IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

COMMONWEALTH OF	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
v.	:	
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GERALD A. SANDUSKY,	:	
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PETITIONER.	:	
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	:	*TYPE OF PLEADING*:
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	:	POST-HEARING BRIEF / PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
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	:	*FILED ON BEHALF OF*:
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	:	PETITIONER, GERALD A. SANDUSKY
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	:	*COUNSEL FOR PETITIONER*:
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COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011 CP-14-CR-2422-2011
v.	:	
GERALD A. SANDUSKY,	:	
PETITIONER.	:	HONORABLE JUDGE JOHN FORADORA

POST-HEARING BRIEF/PROPOSED FINDINGS OF FACT and CONCLUSIONS of LAW

AND NOW COMES, Petitioner, Gerald A. Sandusky, by and through his counsel, Alexander H. Lindsay, Jr., Esq., and J. Andrew Salemme, Esq., and the Lindsay Law Firm, P.C., and files this Post-Hearing Brief/Proposed Findings of Fact and Conclusions of Law:

SUMMARY OF PROCEDURAL HISTORY

On November 3, 2011, a grand jury voted to approve a presentment recommending charges against Mr. Sandusky, Penn State Athletic Director Timothy Curley, and Vice President Gary Schultz. This information was improperly and prematurely released on November 4, 2011. Mr. Sandusky surrendered to authorities, was arraigned, and released on bail on November 5, 2011.

On November 14, 2011, Mr. Sandusky's trial counsel advised him to sit for an interview with NBC Sports journalist Bob Costas, without notice that he would be interviewed or preparation for the interview. Indeed, Mr. Sandusky was advised that Mr. Costas was only going to speak to trial counsel until shortly before the interview.

Attorney General Linda Kelly and Pennsylvania State Police Commissioner Frank Noonan issued statements concerning the Sandusky investigation, including a request that anyone with information about the case should call the Office of Attorney General or Pennsylvania State Police.

Less than a month later a grand jury session on December 5, 2011 brought about testimony from two new purported victims, S.P. and R.R.

On December 7, 2011, the Grand Jury voted to approve a new presentment describing S.P. and R.R. as victims. ***See*** PCRA Appendix, at 300. The December 7, 2011 presentment incorporated the previously identified victims, and recommended charges for involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, attempt to commit indecent assault, unlawful contact with a minor, corruption of minors, and endangering welfare of children. That same day, Mr. Sandusky was arrested on the additional charges in Criminal Information No. CP-14-CR-2421-2011. Mr. Sandusky posted bail and was released on December 8, 2011.

On December 12, 2011, the trial judge, the district magistrate, the prosecution team, and Joe Amendola met at the Hilton Garden Inn for a night time off-the-record discussion regarding Mr. Sandusky waiving his preliminary hearing. Apparently, the Commonwealth threatened to add additional charges against Mr. Sandusky and seek an increase in his bail if he proceeded with his preliminary hearing. After the Hilton Garden Inn meeting, Mr. Amendola recommended that Mr. Sandusky waive his preliminary hearing and forego an opportunity to cross-examine the accusers. On December 13, 2011, Mr. Amendola waived Mr. Sandusky's preliminary hearing, and the charges were held for the Centre County Court of Common Pleas.

Mr. Sandusky was formally arraigned on the charges on January 11, 2012. The Commonwealth produced discovery to Mr. Sandusky on January 17, and 23, March 7, 12, & 27, April 27, May 4, 9, 14, 16, 18, 24, and 31, and June 4, 8, and 15, 2012. Jury selection occurred on June 5 and 6, 2012, 146 days from Mr. Sandusky's formal arraignment on January 11, 2012. The Honorable John M. Cleland, Senior Judge, presided at the jury trial of this matter.

Trial commenced on June 11, 2012 – a mere 152 days from the date Mr. Sandusky was formally arraigned on January 11, 2012. At trial, eight alleged victims testified. Additionally, the Commonwealth presented evidence relating to two accusers who were not identified to the jury. Mr. Sandusky was convicted, after jury trial, on June 22, 2012, of 45 of 48 charges against him related to allegations that he sexually abused ten men (during their minority), eight of whom were identified at trial.[1]

Mr. Sandusky filed an interlocutory appeal based on the collateral order doctrine, prior to sentencing, to challenge a protective order regarding the leak of discovery materials to the media; specifically, a tape-recorded interview of Matt Sandusky that occurred during Mr. Sandusky's trial. In the meantime, Judge Cleland sentenced Mr. Sandusky on October 9, 2012, to an aggregate sentence of 30 to 60 years' imprisonment, with credit for 112 days served on the aforementioned counts. On October 18, 2012, counsel filed timely post-sentence motions on Mr. Sandusky's behalf. Specifically, the motions included a motion in arrest of judgment and/or for a new trial, a motion for reconsideration, a motion for modification of sentence, motion for hearing on court ordered restitution and court costs, motion for leave of court to file amended post-sentence motion *nunc pro tunc*, and a reservation for ineffective assistance of counsel claims.

On January 30, 2013, the trial court denied Mr. Sandusky's post-sentence motions. Mr. Sandusky sought reversal of his convictions and the judgment of sentence on direct appeal to the Superior Court on February 21, 2013, by timely filing a notice of appeal. The Superior Court

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1 Specifically, Mr. Sandusky was convicted of eight counts of Involuntary Deviate Sexual Intercourse under 18 Pa.C.S. § 3123(a)(7), seven counts of Indecent Assault under 18 Pa.C.S. § 3126(a)(7) and (8), nine counts of Unlawful Contact with a Minor under 18 Pa.C.S. § 6318(a)(1)(5), ten counts of Corruption of Minors under 18 Pa.C.S. § 6301(a)(ii), ten counts of Endangering the Welfare of Children under 18 Pa.C.S. § 4304, and one count of Criminal Attempt to Commit Indecent Assault under 18 Pa.C.S. § 901.

heard oral argument on September 17, 2013. In his direct appeal, Mr. Sandusky raised the following claims:

> a. Was reversible error committed when the trial court refused to give the standard suggested criminal jury instruction requested by the defense on the failure of the complainants to make a prompt complaint to authorities;
>
> b. Is the Commonwealth estopped from arguing the instruction was not warranted under principles of judicial estoppel?
>
> c. Was the refusal to give the failure to make a prompt report jury instruction harmless error?
>
> d. Did reversible error occur when the prosecutor commented adversely on the defendant's not testifying at trial;
>
> e. Can the prosecutor's adverse comments as to Appellant not having testified be said to have been harmless?
>
> f. Did the Court deny Appellant due process of law and impair his Sixth Amendment right to counsel when it denied his motions for three continuances due to the vast amount of material turned over to the defense pursuant to court ordered discovery and service of subpoenas; and
>
> g. Did the Court commit reversible error when it required the jury to weigh the testimony of Appellant's character evidence against all of the other evidence in the case?

See Sandusky Direct Appeal Brief, 6/20/13, at 14; ***see also Commonwealth v. Sandusky***, 77 A.3d 663 (Pa. Super. 2013).

On October 2, 2013, the Pennsylvania Superior Court affirmed all of Mr. Sandusky's convictions. ***See Sandusky***, 77 A.3d 663. Thereafter, Mr. Sandusky filed a petition for allowance of appeal with the Pennsylvania Supreme Court. The Supreme Court denied Mr. Sandusky's petition for allowance of appeal on April 2, 2014. ***See Commonwealth v. Sandusky***, 81 A.3d 77 (Pa. 2014). Mr. Sandusky did not seek review with the United States Supreme Court.

Under 42 Pa.C.S. § 9545(b)(3), Mr. Sandusky's judgment of sentence became final on July 1, 2014, (upon the expiration of the 90-day period for Mr. Sandusky to seek a writ of *certiorari*

from the Supreme Court of the United States). Therefore, Mr. Sandusky's original PCRA petition was timely filed on April 2, 2015.[2] Mr. Sandusky filed an amended petition on May 6, 2015. The Commonwealth filed a response on September 1, 2015. A supplemental amended petition followed with permission of Judge Cleland on March 7, 2016. ***See*** Pa.R.Crim.P. 905.

The Commonwealth answered, and Mr. Sandusky filed a response to that Answer on April 11, 2016. Judge Cleland scheduled an argument on whether Mr. Sandusky was entitled to an evidentiary hearing on May 2, 2016. Judge Cleland indicated that Mr. Sandusky's witness certifications were not sufficiently detailed. More importantly, at the close of the argument, Judge Cleland, for the first time, disclosed that he had been present and taken part in the aforementioned off-the-record meeting at the Hilton Garden Inn wherein Mr. Amendola and the Commonwealth engaged in negotiations to waive Mr. Sandusky's preliminary hearing. Counsel, upon learning this information, filed a motion to recuse based on Judge Cleland having a potential conflict of interest since he acknowledged being a fact witness relative to one of Mr. Sandusky's claims. Judge Cleland initially denied this motion.

Subsequently, at the request of Judge Cleland, Mr. Sandusky provided briefs on why the grand jury in this case lacked subject matter jurisdiction to investigate Aaron Fisher's allegations based on the plain language of the Grand Jury Act. ***See*** PCRA Court Order, 5/5/16; ***see also*** Brief Re: Subject Matter Jurisdiction Claim, 5/19/16; Reply Brief-Subject Matter Jurisdiction Issue, 6/8/16. Judge Cleland initially granted an evidentiary hearing as to four claims and scheduled an evidentiary hearing for May 20, 2016.[3] Attorney Sam Stretton, who represented former Judge

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2 Amended petitions relate back to the date of the original filing. ***See Commonwealth v. Padden***, 783 A.2d 299 (Pa. Super. 2001).

3 The issues, as outlined in the Court Order were as follows:

Barry Feudale, a potential witness, filed a motion with the PCRA court seeking to preclude Mr. Feudale's testimony.[4] On or about May 19, 2016, Judge Cleland and the parties participated in a status conference. At the conclusion of that conference, Judge Cleland entered an order canceling the originally scheduled hearing. Thereafter, however, Judge Cleland granted an evidentiary hearing as to ten issues; specifically:

1. Trial counsel were ineffective in not objecting to prosecutorial misconduct that occurred during the closing statement when the prosecutor falsely stated that the 2001 shower victim was unknown.

2. Trial counsel were ineffective in neglecting to inform Mr. Sandusky of the agreement between Mr. Amendola and the Commonwealth that neither side would present Mr. Myers.

3. Trial counsel were ineffective for failing to file a motion to quash the grand jury presentment and charges arising therefrom relative to victims 2 through 10 based on governmental misconduct in tainting the grand jury process.

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1. That, in referring in his closing argument to those "known only to God," Joseph McGettigan: (1) was referring to the allegations regarding Victim #2; (2) if so, was lying because he knew Victim #2 was A.M.; and (3) Joseph Amendola knew Mr. McGettigan was lying.

2. That Judge Barry Feudale withheld ***Brady*** material from defense counsel.

3. That the Office of Attorney General withheld ***Brady*** material from defense counsel.

4. That the Office of Attorney General leaked otherwise secret grand jury information for the purpose of locating additional victims of the Defendant's crimes.

See PCRA Court Order, 5/5/16. Counsel notes that these issues were not set forth in the manner outlined by PCRA counsel in their filings. In addition, counsel, on-the-record, during a telephone conference with the prosecution and Judge Cleland, did subsequently provide that it was withdrawing the Feudale ***Brady*** issue based on comparison of information provided by the OAG as to what exhibits were introduced before Judge Feudale and the file of trial counsel.

[4] This motion was never ruled on by Judge Cleland. However, Grand Jury Supervising Judge Norman Krumenacker, III, purported to grant the motion, though it was not filed before him. Petitioner's Petition for Review of that decision was denied by the Pennsylvania Supreme Court.

4. Trial counsel were ineffective in waiving Mr. 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.

5. Trial counsel was ineffective in permitting Mr. Sandusky to be interviewed by Bob Costas without adequately advising him and preparing him for the interview and thereby providing the Commonwealth with additional evidence.

6. Trial counsel were ineffective in failing to present the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier.

7. Trial counsel were ineffective in eliciting inculpatory evidence against Mr. Sandusky and opening the door for the Commonwealth to introduce additional rebuttal evidence.

8. Trial counsel were ineffective for not making a motion to preclude Matt Sandusky from testifying as a rebuttal witness and failing to advise Mr. Sandusky regarding any strategy that they would pursue if Mr. Sandusky was permitted to testify after the Commonwealth indicated it would call Matt Sandusky.

9. Trial counsel were ineffective for not calling Mr. Sandusky to testify and inadequately advising him regarding testifying after the Commonwealth provided that it would [not] seek to call Matt Sandusky for rebuttal purposes.

10. Trial counsel were ineffective in neglecting to object to the trial court's erroneous guilt instruction as part of its character evidence instruction.

See PCRA Court Order, 6/5/16, at 1-2. (footnotes omitted).

Mr. Sandusky filed a number of addendums to his PCRA appendix on July 14, 2016, and submitted a brief on the issues for which the initial PCRA court had not granted a hearing. ***See*** Brief on Non-Evidentiary Hearing Issues, 7/14/16. Hearings limited to the ten issues listed above transpired on August 12, 22, 23 and on November 4, 2016. The latter hearing occurred after Allan Myers evaded attempts to serve a subpoena for the original dates. PCRA counsel were permitted to serve Mr. Myers with a subpoena that did not include a date certain.

Additionally, based on requests from Judge Cleland, Mr. Sandusky submitted briefs on the questions of whether quashal is an appropriate remedy based on alleged prosecutorial misconduct

during a grand jury investigation and issues related to a request for *in camera* review of therapy notes. ***See*** PCRA Court Order, 8/23/16; Brief, 9/1/16; Brief—Remedy for Governmental Misconduct via Leaking Grand Jury Information—quashal of presentment and dismissal of charge, 9/1/16. Judge Cleland, on October 17, 2016, scheduled the aforementioned November 4, 2016 hearing. That Order also dismissed Mr. Sandusky's claim relative to a grand jury leak and counsel's failure to file a motion to quash the presentment and charges arising therefrom and indicated an opinion in support would follow. ***See*** PCRA Court Order, 10/17/16.

Following the November 4, 2016 hearing, Mr. Sandusky filed a brief on the issues on which Judge Cleland had granted an evidentiary hearing. ***See*** Brief on Evidentiary Hearing Issues, 11/14/16. Judge Cleland then ordered PCRA counsel to either remove a footnote renewing their position that Judge Cleland was compelled to recuse himself or indicate that they would call him as a witness. ***See*** PCRA Court Order, 11/16/16. Counsel declined to withdraw the footnote and indicated that they legally could not call Judge Cleland as a witness. ***See*** Response to November 15, 2016 Order, 11/17/16.

Judge Cleland recused himself on November 18, 2016. ***See*** PCRA Court Opinion and Order, 11/18/16. Thereafter, on or about February 13, 2017, the Honorable Judge John Foradora, the President Judge of Jefferson County, was specially assigned. On February 17, 2017, President Judge Foradora directed that an evidentiary hearing be conducted on Mr. Sandusky's remaining claims. Thereafter, on March 24, 2017 and May 11, 2017, the PCRA court conducted evidentiary hearings in this matter. The evidentiary hearings were completed on May 11, 2017. The Court directed, with the agreement of the parties, that Mr. Sandusky submit proposed findings of fact and conclusions of law within thirty days of the completion of the final transcript and the

Commonwealth's proposed findings of fact and conclusions of law would follow thirty days later.

This Post-Hearing Brief/Proposed Findings of Fact and Conclusions of Law follow.[5]

STATEMENT OF QUESTIONS PRESENTED[6]

1. Did Mr. Amendola perform ineffectively in permitting Mr. Sandusky to be interviewed by Bob Costas without adequately advising him and preparing him for the interview and thereby providing the Commonwealth with additional evidence?

   Suggested Answer: Yes.

2. Were trial counsel ineffective when they did not seek a mistrial after the prosecutor improperly made multiple comments based on Mr. Sandusky's silence?

   Suggested Answer: Yes.

3. Whether trial counsel were ineffective for advising Mr. Sandusky not to testify based on both factually and legally erroneous advice that Matt Sandusky would be called in rebuttal?

   Suggested Answer: Yes.

4. Whether counsel were ineffective in not making a motion to preclude Matt Sandusky from testifying as a rebuttal witness or Mr. Sandusky being asked questions beyond the scope of direct examination regarding Matt Sandusky and failing to advise Mr.

[5] The final transcript was provided to the parties on June 12, 2017.

[6] The issues listed have been re-ordered from Mr. Sandusky's petitions and supplemental filings. For ease of review, Mr. Sandusky has also noted in the body of this filing the issue number for the pertinent claim as they are found in his Second Amended Petition and where those issues have been preserved in his various briefs and memorandum.

The following issues are no longer being pursued:

> Trial counsel was ineffective in neglecting to inform Mr. Sandusky of the agreement between Mr. Amendola and the Commonwealth that neither side would present Mr. Myers.
>
> The Supervising Judge of the Grand Jury [Barry Feudale] was unfairly biased and the Commonwealth acted in concert to deprive Mr. Sandusky of relevant exculpatory evidence under ***Brady v. Maryland***, 383 U.S. 83 (1963).
>
> Trial counsel were ineffective in failing to argue that under Pa.R.E. 806, Mr. Sandusky had the right to cross-examine James Calhoun about the excited utterance introduced through Mr. Petrosky.

Sandusky regarding any strategy that they would pursue if Mr. Sandusky was permitted to testify and not presenting Mr. Sandusky as a witness?

Suggested Answer: Yes.

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

7. Were trial counsel ineffective in eliciting inculpatory evidence against Mr. Sandusky and opening the door for the Commonwealth to introduce additional rebuttal evidence by presenting Dr. Elliott Atkins?

Suggested Answer: Yes.

8. Whether the Commonwealth violated ***Brady v. Maryland***, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in failing to turn over material impeachment evidence and, in the alternative, trial counsel was ineffective in not raising the ***Brady*** violation?

Suggested Answer: Yes.

9. Whether trial counsel were ineffective in failing to present expert testimony that called into question the theory of repressed memory and demonstrated the likelihood of false memories?

Suggested Answer: Yes.

10. Whether after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky recollection of the alleged crimes was based on receiving therapy, which if presented at trial would have led to a reasonable probability that the outcome of the trial would have been different?

Suggested Answer: Yes.

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

Suggested Answer: Yes.

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

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

14. Whether trial counsel and direct appellate counsel were ineffective when they failed to appeal Mr. Sandusky's convictions relating to Victim 8 as lacking sufficient evidence.

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

16. Whether trial counsel were ineffective in failing to present the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier?

    Suggested Answer: Yes.

17. Whether trial counsel were ineffective in failing to use Mr. Myers prior statement to police that Mr. Sandusky did not molest him in the 2001 shower incident to impeach Mr. McQueary as well as those and other exculpatory statements as substantive evidence?

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

19. Whether trial counsel were ineffective in neglecting to object to the trial court's erroneous guilt instruction as part of its character evidence instruction?

    Suggested Answer: Yes.

20. Whether Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky, which was used by the prosecution during its closing summation?

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

22. Whether trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance for a cooling-off period was warranted?

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

24. Whether trial counsel were ineffective for failing to object to improper opinion testimony by an unqualified expert?

    Suggested Answer: Yes.

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

    Suggested Answer: Yes.

26. Whether trial counsel were ineffective in failing to object to prosecutorial misconduct that occurred during the closing statement when the prosecutor stated that the 2001 alleged shower victim was "known only to God."

    Suggested Answer: Yes.

27. Whether Mr. Amendola performed ineffectively in waiving Mr. Sandusky's preliminary hearing and failing to use that proceeding to cross-examine the witnesses?

    Suggested Answer: Yes.

28. Whether trial counsel were ineffective for failing to file a motion to quash the grand jury presentment and the charges arising therefrom based on governmental misconduct in tainting the grand jury process?

    Suggested Answer: Yes.

29. Whether trial counsel were ineffective in not seeking to quash the grand jury presentment and finding that the grand jury had subject matter jurisdiction in this matter in clear derogation of the plain language, intent, and history of the Grand Jury Act?

    Suggested Answer: Yes.

30. Whether trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law?

    Suggested Answer: Yes.

31. Whether, based on all of the aforementioned claims, the cumulative ineffectiveness errors in this matter were so significant that they deprived Mr. Sandusky of a fair trial in violation of his due process rights and his state and federal constitutional right to a fair trial.

    Suggested Answer: Yes.

SUMMARY OF THE ARGUMENT

The American judicial system prides itself on upholding the Rule of Law. That is, we are governed not by the arbitrary nature and whims of man, but by written law that, in theory, is to apply to all in an equal manner. Indeed, the federal and state constitutions do not apply differently to accused sex offenders than to other individuals. "[T]he capital defendant, the felon, and the misdemeanant alike[,]" including an accused sex offender such as Jerry Sandusky is entitled to the same trappings of due process and effective representation as any other person. ***Commonwealth v. Stewart***, 84 A.3d 701, 712 (Pa. Super. 2013) (*en banc*) (quoting ***Commonwealth v. Brooks***, 839 A.2d 245, 255-256 (Pa. 2003) (Eakin, J., concurring)).

By any objective measure, Mr. Sandusky did not receive adequate representation in this case. Any judge who practiced criminal law who reads Mr. Amendola's belief that the failure to identify Mr. Sandusky in court, ***see*** N.T., 8/12/16, at 117-120, is of more significance than the decision to waive the preliminary hearing knows that Mr. Amendola was not fit to try this case. Any judge or attorney who reads Mr. Amendola's attempt to justify allowing his client to go on national television for an interview without any preparation, knows that Mr. Sandusky's counsel failed him. When one reads that Mr. Amendola failed to either review or introduce evidence that an eyewitness denied seeing Mr. Sandusky commit the crimes he was accused of, the only evidence of which was hearsay, one should be compelled to shake their head in disbelief.

The seriousness of the charges cannot excuse serial instances of governmental misconduct, which includes leaking grand jury information, commenting on the defendant's silence, and myriad instances of failing to turn over ***Brady*** impeachment evidence. One may ask how can an innocent person be convicted? The two most common answers to this query are because of governmental malfeasance and ineffective assistance of counsel. That is, law enforcement and/or prosecutors become more concerned with achieving a conviction than ascertaining the truth. As a result, law enforcement may coach witnesses, feed witnesses information, intimidate witnesses, or fail to disclose evidence. Similarly, a prosecutor may fail to inform defense counsel of a witness or witnesses changes in their story and make inappropriate commentary or arguments.

Perhaps more frequently, an innocent person is found guilty because his attorney performs inadequately. Instantly, a perfect storm of these factors worked to deprive Mr. Sandusky of a fair trial, which was exacerbated by the intense negative media attention and the trial court's insistence that the matter go to trial at breakneck speed. Indeed, in Mr. Sandusky's Second Amended Petition he indicated that if one were to write a textbook on how not to try a sex offense case this matter

would provide the model. Here, Mr. Amendola's representation was grossly ineffective. For example:

- Mr. Amendola advised his client, without any preparation, to do a nationally televised interview that amounted to an interrogation, which was ultimately used as evidence against Mr. Sandusky at trial.

- Mr. Amendola took part in an off the record meeting at a hotel to discuss waiving Mr. Sandusky's preliminary hearing with the district magistrate and trial court, who are not to participate in negotiations regarding the waiver of legal rights.

- Mr. Amendola waived the preliminary hearing on the erroneous belief that a magistrate would automatically increase his client's bail upon the request of the Commonwealth if it added additional charges, foregoing an opportunity to cross-examine the accusers and have the allegations regarding Victim 8 dismissed.

- Mr. Amendola failed to move to quash the grand jury presentments and charges arising therefrom based on colorable claims of grand jury leaks where he knew that a reporter had the name and phone number of an agent involved in the investigation and was providing it to potential witnesses.

- Mr. Amendola neglected to file a motion to quash the charges where there was no jurisdiction for a grand jury to investigate the allegations by Aaron Fisher.

- Mr. Amendola opposed the Commonwealth's request to change venue or venire despite the overwhelming amount of negative pre-trial publicity.

- Mr. Amendola neglected to ask for a cooling off period, despite noting that possibility and being aware of the unprecedented negative media attention and needing more time to prepare.

- Mr. Amendola represented to the court that he could not adequately or ethically represent Mr. Sandusky and asked to withdraw and, despite filing interlocutory appeals based on the court denying a continuance request, failed to file a collateral appeal.

- Mr. Amendola set forth in his opening statement that the evidence against his client was overwhelming and promised that Mr. Sandusky would testify, but then did not call him.

- Mr. Amendola failed to present any expert testimony regarding memory, including repressed or false memories.

- Mr. Amendola, despite being aware of police recordings showing suggestive police questioning and learning that therapy was used to enhance the memories of the

accusers, did not challenge the reliability of the accusers under Pa.R.E. 601 or present expert testimony on suggestive questioning.

- Mr. Amendola did not raise a ***Brady*** violation claim after it became apparent that the accusers told Mr. McGettigan of material changes in their accusations and Mr. McGettigan failed to disclose this impeachment evidence.

- Mr. Amendola moved to introduce the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier but failed to do so under Pa.R.E. 804(b)(3), and erroneously believed that the Commonwealth would be able to introduce evidence that these men had been charged with perjury.

- Mr. Amendola gave co-counsel one hour to prepare for cross-examining critical witness Michael McQueary.

- Mr. Amendola neglected to object to a lay fact witness, Jessica Dersham, offering opinion expert testimony.

- Mr. Amendola failed to present a tape-recorded statement by James Calhoun wherein he denied witnessing Mr. Sandusky sexually abuse unidentified Victim 8.

- Mr. Amendola, despite a warning from the trial court itself, and his client not supporting the decision, opened the door to the Commonwealth presenting expert testimony that Mr. Sandusky suffered from pedophilia.

- Mr. Amendola factually and legally erroneously advised his client not to testify because Matt Sandusky would be called in rebuttal, which is in direct opposition to the Commonwealth's record statements.

- Mr. Amendola failed to present the exculpatory statements of Allan Myers that were against his pecuniary interest.

- Mr. Amendola and Mr. Rominger neglected to object to the prosecutor claiming that Victim 2 is known only to God, where the Commonwealth at that time had never indicated it did not believe Allan Myers' claim to being that person.

- Mr. Amendola and Mr. Rominger objected but failed to move for a mistrial where the prosecutor repeatedly commented on Mr. Sandusky's silence in the face of the accusations.

All of these issues, standing alone, warrant a new trial, let alone when viewed in conjunction with one another and the additional claims Mr. Sandusky has forwarded. Only by

creating or applying a different set of rules to this case can one find that Mr. Sandusky had adequate representation and received a fair trial

COSTAS INTERVIEW

1. Mr. Amendola performed ineffectively in permitting Mr. Sandusky to be interviewed by Bob Costas without adequately advising him and/or preparing him for the interview and thereby providing the Commonwealth with additional evidence.[7]

Proposed Findings of Fact:

1. Shortly after Mr. Sandusky's arrest, Mr. Amendola was approached by Anderson Cooper of CNN and Bob Costas to do an interview. N.T., 8/12/16, at 105-106 (Testimony of Joseph Amendola) (Undisputed).

2. Mr. Amendola, because he was "being told by media people...that Jerry was even above people like Adolph Hitler," told Mr. Sandusky that, "We have to try to get our side out." ***Id.*** at 105 (Testimony of Joseph Amendola) (Undisputed).

3. Mr. Amendola discussed with Mr. Sandusky "potentially giving an interview." ***Id.*** at 106 (Testimony of Joseph Amendola). (Undisputed).

4. Mr. Sandusky was reluctant to be interviewed and had reservations about doing an interview. ***Id.*** (Testimony of Joseph Amendola) (Undisputed); ***see also id.*** at 109 (Testimony of Joseph Amendola).

5. Mr. Amendola agreed to travel to New York without Mr. Sandusky, to do an interview with Bob Costas. ***Id.*** at 107 (Testimony of Joseph Amendola) (Undisputed).

6. At that time, it was not planned that Mr. Sandusky would be interviewed. ***Id.*** at 108-109 (Testimony of Joseph Amendola) (Undisputed).

7. Mr. Amendola traveled to New York with NBC producer Kim Kaplan, a producer for Bob Costas' show. N.T., 3/24/17, at 24 (Testimony of Joseph Amendola) (Undisputed).; ***id.*** at 32 (Testimony of Joseph Amendola) (Undisputed).

8. Mr. Amendola had promised to give his first exclusive interview to Bob Costas. N.T., 3/24/17, at 20-22 (Testimony of Joseph Amendola) (Undisputed).

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[7] This issue was listed as Issue 26 in Mr. Sandusky's most recent Amended Petition. ***See*** Second Amended PCRA Petition, 3/7/16, at 27, 131-134. The claim was also delineated in Mr. Sandusky's Brief on Evidentiary Hearing Issues. ***See*** Brief on Evidentiary Hearing Issues, 11/14/16, at 2, 36-42.

9. However, Mr. Amendola gave an interview to CNN, but believed that the CNN interview would not be aired until after the Costas interview. ***Id.*** at 22-23 (Testimony of Joseph Amendola) (Undisputed).

10. NBC and Kim Kaplan expressed displeasure to Mr. Amendola on the flight to New York about his having done the CNN interview. ***Id.*** at 25 (Testimony of Joseph Amendola) (Undisputed); ***id.*** at 33-34 (Testimony of Joseph Amendola) (Undisputed).

11. NBC attempted to get Matt Sandusky or Dottie Sandusky to also be interviewed besides Mr. Amendola. N.T., 3/24/17, at 24 (Testimony of Joseph Amendola) (Undisputed).; ***id.*** at 31 (Testimony of Joseph Amendola) (Undisputed).

12. Indeed, Kim Kaplan asked, "could you get Jerry or perhaps Matt or perhaps Dottie to do a phone interview?" ***Id.*** at 31 (Testimony of Joseph Amendola) (Undisputed).

13. Mr. Amendola procured Mr. Sandusky to do the interview. ***Id.*** at 26 (Testimony of Joseph Amendola) (Undisputed).

14. Mr. Amendola was "trying to find friends in the media. We were trying to show the media he had his side to this." ***Id.*** at 28 (Testimony of Joseph Amendola) (Undisputed).

15. Mr. Amendola called Mr. Sandusky fifteen minutes before the interview to ask him to do the interview. N.T., 8/12/16, at 16 (Testimony of Mr. Sandusky); Supplement to Mr. Sandusky's Ineffectiveness Claim Related to the Bob Costas Interview and Request to Reopen the Record, at 2 (citing *Bob Costas on Jerry Sandusky Interview*: 'Very Strange' (VIDEO), Huffington Post (Nov. 15, 2011), http://www.huffingtonpost.com/2011/11/15/bob-costas-jerry-sandusky-strange_n_1094800.htmlB) (filed 2/8/17).

16. Mr. Amendola told Mr. Sandusky, "All you have to say is I'm innocent, we're going to prove my innocence at trial." N.T. 8/12/16, at 107 (Testimony of Joseph Amendola) (Undisputed); ***Id.*** at 16 (Testimony of Mr. Sandusky) (Undisputed) ("Mr. Amendola called me just prior to when the interview occurred. At that time, he said to me, 'Jerry, they want to interview you.' And he said, 'All you have to do' he said, 'I think you should do it. All you have to do is say you're innocent.").

17. Mr. Amendola explained to Mr. Sandusky that other than stating he was innocent and intended to prove it at trial, "he didn't need to answer other questions." ***Id.*** at 111 (Testimony of Joseph Amendola) (Undisputed); ***see also id.*** at 16-17 (Testimony of Mr. Sandusky) (Undisputed).

18. Mr. Amendola did not inform Mr. Sandusky of what questions would be asked by Mr. Costas. ***Id.*** at 16 (Testimony of Mr. Sandusky) (Undisputed); ***Id.*** at 111 (Testimony of Joseph Amendola) (Undisputed).

19. This was because Mr. Costas refused to disclose to Mr. Amendola the questions that would be asked. ***Id.*** at 111 (Testimony of Joseph Amendola) (Undisputed).

20. Mr. Amendola did not prepare Mr. Sandusky to be questioned by Mr. Costas. ***Id.*** at 17 (Testimony of Mr. Sandusky); ***see id.*** at 111 (Testimony of Joseph Amendola).

21. Mr. Sandusky had no preparation for the interview by Mr. Amendola and Mr. Amendola did not suggest any questions that would be asked. ***Id.*** at 17 (Testimony of Mr. Sandusky); ***see also id.*** at 111 (Testimony of Joseph Amendola) (Undisputed).

22. Mr. Amendola, believed that, in general, the interview went well. ***Id.*** at 111 (Testimony of Joseph Amendola) (Undisputed); ***see also*** N.T., 3/23/17, at 28 (Testimony of Joseph Amendola) (Undisputed) ("but for the magic pause and the repeating of the question that has become famous, the interview went well. I mean, the rest of the interview wasn't bad.").

23. The interview was played at trial. N.T., 6/13/12, at 196-197.

24. In fact, the interview that was played was an inaccurately edited interview that made it appear that there was repetition of the infamous question and answer regarding Mr. Sandusky being sexually attracted to young boys. N.T. 6/14/12, at 134 (Undisputed).

25. The Commonwealth put great stock in the Costas interview, making it a lynch pin of the prosecution. N.T., 8/12/16, at 112 (Testimony of Joseph Amendola).

26. The Commonwealth, via Joseph McGettigan, repeatedly referenced the interview in the closing summation. N.T., 6/21/12, 140-142, 145-146.

27. Mr. McGettigan stated, "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." N.T., 6/21/12, at 140-141.

28. Mr. Amendola acknowledged that the significance of the interview was not the actual answers but the manner in which the questions were answered. N.T., 8/12/16, at 113 (Testimony of Joseph Amendola) (Undisputed).

29. Mr. Amendola was aware that in preparing a witness it was of sublime importance the manner in which the witness answers the questions. ***Id.*** at 114 (Testimony of Joseph Amendola) (Undisputed).

30. Mr. Amendola admitted he had no control over how Mr. Sandusky would answer, because, unlike a police interview, he could not stop the interview. ***Id.*** at 114-115 (Testimony of Joseph Amendola) (Undisputed).

31. Mr. Amendola acknowledged that the interview had the same significance at trial as a police interview. ***Id.*** at 115 (Testimony of Joseph Amendola) (Undisputed).

32. Mr. Amendola was not even at Mr. Sandusky's side for the interview as he was in New York while Mr. Sandusky was at home in State College. (Undisputed).

33. He also testified that "had I been answering the questions for Jerry he would have had no problem giving appropriate answers." N.T., 3/24/17, at 36 (Testimony of Joseph Amendola) (Undisputed).

34. Mr. Amendola, prior to Mr. Sandusky's interview with Bob Costas, in discussing doing the interview, did not tell Mr. Sandusky that the interview could be introduced into evidence against him. N.T., 8/12/16, at 115 (Testimony of Joseph Amendola); ***see also id.*** at 41 (Testimony of Mr. Sandusky) (Undisputed).

35. Despite Mr. Amendola admonishing Mr. Sandusky not to speak with family and potential character witnesses, he advised Mr. Sandusky to give a national media interview. ***Id.*** at 116-117 (Testimony of Joseph Amendola) (Undisputed); ***see also*** N.T., 3/24/17, at 35 (Testimony of Joseph Amendola) (Undisputed).

36. One of the reasons Mr. Amendola urged Mr. Sandusky to do the interview was to find "media friends who were going to be media friendly to use so we can get our defense out[.]" N.T., 3/24/17, at 37 (Testimony of Joseph Amendola) (Undisputed).

37. Mr. Amendola's strategy was to curry friends in the media. ***Id.*** at 38 (Testimony of Joseph Amendola) (Undisputed).

38. Indeed, Mr. Amendola hosted a football party for representatives of Fox, CNN, NBC, ABC, and CBS, on the Sunday before he waived Mr. Sandusky's preliminary hearing on the following Wednesday. ***Id.*** at 43 (Testimony of Joseph Amendola) (Undisputed).

Proposed Conclusions of Law:

1. To sustain an ineffectiveness claim, a petitioner must demonstrate: (1) The underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Spotz***, 896 A.2d 1191, 1209-10 (Pa. 2006).

2. "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" ***Stewart***, ***supra*** at 707.

3. "[T]he 'reasonable probability' test is not a 'stringent one[.]'" ***Id.*** at 715.

4. A claim has arguable merit when the facts upon which it is based, if true, could entitle the petitioner to relief. ***Stewart***, ***supra***.

5. Trial counsel's decision to allow his client to be interviewed by Bob Costas without any, let alone adequate, preparation and failing to carefully explain the evidentiary ramifications

is an issue of arguable merit. ***See e.g.***, Wesley M. Oliver & Rebecca L. Silinski, *George Zimmerman, Jerry Sandusky, and the Ethics of Counsel's Use of the Media*, 68 Okla. L.Rev. 297 (2016), at 298 ("there are times when the lawyer's moment in the spotlight undermines the client's interest in a fair trial. This is especially true where you combine a lawyer, with no particular media-relations expertise, and his desire for media attention."); ***Id.*** at 299 ("Joseph Amendola...provides perhaps the best example of an engagement with the media that hurt the client's interest.").

6. Trial counsel had no reasonable trial strategy for allowing Mr. Sandusky to do the interview nor could there be a reasonable basis for permitting your client to do a national interview without any preparation. Mr. Amendola's "strategy" of currying favor with the media was not a tactic related to the actual trying of the case. ***See e.g.***, Wesley M. Oliver & Rebecca L. Silinski, *George Zimmerman, Jerry Sandusky, and the Ethics of Counsel's Use of the Media*, 68 Okla. L.Rev. 297 (2016), at 299 ("No lawyer would regard Sandusky's appearance on Rock Center as a strategic victory for the defense"); ***Id.*** at 304 ("Amendola's media 'strategy' simply lacked competence."); ***Id.*** at 305 (quoting Attorney James Bryant, stating, "To put a client on TV under those circumstances would 'take a gun to my head.'"); ***Id.*** at 307 ("If he were my client, [said] defense attorney Phil Masorti, I would hope I would be able to distinguish that while these interviews may be good for me as his lawyer, they may not be good for him as my client...I watched that interview. It killed [Sandusky]") (brackets in original); ***Id.*** ("Most people were 'absolutely baffled as to *why any licensed attorney would allow Sandusky to go on national TV* and admit that he was naked in the shower with little boys on at least two occasions[.]"); ***Id.*** ("the most disparaging thing was that Amendola had just encouraged his client to give up his Fifth Amendment right not to incriminate himself—something [Attorney] Phil Masorti called 'unforgivable.'"); ***Id.*** at 308 ("the only person in the United States legally obligated to vigilantly defend Sandusky has taken it upon himself to encourage his client to waive the most basic constitutional right...the right to remain silent.").

7. Mr. Amendola's encouraging of Mr. Sandusky to waive his right to remain silent and speak to Mr. Costas had no strategic trial basis as it was based on currying media attention.

8. Mr. Sandusky suffered actual prejudice as the Costas interview was not only played at trial, the actual interview that was played inaccurately repeated the most damaging portion of the interview, and Mr. McGettigan repeatedly referenced Mr. Sandusky's failure to tell Mr. Costas the name of the individual observed by Mr. McQueary.

9. Had counsel properly advised Mr. Sandusky about the ramifications of providing an interview or adequately prepared him to answer questions, Mr. Sandusky would not have given the interview or would not have provided fodder for the Commonwealth to use to imply that he was a sexual predator.

10. Absent the Costas interview, Mr. McGettigan would not have been able to comment on Mr. Sandusky's silence or referred to the interview.

11. As it is clear from the facts and PCRA testimony, trial counsel inadequately advised and did not prepare Mr. Sandusky regarding the Costas interview, resulting in highly

damaging evidence and arguments by the Commonwealth, Mr. Sandusky has established that there is a reasonable probability that the outcome of the trial would have been different.

12. Mr. Sandusky is entitled to a new trial as a result of trial counsel's ineffectiveness.

Discussion:

The Commonwealth introduced the Costas interview into evidence, used it against Mr. Sandusky in its case in chief, and then the Commonwealth repeatedly commented on the facts that: (1) the prosecuting attorney never had the opportunity to question Mr. Sandusky that Bob Costas did; and (2) Mr. Sandusky made statements in that interview that he could have clarified "to anybody at any time." N.T., 6/21/12, at 145.

The intent of these statements and the inferences that the prosecution wished to raise was to prejudice Mr. Sandusky to the jury based on the fact that he did not testify at trial but had given pretrial interviews to the media. Specifically, the Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to the jury directly.

The record demonstrates that counsel did not adequately prepare him for the interview. This is akin to failing to prepare a defendant and adequately advise him regarding his rights relative to testifying since Mr. Sandusky was, in essence, testifying, albeit not in a court. ***Cf. Commonwealth v. Perry***, 644 A.2d 705, 709 (Pa. 1994) (failure to interview defendant and otherwise prepare for trial was claim of arguable merit).

Trial counsel did not provide notice that Mr. Sandusky would be interviewed or prepare him for the interview until fifteen minutes before the interview. Mr. Sandusky was initially advised that Mr. Costas was only going to speak to trial counsel. Failing to properly advise a defendant or properly prepare an individual for an interview that can be used against him is a claim of arguable merit since any statements a defendant makes could be used to convict.

Mr. Sandusky specifically recalled that Mr. Amendola traveled to New York to do an interview with Bob Costas, and there was no intention at that time of Mr. Sandusky being interviewed. Mr. Sandusky set forth that shortly before Mr. Amendola was to be interviewed, Mr. Amendola called him and advised him to do the interview with Mr. Costas. According to Mr. Sandusky, Mr. Amendola's only advice was that Mr. Sandusky would only have to say he was innocent. Mr. Amendola did not prepare Mr. Sandusky for the interview, provide him with any questions that might be asked, nor explain to him that the interview could be used against him at trial.

Mr. Amendola acknowledged that he only called Mr. Sandusky shortly before his interview to convince him to do the interview with Mr. Costas. He submitted that Mr. Sandusky had been reluctant to do an interview and that the original intent was for Mr. Amendola to travel to New York to do an interview with Bob Costas. Indeed, Mr. Sandusky was not present and was interviewed via telephone from his home. Bob Costas, himself, provided an interview in which he recalled that Mr. Amendola only contacted Mr. Sandusky fifteen minutes before the interview.

Despite Mr. Amendola claiming that he had instructed Mr. Sandusky not to speak to friends or family about the case, he advised Mr. Sandusky to do the interview because the media was proclaiming Mr. Sandusky to be worse than Adolf Hitler. Mr. Amendola's actual reason for instructing Mr. Sandusky to do the interview is even more egregious. Mr. Amendola had promised Mr. Costas an exclusive interview; however, NBC learned that Mr. Amendola had given an interview to CNN. Upon learning of this, NBC producer Kim Kaplan voiced strong displeasure. In order to make up for this and ingratiate himself with the media again, Mr. Amendola convinced Mr. Sandusky to do the interview.

At the PCRA hearing, Mr. Amendola admitted that it was not Mr. Sandusky's answers that were damaging, but the way in which he answered. Mr. Amendola explained that Mr. Sandusky had always proclaimed his innocence and wanted to testify to his innocence and that he told Mr. Sandusky that the Costas interview would be a golden opportunity to say he was innocent. He acknowledged that Mr. Sandusky had reservations about doing the interview, but maintained that he was willing.

Mr. Amendola's own testimony reveals that he did not prepare Mr. Sandusky in any manner for the interview. He did not conduct a mock interview or ask Mr. Sandusky questions that might be asked by Mr. Costas. The only advice Mr. Amendola actually provided to Mr. Sandusky was that he should do the interview and express his innocence. His explanation was not related to any trial or defense strategy, but was based on what the media on a national level was saying—that Mr. Sandusky was guilty. Mr. Amendola acknowledged that the interview was utilized by the Commonwealth and that the prosecution referred to the Costas interview in the closing summation as grounds to find Mr. Sandusky guilty.

Although Mr. Amendola admitted that is was "of sublime importance" to prepare a witness at trial on how to answer questions, as noted, he did not prepare Mr. Sandusky for the interview in any manner. Indeed, Mr. Amendola set forth that he did not have any way of knowing how Mr. Sandusky would respond to being asked if he was sexually attracted to boys. He added that unlike a police interrogation wherein he could stop the interview process, his ability to stop any questioning on national television would have been extremely damaging. However, he was aware that the interview had the same significance of a police interview.

While Mr. Amendola had instructed Mr. Sandusky to be careful in discussing the case with potential character witnesses, he did not specifically inform Mr. Sandusky that the interview could

be introduced into evidence against him, regardless of his answers. Mr. Amendola's representation in this regard had no reasonable legal basis. Here, the Commonwealth asked the jury to infer from the Costas interview that Mr. Sandusky was guilty of the crimes charged because he did not immediately answer the questions, repeated questions before answering them, and did not disclose the identity of the McQueary shower teenager.

Counsel could have no reasonable basis not to prepare his client to do an interview where he permits his client to speak to the media. This is because all effective criminal defense attorneys are aware that any such statement could be used to prosecute the defendant. Thus, it is incumbent upon trial counsel, if he elects to allow his client to provide an interview, to inform him of the ramifications and prepare him in such a manner as to avoid even the slightest possibility that the Commonwealth will use the interview against the defendant.

As discussed in *George Zimmerman, Jerry Sandusky, and the Ethics of Counsel's Use of the Media*, 68 Okla. L.Rev. 297 (2016), "No lawyer would regard Sandusky's appearance on Rock Center as a strategic victory for the defense." ***Id.*** at 299. Simply put, "Amendola's media 'strategy' simply lacked competence." ***Id.*** at 304. Pointedly, "the most disparaging thing was that Amendola had just encouraged his client to give up his Fifth Amendment right not to incriminate himself[.]"

Finally, Mr. Sandusky suffered actual prejudice. If counsel properly advised Mr. Sandusky about the implications of providing an interview or adequately prepared him, Mr. Sandusky either would not have given the interview or would not have provided fodder for the Commonwealth to use to imply that he was a sexual predator. Absent the Costas interview, the prosecution could not have commented on that interview and set forth that Mr. Sandusky "had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas." N.T., 6/21/12,

at 140. The prosecution would have been unable to argue, "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?" ***Id.***

Even more importantly, the Commonwealth would not have been able to comment on Mr. Sandusky's silence at trial by stating, "I wouldn't know. I only heard him on TV. Only heard him on TV." ***Id.*** at 142. Furthermore, the Commonwealth could not have opined, "**he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today**[,]" or "**he could have provided it to anybody at any time**[,] or "**he didn't provide that name to anybody, ever**, certainly not to Bob Costas, no." ***Id.*** at 145-46 (emphasis added).

Thus, to the extent that the Commonwealth has argued that these statements were not improperly commenting on Mr. Sandusky's failure to testify, it still would not have been able to introduce them to infer Mr. Sandusky's guilt had trial counsel either adequately prepared Mr. Sandusky for the interview or provided advice that would have resulted in Mr. Sandusky not doing the interview himself. Since trial counsel inadequately advised and prepared Mr. Sandusky regarding the Costas interview, resulting in damaging evidence and arguments by the Commonwealth to be introduced, Mr. Sandusky has established that there is a reasonable probability that the outcome of the trial would have been different.[8]

[8] The Commonwealth throughout these proceedings has attempted to imply that Mr. Sandusky wanted to utilize the media before his trial (and not Mr. Amendola). Setting aside that this is not supported by the testimony of record, the issue is the advice and preparation provided by Mr. Amendola. That advice and preparation falls woefully short of what any reasonable attorney would have provided.

THE PROSECUTOR'S COMMENTS ON SILENCE

2. Trial counsel were ineffective when they did not seek a mistrial after the prosecutor improperly made multiple comments based on Mr. Sandusky's silence.[9]

Proposed Findings of Fact:

39. Prosecutor Joseph McGettigan, during his closing argument, multiple times, commented on Mr. Sandusky's failure to testify and failure to tell him or anyone else the name of an alleged victim. N.T., 6/21/12, at 140-142, 145-146.

40. Mr. McGettigan set forth, "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.*" ***Id.*** at 142.

41. Mr. McGettigan continued, stating, "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.*" ***Id.*** at 145.

42. Mr. McGettigan, in discussing the name of alleged Victim 2, added, "One thing he didn't which he could have provided to Bob Costas, he could have *provided it to anybody at any time.*" ***Id.*** at 145-146.

43. Mr. McGettigan also set forth, "But *he didn't provide that name to anybody, ever*[.]" ***Id.***

44. Mr. McGettigan reiterated, during his PCRA testimony that he intended to comment on Mr. Sandusky's silence, wherein he stated, "And *at any time, he could have told anyone who that person was.* He declined to do so to Mr. Costas, he didn't—I don't know if he did it to his own attorney. But *I sat in a room with him when he was arrested and waited for his attorney, he could have told me* then because the circumstances of the victimization of Victim 2 were well known. *And he could at any time have told any number of persons. He declined to do so.*" N.T., 8/23/16, at 59 (Testimony of Joseph McGettigan).

45. Mr. Rominger objected at the conclusion of the closing argument, but did not move for a mistrial. N.T., 6/21/12, 156-158 (Undisputed).

46. Mr. Rominger acknowledged he had no basis for not moving for a mistrial after having lodged the objection. N.T., 8/12/16, at 74-75 (Testimony of Karl Rominger) (Undisputed).

47. Appellate counsel, recognized as an expert by the Commonwealth, ***see*** N.T., 5/11/17, at 42, raised the issue on direct appeal, N.T., 5/11/17, at 37-39; ***see also Sandusky***, 77

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[9] This claim was set forth in the Second Amended Petition as Issue 25. ***See*** Second Amended PCRA Petition, 3/7/16, at 27, 127-131; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 20 therein), 100-106.

A.3d 663, and stated, "I think it is a terrific issue. No reason in the world to compare the prosecutor's ability to question with Bob Costas. And for him to say, you know, people tell me I'm just a good of a questioner as Mr. Costas, unless you want to highlight the fact that oh, this prosecutor didn't get a chance to question Mr. Sandusky because he didn't take the stand, that's a dynamite issue." N.T., 5/11/17, at 39 (Testimony of Norris Gelman).

48. The Superior Court found the issue to be waived on direct appeal because trial counsel failed to move for a mistrial. ***See Sandusky***, 77 A.3d 663 (Undisputed).

49. The jury was not given a corrective instruction and the standard jury instruction regarding a defendant not having to testify was given ***before*** the prosecutor's closing statement. ***See*** N.T., 6/20/12, at 74-75 (court noting it was giving instructions before closing arguments and stating, "since I'm giving the charge before closing arguments, I feel quite confident that the Commonwealth will not make any reference to [Mr. Sandusky not testifying] in the closing arguments because to do so would be prejudicial and would result in a very prompt admonition from me if that would happen. I have no reason to think that counsel would engage in that strategy.").

Proposed Conclusions of Law:

13. The Fifth Amendment provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V.

14. In similar fashion, Article I, § 9 of the Pennsylvania Constitution reads that a person "cannot be compelled to give evidence against himself[.]"

15. Commenting on an individual's failure to testify or commenting on a defendant's right against self-incrimination are improper. ***Commonwealth v. DiPietro***, 648 A.2d 777 (Pa. 1994); ***Commonwealth v. Molina***, 104 A.3d 430 (Pa. 2014) (hereinafter "***Molina II***"); ***Commonwealth v. Molina***, 33 A.3d 51 (Pa. Super. 2011) (*en banc*); ***Commonwealth v. Clark***, 626 A.2d 154 (Pa. 1993) (counsel ineffective for failing to object to prosecutor's comment on post-arrest silence).

16. "A defendant is not required to deny any accusation levelled at him in a trial no matter how inculpatory. He may be charged with the most serious of offenses, including murder and high treason. A cloud of witnesses may testify to circumstances, events, episodes which wrap him in a serpent's embrace of incrimination, but ***no inference of guilt may be drawn from his failure to reply or to take the witness stand. Indeed, and properly so, if the prosecuting attorney*** or the judge ***makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him, and a verdict of guilt follows, a new trial is imperative.***" ***Commonwealth v. Dravecz***, 227 A.2d 904, 906-907 (Pa. 1967) (emphasis added).

17. "A tacit admission is still an unwilling performance. It is more gentle because it is silent, but it is as insidious as monoxide gas which does not proclaim its presence through sound or smell. A forced confession is a steam-chugging locomotive moving down the track, blowing its whistle and clanging its bell with the victim tied to the rails. A tacit admission is a diesel

locomotive silently but relentlessly moving forward without audible signals and striking the victim unawares. The approach is different, the effect is the same." ***See id.***

18. It is axiomatic that in Pennsylvania, "defendants have an 'absolute right to remain silent and not to present evidence at trial' and that prosecutors cannot comment on a defendant's refusal to testify." ***Molina II***, at 435 (citing ***Griffin v. California***, 380 U.S. 609, 615 (1965)) (internal quotations omitted).

19. This issue has arguable merit. ***See Clark***, ***supra***.

20. A court may grant a new trial on the basis of improper commentary by a prosecutor if "the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would then prevent them from properly weighing the evidence and rendering a true verdict." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004).

21. The Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to the jury directly.

22. The prosecutor's repeated comments were not "fair rebuttal" to a defense argument when he repeatedly stated that he only heard Mr. Sandusky on TV and that he did not provide the jury with information that could have been enormously helpful, and that Mr. Sandusky could have provided a name "to anybody at any time" and that he "didn't provide that name to anybody, ever"; rather, it was an effort to bolster the Commonwealth's own evidence regarding the interview and to draw attention to the fact that Mr. Sandusky did not to testify at trial in this matter.

23. As a matter of law, the prosecutor's statements that he only heard Mr. Sandusky on television along with his multiple references that Mr. Sandusky could have provided the jury with answers that would have solved many problems are grounds for a new trial.

24. Trial counsel, who objected, had no reasonable basis for not moving for a mistrial. ***See also Clark***, ***supra*** at 157 n.5; ***see also*** N.T., 8/12/16, at 73 (Testimony of Karl Rominger) (Undisputed).

25. Since the Commonwealth violated Mr. Sandusky's rights under Article I, Section 9 of the Pennsylvania Constitution, ***Molina II***, ***supra***, and the Fifth Amendment to the Constitution of the United States, ***Molina I***, and since trial counsel had no reasonable basis for failing to move for a mistrial based on the inappropriate argument, this Court must grant Mr. Sandusky a new trial. ***Compare also Clark***, ***supra*** at 158 ("we have concluded that because of its nature, an impermissible reference to the accused's post-arrest silence is innately prejudicial.").

Discussion:

The Fifth Amendment provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. Amend. V. Similarly, Article I, Section 9 of the Pennsylvania Constitution sets forth that one "cannot be compelled to give evidence against himself[.]" The Pennsylvania Supreme Court has not held that, for all purposes, the Fifth Amendment and Article I, Section 9 are co-extensive. ***D'Elia v. Pennsylvania Crime Comm'n***, 555 A.2d 864, 870 (Pa. 1989). Chief Justice John Marshall in ***United States v. Burr***, 25 F.Cas. 38 (C.C. Va. 1807), in an early discussion of the right against self-incrimination, opined,

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw if from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

Id. at 40.

During closing arguments, the prosecution inappropriately referenced the fact that Mr. Sandusky elected not to testify at trial in this matter while simultaneously commenting on the fact that Mr. Sandusky participated in an ill-advised pre-trial media interview with Bob Costas of NBC. It is axiomatic that in Pennsylvania, "defendants have an 'absolute right to remain silent and not to present evidence at trial' and that prosecutors cannot comment on a defendant's refusal to testify." "***Molina II, supra.***

As noted above, a court may grant a new trial on the basis of improper commentary by a prosecutor if "the unavoidable effect of such comments would be to prejudice the jury, forming in

their minds fixed bias and hostility towards the accused which would then prevent them from properly weighing the evidence and rendering a true verdict." ***Poplawski, supra*** at 327. In ***Molina II***, the Pennsylvania Supreme Court recently conclusively and unequivocally ruled that the jurisprudence and public policy of Pennsylvania, as embedded in the Pennsylvania Constitution, "prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense." ***Id.*** at 451. The Pennsylvania Superior Court in ***Molina***, 33 A.3d 51, ruled similarly with regard to the Fifth Amendment.

At trial in this matter, the attorney for the Commonwealth stated, "**I wouldn't know. I only heard him on TV. Only heard him on TV.**" N.T., 6/21/12 at 140-142 (emphasis added). The prosecutor again improperly commented on Mr. Sandusky's refusal to testify throughout his closing argument as follows:

> The defendant's explanation on television, is there anything else you missed? Mr. Amendola read it with great animation. I'm not sure if there was anything – any other important information communicated **because he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today**.
>
> ...
>
> One thing he didn't which he could have provided to Bob Costas, **he could have provided it to anybody at any time**
>
> ...
>
> **But he didn't provide that name to anybody, ever,** certainly not to Bob Costas, no. He forgot that.

Id. at 145-46. (emphases added). Thus, the prosecutor commented both on Mr. Sandusky's failure to provide information pre-trial and failing to testify at trial.

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

Remarkably, Mr. McGettigan, during his PCRA testimony, demonstrated that he explicitly intended to comment on Mr. Sandusky's silence at trial, when he opined,

> And at any time, he could have told anyone who that person was. He declined to do so to Mr. Costas, he didn't—I don't know if he did it to his own attorney. But I sat in a room with him when he was arrested and waited for his attorney, he could have told me then because the circumstances of the victimization of Victim 2 were well known. And he could at any time have told any number of persons. He declined to do so.

N.T., 8/23/16, at 59. Pointedly, Mr. McGettigan found it problematic that Mr. Sandusky did not speak with him.

Hence, it is apparent that the Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to the jury directly. Since Mr. Sandusky did not testify at trial, the comments were not fair impeachment of his trial testimony. Read in context, the statements could not even be construed as a fair response to Mr. Amendola's arguments regarding the Costas interview. Further, it was Mr. Amendola's own ineffectiveness that resulted in the Costas interview even transpiring and being played for the jury. The prosecutor's comment's that Mr. Sandusky never provided information to anybody ever and did not provide information to the jury was not "fair rebuttal" to a defense argument; rather, it was an effort to bolster the

Commonwealth's own evidence regarding the interviews and to draw attention to the fact that Mr. Sandusky did not to testify at trial in this matter.[10]

It is evident from the record that the Commonwealth sought to accentuate the fact that Mr. Sandusky explained himself to the media, but he did not explain himself to the jury - a tactic solely designed to prejudice Mr. Sandusky and imply to the jury that he was afraid to testify. Here, the prosecutor's repeated comments to the fact that Mr. Sandusky failed to testify crossed the line from fair rebuttal or oratorical flair to highlighting Mr. Sandusky's silence and directly pleading to the jury to draw an adverse inference from his failure to tell the jury who alleged Victim 2 was. As such, the commentary is beyond the pale, and a new trial would have been warranted on direct appeal had trial counsel properly preserved an objection.

This conduct was more prejudicial than that in ***Molina***, as the silence in ***Molina*** concerned solely pre-arrest silence – in other words, silence at a time before a defendant is required to be advised of his ***Miranda*** rights. In the instant case, the commentary was a direct attack on Mr. Sandusky's right not to testify at trial, coupled with his pre-trial media statements, as substantive evidence of his guilt. Indeed, the prosecutor impugned Mr. Sandusky for not clarifying any of his statements in court to the jury. There can be no greater infringement on his right to remain silent at trial than these statements.

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

In ***DiPietro***, ***supra***, the Supreme Court reversed a conviction based on a prosecutor's summation commenting on a defendant's silence. In ***DiPietro***, after an argument inside a bar, the defendant drove his car over a curb, striking the victim. DiPietro did not inform police that he hit the victim by accident. There the prosecutor stated,

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

DiPietro, ***supra*** at 778 (brackets in original). Here, the prosecutor's comment is even more significant because the comment pertains to Mr. Sandusky's silence at trial. The Pennsylvania Supreme Court also awarded a new trial in a murder case based on a prosecutor's summation based on commenting on a defendant's silence in ***Commonwealth v. Dulaney,*** 295 A.2d 328 (Pa. 1972). Unlike here, the defendant had actually testified. In closing, the prosecutor argued,

> If you had killed a man in self-defense and an officer, a detective in Homicide Division, and you knew you had been apprehended and this was it, asked you explain the murder of [the victim], what would you say? What would you say? You'd say 'Maybe I did it. I did it, but listen, I did it because I was afraid of him. He had a gun...Honest, Detective, I didn't mean to kill him. I wouldn't have killed him, but I was scared...' You wouldn't say 'I stabbed him' and leave it at that. If there was a reason you stabbed him, you'd want the detective to know from the very, very beginning...But the first thing you do once the police finally apprehended you and asked you explain the murder, boy they couldn't get me to stop talking if they said explain the murder and I had murdered somebody in self-defense, they couldn't shut me up until I told them every ramification of why I was afraid of him, what a bad guy he was, how he was an enforcer for a dope ring. They couldn't shut me up until I told all that. But all this defendant said is 'I stabbed

him' and we didn't hear the story of self-defense until five months later. You think about that.

Id. at 330. The ***Dulaney*** Court held, "To refuse to present his defense to the police was not only a constitutional right of the accused, but indeed probably an advisable course to take." ***Id.*** at 331. The Pennsylvania Supreme Court ruled similarly in ***Commonwealth v. Easley***, 396 A.2d 1198 (Pa. 1979). There, after the defendant did testify, the prosecutor in his closing argument posited, "He has the right to remain silent. You have heard that. You know that. But he told us here he is going to tell the police the whole thing was an accident. Does he ever tell anybody that? Now today he does. After he has access to all these notes for five or six months." ***Id.*** at 1201. The ***Easley*** Court rejected the argument that the prosecutor's comment was proper rebuttal to the defendant's testimony that he intended to summon police.

In ***Clark***, ***supra***, the Supreme Court also reversed a murder conviction based on impermissible references to post-arrest silence, which is closely akin to this matter. In ***Clark***, the following exchange occurred:

Q. Mr. Clark, you started running back down 19th Street, didn't you?
A. Yes I did.
Q. Started stuffing the gun back into your pants didn't you?
A. Yes.
Q. Where were you going?
A. I was going home.
Q. Did you *ever* think of telling the police what happened?
A. No.
Q. **I withdraw that. Don't answer that. Withdraw that. I withdraw that question**, Judge.

Clark, ***supra*** at 155-156. Despite the prosecutor moving to withdraw the question, the ***Clark*** Court found grounds for a new trial. It opined, "Appellant avers that the 'broadest possible coverage is employed by use of the word 'ever' and a reasonable juror could have interpreted the prosecutor's question to have referred to silence following Appellant's arrest. Appellant contends that in order

to rectify that impermissible reference to his post-arrest silence, he is entitled to a new trial." ***Id.*** at 156.

Similarly, the arguments of Mr. McGettigan in which he used the term "ever" in describing Mr. Sandusky's failure to testify and/or identify alleged Victim 2 are impermissible references to silence. As the ***Clark*** Court reasoned, "Notwithstanding the intention of the questioner, the question was ambiguous regarding the specific time frame to which it was directed. The prosecutor's question was, "Did you *ever* think of telling the police what happened?" N.T. p. 2.165 (emphasis added). Webster's Dictionary defines 'ever' as 'through all time or at anytime.' Thus it is reasonable to assume that the jury would have interpreted the prosecutor's question as embracing Appellant's post-arrest silence." ***Id.***

Instantly, the intent of Mr. McGettigan's summation is not even ambiguous based on his PCRA testimony. It is apparent and reasonable to assume that the jury interpreted the prosecutor's argument as embracing Mr. Sandusky's failure to testify. The Pennsylvania Supreme Court "has firmly exhibited its intention to insure that the post-arrest silence of the accused is not used to his detriment in legal proceedings. [***Commonwealth v.***] ***Turner,*** 499 Pa. 579, 454 A.2d 537." ***Id.*** The ***Clark*** Court noted that,

> In ***Turner,*** we held that **any** reference to the post-arrest silence of the accused is potentially prejudicial to the accused. 499 Pa. at 585, 454 A.2d at 540. Such a reference may impermissibly contribute to the verdict and consequently warrants the granting of a new trial for the accused. ***Id. Turner*** reflects this Court's concern that lay jurors may mistakenly interpret the exercise of the Fifth Amendment privilege not to incriminate oneself as an implicit admission of guilt.

Id. (footnote omitted) (emphasis added).

Numerous times the prosecutor pointed out to the jury that Mr. Sandusky had not testified or provided information to anyone that would have showed his innocence. Trial counsel had no reasonable strategic basis for failing to move for a mistrial or request **any** remedy for the

Commonwealth's misconduct. Had trial counsel not waived this issue for appellate review, given the violation of Mr. Sandusky's right to remain silent, there is a reasonable probability that the Superior Court would have vacated Mr. Sandusky's conviction and remanded this matter for a new trial.

Since the Commonwealth violated Mr. Sandusky's rights under Article I, Section 9 of the Pennsylvania Constitution, ***Molina II, supra***, and the Fifth Amendment to the Constitution of the United States, ***Molina I***, and since trial counsel had no reasonable basis for failing to move for a mistrial based on the inappropriate argument, this Court must grant Mr. Sandusky a new trial. ***Compare also, Clark, supra.***

ADVISING MR. SANDUSKY NOT TO TESTIFY AFTER PROMISING THE JURY THAT HE WOULD TESTIFY

3. Trial counsel were ineffective for advising Mr. Sandusky not to testify based on both factually and legally erroneous advice that Matt Sandusky would be called in rebuttal.[11]

4. Trial counsel were ineffective in not making a motion to preclude Matt Sandusky from testifying as a rebuttal witness or Mr. Sandusky being asked questions beyond the scope of direct examination regarding Matt Sandusky and failing to advise Mr. Sandusky regarding any strategy that they would pursue if Mr. Sandusky was permitted to testify and not presenting Mr. Sandusky as a witness.[12]

5. Mr. Amendola was ineffective for promising the jury that Mr. Sandusky would testify at trial and not calling him.[13]

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[11] This claim was forwarded in the Second Amended Petition as Issue 32. Second Amended PCRA Petition, 3/7/16, at 28, 147-148; ***see also*** Brief on Evidentiary Hearing Issues, 11/14/16, at 2, 59-62; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 42-43.

[12] This issue was delineated in Mr. Sandusky's Second Amended Petition as Issue 31. Second Amended PCRA Petition, 3/7/16, at 28, 143-146; ***see also*** Brief on Evidentiary Hearing Issues, 11/14/16, at 2, 52-59; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 42-43.

[13] This claim was set forth as Issue 30 in the Second Amended Petition. Second Amended PCRA Petition, 3/7/16, at 27, 142-143; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 10, 108-111; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 41-42.

Proposed Findings of Fact:

50. Mr. Amendola promised in his opening statement that Mr. Sandusky would testify. N.T., 6/11/12, Vol. 2, at 9, 26.

51. Mr. Sandusky intended to testify in his defense. N.T., 8/12/16, at 23 (Testimony of Mr. Sandusky) (Undisputed); ***Id.*** at 149 (Testimony of Joseph Amendola) (Undisputed); N.T., 6/11/12, Vol. 2, at 9, 26 (Opening Statement of Joseph Amendola).

52. Mr. Amendola advised Mr. Sandusky not to testify after Matt Sandusky came forward based on the belief that Matt Sandusky would be called in rebuttal. N.T., 8/12/16, at 25, 28 (Testimony of Mr. Sandusky) (Undisputed); ***Id.*** at 150, 155 (Testimony of Joseph Amendola); N.T., 6/20/12, at 69, 79.

53. During the trial, Matt Sandusky provided a statement to the Commonwealth indicating that he had been subjected to abuse. N.T., 8/12/16 at 24 (Testimony of Mr. Sandusky) (Undisputed).

54. Trial counsel learned of the statement on a Thursday, ***id.***, and on the following Monday morning advised Mr. Sandusky and two of his children that he did not think they should testify. ***Id.*** 24-25 (Testimony of Mr. Sandusky).

55. Mr. Amendola told Mr. Sandusky that if he testified that Matt Sandusky would be called in rebuttal. ***Id.*** at 25, 28 (Testimony of Mr. Sandusky) (Undisputed); ***see also Id.*** at 153, 155 (Testimony of Joseph Amendola) (Undisputed); N.T., 6/20/12, at 69, 79 (Statements of Joseph Amendola) (Undisputed).

56. Specifically, Mr. Amendola, set forth the reason that he advised Mr. Sandusky not to testify was because the Commonwealth would call Matt Sandusky in rebuttal, stating, "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., 6/20/12, at 69; ***see also*** N.T., 8/12/16, at 81 (Testimony of Karl Rominger).

57. Mr. Amendola reiterated during the colloquy of Mr. Sandusky, "if you were to take the stand and testify, virtually anything you said after you were sworn in would in all likelihood, if not certainly, trigger the ability of the Commonwealth to call your son, Matthew Sandusky, as a witness against you in rebuttal?" N.T., 6/20/12, at 79.

58. Mr. Amendola continued, "And is that the reason why you have chosen not to testify?" ***Id.*** Mr. Sandusky responded, "Yes." ***Id.***

59. The Commonwealth stated on the record that it would not call Matt Sandusky in rebuttal, providing, "we would not call Matthew Sandusky in rebuttal if the defendant were to testify and that is our position presently." N.T., 6/20/12, at 80.

60. Mr. Fina originally stated, "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." N.T., 6/20/12, at 73 (emphasis added).

61. Thereafter, Mr. Fina did admit that they agreed not to use Matt Sandusky in rebuttal after further discussions, but stated that it would cross-examine Mr. Sandusky regarding Matt Sandusky. ***Id.*** ("After discussions here today regarding the potential testimony of Defendant Sandusky, we agreed that we would not use Matt Sandusky in rebuttal.").

62. The Commonwealth objected to Mr. Amendola's colloquy as inaccurate because it had provided that they would not call Matt Sandusky in rebuttal and Mr. McGettigan posited, "I would ask that the questions regarding the basis for his decision not to testify be stricken because the real basis for his declining to testify is a full understanding of his legal position and not on the one thing I'm concerned about is an appellate issue for that reason, because **we have already agreed Matt would not testify. We withdrew him from our case in chief and now to claim that this is the sole linchpin of his decision is unfair** to the Commonwealth." ***Id.*** at 81-82 (emphasis added) (Undisputed).

63. Mr. Sandusky informed Mr. Amendola that even if Matt testified there was significant evidence that could be used to cross-examine and impeach Matt Sandusky. N.T., 8/12/16, at 25 (Testimony of Mr. Sandusky).

64. Mr. Amendola did not believe he had adequate time to prepare to rebut Matt's testimony. ***Id.*** at 25 (Testimony of Mr. Sandusky).

65. Mr. Amendola, at that time, had not actually reviewed or read Matt Sandusky's grand jury testimony wherein he defended his father. N.T., 6/26/12, at 10 (Judge Feudale: That transcript you did receive, you acknowledge you received that? Mr. Amendola: I received it. Ironically, Your Honor, **I never reviewed it.** Judge Feudale: Is that right? Mr. Amendola: Didn't have a need to. I mean, the Court—I know Judge Cleland is very aware of this. I asked for continuances because we were so backed up with discovery materials, I was literally preparing the night before for testimony the next day. Never got to Matt Sandusky's transcript because he wasn't called as a witness.") (emphasis added); ***see also Commonwealth v. Sandusky***, 70 A.3d 886, 891 (Pa. Super. 2013); N.T., 3/24/17, at 85 (Testimony of Joseph Amendola).

66. Mr. Amendola did not discuss with Mr. Sandusky filing a motion to preclude Matt from testifying. N.T., 8/12/16, at 28-29 (Testimony of Mr. Sandusky) (Undisputed); ***Id.*** at 156 (Testimony of Joseph Amendola) (Undisputed).

67. Mr. Amendola did not file any motions to preclude Matt Sandusky from offering alleged bad acts evidence or seek a ruling that would limit Matt Sandusky and the Commonwealth to the scope of direct examination. N.T., 8/12/16, at 156-157 (Testimony of Joseph Amendola) (Undisputed).

68. Mr. Rominger believed that they should have pursued a motion relative to Matt Sandusky. N.T., 8/12/16, at 81 (Testimony of Karl Rominger) (("I would have thought that would be somebody we would want to keep off the stand after the trial collapsed into less than a week.").

69. Mr. Amendola did not prepare Mr. Sandusky to testify by actually questioning him. ***Id.*** at 29 (Testimony of Mr. Sandusky).

70. Specifically, Mr. Amendola did not provide the questions that he would ask or conduct mock questioning. ***Id.*** at 29-30 (Testimony of Mr. Sandusky) (Undisputed).

71. Absent the erroneous and insufficient advice, Mr. Sandusky would have testified.

Proposed Conclusions of Law:

26. As a factual matter, Mr. Amendola's advice that Matt Sandusky would be called in rebuttal was incorrect based on the Commonwealth's representations. N.T., 6/20/12, at 80-82.

27. In addition, Matt Sandusky could not legally testify in rebuttal unless Mr. Amendola opened the door to such testimony by not focusing his direct examination on the allegations in question.

28. The Commonwealth could not, as a matter of law, cross-examine Mr. Sandusky about Matt Sandusky unless Mr. Amendola was ineffective by opening the door to such cross-examination. ***Commonwealth v. Cheatham***, 239 A.2d 293, 296 (Pa. 1968); ***Commonwealth v. Katsafanas***, 464 A.2d 1270, 1280 (Pa. Super. 1983); ***Commonwealth v. Ervin***, 396 A.2d 776, 777 (Pa. Super. 1978); ***Commonwealth v. La***, 640 A.2d 1336, 1350 (Pa. Super. 1994); ***Commonwealth v. McGuire***, 448 A.2d 609, 612 (Pa. Super. 1982).

29. Mr. Sandusky's claims that Mr. Amendola was ineffective in advising him not to testify and failing to properly litigate and file motions that would have impacted Mr. Sandusky's decision to testify are issues of arguable merit. ***See Commonwealth v. Nieves***, 746 A.2d 1102 (Pa. 2000); ***Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015).

30. While Mr. Sandusky did undergo a colloquy on his right to testify, the information supplied by counsel rendered that colloquy void. ***Nieves, supra.***

31. Where trial counsel gives advice that is unreasonable, it can vitiate a knowing and intelligent waiver of the right to testify. ***Id.***

32. Counsel could have no reasonable basis for misrepresenting the Commonwealth's position as to Matt Sandusky, especially after it provided on the record that it was not going to present Matt Sandusky. ***Cf. Nieves, supra.***

33. If counsel feared that the Commonwealth was being disingenuous and would present Matt Sandusky, he could have filed a motion *in limine* precluding such testimony, noting the Commonwealth's representation, and was ineffective in failing to do so.

34. Although the Commonwealth was not expressly seeking to charge additional conduct or amend the information, introduction of Matt Sandusky's testimony would have been to the same effect.

35. In ascertaining prejudice when the Commonwealth seeks to introduce new crimes and amend its information the court considers: whether the amendment changes the factual scenario supporting the charges; whether the amendment adds new facts previously unknown to the defendant; whether the entire factual scenario was developed during a preliminary hearing; whether the description of the charges changed with the amendment; whether a change in defense strategy was necessitated by the amendment; and whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation. ***See Commonwealth v. Sinclair***, 897 A.2d 1218, 1223 (Pa. Super. 2006).

36. Counsel also had no reasonable basis for not making a motion to preclude Mr. Sandusky from being asked questions on cross-examination pertaining to Matt Sandusky, unless Mr. Amendola opened the door, where that was a concern.

37. The prejudice required for a claim relative to being deprived of the right to testify on one's own behalf is not whether the outcome of the trial would have been different, but only whether the decision to testify would have been altered. ***See Walker***, 110 A.3d 1000.

38. Mr. Sandusky testified that had he been adequately informed that Matt Sandusky would not be allowed to testify in rebuttal, Mr. Sandusky would have taken the stand.

39. Mr. Sandusky suffered actual prejudice because had he not been erroneously informed that Matt Sandusky would testify in rebuttal, he would have testified as originally planned.

40. Mr. Amendola was ineffective in promising that Mr. Sandusky would testify and then advising him not to testify based on the erroneous belief that Matt Sandusky would be called in rebuttal.

41. Numerous courts have held that where defense counsel makes a promise in opening statements and fails to see that promise through, counsel is ineffective. ***See Ouber v. Guarino***, 293 F.3d 19 (1st Cir. 2002); ***Anderson v. Butler***, 858 F.2d 16 (1st Cir. 1988); ***McAleese v. Mazurkiewicz***, 1 F.3d 159 (3d Cir. 1993); ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219 (7th Cir. 2003); ***Harris v. Reed***, 894 F.2d 871 (7th Cir. 1990).

42. "The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffective assistance of counsel." ***McAleese, supra*** at 166.

43. "Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well

infer that the testimony would have been adverse to his client and may also question the attorney's credibility." ***Leibach, supra*** at 259.

44. Counsel could have no reasonable basis to promise that his client would testify and then subsequently elect not to present him for a reason that was expressly disavowed by the Commonwealth.

45. Mr. Sandusky is entitled to a new trial due to trial counsel's ineffectiveness as it relates to the issues concerning Mr. Sandusky's uninformed decision not to testify.

Discussion:

To the extent that the Commonwealth acknowledged that Matt Sandusky would not testify in rebuttal—Mr. Amendola's advice to Mr. Sandusky was both factually and legally erroneous. Mr. Amendola stated on the record at trial, regarding Mr. Sandusky's reason for not testifying, that: "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, at 69 (emphasis added).

In light of the Commonwealth's position that it would not call Matt Sandusky, Mr. Amendola's advice provided on the record is factually wrong. Indeed, Mr. Amendola's advice and statement on the record is even more ineffective in light of the Commonwealth claiming that it would not call Matt Sandusky at all. The colloquy record further demonstrates Mr. Amendola's ineffectiveness in this regard as Mr. McGettigan expressly stated that the prosecution disagreed with Mr. Amendola's representations.

Mr. McGettigan himself first set forth, "we would not call Matthew Sandusky in rebuttal if the defendant were to testify and that is our position presently." N.T., 6/20/12, at 80. He continued, "I would ask that the questions regarding the basis for his decision not to testify be stricken because the real basis for his declining to testify is a full understanding of his legal position and not on the

one thing I'm concerned about is an appellate issue for that reason, because **we have already agreed Matt would not testify. We withdrew him from our case in chief and now to claim that this is the sole linchpin of his decision is unfair to the Commonwealth.**" *Id.* at 81-82.

Hence, while Mr. Sandusky did undergo a colloquy on his right to testify, the information supplied by counsel rendered that colloquy void. ***Nieves***, ***supra***. In ***Nieves***, counsel incorrectly informed his client regarding the admissibility of prior crimes evidence if the defendant testified and the Supreme Court found trial counsel ineffective. Where trial counsel gives advice that is unreasonable, it can vitiate a knowing and intelligent waiver of the right to testify. ***Id.***

In ***Nieves***, the defendant had been colloquied. ***See Nieves***, ***supra*** at 1103 ("Appellant was colloquied and indicated that he did not wish to testify and that he had no witnesses he wished to call. He also indicated that he was satisfied with his attorney's representation."). Moreover, the advice provided to Mr. Sandusky did cause an unknowing waiver of his right to testify. Specifically, counsel incorrectly told Mr. Sandusky that Matt Sandusky would be permitted to rebut his testimony. Matt could not testify in rebuttal unless Mr. Amendola ineffectively opened the door and the Commonwealth expressly indicated that he would not testify in rebuttal.

Thus, Mr. Amendola incorrectly instructed his client that Matt Sandusky could be called in rebuttal. As a matter of law, Matt Sandusky could not have been called in rebuttal unless Mr. Amendola opened the door via his direct examination and as a factual matter the Commonwealth stated it would not present Matt in rebuttal. Additionally, cross-examination must be limited to the scope of direct examination. Since the Commonwealth could neither cross-examine Mr. Sandusky about Matt nor call Matt in rebuttal, Mr. Amendola's advice was legally mistaken.

Finally, the prejudice required for a claim relative to being deprived of the right to testify on one's own behalf is not whether the outcome of the trial would have been different, but only

whether the decision to testify would have been altered. ***See Walker***, 110 A.3d 1000. Mr. Sandusky testified that had he been adequately informed that Matt Sandusky would not be allowed to testify in rebuttal, Mr. Sandusky would have taken the stand. Since Mr. Sandusky would have testified, based on ***Walker***, actual prejudice exists.

While the Commonwealth's claim that it would not present Matt Sandusky in rebuttal would seem to obviate the need to file a motion *in limine*, by stating that they would seek to cross-examine Mr. Sandusky regarding Matt Sandusky necessarily means that they *could* theoretically call Matt Sandusky in rebuttal based on Mr. Sandusky's answers to the questions posed by the Commonwealth. Frankly, it makes little sense to ask questions on cross-examination regarding Matt Sandusky if it did not intend to place Matt Sandusky on the stand based on the answers provided by Mr. Sandusky because that would mean the Commonwealth would simply let Mr. Sandusky's testimony stand without any rebuttal.

As argued in Mr. Sandusky's Supplemental Petition, and not disputed by the Commonwealth in its Second Answer, such cross examination would have been beyond the scope of any direct examination. Thus, as argued in prior filings, trial counsel should have made a motion to preclude the Commonwealth from questioning Mr. Sandusky on cross-examination about Matt Sandusky, as it would have been beyond the scope of any direct examination. Had trial counsel performed effectively, he would have argued that Matt could not serve as a proper rebuttal witness nor could Mr. Sandusky be cross-examined about Matt, unless Mr. Amendola somehow opened that door. First, trial counsel during his direct examination of Mr. Sandusky would have only focused on the alleged victims. For example, asking questions such as:

1. Did you ever touch victim X in a sexual manner?

2. Did you perform oral sex on victim X?

3. Did you cause victim X to perform oral sex on you?

4. Did you ever sodomize or have sex with victim X?

These questions would have been repeated with each alleged victim. The Commonwealth on cross-examination would have been limited to the scope of that direct examination. Since Mr. Sandusky was not charged with crimes against Matt Sandusky nor did any of the alleged victims testify that Matt Sandusky saw them being assaulted, the only proper rebuttal allowed would have to pertain to the charged crimes and not other alleged prior bad acts relative to Matt Sandusky.

Trial counsel also could and should have provided either an oral motion or motion *in limine* to prevent the Commonwealth from improperly asking questions beyond the scope of the direct examination. ***See Cheatham***, ***supra*** at 296; ***Katsafanas***, ***supra*** at 1280 (Pa. Super. 1983) ("cross-examination of witnesses is limited to matters brought out on direct examination"); ***Ervin***, ***supra*** at 777; ***La***, ***supra*** at 1350; ***McGuire***, **supra** at 612 ("The cross-examination of Mrs. McGuire was clearly improper. Cross-examination is limited by the scope of the witness' direct examination."). At the very least, trial counsel should have ascertained a ruling from the court as to whether it would permit the Commonwealth to ask questions on cross-examination, (in violation of Pa.R.E. 404(b)), regarding Matt Sandusky in order to adequately inform Mr. Sandusky regarding his right to testify.

Counsel could have no reasonable basis for not taking these actions as without a ruling that Matt Sandusky could not testify in rebuttal or would be permitted to testify, or that the Commonwealth could not cross-examine Mr. Sandusky unless he opened the door, counsel could not adequately inform his client regarding his decision to testify. Thus, irrespective of what the court's ruling would have been, Mr. Sandusky's waiver of his right to testify was not knowing and intelligent because counsel did not explain that Matt 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 siblings' testimony.

Further, evidence of uncharged other crimes, wrongs, or acts are inadmissible when the potential for prejudice outweighs its probative value. ***See*** Pa.R.E. 404(b). Here, evidence that Mr. Sandusky allegedly did anything inappropriate with Matt Sandusky, contrary to Matt's earlier testimony under oath, would have been highly prejudicial.

In essence, the Commonwealth would be able to introduce uncharged crimes after the filing of its criminal information thereby significantly altering the defense strategy. In the context of permitting the Commonwealth to amend a criminal information, it is well-settled that such a practice is prohibited where prejudice would result. The rule against allowing additional or different charges to be included is "to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." ***Commonwealth v. Roser***, 914 A.2d 447, 453 (Pa. Super. 2006). In ascertaining prejudice when the Commonwealth seeks to introduce new crimes and amend its information the court considers:

> (1) whether the amendment changes the factual scenario supporting the charges;
>
> (2) whether the amendment adds new facts previously unknown to the defendant;
>
> (3) whether the entire factual scenario was developed during a preliminary hearing;
>
> (4) whether the description of the charges changed with the amendment;
>
> (5) whether a change in defense strategy was necessitated by the amendment; and
>
> (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

See Sinclair, supra at 1223.

Although the Commonwealth was not expressly seeking to charge additional conduct or amend the information, introduction of Matt Sandusky's testimony would have been to the same effect. Moreover, this new allegations of a crime added new facts unknown to the defendant since Matt had been a defense witness up until that day, introduction of his testimony would have significantly altered the defense strategy and the timing of the Commonwealth informing counsel of the information did not provide for any time for preparation.

Further, the Commonwealth could not establish good cause to excuse its absence of pretrial notice regarding whether it would present other non-charged bad acts evidence. ***See*** Pa.R.E. 404(b). Although the Commonwealth represented that Matt Sandusky had only recently come forward, it had ample opportunity to question Matt Sandusky prior to trial. Also, as previously noted, Matt Sandusky could not offer proper rebuttal to the testimony that Mr. Sandusky would have offered, *i.e.*, that he had never abused the alleged victims in this case.

Additionally, even if the trial court were to have permitted the Commonwealth to ask broad questions on cross-examination like "are you a pedophile" in an attempt to open the door to Matt Sandusky (who they asserted they would not call), trial counsel needed to adequately advise Mr. Sandusky as to how they would have questioned Matt had he testified. Without explaining that they could have impeached Matt's testimony with his vigorous prior defenses of his father as well as presented Mr. Sandusky's other children to rebut Matt's sudden change, Mr. Sandusky could not make a knowing and informed decision on whether or not to testify.

The advice provided to Mr. Sandusky which caused an unknowing and unintelligent waiver is more significant when considered in the context of trial counsel having promised that Mr. Sandusky would testify. During Mr. Amendola's opening statement, Mr. Amendola made several promises to the jury that Mr. Sandusky would testify. ***See*** N.T., 6/11/12, Vol. 2, at 9, 26. Numerous

courts have held that where defense counsel makes a promise in opening statements and fails to see that promise through, counsel is ineffective. ***See Ouber, supra*** at 33-34 (holding that counsel's failure to present defendant's testimony as to knowledge was "egregious" error that "but for its commission, a different outcome might well have eventuated."); ***Anderson, supra*** at 18 (broken promise from opening statement to present expert psychiatric testimony resulted in finding of ineffective assistance); ***McAleese, supra*** at 166 ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffective assistance of counsel."); ***Leibach, supra*** at 259 ("Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility."); ***Harris, supra*** at 879 ("When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up to the claims he made in the opening.").

In the present case, trial counsel promised the jury that they would hear Mr. Sandusky deny the conduct for which he was charged and explain his interaction with the men involved. Trial counsel, having promised the jury that Mr. Sandusky would speak to them and explain his side of events, broke that promise, undermining the defense and completely destroyed the defense's credibility. Mr. Sandusky was prejudiced by the broken promise where the reason given by Mr. Amendola was expressly disavowed by the Commonwealth. ***See Harris, supra***; ***McAleese, supra***. For all of the aforementioned reasons, Mr. Sandusky is entitled to a new trial.

INADEQUATE REVIEW OF DISCOVERY

6. Mr. Amendola was ineffective for neglecting to adequately review discovery and erroneously stating that nothing in discovery would have changed his trial presentation.[14]

Proposed Findings of Fact:

72. Mr. Amendola, during his PCRA testimony stated, "We can't prepare...I felt like Custer at Little Bighorn for God's sake. I mean, we had boxes of materials that had just come in that ***we couldn't even look at*** because we had to get ready for trial. And it was ***an absolutely hopeless situation to try to do it properly***." N.T., 3/24/17, at 51-52 (Testimony of Joseph Amendola) (Undisputed) (emphases added).

73. Mr. Amendola was "getting material right up until trial, discovery material, and we were trying to sift through that." ***Id.*** at 76 (Testimony of Joseph Amendola) (Undisputed).

74. Mr. Amendola was not certain if he had reviewed the Calhoun tape, in which James Calhoun denied seeing Mr. Sandusky abuse anyone, prior to trial. ***Id.*** at 76 (Testimony of Joseph Amendola) (Undisputed).

75. Mr. Amendola did recall that, "we were getting boxes of stuff in late May [2012] while we were trying to get ready for a trial two weeks later and filing ancillary motions for continuances with the Superior Court and later the Supreme Court. So yes, ***we had all kinds of stuff coming in that we literally didn't have time to review.***" ***Id.*** at 78-79 (Testimony of Joseph Amendola) (Undisputed) (emphasis added); ***See id.*** at 67; N.T., 1/10/13, at 18 ("We finally asked the judge to basically relieve us of representation, that was done I believe on June 5th, just totally out of frustration because we knew we hadn't had an opportunity to really evaluate this. Did we look at the material? Yes, we glanced over it, but not in the same way that we did early on.") (Testimony of Joseph Amendola); ***Id.*** at 27 (Testimony of Joseph Amendola) (Undisputed) ("I can't say I looked at them all.").

76. Mr. Amendola explained that his answer during the post-sentence motion hearing that he would not have done anything different at trial based on his review of discovery was taken out of context and was not an accurate statement with respect to all of the discovery. N.T., 3/24/17, at 80-81.

77. Mr. Amendola did review discovery after the trial, "[b]ut not the same way I reviewed them before." ***Id.*** at 81 (Testimony of Joseph Amendola); ***see also*** N.T., 1/10/13, at 18 (Testimony of Joseph Amendola).

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[14] This position was leveled as Issue 14 in Mr. Sandusky's Second Amended PCRA Petition. Second Amended PCRA Petition, 3/7/16, at 26, 92-93; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 8 (Issue 9), 58-59; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 27-28.

78. Mr. Amendola was unable to go through discovery "line by line and taking notes to follow up on further discovery." N.T., 3/24/17, at 82 (Testimony of Joseph Amendola) (Undisputed); ***see also id.*** at 83 (I certainly didn't take the same approach I would have taken had we had time to properly prepare the case before trial.") (Testimony of Joseph Amendola) (Undisputed).

79. Mr. Amendola had not reviewed in discovery the grand jury testimony of Matt Sandusky, which was very favorable to Mr. Sandusky. N.T., 6/26/12, at 10; ***see also Commonwealth v. Sandusky***, 70 A.3d 886, 891 (Pa. Super. 2013); N.T., 3/24/17, at 85 (Testimony of Joseph Amendola).

80. Mr. Amendola did not present the tape-recorded statement of James Calhoun.

81. Mr. Amendola would have done things differently if he completed his review of discovery. N.T., 8/12/16, at 178 (Testimony of Joseph Amendola).

82. The Superior Court found no prejudice in the Court's denial of continuances based on Mr. Amendola's imprecise statement that he would not have altered his trial strategy if he had more time to review discovery.

Proposed Conclusions of Law:

46. This issue has arguable merit as counsel himself repeatedly argued and testified that he was not able to adequately review discovery. ***Cf. Perry, supra.***

47. Counsel's explanation that he did not have adequate time to review discovery is not a reasonable basis where the appellate court's have already concluded that he was not entitled to a continuance so that he would have more time to prepare and review such discovery. ***See Sandusky***, 77 A.3d 663.

48. Failing to review discovery, such as Matt Sandusky's grand jury testimony and the exculpatory taped statement of James Calhoun, has no reasonable basis.

49. Mr. Sandusky suffered actual prejudice as a result of Mr. Amendola's inadequate review of discovery since, had Mr. Amendola thoroughly reviewed discovery, he would have presented the Calhoun tape, which would likely have led to a reasonable probability that the trial would have been different as to alleged Victim 8.

50. Mr. Sandusky also suffered actual prejudice as Mr. Amendola's advice regarding Mr. Sandusky's decision not to testify, which could not have been knowingly and intelligently made where his attorney was unaware of the actual grand jury testimony of Matt Sandusky.

51. In addition, absent Mr. Amendola's imprecise statement during the Post-Sentence Motion hearing that he would not have done anything differently with additional time to review

discovery, there is a reasonable probability the Superior Court would not have found harmless error in denying Mr. Sandusky's continuance issue on direct appeal.

52. Because there is a reasonable probability that the outcome of Mr. Sandusky's trial and direct appeal would have been different had Mr. Amendola adequately reviewed discovery, he is entitled to a new trial.

Discussion:

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

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

N.T., Post-Sentence Motion Hearing, 1/10/13, at 39-40.[15]

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15 In the Commonwealth's first Answer, it relied heavily on this statement by Mr. Amendola and the Superior Court decision on direct appeal. What it overlooked was that Mr. Sandusky's position is that Mr. Amendola's representation itself was ineffective assistance and inaccurate. It is plain that Mr. Amendola's statement is inaccurate or, as he himself testified to during the PCRA hearings,--imprecise. As is clear from the PCRA testimony, trial counsel did not review discovery fully as they failed to uncover or present Mr. Calhoun's statement denying Mr. Sandusky committed any crime against unidentified Victim 8. Furthermore, both trial counsel acknowledged that they had never reviewed Matt Sandusky's grand jury testimony. ***See Commonwealth v. Sandusky***, 70 A.3d 886 (Pa. Super. 2013). This indicates not only had they not reviewed all of the discovery but that they could not have provided sound advice as to whether Mr. Sandusky should testify.

Trial counsel was ineffective for testifying in this regard because trial counsel did not review, after the trial, all the discovery materials he had lacked time to examine before trial. Indeed, neither trial attorney ever reviewed Matt Sandusky's grand jury testimony, which would have been critical in advising Mr. Sandusky about his right to testify. Since the Superior Court relied on this statement in affirming Mr. Sandusky's convictions, it is apparent that absent this statement there is a reasonable probability that the result of the appeal would have been different.

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

Furthermore, it is apparent from Mr. Amendola's own PCRA testimony that he did not adequately review discovery. He acknowledged that he did not go through certain discovery line by line and it is clear that he had not reviewed the grand jury testimony of Matt Sandusky, nor does it appear that he reviewed the Calhoun tape/transcript. There can be no reasonable basis for not adequately reviewing discovery. While Mr. Amendola's basis for not doing so was a lack of time, the Superior Court has already ruled that Mr. Amendola was not entitled to additional time. Finally, Mr. Sandusky suffered actual prejudice where, had Mr. Amendola adequately reviewed discovery he would have played the Calhoun tape, calling into question the hearsay testimony of Ronald Petrosky. Further, Mr. Amendola could not adequately discuss Mr. Sandusky's decision not to testify based on the Matt Sandusky issue where he had not reviewed Matt Sandusky's grand

jury testimony. Since there is a reasonable probability that the outcome of the trial would have been different, Mr. Sandusky is entitled to a new trial.

OPENING THE DOOR TO EXPERT TESTIMONY THAT MR. SANDUSKY WAS A PEDOPHILE—DR. ATKINS ISSUE

7. Trial counsel were ineffective in eliciting inculpatory evidence against Mr. Sandusky and opening the door for the Commonwealth to introduce additional rebuttal evidence by presenting Dr. Elliott Atkins.[16]

Proposed Findings of Fact:

83. Mr. Amendola did not originally intend to call Dr. Atkins as a witness. N.T., Motion for Continuance, 5/29/12, at 32 ("We don't anticipate Dr. Atkins testifying at trial as an expert.").

84. The trial court advised Mr. Amendola that if he presented Dr. Atkins he would open the door to the Commonwealth being allowed to present expert testimony that Mr. Sandusky was a pedophile. N.T., 8/12/16, at 12 (Undisputed).

85. Mr. Sandusky believed that Dr. Atkins would testify that he was not a pedophile and not a preferential sex abuser of young people. N.T., 8/12/16, at 31 (Testimony of Mr. Sandusky) (Undisputed).

86. Mr. Amendola did not inform Mr. Sandusky that by putting Dr. Atkins on the stand he would open the door to psychological testimony that Mr. Sandusky was a pedophile. N.T., 8/12/16, 33 (Testimony of Mr. Sandusky) (Undisputed); ***see also id.*** at 187-188 (Testimony of Lindsay Kowalski) (Undisputed).

87. Upon hearing Dr. Atkins trial testimony, Mr. Sandusky became visibly upset and had to be calmed down by paralegal, Lindsay Kowalski. ***Id.*** at 35 (Testimony of Mr. Sandusky) (Undisputed); ***see also id.*** at 186 (Testimony of Lindsay Kowalski) (Undisputed) ("He was just really angry. I sat next to him during the trial. And throughout most of the trial he was pretty calm and just receptive to what was happening, but this stands out in my mind as he was almost shaking with anger. He muttered under his breath a lot, just his displeasure. I don't recall verbatim what he said. But he was very not happy about the fact that Elliot was testifying and what he – specifically what he was saying.").

88. Mr. Amendola had initially attempted to retain a Dr. Fred Berlin. ***Id.*** at 160 (Testimony of Joseph Amendola) (Undisputed).

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[16] This position was raised in the Second Amended PCRA Petition as Issue 29. Second Amended PCRA Petition, 3/7/16, at 27, 139-141; ***see also*** Brief on Evidentiary Hearing Issues, 11/14/16, at 2 (Issue 5), 47-52; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 41.

89. Dr. Berlin informed Mr. Amendola that he could not review the information provided in time for the June trial. ***Id.*** at 160-161 (Testimony of Joseph Amendola) (Undisputed).

90. A second expert, Dr. Voskanian, also indicated to Mr. Amendola that he would not have sufficient time to undertake reviewing the materials and providing an expert report. ***Id.*** at 161 (Testimony of Joseph Amendola) (Undisputed).

91. Mr. Amendola then contacted Dr. Atkins. ***Id.*** (Testimony of Joseph Amendola) (Undisputed).

92. Dr. Atkins informed Mr. Amendola of a diagnosis of histrionics. ***Id.*** (Testimony of Joseph Amendola) (Undisputed).

93. Dr. Atkins testimony was intended to explain letters that Mr. Sandusky had sent to Alleged Victim 4. ***Id.*** at 162-163 (Testimony of Joseph Amendola); N.T., 6/19/12, at 164 (Undisputed).

94. Mr. Amendola confirmed that Mr. Sandusky was unhappy with the proposed testimony of Dr. Atkins. N.T., 8/12/16, at 161-162 (Testimony of Joseph Amendola) (Undisputed).

95. Lindsay Kowalski reiterated that Mr. Sandusky "was very much against hearing what Elliot wanted to say, he didn't think it was relevant, he didn't want it to be talked about at all." ***Id.*** at 185-186 (Testimony of Lindsay Kowalski) (Undisputed).

96. Indeed, as it pertained to Dr. Atkins role and testimony, Mr. Sandusky "was never happy. Every single time there was any discussion of it, any time Elliot was going to talk about what he would present, Jerry was very voiceful in his opposition." ***Id.*** at 186 (Testimony of Lindsay Kowalski) (Undisputed).

97. Mr. Amendola acknowledged opening the door to the Commonwealth's expert opining that Mr. Sandusky suffered from pedophilia. ***Id.*** at 164 (Testimony of Joseph Amendola) (Undisputed).

98. Although Mr. Amendola admitted Dr. Atkins testimony related to letters written by Mr. Sandusky, he posited that Mr. Sandusky's showering with adolescent boys in public showers had to be confronted with psychological testimony. ***Id.*** at 163-164 (Testimony of Joseph Amendola).

99. The grounds for introducing testimony by Dr. Atkins at trial was related to Mr. Sandusky having written letters to B.S.H. N.T., 6/19/12, at 162.

100. Mr. Amendola also did not believe, despite the Court's cautioning, that Dr. Atkins' testimony would open the door to Mr. Sandusky being labeled a pedophile. N.T., 8/12/16, at 167 (Testimony of Joseph Amendola) ("we had talked to Dr. Atkins about that. He assured us that would not be a problem.").

101. Mr. Amendola believed that testimony that Mr. Sandusky suffered from pedophilia was not a problem. ***Id.*** at 168 (Testimony of Joseph Amendola).

102. As a result of Dr. Atkins' testimony, the Commonwealth introduced, in rebuttal, its own expert testimony that Mr. Sandusky was a pedophile from Dr. John O'Brien. N.T., 6/19/12, at 295.

103. Specifically, trial counsel opened the door to psychiatrist Dr. John O'Brien testifying on rebuttal for the Commonwealth that Mr. Sandusky suffered from "psychosexual disorder with a focus on adolescence or preadolescence." ***Id.*** at 295.

104. Dr. Atkins himself, stated "If, in fact, the things he is accused of are true, then he would have a psychosexual disorder." N.T., 6/19/12, at 216-17 (Trial Testimony of Dr. Atkins).

105. Despite the fact that Dr. Atkins testimony was offered to explain Mr. Sandusky's letters, Dr. Atkins went beyond the scope of the proffer and testified as to Mr. Sandusky's relationships and his broader behavior, including his sexual behavior. ***See generally id.***

Proposed Conclusions of Law:

53. Trial counsel's decision to call Dr. Atkins as an expert witness and open the door to expert testimony that his client was a pedophile is a claim of arguable merit. ***Ramos v. Lawler***, 695 F.Supp.2d 347 (M.D. Pa. 2009); Commonwealth's Second Answer at 42 (finding that Mr. Amendola's decision was a regrettable choice, but arguing that counsel had a reasonable basis for his decision).

54. In ***Ramos***, the U.S. District Court, in ruling on a federal *habeas corpus* review of a Pennsylvania state conviction, held that where defense counsel elicits inculpatory evidence in a jury trial that opens the door to the prosecution introducing evidence that would otherwise not have been admissible, counsel is ineffective.

55. Counsel could have no reasonable basis to open the door to expert testimony that his client was a pedophile where the trial court warned against the decision and Mr. Sandusky opposed the testimony.

56. Counsel erroneously believed that Dr. Atkins' testimony would not open the door to Mr. Sandusky being labeled a pedophile by a Commonwealth expert, N.T., 8/12/16, at 167, and therefore his decision to present Dr. Atkins and any advice he provided to Mr. Sandusky regarding calling Dr. Atkins was in error.

57. There can be no reasonable basis for not informing your client that by calling an expert that it would open the door to opposing expert testimony that Mr. Sandusky was a pedophile or inaccurately informing your client that it would not open the door to such testimony.

58. Mr. Sandusky suffered actual prejudice as the jury heard expert testimony that Mr. Sandusky was a pedophile.

59. Mr. Sandusky is entitled to a new trial.

Discussion:

At trial, trial counsel presented the testimony of psychologist Elliot Atkins, "to explain the letters and the purpose of the letters" that Mr. Sandusky wrote to several of the victims. N.T., 6/19/12 at 164. Dr. Atkins concluded that Mr. Sandusky suffered from "histrionic personality disorder." ***Id.*** at 169, 172. Despite the fact that the testimony was offered only to explain Mr. Sandusky's letters, Dr. Atkins went beyond the scope of the proffer and testified as to Mr. Sandusky's relationships and his broader behavior, including his sexual behavior. ***See generally id.*** As a result, the Commonwealth elicited from Dr. Atkins on cross-examination that the same symptoms underlying the histrionic personality disorder also support a psychosexual disorder. ***Id.*** at 215-17. Indeed, Dr. Atkins stated "If, in fact, the things he is accused of are true, then he would have a psychosexual disorder." ***Id.*** at 216-17soem.

Because of the ill-considered decision to present Dr. Atkins, trial counsel opened the door to psychiatrist Dr. John O'Brien testifying on rebuttal for the Commonwealth. He opined that Mr. Sandusky suffered from "psychosexual disorder with a focus on adolescence or preadolescence." ***Id.*** at 295. In ***Ramos***, ***supra***, in ruling on a federal *habeas corpus* review of a Pennsylvania state conviction, the court held that where defense counsel elicits inculpatory evidence in a jury trial that opens the door to the prosecution introducing evidence that would otherwise not have been admissible, counsel is ineffective.

In this case, as in ***Ramos***, trial counsel's direct examination of Elliot Atkins opened the door to Dr. O'Brien's testimony that Mr. Sandusky had a psychosexual disorder with a focus on adolescence or preadolescence. Mr. Sandusky's claim therefore has arguable merit. Had trial

counsel not introduced the testimony of Elliot Atkins, the outcome of the proceedings would have likely been different, as the Commonwealth would not have been able to present Dr. O'Brien's expert opinion on rebuttal relating to Mr. Sandusky's alleged psychosexual disorder or elicited damaging testimony from Dr. Atkins himself.

Moreover, the testimony of Dr. Atkins was irrelevant to Mr. Sandusky's defense that the charged conduct did not occur. Hence, trial counsel had no reasonable basis for presenting the testimony of Dr. Elliot Atkins. Mr. Sandusky submits that trial counsel presented the testimony of Dr. Atkins after receiving his expert opinion at the eleventh hour before trial simply because they believed it necessary to present some degree of expert testimony to explain Mr. Sandusky's alleged behavior. Critically, Dr. Atkins's testimony also caused confusion with the jury, as the jury was presented with evidence of a mental infirmity of a sort that would, in theory, explain or excuse the alleged criminal behavior, when Mr. Sandusky's contention was and is that there was no criminal behavior.

Mr. Sandusky and Mr. Amendola both testified that initially they had planned to call Dr. Fred Berlin. N.T., 8/12/16, at 30; ***Id.*** at 160-161. According to them, Dr. Berlin indicated that he would not have adequate time to prepare. Accordingly, Mr. Amendola belatedly contacted Dr. Elliot Atkins. Mr. Sandusky explained that his understanding of Dr. Atkins testimony was that he would testify that Mr. Sandusky was not a pedophile and not a preferential sex offender.

He set forth that he was interviewed by Dr. Atkins during the actual trial—and that Dr. Atkins did mention the term "histrionic personality disorder," but did not explain it. Mr. Sandusky was not told by Mr. Amendola that by presenting Dr. Atkins it would open the door to expert testimony by the Commonwealth that he was a pedophile. Mr. Sandusky indicated that had he so been informed that he would have exploded. He added, and another witness, Lindsay Kowalski

confirmed, that Mr. Sandusky did become visibly upset and shaken upon hearing Dr. Atkins actual testimony.

Mr. Amendola acknowledged that Mr. Sandusky "wasn't thrilled" with presenting Dr. Atkins. ***Id.*** at 161. He admitted that Mr. Sandusky, "didn't like the idea at all about somebody saying that he had some sort of psychiatric or psychological problem[.]" ***Id.*** at 162. Mr. Amendola continued, stating, "He wasn't happy, but he was involved with it." ***Id.*** Mr. Amendola conceded that by presenting Dr. Atkins it opened the door to testimony that Mr. Sandusky was a pedophile. Pointedly, the trial court itself, disclosed during the PCRA proceedings, that it had informed Mr. Amendola that if he elected to present Dr. Atkins the Commonwealth would be permitted to introduce expert testimony that Mr. Sandusky was a pedophile. N.T., 8/12/16, at 10-12.

Remarkably, even during the PCRA hearing, Mr. Amendola refused to submit that testimony that Mr. Sandusky was a pedophile was damaging, opining that he did not "think it was problem. I think the testimony was neutralized." ***Id.*** at 168. For a trial attorney to not recognize that expert testimony that his client is a pedophile is not damaging is mind-boggling. It further demonstrates the ineffectiveness of Mr. Amendola who failed to even grasp the importance of the Commonwealth being able to introduce such damning testimony.

Mr. Amendola's basis for introducing the testimony of Dr. Atkins cannot remotely be considered reasonable. His basis at trial was to explain letters that Mr. Sandusky had written to B.S.H. Those letters, however, contained no information that suggested Mr. Sandusky was a pedophile. ***See*** N.T., 6/11/12, at 116-118; ***Id.*** at 192-197. Mr. Amendola's basis at the PCRA hearing was somewhat different from that discussed at trial. He claimed during the PCRA hearings that it was also introduced to soften the impact of Mr. Sandusky having taken public showers with minors. Dr. Atkins testimony, nonetheless, was not based in any manner on Mr. Sandusky's

showering habits. Furthermore, it is simply unreasonable to present testimony by an expert on the issue of Mr. Sandusky having written letters where the result is expert testimony that Mr. Sandusky was a pedophile. Trial counsel was ineffective for presenting the testimony of Elliot Atkins. Mr. Sandusky is entitled to a new trial.

BRADY VIOLATIONS

8. The Commonwealth violated Brady v. Maryland, 383 U.S. 83 (1963), in failing to turn over material impeachment evidence and, in the alternative, trial counsel was ineffective in not raising the Brady violation.[17]

Proposed Findings of Fact:

106. Mr. McGettigan did not tell Mr. Amendola, prior to a witness taking the stand, that the witness had given a different statement than he had given previously. N.T., 8/12/16, at 143 (Testimony of Joseph Amendola) (Undisputed); N.T., 3/24/17, at 92, 102-103 (Testimony of Joseph Amendola) (Undisputed).

107. Mr. Amendola did not understand the distinction between changes in testimony and statements that were provided in discovery, which he was aware of, and changed latter statements that the prosecutor did not disclose. N.T., 8/12/16, at 143 (Testimony of Joseph Amendola).

108. J.S. testified at trial differently from prior statements and prior testimony. N.T., 6/14/12, at 119-122 (Trial testimony of J.S.).

109. J.S. had not, prior to his trial testimony, told anyone other than Joe McGettigan and his own attorneys, that Mr. Sandusky allegedly kissed him on the shoulder. ***Id.*** at 119-120 (Trial testimony of J.S.).

110. J.S. told Mr. McGettigan this information in January before the trial. N.T., 6/14/12, at 120-121 (Trial testimony of J.S.); N.T., 3/24/17, at 91.

111. J.S. also told Mr. McGettigan that Mr. Sandusky had washed his butt—which was first revealed at trial. N.T., 6/14/12, at 120 (Trial testimony of J.S.).

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[17] This claim was posited in Mr. Sandusky's Second Amended PCRA Petition as Issue 15. Second Amended PCRA Petition, 3/7/16, at 26; ***Id.*** at 12-13 (discussing Ronald Petrosky), 94-96; ***see also*** Brief on Evidentiary Hearing Issues, 7/14/16, at 8, 59-66 (Issue 10); ***see also*** Addendum to the PCRA Appendix, 6/20/16.

112. Again, J.S. informed Mr. McGettigan of this change in January prior to the trial. ***Id.*** (Trial testimony of J.S.).

113. Mr. McGettigan did not inform Mr. Amendola of this material ***Brady*** impeachment evidence. N.T., 8/12/16, at 142-143 (Testimony of Joseph Amendola) (Undisputed); N.T., 3/24/17, at 93 (Testimony of Joseph Amendola) (Undisputed).

114. Mr. Amendola did not raise a ***Brady*** claim. N.T., 3/24/17, at 92-94 (Testimony of Joseph Amendola) (Undisputed).

115. Mr. Amendola set forth the reason that he did not raise the issue was "because we were flying by the seat of our pants trying to get ready for trial and the next witness. And we were—I was already concentrating on who I thought was coming up next. But I did not raise it, you are absolutely right." ***Id.*** at 93-94 (Testimony of Joseph Amendola) (Undisputed).

116. D.S., Accuser Number 7, also provided information to Mr. McGettigan that was different from prior testimony and statements. N.T., 6/13/12, at 139-146; ***see also*** N.T., 3/24/17, at 94-95; N.T., 5/11/17, at 9 (Testimony of D.S.) (Undisputed).

117. D.S. testified for the first time at trial that Mr. Sandusky would give him bear hugs in the shower. N.T., 3/24/17, at 95 (Testimony of Joseph Amendola); N.T., 6/13/12, at 139 (Trial testimony of D.S.); N.T., 5/11/17, at 8-9 (Testimony of D.S.).

118. D.S. told Mr. McGettigan of this change several months before trial. N.T., 6/13/12, at 139-146 (Trial testimony of D.S.) (Undisputed); N.T., 5/11/17, at 9 (Testimony of D.S.) (Undisputed).

119. D.S. for the first time testified at trial that Mr. Sandusky touched his penis and indicated that he had informed Mr. McGettigan of this change in his story several months before the trial. N.T., 6/13/12, at 141, 143 (Trial testimony of D.S.); N.T., 5/11/17, at 9 (Testimony of D.S.).

120. Similarly, Mr. McGettigan was told by D.S. of a change in his allegations related to Mr. Sandusky grabbing him from behind in the shower, kissing him, and touching him skin to skin. N.T., 3/24/17, at 99-100; N.T., 6/13/12, at 144-145 (Testimony of D.S.); *see also* N.T., 5/11/17, at 9 (Testimony of D.S.).

121. Mr. McGettigan never disclosed this material impeachment evidence. N.T., 3/24/17, at 102-103 (Testimony of Joseph Amendola) (Undisputed).

122. Mr. McGettigan also failed to inform trial counsel of a material change in Ronald Petrosky's statements relative to Alleged Victim 8. N.T., 6/13/12, at 199, 201; ***see also*** Addendum to Appendix, at 2; Amended Petition, 3/7/16, at 12-13.

123. Specifically, Mr. Petrosky changed the location of where he heard Mr. James Calhoun claim he saw an individual being sexually assaulted in a shower. N.T., 6/13/12, at 199, 201.

124. The Commonwealth also expressly informed trial counsel that no information regarding counseling or therapy to enhance the individual's memories was available. N.T., 3/24/17, at 105-107 (Testimony of Joseph Amendola) (Undisputed); N.T., 1/10/13, at 61 (Argument of Frank Fina); ***see also id.*** at 42 (Joseph Amendola: We have determined since the trial there's a potential issue with recovered memory. That goes back to Dr. Gillum who...Mr. McGettigan: Let me stop you for [a] second. Your Honor, that is nonresponsive. Judge Cleland: Yes, it's not responsive.").

125. Had Mr. Amendola been aware, prior to trial, that counseling and therapy was used to alter the accuser's stories and/or helped them to remember allegations of abuse, he would have filed a pre-trial motion challenging the competency of the witnesses. N.T., 3/24/17, at 108 (Testimony of Joseph Amendola) (Undisputed); ***see also***, N.T., 1/10/13, at 42.

126. In addition, had Mr. Amendola been aware that counseling and therapy aided the accusers in remembering additional allegations of abuse he would have sought an expert dealing with memory. N.T., 3/24/17, at 108 (Testimony of Joseph Amendola) (Undisputed).

127. Mr. Amendola was "told there was no information concerning that issue. Several times, by the way." ***Id.*** at 109 (Testimony of Joseph Amendola) (Undisputed); ***see also***, N.T., 1/10/13, at 42, 61.

128. Mr. McGettigan actually questioned Mr. Amendola at the Post-Sentence Motion Hearing, stating that, "There's nothing about recovered memory in any of these in nine, 12,000 pages that we're talking about, is there?" N.T., 1/10/13, at 42.

129. Mr. Fina also set forth, "This was not a case, Your Honor, involving a single complainant who had, you know, some kind of repressed memory and some years later came forward." ***Id.***

130. However, D.S. testified at trial that, "That doorway that I had closed has since been reopening more. More things have been coming back and things have changed since that grand jury testimony. Through counseling and different things, I can remember a lot more detail that I had pushed aside than I did at that point." N.T., 6/13/12, at 143 (Testimony of D.S.); N.T., 5/11/17, at 10 (Testimony of D.S.).

131. D.S. added, "Through counseling and through talking about different events, through talking about things in my past, different things very triggered different memories and have had more things come back, and it's changed a lot about what I can remember today and what I could remember before because I had everything negative blocked out." N.T., 6/13/12, at 146 (Testimony of D.S.); N.T., 5/11/17, at 10 (Testimony of D.S.).

132. He repeated a similar sentiment later, providing, "That testimony is what I had recalled at that time. Through—again through counseling, through talking about things, I have remembered a great deal more things that I had blocked out. And at that time that was, yes, that's what I thought but at this time that has changed." N.T., 6/13/12, at 152 (Testimony of D.S.).

133. D.S. in a post-trial interview discussed how therapy altered his recollection. N.T., 5/11/17, at 12 ("I had spoken to him about seeking counseling for help and through that, kind of reaching deeper into my memory and deeper into those events that had happened previously and kind of explained to him the reasons why for so long it was mostly a positive experience with Mr. Sandusky until there was a certain point that that ended. And then I was able to, unfortunately, recall some of the not-so-good events.").

134. D.S. in his own e-mail indicated that his therapist had told him that he had repressed memories. N.T., 5/11/17, at 13, 23-24 (Testimony of D.S.).

135. J.S. and B.S.H. also testified to having blocked out memories of abuse. N.T., 6/14/12, at 121-122 (Testimony of J.S.); N.T., 6/11/12, at 162-163 (Testimony of B.S.H).

136. Acting Attorney General Linda Kelly stated at a press conference after the trial that, "It was incredibly difficult for some of them to unearth long buried memories of the shocking abuse they suffered[.]" Addendum to PCRA Appendix, at 1 (citing https://www.youtube.com/watch?v=czFCQpjD_0o.); N.T., 5/11/17 , at 75.

137. If Mr. Amendola knew of the memory issue in advance of trial, he would have sought expert testimony and/or a competency hearing. N.T., 3/24/17, at 107-108 (Testimony of Joseph Amendola) (Undisputed).

Proposed Conclusions of Law:

60. In ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutorial suppression of evidence that is material to guilt or punishment violates due process.

61. A ***Brady*** claim is cognizable under the PCRA. 42 Pa. C.S. § 9543(a)(2)(vi); ***Commonwealth v. Simpson***, 66 A.3d 253, 264 n.16 (Pa. 2013).

62. A ***Brady*** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. ***Commonwealth v. Tedford***, 960 A.2d 1, 30 (Pa. 2008) (citations omitted).

63. Evidence is material where it affects the credibility of a witness. ***Commonwealth v. Ly***, 980 A.2d 61 (Pa. 2009).

64. A ***Brady*** claim, unlike a non-***Brady*** after-discovered evidence issue, can succeed if the after-discovered evidence would have been used solely to impeach a witness. ***Commonwealth v. Galloway***, 640 A.2d 454 (Pa. Super. 1994).

65. The Commonwealth violated ***Brady*** by failing to disclose material impeachment evidence in the nature of changes in stories that had been disclosed to the prosecution prior to trial.

66. The Commonwealth violated ***Brady*** by failing to disclose that various accusers were changing their allegations, some based on therapy and counseling. In fact, the Commonwealth on multiple occasions expressly disavowed therapy playing a role in the accusers' allegations.

67. The Commonwealth violated ***Brady*** by neglecting to inform counsel that Ronald Petrosky had altered the location of the shower incident relative to unidentified alleged Victim 8, which was material impeachment evidence.

68. Evidence that therapy and counseling were used to enhance or alter the accuser's memories was not available to defense counsel pre-trial as their requests for such information were denied as privileged or counsel was told that the Commonwealth did not possess such information.

69. This issue, either as a stand-alone constitutional violation, or as an ineffectiveness claim, is one of arguable merit.

70. To the extent that counsel could have known that the Commonwealth violated ***Brady*** by not disclosing material impeachment evidence in the nature of changed statements, based on the accuser's testimony, counsel provided no reasonable basis for not raising the issue—setting forth that he (Mr. Amendola) was flying by the seat of his pants. N.T., 3/24/17, at 93.

71. Mr. Sandusky suffered actual prejudice as it is apparent that had Mr. Amendola been made aware of the changed statements and the reason for such changes by the accusers, he would have litigated this issue by having either a competency hearing and or presenting expert testimony on memory.

72. Competency hearings are appropriate when a witness's memory has been corrupted or compromised by tainted interview techniques. ***Commonwealth v. Delbridge***, 855 A.2d 27, 40 (Pa. 2003).

73. "An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." ***Id.***

74. Any witness may be disqualified and deemed incompetent if, inter alia, the witness has "an impaired memory." Pa.R.E. 601(b)(3).

75. As the official comment to Rule 601 states, "The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104." Pa.R.E. 601, cmt.

76. The Pennsylvania appellate courts have ruled that expert testimony is permitted to assist the court in ruling if competency under Rule 601 is an issue. ***Id.***; ***see also Commonwealth v. Baker***, 353 A.2d 454 (Pa. 1976); ***Commonwealth v. Gaerttner***, 484 A.2d 92 (Pa. Super. 1984).

77. "[T]he law is clear that a criminal defendant is entitled to know about any information that may affect the reliability of the witnesses against him." ***Commonwealth v. Mejia–Arias***, 734 A.2d 870, 876 (Pa. Super.1999).

78. In this case, the witnesses' testimony concerned issues of therapy enhanced memories and false memory.

79. "[T]he long delay in reporting the persistent memory of the first incident and the recovery of memories of the intervening incidents, would, inter alia, raise an issue of the reliability of the recovered memories." ***Commonwealth v. T.J.W.***, 114 A.3d 1098 (Pa. Super. 2015).

80. The rules of evidence do not limit the court to determining that a witness has an impaired memory to child victims or child witnesses. Pa.R.E. 601; ***see also Baker, supra***.

81. In addition, had Mr. Amendola known in advance of the alterations in the accuser's stories, he would have been able to better exploit these changes at trial and retained an expert in advance.

82. Expert testimony regarding how memory works, false memories, and "repressed" memories would have called into question the allegations of multiple accusers.

83. Mr. Sandusky is entitled to a new trial based on the Commonwealth's ***Brady*** violations as it pertains to the accusers' changed memories.

84. Trial counsel's ineffectiveness in failing to object due to a ***Brady*** violation as it relates to Ronald Petrosky's change in testimony is also one of arguable merit.

85. Mr. Petrosky's testimony was hearsay and admitted as an excited utterance based on other evidence related to shower incidents. N.T., 6/13/12, at 206-221.

86. Counsel had no reasonable basis for not objecting to the ***Brady*** violation and move to preclude the government from using Mr. Petrosky where counsel vigorously contested the admission of Mr. Petrosky's testimony and that testimony was the only basis for Mr. Sandusky's convictions as they related to alleged Victim 8.

87. Mr. Sandusky suffered actual prejudice as Mr. Petrosky's testimony directly led to convictions.

88. Mr. Sandusky is entitled to a new trial based on the Commonwealth's Petrosky ***Brady*** violations.

89. Mr. Sandusky is also entitled to a new trial based on the additional ***Brady*** violations and trial counsel's failure to adequately object and move for a mistrial.

Discussion:

Instantly, evidence that certain accusers' recollection and memories changed due to therapy is material impeachment evidence that should have been disclosed pre-trial or during trial. Any evidence that the accusers' memory had been impaired and/or was refreshed by psychiatric treatment was material impeachment evidence. Since the Commonwealth possessed this information, it violated ***Brady*** by failing to disclose this evidence. Also, because Mr. Sandusky's counsel was unable to learn of this information through a non-governmental source, due to the psychiatrist-patient privilege, the Commonwealth violated ***Brady***.

Mr. Sandusky in his Addendum to his PCRA Appendix provided a link to Attorney General Linda Kelly's press conference immediately following Mr. Sandusky's convictions in which she makes clear reference to recovered memories. Ms. Kelly expressly stated, "It was incredibly difficult for some of them to unearth long buried memories of the shocking abuse they suffered[.]" https://www.youtube.com/watch?v=czFCQpjD_0o. ***See also***, N.T., 5/11/17, at 75 ("Ms. Kelly talked about unearthed memories."). Mr. McGettigan can be seen standing directly next to Ms. Kelly at the time of the press conference. Several accusers testified to telling Mr. McGettigan of changes in their accusations, and that they had blocked out those memories. D.S. explained at trial that therapy and counseling allowed him to remember additional detail.

The accusers had clearly notified the prosecution of changes in their accusation, but, in violation of ***Brady***, the prosecution failed to provide this information to trial counsel. For example, D.S. testified as follows:

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

sort of like closing a door, closing—putting stuff in the attic and closing the door to it.

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

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

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

> Mr. Amendola: Prior to today, did you ever tell members of the Attorney General's Office or any of the investigators in this case that Mr. Sandusky when he drove around with you would put his hand down your pants and touch your penis?
>
> D.S.: Yes, one.
>
> Mr. Amendola: Who did you tell?
>
> D.S.: Joe McGettigan.

Id. at 141.

D.S. explained his change in testimony as follows. "That doorway that I had closed has since been reopening more. More things have been coming back and things have changed since that grand jury testimony. Through counseling and different things, I can remember a lot more detail that I had pushed aside than I did at that point." ***Id.*** at 143. He added, "Through counseling

and through talking about different events, through talking about things in my past, different things very triggered different memories and have had more things come back, and it's changed a lot about what I can remember today and what I could remember before because I had everything negative blocked out." ***Id.*** at 146. Indeed, he repeated a similar sentiment later, providing, "That testimony is what I had recalled at that time. Through—again through counseling, through talking about things, I have remembered a great deal more things that I had blocked out. And at that time that was, yes, that's what I thought but at this time that has changed." ***Id.*** at 152.

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

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

Had this evidence been disclosed, Mr. Sandusky could have filed a motion *in limine* to preclude such testimony under ***Commonwealth v. Nazarovitch***, 436 A.2d 170 (Pa. 1981), and

Pa.R.E. 601, and argued that recovered memories based on therapy do not meet the requirements of ***Topa/Frye*** and therefore any testimony based on that non-scientific therapy was improper. Alternatively, or in addition to, counsel could have called an expert to provide expert testimony on memory. Mr. Sandusky provided expert testimony from Dr. Elizabeth Loftus at his PCRA hearing in this respect. Testimony from an expert would have led to a reasonable probability that the outcome of the trial would have been different. This position is explored in more detail below.

In addition, trial counsel could have successfully sought the review of the therapy notes of those accusers, which would not have been precluded by the psychiatrist-patient privilege.[18] In ***T.J.W.***, ***supra***, the Pennsylvania Superior Court, in a unanimous decision, interpreted that privilege. Therein, the defendant was accused of rape, involuntary deviate sexual intercourse, aggravated indecent assault, and other sex crimes. The accuser was the defendant's daughter. The defendant sought *in camera* inspection of mental health records relative to therapy the accuser had undergone.

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

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[18] The Commonwealth sought to attack Mr. Sandusky's expert witness on memory, Dr. Elizabeth Loftus, based on her limited review of various materials. However, this was an unfair attack as the Commonwealth well-knew since Mr. Sandusky's attempts to review therapy notes and have those notes provided to his expert were rejected. The PCRA court set forth that it would not change its Order in that regard after the Commonwealth opened the door, but noted that it was well aware that Mr. Sandusky could not provide certain detailed information. N.T., 5/11/17, at 93.

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

The panel first set forth,

> "the law is clear that a criminal defendant is entitled to know about any information **that may affect the reliability of the witnesses against him**." ***Commonwealth v. Mejia–Arias***, 734 A.2d 870, 876 (Pa. Super.1999) (quoting ***Commonwealth v. Copeland***, 723 A.2d 1049, 1051–52 (Pa. Super. 1998), *appeal denied*, 561 Pa. 652, 747 A.2d 897 (1999)). Therefore, absent an applicable claim of privilege, if Appellee T.J.W. were able to articulate a reasonable basis for his request, he would have **a colorable claim to seek evidence which might show that the complainant's memories were somehow impaired or otherwise unreliable**.

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

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

It should be added that the decision in ***T.J.W.,*** insofar as it applies to this matter, does not constitute non-binding *dicta*. *Dicta* or *obitur dictum* is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential[.]" Black's Law Dictionary, 3d Pocket Edition. Although the ***T.J.W.*** Court initially concluded that the appellant therein (the accuser) had waived a claim of privilege it also ruled in the alternative. The Superior Court's waiver finding, however, does not result in its alternative holding be considered *dicta*. ***Commonwealth v. Reed***, 971 A.2d 1216, 1220 (Pa. 2009). Since ***T.J.W.*** addressed, in the alternative, the merits of the issues, its alternative holding is not *obiter dictum*. ***Reed***, ***supra***.

Further, ***T.J.W.*** does not constitute a new rule of law merely because it was decided after Mr. Sandusky's trial. The ***T.J.W.*** Court expressly relied on and cited prior decisions discussing privilege and was interpreting a statute. ***See T.J.W.***, ***supra*** at 1103 (citing ***Mejia–Arias***, ***supra*** at 876, and ***Copeland***, ***supra*** at 1051–52). A new rule of law is one that "overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent[.]" ***Fiore v. White***, 757 A.2d 842, 847 (Pa. 2000).

"A decision does not articulate a new rule of law when it 'merely relies upon a statutory interpretation which was not wholly without precedent.'" ***Id***. As the ***Fiore*** Court set forth, "when we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of an existing law." ***Id***. at 848.

Here, the ***T.J.W.*** ruling did not overrule any prior decision, nor did it express a fundamental break from past precedent or decide an issue of first impression that was not foreshadowed by

existing precedent. Rather, it applied existing precedent in interpreting a statutory provision: 42 Pa.C.S.. § 5944. Thus, it is evident that it did not announce a new rule of law. The Commonwealth's prior argument, that ***T.J.W.*** was wrongly decided, does not alter that it is binding precedent.

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

Even absent presentation of an expert on the phenomena of false memories, Mr. Sandusky was prejudiced by the Commonwealth's failure to disclose this vital impeachment evidence. Had the jury known in clearer detail that numerous victims' memories of the abuse were the result of having received therapy and did not recall certain allegations of abuse prior to undergoing therapy, there is a reasonably probability that it would have acquitted Mr. Sandusky as to at least one charge or a mistrial could have resulted. Mr. Sandusky is entitled to a new trial.

REPRESSED AND FALSE MEMORIES

9. Trial counsel were ineffective in failing to present expert testimony that called into question the theory of repressed/false memory and demonstrated the likelihood of false memories.[19]

Proposed Findings of Fact:

138. D.S. testified at trial that, "That doorway that I had closed has since been reopening more. More things have been coming back and things have changed since that grand jury testimony. Through counseling and different things, I can remember a lot more detail that I had pushed aside than I did at that point." N.T., 6/13/12, at 143 (Testimony of D.S.); N.T., 5/11/17, at 10 (Testimony of D.S.).

139. D.S. also maintained, "Through counseling and through talking about different events, through talking about things in my past, different things very triggered different memories and have had more things come back, and it's changed a lot about what I can remember today and what I could remember before because I had everything negative blocked out." N.T., 6/13/12, at 146 (Testimony of D.S.); N.T., 5/11/17 at 10 (Testimony of D.S.).

140. He continued, providing, "That testimony is what I had recalled at that time. Through—again through counseling, through talking about things, I have remembered a great deal more things that I had blocked out. And at that time that was, yes, that's what I thought but at this time that has changed." N.T., 6/13/12, at 152 (Testimony of D.S.).

141. D.S. in his own e-mail, sent after trial, indicated that his therapist had told him that he had repressed memories. N.T., 5/11/17, at 13, 23-24; ***see also id.*** at 21.

142. At trial, D.S. also had submitted "I had sort of blocked out that part of my life. Obviously, going to football games and those kind of things, I had chose to sort of to keep out in the open, so to speak. And then the more negative things, I had sort of pushed into the back of my mind, sort of like closing a door, closing—putting stuff in the attic and closing the door to it. That's what I feel like I did." N.T., 6/13/12, at 119 (Testimony of D.S.).

143. D.S. testified during his grand jury testimony that Mr. Sandusky never kissed him. N.T., 5/11/17 at 8. (Undisputed).

144. He also testified during the grand jury proceeding that Mr. Sandusky did not touch his privates skin on skin. ***Id.*** (Undisputed).

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[19] This issue was included in Mr. Sandusky's Second Amended PCRA Petition as Issue 17. Second Amended PCRA Petition, 3/7/16, at 26, 99-106; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 8 (Issue 12), 69-78; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 28-31.

145. D.S. also submitted testimony during the grand jury proceeding that Mr. Sandusky did not fondle him over his clothes. ***Id.*** (Undisputed).

146. He maintained during his PCRA testimony that he was "still in, I guess, a discovery stage[.]" ***Id.*** (Undisputed).

147. D.S. also had told police before testifying at either the grand jury or trial that Mr. Sandusky never gave him bear hugs in the shower. ***Id.*** at 5. However, his trial testimony differed. ***See generally***, N.T., 6/13/12, at 85-165.

148. Aaron Fisher's allegations changed drastically after undergoing therapy and counseling from Michael Gillum.

149. Mr. Fisher first disclosed that Mr. Sandusky touched him inappropriately overtop his clothing. N.T., 6/12/12, at 70-71 (Testimony of Aaron Fisher).

150. On November, 19, 2008, Aaron Fisher met with the principal and guidance counselor. He did not allege that Mr. Sandusky engaged in oral or anal sex. ***See Id.*** at 153 (Testimony of Jessica Dershem).

151. Jessica Dershem, a twenty-five-year-old Clinton County caseworker interviewed Aaron Fisher for one hour. Aaron Fisher did not disclose that sexual intercourse of any type occurred. ***Id.*** at 154-156.

152. Instead, Aaron Fisher stated that Mr. Sandusky cracked his back approximately thirty times. ***Id.*** at 155; ***see also id.*** at 72.

153. In her report, Ms. Dershem wrote that Mr. Sandusky was involved in ten back cracking episodes and she notified Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing.

154. Police then interviewed Aaron Fisher, specifically Trooper Joseph Cavanaugh and Joseph Akers. Also present was Ms. Dershem. ***Id.*** at 157.

155. Aaron Fisher denied that Mr. Sandusky touched Aaron Fisher's genitalia and that oral sex occurred. ***Id.*** at 158; ***see also id.*** at 72-73.

156. As of December 12, 2008, Aaron Fisher still had yet to inform police that Mr. Sandusky had done anything criminal. ***See id.*** (Undisputed).

157. In fact, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire. ***Id.***

158. Only after meeting with therapist Michael Gillum did Aaron Fisher make sexual abuse allegations.

159. Michael Gillum also treated B.S.H., prior to trial. N.T., 5/30/12, at 46.

160. B.S.H. testified that "I have spent, you know, so many years burying this in the back of my mind forever." N.T., 6/11/12, at 162-163 (Testimony of B.S.H.).

161. J.S. testified that "Everything that's coming out now is because I thought about it more. I tried to block this out of my brain for years." N.T., 6/14/12, at 122 (Testimony of J.S.).

162. In an interview with police prior to trial, J.S. had said, "I don't believe any of this stuff is true and hope that he's found not guilty." ***See*** Moulton Report, at 81 (Attached to PCRA Appendix).

163. Aaron Fisher, D.S., and B.S.H. are all known to have been in therapy during trial.

164. False memories, repressed memories, and therapy enhanced memories were at issue in this case. N.T., 6/11/12, at 162-163; N.T., 6/13/12, at 143, 146, 152; N.T., 6/14/12, at 122; N.T., 5/11/17, at 9-14, 16, 23-24.

165. Mr. Gillum's PCRA testimony was evasive.

166. Contrary to Mike Gillum's PCRA testimony, ***see*** N.T., 3/24/17, at 144, Aaron Fisher had not made any allegations of sexual abuse prior to seeing Mr. Gillum. ***See*** N.T., 612/12, at 72-73; ***Id.*** at 153-158.

167. Mr. Gillum told Aaron, "I really think I know what you must be going through even though you won't tell me." Gillum continued, "if someone touched you in your private parts, well that's really embarrassing and hard to talk about because you're probably very scared...It's my job and purpose to protect you and help you." ***See*** Silent No More, at 64-65.

168. Mr. Gillum stated to Aaron, "I know something terrible happened to you. I understand that you want it to stop and you want to get away from him and you're not sure if you want to take it further than that." N.T., 3/24/17, at 151; Silent No More, at 66.

169. "[Aaron] was with [Mr. Gillum] for a couple of hours before he told [Mr. Gillum] that oral sex had occurred. Even then he didn't tell [Mr. Gillum] on his own; [Mr. Gillum] asked him and he said it had." ***Id.*** at 67.

170. Mr. Gillum also explained "this process of grooming to Aaron many times over his three years in therapy sessions." N.T., 3/24/17, at 152-153; Silent No More, at 25.

171. According to Aaron, he would dissociate with his body." Silent No More, at 22 ("I took myself out of my body and away from him and out of that basement room.").

172. Aaron asserted, "I managed to lock it all deep inside my mind somehow." ***Id.*** at 28.

173. Mr. Gillum told Aaron that Mr. Sandusky was the exact profile of a predator. N.T., 3/24/17 at 155, ***Id.*** at 159; Silent No More, at 22, 72.

174. According to Mr. Fisher, "Mike has explained a lot to me since this all happened. He said that what I was doing is called compartmentalizing." Silent No More, at 28.

175. Mr. Gillum asserted in his book that "Aaron managed to dissociate himself from the grim reality of abuse[.]" Silent No More, at 108.

176. Mr. Gillum has posited that, "Emotional signs of trauma, however, can remain locked within the victim's psyche as they search for the magic bullet to mask their pain." ***Id.*** at 217.

177. Repressed memory and "dissociative" amnesia are synonymous terms. ***See*** American Psychiatric Association, Diagnostic and Statistical Manuel of Mental Disorders (DSM-IV). Accordingly, dissociation is language regularly associated with repressed memories.

178. Mr. Gillum acted as an advocate for Mr. Fisher and not as a disinterested clinician. N.T., 3/24/17, at 155-156 (Testimony of Michael Gillum) (Undisputed).

179. Even if Michael Gillum did not "practice" repressed memory therapy, he believes in repressed memories, N.T., 3/24/17, at 159, and his manner of therapy and suggestive questioning were conducive to creating false memories. ***See*** N.T., 5/11/17, at 73, 89-90 (Testimony of Dr. Elizabeth Loftus).

180. Mr. Sandusky presented expert testimony from Dr. Elizabeth Loftus. ***Id.*** at 57-100.

181. Dr. Loftus is a professor at the University of California Irvine in the department of psychology and social behavior and is also a professor of law. ***Id.*** at 57.

182. Dr. Loftus went to Stanford for graduate school and received a Master's Degree in psychology in 1967 and a Ph.D. in psychology in 1970 Stanford University. ***Id.*** at 58.

183. She is the author of over 500 scientific articles and chapters in books, and has published approximately twenty-two books. ***Id.*** at 59.

184. She is an expert in human memory and the malleability of human memory. ***Id.***

185. She has lectured to the Secret Service, the F.B.I., and had a contract with the C.I.A. ***Id.*** at 61.

186. Dr. Loftus has testified in court approximately 300 times since 1975. ***Id.***

187. The PCRA court found Dr. Loftus to be an "expert in the field of human psychology, specific emphasis in the human memory." ***Id.*** at 62.

188. Dr. Loftus testified that,

> one thing we know about memory is it doesn't work like a recording device. We don't simply record the event, play it back later. Grasping the process is much more constructive and reconstructive. So we're actually taking bits and pieces of experience. Sometimes if you put your mind in different places, you can come up with what feels like a memory. And so, one of the major things that influences memory is that people are sometimes composed to other experiences later on that can contaminate or distort or supplement a person's memory. And that's the phenomenon of distorting or false memories I've been studying for the last 40 years.

Id. at 62-63.

189. She added, "You expose people to suggested information. After some event is over, you can distort or contaminate their memory from what they experienced. But we have more recently shown that you can go even further with people. You can plant entirely false memories into the mind of people for events that never happened." ***Id.*** at 64.

190. Dr. Loftus opined:

> we have successfully convinced ordinary, otherwise healthy people, that they were lost in the shopping mall, that they were five or six-year-old, that they were frightened, cried, and had to be rescued by an elderly person and reunited with the family. Other investigators implant a false memory that when you were young, you nearly drowned, had to be rescued by a lifeguard, or that you were attacked by a vicious animal, or if you committed a crime as a teenager that was serious enough that the police actually came. All of these are examples, scientific examples, showing that you can create in the minds of otherwise healthy, ordinary people completely false memories for things that didn't happen.

Id. at 64-65.

191. Dr. Loftus noted that you can implant memories in both adults and children. ***Id.*** at 65.

192. She set forth that without independent corroboration it is not possible to determine whether a memory is false or accurate. ***Id.***

193. Dr. Loftus highlighted that "part of the problem is that these false memories have characteristics that sometimes resemble true memories. So false memories, we can be very emotional about them, they can persist for a long time, we act on them." ***Id.*** at 66.

194. According to Dr. Loftus,

> based on the information that I received from [PCRA counsel], that it seems pretty evident that there was dramatic changes within the testimony of some of the accusers. I talk about the three of them in my report to you. Dramatic changes in their testimony. It seems, you know, obvious that there was an involvement of psychotherapy --- highly suggested things that were going on in terms of the questioning, in terms of the way the accusers were interviewed --- that could be responsible for those stages of testimony.

Id. at 68-69 (overruled objection omitted).

195. She further submitted that, "one of the major reasons why someone's testimony changes from one point to another is they have been exposed to suggestive information that causes a change in your memory." ***Id.*** at 71.

196. In Dr. Loftus' expert opinion, "When you have either suggestive interviewing or suggestive psychotherapy, it can sometimes cause people, speaking in general, to visualize things differently, to a non-belief of inferences about what happened. And these can solidify and come to feel as if they're actual memories." ***Id.*** at 72.

197. Dr. Loftus found that D.S., Aaron Fisher, and B.S.H. all could have had their memory affected by either suggestive questioning and/or psychotherapy. ***Id.*** at 72-73.

198. Had Dr. Loftus or another expert been presented as a witness, the witness could have:

> talked about the nature of memory, the malleability of memory, the content involved in memory, what science has shown about the characteristics of lost memory, how they develop, ***that people can be very emotional and detailed and confident about them even when they're false***. So I will talk about that scientific work.
>
> I would identify examples of suggestions that might occur in a particular case, examples that could be responsible for the creation of false memory if these memories are false. I would possibly, as I've done in other cases, testify about the highly controversial nature of the whole concept of repressed. It is – as a matter of fact, it is so controversial that in many other jurisdictions, accusers who claim to have repressed memories that have been recovered, the cases are even dismissed because of the controversial nature of that theory. So those are some of the things that either I or another expert could have testified about in this case had the testimony been admitted.

Id. at 73-74 (emphasis added).

199. In Dr. Loftus' view, there were indications that repressed memory was at issue. ***Id***. at 74-75.

200. She posited, "when it comes to the idea of massive repression, a horrific brutalization vanished into the unconscious walls of the rest of your mental life and you need psychotherapy to dig it out, you can reliably recover these memories and you need to do this in order to heal yourself. There is no credible scientific support for this." ***Id***. at 76.

201. Based on her review of Mr. Gillum and Aaron Fisher's book, Dr. Loftus believed that Mr. Fisher had a therapist who appeared to have convinced his patients that he had repressed memories of abuse. ***Id***. at 89.

202. In Dr. Loftus' expert opinion, Mr. Fisher did undergo a type of repressed memory therapy. ***Id***.

203. Dr. Loftus noted that repressed memory therapy "is the techniques and practices that are designed to get people to remember things that somebody thinks they have repressed or forgotten." ***Id***. at 92.

Proposed Conclusions of Law:

90. "[T]here is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst." ***Isely v. Capuchin Province***, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995); ***see also State v. King***, 733 S.E.2d 535 (N.C. 2012); ***State v. Hungerford***, 697 A.2d 916 (N.H. 1997); ***State v. Quattrocchi***, 1999 WL 284882, at *13 (R.I. Super. 1999); ***Phillips v. Gelpke***, 889 A.2d 1108 (N.J. Appellate Div. 2006); ***U.S. v. D.W.B.***, 74 M.J. 630, 644 (Navy-Marine Crim. App. 2015).

91. "The scientific principle of memory repression, where an individual's consciousness is denied access to traumatic memories until the individual is psychologically competent to cope with the memories, has simply not achieved general acceptance among memory scientists. This lack of acceptance is true, regardless of whether the purported phenomenon is called repression, dissociation, or anything else. In fact, the scientific evidence supporting the repression principle is remarkably weak." ***Phillips***, ***supra*** at 112 (quoting Robert Timothy Reagan, *Scientific Consensus on Memory Repression and Recovery*, 51 Rutgers L.Rev. 275 (1999)).

92. "[A]lthough the assumption of memory being generally reliable may be intuitively appealing, many studies have yielded evidence of reconstructive processes and distortions in memory in many legally relevant situations (e.g., Frenda, Nichols, & Loftus, 2011; Nash & Wade, 2008), and only in a few situations does it seem that memory is particularly resistant to distortion. (e.g. Oeberst & Blank, 2012)." Julia Shaw and Stephen Porter, *Constructing Rich False Memories of Committing Crime*, Psychological Science, 2015, Vol. 26(3) 291-301, at 291 (hereinafter, "Shaw and Porter").

93. "The mind seems to be able to construct information from internal and external sources to generate a coherent but false picture of what occurred (e.g., Frenda et al., 2011)." ***Id.***

94. "Even memories for stressful and emotional events seem highly vulnerable to modification by exposure to misinformation (Morgan, Southwick, Steffian, Hazlett, & Loftus, 2013)." ***Id.*** at 292.

95. "Studies also suggest that false memories can be largely indistinguishable from true memories in both emotional content (Laney & Loftus, 2008) and brain activation (Stark, Okado, & Loftus, 2010)." ***Id.***

96. "[P]eople can come to visualize and recall detailed false memories of engaging in criminal behavior. Not only could the young adults in [the Shaw and Porter] sample be led to generate such memories, but their rate of false recollection was high, and the memories themselves were richly detailed." ***Id.*** at 298.

97. "[E]ven highly emotional content may not reliably indicate memory accuracy (Laney & Loftus, 2008)." ***Id.***

98. "Experiencing memorylike images of being sexually abused by a loved one, and accepting those images as accurate memories, would be an emotionally wrenching experience regardless of whether the images were verdical memories." ***See*** D. Stephen Lindsay and J. Don Read, *'Memory Work' and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional, and Personal Issues*, Psychology, Public Policy, and Law, Vol. 1, No. 4, 1995, 846-908, at 868 (hereinafter "Lindsay and Read").

99. "Regardless of whether all, some, or none of the CSA [child sexual abuse] events a particular client remembers in therapy actually occurred, the experience of 'remembering' is likely to be a traumatic one, leading to numerous psychological symptoms[.]" ***Id.*** at 872.

100. "[E]xisting research on children's and adult's memory for physical traumas, murders, natural disasters, and so on, suggests that memory for trauma follows the same principles as memories for mundane events, and that, because of their salience, traumatic events are more, rather than less, likely to be remembered." ***Id.*** at 862.

101. Certain types of psychotherapy "combine virtually all of the factors that have been shown to increase the likelihood of illusory memories or beliefs[.]" ***Id.*** at 865.

102. Studies, as recent as 2011, have shown that 81% of individuals with an undergraduate degree believe, (without scientific support), that traumatic memories are often repressed. Lawrence Patihis, Lavina Y. Ho, Ian W. Tingen, Scott O. Lilienfeld, Elizabeth Loftus, Psychological Science, *Are the "Memory Wars" Over? A Scientist-Practitioner Gap in Beliefs About Repressed Memory*, 2014, at 521 (http://pss.sagepub.com/content/25/2/519).

103. Seventy percent of undergraduates (again, without scientific support) believe that repressed memories can accurately be retrieved in therapy. ***Id.***

104. In addition, over sixty percent of clinical psychologists and sixty-nine percent of psychoanalysts believed that traumatic memories could be repressed. ***Id.*** at 528.

105. Issues related to therapy enhanced memory pertain to the reliability of the witness/evidence and not credibility. ***T.J.W.***, ***supra***; ***see also Nazarovitch***, ***supra***; ***Isely, supra***; ***King***, ***supra***; ***Hungerford***, ***supra***; ***Quattrocchi***, ***supra***; ***Phillips***, ***supra***; ***D.W.B.***, ***supra***; ***Franklin v. Stevenson***, 987 P.2d 22 (Utah 1999).

106. An expert in the field of psychology with a specialization in human memory would have been useful and helpful at trial. ***See*** N.T., 5/11/17, at 77.

107. Trial counsel's failure to present expert testimony either at a competency hearing and/or during trial on memory is an issue of arguable merit where multiple accusers testified that their allegations became more serious because of therapy and counseling and/or had blocked out their memories of abuse.

108. Counsel could have no reasonable basis for failing to present expert testimony on memory, including false memories and repressed memory, where accusers' allegations changed due to therapy and counseling and they claimed to have blocked out the memories.

109. "Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive[.]" ***Commonwealth v. Walker***, 92 A.3d 766, 789 (Pa. 2014) (quoting ***United States v. Smithers***, 212 F.3d 306, 312 n. 1, 316 (6th Cir.2000)).

110. Experts on memory, such as Dr. Elizabeth Loftus, would have been available to testify.

111. Dr. Loftus, and other experts, would have been willing to testify. ***See*** N.T., 5/11/17, 57-100 (Testimony of Dr. Loftus on behalf of Mr. Sandusky).

112. Testimony, "about the nature of memory, the malleability of memory, the content involved in memory, what science has shown about the characteristics of lost memory, how they develop, that people can be very emotional and detailed and confident about them even when they're false[,]" N.T., 5/11/17, at 73, would have aided the defense.

113. Similarly, discussion and testimony concerning "examples of suggestions that might occur in a particular case, examples that could be responsible for the creation of false memory if these memories are false[,]" ***id.***, could have altered the outcome of this case.

114. Michael Gillum's after-the-fact claim that he did not engage in repressed memory therapy is not credible, in part, because when he testified to that effect he knew that testimony that he engaged in such practice could warrant a new trial for Mr. Sandusky.

115. Mr. Gillum's references to "dissociation" are common parlance in repressed memory therapy. ***See*** Lindsay and Read, at 854 ("It is claimed that children 'dissociate' during CSA [child sexual abuse] in ways that impair later conscious recollection or that they later 'repress' memories of trauma.").

116. "Psychiatrists and other clinicians involved in evaluating allegations must remain impartial, be aware of their own biases, and resist inappropriate pressure by other members of the assessment team (who may have their own agendas or identify too strongly with the accuser)." Richard C.W. Hall, Ryan C.W. Hall, *False Allegations: The Role of the Forensic Psychiatrist*, Journal of Psychiatric Practice, (September 2001).

117. Repressed memory therapy is a discredited therapy that is not scientifically reliable. ***Isely, supra***; ***King, supra***; ***Hungerford, supra***; ***Quattrocchi, supra***; ***Phillips, supra***; ***D.W.B., supra***; ***Franklin v. Stevenson***, 987 P.2d 22 (Utah 1999); N.T., 5/11/17, 76.

118. Expert testimony on false memories and "repressed" memories goes to the reliability of the individual and not necessarily their credibility; ***see T.J.W., supra***; ***Isely, supra***; hence, it is admissible expert testimony. ***Cf. Walker***, 92 A.3d 766; Pa.R.E. 702; ***Nazarovitch, supra see also Baker, supra***; ***Gaerttner, supra***.

119. Mr. Sandusky suffered actual prejudice, since had expert testimony on false memories and repressed memories been presented, there is a reasonable likelihood that at least one conviction would not have occurred, because the reliability of the accusers' stories would have been called into question by an expert on memory.

120. Mr. Sandusky is entitled to a new trial.

Discussion:

Trial counsel were ineffective in not seeking to preclude the testimony of the accusers that was based on therapy or present expert testimony on false memories/repressed memory therapy. In ***Nazarovitch, supra***, the Pennsylvania Supreme Court recognized the importance of having the trial court make the preliminary determination of whether evidence concerning a repressed or recovered memory is sufficiently reliable to permit admission at trial in the case of testimony "recovered" by hypnosis. The Supreme Court of the United States has acknowledged that certain circumstances warrant a court's pretrial assessment of a witness's reliability as a predicate to admissibility of evidence. ***See e.g., Jackson v. Denno***, 378 U.S. 368 (1964) (authorizing a pretrial determination as to whether a defendant's confession was voluntary); ***Manson v. Brathwaite***, 432

U.S. 98 (1977) (pretrial hearing into reliability of identification in cases involving suggestive lineups).

Repressed memory therapy is analogous to hypnosis and in fact hypnosis is a technique sometimes used in that type of therapy. Both hypnosis and repressed memory therapy have their origin and derive from psychologists and psychiatrists and treatment of patients. The Superior Court in ***T.J.W.***, ***supra*** confirmed that issues regarding repressed or recovered memory relate to reliability.

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

Similarly, Dr. Harrison Pope, Jr., and Dr. James Hudson have opined, "Decades of research on victims of trauma have shown that individuals remember traumatic events very well, and often much more vividly than non-traumatic events." Modern Scientific Evidence: The Law and Science of Expert Testimony (2011-2012), *Repressed Memories: Scientific Status*, (ed. Faigman et al.), at 850.[20] That work contains a table of 33 scientific publications that question the validity of repressed and recovered memory. ***See*** Attachment C to March 7, 2016 Amended Petition.

[20] Other leading scholars have published works questioning and debunking the pseudoscientific theory of repressed memory. ***See*** Richard Ofshe and Ethan Watters, Making Monsters (1994); Elizabeth Loftus, The Myth of Repressed Memory (1994); Dr. Paul Simpson, Second Thoughts (1996). Mark Pendergrast's acclaimed work, *Victims of Memory*, (1996), is also a comprehensive and detailed account of the dubious practice of repressed memory therapy.

Thus, had counsel presented a motion *in limine* with supporting citations to the numerous scholarly books, learned treatises, and articles,[21] on the unreliability of refreshed memory through therapy there is a reasonable probability that the court would have precluded testimony based on memories that were offered only after undergoing such therapy. ***See also King***, ***supra***; ***Hungerford***, ***supra***; ***Quattrocchi***, ***supra*** at *13; ***D.W.B.***, ***supra*** at 644; ***Isely, supra*** at 1066 (''[T]here is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst.''); ***Franklin, supra.***

Absent this therapeutically refreshed testimony, the outcome of the trial would likely have been different since the accusers had little independent recollection of the most serious alleged criminal behavior, and only remembered events such as showering with Mr. Sandusky and Mr. Sandusky putting his hand on their knee. Insofar as the Commonwealth asserts that the victims did not undergo therapy that enhanced/created memories of abuse, it is inconsistent with the testimony at trial, Attorney General Linda Kelly's statements immediately after trial, and after-discovered evidence.

Of course, once the accusers testified at trial as to being able to remember abuse after undergoing therapy, trial counsel should have presented an expert on false memory and repressed memory to opine that repressed memory therapy is not an accepted science.[22] The test for ineffectiveness for failing to call a witness requires the petitioner show that the witness exists, was available to testify, counsel knew of or should have known of the witness, the witness was willing

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

22 To the extent trial counsel could only have learned of the issue after a number of accusers testified, it should be noted that the difficulty in obtaining an expert witness mid-trial would have been obviated by the Commonwealth had it not violated ***Brady*** by failing to disclose that the accusers were changing their allegations and explaining that they had blocked out memories of abuse and/or therapy and counseling was enabling them to recall being abused.

to testify, and the absence of the testimony was so prejudicial that there is a reasonable probability that the outcome of the trial would have been different. ***Commonwealth v. Chmiel***, 30 A.3d 1111 (Pa. 2011).

Instantly, such an expert exists; indeed, numerous experts on the subject exist. Dr. Loftus testified during Mr. Sandusky's PCRA proceedings. Finally, such testimony would have likely led to a different outcome at trial. Here, Mr. Sandusky's expert would have testified that recovered memories are neither scientific nor are the results reliable; however, she would not be attacking the actual accusers' beliefs that they are telling the truth. Expert testimony on false memories does not improperly infringe on the jury's credibility determining function any more than using prior inconsistent statements and is beyond the ken of the ordinary training, knowledge, intelligence, and experience of a lay person. ***See*** Pa.R.E. 702. The expert testimony would not have improperly infringed on the jury's credibility determining function as the testimony would have been limited to repressed memory therapy and false memories. As Dr. Loftus noted, she could have:

> talked about the nature of memory, the malleability of memory, the content involved in memory, what science has shown about the characteristics of lost memory, how they develop, that people can be very emotional and detailed and confident about them even when they're false. So I will talk about that scientific work.
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> I would identify examples of suggestions that might occur in a particular case, examples that could be responsible for the creation of false memory if these memories are false. I would possibly, as I've done in other cases, testify about the highly controversial nature of the whole concept of repressed. It is – as a matter of fact, it is so controversial that in many other jurisdictions, accusers who claim to have repressed memories that have been recovered, the cases are even dismissed because of the controversial nature of that theory. So those are some of the things that either I or another expert could have testified about in this case had the testimony been admitted.

N.T., 5/11/17 at 73-74.

This expert testimony relates to the reliability of the accusers' memories and, in fact, could have been introduced pre-trial. Such testimony does not indicate that a person is not telling the truth; instead, the expert would acknowledge that the person who underwent the therapy is not lying and believes in the memory. In this case, the expert testimony would have been helpful and relevant with respect to the accuser's allegations that they had blocked out the abuse. The expert testimony would be to establish how therapy can lead to false memories.

Phrased differently, expert testimony on false memory does not directly speak to whether an accuser is untrustworthy because the expert is not rendering an opinion on whether a specific witness is lying. ***Compare Commonwealth v. Alicia***, 92 A.3d 753, 760 (Pa. 2014) (concluding that expert testimony on false confessions was inadmissible and opining, "We have consistently maintained that a lay jury is capable of determining whether a witness is lying, and thus expert testimony is not permissible as to the question of witness credibility."); ***see also id.*** 762 n.12 ("In assessing the reliability of an eyewitness identification, **the issue is generally not whether the victim or witness is telling the truth—the victim or witness is often entirely and honestly convinced**, and convincing to the fact-finder, that he or she has correctly identified the true perpetrator. The issue is rather whether the witness's identification is indeed accurate.") (emphases added).

Here, the issue is not whether the accusers who underwent therapy were telling the truth about recovered memories, as they are honestly convinced, but the issue is whether the memory is accurate. Unlike eyewitness expert testimony, which was not authorized in Pennsylvania until ***Walker***, 92 A.3d 766, after Mr. Sandusky's trial, there was no case prohibiting expert testimony on the ***lack of scientific basis*** for repressed memory or on false memory. ***Compare Crawford***, ***supra*** (reliability of repressed memory not at issue).

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

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

Although it is presumed that an adult witness is competent to testify, that presumption can be rebutted. While ***Delbridge***, ***supra***, dealt with competency hearings for child witnesses, it also noted that competency hearings are appropriate when a witness's memory "may have been corrupted by insanity, mental retardation or hypnosis," the Court added, "we see no reason to alter it in cases where the memory of the witness is allegedly compromised by tainted interview techniques." ***Id.*** at 40. The ***Delbridge*** Court added, "An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be

demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." ***Id.***

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

In this case, the witnesses' testimony concerned issues of therapy enhanced memories. The rules of evidence do not limit the court to determining that a witness has an impaired memory to child victims or child witnesses. Pa.R.E. 601; ***see also Baker, supra*** ("whether the witness...has the ability to remember the event which was observed or perceived"). The Commonwealth did not previously address the plain language of the rule of evidence and case law regarding expert testimony on impaired memories because it is plain that the rule does not *per se* preclude a separate hearing when there is evidence of impaired memory and tainted investigative techniques nor prevent expert testimony during trial. Nothing in the Commonwealth's Second Answer refuted the evidence demonstrating improper police questioning and impaired memory and that the accusers' statements were unreliable (which is distinct from credibility).[23] Indeed, numerous

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

accusers testified at trial that the reason their testimony changed was based on having remembered additional facts between their police interviews, grand jury testimony and trial.

In direct contradiction to statements made on the record, and after-discovered statements made by D.S., as well as Matt Sandusky, the Commonwealth maintained that there was no evidence that a number of the accusers underwent therapy that brought forth alleged repressed/false memories. Mr. Sandusky has presented evidence that various accusers did undergo therapy to improve their memory of abuse and that is why they testified at trial as to why their stories changed over time.

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

That the Commonwealth did not present expert testimony does not preclude a defendant from doing so. Here, Z.K. testified to blacking things out, B.S.H. testified to remembering events that he had forgot, Aaron Fisher and Mike Gillum have made statements in their book that infer that Mr. Gillum helped Aaron Fisher remember being abused.

The Commonwealth cannot dispute that the accusers underwent therapy that aided their memory. Pointedly, it cannot do so because Attorney General Linda Kelly, immediately after Mr. Sandusky's convictions, stated at her press conference that the victims' had unearthed long buried memories. While the Commonwealth previously posited that Mr. Sandusky is manufacturing his claim, Mr. Sandusky has outlined those accusers that originally denied any allegations of oral sex

or other types of sexual abuse. These stories changed over time after many of the accusers entered into therapy, sometimes at the behest of their civil attorneys.

As noted, Matt Sandusky, D.S., and Aaron Fisher have all made statements regarding therapy and memories of abuse. An attorney for Z.K. publicly stated that the alleged victims had buried the events deep in their subconscious. Phrased succinctly, Mr. Sandusky has set forth numerous instances regarding the accusers' ability to recall the alleged abuse, which undisputedly significantly changed over time. Had trial counsel presented expert testimony on memory, there is a reasonable probability that the outcome of Mr. Sandusky's trial would have been different. Mr. Sandusky is entitled to a new trial on this claim.

AFTER-DISCOVERED EVIDENCE—REPRESSED MEMORIES/FALSE MEMORIES

10. Mr. Sandusky is entitled to a new trial based on after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky recollection of the crimes alleged were the result of receiving therapy, which if presented at trial would have led to a reasonable probability that the outcome of the trial would have been different.[24]

Proposed Findings of Fact:

204. Following trial, Aaron Fisher and Michael Gillum published a book revealing Mr. Gillum's treatment of Mr. Fisher.

205. Prior to Mr. Fisher's therapy with Mr. Gillum, he had never acknowledged any sexual abuse. N.T., 6/12/12, at 72-74; ***Id.*** at 153-159.

206. D.S. participated in an interview after trial and exchanged e-mails in which he discussed having repressed memories and his therapy. N.T., 5/11/17, at 13; ***Id.*** at 23-24.

207. D.S. admitted that before the allegations of abuse surfaced, he considered Mr. Sandusky to be a good friend. ***Id.*** at 12.

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[24] This claim was raised in Mr. Sandusky's Second Amended PCRA Petition as Issue 16. Second Amended PCRA Petition, 3/7/16, at 26, 96-99; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 8 (Issue 11), 66-69.

208. In one interview, post-trial, D.S. candidly admitted that his therapists suggested that he had repressed memories. ***Id***. 13-14.

209. Matt Sandusky made statements on television concerning repressing memories. www.oprah.com/own-oprahprime/Matthew-Sandusky-on-Hearing-Victim-Testimony-Video.

210. Matt Sandusky proclaimed, "I didn't have the memory of—I didn't have these memories of the sexual abuse...All of these things start coming back to you, yes, [and] it starts to become very confusing for me and you try and figure out what is real and what you're making up." ***Id.***

Proposed Conclusions of Law:

121. After-discovered evidence is evidence that:"(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Commonwealth v. Padillas***, 997 A.2d 356, 363 (Pa. Super. 2010).

122. The critical issuc for after-discovered evidence is not the availability or existence of the witness, but their testimony.

123. Evidence related to Aaron Fisher, D.S. and Matt Sandusky would not be used solely for impeachment purposes since had this evidence been revealed, trial counsel could have presented expert testimony on repressed memory therapy/false memories or filed a motion *in limine* to preclude any/certain testimony based on recovered memories/memory enhanced by therapy/psychoanalysis. ***See Nazarovitch***; ***compare also Commonwealth v. Henkel***, 938 A.2d 433 (Pa. Super. 2007).

124. The evidence is not cumulative of evidence introduced at trial.

125. Counsel could not have obtained this evidence since the Commonwealth denied that therapy was involved in bringing forth the allegations, N.T., 1/10/13, at 61, refused to disclose therapy records and contested disclosure of therapy records (and still does), ***see also id***. at 31, and the trial court held that such information was privileged.

126. That the alleged victims actually had little recollection of the abuse or that certain aspects of the abuse only was remembered based on therapy would have altered counsel's trial strategy regarding the filing of motions or presentation of expert witnesses.

127. Whilc factual testimony that contradicts the testimony of a witness may be impeachment evidence, it is not evidence that impeaches the character of a witness nor is it always evidence that is used solely to impeach a witness. Phrased differently, if the evidence contradicted factual testimony as to a material issue, it was not considered as being used solely for impeachment purposes.

128. The after-discovered evidence is not mere impeachment evidence as there is a distinction between credibility and reliability and the evidence would likely have changed the outcome of the case as Mr. Amendola would have been able to present expert testimony on memory and/or obtained therapy records to demonstrate the unreliability of memory enhanced by therapy and psychoanalysis.

129. Mr. Sandusky is entitled to a new trial.

Discussion:

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

In ***Commonwealth v. Flanagan***, 7 Watts & Serg. 415 (Pa. 1844), the Supreme Court also reasoned that the after-discovered evidence, testimony in that case, must not be solely for the purpose of impeaching a witness that testified but must go to the merits of the case. More recently, the Superior Court has posited that a petitioner must demonstrate that the evidence "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Padillas***, ***supra***.

The critical issue for after-discovered evidence is not the availability or existence of the witness, but their testimony. In ***Commonwealth v. Bulted***, 279 A.2d 158 (Pa. 1971), the defendant was convicted of killing his wife. At trial, he alleged that he discovered his wife with Francisco Matos and fought with him. When he returned to his house, he alleged his wife pulled a gun on

him and in the struggle she was shot. Matos, who was known, did not testify. He later provided a statement to police corroborating the earlier fight. The statement was considered after-discovered evidence.

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

In ***Commonwealth v. Bonaccurso***, 625 A.2d 1197 (Pa. Super. 1993), the Superior Court addressed an after-discovered evidence claim. At trial, the defendant alleged he was misidentified. However, a witness who saw the crime, a shooting, but had denied seeing it, came forward after the trial. His description of what transpired could have supported a lesser finding than first-degree murder. Judge Beck, writing in a concurring decision, agreeing with the majority opinion, asserted that the "new witness' testimony. . .was unavailable at the time of trial." *Id.* at 1202. Hence, where the testimony is unavailable it can be after-discovered evidence even where the identity of the person is known at the time of trial.

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

and was the primary person responsible for Mr. Fisher's claim of improper back-cracking changing to claims of sexual abuse. He also counseled B.S.H. and perhaps another accuser.

In an interview following Mr. Sandusky's trial, D.S. admitted that before he entered into therapy he had no memory of being abused. He admitted that before the allegations of abuse surfaced, he considered Mr. Sandusky to be a good friend. In one interview, post-trial, D.S. candidly admitted that his therapists suggested that he had repressed memories.

In an e-mail exchange with the interviewer, he further provided, "Yes, actually both of my therapists have suggested that I have/had repressed memories, and thats why we have been working on looking back on my life for triggers. My therapist has suggested that I may still have more repressed memories that have yet to be revealed, and this could be a big cause of the depression that I still carry today. We are still currently working on that." E-mail exchange between D.S. and M.P., 10/14/15, N.T., 5/11/17, at 23-24.

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

This information, since it was not revealed until after trial, constitutes after-discovered evidence that would warrant a new trial. As previously delineated, to succeed on an after-

discovered evidence claim, a petitioner must generally show that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Padillas***, ***supra*** at 363. While due diligence does not exist where counsel could have questioned or investigated an obvious available source of information, in this case, the doctor-patient privilege precluded counsel from questioning the accusers' therapists regarding whether they were engaged in assisting the accusers recover memories. Moreover, the prosecution continually denied that therapy played any role in the accusers' allegations.

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

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

That the alleged victims actually had little recollection of the abuse and/or certain aspects of the abuse only was remembered based on therapy is exculpatory evidence and would have altered counsel's trial strategy regarding the filing of motions and/or presentation of expert witnesses. This after-discovered evidence is not mere impeachment evidence and it would likely have changed the outcome of the case.[25]

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

> With respect to granting *new trials on the ground of newly discovered testimony,* there are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative. 4 *Johns. R.* 425. 5 *id.* 248. It cannot be denied in this case that the testimony offered was material to sustain the point of defence; and that it is not liable to the objection that it goes to impeach the plaintiff's witness. Russell says nothing about the character of the witness Heckscher, but contradicts the fact sworn to by him.

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

While factual testimony that contradicts the testimony of a witness may be impeachment evidence, it is not evidence that impeaches the character of a witness nor is it always evidence that is used SOLELY to impeach a witness. Phrased differently, if the evidence contradicted factual testimony as to a material issue, it was not considered as being used solely for impeachment

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

purposes. ***See id.*** (evidence must go to the merits of the case and not solely to impeach the character of a witness). This nuance has been applied in Pennsylvania in ***Commonwealth v. Mosteller***, 284 A.2d 786 (Pa. 1971), and ***Commonwealth v. Krick***, 67 A.2d 746 (Pa. Super. 1949). The alleged after-discovered evidence in those matters involved recantation from a victim. The testimony in those cases would have impeached the victim's earlier testimony, but also was material factual testimony that contradicted facts sworn by that person and was exculpatory in nature. Similarly, in this case, the evidence would not solely be used for impeachment purposes. For all of the aforementioned reasons, Mr. Sandusky is entitled to a new trial.

SUGGESTIVE POLICE QUESTIONING

11. Trial counsel rendered ineffective assistance by neglecting to file a motion in limine and seeking a hearing to preclude the use at trial of the victims' prior statements to police that were gleaned by suggestive and improper police questioning.[26]

Proposed Findings of Fact:

211. Corporal Rossman and Trooper Leiter inadvertently did not turn off a tape-recorder while interviewing B.S.H. with his attorney, Benjamin Andreozzi. N.T., 6/19/12, at 83, 99-100 (Undisputed).

212. Trooper Leiter and Mr. Andreozzi, while B.S.H. is out of the room can be heard saying the following:

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

[26] Mr. Sandusky presented this issue in his Second Amended PCRA Petition as Issue 18. Second Amended PCRA Petition, 3/7/16, at 26, 106-115; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 8 (Issue 13), 78-87; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 31-32.

operates, and the other kids we've dealt with have told us that this has happened after this and that. Did that happen to you?

Mr. Andreozzi: And I need to tell him, too, yeah, Ok.

N.T., 3/24/17, at 181-183 (Undisputed).

213. Upon B.S.H. returning to the room, Trooper Leiter told B.S.H.:

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

See N.T., 6/19/12, at 57-58; ***see also*** N.T., 3/24/17, at 172-173.

214. These portions of the interview were not intended to be recorded. ***See*** N.T., 6/19/12, at 83, 99-100.

215. Corporal Leiter indicated he had no special training in interrogating witnesses alleging sexual abuse. N.T., 3/24/17, at 169 (Testimony of Joseph Leiter) (Undisputed).

216. Trooper Rossman also had no specialized training. ***Id.*** at 190.

217. Neither Trooper Rossman nor Corporal Leiter believed that their method of questioning was improper. N.T., 6/19/12, at 33 (Testimony of Scott Rossman); N.T., 6/19/12, at 105-108 (Testimony of Joseph Leiter).

218. The trial court actually instructed the parties, "The issue is not whether or not the witness's testimony was corrupted by any questions. The purpose of the evidence is to show that the troopers didn't tell the truth[.]" N.T., 6/19/12, at 91 (Undisputed).

219. Trooper Rossman acknowledged the method used on the taped statement was consistent with the method of questioning with other accusers. N.T., 3/24/17, at 195-196 (Testimony of Scott Rossman) (Undisputed).

220. Trooper Rossman was not familiar with the concept of confirmatory bias. N.T., 3/24/17, at 199 (Undisputed).

221. Trooper Rossman acknowledged that during initial interviews many of the accusers said little or nothing occurred. N.T., 6/19/12, at 32-33 (Undisputed).

222. Trooper Rossman interviewed Aaron Fisher, J.S., D.S., Z.K., B.S.H., M.K., and S.P. N.T., 3/24/17, at 188-189 (Undisputed); N.T., 6/19/12, at 30.

223. He interviewed these individual's multiple times. N.T., 3/24/17, at 189. (Undisputed).

224. Trooper Rossman specifically conveyed to the accusers, when they were not telling him of abuse, that he believed more serious instances of abuse did occur. N.T., 6/19/12 at 33 (Trial Testimony of Scott Rossman) (Undisputed).

225. Aaron Fisher was told by police that there were more victims. N.T., 6/12/12, at 77. (Testimony of Aaron Fisher) (Undisputed).

226. During his grand jury testimony, D.S., another accuser, openly acknowledged that Corporal Leiter had told him that Mr. Sandusky had "basically went further and actually got very sexual with some of them." N.T., 4/11/11, at 41 (introduced as Exhibit at N.T., 5/11/17 hearing).

227. Aaron Fisher gave statements in 2008 that no direct sexual activity occurred; after six months of interviews, and therapy with Mr. Gillum, Aaron Fisher claimed to law enforcement that oral sex occurred. N.T., 6/12/12, at 72-73; ***Id.*** at 153-159.

228. In his grand jury testimony on November 16, 2009, Aaron Fisher denied that oral sex occurred until the prosccutor reminded Aaron Fisher that he previously stated it occurred. ***See*** Transcript of Grand Jury, November 16, 2009, at pgs. 2-9, Appendix, P. 703.

229. Aaron Fisher's story began with not being uncomfortable with Mr. Sandusky to claims of giving and receiving oral sex.

230. Aaron Fisher further specifically admitted that his "memories" developed as his therapist, Mike Gillum, asked suggestive questions. *See* Aaron Fisher, *Silent No More*, at p. 71 at Appendix, at 481.

231. Allan Myers was interviewed in September 2011, and confirmed that there was never any inappropriate contact between he and Sandusky. N.T., 8/22/16, at 80-83 (Testimony of Joseph Leiter) (Undisputed); N.T., 11/4/16, at 18-19 (Testimony of Allan Myers); ***see also*** Corporal Joseph Leiter's Pennsylvania State Police Report dated September 22, 2011, attached at Appendix, at 436 (Introduced as Exhibit 8 at PCRA hearing on 8/22/17).

232. Additionally, Mr. Myers indicated that he was uncomfortable with his feeling that the Pennsylvania State Police were trying to put words in his mouth, and that the police became angry when he did not respond the way they hoped he would. Allan Myers Interview with Curtis Everhart, dated November 9, 2011, attached at Appendix, P. 433.

233. After several more interviews, in March 2012, Allan Myers claimed he was abused at some point. N.T., 8/22/16, at 96, 100 (Testimony of Anthony Sassano); A copy of Inspector M. J. Corricelli's Memorandum of Interview, dated March 8, 2012, at Appendix, at 441.

234. J.S. was first interviewed on July 19, 2011, and he denied that any inappropriate or sexual contact occurred. A copy of Trooper Mark Yakicic's Pennsylvania State Police Report, dated July 19, 2011, attached at Appendix, at 482; ***see also*** N.T., 6/14/12, at 109, 114 (Trial Testimony of J.S.).

235. On August 18, 2011, J.S. stated that some inappropriate contact occurred, but there was no abuse. ***See*** Transcript of Grand Jury, 8/18/11 at pgs. 10-14, 17-19, 21-23, Appendix at 706 (Undisputed); N.T., 6/14/12, at 120-123.

236. When J.S. testified at trial, he claimed of the 50 nights he spent at the Sandusky residence, sexual contact occurred on almost every occasion. N.T., 6/14/12, at 108.

237. Z.K. was initially interviewed in 1998 and stated that no inappropriate contact occurred. A copy of Z.K.'s interview with Ronald Schreffler, dated May 4, 1998, was included in the PCRA Appendix, at 488; N.T., 6/14/12, at 72-76 (Undisputed).

238. In January 2011, Z.K. was interviewed again, and he denied that any sexual contact occurred.

239. In June of 2011, Z.K. testified to the grand jury that although Sandusky made him uncomfortable, they did not have sexual contact. ***See*** N.T. Grand Jury, 6/17/11, at 11-21 at Appendix, at 720 (Undisputed).

240. When Z.K. testified at trial, he still did not state he was abused, but suggested that he may have blocked it out. ***See*** N.T., 6/14/12, at 8, 15-17, and 26-27 (Testimony of Z.K.) (Undisputed).

241. D.S. was first interviewed in February 2011, and he stated that Mr. Sandusky never actually touched his genitals. A copy of Corporal Leiter's Pennsylvania State Police report, dated February 4, 2011, is attached at Appendix, at 513 (introduced as Exhibit at 5/11/17 hearing) (Undisputed).

242. When he testified to the grand jury in April 2011, D.S. stated he recalled no actual sexual contact. ***See*** N.T., 4/11/11 (introduced as Exhibit C at 5/11/17 hearing).

243. At trial, D.S. testified that memories that were essentially repressed were being recovered, and that he now recalled Mr. Sandusky assaulted him as well. ***See*** N.T., 6/13/12, at 95, 98, 101-103, 105-113, 116, 118-119, 140-146, 152, and 155.

244. Only after seeking therapy did D.S. make any allegations of sexual misconduct. At trial and in a post-trial interview, he stated that his therapy sessions helped him to remember the alleged abuse. N.T., 5/11/17, at 10-16, 22.

245. S.P. was first interviewed in November 2011, and denied being sexual with Mr. Sandusky. A copy of Christina Short's written statement regarding S.P. was attached at Appendix, at 541 (Undisputed).

246. In December 2011, he testified to the grand jury that he engaged in oral sex with Mr. Sandusky, but not anal intercourse, although Mr. Sandusky attempted anal intercourse.[27] ***See*** Transcript of Proceedings of Grand Jury, 12/5/11, at 17-20, 31-32, Appendix, at 715 (Undisputed).

247. At trial, S.P.'s story evolved to include an allegation that he and Sandusky actually engaged in anal intercourse. ***See*** N.T., 6/14/12, at 217-18, 221, 232-33, 236, and 245.

248. R.R. was first interviewed in November 2011, and he claimed that Sandusky asked for oral sex, but he refused. A copy of the Office of Attorney General Investigative Report Supplemental 53, dated November 29, 2011, was attached at Appendix, at 552.

249. By the time R.R. testified at trial, he claimed multiple instances of oral sex and digital manipulation that he did not disclose during interviews. ***See*** N.T., 6/13/12, at 32, 41-42, 46, 49-50, 52, 56-59, and 63-67.

250. Trial counsel did not provide expert testimony on suggestive questioning or file motions *in limine* to preclude the use of statements gleaned by suggestive questioning.

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

Proposed Conclusions of Law:

130. "During interviewing, asking leading questions, introducing new and inaccurate information, and pressuring or expecting the interviewee to report memory details may facilitate such an inaccurate account (Loftus, 2005)." Shaw and Porter, ***supra*** at 292.

131. "Exposure to misinformation provided by interviewers can lead to major distortions in memory[.]" ***Id.*** at 298.

132. "The effects of suggestive questioning are well-documented. For example, Loftus and Zanni (1975) demonstrated that simply using a definite article in a question ('Did you see *the* broken headlight?') can result in more frequent reporting of an event that never occurred than the same query with an indefinite article ('Did you see *a* broken headlight?')." John S. Shaw, III, Sena Garven, and James M. Wood, Co-witness Information Can Have Immediate Effects on Eyewitness Memory Reports, Law and Human Behavior, Vol. 21, No. 5, (Oct. 1997), 503-523, at 504.

133. "[B]oth informational and normative influences could exert pressure on a witness to have her or his memory report conform to the reports of other witnesses." ***Id.*** at 506.

134. "[C]o-witness information, whether communicated directly by a co-witness or indirectly by a third party, can have an immediate influence on a witness's memory report." ***Id.*** at 519.

135. "[L]aw enforcement investigators may pair co-witness information with suggestive questioning when interviewing particularly reluctant or embarrassed witnesses. Our results suggest that such a strategy may add significantly to the biasing influence that suggestive questioning would have alone." ***Id.*** at 520.

136. "[C]o-witness information, whether received directly from another witness or indirectly through an interviewer, can have a substantial and immediate impact on the accuracy of a witness's memory report." ***Id.*** at 521.

137. "Although much of the research has focused on the degree to which suggestive techniques compr[om]ise the accuracy of young children's reports, these same tactics can also influence the accuracy of reports provided by older children and adults." Robert Rosenthal, *Suggestibility, Reliability, and the Legal Process*, Developmental Review (2002).

138. Such tactics include biased interviewers, stereotype induction (telling the person that the suspect is bad), multiple interviews, and "peer pressure" (suggesting that others have provided information that the interviewer then repeats). ***Id.***

139. With the inadvertent recording of the interview with B.S.H., it is evident that law enforcement officers were engaged in suggestive interviewing that tainted the victims' testimony.

140. Trooper Rossman and Corporal Leiter engaged in highly suggestive questioning and improper protocol in questioning witnesses.

141. The result of the troopers' method of questioning could have and likely did cause group contagion and tainted memories.

142. Trial counsel possessed this information before trial, nevertheless, counsel did not file a motion *in limine* to either preclude introduction of prior consistent statements based on the suggestive questioning or present expert testimony and have the Court make the initial determination as to whether the purported victims' statements were the result of improper suggestive interviewing.

143. Trial counsel's failures were exacerbated by the trial court's erroneous belief that, "The issue is not whether or not the witness's testimony was corrupted by any questions. The purpose of the evidence is to show that the troopers didn't tell the truth[.]" N.T., 6/19/12, at 91.

144. Trial counsel's failure to seek to preclude accusations made as a result of suggestive and improper police questioning and/or provide expert testimony on suggestive questioning and its role with memory is one of arguable merit.

145. Counsel had no reasonable basis for not presenting expert testimony regarding suggestive questioning and/or seeking to preclude accusations made as a result of suggestive questioning where it knew such suggestive questioning occurred and part of their trial strategy was to show suggestive questioning and tainting the accusers.

146. Presenting an expert witness, such as Dr. Loftus, who would have discussed the impact of suggestive questioning on memory, is not inconsistent with attempting to impeach the officers via their recorded interview.

147. There is a reasonable probability that had trial counsel provided expert testimony on suggestive questioning and/or sought to preclude certain evidence that was the result of suggestive questioning the outcome of the trial would have been different. Indeed, the trial court would not have been able to instruct the parties that the question of whether a witness's testimony was tainted/corrupted was not in question.

148. Mr. Sandusky is entitled to a new trial.

Discussion:

As mentioned, the alleged victims had given multitudes of inconsistent statements throughout the course of the investigation during interviews, grand jury testimony, media accounts, and ultimately at trial. The variety of inconsistent statements rendered these witnesses' testimony so unreliable that any probative value of the testimony was significantly outweighed by the prejudice suffered by the defense. ***See*** Pa.R.E. 403. Further, as discussed above, any witness may be deemed incompetent if he has "an impaired memory." Pa.R.E. 601(b)(3). As outlined above, trial counsel should have either sought to preclude testimony regarding repressed memories as lacking any scientific basis or presented expert testimony on the phenomenon of false memories and the lack of scientific support for repressed memories.

On April 5, 2011, following the leaking of the grand jury investigation to Sara Ganim, B.S.H.'s attorney, Ben Andreozzi, met with investigators and told them he had a client who may have information relevant to the case. On April 21, 2011, B.S.H. again met with investigators and described conduct of inappropriate touching, but he denied that oral sex or any penetration occurred. Almost a month later, on May 19, 2011, B.S.H. testified to the grand jury, and his story cascaded to include tales of oral sex, an attempted anal penetration and two attempts at digital penetration. ***See*** N.T. 5/19/11, testimony of B.S.H. at 25-32, 53-60, 85-88 at Appendix, at 698.

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

> We interviewed about nine. Again, I called them kids. I apologize. Nine adults we have interviewed and you're doing very well. It is

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

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

This portion of the interview was not supposed to be recorded. ***See id***. at 83, 99-100. Moreover, this is also consistent with Corporal Leiter's conversation with Attorney Andreozzi during the unintentional recording, which was recounted during Corporal Leiter's cross-examination as follows:

> Q. I'm going to read part of that. We'll play the tape after we have a chance to set it up but a comment was made that purported to you, has your initial on it, Mr. Andreozzi asked you during the course that you have a witness that's conveyed and your response was we have two that have seen him. We can't find the victim but he may be in there. And then Andreozzi, the attorney, says oh you're kidding. The time frame matches up. Can we at some point in time say to him, listen, we have interviewed other kids and other kids have told us there was intercourse and they have admitted it. You know, is there anything else that you want to tell us?

> Purportedly your responses [SIC] was, yeah, we do that with all the other kids. Say, listen, this is what we found so far. You fit the same pattern of all the other ones. This is the way he operates and we know the progression of the way he operates and the other kids we dealt with have told us that this happened after this has happened that. Did that happen to you?
>
> Do you recall that conversation back and forth with Mr. Andreozzi?
>
> A. I don't recall it but if it's been recorded, it's there.

N.T., 6/19/12, at 55-56.

The actual tape reveals the following:

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

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

The history of how the stories evolved due to continued interviews was consistent with essentially all of the witnesses against Mr. Sandusky. With the inadvertent recording of the interview with B.S.H., it is evident that law enforcement officers were engaged in suggestive interviewing that tainted the victims' testimony. Trial counsel possessed this information before

trial, nevertheless, counsel did not file a motion *in limine* to either preclude introduction of prior consistent statements based on the suggestive questioning or present expert testimony and have the Court make the initial determination as to whether the purported victims' statements were the result of improper suggestive interviewing; hence, unreliable. Indeed, during his grand jury testimony, D.S., another accuser, openly acknowledged that Corporal Leiter had told him that Mr. Sandusky had "basically went further and actually got very sexual with some of them." N.T., 4/11/11, at 41.

Moreover, most of these alleged victims did not come forward with stories of alleged abuse until after the leak of grand jury investigation to Sara Ganim, and some did not occur until after Mr. Sandusky's arrest.[28] Trial counsel should also have sought a hearing at which expert testimony on the reliability of these witnesses' memories would have been explored since reliability does not pertain to credibility or presented a memorandum discussing the research on suggestive questioning and its impact on memory. Had counsel done so, counsel could have moved to preclude the Commonwealth from being able to rehabilitate the witnesses with consistent statements that were the result of improper suggestive interviewing techniques.

In the instant case, the suggestive interviewing by law enforcement and the Clinton County Office of Children, Youth, and Family caseworkers, combined with the witnesses' evolving tales warranted a pretrial hearing into whether the evidence was even reliable before a fact finder could

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

pass on the question of credibility. Given the overwhelming number of prior inconsistent statements by the witnesses, trial counsel should have filed a motion *in limine* asserting that the purported victims' testimonies were precluded by Pa.R.E. 403 and Pa.R.E. 601, for the following reasons:

a. Due to faulty or impaired memory, the witnesses' competency was at issue, and the trial court should have passed on the preliminary question of whether the witnesses were competent to testify;

b. Due to the contradictory statements, viewed in the context of the cascading descriptions of illegal conduct that combined with continued suggestive interviewing by law enforcement, the witnesses' testimony was sufficiently unreliable that the trial court should make the initial determination under ***Nazarovitch***, ***supra***;

c. With the strong financial incentives for the witnesses to pursue private action against Penn State University, the trial counsel should have requested a hearing to determine if the witnesses' motivation to fabricate their tales rendered their testimonies far more prejudicial than probative, warranting exclusion under Pa.R.E. 403.

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

Trial counsel also could have presented expert testimony on suggestive questioning at trial. In this respect, Dr. Loftus testified as to the role that suggestive questioning can play in creating

false memories and affecting memory. Her testimony is consistent with a broad array of scientific studies. One study, citing Dr. Loftus, set forth,

> The effects of suggestive questioning are well-documented. For example, Loftus and Zanni (1975) demonstrated that simply using a definite article in a question ('Did you see *the* broken headlight?') can result in more frequent reporting of an event that never occurred than the same query with an indefinite article ('Did you see *a* broken headlight?').

Shaw, Garven, and Wood, ***supra*** at 504. The article continued, "[B]oth informational and normative influences could exert pressure on a witness to have her or his memory report conform to the reports of other witnesses." ***Id.*** at 506. Importantly, the authors highlighted that "co-witness information, whether received directly from another witness or indirectly through an interviewer, can have a substantial and immediate impact on the accuracy of a witness's memory report." ***Id.*** at 521. That study concluded, "[L]aw enforcement investigators may pair co-witness information with suggestive questioning when interviewing particularly reluctant or embarrassed witnesses. Our results suggest that such a strategy may add significantly to the biasing influence that suggestive questioning would have alone." ***Id.*** at 520.

Another article noted, "During interviewing, asking leading questions, introducing new and inaccurate information, and pressuring or expecting the interviewee to report memory details may facilitate such an inaccurate account (Loftus, 2005)." Shaw and Porter, ***supra*** at 292. Critically, "[e]xposure to misinformation provided by interviewers can lead to major distortions in memory[.]" ***Id.*** at 298. Dr. Loftus noted that she would have been able to "identify examples of suggestions that might occur in a particular case, examples that could be responsible for the creation of false memory if these memories are false." In her view, the taped police interview herein was highly suggestive as were the methods used by Mr. Gillum.

Police not only used suggestive questioning with the accusers but also introduced additional information and told other accusers regarding allegations and in some cases actually pressured individuals to make more serious allegations. It is beyond cavil that the investigators believed in Mr. Sandusky's guilt and made that clear to those they interviewed. Such confirmatory bias and suggestive questioning are improper methods of questioning witnesses. The investigators acknowledged having no training in investigating sexual assault allegations and their actions demonstrate a failure to follow proper protocols when interviewing witnesses.

Despite the assertions of the media and Mr. Sandusky's trial counsel that the evidence against Mr. Sandusky was "overwhelming," once the witnesses' competency and reliability are properly questioned, before even passing on the question of their credibility, the evidence in this case was highly questionable. The Commonwealth's entire case rested on testimony that trial counsel should have exposed as incompetent and/or unreliable, and in certain cases inadmissible. As a result, trial counsel was ineffective for failing to file a motion *in limine* and seek the trial court's preliminary ruling on the competency and reliability of the witnesses, and neglecting to present expert testimony on suggestive questioning and its impact on memory at trial or during a pre-trial hearing. Mr. Sandusky is entitled to a new trial.

CALHOUN CLAIMS

12. Trial counsel were ineffective for failing to introduce a tape-recorded statement by James Calhoun in which he contradicted Mr. Petrosky's testimony and Mr. Calhoun denied observing Mr. Sandusky performing any sex acts with a boy in a shower.[29]

Proposed Findings of Fact:

251. The Commonwealth introduced hearsay evidence via Ronald Petrosky that James Calhoun observed Jerry Sandusky molesting a child in the Lasch Building shower. N.T., 6/13/12, at 223-233.

252. Mr. Petrosky testified before the grand jury that the shower incident occurred in the assistant coaches' locker room, N.T., 5/19/11, at 6; N.T., 6/13/12, at 241, but testified at trial that it occurred in the staff locker room. N.T., 6/13/12, at 237-238.

253. James Calhoun provided a tape-recorded statement to Trooper Yakicic, in which he stated that he did not see Jerry Sandusky sexually abusing a child in a shower. N.T., 3/24/17, at 72-73.

254. Mr. Calhoun's statement to the Trooper was given thirteen months before Mr. Sandusky's trial. N.T., 3/24/17, at 71.

255. Mr. Amendola was aware of the interview, N.T., 3/24/17, at 70, but was not certain if he reviewed the tape or transcript prior to trial, ***id.*** at 76, and ultimately could not recall whether he reviewed the tape/transcript prior to trial. ***Id.*** at 77.

256. Mr. Amendola initially believed that he did play a transcript of Mr. Calhoun's interview. N.T., 3/24/17, at 70 (Testimony of Joseph Amendola).

257. Mr. Amendola stated that had he reviewed the interview he "would have raised it at some point." ***Id.*** at 78 (Testimony of Joseph Amendola) (Undisputed).

258. Mr. Amendola acknowledged that it was possible that due to the massive amount of discovery he may not have had time to review the transcript/tape before trial. ***Id.*** at 79 (Testimony of Joseph Amendola) (Undisputed).

259. Mr. Amendola did not review the transcript/tape prior to or during trial.

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[29] Mr. Sandusky forwarded this position in his Second Amended PCRA Petition as Issue 19. Second Amended PCRA Petition, 3/7/16, at 26, 115-119; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 14), 87-90; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 33.

260. The only evidence against Mr. Sandusky as it related to Alleged Victim 8 was Ronald Petrosky's hearsay testimony about a conversation with Mr. Calhoun, whose own interview refuted that testimony. N.T., 3/24/17, at 72. (Undisputed).

261. This evidence was admitted based, in part, on other allegations of sexual abuse in Penn State showers. N.T., 6/13/12, at 216-217, 221.

262. Mr. Amendola and Mr. Rominger vigorously opposed introducing Mr. Petrosky's hearsay testimony. N.T., 6/13/12, at 207-220; N.T., 5/30/16, 3-27.

263. Mr. Amendola did not present the exculpatory evidence from Mr. Calhoun's taped interview that directly refuted Mr. Petrosky's testimony.

264. The Commonwealth in its Bill of Particulars asserted that the crime occurred between November 20-27, 2000, ***see*** Bill of Particulars, and Mr. Petrosky testified that it occurred during an away game with Ohio State. ***See*** N.T., 6/13/12, at 241. The Ohio State game transpired September 23, 2000. Further, Penn State's last away game that year was November 18, 2000.

265. Accordingly, not only did Mr. Petrosky offer two different locations to the incident, his recollection of when the incident allegedly occurred was unclear. N.T., 6/13/12, at 237-238, 241 (Trial Testimony of Ronald Petrosky); N.T., 5/19/11, at 6 (Grand Jury Testimony of Ronald Petrosky).

266. During his grand jury testimony, Mr. Petrosky related that he went into the assistant coaches' locker room to hook up a hose and heard showers running and left.

267. He also recounted that to clean the shower you would spray the walls with a chemical bottle hooked up to the hose and then wait ten to fifteen minutes before spraying the chemical off to finish the cleaning process. N.T., 6/13/12, at 225. However, he later claimed it only took him five minutes to clean the shower. ***Id.*** at 246-247.

268. Mr. Petrosky testified during his grand jury testimony that he waited ten minutes before re-entering the shower and beginning the cleaning process, ***id.*** at 244, but changed that testimony at trial to five minutes. ***Id.***

269. He also testified at trial that he went back into the shower and cleaned up after observing Mr. Sandusky leave the locker room before encountering Mr. Calhoun. ***Id.*** at 245.

Proposed Conclusions of Law:

149. Trial counsel's failure to present exculpatory evidence as to alleged Victim 8 is a claim of arguable merit.

150. Trial counsel had no reasonable basis for not presenting the tape-recorded statement.

151. To the extent that trial counsel asserted that he did not present the tape-recorded statement because Mr. Calhoun suffered from dementia, this is not a reasonable basis where Mr. Calhoun's interview was given over a year prior to Mr. Amendola learning from a doctor of Mr. Calhoun's inability to testify at trial because of dementia and Mr. Amendola never interviewed Mr. Calhoun.

152. Moreover, Mr. Amendola's proffered reason is not credible where he could not actually recall if he had even reviewed Mr. Calhoun's statement before trial and he stated he would have raised it had he reviewed it.

153. Mr. Sandusky suffered actual prejudice because the sole evidence with respect to alleged Victim 8 was the hearsay testimony of Ronald Petrosky which would have been directly refuted by Mr. Calhoun's taped-statement.

154. Had Mr. Calhoun's statement that it was not Mr. Sandusky that he observed abusing a minor in a shower been introduced, there is a reasonable probability that Mr. Sandusky would not have been found guilty of the charges related to alleged Victim 8.

155. Mr. Sandusky is entitled to a new trial.

Discussion:

In the present case, two alleged victims in this matter did not come forward to testify. One of those alleged victims was a child described by Mr. Petrosky, a janitor at Penn State University. He was permitted to testify as to a hearsay statement Jim Calhoun made to him. Over trial counsel's objection to introduction of Mr. Calhoun's statement to Mr. Petrosky as an excited utterance, Mr. Petrosky testified that Mr. Calhoun told him that Mr. Calhoun saw Jerry Sandusky performing oral sex on a minor child. Mr. Petrosky assumed it was Mr. Sandusky because he claimed to see Mr. Sandusky walk out of the building with a child.

Despite Mr. Calhoun having informed police that he did not observe Mr. Sandusky molest a child, trial counsel failed to present this impeachment evidence. Specifically, in discovery in this matter, the Commonwealth disclosed a tape recorded interview Mr. Calhoun gave to the Commonwealth's investigator, Trooper Yakicik, on May 15, 2011. In the interview, Trooper Yakicic asks Mr. Calhoun about a time he observed an older man committing sexual assault on a

young boy. After Mr. Calhoun describes seeing the assault in graphic detail, the following exchange occurs:

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

N.T., 3/24/17, at 72-73.

Certainly, had counsel been aware of this evidence it would have had to have been presented. This therefore belies Mr. Amendola's statement relied on by the Superior Court in Mr. Sandusky's prior direct appeal that had he had adequate time to review discovery his trial strategy and presentation would not have been different.

Failing to present this critical evidence, which directly contradicted the Commonwealth's sole evidence as to that unnamed victim, is a claim of arguable merit. ***See Khalifah, supra*** (evidence that directly contradicted testimony of a victim warranted evidentiary hearing); ***Commonwealth v. Shaffer***, 763 A.2d 411 (Pa. Super. 2000) (counsel ineffective for failing to introduce a police report as a business record that demonstrated that the victim's testimony was inconsistent with information in the report). In addition, counsel could have no reasonable basis

for not using this evidence when both trial attorneys opposed the very introduction of Mr. Petrosky's testimony. ***See also Commonwealth v. Murphy***, 591 A.2d 278 (Pa. 1991) (failing to impeach a prosecution eyewitness held to be ineffective assistance).

It is beyond cavil that there is a reasonable probability of a different outcome as to the unnamed shower victim had a statement from the witness who allegedly viewed the crime been presented that was in direct opposition to the Commonwealth's evidence. ***See Stewart, supra*** (failure to present alibi witness that would have directly contradicted Commonwealth's evidence was ineffective assistance); ***Matias, supra***; ***Shaffer, supra***; ***Murphy, supra***.

The Commonwealth submits that it subjected Mr. Calhoun to the interview in which he provided that answer while Mr. Calhoun was suffering from dementia. Whether Mr. Calhoun was not cognitively lucid at the time the Commonwealth interviewed him and had a compromised mental state would have gone to the weight of the evidence. It does not dispel that he factually stated something directly contradictory to what Mr. Petrosky testified. Further, the dementia diagnosis occurred thirteen months after the interview.

As discussed previously, no attorney would choose not to present evidence that directly contradicts the sole basis on which the government seeks a conviction. Mr. Sandusky is entitled to relief on this claim as a matter of law. As to prejudice, the preponderance of evidence standard is not particularly heightened and in light of the exceptionally meager evidence of the Commonwealth regarding Victim 8, there is a reasonable probability that the jury would have found that the unidentified victim was not assaulted by Mr. Sandusky had the statement been provided.

13. Appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony, relative to Mr. Calhoun's hearsay statement, was inadmissible as an excited utterance as there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim.[30]

Proposed Findings of Fact:

270. Counsel vigorously argued that Mr. Petrosky's testimony relaying hearsay evidence was inadmissible. N.T., 5/30/16, 3-27; 6/13/12, 207-220; N.T., 6/18/12, at 8 (Undisputed).

271. Although ultimately admitting the evidence, the trial court queried the Commonwealth, "how do you lay the groundwork that the excited event actually occurred but for the excited utterance? So you've got that circular logic. I mean, isn't the case law that you have to have independent evidence or evidence independent of the statement itself that there was actually an exciting event?" N.T., 5/30/16, at 17 (Questions by Judge Cleland) (Undisputed).

272. Judge Cleland continued, "Independently, how do you know there's a crime involving Victim 8?" ***Id.*** at 22.

273. Judge Cleland, again although he ultimately admitted the evidence, stated, "there has to be evidence of a crime other than the exciting utterance." ***Id.*** at 23 (Undisputed). The Commonwealth agreed. ***Id.*** (Undisputed).

274. During trial, the Commonwealth maintained that the issue of introducing Mr. Calhoun's hearsay statement via Mr. Petrosky was "certainly novel, Judge, but I would assert we have gotten the ball over the finish line here. Maybe by a hair." N.T., 6/13/12, at 216 (Argument of Frank Fina).

275. The trial court admitted Mr. Petrosky's testimony based on other evidence related to other charges concerning alleged shower incidents. N.T., 6/13/12, at 216-217, 221.

276. Mr. Petrosky changed his testimony as to the location of the actual incident between his grand jury testimony and his trial testimony. N.T., 5/19/11 at 6 (incident in assistant coaches' locker room); N.T., 6/13/12, at 241; N.T., 6/13/12, at 237-238 (incident in staff locker room) (Undisputed).

277. The only evidence relative to the charges pertaining to Victim 8 was provided by Mr. Petrosky. (Undisputed).

278. Victim 8 was not identified at trial and has never been identified.

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[30] Mr. Sandusky leveled this claim in his Second Amended PCRA Petition as Issue 21. Second Amended PCRA Petition, 3/7/16, at 26-27, 120-121; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 16), 92-93; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 34.

279. Appellate counsel preserved the issue in his post-sentence motion and the post-sentence motion brief. ***See*** Post-Sentence Motion, 10/18/12; Post-Sentence Motion Brief, 1/10/13.

280. Appellate counsel did not raise the issue before the Superior Court. ***See Commonwealth v. Sandusky***, 77 A.3d 663 (Pa. Super. 2013).

Proposed Conclusions of Law:

156. Hearsay alone cannot be grounds for a conviction. ***Commonwealth v. Barnes***, 456 A.2d 1037 (Pa. Super. 1983); ***Commonwealth ex rel. Buchanan v. Verbonitz***, 581 A.2d 172, 174 (Pa. 1990) (plurality) ("Fundamental due process requires that no adjudication be based solely on hearsay evidence."); ***Commonwealth v. Keys***, 814 A.2d 1256 (Pa. Super. 2003).

157. Where there is no corroborating evidence that a crime occurred and the only evidence of the crime is based on hearsay, the hearsay evidence is inadmissible even if falling within a hearsay exception. ***Barnes, supra.***

158. This issue has arguable merit. ***Barnes, supra***; ***Verbonitz, supra.***

159. Appellate counsel had no reasonable basis not to raise this issue where it was preserved and evidentiary issues, in contrast to sufficiency claims, do warrant a new trial. ***See Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa. Super. 2012) ("a successful sufficiency-of-the-evidence challenge warrants discharge rather than a new trial[.]; ***compare id.*** at 325 ("Having addressed Appellant's sufficiency issue, we now examine his initial [evidentiary] claim and, finding it meritorious, we award him a new trial.").

160. Appellate counsel erroneously believed the issue would not warrant a new trial and would only impact sentencing, which was concurrent. N.T., 1/10/13, at 56-57; N.T., 5/11/17, at 29-30.

161. Appellate counsel when questioned by the trial court during the post-sentence motion hearing initially set forth, as it relates to raising the Calhoun/Petrosky issue, "I didn't think I could properly ignore it." N.T., 1/10/13, at 57.

162. Appellate counsel's basis for not raising the issue on appeal, because it would not have resulted in a new trial, N.T., 5/11/17, at 29-30, is legally inaccurate because the claim was not a sufficiency issue. ***See Brown***, 52 A.3d 320.

163. Further, appellate counsel's basis for not presenting the issue because he did not wish to take away from stronger issues is not reasonable where he knowingly raised a waived issue and there is reasonable probability that the present issue would have entitled Mr. Sandusky to a new trial. ***See Showers v. Beard***, 635 F.3d 625, 634 (3d Cir. 2011) ("The Superior Court determined that counsel made a tactical decision not to include all of the arguments on appeal. This court agrees that counsel need not, and should not, raise every non-frivolous claim but rather may select among them in order to maximize the likelihood of success on appeal. ***Smith v.***

Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Here, however, without conducting an independent investigation of the need to consult an expert rebuttal witness, counsel ignored an argument going directly to the issue of guilt that is "clearly stronger than those presented." ***Id.*** (quotation omitted); ***Davila v. Davis***, ___ U.S. ___ (2017) (filed June 26, 2017) (Slip Opinion at 10) ("In most cases, ***an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors.***").

164. Mr. Sandusky suffered actual prejudice since all of the convictions related to Victim 8 were based on Mr. Petrosky's testimony.

165. Mr. Sandusky suffered additional actual prejudice since Mr. Petrosky's testimony bolstered other evidence related to other alleged shower incidents.

166. There is a reasonable probability that absent the Petrosky evidence that Mr. Sandusky would have been acquitted of multiple charges, including all of the charges pertaining to alleged Victim 8.

167. Mr. Sandusky is entitled to a new trial.

Discussion:

Trial counsel objected to allowing Mr. Petrosky to testify regarding the alleged hearsay statement from Mr. Calhoun, citing ***Barnes***, ***supra***. That case held that, "[w]here there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule." ***Barnes***, ***supra*** at 1040; ***see also Keys***, ***supra*** (lack of corroboration of hearsay statement by a spousal abuse victim was inadmissible). In ***Barnes***, the victim alleged that someone had broken into his home and beaten and robbed him. Here, there is no evidence that Mr. Sandusky performed oral sex on an unidentified victim other than the hearsay statement itself. The Commonwealth acknowledged the issue was close, stating it had presented enough evidence based on a course of conduct theory and that Mr. Petrosky saw Mr. Sandusky leave the building with a young boy.

However, the critical inquiry is whether there was corroboration of the crime, not innocuous and innocent behavior. Taking a shower with a child in a locker room and walking out with a child is not criminal behavior. The only evidence of the crime was the hearsay evidence.

Since the Commonwealth could not corroborate that a crime occurred outside of the hearsay evidence, admission of Mr. Petrosky's testimony was in error and had counsel raised this issue on direct appeal there is a reasonable probability that Mr. Sandusky would have been entitled to a new trial. ***See Barnes, supra.***

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

The case cited by the Commonwealth was ***Commonwealth v. Sanford***, 580 A.2d 784 (Pa. Super. 1990). Reliance on that case is misplaced. ***Sanford*** did not involve a case where the sole evidence of a crime was hearsay. Therein, a doctor had examined the child and there was corroborating physical evidence. Thus, the very case the Commonwealth relied on in its Answer did not state what it alleges. Instantly, there was no corroborating physical evidence as to Victim 8. Since the elements of the crimes could only be established based on hearsay testimony, the admission of the evidence deprived Mr. Sandusky of due process and a fair trial.

Appellate counsel had no reasonable basis for failing to raise this preserved issue on appeal. Appellate counsel argued the issue in a post-sentence motion brief and provided more detailed and lengthier argument on this issue than the waived issue of the prosecutor's improper comment on Mr. Sandusky's silence during closing arguments. Mr. Gelman testified initially that he did not even raise the claim in question before the trial court. However, after his recollection was refreshed, he acknowledged that he had raised the issue. At one point he said the issue was not

arresting and then set forth that it was an interesting issue. N.T., 5/11/17, at 30, 36. Nevertheless, he elected not to present the issue on direct appeal because he believed, erroneously, that it only would impact Mr. Sandusky's concurrent sentence. This despite Mr. Gelman acknowledging being aware that evidentiary challenges entitle defendants to a new trial. Since the challenge in question was not a sufficiency issue, the remedy would have been a new trial—and not a discharge that would not have affected the sentencing structure. Since counsel's basis for not raising the issue was legally in error, i.e., that it would only impact a concurrent sentence, it was unreasonable. Had appellate counsel raised the evidentiary issue, the remedy would have been a new trial.

To the extent that counsel asserted that he wished to winnow the issues, he actually knowingly raised a waived issue in place of a claim that would have resulted in a new trial. His position that raising a waived issue would preserve it for PCRA review and *habeas* review is also legally erroneous. A claim of trial counsel ineffectiveness for not preserving the closing argument/comment on silence issue could have been raised regardless of whether the underlying issue was presented on direct appeal. ***See Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002) (ineffectiveness claims to be raised during PCRA). Further, as noted in ***Showers***, raising an issue that cannot entitle a person to relief (in this case because it was waived) in lieu of an issue that would entitle a person to a new trial is not reasonable. ***See Davila v. Davis***, ___ U.S. ___ (2017) (filed June 26, 2017) (Slip Opinion at 10) ("In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors.").

14. Direct Appellate Counsel was ineffective for failing to appeal Mr. Sandusky's convictions relating to Victim 8 as lacking sufficient evidence.[31]

[31] Mr. Sandusky presented this issue in his Second Amended PCRA Petition at Issue 23. Second Amended PCRA Petition, 3/7/16, at 27, 123-124; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 18), 96-98; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 35.

Proposed Findings of Fact:

281. Trial counsel and Appellate counsel initially included in their Post-Sentence Motion, a sufficiency challenge. ***See*** Post-Sentence Motion, 10/18/12.

282. The sole evidence against Mr. Sandusky relative to alleged Victim 8 was the testimony of Ronald Petrosky, which relayed hearsay evidence. ***See*** N.T., 6/13/12, 223-233.

283. Trial counsel believed the evidence relative to alleged Victim 8 was insufficient. N.T., 3/24/17, at 75 ("in fact we had anticipated right up until trial that Judge Cleland might toss that set of charges.") (Testimony of Joseph Amendola) (Undisputed); ***see also*** N.T., 5/30/16, 3-5.

284. The trial court itself intentionally sentenced Mr. Sandusky on the counts relative to alleged Victim 8 concurrently due to its obvious belief that the evidence was weak and the convictions might be overturned. Judge Cleland's Sentencing Statement, 10/11/12, at 6.

285. Mr. Gelman believed the evidence related to alleged Victim 8 was questionable. N.T., 5/11/17, at 34.

286. Appellate counsel did not raise a sufficiency claim relative to the counts connected to alleged Victim 8. ***See Sandusky***, 77 A.3d 663.

Proposed Conclusions of Law:

168. Appellate counsel's decision not to raise a sufficiency claim to the charges associated with Victim 8 is one of arguable merit where the sole evidence against Mr. Sandusky was hearsay evidence.

169. "Fundamental due process requires that no adjudication be based solely on hearsay evidence." ***Verbonitz, supra*** at 174.

170. The rules of criminal procedure had to be changed to authorize hearsay alone to be considered for the much lower *prima facie* burden at a preliminary hearing. ***See Commonwealth v. Ricker***, 120 A.3d 349 (Pa. Super. 2015) (discussing change in law and rule of procedure with respect to hearsay at a preliminary hearing), *allowance of appeal granted*, 135 A.3d 175 (Pa. 2016).[32]

171. Since the elements of the crimes could only be established based on hearsay testimony, the evidence was so unreliable as to be based on surmise and insufficient as a matter of law and deprived Mr. Sandusky of due process. ***See Verbonitz, supra.***

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[32] Judge Cleland erroneously maintained at the August 12, 2016 hearing that hearsay alone could have been used at the preliminary hearing. N.T., 8/12/16, at 130-131. However, the applicable rule of criminal procedure at that time had yet to be modified to permit hearsay alone to be used to bind over charges. ***See Commonwealth v. Ricker***, 120 A.3d 349 (Pa. Super. 2015), *appeal granted*, 135 A.3d 175 (Pa. 2016).

172. Appellate counsel's proffered reason for not raising the issue, because it would not have entitled Mr. Sandusky to a new trial or a lesser sentence is unreasonable since the claim would have resulted in complete discharge for those offenses.

Discussion:

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

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

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

See Judge Cleland's Sentencing Statement, 10/11/12, at 6.

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

174.[33] Instantly, there was no corroborating physical evidence as to Victim 8. Since the elements of the crimes could only be established based on hearsay testimony, the evidence was insufficient and deprived Mr. Sandusky of due process. While generally, in considering a sufficiency claim, the court must consider improperly admitted evidence, even assuming *arguendo* that the evidence was properly admitted—since it was pure hearsay that established all of the elements of the alleged crime, the evidence was insufficient. As a result, this Court should enter judgment of acquittal on the charges relating to Victim 8.

Appellate counsel's basis for not raising a sufficiency issue, that it would not have affected Mr. Sandusky's total sentence even if successful, while true, ignores that discharge for four separate crimes could have resulted. It is not reasonable to forego raising an issue that would result in complete discharge for certain offenses simply because it would not impact an individual's aggregate sentence.

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33 Although a plurality decision, a majority of justices agreed with this proposition since the secondary opinion in that case, authored by Justice Flaherty and joined by Justice Cappy, relied on a due process analysis to conclude that hearsay alone could not be used at a preliminary hearing. Obviously, the burden at trial is much higher than at a preliminary hearing. It took a change in the law to allow hearsay alone to be able to sufficient to establish a prima facie case. ***Commonwealth v. Carmody***, 799 A.2d 143, 146 n. 2 (Pa. Super.2002) ("[I]f the hearsay testimony offered at the preliminary hearing is the *only* basis for establishing a *prima facie* case, it fails to meet the criteria for evidence upon which the preliminary hearing judge may rely."), *abrogation by rule recognized by* ***Commonwealth v. Ricker***, 120 A.3d 349, 355 (2015), *appeal granted,* 135 A.3d 175 (Pa. 2016).

15. Direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to admission of hearsay statements from Mr. Calhoun via Mr. Petrosky.[34]

Proposed Findings of Fact:

287. Ronald Petrosky was permitted to offer hearsay testimony of a purported statement by James Calhoun in which Mr. Calhoun allegedly stated that he saw a man, whom Mr. Petrosky identified as Jerry Sandusky, was sexually abusing a boy in the shower. N.T., 6/13/12, at 222-232.

288. Mr. Calhoun did not testify against Mr. Sandusky. (Undisputed).

289. Mr. Sandusky was never afforded the opportunity to cross-examine Mr. Calhoun. (Undisputed).

290. Mr. Calhoun provided a statement to authorities directly refuting Mr. Petrosky's testimony. N.T., 3/24/17, at 72-73 (Undisputed).

291. Trial counsel argued that the testimony of Mr. Petrosky would violate Mr. Sandusky's confrontation clause rights. N.T., 6/13/12, at 218-219 (Undisputed).

292. Appellate counsel did not raise the issue on appeal. N.T., 5/11/17, at 37.

293. Appellate counsel's basis for not raising the issue was because he did not believe the statement was "testimonial." ***Id.***

Proposed Conclusions of Law:

173. "[T]he Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI.

174. Article I, § 9 provides, "In all criminal prosecutions the accused hath a right. . .to be confronted with the witnesses against him[.]"

175. Mr. Calhoun's alleged statement was hearsay offered for the truth of the matter asserted.

176. Irrespective of whether a hearsay statement meets an exception to the general rule against hearsay, a statement may not be admitted if it would violate a defendant's constitutional right to confront the witnesses against him. ***See e.g. Crawford v. Washington***, 541 U.S. 36 (2004).

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[34] Mr. Sandusky set forth this issue in his Second Amended PCRA Petition at Issue 22. Second Amended PCRA Petition, 3/7/16, at 27, 121-123; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 17), 93-95.

177. In ***Davis v. Washington***, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court developed one, non-exhaustive test for determining whether a statement is "testimonial" to-wit, the question turns on whether the admission of the statement is a "weaker substitute for live testimony."

178. In ***Commonwealth v. Abrue***, 11 A.3d 484 (Pa. Super. 2010), the Superior Court recognized that the ***Davis/Allshouse*** primary purpose test is not always decisive on whether a statement is testimonial; indeed, ***Davis*** expressly stated so. 11 A.3d at 492 (citing ***Davis***, 547 U.S. at 822 n.1 and ***Allshouse***, 985 A.2d at 854)).

179. "A document or statement is testimonial if its primary purpose is 'to establish or prove past events potentially relevant to later criminal prosecution.' A document or statement has such a primary purpose if it is created or given 'under circumstances which would lead an objective witness reasonably to believe that the document or statement would be available for use at a later trial.' If a document or statement is testimonial, then the witness who prepared it must testify at trial, unless he or she is unavailable and the defendant had a prior opportunity for cross-examination." ***Commonwealth v. Brown***, 139 A.3d 208 (Pa. Super. 2016).

180. An objective witness hearing a claim that a person observed seeing a sex crime would reasonably believe that the statement would be available for use at a trial.

181. The hearsay statement from Mr. Calhoun was used as a weaker substitute for live testimony identifying Mr. Sandusky as the perpetrator of a crime.

182. Since the hearsay statement of identification was a weaker substitute for live testimony, it could only be used if Mr. Calhoun was unavailable and the accused had a prior opportunity to cross-examine him. ***See e.g. Crawford***, 541 U.S. at 68; ***Abrue***, 11 A.3d at 493.

183. Since Mr. Sandusky was not afforded an opportunity to cross-examine Mr. Calhoun, his confrontation clause rights were violated.

184. This claim is one of arguable merit.

185. Because appellate counsel's basis for not raising the issue was his belief that the statement was not "testimonial," N.T., 5/11/17, at 37, was in error, he could have no reasonable basis for not pursuing the issue. ***Commonwealth v. Reed***, 42 A.3d 314 (Pa. Super. 2012) (where counsel's reason for chosen course of action is legally erroneous he had no reasonable basis for the decision).

186. Similarly, trial counsel, Mr. Rominger, was ineffective in informing the court that the statement was not testimonial based on the totality of circumstances. N.T., 6/13/12, at 219.

187. Mr. Sandusky suffered actual prejudice since the evidence was admitted and was the sole evidence of the alleged crimes against alleged Victim 8.

188. Mr. Sandusky is entitled to a new trial.

Discussion:

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

In opposing Mr. Petrosky's testimony, trial counsel opposed Mr. Petrosky testifying as to Mr. Calhoun's hearsay statement, in part, on the grounds that the testimony violated Mr. Sandusky3.s rights confrontation clause. ***See*** N.T., 6/13/12, at 208, 218-219. In that argument, trial counsel erroneously conceded that Mr. Calhoun's hearsay statement was not "testimonial" hearsay for purposes of a confrontation clause argument under ***Crawford v. Washington***, ***supra***, and its progeny. ***Id.*** Mr. Calhoun's statement was clearly hearsay offered for the truth of the matter asserted; and Mr. Sandusky was never afforded the opportunity to cross-examine Mr. Calhoun. Irrespective of whether a hearsay statement meets an exception to the general rule against hearsay, a statement may not be admitted if it would violate a defendant's constitutional right to confront the witnesses against him. ***See e.g. Crawford v. Washington***, ***supra***.

In ***Crawford***, the U.S. Supreme Court noted that the crux of the inquiry concerns whether the statement against the accused is "testimonial" in nature, such that the accused has a right to test the statement "in the crucible of cross-examination." ***Id.*** at 61. In ***Davis v. Washington***, ***supra***, the Supreme Court developed one, non-exhaustive test for determining whether a statement is "testimonial" to-wit, the question turns on whether the admission of the statement is a "weaker substitute for live testimony."

In ***Commonwealth v. Allshouse***, 985 A.2d 847 (Pa. 2009), the Pennsylvania Supreme Court interpreted ***Davis*** as creating a "primary purpose test," and that a statement is not

"testimonial" if it "is made with the purpose of enabling police to meet an ongoing emergency." ***Id.*** at 854. Alternatively, a statement is testimonial if it is not made in the context of an ongoing emergency and if the primary objective of the questioning is to "to establish or prove past events." ***Id.*** In ***Commonwealth v. Abrue***, 11 A.3d 484 (Pa. Super. 2010), the Superior Court recognized that the ***Davis/Allshouse*** primary purpose test is not always decisive on whether a statement is testimonial; indeed, ***Davis*** expressly stated so. 11 A.3d at 492 (***citing Davis***, 547 U.S. at 822 n.1 and ***Allshouse***, 985 A.2d at 854)). Rather, the totality of the circumstances must be examined.

Recently, the Superior Court opined,

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

Brown, 139 A.3d at 212 (internal citations omitted) (brackets in original).

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

Given that Mr. Calhoun's hearsay statement was the **only** direct evidence of the charges related to alleged Victim 8, this issue should have been raised on direct appeal, and if it had, the Superior Court likely would have reversed Mr. Sandusky's convictions on all charges relating to

Victim 8. Since the hearsay statement of identification was a weaker substitute for live testimony, it could only be used if Mr. Calhoun was unavailable and the accused had a prior opportunity to cross-examine him. ***See e.g. Crawford***, 541 U.S. at 68; ***Abrue***, 11 A.3d at 493. Since Mr. Sandusky was not afforded an opportunity to cross-examine Mr. Calhoun, his confrontation clause rights were violated. Trial counsel and direct appeal counsel were ineffective for failing to adequately argue and pursue this issue.

16. Trial counsel were ineffective in failing to present the grand jury testimony of Timothy Curley, Gary Schultz, and Graham Spanier.[35]

Proposed Findings of Fact:

294. The grand jury testimony of Mr. Curley, Mr. Schultz, and Dr. Spanier was in opposition to that of Michael McQueary. N.T., 8/12/16, at 171; ***see also*** N.T., 6/18/12, 162-165.

295. Counsel sought to introduce the prior testimony of Mr. Curley, Mr. Schultz, and Dr. Spanier. N.T., 8/12/16, at 78 (Undisputed); Motion *in Limine*, 6/11/12; N.T., 6/18/12, 162-165

296. Mr. Curley, Mr. Schultz, and Dr. Spanier were unavailable for trial. N.T., 8/12/16, at 76-77 (Testimony of Karl Rominger) (Undisputed); N.T., 6/18/12, at 168 (Statement by Frank Fina) (Undisputed).

297. The trial court stated that evidence of perjury charges would be admissible. N.T., 6/18/12, at 167.

298. Counsel did not seek to admit the prior grand jury testimony under Pa.R.E. 804(b)(1), based on the unavailability of those witnesses. N.T., 8/12/16, at 79 (Testimony of Karl Rominger) (Undisputed); ***see also***, N.T., 8/12/16, at 170 (Testimony of Joseph Amendola) (Undisputed).

299. Mr. Rominger could provide no basis for not seeking to admit their testimony under Rule 804(b)(1). N.T., 8/12/16, at 79 (Undisputed).

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[35] Mr. Sandusky raised this claim in his Second Amended PCRA Petition at Issue 27. Second Amended PCRA Petition, 3/7/16, at 27, 134-137; ***see also*** Brief on Evidentiary Hearing Issues, 11/14/16, at 2 (Issue 4), 42-47; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 39-40.

300. The grand jury testimony of Mr. Curley, Mr. Schultz, and Dr. Spanier "[w]ould have been very helpful." N.T., 8/12/16, at 171 (Testimony of Joseph Amendola).

301. Mr. Amendola believed if the grand jury testimony was presented that the Commonwealth could introduce the charges against Mr. Curley, Mr. Schultz, and Dr. Spanier. N.T., 8/12/16, at 170; ***see also*** N.T., 6/18/12, at 167, 171 (court and prosecution erroneously maintaining evidence of charged crimes would be admissible).

Proposed Conclusions of Law:

189. This issue is one of arguable merit, where, under Rule 804(b)(1), prior testimony is admissible if a witness is unavailable and the testimony in question would have further rebutted the testimony of Michael McQueary.

190. The Commonwealth had an adequate opportunity to question the witnesses during the grand jury proceedings about the information provided to them by Michael McQueary and a similar motivation since it was their belief at the time that the administrators were not being forthright. ***See Commonwealth v. Schultz***, 133 A.3d 294, 302 n.8 (Pa. Super. 2016) ("The OAG, outside the presence of Ms. Baldwin, later explicitly told the grand jury supervising judge that Schultz's and Curley's testimony was not consistent. N.T., 4/13/11, at 10.").

191. The prior grand jury testimony would have been admissible under Rule 804(b)(1).

192. Counsel could have no reasonable basis for not seeking to introduce the grand jury testimony under Rule 804(b)(1) where they filed a motion to admit such testimony and vigorously attempted to introduce such evidence.

193. The Commonwealth could not, as a matter of law, introduce pending criminal charges against Mr. Curley, Mr. Schultz, and Dr. Spanier, Pa.R.E. 609; ***Commonwealth v. Doswell***, 621 A.2d 104, 106 (Pa. 1993); hence, counsel's basis for not introducing the evidence lacked a reasonable basis and the trial court was in error in telling counsel that it would be admitted.

194. Similarly, the Commonwealth could not introduce e-mails and other statements made by Mr. Curley, Mr. Schultz, and Dr. Spanier because that would run afoul of the federal and state confrontation clauses.

195. Pursuant to Pa.R.E. 609, a witness's credibility can be attacked regarding crimes only if the witness has been ***convicted*** of a crime of dishonesty.

196. The rule explicitly is limited to convictions and does not authorize admission into evidence of charges of a crime.

197. The Commonwealth would have been precluded from introducing that these three men, innocent until proven guilty, had been charged with perjury in order to impeach their

testimony. ***See Commonwealth v. Doswell***, 621 A.2d 104, 106 (Pa. 1993). ("With respect to impeachment based on a criminal charge, however, we have no difficulty concluding that it was error to utilize a criminal charge to impeach. It is fundamental that a person who has been charged with a crime and has not been tried "is presumed innocent until proven guilty in a court of law[.]").

198. Mr. Sandusky suffered actual prejudice where the evidence would have further called into question Mr. McQueary's assertions as to what he actually witnessed.

199. The testimony of Mr. Curley, Mr. Schultz, and Dr. Spanier more closely aligned with the fact that Dr. Dranov did not report the incident, Mr. McQueary's father did not report the matter, and Michael McQueary never reported the incident to police; thus, there is a reasonable probability that at least one juror would have voted to acquit Mr. Sandusky as to the charges related to alleged Victim 2 of which the jury did find Mr. Sandusky guilty.

200. Mr. Sandusky is entitled to a new trial.

Discussion:

At trial in this matter, Mr. Sandusky's trial counsel made it clear to the trial court that Graham Spanier, Tim Curley, and Gary Schultz were critical defense witnesses. ***See*** Sandusky Motion *In Limine* To Admit The Out Of Court Statements Of Unavailable Witnesses Spanier, Curly, Schultz, 6/11/12. Nevertheless, the Court denied the motion *in limine*. Despite this fact, trial counsel could have presented the grand jury testimony of these men under Pa.R.E. 804(b)(1), which governs former testimony. In order for former testimony to be admissible, the declarant must be unavailable. ***See*** Pa.R.E. 804.

Under the rules of evidence, a person is unavailable if he refuses to testify. ***Id***. In this case, the Commonwealth itself acknowledged that Mr. Curley, Mr. Schultz, and Mr. Spanier were unavailable because they would not testify due to pending charges. N.T, 6/18/12, at 168. Thus, the first aspect of the rule allowing former testimony is met. Further, it should be noted that the Commonwealth has no confrontation clause rights, which only applies to a criminal defendant. In this respect, however, the rules of evidence did provide that former testimony at a hearing is admissible against a party if that party had an opportunity and similar motive to develop it by direct

examination. ***See*** Pa.R.E. 804(b). Instantly, the Commonwealth at the grand jury proceeding clearly had the opportunity to explore the testimony on direct examination and its motive—to show dishonesty or a lack of credibility also would have been identical at both proceedings. Under Rule 804, the grand jury testimony of these men would have been admissible.

Insofar as the Commonwealth argued at trial that it would be allowed to introduce that these men had been charged with perjury, this was legally inaccurate. Pursuant to Pa.R.E. 609, a witness's credibility can be attacked regarding crimes only if the witness has been convicted of a crime of dishonesty. The rule explicitly is limited to convictions and does not authorize admission into evidence of charges of a crime. Hence, the Commonwealth would have been precluded from introducing that these three men, innocent until proven guilty, had been charged with perjury in order to impeach their testimony. ***See Doswell, supra*** at 106. ("With respect to impeachment based on a criminal charge, however, we have no difficulty concluding that it was error to utilize a criminal charge to impeach. It is fundamental that a person who has been charged with a crime and has not been tried "is presumed innocent until *proven guilty in a court of law*[.]").

The grand jury testimony of these three men could have cast serious doubt on the credibility of Mr. McQueary. This would have undermined the Commonwealth's case that Mr. Sandusky was a serial shower rapist. Indeed, Mr. McQueary himself at the time of the incident never told his father or Dr. Dranov, who asked him explicitly three times, that he saw sexual abuse.

It is simply inexplicable that a six foot five inch, 220 lbs. twenty-six-year-old, former football player who saw a child being raped would have done nothing. Dr. Dranov, a mandated reporter, did not report the incident after Mr. McQueary told him what he observed. Thus, Mr. McQueary's statements to the doctor were almost certainly the same as those relayed to Mr. Curley and Mr. Schultz and Joe Paterno. That is, he heard slapping sounds. Even Joe Paterno's grand

jury testimony does not support Mr. McQueary's claims that he clearly related that he thought he saw Mr. Sandusky sodomizing a child. Had counsel introduced this testimony in combination with showing that Mr. McQueary took part in Mr. Sandusky's celebrity golf tournament shortly thereafter, also participated in a charity related flag-football fund raiser in 2002 and 2004, as well as another golf outing in 2003, the jury would have been left with serious doubt as to the credibility of Mr. McQueary.

Counsel had no reasonable basis not to present this testimony when they argued extensively to be permitted to call these witnesses to testify and argued that they should be allowed to introduce their grand jury testimony and the apparent reason that they did not present the testimony was based on the incorrect assumption that the Commonwealth could impeach these witnesses with charges that had not resulted in convictions.

Mr. Rominger testified, consistent with the trial record, that he and Mr. Amendola "wanted to bring [Mr. Curley, Mr. Schultz, and Dr. Spanier] to testify, but they were going to assert the privilege. At least two of the three, but maybe all three." N.T., 8/12/16 at 76. He noted that Frank Fina expressly informed trial counsel that the individuals would invoke privilege. Again, this is confirmed by the trial record. N.T., 6/18/12, at 168.

Mr. Rominger added that he was aware that these individuals had testified under oath before a grand jury. He recalled having filed a motion to admit their testimony under Rule 804(b)(3); however, he could not provide a reason why he did not argue for the admission of these individual's testimony pursuant to Rule 804(b)(1). Accordingly, because Mr. Amendola and Mr. Rominger strongly wished to introduce this evidence there can be no reasonable basis for not arguing that it was admissible under Rule 804(b)(1).

Indeed, Mr. Amendola opined that, "We tried our very best to get them into court, but they were unavailable." N.T., 8/12/16, at 171. He admitted that their testimony "would have been very helpful." ***Id.*** Mr. Amendola, however, incorrectly believed that presenting testimony from the Penn State administrators would have allowed the Commonwealth to introduce evidence that those men had been charged criminally. As discussed, evidence of criminal charges would not have been admissible under both the rules of evidence and case law. ***Doswell, supra***. Hence, Mr. Amendola's explanation for not introducing such evidence was unreasonable. ***See Reed***, 42 A.3d 314 (counsel's legally erroneous basis for not objecting considered unreasonable).

Finally, there is a reasonable probability that the outcome of the trial would have been different as the grand jury testimony of these individuals would have further undermined Michael McQueary's claims to have seen Mr. Sandusky engaged in what could only be sexual misconduct. Pointedly, the testimony of Tim Curley, Gary Schultz, and Graham Spanier, are entirely consistent with Michael McQueary telling these men that he saw Jerry Sandusky in a shower with a boy and he was uncomfortable with what he saw; however, their testimony is entirely inconsistent with Michael McQueary's belated assertion that he unquestionably informed these men of witnessing what he believed was a sexual assault.

To believe Michael McQueary's newest statements is to find that his own father and Dr. Dranov, a required reporter, heard of an allegation of rape and did nothing. Had the grand jury testimony of the Penn State officials been introduced it would have damaged Michael McQueary's assertion that he believed what he saw was a sexual assault. Additionally, considered in conjunction with the issue of trial counsel's failure to present Mr. Myers' exculpatory statements, as statements against interest, Mr. Sandusky suffered prejudice.

ERRONEOUS JURY INSTRUCTION

17. Trial counsel were ineffective in neglecting to object to the trial court's erroneous guilt instruction as part of its character evidence instruction.[36]

Proposed Findings of Fact:

302. The Superior Court determined that the trial court erred in failing to give a prompt complaint jury instruction, but found that jury instruction error to be harmless. ***Sandusky***, 77 A.3d 663.

303. The trial court, however, also erroneously instructed the jury, "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." N.T., 6/21/12, at 22 (Undisputed).

304. The correct instruction would have been, "If on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find—that he is not guilty, you should find him not guilty."

305. There was no typographical error in the transcript regarding the instruction. N.T., 8/22/16, at 88.

306. Trial counsel did not object to this instruction. ***See*** N.T., 6/21/12, at 22, 33-34 (Undisputed).

Proposed Conclusions of Law:

201. This issue is one of arguable merit. ***Cf. Commonwealth v. Billa***, 555 A.2d 835 (Pa. 1989) (counsel ineffective for not seeking a limiting instruction); ***Commonwealth v. Reyes-Rodriguez***, 111 A.3d 775 (Pa. Super. 2015) (*en banc*).

202. Since Mr. Sandusky presented testimony by character witnesses, he was entitled to an instruction that character evidence alone could give rise to a reasonable doubt. ***See Commonwealth v. Weiss***, 606 A.2d 439 (Pa. 1992); ***Commonwealth v. Neely***, 561 A.2d 1 (Pa. 1989).

203. Counsel could have no reasonable basis for not objecting to an erroneous character evidence instruction that incorrectly told the jury to find Mr. Sandusky guilty even if it was not satisfied beyond a reasonable doubt that Mr. Sandusky was guilty.

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[36] Mr. Sandusky preserved this issue in his Second Amended PCRA Petition at Issue 33. Second Amended PCRA Petition, 3/7/16, at 2, 148-150; ***see also*** Brief on Evidentiary Hearing Issues, 7/14/16, at 3 (Issue 8), 96-98; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 43-44.

204. In sex offense cases, character evidence is of paramount importance. ***Weiss***, ***supra***; ***see also Commonwealth v. Hull***, 982 A.2d 1020 (Pa. Super. 2009) (discussing importance of character evidence).

205. A jury instruction must "clearly and accurately present the law to the jury for its consideration." ***Commonwealth v. Simpson***, 66 A.3d 253, 274 (Pa. 2013).

206. The trial court confusingly and misleadingly provided that Mr. Sandusky could be found guilty even if the jury determined that the weight of the character evidence was sufficient to show a reasonable doubt.

207. It is presumed that a jury follows the court's instruction. ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1184 (Pa. 2011).

208. The Superior Court has held,

> where the trial court charged both correctly and incorrectly on the same proposition and it is impossible to determine which instruction was followed by a jury, there must be a reversal." ***Commonwealth v. Holloway***, 212 Pa.Superior Ct. 250, 254, 242 A.2d 918, 920 (1968), *citing* ***Reiter v. Reiter***, 159 Pa.Superior Ct. 344, 48 A.2d 66 (1946). ***Accord***, ***Commonwealth v. Broeckey***, 364 Pa. 368, 374, 72 A.2d 134, 136 (1950) ("Where an erroneous instruction consists of a palpable misstatement of the law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, unless the erroneous instruction is expressly withdrawn, for the jury, assuming as is their duty, that the instructions are all correct, may as readily follow the incorrect as the correct."). ***See also Commonwealth v. Ewell***, 456 Pa. 589, 595, 319 A.2d 153, 157 (1974) ("It is not for us to say what in fact happened in the jury room, or what would have happened if the jury had been correctly instructed."); and ***Commonwealth v. Wortham***, ***supra***, 471 Pa. at 248, 369 A.2d at 1289 (1977) ("We have often granted new trials on the basis of inadequate, unclear, misleading or inappropriate charges.").

Commonwealth v. Waller, 468 A.2d 1134, 1136 (Pa. Super. 1983).

209. Because it is presumed that the jury followed the erroneous instruction (and the jury was not instructed properly on prompt complaints), Mr. Sandusky suffered actual prejudice.

210. Since the trial court erroneously instructed the jury to find Mr. Sandusky guilty where the proper instruction was to find him not guilty, omitting the critical word "not" on two occasions, and it is presumed that the jury followed this instruction, Mr. Sandusky is entitled to a new trial.

Discussion:

Knowing that the trial court denied counsel's request for a prompt complaint instruction, trial counsel's failure to object to the court's erroneous character evidence instruction was inexcusable. Since Mr. Sandusky presented testimony by character witnesses, he was entitled to an instruction that character evidence alone could give rise to a reasonable doubt. ***See Weiss, supra.***

In instructing the jury regarding character evidence, however, the court incorrectly instructed the jury. Specifically, it stated, "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." N.T., 6/21/12, at 22 (emphasis added). The correct instruction would have been, "if on all the evidence you are not satisfied beyond a reasonable doubt that he is NOT guilty, you should find him NOT guilty." Trial counsel did not object to this erroneous instruction.

During the PCRA hearing, a tape of the court's instruction was played in chambers. That tape revealed that the transcript accurately reflected the Court's charge. Phrased differently, there was no transcription error and the trial court erred in its instruction to the jury. This issue is one of arguable merit. ***Cf. Billa, supra*** (counsel ineffective for not seeking a limiting instruction); ***Reyes-Rodriguez, supra*** (evidentiary hearing held to afford petitioner an opportunity to establish counsel was ineffective in failing to request a character evidence instruction that such evidence alone could establish reasonable doubt).

Further, counsel could have no reasonable basis for not objecting to an erroneous character evidence instruction that incorrectly told the jury to find Mr. Sandusky guilty even if it was not satisfied beyond a reasonable doubt that Mr. Sandusky was guilty. The mistake is also more serious because it occurred in the context of an instruction on character evidence and how such

evidence is itself sufficient to raise a reasonable doubt. Moreover, in sex offense cases, character evidence is of paramount importance. ***Weiss***, ***supra***; ***see also Hull***, ***supra*** (discussing importance of character evidence). An improper character witness instruction is therefore more prejudicial in such cases.

Although "trial courts are invested with broad discretion in crafting jury instructions," ***Simpson***, ***supra*** at 274, the instruction must "clearly and accurately present the law to the jury for its consideration." ***Id***. Even considering the character jury instruction in its entirety reveals that the court confusingly and misleadingly provided that Mr. Sandusky could be found guilty even if the jury determined that the weight of the character evidence was sufficient to show a reasonable doubt. Since it is presumed that a jury follows the courts instruction, ***Chmiel***, ***supra*** at 1184, and the jury was confusingly and erroneously instructed to find Mr. Sandusky guilty even if it was "not satisfied beyond a reasonable doubt he is guilty," Mr. Sandusky suffered actual prejudice. To the extent that the Commonwealth maintains that viewing the entirety of the instruction renders the omission of the word "not" from the phrase "not guilty" as non-prejudicial it is legally in error. As the Superior Court has explained:

> where the trial court charged both correctly and incorrectly on the same proposition and it is impossible to determine which instruction was followed by a jury, there must be a reversal." ***Commonwealth v. Holloway***, 212 Pa.Superior Ct. 250, 254, 242 A.2d 918, 920 (1968), *citing* ***Reiter v. Reiter***, 159 Pa.Superior Ct. 344, 48 A.2d 66 (1946). ***Accord, Commonwealth v. Broeckey***, 364 Pa. 368, 374, 72 A.2d 134, 136 (1950) ("Where an erroneous instruction consists of a palpable misstatement of the law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, unless the erroneous instruction is expressly withdrawn, for the jury, assuming as is their duty, that the instructions are all correct, may as readily follow the incorrect as the correct."). ***See also Commonwealth v. Ewell***, 456 Pa. 589, 595, 319 A.2d 153, 157 (1974) ("It is not for us to say what in fact happened in the jury room, or what would have happened if the jury had been correctly instructed."); and ***Commonwealth v. Wortham***, ***supra***, 471 Pa. at 248, 369 A.2d at 1289 (1977) ("We have often granted new trials on the basis of inadequate, unclear, misleading or inappropriate charges.").

Waller, supra at 1136. Here, it is beyond cavil that the court's instruction was a misstatement of the law. That misstatement was not in any way cured by any conflicting instructions. Moreover, there can be no dispute that the instruction was unclear and misleading. The erroneous instruction was not withdrawn and is rendered more harmful by the trial court's failure to issue a prompt complaint instruction and failing to adequately inform the jury that character evidence alone can warrant a finding of not guilty. When viewed in combination with the court's failure to provide a prompt complaint instruction, it is apparent that Mr. Sandusky suffered actual prejudice. Mr. Sandusky is entitled to a new trial.

ALLAN MYERS

18. Trial counsel were ineffective in failing to use Mr. Myers prior statements that Mr. Sandusky did not molest him in the 2001 shower incident as both impeachment and substantive evidence.[37]

Proposed Findings of Fact:

307. Allan Myers was the person observed by Michael McQueary. N.T., 11/4/16, at 21, 23-25, 34 (Testimony of Allan Myers).

308. Mr. Myers, prior to trial, provided a statement to Curtis Everhart, an investigator for Mr. Amendola, in which Mr. Myers denied that he was ever sexually abused by Mr. Sandusky. ***Id.*** at 20-26 (Testimony of Allan Myers) (Undisputed).

309. Mr. Myers was unavailable to testify and unwilling to testify on behalf of Mr. Sandusky. ***See*** Commonwealth's Second Answer at 15; N.T., 8/12/16, at 69-70; (Testimony of Karl Rominger) (Undisputed); N.T., 8/22/16 at 109-110 (Testimony of Agent Sassano) (Undisputed); ***see also*** N.T., 8/23/16, at 32-33 (Testimony of Frank Fina); ***see also id.*** at 30. (noting that the prosecution could not locate Mr. Myers to subpoena for the grand jury); ***Id.*** at 56 (Testimony of Joseph McGettigan) (Undisputed) ("We couldn't locate him. Mr. Shubin was unhelpful in allowing us to speak with his client. In fact, he was [an] impediment to allowing us to speak to his client.").

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[37] Mr. Sandusky forwarded this claim in his Second Amended PCRA Petition at Issue 4. Second Amended PCRA Petition, 3/7/16, at 25, 43-44; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 2), 21-25; ***see also*** Addendum to Response to Commonwealth's Answer and Request to Amend, 5/2/16, at 1-3.

310. Mr. Myers retained Attorney Andrew Shubin. N.T., 11/4/16, at 38 (Testimony of Allan Myers) (Undisputed); N.T., 8/22/16 at 24-25 (Testimony of Andrew Shubin) (Undisputed).

311. Mr. Shubin also represented J.S., D.S., R.R., and Matt Sandusky. N.T., 8/12/16, at 24. (Testimony of Andrew Shubin) (Undisputed).

312. Mr. Myers received a settlement from Penn State based on his claim to having been abused by Mr. Sandusky. N.T., 11/4/16, at 28 (Testimony of Allan Myers) (Undisputed).

313. Mr. Amendola believed that Mr. Myers was the person observed by Michael McQueary, but that Mr. Myers was not abused. N.T., 8/12/16, at 147 (Testimony of Joseph Amendola) (Undisputed); N.T. 5/11/17, at 117.

314. Mr. Myers thought of Mr. Sandusky as a father figure. N.T., 11/4/16, at 10 (Testimony of Allan Myers) (Undisputed).

315. Mr. Myers resided with Mr. Sandusky and his family as an adult. ***Id.*** at 12 (Testimony of Allan Myers) (Undisputed).

316. Mr. Myers left, not because of abuse, but because Mr. Sandusky was "controlling." ***Id.***

317. Mr. Myers provided a statement to Corporal Joseph Leiter and James Ellis denying being abused by Mr. Sandusky. ***Id.*** at 15-18 (Testimony of Allan Myers) (Undisputed); N.T., 8/22/16 at 80-83 (Testimony of Joseph Leiter) (Undisputed).

318. Mr. Myers told an investigator for Mr. Amendola that he worked out with Mr. Sandusky and was "alleged Victim Number 2." N.T., 11/4/16, at 21.

319. Mr. Myers said, "We were in the shower and Jerry and I were slapping towels at each other trying to sting each other." ***Id.*** at 22.

320. Mr. Myers told the investigator, "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." ***Id.*** at 23.

321. Mr. Myers also informed the investigator, "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." ***Id.***

322. Mr. Myers acknowledged that Mr. Sandusky told him that Penn State officials would be calling him, but they never did. ***Id.*** at 25.

323. Mr. Myers also told the investigator, "What McQueary said he observed is wrong, I can't understand why that was said. It is not the truth." ***Id.*** at 26.

324. Mr. Amendola did not introduce Mr. Myers statement that Mr. Sandusky did not abuse him in the shower episode into evidence as a statement against Mr. Myers pecuniary interest.

325. Mr. Amendola believed that if he introduced Mr. Myers exculpatory statement that the Commonwealth could introduce Mr. Myers other statements to law enforcement or would have presented Allan Myers. N.T. 3/24/17, at 120. (Testimony of Joseph Amendola).

326. The Commonwealth would not have called Mr. Myers to testify that he was Victim 2, since Mr. McGettigan has proffered that he did not believe Allan Myers. ***See*** N.T., 8/23/16 at 57 (Testimony of Mr. McGettigan).

Proposed Conclusions of Law:

211. Trial counsel's failure to introduce an exculpatory statement from Allan Myers, alleged Victim 2, is a claim of arguable merit.

212. Trial counsel could have no reasonable basis for not introducing the exculpatory statement where he believed Allan Myers was the person seen by Michael McQueary but did not believe he had been abused.

213. Trial counsel erroneously believed the Commonwealth could introduce Mr. Myers' later statements to law enforcement that Mr. Sandusky had abused him. N.T., 3/24/17, at 120.

214. Those statements could not have been introduced since they would run afoul of Mr. Sandusky's confrontation clause rights and therefore, Mr. Amendola's basis for not introducing the statement is not legally sound.

215. Mr. Myers statements in which he denied being abused by Mr. Sandusky are statements against his pecuniary interest and are admissible under Pa.R.E. 804(b)(3), where he retained Attorney Andrew Shubin to file a civil action against Penn State on his behalf.

216. The relevant rule provided at that time,

> **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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

217. Mr. Sandusky suffered actual prejudice.

218. Had exculpatory evidence that Mr. Sandusky did not abuse the person seen by Mr. McQueary been introduced, in conjunction with Mr. McQueary's failure to stop any alleged abuse, and the fact that neither his father nor Dr. Dranov reported the incident, there is a reasonable probability that the jury would not only have rejected that Mr. Sandusky raped alleged Victim 2, Allan Myers, as it did, but also that there was any crimes committed.

219. Mr. Sandusky is entitled to a new trial.

Discussion:

Allan Myers provided several statements in which he denied being abused by Mr. Sandusky. N.T., 11/4/16, at 13-26. For example, on September 20, 2011, Corporal Joseph Leiter and Trooper James Ellis interviewed Mr. Myers and he stated that Mr. Sandusky never did anything to him that was inappropriate or made him feel uncomfortable. N.T., 11/4/16, Exhibit 3. This report and the statement therein would have been admissible because the report is admissible under the business records hearsay exception, ***see Shaffer***, ***supra***, and Mr. Myers statement is admissible as a statement against his pecuniary interest. Similarly, Inspector Corricelli interviewed Allan Myers, on February 28, 2012, regarding his relationship with Mr. Sandusky. There was no mention of inappropriate contact with Mr. Sandusky. Mr. Myers was also interviewed by Curtis Everhart, an investigator for Mr. Sandusky. Therein, he denied being abused.

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

The Commonwealth also has acknowledged that there is no evidence that Mr. Myers was available or willing to testify. Since Mr. Myers was unavailable to testify, Mr. Sandusky is entitled to relief as a matter of law. Mr. Myers statements in which he denied being abused by Mr. Sandusky are statements against his pecuniary interest and are admissible under Pa.R.E. 804(b)(3), where he retained Attorney Andrew Shubin to file a civil action against Penn State on his behalf. The relevant rule provided at that time,

> **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Pa.R.E. 804(b)(3).[38]

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

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[38] The current rule reads similarly:

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

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

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

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

Finally, Mr. Sandusky suffered actual prejudice because had there been evidence that there

was no Victim 2 in the Penn State shower it would have called into question Mr. McQueary's trial testimony, which was inconsistent with his own prior statements that he made regarding hearing slapping sounds and seeing an arm before seeing Mr. Sandusky and a boy in the shower. Further, evidence from the alleged victim that he was not abused and had in fact lived as an adult with the Sanduskys, asked Mr. Sandusky to stand in as his father on senior night, requested the Sanduskys attend his wedding, and traveled ten hours to attend a funeral in support of Mr. Sandusky would lead to a reasonable probability that one juror would have concluded that Mr. Sandusky was not guilty of the pertinent crimes, resulting in a different outcome. Indeed, the prosecution spent considerable time in his closing argument discussing Victim 2, demonstrating the importance that the prosecution placed on Michael McQueary's testimony. Accordingly, the Commonwealth cannot cogently argue that such evidence would not have been significant and/or that no prejudice results for failing to introduce evidence that the jury could have interpreted to be exculpatory.

FAILURE TO INTERVIEW

19. Trial counsel were ineffective in failing to interview the victims, other than Allan Myers, as well as Mr. McQueary, Mr. Petrosky, and Mr. Calhoun.[39]

Proposed Findings of Fact:

327. Mr. Amendola did not interview Mr. Calhoun, Mr. Petrosky, Mr. McQueary, or other accusers who testified. ***Cf.*** N.T., 3/24/17, at 85-86 (Testimony of Joseph Amendola that he could not recall whether the accusers, Mr. Calhoun or Mr. Petrosky were interviewed).

Proposed Conclusions of Law:

220. "In [***Commonwealth v.***] ***Jones,*** [437 A.2d 281 (Pa. 1981),] our Supreme Court specifically found trial counsel ineffective for failing to interview a witness where the key issue turned on the credibility of the defendant and an undercover police officer." ***Stewart, supra.***

[39] Mr. Sandusky raised this claim in his Second Amended PCRA Petition at Issue 12. Second Amended PCRA Petition, 3/7/16, at 26, 85-88; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 7), 48-52.

221. "Failure to prepare is not an example of forgoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel." ***Perry, supra.***

222. "[T]he question here is the decision not to interview the witnesses, not the decision to refrain from calling them at trial.... the value of the interview is to inform counsel of the facts of the case so that he may formulate strategy. ***Stewart, supra*** at 713 (quoting ***Commonwealth v. Mabie***, 359 A.2d 369 (Pa. 1976)).

223. As the ***Mabie*** Court opined,

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

Id. at 374.

224. Had counsel interviewed the witnesses who testified or conducted a preliminary hearing, they would have learned that many of the victims' allegations changed over time based on having received psychological treatment and that they were claiming to have repressed their memories of abuse.

225. Interviewing witnesses would have allowed counsel to prepare for trial by contacting the numerous experts in this country on repressed/ false memory and its extensive problems, file a motion *in limine* regarding memory testimony that, similar to hypnotically refreshed testimony, should have been precluded, and/or sought an expert witness to testify that repressed memory therapy is no longer considered by leading academics to be reliable.

226. Counsel's failure to interview Mr. Calhoun had no reasonable basis and resulted in actual prejudice.

227. Mr. Calhoun provided a statement to police that indicated that Mr. Sandusky was not involved in the shower incident described by Mr. Petrosky. Had trial counsel interviewed Mr. Calhoun, he would have known that Mr. Calhoun denied seeing Jerry Sandusky molest anyone.

228. Moreover, counsel would have been able to learn of the competence or lack of competence of Mr. Calhoun.

229. If counsel had interviewed Mr. Petrosky they would have learned that Mr. Petrosky had changed the physical location of the crime.

230. This would have led to a reasonable probability that the outcome of the trial would have been different since it would have altered the admissibility of Mr. Petrosky's testimony and, even if still admitted, would have significantly called into question all of the charges related to Victim 8.

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

232. Mr. Sandusky is entitled to a new trial.

Discussion:

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

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

> the question here is the decision not to interview the witnesses, not the decision to refrain from calling them at trial.... the value of the interview is to inform counsel of the facts of the case so that he may formulate strategy.

Stewart, supra at 713. Further, even if all of these witnesses would not have met with counsel, this highlights the importance of having conducted a preliminary hearing. Had counsel interviewed the witnesses who testified or conducted a preliminary hearing, they would have learned that many of the victims' allegations changed over time based on having received psychological treatment and that they were claiming to have repressed their memories of abuse. D.S., J.S., B.S.H., Z.K., all testified regarding issues of memory, blocking things out, and therapy. S.P.'s testimony changed radically between his grand jury testimony and his trial testimony.

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

Mr. Sandusky further posits that counsel's failure to interview Mr. Calhoun had no reasonable basis and resulted in actual prejudice. Mr. Calhoun provided a statement to police that indicated that Mr. Sandusky was not involved in the shower incident described by Mr. Petrosky. Had trial counsel interviewed Mr. Calhoun, he would have known that Mr. Calhoun denied seeing Jerry Sandusky molest anyone. No claim of a reasonable strategy attaches to a decision not to meaningfully interview the witness before trial. ***Stewart, supra*** at 713. With respect to the unnamed victim, the evidence was not overwhelming and the charge hinged on whether the jury

believed Mr. Petrosky accurately relayed Mr. Calhoun's out-of-court statement. Thus, trial counsel's failure to interview Mr. Calhoun and present, at least, his statement to police denying Mr. Sandusky was involved resulted in actual prejudice. ***See id.***; ***see also Commonwealth v. Matias***, 63 A.3d 807 (Pa. Super. 2013) (*en banc*) (counsel ineffective for not calling daughter of defendant to refute testimony of sex assault victim).

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

However, in violation of ***Brady***, the Commonwealth did not disclose this material change. Had counsel interviewed Mr. Petrosky, it would have learned of this significant change in testimony and been adequately prepared to cross-examine him on this subject as well as argue against the introduction of that testimony. In addition, Mr. Petrosky testified at the grand jury proceeding that the upper body of the adult and child were not visible. At trial, in contrast, he stated he did not see the upper bodies because he was looking down. Again, this information was ***Brady*** evidence, and had counsel interviewed Mr. Petrosky he would have known of any possible change.

Pointedly, the trial court itself based part of its decision to allow the Petrosky testimony on the fact that the Commonwealth argued a course of conduct. Since counsel had not interviewed

Mr. Petrosky, no argument was leveled against the fact that Mr. Petrosky had only recently changed his story and that the Commonwealth did not disclose that fact until the day of trial.

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

As the ***Mabie*** Court opined,

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

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

If counsel had interviewed Mr. Calhoun and Mr. Petrosky they would have learned that Mr. Calhoun denied witnessing Mr. Sandusky commit a crime and that Mr. Petrosky had changed the physical location of the crime. This would have led to a reasonable probability that the outcome of the trial would have been different since it would have altered the admissibility of Mr. Petrosky's testimony and, even if still admitted, would have significantly called into question all of the charges related to Victim 8.

Moreover, counsel would have been able to learn of the competence or lack of competence of Mr. Calhoun. With respect to Mr. McQueary, he was one the linchpins of the Commonwealth's case. Failing to interview him had no strategic purpose. Since the alleged victim himself did not testify, Mr. McQueary's credibility was critical. As in ***Jones***, ***supra***, where credibility was the key factor, it was ineffective to not interview Mr. McQueary.

COOLING OFF PERIOD AND/OR CHANGE OF VENUE OR VENIRE/INADEQUATE VOIR DIRE

20. Trial counsel was ineffective for not requesting a change of venue or venire or seeking a cooling off period prior to the start of trial.[40]

21. Trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance was warranted.[41]

22. Trial counsel were ineffective during voir dire in neglecting to question the jurors specifically about the information they had learned from the media where one of the trial court's

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[40] Mr. Sandusky presented this issue in his Second Amended PCRA Petition at Issue 9. Second Amended PCRA Petition, 3/7/16, at 25, 71-80; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 5), 34-47; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 19-23.

[41] Mr. Sandusky set forth this issue in his Second Amended PCRA Petition at Issue 8. Second Amended PCRA Petition, 3/7/16, at 25, 66-71; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 4), 30-34; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 19-23.

opening question to each juror conceded that due to the extensive media coverage the juror had knowledge of highly prejudicial information.[42]

Proposed Findings of Fact:

328. The Commonwealth sought a change of venue and venire due to the overwhelming pre-trial publicity. ***See*** N.T., Motion to Change Venire, 2/20/12 (Undisputed).

329. Mr. Amendola opposed the change of venue and venire. ***See*** Memorandum in Opposition to the Commonwealth's Motion for Change of Venire, 2/8/12; N.T., Motion to Change Venire, 2/20/12 (Undisputed).

330. Mr. Amendola was aware of the law regarding cooling-off periods. ***See*** Memorandum in Opposition to the Commonwealth's Motion for Change of Venire, ***supra*** at 4 ("the court must determine whether such information is the product of reports by the police and prosecutorial officers, the extent of the saturation as well as the possibility of a 'cooling off period[.]") (Undisputed).

331. Mr. Amendola argued that, "the better course in [Mr. Sandusky's] cases may be for the Defendant and the Commonwealth to jointly request a continuance of the Defendant's cases for a sufficient amount of time to allow media attention on a local, statewide, and national level to subside[.]" ***Id.*** at 5 (Undisputed).

332. Mr. Amendola, however, did not seek a cooling off period. N.T., 3/24/17, at 58 (Undisputed).

333. Mr. Amendola also was aware that "[t]he trial court can make its determination based on evidence such as qualified public opinion surveys or opinion testimony offered by individuals[.]" Memorandum in Opposition to the Commonwealth's Motion for Change of Venire, at 5 (citing ***Commonwealth v. Cohen***, 413 A.2d 1066 (Pa. 1980)) (Undisputed).

334. Mr. Amendola did not present the Court with public opinion surveys or expert opinion testimony. ***See*** N.T., Motion to Change Venire, 2/20/12.

335. Mr. Amendola agreed that the media coverage of Mr. Sandusky's case was significant. Memorandum in Opposition to the Commonwealth's Motion for Change of Venire, ***supra*** at 5 (Undisputed).

336. Mr. Amendola did not provide the trial court with the extensive research done on pre-trial publicity or conduct a public opinion survey to illustrate the necessity of a cooling-off period. (Undisputed).

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[42] Mr. Sandusky delineated this claim in his Second Amended PCRA Petition at Issue 10. Second Amended PCRA Petition, 3/7/16, at 25, 80-81; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 6), 47; ***see also*** Response to Commonwealth's Answer, 4/11/16, at 19-23.

337. Mr. McGettigan stated, "that the attention and publicity that has accompanied this case is unique in the—certainly in this county's history and perhaps in the Commonwealth's as well." N.T., 2/20/12, at 4 (Undisputed).

338. Mr. McGettigan continued, "The publicity that has been attended to this has been completely pervasive. As I read through—I read through, just as I was listening here, to the defendant's own brief and he talked about a cooling-off period." ***Id.*** at 8 (Undisputed).

339. Mr. McGettigan posited, "The publicity has been extraordinary conclusory nature, extraordinary[il]y so." ***Id.*** at 11 (Undisputed).

340. He added, consistent with the expert report attached to Mr. Sandusky's Amended Petition, "they bring to the—their potential jury service a wealth of information about the crime, about the defendant, about all the parties that make it difficult for them to put aside, I would submit, what may be certainly ***unconscious biases or inclinations***, notwithstanding an effort of great integrity and personal effort to be completely unfair and impartial." ***Id.*** at 17 (emphasis added) (Undisputed).

341. The trial court, in denying the Commonwealth's motion to change venue or venire opined, "I am not persuaded the Commonwealth has established the factual predicate to reach a conclusion that the 'most imperative grounds' support granting its motion, especially since the Defendant objects." Trial Court Order, 2/13/12.

342. The court inquired with **every** prospective juror by using a question that in one form or another conceded extensive knowledge of prejudicial information. ***See*** footnote 43 (Undisputed).

343. The information that those jurors would have read or heard involved extraordinarily prejudicial information and involved reports that judged Mr. Sandusky guilty before his trial even began.

344. Mr. Amendola himself testified at the PCRA hearing that prior to Mr. Sandusky's trial he was viewed as more evil than Adolf Hitler. N.T., 8/12/16, at 105 (Undisputed).

345. Mr. Amendola did not ask probing questions concerning the information from the grand jury presentment or the media that the jurors were actually aware of. ***See generally***, N.T. Jury Selection, 6/5/12-6/6/12; N.T., 3/24/17, at 62.

346. Trial counsel did recognize the importance of a jury consultant by retaining Beth Bochnak to assist in actual jury selection in Centre County. N.T., 5/30/12, at 30; ***see also*** N.T., 3/24/17, at 49.

347. Ms. Bochnak, however, was involved in a murder trial in Puerto Rico and was unavailable to participate in jury selection in this matter. N.T., Motion to Withdraw, 6/5/12, at 4.

348. The trial court denied counsel's continuance request to allow Ms. Bochnak to participate. N.T., 3/24/17, at 49.

349. Counsel did not retain another expert nor file any memoranda with any research into jury bias in high profile cases himself. ***Id.*** at 49-50 (Undisputed).

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

Proposed Conclusions of Law:

233. The failure to investigate and adequately prepare pre-trial is a claim of arguable merit. ***See Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994); ***Commonwealth v. Brooks***, 839 A.2d 245, 248 (Pa. 2003).

234. Pretrial publicity may be so pervasive and/or inflammatory that a defendant is not required to prove actual prejudice. ***Cf. Commonwealth v. Bridges***, 757 A.2d 859, 872 (Pa. 2000); ***Commonwealth v. Robinson***, 864 A.2d 460, 484 (Pa. 2004).

235. Further, pretrial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias[.]" ***Commonwealth v. Drumheller***, 808 A.2d 902 (Pa. 2002).

236. Indeed, certain circumstances warrant a finding that a trial was inherently lacking in due process. ***Commonwealth v. Pierce***, 303 A.2d 210, 212 (Pa. 1973).

237. Pretrial publicity is presumed prejudicial where 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 it refers to confessions, admissions, or re-enactments of the crime by the accuse; (3) the publicity is derived from police and prosecuting officer reports." ***Bridges, supra.***

238. The grand jury presentment was, in essence, a prosecuting officers report. ***See*** N.T., 3/24/17, at 61-62.

239. An accused may not be punished without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." ***Chambers v. Florida***, 309 U.S. 227, 236-37 (1940).

240. "[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." ***Estes v. Texas***, 381 U.S. 532, 542-43 (1965).

241. "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another

county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered." ***Sheppard v. Maxwell***, 384 U.S. 333, 362-363 (1966).

242. In this case, given the statewide interest resulting from the impact and consequences the allegations against Mr. Sandusky had against Penn State University as a whole, its highly popular football program, and one of the all-time icons in collegiate sports, Mr. Sandusky submits that absent a change of venue or venire or cooling period prejudice was inevitable.

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

244. Trial counsel's failure to join in the request for a change of venire, seek a change of venue, or ask for the cooling-off period he noted was appropriate is a claim of arguable merit.

245. The colloquy given to Mr. Sandusky regarding his decision to contest the change of venire does not impact the issues regarding seeking a cooling off period.

246. Further, the colloquy herein cannot automatically preclude an ineffectiveness claim, where Mr. Amendola's advice was not governed by any research and had no bearing on his failure to seek the cooling-off period he noted in his memorandum was a more appropriate resolution. ***See Nieves, supra***; ***compare also Commonwealth v. Henderson***, 444 A.2d 720 (Pa. Super. 1982); ***Commonwealth v. Farnwalt***, 429 A.2d 664 (Pa. Super. 1981); ***Commonwealth v. McCall***, 406 A.2d 1077 (Pa. Super. 1979); ***Commonwealth v. Strader***, 396 A.2d 697 (Pa. Super. 1978).

247. In a case where counsel sought a continuance due to excessive discovery, and the case was only seven months old when it went to trial, there can be no reasonable basis for not, at the very least, seeking a cooling period.

248. Trial counsel had no reasonable basis for failing to conduct any research into the area of juror bias and for actually contesting the Commonwealth's change of venire.

249. Based on similar research done in Dauphin County relative to Tim Curley, Gary Schultz, and Graham Spanier, it is apparent that a Centre County jury could not have dispassionately considered the evidence without a cooling period no matter what type of questioning was engaged in by a court to ameliorate the prejudice.

250. A trial court can make its determination based on evidence such as qualified public opinion surveys or opinion testimony offered by individuals. ***Cohen, supra***.

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

Neil Vidmar and Valeria P. Hans, *American Juries, The Verdict*, at 113 (2007); ***see also*** Report of Arthur H. Patterson, PH.D., In Support of Gary Schultz and Timothy Curley Motion to Request Supplemental *Voir Dire* Measures, at 16 (attached to Second Amended PCRA Petition and quoting Vidmar and Hans) (hereinafter "Patterson Report").

252. The Patterson Report added:

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

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

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

Id. at 17-18 (quoting Posey and Wrightman, Trial Consulting, at 58 (2005)).

254. According to the report,

> the conclusion of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.

> Instructions from the Court are unlikely to alleviate the problem. Admonitions from the bench to 'set aside one's biases' have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity.

Id. at 18.

255. The Patterson Report concluded, to a reasonable degree of scientific certainty that, "The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury." ***Id.*** at 19-20.

256. This applies with equal if not more force to the actual trial of Mr. Sandusky.

257. In the alternative, had counsel researched the issue himself, trial counsel would not have objected to the Commonwealth's change of venue request, thereby resulting in the outcome of jury selection being different and thus a reasonable probability that the outcome of the trial would been altered as it would only take one juror to result in a mistrial.

258. Had trial counsel joined in the change of venire request, there is a reasonable probability that the request would have been granted thereby establishing actual prejudice.

259. The trial court's own order in this case belies that it would not have changed venue had counsel agreed. In that order the trial court set forth, "the prosecution's request for a change of venue should be much more strictly scrutinized than one by the accused[.]" Trial Court Order, 2/13/12 at 4 (quoting ***Commonwealth v. Reilly***, 188 A. 574, 580 (Pa. 1936)).

260. In addition, had trial counsel sought a cooling-off period, where the Commonwealth itself conceded intense pre-trial publicity and sought a change of venire, there is a reasonable probability that the trial court would have continued the case to allow the publicity to subside.

261. Counsel did not retain the services of a consultant to conduct research or provide a report as to the ability to select an unbiased jury in Centre County. N.T., 3/24/17, at 49-50.

262. Counsel also did not cite or discuss the aforementioned publications with respect to seeking a continuance for a cooling off period.

263. Counsel's basis for not seeking a cooling-off period, because the trial court had denied his other continuance requests that he believed were legitimate, ***see*** N.T., 3/24/17, at 57-59, is not a reasonable basis for not seeking a continuance for separate legal reason.

264. Counsel had no reasonable basis for not investigating jury bias in light of the extensive negative pre-trial publicity and presenting such available information to the judge in a motion for a cooling-off period.

265. Had counsel conducted research into the matter themselves, they would have agreed to a change of venue/venire and/or had convincing empirical evidence to continue the trial, thereby leading to a reasonable probability that the outcome of jury selection and trial would have been different.

266. Mr. Sandusky is entitled to a new trial.

Discussion:

The failure to investigate and adequately prepare pre-trial is a claim of arguable merit. ***See Perry, supra***; ***Brooks, supra*** at 248 ("counsel's failure to prepare for trial is 'simply an abdication of the minimum performance required of defense counsel.'"). In this case, despite the overwhelming amount of negative pre-trial publicity, counsel elected to try the case in Centre County, the center of the storm.

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

Moreover, trial counsel recognized the importance of a jury consultant by retaining Beth Bochnak to assist in actual jury selection in Centre County. Ms. Bochnak, however, was involved in a murder trial in Puerto Rico and was unavailable to participate in jury selection in this matter. The trial court denied counsel's continuance request to allow Ms. Bochnak to participate.

Counsel, nevertheless, did not retain the services of a consultant to conduct research or provide a report as to the ability to select an unbiased jury in Centre County that would have aided in determining whether a jury could be selected in Centre County that did not have significant knowledge of highly prejudicial information. While counsel is not ineffective for declining to call

an expert witness where he can adequately cross-examine a Commonwealth expert, ***Commonwealth v. Marinelli***, 810 A.2d 1257, 1269 (Pa. 2002), these issues do not relate to calling an expert to testify. Counsel did not undertake any research or investigation into jury bias in high profile cases himself. Had counsel done so, they would have discovered the compelling research set forth above, which would have resulted in them agreeing to move venue/venire.

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

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

The expert report in the cases involving Tim Curley and Gary Schultz provides a glimpse of what information trial counsel could have learned had they retained such an expert or conducted their own research on the available books and papers on the subject of jury bias. For example, the consultant therein conducted an extensive phone survey of 710 individuals: 410 in Dauphin

County, and 100 each in Erie, Chester, and Luzerne Counties. Large majorities in each county believed that Tim Curley, Gary Schultz, and Graham Spanier were definitely or probably guilty of allegedly covering up Mr. Sandusky's actions. Significant majorities, in excess of seventy percent in each of Dauphin, Luzerne, and Chester Counties, had been exposed to television reports. A large percentage were also familiar with newspaper reports and via word of mouth discussions.

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

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

See Patterson Report, at 16. Citing an additional source, the report noted,

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

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

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

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

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

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

Id. at 18 (emphasis added).

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

The Commonwealth itself argued in support of a change of venue. Specifically, Mr. McGettigan stated, "that the attention and publicity that has accompanied this case is unique in the—certainly in this county's history and perhaps in the Commonwealth's as well." N.T., 2/20/12, at 4. He added, "There are two things that tend to reduce the impact of publicity on a case and they are time and distance or locale." ***Id.***

Mr. McGettigan continued,

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

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

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

> I am just saying you can see the pervasive nature of the impact of these charges and [the] defendant's crimes on the community at large and the fact that they bring to the—their potential jury service a wealth of information about the crime, about the defendant, about all the parties that make it difficult for them to put aside, I would

> submit, what may be certainly unconscious biases or inclinations, notwithstanding an effort of great integrity and personal effort to be completely unfair and impartial.

Id. at 17.

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

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

Concomitantly, in a string of post-conviction cases, the Pennsylvania Superior Court directed lower courts to conduct evidentiary hearings on whether counsel's advice caused an invalid guilty plea despite the defendant's admissions in their guilty pleas that the plea was not induced by any promises made by counsel. ***Henderson***, ***supra***; ***Farnwalt***, ***supra***; ***McCall***, ***supra***; ***Strader***, ***supra***. Thus, it is evident that counsel's advice may vitiate a colloquy. Instantly, Mr. Sandusky unequivocally indicated that the decision was counsel's and he trusted that decision. However, counsel undertook no investigation or research into determining the ability to select a

fair jury in Centre County. Moreover, the colloquy did not cover seeking a cooling-off period and has no impact on trial counsel's decision not to ask for such a cooling period.

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

Indeed, as discussed, no amount of admonitions from the court could have prevented the prejudicial impact of the pre-trial publicity. The trial court acknowledged the extensive media circus surrounding the trial in its *voir dire* questioning and placed on the record that there were "250-some reporters here and stories are going to be stories." N.T., 6/6/12, at 8.

It opined, "With all this press, with all this media, with 240 some reporters that are credentialed and 30-some trucks, why are we not going to sequester you?" N.T., 6/5/12, at 8. Thus, there were 240 to 250 reporters and approximately thirty television trucks at the actual trial. This highlights the pervasive media attention surrounding the case. In fact, two reporters were actually permitted to be present during the individual *voir dire* proceedings. ***See*** N.T., 6/5/12, at 22 ("There are two pool reporters and a member of the public seated here."); ***Id.*** at 121 ("We have members of the press and public here[.]"). While the court did inform jurors that if they were uncomfortable revealing any information in front of the media that he would ask the media to

leave, it is hard to measure how jurors would react to traditional questions of whether they could be fair when media members were listening to the *voir dire*.

The court inquired with **every** prospective juror by using a question that in one form or another conceded extensive knowledge of prejudicial information. For example, "Do you know anything about the case **other than what you have read in the newspapers or heard or seen on television or radio TV news**[.]" N.T., 6/5/12, at 23. Similarly, "There's been a lot of information about this case in the newspapers, television, radio, Internet. Do you know anything about the case other than what has been in general circulation." ***Id.*** at 41.[43] The problem is that counsel

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

Id. at 148 ("other than what you've read in the papers, heard on the radio, television, maybe looked at on the Internet? Do you have any information beyond what is in the general public?); ***Id.*** at 161-62 (There's been a lot written about this case in newspapers, radios, television, Internet, blogs. Do you know anything about the case beyond that sort of common information?); ***Id.*** at 169 ("There's been, you know, an awful lot written about this and some television, radio, Internet. Do you know anything about the case beyond what has just in that arena?"); ***Id.*** at 180 (There's obviously, been a lot in the newspapers, on television, radio, Internet about this. Beyond the general information that everybody knows about or is there anything unusual particularly you know about the case, any unusual knowledge?").

Id. at 188-189 ("There's been obviously a lot written about the case, television, radio, Internet. Beyond what generally people would know from that, do you know anything else about the case?"); ***Id.*** at 197 ("There has been obviously a lot written about this case. There's been on

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

The prosecution in its own opening set forth, "And, you know, up until now, these young men have been known as, in public—some of you read the papers. We all read the paper—Victim No. 1, Victim No. 2, Victim No. 3[.]" N.T., 6/11/12, at 8. While public access to trials is important, the Supreme Court of the United States has cautioned that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." ***Bridges v. California***, 314 U.S. 252, 271 (1941). The High Court has also stated that an accused may not be punished without "a charge fairly made and fairly tried **in a public tribunal free of prejudice, passion, excitement, and tyrannical power.**" ***Chambers v. Florida***, ***supra*** at 236-37 (emphasis added). The Court also noted:

> It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. **Nevertheless, at times a**

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

> **procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.**

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

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

Id. at 362-63 (emphasis added).

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

The Pennsylvania Supreme Court has further noted that in certain circumstances, before a defendant can receive a fair trial, a "cooling off" period may be necessary. ***Robinson***, 864 A.2d at

484 (Pa. 2004); ***see also Briggs***, ***supra***. In ***Robinson***, the court was faced with the question of whether a cooling off period is necessary where pretrial publicity potentially tainted a jury pool warranting a defense request for a change of venue or venire. In this case, given the statewide interest resulting from the impact and consequences the allegations against Mr. Sandusky had against Penn State University as a whole, its highly popular football program, and one of the all-time icons in collegiate sports, Mr. Sandusky submits that absent a change of venue or venire prejudice was inevitable.

To the extent that the trial court could conclude that pre-trial publicity was equally excessive across Pennsylvania because of the enormous amount of media scrutiny, under ***Sheppard***, trial counsel should have requested that the trial court continue the trial to allow the general animus against Mr. Sandusky and Penn State University to dissipate, and trial counsel was ineffective for failing to make a record of this reasoning to the trial court. This is all the more true where trial counsel actually opposed the Commonwealth's motion for change of venue and therein noted the possibility of seeking a cooling-period. ***See*** Memorandum in Opposition to Motion to Change Venue; ***see also*** N.T., 2/20/12, at 8 (Mr. McGettigan noting that Mr. Amendola's own brief "talked about a cooling-off period.").

In a case where counsel sought a continuance due to excessive discovery, and the case was only seven months old when it went to trial, there can be no reasonable basis for not, at the very least, seeking a cooling period. The trial court's own order in this case belies that it would not have changed venue had counsel agreed. In that order the trial court set forth, "the prosecution's request for a change of venue should be much more strictly scrutinized than one by the accused[.]" Trial Court Order, 2/13/12 at 4 (quoting ***Reilly***, ***supra*** at 580). The court added, "The same standard-establishing the most imperative grounds-has also been applied to a Commonwealth request, as

here, for a change of venire." ***Id.*** The court concluded, "I am not persuaded the Commonwealth has established the factual predicate to reach a conclusion that the 'most imperative grounds' support granting its motion, **especially since the Defendant objects.**" ***Id.*** (emphasis added). Hence, it is beyond cavil that one of the critical factors in determining the change of venue motion by the Commonwealth was trial counsel's decision to oppose it.

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

Indeed, in violation of the order sealing the presentment, the charges against Mr. Sandusky were posted on a website of the Pennsylvania Unified Judicial System. Apparently the only person to discover the mistaken posting of the charges against Mr. Sandusky, prior to the official public release, was Sara Ganim – the reporter who also mysteriously received the leaked confidential grand jury material in March 2011. ***See*** Appendix, at 22, 88. Additionally, the initial grand jury presentment, drafted by the prosecution, contained factually false information. To-wit, the initial presentment stated:

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

See Grand Jury Presentment No. 12 at 6. This misrepresentation further poisoned the atmosphere against Sandusky by sensationalizing, inflating and improperly bolstering what Mr. McQueary

actually saw into scandalous and outrageous conduct unsupported by Mr. McQueary's actual testimony.[44]

Mr. Sandusky was prejudiced by the pervasive media attention in Centre County, and by the fact that the community's overriding sentiment to see Mr. Sandusky convicted based on questionable allegations, and the downfall of Joe Paterno, had not abated. Trial counsel had no reasonable basis for failing to include this relevant information of the pervasive media attention and the hostile atmosphere in Centre County in their motion for continuance. Similarly, trial counsel failed to undertake an investigation or to determine if the passions against Mr. Sandusky had dissipated in Centre County or anywhere else. Had the trial court been presented with this

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[44] The release of the presentment and the inclusion of false information in that presentment was itself prosecutorial misconduct. Trial counsel were or should have been aware that the presentment was unlawfully leaked by being placed online and that Sara Ganim discovered the mistaken posting. Additionally, counsel did know that the presentment contained factually inaccurate information to the extent that it provided that Mr. McQueary actually observed a victim being subjected to anal intercourse. Mr. McQueary, who had not actually testified before the grand jury that issued the presentment, his prior testimony having been read, did not testify in that manner. Thus, the Commonwealth was well aware that the presentment was inaccurate when it was submitted for approval. Mr. Rominger drafted a motion to preclude the OAG from continuing its participation based on the presentment containing false information. However, that motion was never filed.

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

overwhelming community sense of anger at Mr. Sandusky, the trial court would have granted the Commonwealth's motion for a change of venire. Moreover, Mr. Sandusky maintains that had this information been properly presented to the trial court before the trial, the court would have had no choice but to continue the trial to avoid undue prejudice to Mr. Sandusky.

The end result of Mr. Sandusky being tried in an environment already polluted with inappropriate leaks from the grand jury and false information in the grand jury presentment, resulted in a trial that failed to comport with the ideals of modern American jurisprudence. Under ***Sheppard***, the trial court would have had an absolute duty to continue this case to allow the passions of the community to ameliorate prior to letting that same community sit in judgment of Jerry Sandusky had counsel properly addressed the issue.

The Commonwealth itself has cited a case that recognized that "pretrial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias[.]" Commonwealth's Answer, at 10 (quoting ***Drumheller***, ***supra***). While the ***Drumheller*** Court added that such a case "would be a most unusual case[,]" no other case in Pennsylvania history can be said to have garnered the type of local, statewide, and national negative media attention. If ever an exceptional case existed, it is this matter. Frankly, if this case is not the type of case that a change of venue should have been awarded, no such case exists and the statement in ***Drumheller*** is rendered meaningless.

While the Commonwealth also maintained that Mr. Sandusky did not identify any juror selected whose partiality could be questioned, as the expert report discussed and made part of the PCRA record delineated and Mr. Sandusky's prior arguments show, the fairness of all the jurors selected can be questioned since they all knew of the negative pre-trial publicity and empirical science and research conclusively demonstrates that no manner of questioning by a court can

secure an unbiased jury in a case like Mr. Sandusky's absent an adequate change of venue or cooling period.

Thus, the Commonwealth's reliance on the trial court's jury instruction misses the mark. As has been demonstrated, learned commentators have concluded that in a high profile sex abuse case such as Mr. Sandusky's, jury instructions have a perverse effect. Moreover, the argument advanced by the Commonwealth ignores that Mr. Sandusky's positions relative to jury selection relate to the very jurors that would have been selected had a change of venue, venire, or cooling period occurred. Had one different juror from another county been selected that believed Mr. Sandusky was not guilty, then there is a reasonable probability that the proceeding would have been different.

Further, under the context of these jury selection claims, Mr. Sandusky avers that the outcome of the proceeding is not the trial itself, but the decision of whether to hold the trial in Centre County. ***See Walker***, 110 A.3d 1000 (waiver of right to testify does not require a showing that the outcome of the trial would probably have been different); ***Commonwealth v. Mallory***, 941 A.2d 686 (Pa. 2008) (waiver of jury trial right claim only requires showing that person would not have waived right, not that outcome of trial would have likely been different).

In addition, a Penn State student who stated he had opinions about the case and as a student, "hear[d] everything" was accepted on the jury. N.T., 6/5/12, at 250. That same juror, when asked if he would be able to return a not guilty verdict and explain to his friends why he voted not guilty set forth, "That would be my business. I wouldn't tell them if that's how I felt *because that's not how I feel*[.]" ***Id.*** at 254. Similarly, a retired bus driver explained that she had strong feelings about protecting kids and did not want to see children hurt and only indicated that she "probably

could be fair." ***Id.*** at 293. This juror also was seated. This refutes the Commonwealth's claim that there were not biased jurors.

Due to trial counsel's ineffectiveness he was deprived of his right to a fair trial. Since trial counsel failed to support his arguments for continuance with the clear evidence of the community's continued thirst for Jerry Sandusky to be convicted irrespective of the evidence actually introduced against him, and opposed the motion for a change of venue/venire without any research or investigation, he was ineffective.

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

Because counsel elected to try the case in Centre County, and the court's *voir dire* questioning presumed extensive knowledge of the case, trial counsel had no reasonable basis in declining to ask the jurors about the general information that they acknowledged that they had heard and learned from the media. Trial counsel's failure to properly question the proposed jurors about the information that saturated Centre County resulted in the selection of jurors that, despite any statements to the contrary, could not fairly consider the evidence. ***See*** Studebaker & Penrod, *Pretrial Publicity and its Influence on Juror Decision Making* in Psychology and Law, at 265-266

(2005 ed. Brewer & Williams); Posey and Wrightsman, *Trial Consulting*, at 58 (2005). Further, as noted above, the court seated two jurors who, had counsel not been ineffective, would not have made it on the jury. For all of the aforementioned reasons, Mr. Sandusky is entitled to a new trial.

FAILING TO FILE COLLATERAL APPEAL ON MOTION TO WITHDRAW

23. Trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky.[45]

Proposed Findings of Fact:

351. Mr. Amendola and Mr. Rominger moved to withdraw due to ethical concerns that they could not adequately and effectively represent Mr. Sandusky. N.T., Motion to Withdraw, 6/5/12, at 3-5; N.T., 3/24/17, at 63 (Testimony of Joseph Amendola) (Undisputed).

352. Mr. Amendola, in moving to withdraw, stated:

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

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

353. Mr. Amendola was unable to adequately review discovery in order to prepare. N.T., 3/24/17, at 80-83.

354. Mr. Amendola was unable to procure a jury consultant. N.T., 3/24/17, at 49 (Testimony of Joseph Amendola) (Undisputed).

355. Mr. Amendola did not have time to prepare. N.T., 3/24/17, at 50 (We didn't have time. We ran out of time, Mr. Lindsay. That was the key issue in our case. We ran out of time. Four and a half month from the time we got our first discovery to trial, four and a half months...We had ten separate sets of charges and no time, no time to sift through all the thousand pages of material and develop our defense. No time. Four and a half months. And we kept asking for a

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[45] Mr. Sandusky raised this issue in his Second Amended PCRA Petition as Issue 13. Second Amended PCRA Petition, 3/7/16, at 26, 88-91; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 8 (Issue 8), 53-58; ***see also*** Response to Commonwealth's Answer, 4/11/16.

continuance after continuance and we never got one continuance. When, in your experience as an experienced trial attorney, has a court not given you one continuance in a case of any magnitude? We didn't get one continuance."; ***Id.*** at 51-52; ***Id.*** at 78-79. (Testimony of Joseph Amendola) (Undisputed).

356. Mr. Amendola and Mr. Rominger did file interlocutory appeals in this matter that were discretionary as it related to the denial of continuances. N.T., 3/24/17, at 65 (Testimony of Joseph Amendola) (Undisputed); ***see also*** N.T., 5/30/16, at 34-38 (discussing filing of interlocutory appeal based on denial of continuance) (Joseph Amendola).

357. Mr. Rominger filed a collateral appeal after the trial as it related to the leak of the Matt Sandusky interview. ***See Sandusky***, 70 A.3d 886.

358. Mr. Amendola did not file an appeal under the collateral order doctrine and Pa.R.A.P. 313.

359. Mr. Amendola was unaware of the precise nature of a collateral appeal, but did understand that such an appeal could have been taken. N.T., 3/24/17, at 65-66 (Testimony of Joseph Amendola) (Undisputed).

360. Mr. Amendola did not know whether he could have taken a collateral appeal. ***Id.*** at 67 (Testimony of Joseph Amendola) (Undisputed).

Proposed Conclusions of Law:

267. Trial counsel could have filed a collateral appeal challenging the trial court's denial of his motion to withdraw. ***Commonwealth v. Reading Group Two Properties, Inc.***, 922 A.2d 1029 (Pa. Cmwlth. 2007); ***see also*** Pa.R.A.P. 313; Commonwealth's First Answer to PCRA Petition, at 18.

268. Such an appeal is not discretionary. Pa.R.A.P. 313(a) ("*General Rule.* An appeal may be taken ***as of right*** from a collateral order of an administrative agency or lower court.").

269. Under the collateral order doctrine, an appeal may be taken when the order is "separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b);. ***Schultz, supra.***

270. An appeal of a motion to withdraw would fall within the ambit of the collateral order doctrine. ***Reading, supra*** at 1033 ("we find that the denial of Appellants' motion to withdraw as counsel for Group Two is an appealable collateral order pursuant to Pa. R.A.P. 313.").

271. The issue is separable from issues of guilt, involves a right too important to be denied review, and if postponed until final judgment would be lost as counsel would have been forced to represent a client when they ethically had set forth that they could do not so effectively.

272. Since trial counsel sought other discretionary interlocutory appeals, but did not choose and/or was unaware of the nature of a collateral appeal, the claim is one of arguable merit.

273. Because counsel was not even aware of the parameters of the collateral order doctrine, he could not provide a reasonable basis for not pursuing such an appeal.

274. Trial counsel had no reasonable basis for not filing a collateral appeal where he ethically could not represent Mr. Sandusky due to his inability to adequately prepare, review discovery, and retain expert witnesses.

275. The actual prejudice required in this instance is not whether Mr. Sandusky's trial result would have been different, but whether counsel would have been permitted to withdraw. ***Cf. Mallory***, ***supra***; ***Walker***, 110 A.3d 1100.

276. In the alternative, Mr. Sandusky suffered actual prejudice relative to his trial and convictions since his attorney did not have sufficient time to review discovery, retain experts, or prepare.

277. Mr. Sandusky is entitled to a new trial.

Discussion:

Trial counsel could not provide effective assistance in this matter given the extensive discovery that was continually disclosed, especially where the disclosures continued up to the eve of trial.[46] Pointedly, it is evident from the trial record itself that the sheer amount of discovery overwhelmed trial counsel. Cognizant of the fact that they were unprepared to try this case in June 2012, after the trial court denied their request for a continuance, trial counsel moved to withdraw, stating:

> I intend to file a motion to withdraw as counsel, Mr. Rominger and I, fully realizing the court will deny it based on the lack of preparation of all of the things that are going most notably the

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

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

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

Messrs. Amendola and Rominger specifically advised the trial court that they had an ethical duty to withdraw, citing the Pennsylvania Rules of Professional Conduct. ***Id.*** Mr. Rominger advised the court that he had contacted and consulted with the Pennsylvania Ethics Hotline, which actually indicated that it was reluctant to issue a formal opinion because they suspected which case was involved. The trial court denied the motion.

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

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

When the trial court denied the motion, trial counsel did not appeal the order as a collateral order under Pa.R.A.P. 313. The issue of being compelled to represent Mr. Sandusky in violation

of the canons of ethics would have been appealable by right under Pa.R.A.P. 313, and the collateral order doctrine. Rule 313 reads,

> (a) *General Rule*. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) *Definition*. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Id.

The question of whether an attorney may be compelled to represent a defendant at trial in violation of the attorney's ethical duties is separable from and collateral to the main cause of action, which is determining Mr. Sandusky's guilt on the charges against him. Second, the right involved is too important to be denied review: those rights are, the constitutional right to effective counsel as well as a due process right to ethical representation. Finally, if the review is postponed until final judgment, the claim is now irreparably lost because trial counsel can no longer withdraw pre-trial. Trial counsel had no reasonable basis for failing to seek review of this question under the collateral order doctrine.

This is especially true since Attorney Rominger invoked the doctrine to appeal the trial court's June 26, 2012 order regarding issues concerning the release of the Matt Sandusky interview. Trial counsel, after failing to seek review of this question under the collateral order doctrine, chose to proceed to represent the defendant even though they were fully cognizant that their representation was in direct violation of the Pennsylvania Rules of Professional Conduct. Mr. Sandusky suffered indisputable prejudice as a result, as he was represented at trial by attorneys

who acknowledged that they could not effectively represent Mr. Sandusky and were admittedly proceeding in violation of Rule 1.1 and 1.16 of the Pennsylvania Rules of Professional Conduct.

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

A finding that counsel could not withdraw would mean that the court determined that Attorney Amendola, an officer of the court, deliberately misled the Court. Here, Mr. Amendola himself acknowledged that he was not able to adequately prepare and present his defense and has testified to that effect during his PCRA testimony. Mr. Sandusky's additional claims demonstrate that Mr. Amendola was unable to effectively represent Mr. Sandusky. Mr. Amendola has already made a record-based statement that he could not effectively represent Mr. Sandusky. Had Mr. Amendola appealed, there is a reasonable probability that he would have been permitted to withdraw where the case was not yet a year old at the time (it was only seven months from the filing of the first information to the start of trial), he had not requested serial continuances, the case was highly complex involving eight accusers and ten alleged victims with over forty charges, and in excess of 12,000 pages of discovery.

It is evident that Mr. Amendola did not completely review the discovery in this case. He did not review Matt Sandusky's grand jury testimony nor does it appear he was aware of the

interview relative to Mr. Calhoun. There is a reasonable likelihood that the outcome of this case would have been different had trial counsel appealed this order under the collateral order doctrine. Given counsels' own admissions that they could not provide constitutionally effective counsel and would be proceeding in violation of the canons of ethics, there is a reasonable probability that the appellate court would have permitted trial counsel to withdraw from the case rather than violate their ethical duty to their client. Counsel's failure to seek a collateral appeal of the denial of either the motion to continue or the motion to withdraw, constitutes ineffectiveness, and Mr. Sandusky should be granted a new trial.

AN INEFFECTIVE OPENING

24. Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky.[47]

Proposed Findings of Fact:

361. Mr. Amendola opened to the jury by stating, "This is a daunting task. I'll be honest with you. I'm not sure how to approach it. The Commonwealth has overwhelming evidence against Mr. Sandusky." N.T. Opening Remarks, 6/11/12, at 3 (Undisputed).

362. Mr. Amendola stated that this was satire. N.T., 5/11/17, at 121 (Testimony of Joseph Amendola).

363. Mr. Amendola also posited during his opening that, "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." N.T. 6/11/12, at 3 (Undisputed).

364. Mr. McGettigan projected a slide of the transcript of Mr. Amendola's opening statement during his own closing and repeated Mr. Amendola's prejudicial statement. N.T., 6/21/12, at 100 (Undisputed).

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[47] Mr. Sandusky raised this issue in his Second Amended PCRA Petition at Issue 24. Second Amended PCRA Petition, 3/7/16, at 27, 124-127; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 19); ***see also*** Response to Commonwealth's Answer, 4/11/16.

Proposed Conclusions of Law:

278. Mr. Amendola's claim that his opening was satire is not credible nor supported by his actual opening remarks, which not only stated the evidence was overwhelming but also compared the task to David vs. Goliath and climbing Mt. Everest.

279. "The opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case." ***Commonwealth v. Parker***, 919 A.2d 943, 950 (Pa. 2007).

280. This claim has arguable merit.

281. Counsel could have no reasonable basis for setting forth in his opening statement that the evidence against his client was overwhelming.

282. Mr. Sandusky suffered actual prejudice where his own attorney told the jury at the outset, prior to any evidence being introduced, that there was overwhelming evidence of Mr. Sandusky's guilt.

283. Mr. Sandusky is entitled to a new trial.

Discussion:

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

This case primarily involved testimony from the alleged victims, victims who had provided multiple inconsistent statements, including repeatedly indicating that Mr. Sandusky had not abused them. The evidence was far from overwhelming. To the contrary, this case rested on the credibility of the alleged victims. Mr. Amendola himself stated in his closing summation, "there is absolutely

no direct evidence other than what came from the mouths of those individuals who testified in court, the eight young men, about these allegations. There's no physical evidence, not one piece of physical evidence. In two of the cases the Commonwealth brought, we don't even have victims—not a victim in two of the cases." N.T., 6/21/12, at 37.

Mr. Amendola's opening statement stands in stark contrast to his closing argument. "The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved[.]" ***Montgomery***, ***supra*** at 113. In ***Parker***, ***supra*** at 950, the High Court posited that "as a practical matter the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case." ***See also Montgomery***, ***supra*** at 113.

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

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

Rominger, in his affidavit, articulated the obvious, "Mr. Amendola's statement during opening that there was overwhelming evidence against our client cast Mr. Sandusky as guilty in the minds of the jurors and that by the end of the testimony by the third witness our defense was largely crippled." Affidavit of Karl Rominger, at 6.

This gaffe is even more problematic when considered in the context of Mr. Amendola stating that Mr. Sandusky would testify and then electing not to present Mr. Sandusky's testimony. Moreover, Mr. McGettigan actually projected a slide of the transcript of Mr. Amendola's opening statement during his closing and repeated Mr. Amendola's prejudicial statement. ***See*** N.T., 6/21/12, at 100. In sum, this claim has arguable merit and counsel could have no reasonable basis for erroneously telling the jury that the Commonwealth had overwhelming evidence at perhaps the most critical part of the trial, which thereby caused actual prejudice.

IMPROPER EXPERT TESTIMONY

25. Trial counsel were ineffective for failing to object to improper opinion testimony by an unqualified expert.[48]

Proposed Findings of Fact:

365. Mr. McGettigan asked numerous leading question to Jessica Dershem, a Clinton County Children and Youth Services caseworker. N.T., 3/24/17, at 124-128; N.T., 6/12/12, 179-184 (Trial Questioning and Testimony of Jessica Dershem).

366. Counsel did not object. (Undisputed).

367. Ms. Dershem testified that during her interview with Aaron Fisher, she thought that he was withholding information and lying to her because she believed "he was uncomfortable talking about the incidents." N.T., 6/12/12 at 127-129.

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[48] Mr. Sandusky proffered this claim in his Second Amended PCRA Petition at Issue 28. Second Amended PCRA Petition, 3/7/16, at 27, 137-139; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 9 (Issue 21), 106-108.

368. Ms. Dershem was a fact witness. N.T., 3/24/17, at 128 (Testimony of Joseph Amendola) (Undisputed).

369. Mr. McGettigan asked, "Now, I'm going to ask you, in your both professional and personal opinion, does the first portion of these things that I have read to you, wrapped up in Aaron for three years, blowing on his stomach, laying on top of him, cannot honestly answer if my hands were below his pants, does that sound like someone who has an inappropriate relationship?" N.T., 6/12/12 at 182.

370. Mr. McGettigan also asked, "did he then go on to say now would that to you, as a trained professional, indicate right there an inappropriate relationship between a middle-aged adult and a small child?" N.T., 6/12/12, at 181.

371. Mr. Amendola was aware that the prosecutor was implying that Ms. Dershem was an expert in her field. N.T., 3/24/17, at 129 (Testimony of Joseph Amendola) (Undisputed).

372. Mr. Amendola acknowledged that the testimony was opinion evidence. ***Id.***

373. Mr. Amendola did not object. ***Id.***; ***see also*** N.T., 6/12/12, at 181-182.

374. Mr. Amendola could not provide a reason as to why he did not object other than to say that "we all have opinions. And she obviously is biased." N.T., 3/24/17, at 131 (Testimony of Joseph Amendola) (Undisputed).

Proposed Conclusions of Law:

284. Ms. Dershem had no basis to opine as to Mr. Fisher's mental state or thoughts during the interview, and trial counsel should have objected.

285. Ms. Dershem was not offered as an expert and not qualified to give her "professional opinion" or her personal opinion on any matter at issue.

286. The issue of an "inappropriate relationship" was legally irrelevant and highly prejudicial as the entire line of questioning sought to prejudice Mr. Sandusky with the jury to convict him on the grounds of inappropriate conduct.

287. Trial counsel failed to object to this highly prejudicial and irrelevant line of questioning.

288. By permitting Ms. Dershem to testify as to her "expert" opinion, without objection, trial counsel gave significance and weight to the notion that Mr. Sandusky could be convicted of "inappropriate" conduct.

289. "It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of the credibility of a witness." ***Commonwealth v. McClur***e, 2016 PA Super 171.

290. The same principle applies to a witness "in whose testimony a jury could find an 'unwarranted appearance of authority in the subject of credibility[.]" ***Id.***

291. Allowing Ms. Dershem to express opinions as to whether she believed Aaron Fisher was lying when he did NOT disclose sexual abuse "is not only irrelevant but also prejudicial." ***Id.***

292. "Pennsylvania Rule of Evidence 701 limits a lay witness's opinion testimony to 'those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge[.]'" ***Cominsky v. Donovan***, 846 A.2d 1256, 1259 (Pa. Super. 2004).

293. Ms. Dershem was presented as a lay witness, but the Commonwealth asked her to present opinion testimony based on her specialized knowledge, training, and experience as a caseworker with the Clinton County Office of Children and Youth Services.

294. Trial counsel's failure to object to expert testimony offered by a lay witness is an issue of arguable merit.

295. Counsel had no reasonable basis for his failure to object as his only explanation was that Ms. Dershem was a biased witness. N.T., 3/24/17, at 131.

296. Mr. Sandusky suffered actual prejudice since the jury was permitted to hear evidence from Ms. Dershem that, in her professional opinion, as a CYS worker, Mr. Sandusky engaged in an inappropriate relationship with Aaron Fisher.

297. Mr. Sandusky suffered actual prejudice because the jury was allowed to hear "expert" opinion testimony that Aaron Fisher was lying when he declined to say that Mr. Sandusky sexually abused him.

298. Mr. Sandusky is entitled to a new trial.

Discussion:

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

a. That during her interview with Aaron Fisher, she thought that he was withholding information and lying to her because she believed "he was uncomfortable talking about the incidents." N.T., 6/12/12 at 127-129.

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

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

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

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

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

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

First, Ms. Dershem was not offered as an expert and not qualified to give her "professional opinion" or her personal opinion on any matter at issue, and second, the issue of an "inappropriate relationship" was not only legally irrelevant, but highly prejudicial as the entire line of questioning seeks to prejudice Mr. Sandusky with the jury to convict him on the grounds of inappropriate conduct. Despite the impropriety of this testimony, trial counsel failed to object to this highly prejudicial and totally irrelevant line of questioning. By permitting Ms. Dershem to testify as to

her faux "expert" opinion, without objection, trial counsel gave significance and weight to the notion that Mr. Sandusky could be convicted of "inappropriate" conduct.

It is also impermissible to allow an individual to testify concerning the credibility of witnesses. ***McClure, supra***. Here, Ms. Dershem testified that she believed Aaron Fisher was lying and not being truthful when he did not disclose sexual abuse. Because Ms. Dershem was offering professional opinion evidence it is even more problematic that she opined on the lack truthfulness of Aaron Fisher when he did not disclose sexual abuse since it provided the unwarranted appearance of authority in the subject of credibility.

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

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

"KNOWN TO GOD, BUT NOT TO US"

26.. Trial counsel were ineffective in not objecting to prosecutorial misconduct that occurred during the prosecutor's closing statement when the prosecutor stated that the 2001 shower victim was known only to God.[49]

Proposed Findings of Fact:

375. Mr. McGettigan, during his closing argument set forth, "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[.]" N.T., 6/21/12, at 111 (Undisputed).

376. Mr. McGettigan intended this reference to be to alleged Victim 2 and alleged Victim 8. N.T., 8/23/16, at 52 (Testimony of Joseph McGettigan) (Undisputed).

377. Mr. McGettigan knew of Allan Myers and his assertion to being Victim 2, and that Mr. Myers was represented by Attorney Andrew Shubin. ***Id.*** at 56 (Testimony of Joseph McGettigan) (Undisputed); ***see also*** N.T., 8/22/16, at 26-27 (Testimony of Andrew Shubin).

378. Mr. McGettigan never interviewed or met with Allan Myers. ***Id.*** at 57 (Testimony of Joseph McGettigan) (Undisputed); ***see also*** N.T., 8/22/16, at 42 (Testimony of Andrew Shubin) (Undisputed).

379. Mr. McGettigan was not interested in determining if Allan Myers was the McQueary shower child. N.T., 8/22/16, at 39 (Testimony of Andrew Shubin).

380. Mr. McGettigan never followed up with Allan Myers or Andrew Shubin, despite Mr. Shubin indicating Mr. Myers was an alleged victim. ***Id.*** at 41.

381. Michael McQueary was never shown a photograph of Allan Myers. N.T., 8/22/16, at 109 (Testimony of Anthony Sassano) (Undisputed).

382. The Commonwealth did not present Mr. Myers because as Mr. Fina maintained, "I had to make an evaluation in this case as I did with great many young men as to whether or not they could be used as witnesses and could be—could withstand the scrutiny and the cross-examination and the due process that occurs in these cases...And some had given dramatically inconsistent statements and conducted themselves in ways that made them, I believe, unusable as witnesses in this case. Mr. Myers would have fallen in that category. I made that decision." N.T., 8/23/16, at 34 (Testimony of Frank Fina) (Undisputed).

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[49] Mr. Sandusky raised this issue in his Second Amended PCRA Petition at Issue 1. Second Amended PCRA Petition, 3/7/16, at 24, 33-39; ***see also*** Brief on Evidentiary Hearing Issues, 7/14/16, at 1 (Issue 1), 4-21; ***see also*** Response to Commonwealth's Answer, 4/11/16.

383. Mr. McGettigan did not want to present Mr. Myers because he knew that it would damage the testimony of Michael McQueary if Mr. Myers exculpatory statements were introduced.

384. All of the accusers provided inconsistent statements. N.T., 8/23/16, at 34 (Testimony of Frank Fina) (Undisputed).

385. Multiple accusers were represented by Andrew Shubin. (Undisputed).

386. Only Allan Myers was apparently disbelieved.

Proposed Conclusions of Law:

299. Mr. McGettigan's closing statement was inaccurate at worst and imprecise at best, where Allan Myers had represented that he was the individual in the shower during the McQueary episode and Mr. McGettigan was aware of Myers assertion of being Victim 2.

300. Mr. McGettigan's claim that he did not believe Allan Myers, where he never interviewed him, and his change in story was not materially distinct from other accusers, was and is not credible.

301. "[I]neffectiveness claims stemming from a failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination, or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process." ***Tedford, supra*** at 29.

302. "[O]ur Supreme Court has narrowly tolerated references to the Bible and other religious invocations and has characterized such references as "oratorical flair." ***Commonwealth v. Chmiel***, 777 A.2d 459, 466 (Pa. Super. 2001).

303. It has further "cautioned that such references are a dangerous practice that is strongly discouraged." ***Id.*** Injecting into trial religious references while simultaneously commenting on Mr. Sandusky's silence was improper.

304. Trial counsel's failure to object to Mr. McGettigan's claim is one of arguable merit.

305. Mr. Rominger, who was charged with objections during the closing summation, acknowledged having no reasonable basis for not objecting to Mr. McGettigan's closing argument. N.T., 8/12/16, at 74-75.

306. Mr. Sandusky suffered actual prejudice as the jury was led to believe, erroneously, that no one had identified the alleged victim seen by Michael McQueary.

307. Had the jury known that the individual was identified and that he had previously claimed that he had not been abused, there is a reasonable probability that the jury would have acquitted Mr. Sandusky on more than the IDSI charge as it related to alleged Victim 2.

308. Because the prosecutor committed misconduct in stating that alleged Victim 2 was known only to God, Mr. Sandusky is entitled to a new trial.

Discussion:

In ***Tedford, supra***, the Supreme Court outlined the law governing prosecutorial misconduct in the context of ineffective assistance of counsel claims. The ***Tedford*** Court set forth, "ineffectiveness claims stemming from a failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination, or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process." ***Id.*** at 29.

A prosecutor commits misconduct where the comments is designed to prejudice the jury, "forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." ***Id.*** at 33. Instantly, the prosecutor insinuated that there were additional victims who had not come forward and misleadingly claimed that Accuser 2 was not known by those involved.

"[O]ur Supreme Court has narrowly tolerated references to the Bible and other religious invocations and has characterized such references as "oratorical flair." ***Commonwealth v. Chmiel***, 777 A.2d at 466. It has further "cautioned that such references are a dangerous practice that is strongly discouraged." ***Id.*** Injecting into trial religious references while simultaneously commenting on Mr. Sandusky's silence was improper. That Mr. McGettigan's references in his closing was intended to prejudice Mr. Sandusky is evident from his PCRA testimony.

Mr. McGettigan asserted,

> Well, he's known to that person as well, the defendant. And at any time, he could have told anyone who that person was. He declined to do so Mr. Costas, he

> didn't—I don't know if he did it to his own attorney. But I sat in a room with him when he was arrested and waited for his attorney, he could have told me then because the circumstances of the victimization of Victim 2 were well known. And he could at any time have told any number of persons. He declined to do so. So it's not entirely accurate, sir, if I may explain my answer. He was known to God and the convicted Jerry Sandusky.

N.T., 8/23/16 at 59.

Importantly, Mr. McGettigan shows a cavalier disregard for Mr. Sandusky's constitutional rights in this testimony and erroneously asserts that Mr. Sandusky did not inform anyone of the identity of Accuser 2. Mr. Sandusky did inform his attorney, Mr. Amendola, and the Commonwealth was aware that he had done so as it knew of Mr. Everhart's interview with Mr. Myers when it interviewed Mr. Myers.

Both Mr. Amendola and Mr. Rominger testified that they believed that Allan Myers was the person observed by Michael McQueary. As noted, Mr. Sandusky informed them that Mr. Myers was that individual. Mr. Myers provided a statement to Mr. Amendola's investigator, Curtis Everhart, in which Mr. Myers set forth that he was alleged Victim 2, but that he was not abused. Mr. Myers also consistently maintained to Postal Inspector Michael Corricelli and Agent Sassano that he was the McQueary shower child. The Commonwealth knew of Mr. Myers, and not until the PCRA hearing did they ever express that they did not believe Mr. Myers.

Mr. Rominger, who was charged with making the objections and arguments in favor thereof regarding the prosecutor's closing argument, noted that he was surprised to hear the Commonwealth maintain that Victim 2 was known only to God and that he had no reasonable basis for not objecting to that comment. He highlighted that he did object to Mr. McGettigan making reference to Mr. Sandusky's silence and that he had no basis for not asking for a mistrial on that basis. Mr. Rominger further articulated the reasons for objecting to the known only to God statement. He posited that referring to God is problematic, and that "we all knew who the person

was[.]" N.T., 8/12/16, at 74. Mr. Rominger admitted that he had no strategic basis for not objecting and requesting a mistrial.

Mr. Amendola also testified that he understood Allan Myers to be Accuser 2. He set forth that he always believed Allan Myers was the person observed in the shower by Michael McQueary, but that he did not believe Mr. Myers was an actual victim. He noted that Mr. Sandusky informed him the day that they received the presentment that the individual seen by Michael McQueary was Allan Myers. Thereafter, Mr. Myers provided a statement to Mr. Amendola.

According to Mr. Amendola, Mr. Myers set forth that Mr. Sandusky was a wonderful person, that he was the person seen by Michael McQueary, and that he had not been abused. However, Mr. Amendola added that thereafter he learned that Mr. Myers had come to be represented by Attorney Andrew Shubin and Mr. Myers was now claiming to have been abused. Mr. Amendola, apparently unaware that he could have used Mr. Myers exculpatory statements as evidence due to Mr. Myers no longer being available to testify, maintained that Mr. Myers became useless. Despite believing four other accusers represented by Mr. Shubin, all of whom had provided inconsistent statements, Mr. McGettigan, Ms. Eshbach, and Agent Sassano testified that they did not believe Mr. Myers. [50]

This information was never conveyed prior to or during trial. Furthermore, ***none of the prosecutors actually met with or interviewed Mr. Myers***. Agent Sassano submitted, factually inaccurately, that one reason he did not believe Mr. Myers was because the police made an effort to keep the accusers from learning of one another. However, it is a matter of record that State

[50] If true that the Commonwealth did not believe Mr. Myers this actually further buttresses Mr. Sandusky's claim that counsel was ineffective in not presenting his exculpatory statements. This is because the Commonwealth could not ethically present evidence that Mr. Myers was, in fact, Victim 2 where it did not believe him.

Police informed each accuser they interviewed that other accusers existed and had made similar allegations. N.T., 6/19/12 at 57-58. Further, Z.K. and D.S. were friends. J.S. knew D.S. and lived in the same complex as B.S.H. and J.S. was friends with R.R. J.S., D.S., and R.R. were all represented by Andrew Shubin, as was Mr. Myers.

An additional reason proffered by the Commonwealth was that Mr. Myers provided an inaccurate drawing of the shower room—but this assumed that Mr. Myers would have recalled a precise description of the locker room if he were abused over a decade after the incident. It ignored that since Mr. Myers was telling the truth that he was the person witnessed in the shower by Michael McQueary, but because he was not sexually abused and was rarely in the shower locker room, he did not remember exactly what the locker room looked like over a decade later. Importantly, the Commonwealth still found Ron Petrosky credible despite him changing the entire location of the locker room in which he allegedly observed Mr. Sandusky as it related to still never identified Victim 8.

Mr. Fina testified that Mr. Myers fell into a category of an unusable witness. He explained that many of the witnesses "had given dramatically inconsistent statements[.]" N.T., 8/23/16, at 34. Mr. Fina opined that he had to evaluate "whether or not [an accuser] could be used as witnesses and could be—could withstand the scrutiny and the cross-examination and the due process that occurs in these cases." ***Id.*** According to Mr. Fina, he made the determination that Mr. Myers was not a useable witness because "he would be a vulnerable witness." ***Id.*** at 35. Although Aaron Fisher had provided numerous inconsistent statements, Mr. Fina posited that he did not see "any parallel" between Mr. Fisher and Mr. Myers. Despite Mr. Fisher's story changing significantly, Mr. Fina would not agree that there were dramatic differences in his initial interviews and his testimony. This latter testimony is simply incredible in light of the record.

Mr. Myers' testimony revealed that he consistently maintained that he was the person observed by Mr. McQueary. Indeed, while Mr. Myers did change from claiming that he was never abused to asserting that he was abused, thereby receiving a large settlement from Penn State, he never wavered from his assertion that he was the person in the shower seen by Mr. McQueary. Critically, Mr. Sandusky does not dispute that Mr. Myers was the individual in the shower; only that he sexually abused Mr. Myers.

Mr. Sandusky offered to make Mr. Myers available to both Penn State and the Second Mile, and contacted Mr. Myers to ask him if he would be willing to speak with those entities. This information was contained in Mr. Myers interview with Curtis Everhart, in which he said that Mr. Sandusky told him that he might be contacted. Additionally, despite the grand jury presentment not including information about a locker shutting and Mr. McQueary not having testified in public to that effect at the time, Mr. Myers statement to Curtis Everhart exclaimed that he did hear a locker shut.

Mr. Myers admitted to failing to disclose any abuse in his first interview with police, although he did set forth that he had taken showers with Mr. Sandusky in the Penn State athletic facilities. In addition, Mr. Myers acknowledged that he told Curtis Everhart that he was the person involved in the McQueary shower episode but that he was not abused. The Commonwealth did not question Mr. Myers on whether he was that person. However, Mr. Myers unequivocally testified that he was Victim 2. The Commonwealth did not ask Mr. Myers if he was sexually abused by Mr. Sandusky in the shower or even if Mr. Sandusky sexually abused him; instead, it only queried whether Mr. Myers was ever sexually abused.

In sum, Mr. Amendola and Mr. Rominger were told that Allan Myers was the person in the McQueary shower episode and the Commonwealth was aware of him and his claim, and never

disclosed that they found him to be incredible or investigated him or his attorney, Andrew Shubin, for insurance fraud based on Mr. Myers' claim to being Victim 2. Because Mr. Myers was known, there could be no basis for not objecting to the prosecutor's misrepresentation.

Mr. McGettigan's belated claim that he did not believe Mr. Myers is not credible for myriad reasons. First, Mr. McGettigan only asserted that he did not believe Mr. Myers after it became apparent that if he did not do so it would all but guarantee Mr. Sandusky a new trial. At no point during the trial or prior to trial did Mr. McGettigan ever set forth that he did not believe Mr. Myers. Additionally, Mr. McGettigan never interviewed Mr. Myers to judge his credibility.

Mr. McGettigan's claim that he did not believe Mr. Myers because of his age at the time of the McQueary episode, ignores that Mr. McQueary testified that he estimated that the child could be anywhere from eight to thirteen years old and at trial estimated the individual was between ten and twelve years of age. N.T., 6/12/12, at 281. Based on Mr. McQueary's testimony of the height of the child in relation to Mr. Sandusky, the child would have been approximately five foot two or five foot three inches tall. ***See*** Curley and Schultz Preliminary Hearing, N.T., 12/16/11, at 94-95. According to the CDC, that matches the average height of a thirteen or fourteen year old—the age of Mr. Myers at the time.[51] ***See*** Vital and Health Statistics, Series 11 Number 246, *2000 CDC Growth Charts for the United States: Methods and Development*, May 2002, at 39.

Further, Mr. McGettigan believed at least four other accusers represented by Attorney Shubin: J.S., D.S., R.R., and Matt Sandusky. Everyone except Matt Sandusky testified against Mr. Sandusky. Despite these individuals having provided various inconsistent statements and several of them denying having been abused at one point, Mr. McGettigan found them to be

[51] Mr. Myers was born April 28, 1987. The McQueary episode occurred in February of 2001, before Mr. Myers turned fourteen.

credible. The distinction with Mr. Myers was that Mr. McGettigan had another witness who could testify: Michael McQueary. Mr. Fina's testimony that he believed that Mr. Myers was a problematic witness is far more credible than Mr. McGettigan's after-the-fact assertion that he never believed that Allan Myers was the person involved in the McQueary shower incident.

Moreover, Agent Sassano's explanation that Mr. Myers was not believable because his story matched the grand jury presentment and that other witnesses came forward prior to the presentment ignores that both S.P. and R.R. only came forward after the original presentment to make similar accusations. Agent Sassano's explanation also fails to account for Mr. Myers accurately relaying that he heard a locker door shut, which was not included in the grand jury presentment nor had Mr. McQueary testified in public regarding his slamming of a locker as of the date Mr. Myers provided that information.[52] Also, Agent Sassano was factually mistaken in claiming that the other accusers were not informed of the accusations of other alleged victims as the taped interview of B.S.H. with his attorney demonstrated.

Frankly, at trial the Pennsylvania State Police revealed in a taped interview that they told each accuser they interviewed that others had made extremely similar allegations. Z.K. and D.S. were friends and B.S.H. lived in the same complex as another accuser. In addition, the Commonwealth claimed that it did not believe Mr. Myers because his drawing of the Lasch

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[52] It must be highlighted that Jonelle Eshbach either lacked candor to the Court or may have committed perjury during the PCRA hearings relative to the information in the presentment relative to Mr. McQueary. Ms. Eshbach was asked whether the grand jury presentment accurately reflected the testimony of Mr. McQueary during the grand jury proceedings. N.T., 8/23/16, at 5. Ms. Eshbach maintained that it did. ***Id.*** However, in Mr. McQueary's trial against Penn State, she read from an e-mail sent to her by Mr. McQueary shortly after the presentment went public, in which Mr. McQueary asserted that the Office of Attorney General had twisted his words. ***See*** N.T., 10/17/16, McQueary v. Penn State University, at 96-98 (Attachment 2 of Brief on Evidentiary Hearing Issues). Further, Mr. McQueary in his grand jury testimony did not testify to seeing Mr. Sandusky engaged in anal intercourse. Ms. Eshbach's claim that the presentment was accurate in this regard is simply erroneous.

Building shower was not accurate. Setting aside that the drawing was not nearly as inaccurate as portrayed by the Commonwealth, it chose to believe a janitor who changed the entire location of where a differing shower incident allegedly occurred. That is, Ronald Petrosky's grand jury testimony placed a shower incident in one locker room shower and at trial he changed his story to reflect that it occurred in a different shower area. Coincidentally, this change helped permit Mr. Petrosky's testimony concerning a hearsay statement to be allowed into evidence. Further, the Commonwealth chose to believe an accuser who changed the date of his allegation by approximately three years. Specifically, during his grand jury testimony, M.K. contended that the incident occurred in 1998, but would change his story at trial to 2001 or 2002. N.T., 6/13/12, at 192-193; ***see also id.*** at 174 (testifying the incident occurred in 2002). This change was significant for purposes of civil remuneration. He also changed the location.

Since Mr. McGettigan knew who the McQueary shower child was and intentionally elected not to interview him or present him because he could use the testimony of Michael McQueary in its place, he committed prosecutorial misconduct in misleadingly asserting to the jury that alleged Victim 2 was known only to God. Mr. Sandusky suffered actual prejudice because it was led to believe that Accuser 2 was not known and had not come forward. Had the jury known that Accuser 2 had come forward and made numerous statements in support of Mr. Sandusky, including originally denying having been abused, there is a reasonable probability that the outcome of the trial would have been different.

To find Mr. McGettigan's claim that he only disbelieved Allan Myers, despite not ever seeing him or interviewing him, but believed all of the remaining accusers, defies logic. The truth is that Mr. Myers, as recognized by Mr. Fina, fell into a category of an unusable witness. Mr. Fina accurately testified that he had to evaluate "whether or not [an accuser] could be used as

witnesses and could be—could withstand the scrutiny and the cross-examination and the due process that occurs in these cases." N.T., 8/23/16, at 34. Mr. McGettigan and the Commonwealth believed that Allan Myers "would be a vulnerable witness," ***Id.*** at 35, not that he was not Victim 2. Because Mr. McGettigan misled the jury, and trial counsel did not object, Mr. Sandusky is entitled to a new trial.

PRELIMINARY HEARING WAIVER

27. Mr. Amendola performed ineffectively in waiving Mr. Sandusky's preliminary hearing and failing to use that proceeding to cross-examine the witnesses who had given numerous prior inconsistent statements.

Proposed Findings of Fact:

387. On the advice of Mr. Amendola, Mr. Sandusky waived his preliminary hearing. N.T., 8/12/16, at 19 (Testimony of Mr. Sandusky) (Undisputed); ***Id.*** at 122 (Testimony of Joseph Amendola).

388. Mr. Amendola discussed with Mr. Sandusky waiving the preliminary hearing for approximately fifteen minutes. ***Id.*** (Testimony of Mr. Sandusky).

389. Mr. Amendola did not discuss the advantages of having a preliminary hearing. ***Id.*** (Testimony of Mr. Sandusky).

390. Mr. Sandusky did not understand that for those witnesses who testified a record would be made that could be used at trial. ***Id.*** at 20 (Testimony of Mr. Sandusky).

391. Mr. Amendola did not discuss with Mr. Sandusky that he could use testimony from the witnesses at trial to impeach the witnesses. ***Id.*** (Testimony of Mr. Sandusky).

392. Mr. Amendola did not inform Mr. Sandusky that if he had a preliminary hearing, it would give Mr. Amendola testimony of the accusers to use at trial. ***Id.*** (Testimony of Mr. Sandusky).

393. Mr. Amendola did not inform Mr. Sandusky of the Hilton Garden Inn meeting with the district judge, Judge Cleland, and the prosecution wherein Mr. Amendola negotiated the waiver. ***Id.*** at 22 (Testimony of Mr. Sandusky); ***see also*** N.T., 8/12/16, at 66 (Testimony of Karl Rominger) (was not aware of meeting until told by PCRA counsel).

394. Mr. Amendola did not discuss with Mr. Sandusky any arrangement pertaining to bail. ***Id.*** at 22.

395. Mr. Rominger did not agree with the decision to waive Mr. Sandusky's preliminary hearing. ***Id.*** at 86-87 (Testimony of Karl Rominger).

396. Mr. Rominger testified that it was his "opinion that it was a fallacy to believe that waiving the preliminary hearing would grant any benefit or anything from [the OAG] whatsoever." ***Id.*** at 87. (Testimony of Karl Rominger).

397. Mr. Rominger understood that Mr. Amendola's basis for waiving the preliminary hearing was to prevent the Commonwealth from asking for an increase in bail based on the Commonwealth not adding additional charges. ***Id.*** at 94 (Testimony of Karl Rominger) (Undisputed).

398. Mr. Rominger noted that the importance of a preliminary hearing is that "you get to build transcripts, particularly in a case where you know that there are grand jury transcripts or likely to be grand jury transcripts. Getting a preliminary hearing transcript means you now have two separate transcripts of each witness which become intensely valuable for impeachment later at trial." ***Id.*** at 97 (Testimony of Karl Rominger) (Undisputed).

399. Mr. Rominger added that it is the only opportunity other than trial to see the government's case and is the most important hearing in a criminal case. ***Id.*** at 97-98 (Testimony of Karl Rominger).

400. Mr. Amendola took part in a night time off the record meeting at the Hilton Garden Inn with the district justice, Judge Cleland, and the prosecution to discuss negotiating to waive Mr. Sandusky's preliminary hearing. ***Id.*** at 124 (Testimony of Joseph Amendola) (Undisputed); N.T., 8/23/16, at 6 (Testimony of Jonelle Eshbach) (Undisputed); ***Id.*** at 36-37 (Testimony of Frank Fina) (Undisputed); Id. at 48 (Testimony of Josep McGettigan) (Undisputed).

401. The actual scheduling of the trial was discussed during the waiver negotiation. N.T., 8/23/16, at 6 (Testimony of Jonelle Eshbach) (Undisputed); ***see also*** Motion to Recuse—Attached Notes of Judge Cleland.

402. Mr. Amendola did not know who scheduled the meeting. N.T., 8/12/16 at 124 (Testimony of Joseph Amendola).

403. Mr. Fina believed that Mr. Amendola scheduled the meeting. N.T., 8/23/16, at 37 (Testimony of Frank Fina).

404. Mr. McGettigan believed that it was a jointly scheduled the meeting. N.T., 8/23/16, at 48 (Testimony of Joseph McGettigan).

405. Ms. Eshbach testified that the Court scheduled the meeting. N.T., 8/23/16, at 6 (Testimony of Jonelle Eshbach).

406. All parties agreed that Judge Cleland and the district magistrate were present and that negotiations occurred regarding the waiver of the preliminary hearing. N.T., 8/12/16 at 126; N.T., 8/23/16, at 6, 37, 48 (Undisputed).

407. Neither the district judge nor Judge Cleland objected to the deal. N.T., 8/12/16, at 126-127 (Testimony of Joseph Amendola) (Undisputed).

408. Mr. Amendola did not object to having the judges present during the meeting and negotiations over the waiver. ***Id***. at 127 (Testimony of Joseph Amendola) (Undisputed).

409. Mr. Amendola did not think the accusers would say anything inconsistent at the preliminary hearing. ***Id***. at 128-129 (Testimony of Joseph Amendola).

410. Mr. Amendola agreed that he would have been better able to cross-examine the witnesses if a preliminary hearing occurred. ***Id***. at 130 (Testimony of Joseph Amendola) (Undisputed).

411. Judge Cleland erroneously believed at that time that a case could be bound over purely on hearsay. ***Id***. at 131-132 (Undisputed).

412. Mr. Amendola erroneously believed that bail would automatically be raised under the rules of criminal procedure if new charges were added. ***Id***. at 135 (Testimony of Joseph Amendola).

413. Mr. Amendola stated that in 99.9% of cases a magistrate will increase bail if asked by the prosecution. ***Id***. at 138 (Testimony of Joseph Amendola).

414. Judge Cleland appeared to agree stating, "I think the answer's pretty obvious about what the realities are." ***Id***. at 138.

415. Mr. Amendola stated, "I can guarantee you that the Commonwealth would have gotten additional bail." ***Id***. at 139.

416. The district magistrate actually originally denied the Commonwealth's request for a $5 million bail.

417. Mr. Amendola was aware that he could appeal the magistrate's decision on bail to Judge Cleland. ***Id***. at 139-140 (Testimony of Joseph Amendola) (Undisputed).

418. Judge Cleland and the magistrate, however, were present for the deal to waive the hearing. ***Id***. at 140 (Testimony of Joseph Amendola) (Undisputed).

Proposed Conclusions of Law:

309. A preliminary hearing is considered a critical stage of the criminal proceedings. ***Commonwealth v. Carver***, 436 A.2d 1209, 1211 (Pa. Super. 1981).

310. Under the criminal rules of procedure, a defense attorney is entitled to cross-examine the witnesses, inspect evidence, and call witnesses on the defendant's behalf at a preliminary hearing. ***See*** Pa.Crim.P. 542.

311. In ***Commonwealth v. Stultz***, 114 A.3d 865 (Pa. Super. 2015), the Superior Court held that claims related to counsel's performance at a preliminary hearing are cognizable under the PCRA.

312. The waiver of a preliminary hearing is a cognizable clam. ***Cf. Stultz, supra***; ***compare also Commonwealth v. Lyons***, 568 A.2d 1266 (Pa. Super. 1989).

313. Mr. Amendola's advice to Mr. Sandusky and decision to waive Mr. Sandusky's preliminary hearing is an ineffectiveness claim of arguable merit.

314. Mr. Amendola' testimony that he told Mr. Sandusky of the Hilton Garden Inn meeting with the judges is not credible where PCRA counsel themselves did not learn of the meeting until the PCRA court disclosed it in May of 2016.

315. Mr. Amendola had an erroneous understanding of Pa.R.Crim.P. 523. ***See*** N.T., 8/12/16, at 135-139.

316. Under the law, a magistrate does not automatically increase bail based on new charges. ***See*** Pa.R.Crim.P. 523.

317. Accordingly, Mr. Amendola's basis for waiving the preliminary hearing was not reasonable where it was based on his belief that Mr. Sandusky would automatically be incarcerated because of an increase in bail.

318. This belief is more unreasonable where Mr. Amendola already knew that the district magistrate had previously rejected a $5 million bail.

319. The basis is also unreasonable where Mr. Amendola allowed the district magistrate and the trial court to be present for and in essence participate in the decision to waive the preliminary hearing.

320. Allowing the courts to be present for the negotiation with the Commonwealth violated Mr. Sandusky's due process rights under ***Commonwealth v. Evans***, 252 A.2d 689 (Pa. 1969).

321. In ***Evans***, the Pennsylvania Supreme Court, in a PCHA case, discussing a court's participation in discussions of a plea set forth:

> The defendant can receive the impression from the trial judge's participation in the plea discussions that he would not receive a fair trial if he went to trial before the same judge. Second, if the judge takes part in the preplea discussions, he may not

> be able to judge objectively the voluntariness of the plea when it is entered. Finally, the defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he ought to plead guilty despite an alternative desire.

Id. at 690-691.

322. "The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office." ***Id.*** at 691.

323. The unequal position of the district magistrate and trial judge with the defendant raise questions of fundamental fairness where those judicial officers would ordinarily be required to determine if the Commonwealth is entitled to an increase in bail. ***See id.***

324. "To properly determine whether prejudice resulted from the quality of counsel's representation, we must focus on counsel's overall trial strategy and view his performance as a whole." ***Weiss, supra*** at 443.

325. Had counsel not waived the preliminary hearing, he would have been able to learn critical information relevant to trial preparation, lessening his reliance on sorting through the discovery materials for such preparation. This could have at least included potential information regarding the alleged victims' therapy and how therapy resulted in them coming forward with these serious allegations.

326. Even assuming *arguendo* that each witness would have testified identically at trial as in the preliminary hearing, trial counsel could have better exploited the numerous inconsistent statements made by the various victims by having conducted a preliminary hearing.

327. The charges pertaining to alleged Victim 8, which were solely based on hearsay, would have been dismissed because at that time the rules did not authorize hearsay alone to bind over charges. ***Verbonitz, supra***; ***compare also Ricker, supra***.

328. Mr. Amendola would have had the opportunity to cross-examine the accusers, and based on their testimony changing at trial, could have learned of material changes.

329. Since the accusers testified to therapy allowing their memories of the events to differ, Mr. Amendola could have learned of memory issues and prepared motions on competency and retained expert witnesses on memory.

330. Because trial scheduling was part of the negotiations, Judge Cleland never continued the trial, resulting in Mr. Amendola being ill-prepared, not having expert witnesses, and not being able to adequately review discovery.

331. Since the case rested almost entirely on credibility, more effectively impeaching the victims at trial would have likely led to a different outcome. ***Commonwealth v. Gillespie***, 620 A.2d 1143, 1145 (Pa. Super. 1993) ("It is well-settled that where there are only two direct witnesses of a particular incident, as in the instant case, the complainant and the appellant, the credibility of those witnesses is of the utmost importance").

332. Mr. Sandusky suffered actual prejudice as the results of his trial would have been different as the charges related to alleged Victim 8 would not have moved forward, Mr. Amendola could have presented expert testimony regarding memory, and precluded evidence from certain accusers.

333. Since there is a reasonable probability that the outcome of the trial would have been different as to certain charges, Mr. Sandusky is entitled to a new trial.

Discussion:

A preliminary hearing is considered a critical stage of the criminal proceedings. ***Carver, supra*** at 1211 ("It is axiomatic that the preliminary hearing is a "critical stage" of a criminal proceeding, at which Appellant is entitled to the assistance of effective counsel."); ***Tarver, supra*** at 1295-1296 (discussing U.S. Supreme Court cases). Further, under the criminal rules of procedure, a defense attorney is entitled to cross-examine the witnesses, inspect evidence, and call witnesses on the defendant's behalf. ***See*** Pa.Crim.P. 542. Thus, Pennsylvania law recognizes that the purpose of preliminary hearing for a defendant goes beyond refuting a Commonwealth's *prima facie* case.

In ***Stultz, supra***, the Superior Court held that claims related to counsel's performance at a preliminary hearing are cognizable under the PCRA. Since trial counsel waived the preliminary hearing, the cognizability of the issue is distinct but analogous. Further, the ***Stultz*** Court relied on ***Lyons, supra***, where no preliminary hearing occurred because the defendant had absconded. Ultimately, the ***Lyons*** panel opined that the absence of the preliminary hearing did not impair the truth-determining process at trial and that Lyons had failed to show that "the absence of a preliminary hearing in any way undermined the truth determining process so as to render unreliable

the trial court's finding of guilt." ***Id.*** at 1269. Nonetheless, it is evident that such a claim is cognizable and may present an issue of arguable merit.

Furthermore, in contrast to ***Lyons***, the truth-determining process herein was rendered unreliable by trial counsel's waiver of the preliminary hearing. Moreover, Lyons' counsel therein did seek to have a preliminary hearing, but that hearing was denied. Instantly, Mr. Sandusky acknowledges that the purpose of a preliminary hearing relative to the Commonwealth is to establish a *prima facie* case of guilt. Mr. Sandusky does not contend that his charges would have been dismissed at a preliminary hearing in light of the fact that he was ultimately convicted, except the charges related to Victim 8, which at that time could not have been based solely on hearsay. ***Verbonitz, supra***. Rather, Mr. Sandusky's position is that by waiving the preliminary hearing, trial counsel was inadequately prepared to cross-examine the victims herein. The purpose of a preliminary hearing with respect to defense counsel is most often to discover what the witnesses will testify to at trial. Even in the event that a witness testifies inconsistently at trial from their preliminary hearing testimony, it is well settled that counsel can impeach that witness using the prior inconsistent testimony.

Indeed, then Attorney Rominger had posted on his website in September of 2011 an article entitled "What is a Preliminary Hearing?" and opined that it is ordinarily a common mistake to waive a preliminary hearing.[53] Mr. Rominger testified that he expressed concerns to Mr. Sandusky regarding the decision to waive his preliminary hearing and explained that he told Mr. Sandusky that he had written an article on why a defendant should not waive that hearing. Mr. Rominger noted that he informed Mr. Amendola that "it was a fallacy to believe that waiving the preliminary

53 http://www.huffingtonpost.com/2011/12/15/karl-rominger-jerry-sandusky-lawyer-showering_n_1151323.html.

hearing would grant any benefit[.]" N.T., 8/12/16, at 87. He posited that worrying about bail is problematic when the real concern is whether the defendant will spend the rest of his life in jail. Mr. Rominger explained, correctly, that it is critical in sex offense cases to make a record in order to use the statements for purposes of preparation and cross-examination.[54]

Mr. Sandusky testified that the night before the preliminary hearing he received a telephone call from Mr. Amendola that he should consider waiving the preliminary hearing. According to Mr. Sandusky, Mr. Amendola was concerned that a preliminary hearing would taint the possible jury pool, and the Commonwealth would bring additional charges. Mr. Sandusky related that Mr. Amendola did not discuss with him any of the advantages of conducting a preliminary hearing nor did Mr. Amendola inform him that by waiving the preliminary hearing they were foregoing an opportunity to have a record made that could be used at trial.

Mr. Sandusky further stated that Mr. Amendola did not directly tell him that there was an agreement between the Commonwealth and Mr. Amendola regarding the waiver. He contended that he assumed that there was communication between the parties, but was never informed of an off the record meeting at the Hilton Garden Inn between the prosecution, Mr. Amendola, the district magistrate, and the trial court.[55] Mr. Rominger confirmed that he was never aware of this meeting until it was disclosed to him by PCRA counsel.

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[54] Judge Cleland was mistaken in believing that the witnesses would not have been necessary at the preliminary hearing because hearsay alone could be used to bind over the charges. The rule allowing hearsay to be used exclusively to establish the elements of the crimes charges was not adopted until after Mr. Sandusky's preliminary hearing nor was the case opining that hearsay alone could be used to establish all of the elements of the crimes decided at that time. ***See*** former Pa.R.Crim.P. 542; ***Commonwealth v. Ricker***, 120 A.3d 349 (Pa. 2015), *allowance of appeal granted*, 135 A.3d 175 (Pa. 2016). Thus, it is clear that at the very least the charges related to Victim 8 could not have been bound over for trial. ***See Commonwealth ex rel. Buchanan v. Verbonitz***, 581 A.2d 172 (Pa. 1990) (plurality).

[55] Mr. Amendola testified, incredibly, that he did so inform Mr. Sandusky. This testimony lacks credulity as Mr. Sandusky's PCRA counsel themselves did not learn of this information until it

This unprecedented off the record meeting at a hotel conference room in which the trial court, district magistrate, Commonwealth and Mr. Amendola, but not Mr. Sandusky were present, involved negotiations to waive a critical stage of the criminal proceedings.[56] The witnesses were unclear as to who called the meeting. Mr. Amendola testified that he was not sure whether the Court or the Commonwealth scheduled the meeting. Mr. Fina testified that he believed that Mr. Amendola called the meeting. Mr. McGettigan maintained that it was a mutual agreement arrived at between Mr. Amendola, the prosecution, and both judges. N.T., 8/23/16, at 48. Ms. Eshbach testified that the court scheduled the meeting. ***Id.*** at 6.

At that night time off-the-record hotel meeting, Mr. Amendola proposed that Mr. Sandusky would waive his preliminary hearing in exchange for the Commonwealth not asking for an increase in bail. Mr. Amendola relayed that his reasoning for advising Mr. Sandusky to waive the hearing in exchange for a promise by the Commonwealth not to add charges and ask for an increase in bail was that it was important to prevent Mr. Sandusky from being incarcerated during trial preparation. Mr. Amendola acknowledged that the deal was discussed before the magistrate and trial court and that they did not object.

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was disclosed by Judge Cleland in May of 2016. Neither Mr. Sandusky, nor Mr. Amendola, nor Mr. Rominger, ever informed PCRA counsel of this meeting. Both Mr. Sandusky and Mr. Rominger expressed shock upon learning this information and testified that they were unaware of this meeting. Had Mr. Sandusky been aware of this meeting, it would have been included in his PCRA petitions, and counsel would not have learned of the information through a disclosure by the PCRA court.

[56] Upon learning of the trial judge's presence for an off-the-record night time meeting that took part at a hotel regarding discussions to waive Mr. Sandusky's preliminary hearing, and because Mr. Sandusky had alleged that trial counsel performed ineffectively in waiving that proceeding, Mr. Sandusky requested that Judge Cleland recuse himself because it had a conflict due to being a fact witness. The Commonwealth took no official record based position.

Despite Mr. Amendola's claim that he had discussed this deal previously with Mr. Sandusky, the Commonwealth nonetheless was not certain that such a deal was agreed upon because they brought the witnesses to Mr. Sandusky's scheduled preliminary hearing. Mr. Amendola further explained that, although the accusers had given multiple inconsistent statements, both to police and in some cases under oath, he did not think that the accusers would testify differently. It is unclear how Mr. Amendola would have known this at the time since the grand jury testimony and police reports had yet to be disclosed in discovery.

Mr. Amendola did admit that questioning by police is quite different from the crucible of cross-examination and that the more prior statements you possess from a witness the better prepared you are for cross-examination at trial. He also acknowledged that he did not discuss the law regarding prior inconsistent statements with Mr. Sandusky in relation to waiving his preliminary hearing and only told Mr. Sandusky that Mr. Amendola could question the witnesses and a record would be made that could be used at trial.

Remarkably, Mr. Amendola believed, and still believes, that a press conference following the waiver of Mr. Sandusky's preliminary hearing was more valuable to Mr. Sandusky's cause then additional impeachment evidence or evidence that could have been used to adequately prepare for trial. Mr. Amendola was unaware that the governing rule of criminal procedure did not mandate an increase in bail if additional charges were filed. N.T., 8/12/16, at 135. Instead, he insisted that "if the Commonwealth asked for it, I can guarantee you that the Commonwealth would have gotten additional bail." N.T., 8/12/16 at 139.[57] Moreover, Mr. Amendola and the

[57] Mr. Amendola's explanation that the district magistrate would do whatever the Commonwealth asked in regards to bail is not supported by the facts of record since the magistrate did not impose the bail requested by the Commonwealth in the first instance. Despite this fact, Judge Cleland actually appeared to be of the view that it is "pretty obvious about what the realities are." N.T.,

Commonwealth allowed the courts to be part of the negotiations, which itself is highly problematic. ***See Evans, supra.***

In this regard, Mr. Amendola was aware that he could have argued against an increase in bail by the district magistrate and appealed that decision to the Court of Common Pleas. He appeared to be unaware that because the judges had participated and/or been present for the negotiations of the deal that he was potentially foreclosing those avenues of review. Indeed, Mr. Amendola set forth that the court's participation "was the positive part of it." ***Id.*** at 140.[58]

Ms. Eshbach, Mr. Fina, and Mr. McGettigan all confirmed that an off-the-record meeting occurred at the Hilton Garden Inn and that the district magistrate and trial court were present. The prosecutors each acknowledged that the purpose of the meeting was to discuss Mr. Sandusky waiving his right to a preliminary hearing.

By electing to waive the preliminary hearing and not question the witnesses, Mr. Amendola was unable to obtain valuable information for purposes of trial and get the charges related to Victim 8 dismissed. Accordingly, this issue has arguable merit. Pointedly, in an article discussing counsel's decision, well known Philadelphia Attorney and former prosecutor Jack McMahon opined, "In a preliminary hearing, you have the right to confront your accusers, you have the right

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8/12/16, at 138. This suggests that courts do not actually follow the law and merely acquiesce to what the Commonwealth seeks.

[58] Mr. Amendola's fear was that the district magistrate would not follow the law and automatically increase Mr. Sandusky's bail merely at the request of the Commonwealth. It is unreasonable to assume that a court will violate the law. It also appears that Mr. Amendola was unaware of the law precluding courts from taking part in negotiations between the parties in criminal matters.

to cross-examine witnesses. It's a very helpful and powerful tool for a trial lawyer[.]" He added, "**It doesn't make sense to give up that important right**."[59] (emphasis added).

Mr. Sandusky adds that trial counsel had no reasonable basis to waive the preliminary hearing since this case involved accusations of child sex abuse without any physical evidence. The Commonwealth failed to uncover any child pornography in Mr. Sandusky's home, including on his computer. This despite police in their affidavit for a search warrant reasoning that, "The individual may save sexually explicit or suggestive materials in a variety of media (example: photographs, digital images, videos, drawings)." ***See*** May 6, 2015 PCRA Appendix at 265, Affidavit of Probable Cause.

The affidavit further set forth that such "individuals sometimes possess and maintain their 'libraries' of child pornographic materials in the privacy and security of their home or another secured location." ***Id.*** According to the affidavit, "computer files or remnants of such files can be recovered months or even years aft they have been downloaded onto a hard drive, deleted or viewed via the Internet...even when such files have been deleted, they can be recovered months or years later using readily available forensics tools." ***Id.*** However, police recovered no evidence of child porn from Mr. Sandusky.

In light of the complete absence of physical evidence, the case rested almost entirely on the credibility of the alleged victims. Further, the victims had provided numerous inconsistent statements regarding Mr. Sandusky. Hence, it was critical to examine these witnesses under oath in order to prepare for their testimony at trial. Such questioning could have determined whether the accusers' therapy was what led to ever changing disclosures.

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59 http://www.bloomberg.com/news/articles/2011-12-13/jerry-sandusky-waives-preliminary-hearing-in-penn-state-sex-abuse-case.

Mr. Amendola's explanation that the basis for the waiver was to prevent Mr. Sandusky from being incarcerated based on an increase in bail was not reasonable herein.[60] As discussed, Mr. Amendola incorrectly believed that the governing rule of procedure automatically required an increase in bail if a person was charged with additional crimes. When confronted with his legally erroneous position, Mr. Amendola posited that the magistrate would have granted any governmental request. However, this position is belied by the record since the magistrate had already declined to institute bail at approximately $5 million, despite the Commonwealth's request. Indeed, Mr. Amendola's assumption was that the magistrate would not faithfully apply the law and merely rubber stamp a Commonwealth demand.

What is more, Mr. Amendola permitted the district magistrate and trial court to participate in the negotiations regarding the plea waiver and opined that the participation of the courts was a benefit. This overlooks that it violates a defendant's due process rights for a court to be involved in the negotiation of waiver of important rights.

The ***Evans*** case cited *supra* involved a PCHA petition, the statute replaced by the current PCRA. There, the facts showed that the trial attorney, judge, and district attorney went into chambers and the judge agreed if the defendant pled guilty to five separate bills of indictment that the Court would only sentence him on one bill. The ***Evans*** Court held, "that such a procedure is not consistent with due process and that a plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary." ***Id.*** at 690.

It highlighted that

> The defendant can receive the impression from the trial judge's participation in the plea discussions that he would not receive a fair trial if he went to trial before the

[60] Mr. Amendola, on cross-examination, also offered that as part of the deal the Commonwealth promised to provide discovery. However, the Commonwealth would have been required to provide discovery under the law; thus, this is an illusory promise.

> same judge. Second, if the judge takes part in the preplea discussions, he may not be able to judge objectively the voluntariness of the plea when it is entered. Finally, the defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he ought to plead guilty despite an alternative desire.

Id. at 690-691. The High Court continued, "The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office." ***Id.*** at 691.

Similar concerns arise where the issue becomes waiver of a preliminary hearing. The unequal position of the district magistrate and trial judge with the defendant raise questions of fundamental fairness where those judicial officers would ordinarily be required to determine if the Commonwealth is entitled to an increase in bail. Here, assuming *arguendo* that Mr. Amendola actually credibly testified that Mr. Sandusky knew of the meeting, which Mr. Sandusky denies, he would have been under the impression that he would automatically have been subjected to a significant increase in bail had he not gone along with the proposed deal that was apparently approved of by the magistrate and trial court.

Finally, Mr. Sandusky suffered actual prejudice. "To properly determine whether prejudice resulted from the quality of counsel's representation, we must focus on counsel's overall trial strategy and view his performance as a whole." ***Weiss, supra*** at 443. Mr. Amendola himself stated on the record that he could not effectively represent Mr. Sandusky due to the overwhelming discovery.

Had counsel not waived the preliminary hearing, he would have been able to learn critical information relevant to trial preparation, lessening his reliance on sorting through the discovery materials for such preparation. This could have at least included potential information regarding

the alleged victims' therapy and how therapy and false memories are what resulted in them coming forward with these serious allegations. Even assuming *arguendo* that each witness would have testified identically at trial as in the preliminary hearing, trial counsel could have better exploited the numerous inconsistent statements made by the various victims by having conducted a preliminary hearing. Moreover, as it relates to Victim 8, the charges would have been dismissed since at that time, hearsay alone could not establish a *prima facie* case. ***Cf. Ricker***, ***supra*** (discussing change in rules of procedure that occurred after Mr. Sandusky's scheduled preliminary hearing that authorized hearsay alone to be used at preliminary hearing).

Since the case rested almost entirely on credibility, more effectively impeaching the victims at trial would have likely led to a different outcome. ***Gillespie***, ***supra*** at 1145 ("It is well-settled that where there are only two direct witnesses of a particular incident, as in the instant case, the complainant and the appellant, the credibility of those witnesses is of the utmost importance").

For all the aforementioned reasons, Mr. Amendola rendered constitutionally ineffective assistance of counsel in advising Mr. Sandusky to waive his preliminary hearing and permitting the district magistrate and trial court to participate in such waiver negotiations, in violation of Mr. Sandusky's due process rights.

GRAND JURY LEAKS

28. Trial counsel were ineffective for failing to file a motion to quash the grand jury presentment and the charges arising therefrom relative to victims 2 through 10 based on governmental misconduct in tainting the grand jury process.[61]

Proposed Findings of Fact:

419. On March 30, 2011, Reporter Sara Ganim wrote a newspaper article regarding the grand jury investigation into Mr. Sandusky. (Undisputed).

420. The article set forth information regarding the 1998 investigation and the investigation related to Aaron Fisher—though it did not name Mr. Fisher. (Undisputed) (See PCRA Appendix, with attached article).

421. In addition, the grand jury presentment was improperly placed online prior to its official release. N.T., 8/12/16, at 169 (Testimony of Joseph Amendola) (Undisputed); N.T., 8/23/12, at 43 (Testimony of Frank Fina) (Undisputed).

422. Ms. Ganim was able to see the improperly released presentment. N.T., 8/12/16, at 169 (Testimony of Joseph Amendola).

423. The prosecution told Michael McQueary in advance that the presentment would be leaked. Exhibit H--N.T., Graham Spanier Trial, 3/21/17, at 24 (Testimony of Michael McQueary).

424. The agents who took the presentment to the district magistrate were also the individuals charged with investigating if the presentment was improperly leaked. N.T., 8/23/12, at 44-45 (Testimony of Frank Fina) (Undisputed).

425. The investigation was turned over to the Judicial Conduct Board. ***Id.*** at 46.

426. Trooper Scott Rossman was unaware of how a police report from a 1998 investigation that was determined to be unfounded at the time found its way to Reporter Sara Ganim. N.T., 8/22/16, at 77. (Testimony of Scott Rossman).

427. Trooper Rossman was never questioned regarding leaks. ***Id.*** (Undisputed).

428. Corporal Joseph Leiter wrote a report, disclosed in discovery, that Sara Ganim approached the mother of Accuser 6. N.T., 8/22/16, at 84 (Testimony of Joseph Leiter) (Undisputed).

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[61] Mr. Sandusky raised this issue in his Second Amended PCRA Petition at Issue 6. Second Amended PCRA Petition, 3/7/16, at 44-62; ***see also*** Brief re: Subject Matter Jurisdiction, 5/19/16; Reply Brief Subject Matter Jurisdiction Claim, 6/9/16; Brief—Remedy for Governmental Misconduct, 9/1/16.

429. Corporal Leiter detailed that the mother, Deb McCord, declined to speak with Ms. Ganim. ***Id.*** (Testimony of Joseph Leiter) (Undisputed).

430. Corporal Leiter indicated that Ms. Ganim gave Ms. McCord the name of an Attorney General agent and a phone number. ***Id.*** at 85 ("Ganim sent in the text, quote 'Debra, it's Sara from The Patriot. I just want to pass along this agent's name and number. The Attorney General has expressed interest in helping you.") (Undisputed).

431. Corporal Leiter testified he did not know the name of the agent referenced. ***Id.***

432. Prosecutor Jonelle Eshbach was aware of the Sara Ganim article and claimed not to know the identity of Ms. Ganim's source(s). N.T., 8/23/12, at 9 (Testimony of Jonelle Eshbach) (Undisputed).

433. Ms. Eshbach was aware of an investigation that she and Frank Fina conducted. ***Id.*** at 9. (Testimony of Jonelle Eshbach) (Undisputed).

434. Ms. Eshbach was "concern[ed] about information that appeared to have that was made public by The Patriot that I thought should not be." ***Id.*** at 11. (Testimony of Jonelle Eshbach) (Undisputed)

435. Ms. Eshbach and Mr. Fina "set a trap internally in the Attorney General's Office to see if anyone from within our office would disclose the information." ***Id.*** at 11. (Testimony of Jonelle Eshbach) (Undisputed).

436. There was no further investigation by the OAG. ***Id.*** at 13. (Testimony of Jonelle Eshbach) (Undisputed).

437. Of the accusers, only Aaron Fisher had testified at grand jury before the March 30, 2011 article by Ms. Ganim. ***Id.*** at 14.

438. Z.K., the individual involved in the 1998 investigation, had not yet testified. ***Id.*** at 14-15 (Testimony of Jonelle Eshbach) (Undisputed).

439. Deb McCord, Z.K.'s mother had not yet testified. ***Id.*** at 16. (Testimony of Jonelle Eshbach) (Undisputed).

440. Ralph Ralston, an investigator involved in the 1998 investigation, had not yet testified. (Undisputed).

441. John Seasock, an individual with knowledge of the 1998 investigation, had not yet testified. ***Id.*** at 17. (Testimony of Jonelle Eshbach) (Undisputed).

442. Aaron Fisher did not know of the 1998 investigation. ***Id.*** (Testimony of Jonelle Eshbach) (Undisputed).

443. Trooper Rossman and Agent Sassano had testified before the grand jury. ***Id.*** (Testimony of Jonelle Eshbach) (Undisputed).

444. Ms. Eshbach did know that Deb McCord had been approached by Sara Ganim about the grand jury investigation and was aware of Corporal Leiter's report. ***Id.*** at 18-19. (Testimony of Jonelle Eshbach) (Undisputed).

445. Ms. Eshbach did not ask Deb McCord who the agent referred to by Ms. Ganim was and could not recall if she asked anyone else to ask for that information. ***Id.*** at 20 (Undisputed).

446. The March 30, 2011 article by Sara Ganim was not the only article that caused the OAG concern regarding leaks. ***Id.*** at 39 (Testimony of Frank Fina) (Undisputed).

447. An article that discussed the grand jury testimony of Dr. Dranov also caused concern. ***Id.*** at 40. (Testimony of Frank Fina) (Undisputed).

448. Mr. Fina was not able to determine if an illegal leak occurred. ***Id.*** at 42.

449. Mr. Fina reported to Judge Feudale on "at least two occasions, maybe more, and told him that I believed it was possible that there was a leak and that we should conduct an investigation to determine whether or not there was a leak." ***Id.*** (Testimony of Frank Fina) (Undisputed).

450. Judge Feudale attempted to investigate whether there were grand jury leaks by appointing two special prosecutors: James Reeder and Ken Brown. ***Id.***; ***see also*** N.T., 8/22/16, at 115 (Testimony of Agent Sassano) (Undisputed).

451. On or about February 8, 2013, Judge Barry Feudale, issued an order appointing former Assistant Attorney General, James M. Reeder, as a special prosecutor to investigate, *inter alia*, grand jury leaks during two Statewide Investigating Grand Juries and a Dauphin County Grand Jury.

452. At a proceeding on November 5, 2015 (held before Senior Judge John M. Cleland) during the questioning of Attorney General Kathleen Kane, it was revealed that a special prosecutor, Kenneth Brown, was appointed in April of 2013 to assist A.D.A. Reeder in his investigation.

453. Reeder and Brown were given 6 months, until August 8, 2013, to investigate, report, make recommendations and, if circumstances warranted, file charges.

454. No investigation was completed by those individuals. ***See*** (Testimony of Barry Feudale) (Under Seal).

455. Mr. Fina testified that he did not know the source of Ms. Ganim's information.

456. Mr. Rominger drafted a motion to disqualify the Office of Attorney General and/or dismiss the charges, which was not filed. N.T., 8/12/16, at 80 (Testimony of Karl Rominger) (Undisputed).

457. The motion was not complete and did not contain specific allegations of an improper leak of grand jury information. ***Id.*** at 85 (Testimony of Karl Rominger) (Undisputed).

458. The motion did note the false detail that Mr. McQueary allegedly saw anal intercourse. ***Id.***

459. Mr. Rominger believed the Office of Attorney General had leaked the grand jury presentment. ***Id.*** at 81.

460. Mr. Amendola suspected grand jury leaks. ***Id.*** at 168 (Testimony of Joseph Amendola) (Undisputed) ("We suspected. Obviously, the reporter from the Harrisburg Patriot News ran a front page article in that paper as well as the local paper...So obviously she got her information from somewhere.)"

461. Mr. Amendola asked for information regarding leaks and was told by Mr. McGettigan and Mr. Fina that there had not been any leaks. ***Id.*** at 169-170 (Testimony of Joseph Amendola) (Undisputed).

462. Mr. Amendola did not file a motion regarding the leaks. ***Id.*** at 169 (Testimony of Joseph Amendola) (Undisputed).

463. Aaron Fisher's therapist, Michael Gillum wrote, regarding reporter Sara Ganim, "Ganim must have somehow gotten her hands on the police report with all of our names on it. The fact that she found Dawn's [Aaron's mother] address and knew Aaron's name was a major leak from the top." N.T., 8/22/16, at 69 (Testimony of Michael Gillum).

464. Mr. Gillum added, "Later we learned that Ganim even contacted Graham Spanier, the president of Penn State, to ask if he had any knowledge of an investigation of Sandusky for criminal activity while he was a Penn State employee. There was definitely a leak somewhere." ***Id.*** at 71.

465. Judge Cleland informed counsel and the prosecution that he would compel Sara Ganim to testify and reveal her source if PCRA counsel could establish that quashal was an appropriate remedy for a grand jury leak. (Undisputed).

466. Judge Cleland on October 17, 2016, denied, without opinion, the grand jury leak claim and indicated an opinion would follow. (Undisputed).

467. Judge Cleland recused himself before he could offer an opinion on this issue. (Undisputed).

468. The undersigned, alleging new evidence based on testimony by Michael McQueary in the criminal trial of Graham Spanier, sought to re-visit this issue.

469. Mr. McQueary's testimony was that he had been alerted that the OAG was going to leak the grand jury presentment. ***See*** N.T., 3/21/17, *Commonwealth v. Spanier*, 3615 CR 2013, at 24 ("I was on my way to Boston for recruiting and I was in going from F terminal over the B terminals over in Philadelphia Airport. And there was one of those little trams. The AGs called ***and said we're going to arrest folks and we are going to leak it out***[.]").

470. The PCRA court ruled that the law of the case applied.

Proposed Conclusions of Law:

334. The law of the case doctrine does not apply herein. ***Windows v. Erie Ins. Exchange***, 2017 PA Super 131; ***Hutchison v. Luddy***, 611 A.2d 1280 (Pa. Super. 1992).

335. "In determining whether the law of the case doctrine applies, the appellate court 'looks to where the rulings occurred in the context of the procedural posture of the case." ***Windows***, ***supra***.

336. The law of the case "does not apply when distinct procedural posture present different considerations, then a substituted judge may correct mistakes made by another judge at an earlier stage of the trial process, or, perhaps more accurately, revisit provisional rulings made earlier in the litigation. ***Id***. (quoting ***Gerrow v. John Royle & Sons***, 813 A.2d 778, 782 (Pa. 2002)).

337. "[W]here new evidence is placed on the record in the interim between the first trial judge's ruling and the second trial judge's reassessment, it is not improper for the second trial judge to reach a result different than the result reached by his or her colleague where the later result is based upon new evidence." ***Hutchison***, ***supra*** at 1289.

338. Therefore, this Court may afford Mr. Sandusky relief on this claim.

339. Judge Cleland erred in failing to allow counsel to call Sara Ganim and ruling against Mr. Sandusky on this claim. ***Cf. Castellani v. Scranton Times, L.P.,*** 956 A.2d 937, 953 n. 14 (Pa. 2008) ("Were a situation to arise, such as that hypothesized by the concurrence below, where the Commonwealth sought a reporter's evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak, then the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict. That question, however, is not before us and we save its consideration for another day. Put another way, we need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value.").

340. Justice Todd, while a Superior Court judge, had opined in a concurring opinion in the Superior Court ***Castellani*** decision that the Shield Law could yield in circumstances involving a grand jury leak and a criminal prosecution.

341. Sara Ganim could be compelled to reveal her source.

342. Release of any information relative to the 1998 investigation, which was determined to be unfounded, would have been criminal. 23 Pa.C.S. § 6349.

343. In ***In re Dauphin County Fourth Investigating Grand Jury***, 19 A.3d 491 (Pa. 2011) ("In re Dauphin County"), and ***In re Thirty-Fifth Statewide Investigating Grand Jury***, 112 A.3d 624 (2015) (OAJC), the Supreme Court indicated, in no uncertain terms, that a breach of grand jury secrecy is serious.

344. Accordingly, where there are colorable allegations or indications that the grand jury process has been breached, the grand jury supervising judge acts within his authority and sound prerogative to appoint a special prosecutor. ***See id.***

345. Instantly, because of colorable allegations of violations of grand jury secrecy, former Grand Jury Supervising Judge Barry Feudale appointed two special prosecutors to investigate leaks, relevant herein, to the Sandusky investigation.

346. Moreover, the Pennsylvania Supreme Court has considered historical breaches of grand jury secrecy as supporting the appointment of a special prosecutor to protect the grand jury process.

347. In ***In re Thirty-Fifth Grand Jury*** case, ***supra***, the Court opined:

Although a supervising judge in his or her discretion, may regard a historical breach in a different light than a present one, both are equally affronts to the dominant and ongoing requirement of confidentiality which supervising judges are charged with enforcing. ***Cf. United States v. Procter & Gamble Co.***, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958)("The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.").

348. Hence, when there are colorable allegations or indications that the sanctity of the grand jury process has been breached and those allegations warrant investigation, the supervising judge should not make a distinction between current and historical breaches of grand jury secrecy.

349. In sum, since there were colorable allegations of grand jury secrecy violations, and the prior Grand Jury Supervising Judge, with the assent of former Chief Justice Castille, ordered the appointment of a special prosecutor, it was error for the subsequent grand jury judge not to re-appoint a special prosecutor or special master after the initial special prosecutors failed to complete an investigation or issue a report.

350. The Grand Jury Supervising Judge violated the coordinate jurisdiction rule and law of the case by failing to appoint a new special prosecutor where his predecessor previously appointed two special prosecutors to investigate serious allegations of grand jury leaks.

351. Pursuant to the law of the case and coordinate jurisdiction rule, Judge Krumenacker was bound to honor the decision of Judge Feudale to appoint a special prosecutor based on Judge Feudale's determination that there was a colorable claim of grand jury leaks. ***Commonwealth v. Starr***, 664 A.2d 1326, 1331 (Pa. 1995); ***Commonwealth v. King***, 999 A.2d 598 (Pa. Super. 2010) (Coordinate jurisdiction requires that when a PCRA judge schedules an evidentiary hearing a subsequent judge assigned to the case must conduct that hearing).

352. Here, upon the transfer of the Grand Jury matter from Judge Feudale to Judge Krumenaker, the transferee judge, Judge Krumenacker, was not permitted to alter the resolution of the legal determination to appoint two special prosecutors to investigate potential grand jury leaks.

353. Prosecutorial misconduct can be grounds for the quashal of a presentment and the charges arising therefrom. ***Schultz***, ***supra***, ***Commonwealth v. Curley***, 131 A.3d 994 (Pa. Super. 2016), and ***Commonwealth v. Spanier***, 132 A.3d 481 (Pa. Super. 2016); ***see also Commonwealth v. McCloskey***, 277 A.2d 764 (Pa. 1971); ***Commonwealth v. Cohen***, 289 A.2d 96 (Pa. Super. 1972) (plurality); ***cf. In re County Investigating Grand Jury VIII***, ***supra*** (quashal of charges would be appropriate if it was demonstrated that grand jury leaks substantially influenced the decision to issue a presentment and recommend the filing of criminal charges); ***Commonwealth v. Williams***, 565 A.2d 160, 164 (Pa. Super. 1989); ***Commonwealth v. Bradfield***, 508 A.2d 568 (Pa. Super. 1986); ***Commonwealth v. Brownmiller***, 14 A.2d 907 (Pa. Super. 1940); ***cf. Bank of Nova Scotia v. United States***, 487 U.S. 250 (1988).

354. Trial counsel's failure to file a motion to quash based on suspected grand jury leaks is an issue of arguable merit. ***Id.***

355. Trial counsel had no reasonable basis not to litigate the issue where he suspected grand jury leaks and it was disclosed in discovery that Sara Ganim provided a witness the name and phone number of an agent with the OAG.

356. Trial counsel's basis, that Mr. Fina and Mr. McGettigan assured him that there were no leaks is not a reasonable basis, where those individuals were members of the very governmental team alleged to have leaked the information.

357. As a result of Sara Ganim's article, Ronald Petrosky came forward with the allegations related to alleged Victim 8. N.T., 6/13/12, at 235.

358. Following the article, a number of accusers changed their stories and made various allegations and S.P. and R.R. came forward.

359. Since quashal is an appropriate remedy, Mr. Sandusky suffered actual prejudice. ***See*** Paragraph 9 citations.

360. Had counsel filed a motion to quash, an investigation into the name of the agent referred to in Corporal Leiter's report would have been uncovered.

361. Learning of that individual having leaked information to Ms. Ganim, would have established the source of the leak.

362. The grand jury leaks in this matter were sufficiently egregious to affect the subsequent grand jury presentments at least as it related to alleged Victim 8 and Accusers 9 and 10.

363. Had counsel filed the motion there is a reasonable probability that quashal at least as to some charges would have resulted.

364. Because Mr. Sandusky suffered actual prejudice, he is entitled to quashal of various charges and, in the alternative, a new trial.

Discussion:

At the close of the PCRA evidentiary hearings in August of 2016, the PCRA court expressed, at an off-the-record conference, that if Mr. Sandusky could establish that quashal was an appropriate remedy for prosecutorial misconduct in the grand jury setting, it would permit PCRA counsel to present Sara Ganim and compel her to reveal her sources. With that in mind, it directed the parties to address the potential remedy of quashal. The briefs were to assume *arguendo* that a grand jury leak was proven. Every case provided by PCRA counsel demonstrated that the quashal of a grand jury presentment was an appropriate remedy. In contrast, not a single case relied upon by the Commonwealth demonstrated that quashal was not a potential remedy. Pointedly, every relevant decision in Pennsylvania has either held or opined on quashal being an appropriate potential remedy. Despite this fact, Judge Cleland *sub silentio* ruled that he would not compel Ms. Ganim to testify as to her source(s) because he denied the pertinent claim.

Since Judge Cleland's decision that quashal is not a potential remedy ignored every decision ever decided in this Commonwealth, he erred. Because quashal is an appropriate remedy, PCRA counsel should have been permitted to further prove its claim that it was the government that was responsible for myriad grand jury leaks. While there does exist a reporter's privilege in

Pennsylvania, the Pennsylvania Supreme Court expressly refused to hold that such a privilege would not yield under similar circumstances presented herein.

In ***Castellani, supra*** at 953 n. 14, the High Court posited,

> Were a situation to arise, such as that hypothesized by the concurrence below, where the Commonwealth sought a reporter's evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak, then the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict. That question, however, is not before us and we save its consideration for another day. Put another way, we need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value.

Justice Todd, while a Superior Court judge, also had opined in a concurring opinion in the Superior Court ***Castellani*** decision that the Shield Law could yield in circumstances involving a grand jury leak and a criminal prosecution. Unlike here, the ***Castellani*** case involved an actual investigation by special prosecutors into the alleged grand jury leak.

Here, the PCRA testimony revealed that Attorney Fina and Attorney Eshbach believed there was a colorable claim of grand jury leaks. They themselves set up a sting operation in an attempt to catch a suspected leaker. In addition, Mr. Fina admitted to going to former Judge Feudale concerning fears of leaks. Judge Feudale opened an investigation and appointed two special prosecutors. Those prosecutors, nevertheless, did not receive cooperation from the Office of Attorney General and never completed any investigation.

Mr. Sandusky's request for the re-appointment of a special prosecutor, based on both the law of the case and ***In re Thirty-Fifth Statewide Investigating Grand Jury***, 112 A.3d 624 (Pa. 2015) (OAJC), and ***In re Dauphin County Fourth Investigating Grand Jury***, 19 A.3d 491 (Pa. 2011), was refused by a different grand jury judge. The Commonwealth continues to hold the untenable position that the grand jury information could have been disclosed by individuals who had *not yet been called to testify before the grand jury* and all governmental bodies involved

continue to thwart any attempt at transparency to reveal Ms. Ganim's source or sources. Additionally, release of any information relative to the 1998 investigation, which was determined to be unfounded, would have been criminal. 23 Pa.C.S. § 6349.

The PCRA hearings also revealed that Sara Ganim had the name and phone number of an Attorney General agent involved in the investigation. Yet, neither the prosecutors nor state police ever actually inquired into who that person was. It is thus apparent from State Police reports introduced into evidence that Ms. Ganim received information from an agent with the Office of Attorney General, *i.e.*, evidence of a leak.

Thus, Mr. Amendola's claim that he had no evidentiary support to file a motion to quash based on grand jury leaks is belied by the record. Mr. Amendola had the police report, knew of the Ganim articles, and that the presentment itself had been improperly leaked online. The Office of Attorney General itself knew that there was evidence of a possible leak insofar as it attempted, half-heartedly, to investigate the potential source of any leak. Mr. Rominger testified that he prepared a motion asking for the OAG to be removed from the case and set forth that in that motion he should have included claims that the Commonwealth improperly leaked information.

In light of the fact that the Commonwealth itself was concerned about grand jury leaks and ultimately special prosecutors were appointed, though they were thwarted from investigating, counsel could have no reasonable basis for not filing a motion to quash. Actual prejudice also ensued. The Commonwealth appears to contend that because investigators learned the identities of certain accusers prior to any leaks that no prejudice resulted. This overlooks that the identity of those accusers is not the critical inquiry; rather, it is how they were influenced to change or modify their stories. Further, it ignores that S.P. and R.R. only came forward after the first grand jury presentment. Due to the leaks, Ronald Petrosky came forward. The leaks also allowed an

opportunity for those individuals who did become accusers to alter their story to better fit the narrative.

Additionally, the Commonwealth claims that counsel's failure to file a motion to quash the presentment is meritless and that only a special prosecutor can investigate such leaks. Whether a special prosecutor/master can investigate grand jury leaks has nothing whatsoever to do with whether counsel can file a motion to quash. Not only is the Commonwealth's position a complete *non-sequitur*, it sidesteps the critical issue. The Commonwealth added that a leak would only result in a finding of contempt. There is, however, nothing in the law that precludes greater sanctions and the very case it cites demonstrates the falsity of its position. It is true that a person who leaked information can be found in contempt. That does not mean there are no other remedies.

Pointedly, one of the non-precedential case previously cited by the Commonwealth suggested the opposite. That decision concluded that a presentment could be quashed if the presentment was substantially influenced by misconduct, but found no such substantial influence therein. ***In re County Investigating Grand Jury VIII***, 2003, 2005 WL 3985351 (Lack. Com. Pl. 2005). Mr. Sandusky's claim, and why he referenced prosecutorial malfeasance by Mr. Fina in the Penn State administration cases, is that the presentment was substantially influenced by prosecutorial/law enforcement misconduct.

Prosecutorial misconduct was used as grounds for quashing charges arising out of a grand jury presentment in the Penn State administration cases. ***See Schultz, supra***; ***Curley, supra***; ***Spanier, supra***; ***see also McCloskey, supra***; ***Commonwealth v. Cohen***, 289 A.2d 96; ***cf. In re County Investigating Grand Jury VIII, supra*** (quashal of charges would be appropriate if it was demonstrated that grand jury leaks substantially influenced the decision to issue a presentment and recommend the filing of criminal charges); ***Williams***, 565 A.2d at 164; ***Bradfield, supra***;

Brownmiller, supr ; ***cf. Bank of Nova Scotia, supra.*** Since prosecutorial misconduct in leaking grand jury information was intentionally done to elicit additional witnesses, the presentment and charges arising therefrom must be quashed.

29. Trial counsel were ineffective in not seeking to quash the grand jury presentment and finding that the grand jury had subject matter jurisdiction in this matter in clear derogation of the plain language, intent, and history of the Grand Jury Act.[62]

Proposed Findings of Fact:

471. The Commonwealth referred the original allegations by a single victim, Aaron Fisher, to a statewide investigating grand jury. (Undisputed).

472. Specifically, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009. (Undisputed).

473. In doing so, the OAG submitted the case on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. (Undisputed).

474. The initial grand jury investigation was subsequently used as the basis for the grand jury presentment by the 33rd Statewide Grand Jury.

475. The investigation was not into public corruption or organized crime and the accused was known.

Proposed Conclusions of Law:

365. Jurisdictional issues can never be waived. ***Commonwealth v. Bethea***, 828 A.2d 1066 (Pa. 2003); ***Commonwealth v. Little***, 314 A.2d 270 (Pa. 1974).

366. "Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result." ***Melograne***, ***supra*** at 1167.

367. Investigating grand juries have statutory limited jurisdiction. 42 Pa.C.S. § 4542.

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[62] Mr. Sandusky raised this issue in his Second Amended PCRA Petition at Issue 5. Second Amended PCRA Petition, 3/7/16, at 44-62; ***see also*** Brief re: Subject Matter Jurisdiction, 5/19/16; Reply Brief Subject Matter Jurisdiction Claim, 6/9/16; Brief—Remedy for Governmental Misconduct, 9/1/16.

368. "Statutory interpretation presents a question of law and is evaluated *de novo.*" ***In re C.S.***, 63 A.3d 351, 354 (Pa. Super. 2013); ***Commonwealth v. Sarapa***, 13 A.3d 961, 962 (Pa. Super. .2011).

369. "In interpreting a statute, [courts] are called to 'ascertain and effectuate the intention of the General Assembly.'" ***Commonwealth v. Hale***, 85 A.3d 570, 580 (Pa. Super. 2014), *affirmed*, 128 A.3d 781 (Pa. 2015).

370. "Every statute shall be construed, if possible, **to give effect to all its provisions**. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." ***Id.*** (emphasis added).

371. A court "may not render language superfluous or assume language to be mere surplusage.'" ***Id.***

372. The history of investigating grand juries and intent of the Investigating Grand Jury Act was to provide a mechanism to investigate public corruption and organized crime.

373. "Broadly speaking, there are two kinds of grand juries-(1) an indicting grand jury and (2) an investigating grand jury." ***Appeal of Hamilton***, ***supra*** at 790.

374. Investigating grand juries were originally convened because of "the existence of widespread corruption, violations of law, or serious crimes, or systematic criminal depredations by public officers, or that a matter of great public importance which is inimical to public interest (riots, etc.) has occurred or is likely to occur[.]" ***Id.*** 791.

375. In addition, they were used when such corruption and "the alleged crimes [could] not be readily discovered or coped with by the ordinary legal processes if promptly, vigorously and impartially pursued by the District Attorney." ***Id.***

376. The ordinary conception of the duties of a grand jury was to guard the right and liberties of the people; it was so understood at its inception. Because of the method by which its deliberations are conducted and the secrecy surrounding them, **it is a particularly suitable body to investigate misconduct of public officials and public evils**. These inquisitorial powers were recognized as early as 1791 in this commonwealth. Lacaze v. State, Add. 59, 71. ***Petition of McNair***, 187 A. 498, 503 (Pa. 1936) (emphasis added).

377. "In some states the power of investigation is virtually unlimited, and the grand jury, of its own motion, may originate and conduct them. But in Pennsylvania the freedom of the grand jury is very much restricted." ***Id.***

378. 'A grand jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety (***Lloyd & Carpenter's Case***, ***supra***; ***Commonwealth v. Crans***, 2 Clark, 172, 192), health, demoralize the personal security of members of the public, or permit systematic criminal depredations by public officers." ***Id.*** at 504.

379. These principles are clearly codified in the current Investigating Grand Jury Act, which has its main focus with respect to multi-county investigating grand juries, on investigating public corruption and organized crime.

380. In this respect, the ***McNair*** Court further posited, "The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them[.]" ***Id.***

381. Thus, it is long-standing law in Pennsylvania that a grand jury investigation "cannot be aimed at individuals primarily, as such nor at the commission of ordinary crimes, but should be of matters of criminal nature wherein public officers or the interests of the general public are involved." ***McNair***, ***supra*** at 504 (internal citations omitted).

382. It is evident that the current Investigating Grand Jury Act, as it relates to multi-county grand jury investigations, was intended to codify the common law Pennsylvania approach to grand jury investigations, which authorized investigations where "there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety, or health, or other criminal acts affecting these functions or of a widespread nature, jeopardizing or demoralizing public security or health[.]" ***Id.***

383. The investigating grand jury and its power to subpoena witnesses and documents and "conduct deliberations in secret was what made it a particularly appropriate and (often) vitally necessary body or instrument to protect the public from criminal misconduct of public officials and from widespread evils." ***Hamilton***, ***supra*** at 791.

384. Indeed, "While individuals are always involved, the *primary objective* of a special grand jury proceeding is to ferret out and discover acts which are or are likely to be harmful to the public, rather than the ordinary prosecution of an individual criminal." ***Id.*** at 792. (italics in original).

385. "There is reason in the law for excluding from the searching and piercing eye of a grand jury, offenses alleged to have been committed by known individuals. It lies in the fundamentals of our democracy, in the establishment of civil rights with which every American is endowed." ***In re Grand Jury Investigation of Registration Commn.***, 22 Pa. D. & C.2d 285, 292 (Pa. Quar. Sess. 1960).

386. Investigating grand juries, thus, have the power to investigate any type of crime, but it must be done when they have jurisdiction because of an inquiry into public corruption and/or organized crime.

387. "A Statewide or regional investigating grand jury convened by the Supreme Court upon the application of the Attorney General **and having jurisdiction to inquire into organized crime or public corruption or both** under circumstances wherein more than one county is named in the order convening said investigating grand jury." 42 Pa.C.S. § 4542.

388. Section 4548 provides a grand jury with power to investigate any crime, such as murder, drug dealing, prostitution, etc... that is related to or arose out of public corruption and organized crime.

389. A grand jury does not have jurisdiction to investigate crimes untethered from its inquiry into public corruption or organized crime. ***See*** 42 Pa.C.S. § 4542.

390. § 4542 must be read together with § 4548.

391. The plain language of Section 4542 explicitly defines a multi-county grand jury as having jurisdiction to inquire into organized crime and public corruption. In this respect, the maxim *expressio unis est exclusio alterius,* which translated means that the expression of one thing is the exclusion of another, applies.

392. Having explicitly expressed that a multi-county grand jury has jurisdiction to inquire into organized crime and public corruption it necessarily does not have jurisdiction to inquire into crimes that do not arise out of its investigation into organized crime and public corruption.

393. To interpret the Grand Jury Act in another manner would render language of the statute surplusage. ***See also*** 1 Pa.C.S. § 1922 (presumption exists "That the General Assembly intends the entire statute to be effective and certain.").

394. "[N]either that Act nor our case law supports the notion that an application for empanelment, once approved, is license to submit *any* investigation through a notice of submission. Subsequent submissions must be shown either to be within the original application for empanelment or meet the jurisdictional predicate for subject matter to be considered by a grand jury." ***Appeal of Stout***, 460 A.2d 249, 251 (Pa. 1983) (Nix, J., concurring).

395. Aaron Fisher's allegations did not amount to public corruption or organized crime, nor was the grand jury inquiring into another matter involving public corruption and organized crime when, through that investigation, it learned of Aaron Fisher allegations. ***See Commonwealth v. Iacino***, 415 A.2d 61 (Pa. 1980) (grand jury did not exceed its authority in issuing indictment against defendant regarding improper sale of state property where grand jury had been impaneled to investigate corruption of supervisory personnel of PennDOT, and evidence of improper sale arose in the course of that investigation, and the sale had been made possible by the submission of false report by defendant, a maintenance supervisor).

396. The OAG had no statutory authority to conduct a grand jury investigation based on the allegations by Aaron Fisher.

397. Aaron Fisher's statements at the time the grand jury investigation began did not give rise to the suggestion of crimes involving public corruption or organized crime.

398. Therefore, the grand jury had no subject matter jurisdiction to investigate.

399. Because the original grand jury lacked subject matter jurisdiction to investigate Aaron Fisher's allegations, the charges against Mr. Sandusky that arose from that improper investigation must be dismissed. ***Compare Schultz, supra;. Curley, supra; Spanier, supra; see also McCloskey, supra; Commonwealth v. Cohen***, 289 A.2d 96 (Pa. Super. 1972) (plurality); ***cf. In re County Investigating Grand Jury VIII, supra*** (quashal of charges would be appropriate if it was demonstrated that grand jury leaks substantially influenced the decision to issue a presentment and recommend the filing of criminal charges); ***Williams***, 565 A.2d at 164; ***Bradfield, supra***; ***Brownmiller, supra***; ***cf. Bank of Nova Scotia, supra***; Pa.R.Crim.P. 556.4(B)(1)(c) (criminal information may be dismissed where a grand jury vote to indict occurred but the indicting grand jury lacked jurisdiction).

Discussion:

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

However, a multi-county grand jury has no jurisdiction to investigate into a crime totally unaffiliated with organized crime or public corruption simply because it occurred in one of the counties. Taking this position to its logical conclusion would mean that an investigating grand jury could investigate DUI crimes entirely unrelated to organized crime or public corruption as well as countless other crimes that transpired in the counties regardless of any connection to organized crime or public corruption.

This was not the intent of the General Assembly in promulgating the Grand Jury Act and would have the potential effect of eviscerating the traditional criminal complaint process in those counties where a grand jury sits. The intent of the General Assembly is paramount and is

determined by the language of the statute. The language of the statute does not give a grand jury *carte blanche* to investigate all crimes that occur in a county once a grand jury is impaneled.

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

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

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

"Statutory interpretation presents a question of law and is evaluated *de novo*." ***In re C.S.***, ***supra*** at 354; ***Sarapa, supra*** at 962. "In interpreting a statute, [courts] are called to 'ascertain and effectuate the intention of the General Assembly.'" ***Hale***, ***supra*** at 580, *affirmed*, 128 A.3d 781

(Pa. 2015). "Every statute shall be construed, if possible, **to give effect to all its provisions**. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." ***Id.*** (emphasis added). A court "may not render language superfluous or assume language to be mere surplusage.'" ***Id.***

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

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

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

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

As explained in ***Melograne, supra***, there is an important difference between subject matter jurisdiction and the power to act. The ***Melograne*** Court set forth,

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

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

Id.

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

Moreover, to the extent that one could conclude that the plain language of the statute is ambiguous, the occasion and necessity for the statute and the circumstances for which it was enacted relate specifically to investigations into public corruption and organized crime. The Investigating Grand Jury Act was not intended to supplant the ordinary criminal process. In this respect, it must be noted that the case relied on by the Commonwealth in its Second Answer, ***In re Twenty-Fourth Statewide Investigating Grand Jury***, 907 A.2d 505 (Pa. 2006), rejected a newspapers argument, as specifically framed therein, which did not invoke or discuss Section 4542. The Pennsylvania Supreme Court explicitly stated that it rejected the argument therein "as it is presently framed." ***Id.*** at 512.

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

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

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

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

PennDOT, and evidence of improper sale arose in the course of that investigation, and the sale had been made possible by the submission of false report by defendant, a maintenance supervisor).

The OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009. In doing so, the OAG submitted the case on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. A founded report would only exist if there had been a judicial determination that Aaron Fisher suffered serious bodily injury, or sexual abuse or exploitation. ***See*** 23 Pa.C.S. § 6303 ("founded report." A child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that child who is subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.").

In short, the OAG had no statutory authority to conduct a grand jury investigation based on the allegations by Aaron Fisher and the report was not founded. Aaron Fisher's statements at the time the grand jury investigation began did not give rise to the suggestion of crimes involving public corruption or organized crime. Therefore, the grand jury had no subject matter jurisdiction to investigate. Mr. Sandusky recognizes that, "If, during an investigation of ongoing criminal activity, a grand jury comes upon criminal activity which has been completed, it is not required to close its eyes thereto." ***McCauley***, ***supra*** at 945 *citing* ***Bradfield***, ***supra***.

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

Furthermore, in both ***Appeal of Stout*** and ***Bradfield***, ***supra***, the cases relied on by ***McCauley***, public corruption was at issue. Since ***McCauley*** did not consider an argument relative to § 4542, and only considered an argument relative to the distinct claim of the power of a grand jury and not jurisdiction, that case is not dispositive. Additionally, the Supreme Court in ***In re Twenty-Fourth Statewide Investigating Grand Jury***, ***supra***, did not consider § 4542; therefore, that case is not controlling.

As the learned Justice Nix opined in his concurring opinion in ***Appeal of Stout***, ***supra*** at 251 (emphasis added),

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

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

Instantly, the initial grand jury in this matter lacked subject matter jurisdiction to investigate the allegations made by Aaron Fisher. That improper grand jury investigation was subsequently used as the basis for the grand jury presentment by the 33rd Statewide Grand Jury.

Because the original grand jury lacked subject matter jurisdiction to investigate Aaron Fisher's allegations, the charges against Mr. Sandusky that arose from that improper investigation must be dismissed. The Commonwealth, in its previous arguments, **conflated** the distinction between the power to investigate and the question presented herein, which relates to jurisdiction. It proffers that the OAG has power to prosecute under the Commonwealth Attorney's Act and that it would be an absurd result to preclude the OAG from utilizing a statewide investigating grand jury to investigate criminal offenses it can prosecute.

Mr. Sandusky has never argued nor contended that the OAG does not have the power to prosecute criminal offenses. The critical inquiry herein is not the power or authority of the OAG. Rather, the salient issue is the jurisdiction of a statewide investigating grand jury. The reason that there is no language in the Investigating Grand Jury Act limiting investigations into specific criminal offenses is because public corruption and organized crime can and often do involve a host of differing criminal offenses. It would, indeed, have been absurd for the legislature to expressly limit the criminal offenses that could be investigated when looking into public corruption and organized crime.

However, it is beyond cavil that the history of investigating grand juries and intent of the Investigating Grand Jury Act was to provide a mechanism to investigate public corruption and organized crime. The Investigating Grand Jury Act does not provide jurisdiction for a grand jury to investigate any criminal offense; rather, it grants power to investigate such criminal offenses where there is appropriate jurisdiction. Jurisdiction only exists to investigate such crimes where the grand jury is inquiring into public corruption and/or organized crime. For example, if it was believed that an elected official was running a sex ring, an investigation into sex offenses would be appropriate as part of the investigation into public corruption and organized crime.

Pointedly, as discussed previously, the legislature did expressly limit the jurisdiction of a multi-county grand jury by providing unequivocally that such a body has "jurisdiction to inquire into organized crime or public corruption or both[.]" 42 Pa.C.S. § 4542. It further specified that a multi-county grand jury was only to be convened because it was necessary because of organized crime or public corruption or both and the investigation could not be adequately performed by a county investigating grand jury. Frankly, the Commonwealth has not even averred that the grand jury at issue was ever empaneled to investigate public corruption and organized crime.

There is a common phrase that "bad facts make bad law." Instantly, only by re-writing and ignoring the unequivocal language of the Investigating Grand Jury Act to justify upholding the conviction of Mr. Sandusky can one conclude that a multi-county grand jury has jurisdiction to inquire into offenses that are not related to public corruption or organized crime. To render such a holding would violate the separation of powers doctrine because the court would in fact be re-writing the statute by reading out the clear and unequivocal language provided by the legislature.[63]

Once impaneled, a statewide investigating grand jury has jurisdiction to inquire into public corruption and organized crime and in doing so can investigate any crime. However, if its inquiry is not into public corruption and organized crime, as was the case herein relative to alleged Victim 1, the grand jury acted without jurisdiction.

To properly understand why the Commonwealth's position leveled previously is grossly mistaken, a brief historical primer on grand juries is warranted. "The grand jury is an ancient mode

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[63] The Court, under the Commonwealth's interpretation, would be re-writing at least three separate portions of the Investigating Grand Jury Act: 42 Pa. C.S. § 4542; 42 Pa.C.S. § 4544(a), and 42 Pa.C.S. § 4544(d). Section 4544(d) would need to be re-written to provide that the impaneling of a multicounty investigating grand jury shall in no way diminish the responsibility and the authority of the district attorneys within their jurisdictions to investigate and prosecute any crime.

of procedure." ***Schultz, supra*** at 314-15 (citing ***Appeal of Hamilton***, 407 Pa. 366, 180 A.2d 782, 790 (1962) (Bell, C.J., dissenting)). "English grand juries 'originally decided matters in accordance with their personal knowledge or their knowledge of neighborhood affairs. Later, they summoned witnesses, investigated persons and conditions, made reports to the sovereign, and gradually became an indicting grand jury.'" ***Appeal of Hamilton, supra*** at 790." ***Id.***

"Broadly speaking, there are two kinds of grand juries-(1) an indicting grand jury and (2) an investigating grand jury." ***Appeal of Hamilton, supra*** at 790. Pennsylvania no longer regularly employs indicting grand juries. However, as will be more fully set-forth below, it has retained the investigating grand jury, also referred to in the past as a "special grand jury." Investigating grand juries were originally convened because of "the existence of widespread corruption, violations of law, or serious crimes, or systematic criminal depredations by public officers, or that a matter of great public importance which is inimical to public interest (riots, etc.) has occurred or is likely to occur[.]" ***Id.*** 791. In addition, they were used when such corruption and "the alleged crimes [could] not be readily discovered or coped with by the ordinary legal processes if promptly, vigorously and impartially pursued by the District Attorney." ***Id.***

In one of Pennsylvania's leading cases on the grand jury process, the Pennsylvania Supreme Court opined,

> The ordinary conception of the duties of a grand jury was to guard the right and liberties of the people; it was so understood at its inception. Because of the method by which its deliberations are conducted and the secrecy surrounding them, **it is a particularly suitable body to investigate misconduct of public officials and public evils**. These inquisitorial powers were recognized as early as 1791 in this commonwealth. Lacaze v. State, Add. 59, 71.

Petition of McNair, 187 A. 498, 503 (Pa. 1936) (emphasis added). The ***McNair*** Court continued, "In some states the power of investigation is virtually unlimited, and the grand jury, of its own

motion, may originate and conduct them. But in Pennsylvania the freedom of the grand jury is very much restricted." ***Id.***

The ***McNair*** Court added,

> A grand jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety (Lloyd & Carpenter's Case, supra; Commonwealth v. Crans, 2 Clark, 172, 192), health, demoralize the personal security of members of the public, or permit systematic criminal depredations by public officers.

Id. at 504. These principles are clearly codified in the current Investigating Grand Jury Act, which has its main focus with respect to multi-county investigating grand juries, on investigating public corruption and organized crime. In this respect, the ***McNair*** Court further posited, "The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them[.]" ***Id.*** This aligns with the Investigating Grand Jury Act as well.

Thus, it is long-standing law in Pennsylvania that a grand jury investigation "***cannot be aimed at individuals primarily***, as such nor at the commission of ordinary crimes, but should be of matters of criminal nature wherein public officers or the interests of the general public are involved." ***McNair***, ***supra*** at 504 (internal citations omitted) (emphasis added). It is evident that the current Investigating Grand Jury Act, as it relates to multi-county grand jury investigations, was intended to codify the common law Pennsylvania approach to grand jury investigations, which authorized investigations where "there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety, or health, or other criminal acts affecting these functions or of a widespread nature, jeopardizing or demoralizing public security or health[.]" ***Id.***

Pointedly, as cogently discussed by Chief Justice Bell in his dissenting opinion in ***Appeal of Hamilton***, ***supra***, grand juries "exist first, for the protection of society, secondly, for the indictment of alleged criminals, thirdly, for the investigation of crimes and conditions which have

created or are likely to create public harm, and fourthly, to protect from criminal charges innocent persons who have been erroneously or falsely accused of crime." ***Appeal of Hamilton, supra*** at 790.

The investigating grand jury and its power to subpoena witnesses and documents and "conduct deliberations in secret was what made it a particularly appropriate and (often) vitally necessary body or instrument to protect the public from criminal misconduct of public officials and from widespread evils." ***Id.*** at 791. Indeed, "While individuals are always involved, the *primary objective* of a special grand jury proceeding is to ferret out and discover acts which are or are likely to be harmful to the public, rather than the ordinary prosecution of an individual criminal." ***Id.*** at 792. (italics in original).

As one court eloquently reasoned, "There is reason in the law for excluding from the searching and piercing eye of a grand jury, offenses alleged to have been committed by known individuals. It lies in the fundamentals of our democracy, in the establishment of civil rights with which every American is endowed." ***In re Grand Jury Investigation of Registration Commn.***, 22 Pa. D. & C.2d 285, 292 (Pa. Quar. Sess. 1960).

With this background in mind, it becomes readily apparent that Mr. Sandusky's position is supported not only by the plain language of the Investigating Grand Jury Act, but all of the historical evidence that provided the background for its adoption. In discussing the impaneling of a multi-county investigating grand jury, the legislature further provided,

> 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). It added that such investigations would not "diminish the responsibility and the authority of the district attorneys within their jurisdictions to investigate and prosecute organized crime or public corruption or both." 42 Pa.C.S. § 4544(d). Hence, it is evident that public corruption and organized crime were the focus of multi-county investigating grand juries, which is entirely consistent with the historical usage of investigating grand juries.

The Commonwealth's position that it strains logic to conclude the legislature would provide the OAG with the power to investigate any criminal offense and the power to use an investigating grand jury, but limit the use of the latter to investigating public corruption and organized crime demonstrates a fundamental misapprehension and misreading of the laws upon which it relies. The OAG could have investigated Mr. Sandusky utilizing a host of resources that do not involve a grand jury investigation. The OAG routinely investigates offenses involving alleged child predators without utilizing a grand jury.

Indeed, the OAG has an entire unit devoted to undercover work that is intended to ferret out individuals using internet chat rooms to attempt to meet with underage children for sexual purposes. Similarly, the OAG has units devoted to drug investigations. The fact that the OAG can investigate crimes in Pennsylvania does not mean that a statewide investigating grand jury has jurisdiction to investigate crimes un-tethered from public corruption or organized crime.

The OAG writes out of the statute, defining a multi-county investigating grand jury, the language "having jurisdiction to inquire into organized crime or public corruption or both" 42 Pa.C.S. § 4542. It then re-writes the provision to read, "having jurisdiction to inquire into and investigate **any criminal activity** wherein more than one county is named in the order convening said investigating grand jury." It does so by noting that the term "multicounty investigating grand jury" appears in Section 4544, which applies to impaneling a grand jury. Of course, it overlooks

that the convening of a multi-county investigating grand jury is "because of organized crime or public corruption[.]" 42 Pa.C.S. § 4544(a). Furthermore, it disregards that this language would be unnecessary under its own interpretation whereby an investigating grand jury would have jurisdiction to investigate offenses not related to an inquiry into public corruption and organized crime.

The Commonwealth argues that had the legislature intended to limit the type of case it could investigate it would have so expressly provided. Yet, it did do just that by defining the jurisdiction of a multi-county investigating grand jury. Moreover, the Commonwealth fails to grasp the distinction between jurisdiction and power and ignores that public corruption and organized crime can involve sex offenses, drug offenses, gambling, murder, theft, robbery, kidnapping, and a host of other crimes. Since public corruption and organized crime encompass a broad variety of criminal offenses it would have been nonsensical to limit the type of case a grand jury could investigate in the manner described by the Commonwealth.

The OAG is simply wrong when it opines that the singular purpose of a grand jury investigation "is to provide resources to properly and adequately investigate crimes in the Commonwealth of Pennsylvania." The primary purpose of the Investigating Grand Jury Act was to create mechanism to investigate public corruption and organized crime. Frankly, one cannot read the Investigating Grand Jury Act or the history of investigating grand juries without it becoming evident that the Act was designed for that express purpose.

Indeed, virtually every case resulting in charges being filed that was the result of a multi-county grand jury investigation involved some type of public corruption or organized crime. While the Commonwealth cited a solitary case in which a multi-county grand jury appeared to have

investigated a crime unaffiliated with public corruption or organized crime that case simply did not engage in any jurisdictional analysis.

Mr. Sandusky's interpretation of the relevant statutory provisions gives effect to all of the statute without requiring provisions to be rendered superfluous or written out of the law. In contrast, the Commonwealth's interpretation is inconsistent with the entire history of Pennsylvania law on investigating grand juries, ignores the plain language of the statute, renders portions of the law superfluous, and fails to give effect to all of the statute's provisions.

30. Trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law.[64]

Proposed Findings of Fact:

476. Aaron Fisher's initial disclosure did not involve claims of sexual abuse, N.T., 6/12/12, at 72, nor was Mr. Sandusky a school employee, although he volunteered as a coach.

477. Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky.

478. Aaron Fisher did not disclose that sexual intercourse of any type occurred. N.T., 6/12/12, at 72; ***Id.*** at 153-159. (Undisputed).

479. Ms. Dershem and Clinton County CYS solicitor, Michael Angelelli, interviewed Mr. Sandusky. N.T., 6/12/12, at 133, 164-174 (Undisputed).

480. Ms. Dershem informed Mr. Sandusky on January 2, 2009, that he was the subject of a report of suspected child abuse. ***See*** N.T., 6/12/12, at 179 (Undisputed).

481. He acknowledged cracking Aaron Fisher's back, as well as hugging him and kissing him on the forehead, but strenuously denied that anything sexual had ever occurred.

482. Ms. Dershem notified Childline. N.T., 6/12/12, at 144. (Undisputed).

483. Law enforcement is to work with the investigative agency, this is to be done as part of the investigative team required by the CPSL. This did not occur.

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[64] Mr. Sandusky raised this issue in his Second Amended PCRA Petition at Issue 5. Second Amended PCRA Petition, 3/7/16, at 5-9, 25, 44-48; ***see also*** Brief on Non-Evidentiary Hearing Issues, 7/14/16, at 7 (Issue 3), 26-30.

484. The Clinton County District Attorney transferred the case to the Centre County District Attorney. (Undisputed)

485. The Center County District Attorney had a conflict of interest and referred the case to the Office of Attorney General ("OAG"). (Undisputed)

486. The OAG assumed jurisdiction over the investigation on March 18, 2009. (Undisputed).

487. The Commonwealth did not seek a presentment and charge Mr. Sandusky based solely on Aaron Fisher's allegations. (Undisputed).

Proposed Conclusions of Law:

400. A school administrator, and law enforcement, are required reporters. 23 Pa.C.S. § 6311.

401. An oral report is to be made to the Department of Public Welfare and can be made to a county CYS agency. 23 Pa.C.S. § 6313.

402. Under 23 Pa.C.S. § 6334, the DPW is to transmit notice of the complaint to the appropriate county agency.

403. Where the county agency, in this case, Clinton County CYS, has a conflict, the matter is to be investigated by the regional DPW office, not an investigating grand jury. 55 Pa. Code § 3490.81.

404. The CPSL required an administrator to report to the Department of Public Welfare. 23 Pa.C.S. § 6302.

405. The investigating agency is to determine if a report is founded or indicated. ***See*** 23 Pa.C.S. § 6338; ***see also*** 23 Pa.C.S. § 6343(a) (noting that the county agency is to investigate the report of abuse).

406. Law enforcement is to report the allegation to the administrative agency in the county charged with conducting an investigation, *i.e.*, the regional DPW office since the Second Mile was an agent of the Clinton County CYS. 55 Pa. Code § 3490.81.

407. Counsel could not have any reasonable basis for not seeking to quash the presentment, where the Commonwealth failed to abide by the CPSL.

408. Mr. Sandusky suffered actual prejudice as the outcome of his trial would have been different had the Commonwealth followed the CPSL and not initiated a grand jury investigation.

Discussion:

As detailed in the Moulton Report, Clinton County failed to follow the CPSL by failing to have in place an investigative team. ***See also*** 23 Pa.C.S. § 6365(c). The CPSL requires mandated reporters to report to the Department of Public Welfare. 23 Pa.C.S. § 6302. The investigating county agency is to determine if a report is founded or indicated. ***See*** 23 Pa.C.S. § 6338; ***see also*** 23 Pa.C.S. § 6343(a) (noting that the county agency is to investigate the report of abuse).

In the event that a school employee was involved and there was a report of sexual abuse or exploitation, the law required the principal to notify law enforcement and the appropriate district attorney. 23 Pa.C.S. § 6353. Here, Aaron Fisher's initial disclosure did not involve claims of sexual abuse nor was Mr. Sandusky a school employee, although he volunteered as a coach.

Law enforcement is to report the allegation to the administrative agency in the county charged with conducting an investigation, *i.e.*, the regional DPW office since the Second Mile was an agent of the Clinton County CYS. 55 Pa. Code § 3490.81 ("(When the suspected abuse has been committed by an agent of the county agency, **the regional staff** shall investigate the report under section 6362 of the CPSL (relating to responsibilities of county agency for child protective services) and this chapter. ... (c) **Regional staff** shall conduct the investigation regardless of the relationship of the agent to the subject child." (emphases added).

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

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

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

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

Police then interviewed Aaron Fisher in the presence of Ms. Dershem. It is known that Aaron Fisher denied that Mr. Sandusky touched Aaron Fisher's genitalia and Aaron Fisher denied that oral sex occurred. As of December 12, 2008, Aaron Fisher had not made any criminal

allegations against Mr. Sandusky to law enforcement. Critically important, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire.

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

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

The OAG assumed jurisdiction over the investigation on March 18, 2009. Instead of proceeding under the ordinary process of filing a criminal information, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009. In doing so, however, the OAG submitted the case on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. Of course, Clinton County CYS was not the proper

investigating authority due to a conflict, and a founded report would only exist if there had been a judicial determination that Aaron Fisher suffered serious bodily injury, or sexual abuse or exploitation. ***See*** 23 Pa.C.S. § 6303 ("founded report." A child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that child who is subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.").

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

Counsel could not have any reasonable basis for not seeking to quash the presentment, where the Commonwealth failed to abide by the CPSL. Frankly, the Commonwealth cannot dispute that the CPSL was violated. Moreover, the very fact that the 1998 investigation had not been properly expunged was itself a violation of the CPSL, and its disclosure was criminal, ***see*** 23 Pa.C.S. § 6349, and prejudiced Mr. Sandusky. Further, it is apparent that Mr. Sandusky suffered actual prejudice as the outcome of his trial would have been different had the Commonwealth followed the CPSL and not initiated a grand jury investigation. This is evident from the fact that the Commonwealth refused to seek a presentment and charge Mr. Sandusky based solely on Aaron

Fisher's allegations. Only after the release of information from the grand jury investigation and the unlawful use of the 1998 investigation did additional accusers come forward. Hence, rather than face one accuser, Mr. Sandusky faced eight.

31. Based on all of the aforementioned claims, the cumulative errors in this matter were so significant that they deprived Mr. Sandusky of a fair trial in violation of his due process rights and his state and federal constitutional right to a fair trial.

Proposed Findings of Fact:

488. The prior Findings of Fact are hereby incorporated by reference as if fully set forth herein.

Proposed Conclusions of Law:

409. The general rule is that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually," ***Commonwealth v. Washington***, 927 A.2d 586, 617 (Pa. 2007) (internal quotations and citations omitted).

410. However, the Pennsylvania Supreme Court has recognized that "if multiple instances of deficient performance are found, the assessment of prejudice may be premised upon cumulation." ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009).

411. In such circumstances, the court considers "each specific lapse as pertaining to a single, overarching ineffectiveness claim based on trial counsel's failure to adequately investigate and prepare for trial." ***Id.***

412. Thus, so long as the petitioner's claims have arguable merit, the PCRA court must consider the issues together in determining actual prejudice. ***See id.***

413. Mr. Amendola's failure to adequately advise and/or properly prepare Mr. Sandusky for the Costas interview is an issue of arguable merit.

414. The claim that trial counsel were ineffective because they did not seek a mistrial after the prosecutor improperly made multiple comments based on Mr. Sandusky's silence is one of arguable merit.

415. Mr. Sandusky's positions that trial counsel were ineffective for advising him not to testify based on both factually and legally erroneous advice that Matt Sandusky would be called in rebuttal is a claim of arguable merit.

416. The claim that counsel were ineffective in not making a motion to preclude Matt Sandusky from testifying as a rebuttal witness or Mr. Sandusky being asked questions beyond the

scope of direct examination regarding Matt Sandusky and failing to advise Mr. Sandusky regarding any strategy that they would pursue if Mr. Sandusky was permitted to testify and not presenting Mr. Sandusky as a witness is an issue of arguable merit.

417. The issue that Mr. Amendola was ineffective for promising the jury that Mr. Sandusky would testify at trial and not calling him is one of arguable merit.

418. Mr. Amendola was ineffective for neglecting to adequately review discovery and erroneously stating that nothing in discovery would have changed his trial presentation and the issue is clearly one of arguable merit.

419. Trial counsel were ineffective in eliciting inculpatory evidence against Mr. Sandusky and opening the door for the Commonwealth to introduce additional rebuttal evidence by presenting Dr. Elliott Atkins and this is a claim of arguable merit.

420. That the Commonwealth violated ***Brady***, in failing to turn over material impeachment evidence and, in the alternative, trial counsel was ineffective in not raising the ***Brady*** violation is a claim of arguable merit.

421. Mr. Sandusky's claim that trial counsel were ineffective in failing to present expert testimony that called into question the theory of repressed memory and demonstrated the likelihood of false memories is an issue of arguable merit.

422. Mr. Sandusky's position that after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky allegations and recollection of the crimes alleged were based on receiving therapy is one of arguable merit.

423. Trial counsel's failure to file a motion *in limine* and seek a hearing relative to suggestive and improper police questioning is an issue of arguable merit.

424. The claim that trial counsel were ineffective for failing to introduce a tape-recorded statement by James Calhoun in which he contradicted Mr. Petrosky's testimony and Mr. Calhoun denied observing Mr. Sandusky performing any sex acts with a boy in a shower is a claim of arguable merit.

425. Mr. Sandusky's position that 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 corroborating evidence that Mr. Sandusky sexually abused the alleged victim is an issue of arguable merit.

426. Trial counsel and direct appellate counsel were ineffective when they failed to appeal Mr. Sandusky's convictions relating to Victim 8 as lacking sufficient evidence and the issue is a claim of arguable merit.

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

428. Mr. Sandusky's claim that trial counsel were ineffective in failing to present the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier is an issue of arguable merit.

429. Mr. Amendola's waiver of Mr. Sandusky's preliminary hearing and failing to use that proceeding to cross-examine the witnesses who had given numerous prior inconsistent statements is one of arguable merit?

430. Trial counsel were ineffective in failing to use Mr. Myers prior statement to police that Mr. Sandusky did not molest him in the 2001 shower incident to impeach Mr. McQueary as well as those and other exculpatory statements as substantive evidence and this is an issue of arguable merit.

431. The claim that trial counsel were ineffective in failing to interview the victims, other than Allan Myers, as well as Mr. McQueary, Mr. Petrosky, and Mr. Calhoun is a claim of arguable merit.

432. Trial counsel's failure to object to the trial court's erroneous guilt instruction as part of its character evidence instruction is a claim of arguable merit.

433. That Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky, which was used by the prosecution during its closing summation, is an issue of arguable merit.

434. That trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance was warranted is a claim of arguable merit.

435. Trial counsel was ineffective for not requesting a change of venue or venire or seeking a cooling off period prior to the start of trial and the claim is an issue of arguable merit.

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

437. Trial counsel were ineffective for failing to object to improper opinion testimony by an unqualified expert and the claim is an issue of arguable merit.

438. The claim that trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky is an issue of arguable merit.

439. The issue that trial counsel were ineffective in failing to object to prosecutorial misconduct that occurred during the closing statement when the prosecutor stated that the 2001 shower victim was "known to God, but not to us" is an issue of arguable merit.

440. That trial counsel were ineffective for failing to file a motion to quash the grand jury presentment and the charges arising therefrom relative to victims 2 through 10 based on governmental misconduct in tainting the grand jury process is a claim of arguable merit.

32. That trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law is an issue of arguable merit.

441. In short, each of Mr. Sandusky's PCRA claims set forth herein have arguable merit.

442. When considered in their totality, it is evident that Mr. Sandusky did not receive a fair trial due to the ineffective assistance of counsel.

443. Mr. Sandusky is entitled to a new trial.

Discussion:

Trial counsel failed to adequately consult with Mr. Sandusky regarding the interview with Bob Costas, resulting in harmful evidence being utilized by the Commonwealth at trial. The Commonwealth extensively commented on the interview and argued that Mr. Sandusky "didn't provide [the jury] with something that could have been enormously helpful to us, could have solved many problems today." N.T., 6/21/12, at 145-46. The claim that Mr. Rominger was ineffective in not seeking a mistrial when the prosecution commented on Mr. Sandusky not testifying, but instead having provided a media interview is of arguable merit. Concomitantly, the position that counsel was ineffective in telling the jury that Mr. Sandusky would testify and then inadequately advising him not to testify based on factually erroneous information, is one of arguable merit. Counsel were also ineffective in not calling Mr. Sandusky to the stand.

Counsel also did not develop a rational and unified defense strategy; waived Mr. Sandusky's preliminary hearing; failed to interview key witnesses or investigate whether the

alleged victims' private attorney's induced the witnesses to alter their stories for financial reasons; and did not sufficiently review the Commonwealth's discovery and incorrectly told the jury during opening statements that the evidence against Mr. Sandusky was "overwhelming," N.T., 6/11/12, Vol. 2, at 3. Furthermore, according to Mr. Rominger, Mr. Amendola's lack of preparation ran so deep that he asked Attorney Rominger to cross-examine Michael McQueary, the Commonwealth's key witness, with only approximately thirty minutes' notice.

Trial counsel also had retained Lindsay Kowalski as a case analyst/consultant to assist with trial. For reasons unknown to Ms. Kowalski, trial counsel failed to utilize any of the graphic aids Ms. Kowalski created. Ms. Kowalski was unaware of any cohesive trial strategy, despite having worked with trial counsel up to and during the trial.

Trial counsel elected not to present a tape recorded statement taken by police in which Mr. Calhoun contradicted Mr. Petrosky's hearsay testimony about Mr. Calhoun observing Mr. Sandusky performing any sex acts with a boy in a shower. Further, the position that appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony was inadmissible as an excited utterance because there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim is one of arguable merit. ***See Barnes, supra.*** Similarly, the claim that direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to admission of hearsay statements from Mr. Calhoun via Mr. Petrosky is an issue with arguable merit.

The argument that trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky is an issue of arguable merit. Counsel also failed in his duty to represent his client effectively by not presenting evidence that Allan Myers refuted the testimony of Michael

McQueary and not objecting to the factually erroneous statement by the prosecutor during his summation that only God knew the identity of the McQueary shower child. These issues have arguable merit.

In addition to these errors, counsel did not fully discuss the substance and potential risks of Elliot Atkins's testimony with Mr. Sandusky prior to Atkins's testimony at trial or move for a mistrial when Trooper Scott Rossman admitted to violating the witness sequestration order by speaking with another trooper. Counsels' failure to object to the court's erroneous guilt instruction on character evidence is of arguable merit. Counsel also did not request that the trial court declare witnesses such as Scott Rossman, Joseph Leiter, Benjamin Andreozzi, or Dawn Daniels, hostile or adverse witnesses, thus enabling trial counsel to ask probing leading questions; or object to the prosecution's improper leading of its witness, Michael McQueary. Counsel also should have objected to the improper expert testimony of an unqualified expert in Jessica Dershem and presented the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier.

It is impossible to precisely measure the prejudice Mr. Sandusky suffered as a result of his counsel's ineffective representation and the serial instances of a lack of strategic decision making. Trial counsels' deficient performance, combined with allegations of sexual abuse, and pervasive negative media attention, made this case a perfect storm. Here, the CPSL law was not properly followed and the grand jury process was improperly invoked. Serial leaks of grand jury information and an inaccurate original presentment led to highly prejudicial and inflammatory information being revealed to the public. Journalists were permitted to be present for jury *voir dire*, chilling any answers a proposed juror might give regarding whether he or she could be fair in the case.

Trial counsel did not explore the actual knowledge the prospective and selected jurors had of the case based on the prejudicial pre-trial publicity even where every juror was asked whether, aside from all of the internet, radio, television, and newspaper coverage, they knew anything else about the case. One victim was never identified and has never come forward and the hearsay testimony leading to Mr. Sandusky's conviction relative to that phantom victim was contradicted by the eyewitness. That latter evidence, however, was not presented. The alleged shower victim observed by Mr. McQueary was known, yet the prosecutor referred to him as only being known by God. Police conducted suggestive interviews and utilized improper questioning techniques and were caught on tape doing so.

Numerous accusers underwent therapy before they made disclosures regarding sexual abuse and changed their recollection of sexual abuse after therapy. The Commonwealth did not turn over material impeachment evidence and several accusers have made statements after trial that therapy helped them recall the alleged abuse. Trial counsel, despite testimony suggesting that the accusers were undergoing therapy and that this treatment is what altered their stories, failed to present any expert testimony on false memories and the problems inherent with repressed memory therapy. Several of the accusers were seeing the same therapist and additional accusers shared an attorney. Considering each of these issues together, Mr. Sandusky must be awarded a new trial no matter the public perception.

CONCLUSION

The PCRA court in this matter rightly noted that the PCRA process is about whether Mr. Sandusky received a fair trial. N.T., 5/11/17, at 111. In its opening introduction, the Court highlighted the infamous Scottsboro boys case where the vitriol against the defendants was so extreme that no attorney would handle the case and that the attorney appointed required an armed

guard. The public was, of course, outraged in those matters. Here, there is little doubt that the public would be outraged at Mr. Sandusky receiving a new trial. Yet, that is exactly what the law requires. One does not need to believe that Mr. Sandusky is actually innocent, although he is, to find that he did not receive a fair trial.

The Commonwealth cannot dispute that the trial court erred in failing to provide a prompt complaint instruction and in giving its character evidence instruction. It cannot dispute that Mr. Sandusky, on the advice of counsel, gave a nationally televised interview with Bob Costas without any preparation. This after NBC expressed its displeasure with Mr. Amendola for having done an interview with CNN when he promised to provide NBC with a first exclusive interview. This interview became a keystone of the prosecutions' case, and an erroneous version of that interview was even played for the jury. Mr. McGettigan focused heavily on this interview during his closing summation and improperly complained to the jury that Mr. Sandusky had not ever provided the jury with important information—an obvious allusion to Mr. Sandusky's decision not to testify. In this latter respect, the Commonwealth cannot dispute that Mr. Amendola erroneously told his client that Matt Sandusky would be called in rebuttal, which was the very basis for Mr. Sandusky's decision not to testify. The mere fact that Mr. Sandusky would have testified but for this erroneous advice warrants a new trial.

Moreover, Mr. McGettigan routinely failed to disclose to trial counsel that the accusers' stories had changed yet again, after their grand jury testimony, in discussions with him. He also did not disclose that Ronald Petrosky had changed the location of the alleged Victim 8 incident. Both Mr. McGettigan and Mr. Fina argued that therapy and counseling were not at issue where several accusers' allegations were not made until they underwent therapy, several accusers claimed to have blocked out the memories, and even indicated that the reason their allegations changed

was that they were remembering more because of therapy and counseling. The Commonwealth vigorously opposed disclosure of therapy notes and continues to do so, while attempting to argue that Mr. Sandusky cannot show that these individuals underwent various types of recovered memory therapy or that the accusers' therapists engaged in highly suggestive questioning.

Trial counsel admitted at trial that he was not prepared and, following trial, has continued to maintain that he could not adequately prepare. Mr. Amendola used the analogy of Custer at Little Bighorn. His exasperation at not ever receiving a continuance and the fact that this case went to trial at an unheard of warp speed was still palpable during the PCRA proceedings. However, counsel did not file a collateral appeal after acknowledging he could not ethically represent Mr. Sandusky adequately nor did he seek a cooling-off period for the trial. In this latter respect, counsel even discussed the law regarding a cooling-off period in a pre-trial filing, but claimed that he did not seek a continuance on that basis because the trial court had denied all of his other continuance requests.

It is also apparent that trial counsel did not adequately review discovery. Counsel failed to play a tape-recorded statement from James Calhoun that directly contradicted the hearsay testimony of Ronald Petrosky. Even the trial court recognized that the evidence provided by Mr. Petrosky was weak. Both trial attorneys admitted to not ever reviewing Matt Sandusky's grand jury testimony, which was disclosed in discovery.

Despite a warning by the trial court, and a client who did not agree with presenting Dr. Atkins, trial counsel opened the door to expert testimony that Mr. Sandusky was a pedophile. This was done without advising his client that by presenting Dr. Atkins it would allow such expert testimony. It is difficult to imagine a more unreasonable decision that a trial attorney could make; of course, in this matter, counsel also advised his client to do a national television interview with

no preparation, waive his preliminary hearing, failed to move for a mistrial based on comments on his client's silence, failed to present exculpatory evidence from James Calhoun, and did not object to a patently erroneous jury instruction. It is evident that Mr. Amendola had a pattern of making unreasonable decisions.

Further, only by setting aside the plain language, legislative intent, and history of the Grand Jury Act, can one avoid concluding that the grand jury lacked jurisdiction to investigate the allegations by Aaron Fisher of alleged sexual abuse. What is more, the Commonwealth's continued claim that Mr. Sandusky cannot establish a grand jury leak is inaccurate. Setting aside that both the Commonwealth and the most recent grand jury supervising judge obstructed attempts to complete an investigation into such leaks, Mr. Sandusky has established that Sara Ganim provided the name and phone number of an OAG agent to Deb McCord, the mother of Z.K immediately before publishing her article. This is evidence that an OAG agent was providing Ms. Ganim with the information contained in her article. Despite police and Deputy Attorney General Eshbach being aware of this fact, they never even attempted to ascertain the identity of that agent. Why? Mr. Amendola's failure to explore this issue also cannot be explained.

In closing, Mr. Sandusky notes that, at one point during Mr. Amendola's opening statement, Mr. Amendola asserted that his task was akin to David verse Goliath. The Commonwealth, the government, with all its might and power represented Goliath. Those not in the legal field, and even those who are, might still consider it a legal miracle if Mr. Sandusky were to be afforded a new trial. Yet, in reality David was not the real underdog.https://www.ted.com/talks/malcolm_gladwell_the_unheard_story_of_david_and_goliath/transcript?language=en.; Malcolm Gladwell, David and Goliath: Underdogs, Misfits and the Art of Battling Giants (2013). Similarly, when viewed objectively, without considering the name

of the defendant and attendant publicity this case generated, the legal positions advanced herein by Mr. Sandusky are exceedingly strong, they are the better and more sound legal arguments—they would not establish bad law or set bad precedent, and should give Mr. Sandusky the decided advantage over the leviathan, Goliath, the government.

Much like the investment banking institutions during the financial crisis of 2008 that were "too big to fail", there is a perception amongst the public that no court would reverse the Sandusky conviction, regardless of how unjust or legally unsound. The belief is that there has simply been too much water under the bridge; too much public outcry; too much money paid out by Penn State in this case to right an obvious wrong. But this perception of the mob ignores the substantial prophylactic effect awarding Mr. Sandusky a new trial would have on the criminal justice system in Pennsylvania.

Award Mr. Sandusky a new trial because the prosecution commented on his silence and failed to turn over ***Brady*** material impeachment evidence, and it would substantially eliminate such problems. What prosecutor would risk a conviction being overturned knowing that such antics resulted in a new trial in the Sandusky case? Dismiss charges or grant Mr. Sandusky a new trial because the Commonwealth leaked information during the grand jury process, and such leaks would almost certainly cease to exist. Grant a new trial because counsel allowed his client to undertake a high profile interview without any preparation and no attorney would ever consider subjecting his client to such an interview without adequate preparation. The criminal justice system in America only works properly when you have diligent and effective trial counsel, ethical prosecutors concerned more for truth than convictions, and even-handed judges who apply the law fairly and without prejudice. If only one of these things breaks down, the judicial system fails.

Mr. Sandusky believes that only by twisting oneself into a Gordian knot can one conclude that he received a fair trial and was effectively represented. Does Mr. Sandusky believe in legal miracles? He does not need too, he has the law on his side and what the PCRA court noted that Ned Pepper needed, "a good judge[,]" N.T., 3/24/17, at 5, to apply it. For reasons outlined *supra*, Mr. Sandusky is entitled to a new trial and/or discharge.

Respectfully submitted:

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
	:	
v.	:	
	:	
GERALD A. SANDUSKY,	:	
	:	HONORABLE JUDGE
PETITIONER.	:	JOHN H. FORADORA, P.J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of July, 2017 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

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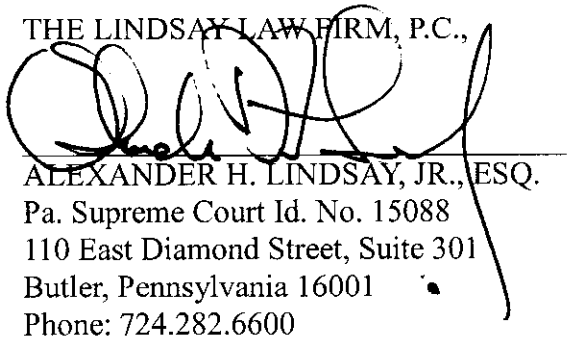
Respectfully submitted,

THE LINDSAY LAW FIRM, P.C.,



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