, officer, or employee of the Pennsylvania Office of Attorney General, including but not limited to Frank Fina, Jonelle Eshbach, Richard Sheetz, Joseph McGettigan, Anthony Sassano, Randy Feathers, and/or Timothy Shaffer, which communications occurred in the timeframe during which the Sandusky investigation was before any grand jury empanelled by the Commonwealth. Also,
2. Any and all records, documents, and correspondence, including e-mails, that were transmitted between any and all members of the judiciary, including but not limited to Judge Barry Feudale, Judge Norman Krumenacker, and/or Judge Todd Hoover; and any representative, agent, officer, or employee of the Pennsylvania Office of Attorney General, including but not limited to Frank Fina, Jonelle Eshbach, Richard Sheetz, Joseph McGettigan, Anthony Sassano, Randy Feathers, and/or Timothy Shaffer, relating to the

investigations of Graham Spanier, Gary Schultz, and/or Tim Curley which communications occurred in the timeframe during which the investigation was before any grand jury empanelled by the Commonwealth concerning Graham Spanier, Gary Schultz and/or Tim Curley.

Please feel free to contact me with any questions relating to the forgoing request.

I am thanking you in advance for your kind attention to this matter.

Very Truly Yours,

THE LINDSAY LAW FIRM, P.C.

**COPY**

Alexander H. Lindsay, Jr.

AHL:ms





COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE  
ATTORNEY GENERAL

December 29, 2014

Alexander H. Lindsay, Jr.  
The Lindsay Law Firm, P.C.  
110 East Diamond Street, Suite 301  
Butler, PA 16001-5982

In re: Commonwealth v. Gerald A. Sandusky, No. CP-14-CR-2421-2011, No. CP-14-CR-2422-2011 (C.P. Centre County)

Dear Mr. Lindsay:

Our Office has received your letter dated December 5, 2014, requesting discovery in the above-referenced matter. It is my understanding that you will be representing Mr. Sandusky with respect to a to-be-filed petition for relief under the Post Conviction Relief Act. As I indicated during our telephone call, because no petition is pending, it is the position of our Office that discovery is premature. Further, there are no exceptional circumstances that warrant discovery as required by Pa.R.Crim.P. 902(E)(1). Of course, the disclosure of evidence under *Brady v. Maryland* is independent of discovery rules. However, I do not see that the materials requested constitute *Brady* material. Also, some of the records and information that you have requested are not such as I may provide, such as Grand Jury materials. Finally, the request appears to be overly broad, as many of the records sought are completely unrelated to the prosecution of Mr. Sandusky and therefore would not be discoverable in any way.

For these reasons, the Office of Attorney General declines to provide the requested materials. If you have any questions or if I may be of assistance in some other way, please feel free to contact me at (717) 705-0098.

Sincerely,

A handwritten signature in black ink that reads "James P. Barker".

James P. Barker  
Chief Deputy Attorney General  
Criminal Law Division  
Appeals and Legal Services Section  
14<sup>th</sup> Floor—Strawberry Square  
Harrisburg, PA 17120

**CERTIFICATE OF SERVICE**

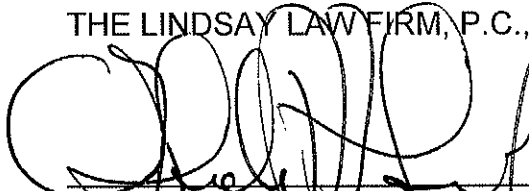
I, Alexander H. Lindsay, Jr., Esquire, hereby certify that a true and correct copy of the foregoing document was served on the 29th day of

September 2015, via U.S. Mail delivery on the following:

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

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

THE LINDSAY LAW FIRM, P.C.,

A large, stylized handwritten signature in black ink, appearing to read 'Alex Lindsay', is written over a horizontal line.

Alexander H. Lindsay, Jr., Esquire  
Counsel for Defendant