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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
GERALD A. SANDUSKY,	:	
Defendant.	:	

OPINION ON DEFENDANT'S PCRA PETITION

Introduction

On June 22, 2012, a jury found the defendant, Gerald A. Sandusky ("Sandusky"), guilty of sexually violating ten juvenile male victims over a period of several years. The trial judge subsequently imposed an aggregate sentence of 30 – 60 years in prison and the defendant filed an unsuccessful appeal to the Superior Court. His petition for allowance of appeal was then denied by the Pennsylvania Supreme Court. That concluded his direct appeal.[1]

Sandusky returned to the trial court to collaterally attack his conviction in a timely Post Conviction Relief Act ("PCRA") petition filed April 2, 2015.[2] An Amended Petition and Second Amended Petition followed. The latter, which incorporated the allegations asserted in the first two petitions, increased the number of issues alleged from fifteen to thirty-four, most of which challenge the effectiveness of trial and appellate counsels' advocacy. PCRA counsel later advised the Court in their post-hearing Brief and Proposed Findings that their client was no longer pursuing three of his claims.

At a hearing spanning six separate dates between August 12, 2016 and May 11, 2017, both of Sandusky's trial attorneys testified, as did the defendant himself and numerous other witnesses. Documentary evidence and a variety of briefs completed the PCRA record.

Legal Standard

It is an inescapable fact that a post-trial PCRA petition comes from a defendant whom a finder of fact previously determined was guilty beyond a reasonable doubt. At an earlier point in

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[1] Once our Supreme Court denied his petition on April 2, 2014, Sandusky had 90 days to ask the United States Supreme Court to review his case but elected not to do so. Accordingly, the judgment of sentence became final on July 1, 2014.

[2] The legislature set forth the general rule in 42 Pa. C.S.A. § 9545, that a defendant must file any and all PCRA claims he may have within one year of the date his judgment of sentence became final.

time, therefore, the Commonwealth satisfied the most stringent burden of proof our law demands. In this case it was a jury weighing the evidence and delivering the verdict, which means the Commonwealth convinced twelve unrelated individuals with no apparent biases against the defendant that he sexually assaulted the ten boys on whose behalf he was charged. Those twelve people watched and listened to a host of witnesses, including most of the victims. Unlike the current cast of players, who have only their transcribed words to consider, the jury had the chance to evaluate each young man's testimony *and* demeanor to assess not only the individual stories, but whether the way each victim told his story meshed with the story itself. That included the opportunity to directly observe how each one responded to cross-examination. With that advantage, they returned on June 22, 2012 to effectively say, "Although these young men may not have perfect recall, we watched them testify and believe beyond a reasonable doubt that they were sharing real memories of things the defendant actually did to them."

After initially challenging the weight and sufficiency of the evidence in his post-trial motions, Sandusky did not pursue either argument before the trial court or on direct appeal, which is where a defendant may directly contest the legitimacy and/or legality of what occurred in the trial court from the time he was arrested through the date he was sentenced. He may also challenge in his direct appeal any of the trial court's adverse rulings on the premise that it or they may have impermissibly contributed to the jury's verdict or his sentence. In essence, then, an appeal is a request that a tribunal with greater authority review the actions of a tribunal with lesser authority to determine whether the law was properly applied.

With few exceptions, though, a defendant may not use the PCRA process to directly challenge the trial court's actions or to contest a ruling made by an appellate court, over which the trial court has no authority. Structurally, then, the filing of a PCRA petition does not constitute an appeal. It is, instead, an avenue by which a convicted defendant may return to the trial court post-appeal to collaterally attack his conviction or sentence. In that regard, the Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541 *et seq.*, authorizes him to allege that his conviction or sentence resulted from one of more of the following: 1.) A violation of the Pennsylvania or United States Constitution that, under the circumstances, so undermined the truth-determining process that his conviction is not reliable; 2.) ineffective assistance of counsel that similarly undermined the truth-determining process; 3.) a plea of guilty unlawfully induced; 4.) obstruction by government officials of the defendant's right to appeal; 5.) the existence of

exculpatory evidence that was not available at the time of trial but would have produced an acquittal had it been available and presented to the finder of fact; 6.) the imposition of a sentence that exceeded the lawful maximum; or 7.) prosecution before a tribunal that did not have jurisdiction, i.e., one that lacked legal authority to preside over the matter at issue. § 9543. Whatever the nature of his claim, though, the defendant is only entitled to relief if he can plead and prove his allegations by a preponderance of the evidence. *Id.* The Commonwealth, having previously proven the defendant's guilty beyond a reasonable doubt, generally does not have to prove anything at the PCRA stage.

Among the seven categories into which a claim may fit, ineffective assistance of counsel is the most commonly utilized and may encompass a wide variety of actions counsel did or did not take throughout his or her representation of the defendant. To prevail on any given claim of ineffective assistance of counsel, a defendant must prove three things: first, that the underlying issue has arguable merit;[3] second, that counsel did not act or fail to act in furtherance of a reasonable strategy; and third, that he was prejudiced by counsel's actions. *Commonwealth v. Fletcher*, 986 A.2d 759, 772 (Pa. 2009). To satisfy this last requirement, the defendant must demonstrate a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.* That means, says *Commonwealth v. King*, 57 A.3d 608 (Pa. 2012), that the nature or severity of the error was such that it undermined confidence in the actual outcome. *Id.* at 613. Where counsel's actions or omissions were informed by his or her strategy, moreover, a defendant cannot sustain his claim unless he can prove that an alternate course of action offered a substantially greater chance of success than the one chosen. *Fletcher, supra.*: *Commonwealth v. Cox*, 863 A.2d 536, 543 (Pa. 2004).

The bulk of Sandusky's claims pertain directly to counsels' advocacy decisions, including steps they took or failed to take in preparation for trial. From the grand jury process through the judge's final charge, he contends that counsel's errors were so numerous and egregious as to warrant a new trial.[4] Numerosity, however, does not create a presumption of merit; each claim must stand or fail independently. Accordingly, a claim otherwise meritless

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[3] Case law does not define the phrase "arguable merit." As a working definition, however, one may say that an issue has arguable merit when there exists a real possibility that a court will agree with the defendant's position if he brings the issue to its attention. Where a defendant fails to prove the facts necessary to sustain his claim or the law does not afford a remedy even if he proves the facts he alleges, though, his issue is said to be without merit.

[4] Although Sandusky had two trial attorneys, Attorney Amendola was lead counsel and, in relation to Karl Rominger, the final decision-maker. For ease of reference, therefore, the Court will speak of trial counsel—Amendola—in the singular except where Mr. Rominger's actions are independently relevant.

does not attain merit simply because it is surrounded by myriad other claims. *Commonwealth v. Williams*, 896 A.2d 523, 547-48 (Pa. 2006). Similarly, if a given claim possesses merit but fails for want of prejudice, the cumulative effect of such non-prejudicial errors will not afford a defendant relief "unless he proves how the particular cumulation requires a different analysis." *Commonwealth v. Hutchinson*, 25 A.3d 277, 318 (Pa. 2011). Guided by these principles, the Court will now address each of Sandusky's claims.

Facts and Discussion—Pre-Trial Claims

Investigating Grand Jury—Jurisdiction (Claim 5):

Challenging the path this prosecution took from its inception, Sandusky contends that the Commonwealth violated his due process rights by submitting the allegations to an investigative grand jury on the grounds that there had been a "founded report" of sexual abuse without following the procedures established in the Child Protective Services Law ("CPSL"), 23 Pa. C.S.A. §§ 6301 *et seq.* He also argues that the grand jury had no jurisdiction over the matter since it did not pertain to organized crime or public corruption involving more than one county. Attorney Joseph Amendola ("Amendola"), he adds, was ineffective for failing to move to quash the presentment that issued pursuant to this defective process.

Because the underlying issue is without merit, this claim fails in its entirety.

A caseworker for Clinton County Children & Youth ("CYS"), Jessica Dershem ("Dershem") became aware of Aaron Fisher ("Fisher") after his high school principal referred him for the agency to investigate possible inappropriate contact between him and the defendant. (Trial Transcript ("TT"), 06/12/2012, pp. 124-25). After interviewing the boy and learning that the alleged contact was sexual in nature, Dershem contacted the police. (*Id.* at 128-30). That was entirely appropriate, as was the district attorney's decision to refer the matter to the Office of the Attorney General.

Although Sandusky suggests otherwise, the CPSL does not require that all abuse allegations be investigated solely by the designated CYS agency and Department of Public Welfare ("DPW"). On the contrary, the version of § 6365 in effect when Dershem first encountered Fisher specifically directed each local district attorney and county CYS to develop protocols to investigate suspected criminal child abuse. *Id.* Even in November 2008, then, the legislature plainly envisioned that law enforcement, not just child protective services agencies, would play a role in investigating allegations of child abuse, and in light of Dershem's testimony

that the law required her to contact the police since Fisher was indicating that he had been sexually abused, the Court can reasonably assume that Clinton County officials had heeded the statute and implemented a joint investigative protocol.

Since that time, our lawmakers have removed counties' discretion to vest CYS and the DPW with sole authority to conduct those investigations, clarifying that law enforcement *must* be notified and assume exclusive or concurrent control in such cases. *See* §§ 6334 – 6334.1. They have thus made mandatory what was once only permissible. Interdepartmental cooperation was indeed authorized in 2008 and 2009, though; the CPSL did not foreclose that possibility or demand that all allegations of child abuse, regardless of the nature and severity, follow the specific route Sandusky says the Fisher investigation should have taken. Accordingly, jurisdiction was not denied the investigating grand jury based on the Commonwealth's alleged failure to comply with the CPSL. Amendola, therefore, was not ineffective for failing to seek quashal of the presentment on that basis.

Nor is there any merit to the defendant's contention that the investigating grand jury lacked subject matter jurisdiction.

The legislature has defined a multicounty investigating grand jury as "[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.A. § 4542. Section 4544 includes similarly restrictive language and sets forth the procedures for empaneling a multicounty investigating grand jury. Once properly empaneled, however, the grand jury's authority expands to encompass all Title 18 violations. As specified in § 4548(a), "The investigating grand jury shall have the power to inquire into offenses against *the criminal laws of the Commonwealth* alleged to have been committed within the county or counties in which it is summoned." *Id.* (emphasis added). The next subsection confirms that expansion, specifying that the grand jury has the power to issue a presentment not just against those alleged to have engaged in organized crime or public corruption, but "with regard to any person who appears to have committed . . . an offense against the criminal laws of the Commonwealth." § 4548(b).

To the extent the legislature may have caused confusion with respect to an investigating grand jury's jurisdiction, our Supreme Court disambiguated the statute in *In re the Twenty-*

Fourth Statewide Investigating Grand Jury, 907 A.2d 505 (Pa. 2006). There the appellant proffered the same argument Sandusky now makes—that organized crime or public corruption was prerequisite to the convening of an investigating grand jury, *id.* at 511, and the Court plainly rejected it. *Id.* The defendant acknowledges its rejection but suggests that his claim is nonetheless viable because the Court only rejected it "as it is presently framed." *Id.* at 512. In making this argument, though, he ignores that the Court expressly agreed with the Attorney General on two significant points: first, that not every matter submitted to an investigating grand jury must independently meet each of the criteria prerequisite to its empanelment; and second, that the statutory requirements for empaneling an investigating grand jury are different than its statutory powers to inquire into other criminal offenses once empaneled. *Id.*

The same is true here. Sandusky does not allege that the investigating grand jury presiding over his case was improperly empaneled, only that it lacked jurisdiction to also entertain the crimes the Attorney General was alleging against him. In light of *In re Twenty-Four Statewide Investigating Grand Jury*, though, the allegation is without merit. Once again, therefore, counsel cannot be deemed ineffective for having failed to raise this claim previously.

Grand Jury Leaks (Claim 6):

In addition to challenging Amendola's failure to object to the entire grand jury process, Sandusky alleges that counsel was ineffective for failing to file a motion to quash the grand jury presentment and dismiss the charges pertaining to Victims 2 through 10 based on governmental misconduct in the form of leaking the presentment and other information as a means to build its case against him.

Because this question was one of the original eleven issues Judge Cleland designated for hearing, PCRA counsel questioned several witnesses about it and subsequently briefed the matter. Judge Cleland did not permit the defendant to call Sarah Ganim ("Ganim"), however, and ultimately dismissed the issue with the promise of a forthcoming opinion. Order, 10/17/2016, ¶ 3. He then recused himself before having the opportunity to explain his decision, and this jurist declined to overrule his dismissal, though it did allow the parties to submit additional documentation in support of or opposition to the claim. Taken together, that evidence reveals that there is no merit to the underlying claim of prosecutorial misconduct.

Attorneys Jonelle Eshbach ("Eshbach") and Frank Fina ("Fina") served as the Commonwealth's primary representatives throughout the grand jury proceedings, and both were

questioned at the PCRA hearing. Eshbach said she was aware of the Ganim article and discussed how she and Fina had set an internal trap to determine whether the journalist's information had come from someone in the Attorney General's Office. (PCRA Transcript ("PCRA"), 08/23/2016, pp. 8-13). She knew *she* was not Ganim's source. (*Id.* at 17). Fina knew the same thing about himself and was certain the leak had not come from the agents who delivered the presentment to the district judge's office. (*Id.*. at 43-44). Like Eshbach, though, he could not identify the source. (*Id.* at 43). He knew the leak was a problem, though. He knew it in 2016, and he knew it in 2011, when he asked Judge Feudale, the supervising judge over the grand jury, to investigate the matter. (*See id.* at 39-42). Because he suspected that the grand jury presentment may have been purposely leaked by the district justice or a member of his staff, moreover, the assistant prosecutor reported his concerns to the Judicial Misconduct Board for further investigation. (*Id.* at 42-46).

It was Agents Feathers and Sessano, now a director with the Attorney General's Office, who both delivered the presentment to the district justice's office and investigated how it had gotten prematurely published. (*Id.* at 43-45). Sandusky did not call Feathers to testify, though, and only asked Sessano whether he was aware of the Ganim article; he did further inquire about what information the former agent had about the leaks. (*See id.*, 08/22/2016, pp. 90-93). Counsel for the Attorney General's Office did, though, and Sassano said he had no knowledge of anybody leaking information. (*Id.* at 114-16).

Corporals Scott Rossman ("Rossman") and Joseph Leiter ("Leiter") (retired) also answered questions about the leaks, including whether they knew how Ganim had gained access to non-public information pertaining to the 2008-2009 investigation regarding Aaron Fisher and a 1998 investigation involving a young man by the name of Zachary Konstas ("Konstas"). Neither was able to name Ganim's source, (*see id.*. at 76-77, 84-85), though Rossman suggested an array of persons who would have had access to information about the Konstas matter. (*Id.* at 77). Similarly, Eshbach readily named various individuals and entities who would have known about the Fisher investigation, (*id.*, 08/23/2016, pp. 24-25), as did Michael Gillum ("Gillum"), the psychologist who counseled with Fisher after his abuse. (*Id.*, 08/22/2016, pp. 68-72).

The testimony, then, did not support the idea that the prosecution leaked grand jury information for any reason, let alone for the purpose of generating more victims. If anything it supports the opposite conclusion, because while someone might be skeptical about the validity of

Eshbach and Fina's internal "trap," it is a fact of human nature that one engaged in or aware of misconduct he does not wish to have exposed does not ask an outside source to investigate it. As the man in charge at that time, however, Fina was actively seeking assistance from Judge Feudale and the Judicial Misconduct Board to ascertain the source(s) of the problem.

Sandusky's post-hearing evidence was no more persuasive.

On June 17, 2017, pursuant to its earlier order and discussions held at sidebar, the Court admitted into evidence the transcribed testimony of Michael McQueary ("McQueary"), a former assistant football coach at Penn State University whose testimony helped to secure Sandusky's conviction relative to Victim #2 and who later testified as a Commonwealth's witness in the case of *Commonwealth v. Graham Spanier*. "Mr. McQueary's testimony," the defendant proffered, "was that he had been alerted that the [Office of Attorney General] was going to leak the grand jury presentment." Brief and Proposed Findings, ¶ 469. In support thereof, he quoted the following portion of the transcript: "I was on my way to Boston for recruiting and I was in going from F terminal over [to] the B terminals over in Philadelphia Airport. And there was one of those little trams. The [Attorney General]s called ***and said we're going to arrest folks and we are going to leak it out[.]***" *Id.* (emphasis Sandusky's); (PCRA, 05/11/2017, Exh. H, p. 24). Those words, though, had nothing to do with grand jury leaks.

When he gave the above-quoted testimony, McQueary was responding to questions about Sandusky's *arrest* and nothing else—a fact that is apparent once the excerpt is put back into its original context. In its totality, the relevant exchange reads like this:

> Q. [Prosecutor] Okay. Did you come to learn that Jerry Sandusky was going to be arrested?
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> A. [McQueary] Yes.
>
> Q. And when Jerry was arrested, was that before a football game or near a football game that you were coaching?
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> A. When he was actually arrested?
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> Q. When all the news broke about his arrest.
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> A. It was an off week. I believe it was a Friday after the Illinois game in 2011. It was – we had a bye [sic] week the next week.
>
> Q. Okay.
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> A. That's when I first learned about it or heard about it, I think.
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> Q. Okay. And when you first heard about it, did – what did you do, if anything?
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> A. I'm not even sure I can tell you. I was on my way to Boston for recruiting and I was in going from F terminal over to the B terminals over in Philadelphia Airport. And there was one of those little trams. The [Attorney General]s called

and said we're going to arrest folks and we are going to leak it out – let me back up a little bit.

We heard rumors and I heard that – the week before that arrests were imminent and that it was going to be more than Jerry Sandusky. And I ran over to Fran Ganter's office. I remember clearly.

Q. Who was Fran Ganter?

A. He was assistant A[thletic] D[irector] for football roughly. I don't know if that's his exact title but that's what it was.

And I said, you gotta call Timmy's. Those guys are in trouble.

Q. Tim Curley?

A. Yeah. And, you know, he kind of passed it off or shrugged me off. I'm not even sure they believed me. And that's all that happened with that.

So a week later, I'm in that airport and I get a call, and the media starts gettin' ahold [sic] of everything, and it's all kind of downhill from that.

Q. Did you see your face on TV?

A. That Sunday morning coming back from Boston, back through the airport, my face was all over the TVs in the airport.

(*Id.* at 23-25). Not only did the "leak" McQueary mentioned have nothing to do with the grand jury, in fact, but the prosecutor made no mention of that tribunal during his direct examination, and McQueary did not bring it up, either. (*See id.* at 3-26). Nor did it come up in his cross- or re-direct examination. (*See id.* at 26-35). That being the case, McQueary's statement does nothing to validate Sandusky's allegation that the Attorney General's Office leaked secret grand jury information.

Save for the McQueary transcript, Judge Cleland was in possession of the same factual record, and because it bore no evidence of the sort of prosecutorial misconduct that would support quashing the presentment or dismissing any of the charges, he appropriately dismissed this PCRA claim.

As a corollary, the fact that Ganim, was exempt from testifying pursuant to the Shield Law, 42 Pa. C.S. 5942, means that Judge Cleland did not err in ruling on the issue without first requiring her to testify. Regardless of what a Superior Court judge may have indicated in a concurrence or was alluded to by our high court in a footnote, a majority of our Supreme Court stated plainly and unequivocally in *Castellani v. Scranton Times, L.P.*, 956 A.2d 937 (Pa. 2008), "[W]e reaffirm that the Shield Law prohibits the compelled disclosure of a confidential source's identity, or any information which could expose the source's identity." *Id.* at 954. Because *Castelloni* is binding on every Pennsylvania court below it, no trial court judge, whether Judge

Cleland or this jurist, has the authority to ascribe precedential status to a footnote when doing so would contradict the Court's clear holding.[5]

This Court would note, moreover, that neither the Superior Court concurrence nor the Supreme Court's footnote actually purports to allow a criminal defendant to overcome the Shield Law in order to discover the source of a grand jury leak he believes disadvantaged him. Rather, the scenario addressed in footnote 14, which parallels the scenario envisioned by then-Judge Todd, now Justice Todd in her concurrence, is one in which the Commonwealth was seeking to compel a source's identity for the purpose of pursuing a criminal investigation or prosecution *of the source of the leak. See id.*, n. 14. Sandusky, of course, is not the Commonwealth, and facilitating a criminal investigation or prosecution of Ganim's source is not his aim. Accordingly, even assigning precedential value to the footnote would not salvage Sandusky's meritless claim.

Amendola was correct, therefore, when he indicated that he had no basis for filing a motion to quash or similar motion. (PCRA, 08/12/2016, p. 169). Aware of the possibility of governmental misconduct, he requested discovery materials related to whether the leaks had come from any government employee and was advised that none existed. (*Id.* at 169-70). He did not have any evidence to the contrary, (*id.*), and, as the PCRA record indicates, would not have found any. As he said, therefore, "It would have been a blind motion without any substance to it." (*Id.* at 170). He thus was not ineffective for failing to file it, not only because he employed a reasonable strategy based on his knowledge of the law, but because "[c]ounsel is not required to perform a useless act or file a meritless motion." *Commonwealth v. Thomas*, 539 A.2d 829, 831 (Pa. Super. 1988). Even with the addition of McQuery's testimony, therefore, the record indicates quite plainly that Judge Cleland did not err in dismissing Claim 6.[6]

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[5] The defendant indicates that Judge Cleland was prepared to compel Ganim to testify and reveal her source if PCRA counsel could establish that quashal was an appropriate remedy for a grand jury leak. Even assuming that he had determined otherwise, though, it is clear from the record that Ganim would not have testified. When Amendola wanted to call her at trial simply to authenticate the newspaper article she wrote and an e-mail she sent to one of the victim's mothers, she took the position that she would go to jail rather than risk being forced to answer questions about her source. (*See* TT, 06/19/2012, pp. 25-28, *id.*, 06/20/2012, pp. 309-20). That being the case, Sandusky was not prejudiced by the inability to call Ganim as a PCRA witness even if Judge Cleland was mistaken as to the availability of quashal as a remedy in the event of prosecutorial misconduct.

[6] Claim 7 was the third of Sandusky's grand jury-related claims. In his Brief and Proposed Findings, however, he advised the Court that he would not be pursuing it.

Bob Costas Interview (Claim 26):

Sandusky participated in a telephone interview with Bob Costas ("Costas") on November 14, 2011, and at one point the interviewer queried, "Are you sexually attracted to young boys?" Sandusky ultimately said no, but only after he paused and repeated the question. The Commonwealth capitalized on that exchange, replaying it for the jury and arguing that it was persuasive evidence of guilt. Because of that, the defendant now alleges that Amendola was ineffective for permitting the interview without adequately advising or preparing him for it. The defendant is wrong.

Setting aside the question of whether this is a legitimate PCRA issue, the credible evidence indicates that it lacks merit.

As much as he would like to pretend otherwise, Sandusky did not go into the interview as a legal novice obsequiously following his attorney's directives with no idea about what Costas might ask or how he should respond. On the contrary, the defendant wanted to publish his story; he wanted Costas's program to be the first medium through which it was delivered; and he was not a man who subjugated his own will to the preferences and advice of counsel. (PCRA, 03/24/2017, pp. 17-18, 29-30, 132-33).

Not comfortable with the idea of being his own spokesperson, the defendant initially elected Amendola to speak on his behalf, and that was the plan until shortly before the interview commenced. (*Id.* at 26, 34-35). During the hour leading up to the interview, however, attorney and client discussed the public's overwhelmingly negative perception of Sandusky and the consequent value of him personally proclaiming his innocence to the nation, and the defendant ultimately agreed to be the interviewee. (*Id.* at 34-35).

Because Costas would not divulge what questions he might ask, Amendola could not feed his client any specific answers. Having spent more than two years defending Sandusky against allegations of sexual abuse, however, he was confident about his client's ability to assert his innocence. (*Id.* at 35-37). Thus, "[W]hat you're going to have to do is explain to Bob Costas in a brief phone conversation that you're innocent, we expect to prove your innocence at trial," (*id.* at 35), seemed to Amendola to be clear and sufficient instruction.

"Assert your innocence" was not the only advice Amendola provided, though; he also told his client to be adamant about it and to stress that he had explanations for and defenses against all the allegations. (*Id.* at 42). Since long before the date of the Costas interview,

moreover, Amendola had counseled Sandusky on many occasions that anything he said to anyone other than his wife could be used against him, (*id.* at 38-39)—an admonition he had reiterated just a few days earlier. (*Id.*, 08/12/2016, p. 116).[7] Sandusky thus was not ignorant about what he should say or how he should say it, and his attorney certainly could not anticipate that the same man who had repeatedly affirmed, "I am not a child molester. I have never molested children. I love children. I've devoted half of my adulthood to helping kids," (*id.*, 03/24/2017, p. 36), would freeze when asked whether he was sexually attracted to young boys.

Because he adequately prepared the defendant for the Costas interview, Amendola's motivation for substituting interviewees is immaterial and not an independent basis for relief. The Court would add, nonetheless, that the attorney secured the last-minute change in furtherance of a deliberate and strategic campaign to curry favor with the media and sway public opinion in his client's favor, not to appease NBC's executives. He thought from the start that Sandusky should give the interview but, in light of his client's uncertainty, agreed to be the designated spokesperson. (*Id.* at 18). When Kim Kaplan ("Kaplan") later suggested that Amendola produce a member of the Sandusky family, however, he saw it as an opportunity to re-proposition his client in that regard—to get Sandusky himself in front of the audience to say he was innocent. (*Id.* at 21-27).

Yes the plan to give Costas the first television interview had been thwarted by CNN, (*id.* at 21-25), and yes Kaplan was disappointed about the preemption. (*Id.* at 25). Neither one had any bearing on Amendola's decision to take another shot at convincing his client to do the interview, though. Rather, it was informed by the realization that public opinion of Sandusky was more negative and pervasive than he thought, as well as his belief that Sandusky would be better able to temper that animus. As counsel explained,

> Well, I had reservations because of what I was hearing. And what I was hearing from the media on a national level in New York was that Jerry's guilty as heck. And I said to myself, and I thought about Jerry and his ability to express his innocence, which he had done to me many times, that this was a golden opportunity for him to tell the national media, to tell the public that I'm not guilty, to hear it from him rather than his spin doctor, which was what most people think an attorney is.

[7] Though the discussion was more extensive on March 24, 2017, Amendola also talked about the Costas interview on August 12, 2016. He was equally consistent and credible both times about what he had advised Sandusky beforehand.

(*Id.*, 08/12/2016, p. 110). It thus does not matter how Kaplan interpreted the airing of the CNN interview or what Amendola may have said to placate her.[8] Kaplan's proposal fit perfectly into the attorney's strategy and provided him with a new argument for persuading Sandusky to give the Costas interview.

Waiving the Preliminary Hearing (Claim 11):

Had Amendola not advised him to waive the preliminary hearing, says Sandusky, the attorney could have used it as an opportunity to obtain discovery and cross-examine the witnesses. Had that occurred, he posits, counsel may have unearthed additional inconsistencies with which to impeach the victims at trial and learned that their memories had been restored through therapy and thus subject to challenge via motions to disqualify the witnesses and/or expert testimony on memory.[9] This claim does not survive scrutiny.

As his preliminary hearing date approached, Sandusky was out on $250,000.00 bail—an amount the family struggled to post. (*Id.* at 135). He did not want to be in jail, and his attorney did not want him there, either. (*Id.* at 121). Well aware of the restrictions inherent to incarceration, in fact, Amendola thought it critical that his client remain at home, where he would be better able to help prepare his defense. (*Id.* at 121, 127, 133-34, 140). Knowing that the Commonwealth had what it needed to file new charges and ask for a bail increase, therefore, counsel deemed it prudent to see whether he could prevent the defendant's re-incarceration. (*Id.* at 120, 126). He began by contacting Attorney McGettigan to inquire whether he would be willing to forego requesting additional bail on any new charges in exchange for Sandusky waiving his preliminary hearing. (*Id.* at 120-21). Amendola knew, after all, that he could not use that proceeding to attack the witnesses' credibility or explore their motives, but that it would provide the Commonwealth with yet another opportunity to publicize its side of the story, including "all the gruesome details of the accusers." (*Id.* at 122, 140).

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[8] To clarify, the Court finds Amendola's testimony to be completely credible on the Costas matter but would add that Kaplan's proposed testimony would not change the outcome even were the Court to view it as a credible and accurate rendition of what she would have testified. The deciding question is whether Amendola adequately prepared Sandusky for the interview, not what Kaplan thought or felt about the CNN debacle and how the attorney could rectify it.

[9] The defendant adds in his Brief and Proposed Findings that Amendola could have gotten the charges relating to Victim #8 dismissed at the preliminary hearing since they were supported solely by hearsay. This contention is not even remotely suggested in the Petition, however, and nor did PCRA counsel advance it while questioning Amendola. The Court thus will not address it here except to say that the probability is slight of Amendola having gotten the charges permanently dismissed given that Judge Cleland, after considering the proposed "hearsay only" argument, rejected counsel's motion to dismiss the related claims. (*See* Transcript (Pretrial Motions), 05/30/2012).; Order, 06/08/2012.

Within a day or two of speaking with McGettigan, who was willing to consent to the terms of the proposal, Amendola discussed the matter with his client. (*Id.* at 122-23). He explained the pros and cons of both options, including that waiver would mean losing the right to question the accusers, (*id.* at 123), and advised the defendant to waive the hearing. (*Id.* at 122). As of December 12, 2011—the day before the hearing—Sandusky was in agreement with his attorney, (*id.* at 127), and did not change his mind. (*Id.*at 128). On the contrary, he called his attorney after the post-waiver press conference to express his delight over "finally see[ing] our side getting out." (*Id.* at 174).

In advising Sandusky to waive his preliminary hearing, then, Amendola had a well-defined goal: to keep Sandusky out of jail both for his own comfort and to facilitate the preparation of his defense. He set that goal with the apparent purpose of advancing the defendant's best interests.

It was not out of ignorance that Amendola advised the defendant to waive the hearing, either. He knew the witnesses' credibility would be a crucial concern at trial and that he was forfeiting the opportunity to observe and cross-examine them ahead of time. (*Id.*). He also knew that their statements would be divulged through the agreed-upon expedited discovery, however, and did not anticipate that their preliminary hearing testimony would differ materially from what they had already disclosed. (*Id.* at 128-29, 174). He did anticipate that the Commonwealth would make a successful bid for a bail increase if it filed additional charges, however—an increase permitted by Rule 523 and which experience told him was a 99.9% probability. (*Id.* at 135-38). In his estimation, therefore, the potential benefits of demanding a preliminary hearing were outweighed by the guaranteed benefits of waiving it. (*Id.* at 129-34). That was an entirely reasonable calculation that precipitated an entirely reasonable response.

There is, moreover, no apparent merit to the proposition that Amendola would have been better prepared to cross-examine the Commonwealth's witnesses at trial had he insisted on a preliminary hearing.[10]

As he had predicted, the discovery process gave Amendola access to the witnesses' prior statements. As is evident from the trial transcripts, moreover, he was thoroughly familiar with that discovery by the time trial commenced and was not reticent to question the witnesses—

[10] For the reasons detailed in the Court's discussion of the defendant's repressed memory allegations, there is also no merit to the "false memories" portion of this claim.

particularly the victims—about narrative inconsistencies, behavioral inconsistencies, and any financial motives they may have had for accusing Sandusky. Whether a preliminary hearing would have afforded him additional impeachment evidence is wholly speculative, as is the notion that one or two more inconsistencies, if any there had been, would have convinced the jury to disbelieve the witnesses' testimony.

Amendola's ability to assess the witnesses' credibility and observe their demeanor likewise would have had no bearing on the trial. Sandusky has denied these allegations from the beginning and, as far as the record reflects, never had any intention of pleading guilty. His attorney's assessment of their credibility thus would have been irrelevant. In terms of demeanor, moreover, one does not ask questions like, "Isn't it true that you were nervous and fidgeting when you said that at the preliminary hearing?" or "Didn't you use a less decisive tone when you testified about this previously?" Accordingly, an earlier opportunity to actually observe the witnesses testifying would have been equally immaterial for purposes of trial. Sandusky, therefore, has not established merit on this issue.[11]

Failure to Conduct Pre-Trial Interviews (Claim 12):

The decision to waive Sandusky's preliminary hearing did not then invoke a duty for Amendola to interview the victims, as well as Michael McQueary, Ronald Petrosky ("Petrosky"), and James Calhoun ("Calhoun"), and nor was it essential that he do so.

The cases Sandusky cites in support of his claim include *Commonwealth v. Jones*, 437 A.2d 985 (Pa. 1981), and *Commonwealth v. Stewart*, 84 A.2d 701 (Pa. Super. 2013). Both involved instances of trial counsel failing to interview known potential defense witnesses, though, not Commonwealth witnesses whose statements had already been revealed through discovery. In *Commonwealth v. Mabie*, 359 A.2d 369 (Pa. 1976), moreover, defense counsel elected not to interview eyewitnesses identified in a police report even though the report did not indicate what they purported to have observed—a failure compounded by the fact that he also failed to obtain copies of his client's hospital records even after his client suggested that they would support his claim of self-defense. *Id.* at 372-74. Finally, the defense attorney in

[11] In his "Response to Letter by Judge Cleland," PCRA counsel asked the Court to disregard Judge Cleland's letter addressing Sandusky's proposed findings of fact with respect to the foregoing issue, and that is what it did. It would note, moreover, that it did not consider any portion of the judge's recusal opinion as it researched the matter. As its opinion reflects, Judge Cleland's role in the waiver conference was ultimately irrelevant to its resolution of the issue. The Court solicited briefs and proposed findings from the parties, and apart from case law and the record as it had been developed prior to its receipt of the defendant's brief, the Court did not rely on any other sources for this or any other issue

Commonwealth v. Perry, 644 A.2d 705 (Pa. 1994), made no efforts to ascertain the identity of a potential witness suggested by the Commonwealth's only eyewitness or to independently locate other potential witnesses on his client's behalf. *Id.* at 707. Unaware until the eve of trial that he was trying a death penalty case, moreover, counsel had done nothing to prepare for the penalty hearing, including interview his own client. *Id.*at 708. Amendola's decision not to independently interview the Commonwealth's witnesses in this case is hardly comparable.

With the exception of Calhoun, whose statements came in through Petrosky, each of the persons Sandusky faults Amendola for not interviewing was a Commonwealth witness, and as our Supreme Court reiterated in *Commonwealth v. Smith*, 17 A.3d 873 (Pa. 2011), trial counsel is not obligated to interview every Commonwealth witness prior to trial and will not be deemed ineffective for failing to do so if the record discloses that his decision was reasonable. *Id.* at 889. As the *Smith* decision indicates, in fact, the decision not to interview a witness will not invalidate an overall reasonable trial strategy just because the proposed interview would have revealed useful, potentially exculpatory information. *See id.* 888-89. "A claim of ineffectiveness such as this cannot succeed solely through comparing, in hindsight, the trial strategy employed with alternatives not pursued," it said. *Id.* at 889. So it is here.

Had Amendola interviewed the proposed witnesses, Sandusky argues, he would have discovered that some of the victims' memories were refreshed through repressed memory therapy and that Calhoun denied in a 2011 police interview that Sandusky was the man he saw performing oral sex on a boy in 2000. By way of response, the Court would incorporate its analyses of Claims 15-17 ("Repressed Memory/*Brady* Allegations, pp. 38-41) and, 19-23 ("Calhoun/Petrosky Issues," pp. 30-36), it being evident from those discussions that interviewing the victims would not have disclosed the proffered information and that Calhoun, even assuming he would have repeated his denial, would not have divulged anything Amendola did not already know.

The defendant also contends that interviews would have revealed that Petrosky changed the physical location of the crime and would have allowed Amendola to assess for himself whether Calhoun was in fact incompetent to testify. The latter suggestion is patently absurd: Amendola did not merely accept the Commonwealth's representation regarding Calhoun's mental state; he saw a letter from the man's doctor saying that he was suffering from dementia and was so incompetent that he could not even remember his own name. (PCRA, 03/24/2017, p.

68). A trained legal professional, Amendola was certainly not in a position to determine otherwise. As for Petrosky, counsel had reviewed his grand jury testimony, which disclosed the inconsistency, and read the relevant portion into the record for the jury to hear. (*See* TT, 06/13/2012, pp. 241-42). Just as he knew from the discovery alone that Calhoun had denied Sandusky's involvement in the shower incident, therefore, Amendola knew from the discovery alone that Petrosky had said "assistant coaches' locker room" to the grand jury and "staff locker room" to the trial jury. Accordingly, each of the alleged bases for Claim 12 is demonstrably without merit.

On a more global level, Amendola's decision not to interview the witnesses did not keep him from skillfully executing his well-planned trial strategy. He wanted to establish that the victims were lying—that their stories were the products of coaching or motivated by greed. (PCRA, 03/24/2017, p. 135-37). He thus introduced the jurors to the recorded police interview with Brett Houtz, questioned the relevant police witnesses about their "suggestive" interviewing practices, and extensively cross-examined the victims to reveal narrative evolutions and inconsistencies. He further delved into many of the victims' decisions to hire civil attorneys, questioning whether money was the real motivating factor for them, and utilized his opening and closing statements to emphasize those issues. Though ultimately unsuccessful, Amendola's strategy was certainly a reasonable one informed and fueled primarily by the discovery. The remote possibility that interviews would have unearthed additional impeachment material does not change that.

Collateral Appeal (Claim 13):

On June 5, 2012, trial counsel filed a motion to withdraw as counsel, which they first discussed with Judge Cleland in Chambers. Mot. to Withdraw, 06/05/2012 (Under Seal); (Transcript (Motion to Withdrawn), 06/05/2012). Due to the volume of written discovery materials and the unavailability of witnesses, they felt ill-prepared to defend Sandusky. (*See id.*) Judge Cleland denied the motion, however, and ordered them to proceed. Neither attorney sought to appeal that order as collateral to the matter at hand, and both continued to represent the defendant at jury selection and through trial.

According to Sandusky, counsel were ineffective for not filing an appeal and for not refusing to continue their representation after their motion was denied. Because Judge Cleland's

order was not a collateral order and because counsel had not been granted leave to withdraw, however, there is no merit to either prong of the argument.

"A collateral order," according to Rule 313 of the Pennsylvania Rules of Appellate Procedure, "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.* Judge Cleland's denial did not qualify.

Sandusky defines the relevant issue—the "important right"—as whether a court can compel an attorney to continue representing a client when the attorney believes he is ethically obligated to withdraw, and indeed, Attorney Rominger dutifully referenced Rules 1.1 and 1.16 of the Rules of Professional Conduct in the motion he drafted. Those Rules, though, do not provide grounds for collateral appellate review. That much is clear from *In re Estate of Wood*, 818 A.2d 568 (Pa. Super. 2003). There the decedent's former guardian *ad litem* appealed an order directing him to testify and produce records for purposes of a will contest. *Id.* at 569-70. Invoking Rule of Appellate Procedure 313, he argued that the order violated the attorney-client privilege, the work-product doctrine, and his duty of confidentiality. *Id.* at 571. Concluding that the Rule was inapplicable, however, the Court denied his claim. It agreed that the appellant's duty of confidentiality was extensive under Rule 1.6 but noted that the Rules of Professional Conduct were not substantive law. *Id.* at 573. Because the attorney could not be disciplined for following the court's order, regardless of its Rule 1.6 implications, it said, he could not use that Rule to avoid compliance. *Id.*

Likewise, Amendola and Rominger could not invoke the Rules of Professional Conduct to circumvent Judge Cleland's order, and their compliance could not have subjected them to disciplinary action. Accordingly, the attorneys had no claim to an "important right" that needed protecting.

Equally meritless is the suggestion that counsel were ineffective for not refusing to continue representing Sandusky despite Judge Cleland's order.

Under Rule 120 of the Pennsylvania Rules of Criminal Procedure, an attorney may only withdraw his appearance in a criminal case with leave of the presiding court. Rule 120(B)(1); *Commonwealth v. Librizzi*, 810 A.2d 692 (Pa. Super. 2002). Attorneys Amendola and Rominger were specifically *denied* leave to withdraw in this case and directed to continue their

representation, and had they simply refused to proceed, they would have been acting in direct contempt of court *and* violation of their ethical obligations to their client. The Rules of Professional Conduct specify, after all, that "[a] lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation". Rule 1.16(c). In its entirety, therefore, Claim 13 fails for want of merit.

Reviewing Discovery and Amendola's Post-Trial Testimony (Claim 14):

Testifying at Sandusky's post-sentence motions hearing, Amendola talked about the plethora of discovery materials he was receiving in the months leading up to trial and how it adversely affected his ability to adequately prepare for trial. (Post-Sentence Motions ("PSM") Transcript, 01/10/2013, pp. 4-20). During cross-examination, though, it became apparent that most of the last-minute materials he received were not pertinent. (*Id.* at 20-33). He continued nonetheless to advance the idea that the volume of discovery he was receiving in such a compressed period of time hobbled the defense, (*see id.* at 32-43), but admitted that he had reviewed everything post-trial and that much of it was irrelevant. (*Id.* at 32-33). He admitted, moreover, that none of the documents he reviewed would have altered his conduct at trial. (*Id.* at 39-43). The Superior Court subsequently utilized that admission as its basis for finding that Judge Cleland's denial of the defendant's motions for continuance did not result in prejudice, *Commonwealth v. Sandusky*, 77 A.3d 663, 672-73 (Pa. Super. 2013).

In a two-pronged claim for ineffective assistance of counsel, Sandusky alleges that Amendola did not actually review all the discovery. He points specifically to his son's grand jury testimony and Calhoun's 2011 police interview. Having not reviewed the former, he argues, Amendola was unable to properly advise him about whether to testify, thereby rendering him unable to make a knowing and voluntary decision in that regard. Asserting that counsel was unaware of the Calhoun interview, moreover, he contends that Amendola, had he known about it, would have used it to nullify the statements he had made to Petrosky eleven years earlier.

Again incorporating here its analysis of Claims 19 and 21-23 ("Calhoun/Petrosky Issues, pp. 30-36), the Court finds that the defendant's claim is without merit.

Whether or not he had perused the transcript, Amendola knew what Matt Sandusky ("Matt") had told the grand jury. As he stated, "I knew the substance of [his testimony]. I

certainly knew that he had defended his father at that proceeding." (PCRA, 03/24/2017, p. 84). That was only to be expected, because until mid-trial, Matt was standing by his father. He was scheduled to be a defense witness, (*id.*), and he and Amendola had discussed his testimony. (*See id. See also* TT, 06/20/2012, p. 70) ("Matt Sandusky . . . had told us he would testify for his dad and testify as to fact situations ironically involving Brett Swisher Houtz . . .. Matt Sandusky indicated to [the Commonwealth] that he was in fact present when certain things occurred with Mr. Houtz"). Those discussions, as the attorney's answer plainly suggested, included what Matt Sandusky had relayed to the grand jury. (*See* PCRA, 03/24/2017, p.84).

When Matt aligned himself with the Commonwealth, then, Amendola knew he could be impeached with his grand jury testimony, (*id.*, 08/12/2016, pp. 157-58), and he and the defendant discussed the pros and cons of proceeding with their plan for Sandusky to testify. (*Id.* at 153-58). That discussion included Matt's impeachability, and specifically his impeachability via reference to his grand jury testimony. (*Id.* at 158).

More broadly, the record reflects that Amendola had indeed reviewed with care the discovery materials most relevant to his trial strategy, including the victims' many statements, and was well prepared to cross-examine each witness the Commonwealth presented. Conversely, the materials he was unable to scrutinize before trial consisted mostly of irrelevant documents not subject to discovery under Rule 573 of the Pennsylvania Rules of Criminal Procedure. (*See* PSM, 01/10/2013, pp. 20-43 (McGettigan and Amendola discussing the categories and substance of the documents; Transcript (Mot. for Cont.), 05/29/2012, pp. 51-73 (Attorney Fina catalogued for Judge Cleland the nature of the discovery materials at issue); and *id.* at pp. 84-85 (Judge Cleland explaining that he ordered much of the discovery Sandusky was requesting, not because the Rules required it, but "because the allegations just happened so long ago . . . that I felt it was only fair you get this information").

Whether it considers Matt Sandusky's jury trial testimony, Calhoun's 2011 interview, or the record as a whole as it relates to discovery, therefore, the Court finds no merit to the proposition that Amendola failed to adequately review it. Accordingly, the first part of Claim 14 does not provide grounds for relief. The second prong fares no better.

Since Amendola did not conduct a careful review of the discovery prior to the post-sentence motions hearing, Sandusky says, he was also ineffective for testifying that nothing in

the discovery would have altered the course of trial. The record does not support this position, either.

With respect to the proposed Calhoun interview and the transcript of Matt's grand jury testimony, the Court can say unequivocally that Amendola did not misrepresent the truth. While it accepts that he did not examine the discovery after trial in precisely the same manner as he would have before trial, moreover, (*see* PCRA, 03/24/2017, pp. 82-83), it also cannot ignore the fact that Sandusky did not offer any credible evidence to sustain his claim that a more concentrated review would have inspired the attorney to proceed differently. Although Amendola said he had never reviewed the discovery post-trial in the same manner he would have pre-trial, (*id.* at 81-83) he also did not indicate anywhere in his testimony that he had become aware of anything that would have altered his trial strategy. (*See id.* at 17-139). That being the case, the defendant has failed to establish that he would have testified differently at the hearing on post-sentence motions regardless.

It bears mentioning, too, that lack of prejudice was not the primary reason the Superior Court rejected Sandusky's challenge to Judge Cleland's orders denying his motions for continuance. Rather, its initial determination—a merits-based determination—was that Judge Cleland had not abused his discretion or violated the defendant's constitutional rights by declining to continue the trial. *Sandusky*, 77 A.3d at 672. That decision was based on the panel's review of Sandusky's reasons for wanting to postpone the trial, its contemplation of the voluminous supplemental discovery counsel had received during the few months before trial; and its consideration of Judge Cleland's reasons for denying the defendant's requests. *See id.* at 671-72. Only then did it proceed to address the effect of Amendola's post-trial testimony. *See id.* at 672-73.

In light of the foregoing, the defendant has failed to demonstrate a reasonable probability that Sandusky's direct appeal would have turned out differently but for Amendola's allegedly erroneous testimony.

Facts and Discussion—Trial Issues

Jury Selection (Claims 8-10):

Trial counsel asked the Honorable John M. Cleland more than once to continue the trial so that he could utilize the services of a jury consultant to help him select jurors untainted by the pretrial publicity these cases had garnered. Omb. Mot., 03/22/2012, pp. 15-16; Mot. for Cont.,

05/25/2012, pp. 8-9. (*See also* Transcript (Mot. for Cont.) (Under Seal), 05/29/2012). Judge Cleland denied each request. Believing that the traditional *voir dire* process was adequate to identify any firmly held opinions and unacceptable biases, he was not convinced that a jury consultant was any more qualified than Attorney Amendola to select an appropriate jury. *See* Memorandum Order, 05/30/2012, p. 2.

In addition to seeking the aid of a jury consultant, Amendola filed a motion requesting individual *voir dire* as part of his Omnibus Pre-Trial Motion. He also sought permission to have the prospective jurors complete supplemental questionnaires based on his concern that they would be reticent to honestly disclose in a public setting information that could reveal prejudices. *See* Supp. Mot. in Limine, 05/15/2012, pp. 17-18, and Brief in Support, 05/17/2012 pp. 27-30. It is unclear from the record whether Judge Cleland authorized the latter measure. It is clear, however, that he conducted individual *voir dire* with the same concern in mind, taking each prospective juror into his chambers, along with counsel, two pool reporters, and a member of the public, and advising each one that he would excuse the latter three if he or she did not wish to answer questions in their presence. (*See e.g.,* Jury Selection Transcript ("JST"), 06/05/2012 ("Day 1"), pp. 16-17, 22, 31).

In Sandusky's estimation, though, Amendola did not do enough to safeguard his right to a fair and impartial jury. He contends that his attorney also should have procured an expert report to establish that a change of venue or venire or a cooling off period was warranted and requested one of those remedies because of it. In failing to do so, however, counsel was not ineffective.

With perfect hindsight, Sandusky now knows that his charitable endeavors and iconic status were not enough to overcome the evidence of his guilt. In 2012, though, he wanted to be tried in Centre County by Centre County jurors. He thus opposed the Commonwealth's pre-trial motion to change venue or venre, Mem. In Opposition, 02/08/2012; (Transcript (oral arguments), 02/20/2012, pp. 20-25). He even affirmed under oath that he understood the potential pitfalls of his decision and wanted to proceed in Centre County anyway. (*Id.* at 27-35).

Five years later, Amendola confirmed that keeping the trial in Centre County was indeed the strategy upon which he and his client had agreed. Consistent with what he had stated in response to the Commonwealth's motion to change venue or venire, he believed the defendant was just as likely to get a fair jury in Centre County as he was anywhere else in the country, (PCRA, 03/24/2017, pp. 47-48), and the defendant has not produced any evidence tending to

indicate that his belief was unreasonable. That being the case, counsel had no reason to even consider filing a motion to change venue or venire or commissioning an expert report designed to support such a motion. He thus was not ineffective for failing to do so.

Amendola also acted deliberately in not filing a motion to continue the trial until there had been a longer cooling-off period.

Trial counsel was familiar with the "cooling-off" concept, Ans. to Mot. for Change of Venue/Venire, 02/28/2012, ¶ 10, as well as the relevant case law. Def. Memo. in Opp., 02/08/2012. It thus was not out of ignorance that he neglected to raise the issue, but because he felt certain that it would be to no avail. As he unhesitatingly explained at the PCRA hearing when asked whether he had requested a continuance based on the need for a cooling-off period, "I did not. And the reason I didn't, quite frankly, was because if we weren't getting continuances on all the other legitimate reasons that we had, we certainly weren't going to get it on that basis." (PCRA, p. 58). Based on his many interactions with Judge Cleland, he was certain that such a request would have been denied on the basis that the jury selection process itself would reveal whether media saturation had in fact unduly prejudiced the jury pool. (*Id.* at 58-59). That was a reasonable assumption.

As the record amply reflects, Judge Cleland took a no-nonsense approach from start to finish with respect to the management of these cases and was not inclined to delay the trial unless he deemed it to be absolutely necessary. He deemed it unnecessary, though, when Amendola learned just a month before jury selection that his jury consultant would be unavailable in June; when expert witnesses counsel expected to retain could not accommodate a June trial; when potentially exculpatory lay-witnesses were unavailable while defending their own criminal charges; and when defense counsel received thousands of pages of discovery materials not long before jury selection was scheduled to commence. *See e.g.,* Mot. for Cont., 05/25/2012, pp. 8-9; (Transcript (Mot. for Cont.) (Under Seal), 05/29/2012). Nor was Judge Cleland persuaded to continue the trial when counsel, purporting to feel overwhelmed by existing developments, sought leave to withdraw from the case. *See* Mot. to Withdraw, 06/05/2012, (Mot. to Withdraw Transcript, 06/05/2012). In the midst of counsel's impassioned speech regarding his inability to adequately try the case, in fact, Judge Cleland announced, "This case has been on track for this trial date since at least January. It's no surprise to anybody. I never ever suggested or made any indication that there would be a continuance, except as

requested by Judge Feudale and as a courtesy to him. I have never, I do not believe, misled or given any indication that I had any intention of scheduling this case except when it was scheduled and we're going to proceed." (*Id.* at 7).

In light of the foregoing, it is fanciful to suppose that Judge Cleland would have granted a continuance based on the allegation that a cooling-off period was necessary. In light of his position on the necessity of a jury consultant, moreover, it is fanciful to suppose that an expert report, even one indicating significant community bias against Sandusky, would have convinced him that the traditional *voir dire* process would be inadequate to weed out biased venire persons.

Once jury selection was underway, though, should counsel have asked prospective jurors whether they had read the grand jury presentments or any other specific accounts of the charges or the defendant's culpability? Sandusky says yes and claims that he was ineffective for not probing more deeply. Viewed through the lens of the law, the record says differently.

In *Commonwealth v. Briggs*, 12 A.3d 291 (Pa. 2011), our Supreme Court again addressed the realities of selecting a constitutionally sound jury when the case at issue was the subject of substantial media coverage. Incorporating the United States Supreme Court's assessment of the same issue, it identified as the decisive question whether a prospective juror exposed to media accounts could suspend any preliminary opinions he or she had formed and decide the matter after considering only the evidence he or she received at trial. *Id.* at 314. In the Court's words,

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

Id.

Additionally, as much as Sandusky would like to rely on academic concepts like "presumptive bias" to suggest that Amendola had a duty to delve further into what the jurors in this case had read, the courts of this Commonwealth generally adhere to the principle that jurors are capable of the introspection necessary to evaluate their own biases. Accordingly, courts will measure the continuing effects of pretrial publicity by reference to the jurors' answers. *Commonwealth v. Robinson*, 864 A.2d 460 (Pa. 2004). "Normally," says the Court, "what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the

publicity is still so fresh in their minds that it has removed their ability to be objective." *Id.* at 484 (internal citations omitted).

As the transcripts reflect, each empaneled juror in this case confirmed his or her ability to consider what was presented at trial and render a verdict based on that evidence alone. That included the two Sandusky referenced as evidencing juror bias.

Despite being a student who had "heard everything," Juror No. 5692, after answering a couple of questions in a seemingly ambiguous manner, affirmed unequivocally that he could be fair and impartial. (*See* JST, Day 1, pp. 249-60). Both the Court and Amendola satisfied themselves in that regard with the following exchanges:

> MR. AMENDOLA: Have you reached any personal decisions about whose fault it is that Penn State has really been hit hard by what's happened with Mr. Sandusky?
>
> JUROR NO. 5692: Who single-handed, like, who's [sic] overall fault? I think there's a lot of people involved. I think everyone had a little piece of everything. I don't think there's anyone. Like, overall that was completely to blame. Do I think Joe did a few things that he shouldn't have? I guess. I think everyone just kind of underestimated a lot of things and –
>
> MR. AMENDOLA: But by what you are telling us, are you really telling us that you have already determined that something happened that shouldn't have happened and so everyone kind of shared on the blame for the charges that were later filed?
>
> JUROR NO. 5692: I'm saying I know what I have read and – not even know. I understand what I have read and that's all I know. And I can – look, I said I read, you know. I have read a little bit of everything and that's all that I – I don't know. I can't say they're my opinions because they're obviously somebody else's. Somebody else wrote it down and I read it because I was interested in it. But that's – I guess that's all I'm saying.
>
> MR. AMENDOLA: Could you put everything that you have read aside and listen to the judge who would instruct you, you can only consider the evidence that you'll hear at trial and based upon that evidence and the Court's instructions make a decision not on what you heard before today or even before next Monday what you hear at trial? Could you live by that instruction?
>
> JUROR NO. 5692: Yeah
>
> . . .
>
> THE COURT: Okay. If you are selected as a juror, you would have to take an oath in which you would agree to decide the case based only on what you heard in the courtroom and put aside everything else that you heard.
>
> JUROR NO. 5692: Um-hum.
>
> THE COURT: There's a lot riding on that answer.
>
> JUROR NO. 5692: Yeah.
>
> THE COURT: Can you do that or do you have some reservations?

JUROR NO. 5692: Yeah. I mean, there's – I don't think there would be a reason for me to believe anything truer than what I would hear in the courtroom anyway so.

THE COURT: Your answer is yes?

JUROR NO. 5692: Yes.

(*Id.* at 255-56, 257-58). Similarly, while Juror No. 3208 expressed a general concern for the welfare of children and sprinkled her answers with all-too-common qualifiers like "probably" and "I guess," her responses to Judge Cleland's and Amendola's clarifying questions disannulled her seeming uncertainty. (*See id.* at 292-99). It is likewise telling that counsel, who had the opportunity to observe Juror No. 3208's demeanor and hear the vocal inflections indiscernible from the pages of a transcript, accepted her without reservation.

Sandusky did not allege any other specific instances of bias among the members of his jury, and as the Court has already indicated, his reliance on "presumptive bias" is unavailing Whereas Sandusky has failed to demonstrate that juror bias influenced the verdict, therefore, Amendola was not ineffective for failing to inquire specifically about whether the jurors had read the presentments or any other specific media accounts.

Amendola's Opening Remarks (Claim 24):

In an opening statement that filled twenty-six transcribed pages, Amendola began, "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." (Transcript (Defense Opening Remarks), 06/11/2012, p. 3). Those words, Sandusky contends, gave the jury an inaccurate impression by effectively conceding that the Commonwealth's evidence was sufficient to establish his guilt. He thus concludes that Amendola rendered ineffective assistance at the very outset of trial. Once again, though, the record does not sustain the claim.

When asked whether he had begun his opening by saying that the evidence against Sandusky was overwhelming, Amendola could not hide his irritation with what he apparently deemed to be an offensive insinuation. "That was satirical," he said. "That's called satire. And again, I'm surprised you never used it." (PCRA, 03/24/2017, p. 121). He proceeded to comment about how widespread people's belief was that the defendant was guilty, explaining, "And I was saying to the jury, look, he's guilty, why have a trial? Read the rest of my opening and you'll realize that what I said is there were a lot of questions, a lot of questions about the authenticity of the statements and the allegations being made against Jerry Sandusky." (*Id.*).

As PCRA counsel continued to challenge his word choice, noting that he told the jury the evidence against the defendant was overwhelming, not that everybody thought he was guilty, Amendola vehemently reiterated, "For the purpose of pointing out that there are two sides to the story. Totally satirical." (*Id.* at 122). He then pointed to his cross-examination of the witnesses as proof that his opening statements could not reasonably be interpreted as an actual concession. (*Id.*).

This jurist did not preside over the trial but can reasonably assume that the inflection Amendola used as he began his opening statement corresponded with his satirical intent. Whether he did or not, though, the jury did not have to wait for him to cross-examine the victims to realize that he thought their stories incredible and believed the jurors would reach the same conclusion after hearing the evidence. Barely into his opening, in fact, counsel plainly stated,

> In the opening statement presented by Mr. McGettigan, an outstanding prosecutor and an outstanding attorney, he referred to the pictures on the screen as pictures of victims. Ladies and gentlemen, let me say this – and I've been saying this from November 5th of last year. There are no victims in this case. The only way and the only time there will be victims in this case will be if, after you hear all the evidence, you listen to all the arguments, you hear the judge's instructions, and you deliberate, you determine beyond a reasonable doubt that Jerry Sandusky is guilty of some or all of the offenses will there be victims. And if you don't get to that point, if you decide, after hearing all the evidence, that there's a reasonable doubt, then there will never be victims because victims only come about after you 12 determine they're victims.

(Transcript (Def. Opening Remarks), p. 4). He launched immediately into an explanation of how the allegations had begun, percolated, and developed into a 10-victim sexual assault case, pointing out the many questions he wanted the jurors to ask about the timeline of events, the alleged victims' veracity, whether a man who had done so much to help children would do what the Commonwealth was alleging, and other seeming inconsistencies. (*See id.* at 4-29).

Considering Amendola's opening statement as a whole and the isolated statement, "The Commonwealth has overwhelming evidence against Mr. Sandusky," within its larger context, then, it is simply unfathomable that even one of the twelve jurors interpreted it as an admission of defeat rather than appreciating the irony Amendola wanted to convey. Accordingly, counsel was not ineffective for making the statement.

Allan Myers (Claims 1, 2, & 4):[12]

Sandusky contends that Allan Myers ("Myers") was the Commonwealth's Victim #2 and that both the prosecution and Amendola were aware of that fact. Based on those alleged facts, he claims that Amendola was ineffective for not objecting to Attorney McGettigan's statement that Victim #2 was unknown and for not calling Myers to testify or using his exculpating statements either as substantive evidence or to impeach McQueary. He further refers to a post-trial statement Myers allegedly made in which he recanted subsequent inculpatory statements, proposing that it constituted after-discovered evidence entitling him to a new trial or, in the alternative, that Amendola was ineffective for failing to learn about the recantation. The material facts he presupposes, however, are not borne out by the record.

When he first read the grand jury presentment, Sandusky named Myers as the person eventually identified as Victim #2. (PCRA, 08/12/2016, p. 144). A few days later, Myers echoed the defendant's belief and told Amendola that nothing inappropriate had occurred in the shower on the date alleged. (*Id.* at 144-45). He likewise exonerated Sandusky during an interview with Corporal Joseph Leiter in September of 2011. (*See* PCRA Exh. 8). It was not long, however, before the young man was telling a completely different story.

Within a week or two of their meeting, Amendola learned that Myers had secured private counsel and was claiming to have been sexually abused by Sandusky on multiple occasions. (*Id.* 145-46). The young man continued to self-identify as Victim #2 but, instead of contradicting McQueary, proffered that the shower incident was only one of many sexual encounters between him and the defendant. (*Id.*, *id.*, 08/22/2016, pp. 25-30, PCRA Exhs. 4-6).

The problem for Sandusky is that the prosecution team never believed that Myers was Victim #2. Not only was his drawing of the relevant locker room completely inaccurate, but his rendition of the shower incident, the details of which he divulged only after the Curley/Schultz preliminary hearing at which McQueary had testified, seemed to parrot the former assistant coach's testimony rather than reflect an independent recollection of the same event. (PCRA, 08/23/2016, pp. 56-58 (McGettigan); *id.* at 30-35 (Fina); *id.*, 08/22/2016, pp. 97-102 (Sassano)). When McGettigan indicated in his closing remarks that Victim #2 was unknown, therefore, he was not engaging in prosecutorial misconduct; in his mind, the boy's identity was indeed a

[12] As proffered in his post-hearing Brief and Proposed Findings, the defendant is no longer pursuing Claim 3, wherein he alleged that Amendola was ineffective for not telling him that he and the prosecutor had agreed that neither side would call Myers as a witness.

mystery. Consequently, Amendola did not have a foundation for objecting when opposing counsel said that Victim #2 was unknown. He thus was not ineffective for failing to do so.

Nor was Amendola ineffective for failing to call Myers as a witness or attempt to use his prior favorable statement(s) to impeach McQueary.

Even assuming that counsel could have effectively controlled the young man so as to elicit only his prior exculpatory statements on direct, the Commonwealth would have brought the rest out on cross, and Amendola thought it best to avoid that risk. (*Id.*, 03/24/2017, pp. 120). In his own words, "[I]t would have, I think, cast more concern and confusion on the whole issue than it did with him not even being in court." (*Id.*). That was a legitimate fear, and Amendola wanted to avoid the potentially prejudicial effect of introducing yet another set of allegations the jury may have believed to be true and ultimately used against Sandusky in its deliberations. Not calling Myers, therefore, was a reasonable strategy.

The Court cannot say whether it was also strategic for Amendola not to use Myers' statements to impeach McQuery or as substantive evidence, because even though *Travaglia* specifies that the petitioner bears the burden of proving that counsel's action or omission was not reasonably strategic, Sandusky did not pursue that line of questioning with Amendola. It does not matter, though, because even had Amendola considered that option, the Rules of Evidence would not have permitted it.

Sandusky proposes that Myers' favorable statements could have been introduced pursuant to Pa.R.Evid. 804(b)(3) as statements against his pecuniary interests. That Rule only applies when the declarant is unavailable, however, and there is no evidence indicating that Myers was unavailable at the time of trial. On the contrary, the record reflects that his attorney made him available as early as February of 2012, (*id.*, 08/22/2016, pp. 38-43), and that he in fact participated in at least three interviews between then and April of that year. (*Id.*, Exhs. 4-6). The only references Agent Sassano and Attorneys McGettigan and Fina made to Myers being unavailable, in fact, related to their inability to locate him in 2011. (*See id.* at 109-10; *id.*, 08/23/2016, pp. 32-33, 56-58). Consequently, Sandusky's suggestion that Amendola did not even understand the Rules of Evidence is itself in error and his allegation that the attorney was ineffective for not properly utilizing them to introduce Myers' exculpatory statements meritless.

Finally, although Sandusky alleged that Myers reaffirmed to Ken Cummings ("Cummings") that his initial exculpatory story was true, the evidence did not support the claim.

In that regard, Myers was asked whether he recalled a person by the name of Ken Cummings coming to his house, and with no further prompting, his plainly irritated response was,

> Yes, I do. The reason I remember this, I just brought my first born child home and this Mr. Cummings showed up at my door and my mother-in-law answered the door, I know his name, I told him to get the f--- off my property. And he was blubbering stuff at me and he left.

(*Id.*, 11/04/2016, p. 37). Counsel followed up by asking whether Cummings had shown him the Everhart statement, to which Myers replied, "I don't remember if he showed me anything. I told him to get the f--- off my property." (*Id.*). He then confirmed that he had in fact been sexually abused by the defendant. (*Id.* at 38).

Had Cummings also testified, he purportedly would have said that his encounter with Myers was not hostile at first and that when he held up the young man's exculpatory statement, as memorialized by Curtis Everhart, and asked whether it was the truth, Myers responded, "Read it. That's what I said." (*Id.* at 42-43). Those six words, the defendant suggests, constituted an arguable recantation. In fact, though, the only reasonable interpretation under the circumstances is that Myers was, in the process of dismissing Cummings, was acknowledging having made the statement, not that it was true. here being no evidence of a recantation, therefore, Sandusky is certainly not entitled to a new trial on that basis, and Amendola was not ineffective for failing to become aware of a statement that never existed.

Calhoun/Petrosky Issues (Claims 19 & 21-23):[13]

On the third day of trial, Ronald Petrosky testified about James Calhoun's statements regarding sexual contact he had witnessed between the defendant and Victim #8. (TT, 06/13/2012, pp. 222-50).[14] According to Petrosky, Calhoun was cleaning in the Lasch building's staff locker room when he saw a man performing fellatio on a boy in the shower. (*Id.* at 223-25, 229-31). A few minutes before, Petrosky had himself seen two pairs of legs—one hairy and one skinny—in the shower and quickly exited the locker room until they left. (*Id.* at 226-29). As he waited in the hallway, he saw Sandusky and a small boy emerge and watched the older man take the boy's hand as they walked down the hall. (*Id.* at 227-28). No one else entered the locker

[13] In its Brief and Proposed Findings, Sandusky advised the Court that he was no longer pursuing Claim 20, which also pertained to Calhoun's statements.

[14] Calhoun was legally unavailable to testify at trial due to his advanced state of dementia.

room as Petrosky waited outside, and Calhoun soon confirmed to him that Sandusky was the man he saw in the shower. (*Id.* at 229-30).

After entertaining extensive arguments from counsel, Judge Cleland concluded that Calhoun's statements qualified as "excited utterances" and that there was sufficient corroborating evidence to ensure that any convictions pertaining to Victim #8 were not based solely on Calhoun's statements. (*See id.* at 199-221; Pre-trial Motions Transcript, 05/30/2012, pp. 3-5, 16-28); Def. Brief re. Supp. Pre-trial Mot., 05/17/2012, pp. 12-18; Com. Memo. in Response, 05/25/2012, pp. 8-10. Neither Amendola nor appellate counsel pursued a challenge to that ruling.

In cross-examining Petrosky, Amendola focused primarily on the inconsistencies between his grand jury and trial testimony. (TT, 06/13/2012, pp. 240-47). He also explored the fact that Petrosky had waited until approximately eleven years after witnessing the incident to mention it to authorities. (*Id.* at 235-36). He did not introduce evidence of an interview Calhoun had given to a state trooper the year before wherein he denied that Sandusky was the man he had seen, however, and Sandusky contends that he was ineffective because of it. The record indicates otherwise.

The proffered interview occurred on May 15, 2011, and Amendola learned at some point prior to trial that Calhoun was incompetent to testify due to dementia which had progressed to the point that Calhoun "would slide in and out of consciousness and ability to know which end was up at any given time." (PCRA, 03/24/2017, pp. 68-70). Weighed against Petrosky's testimony about what he had personally observed and what a lucid Calhoun had expressed to him years earlier, though, Amendola did not deem Calhoun's subsequent contradiction to be useful impeachment evidence. (*Id.* at 70-76). That was not a *post hoc* assessment, but an informed and reasonable pre-trial decision.[15]

[15] Sandusky proposes a finding that Amendola did not learn of the interview until after trial. He cites in support of that proposal the attorney's equivocation as to when he had received copies of the transcript and recording. (*See* PCRA, 03/24/2017, pp. 70, 76-77). When first asked about them, though, Amendola was certain he had seen the transcript and listened to the recording ahead of time. (*id.* at 70). That recollection finds support in an on-the-record discussion regarding the nature of the late-disclosed discovery materials. (*See* Transcript (Mot. for Cont.) (Under Seal), 05/30/2012, pp. 51-73, 75-80, 84-85). There Attorney Fina represented to the Court that none of those materials contained substantive information about the victims or was otherwise discoverable under the Rules of Criminal Procedure. (*Id.* at 51-52). Amendola did not disagree with that statement, and yet the Calhoun interview, exculpatory in nature, would have constituted mandatory discovery under the Rules.

Amendola's strategy notwithstanding, it is far from certain that he could have used Calhoun's denial regardless.

Sandusky contends that the police report containing Calhoun's denial would have been admissible as a record of a regularly conducted activity. Pennsylvania Rules of Evidence 803(6) does not allow for the automatic admission of all such records, though. Rather, it articulates five restrictions and requirements that must be satisfied before a document generated in the general course of business may be admitted into evidence. *See id.* The final requirement is that "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness," *id.*, and therein lies the problem. Here the source of information was a man whose dementia only one year later could only be classified as severe, and the Court is confident that McGettigan's, clearly not inclined to do the defense any favors, would have opposed Amendola using his memorialized statements to impeach Petrosky. That would have left the matter to Judge Cleland's discretion, and in light of the advanced state of Calhoun's disease by mid-2012, it is wholly speculative to imagine that he would have found the man to have been a trustworthy source of information just one year earlier.

Once Sandusky was convicted and sentenced relative to Victim #8, moreover, it was not ineffective for Norris Gelman, Esq. ("Gelman") to forego challenging the rulings that allowed the jury to consider the charges. There was no meritorious Confrontation Clause issue to be raised, and whether or not Judge Cleland should have excluded Calhoun's hearsay statements, counsel made a reasonable strategic decision not to challenge those convictions since Sandusky would not have realized any benefit from a favorable Superior Court decision.

The Confrontation Clause guarantees a defendant's right to face his accusers, and according to the United States Supreme Court, that requires courts to exclude *testimonial* hearsay statements when the defendant did not have a meaningful opportunity to cross-examine the unavailable declarant. *Crawford v. Washington*, 541 U.S. 36, 59-68 (2004). *Crawford* did not affect the admissibility of excited utterances, however, *Commonwealth v. Jones*, 912 A.2d 268, 282-83 (Pa. 2006), and the statements at issue here were distinctly non-testimonial.

A fellow custodian, Petrosky simply asked his colleague, "Jim, what's wrong?" when he entered the staff locker room and saw Calhoun in a clearly agitated state, his face white and his hands trembling. (TT, 06/13/2012, p. 229). Petrosky feared that the older man was experiencing an acute medical episode and wanted to find out whether he should call someone. (*Id.*). He was

not looking for a scandal and had no idea that his question was going to elicit the information it did.

With respect to Calhoun, moreover, the record does not suggest that he was cognizant of anything other than the startling event itself as he related what he had seen. Creating a record for later prosecution was certainly not a goal that could reasonably be attributed to him: He could not even identify the perpetrator and had no reason at that moment to know that Petrosky could. (*See id.*). There was thus no evidence to support an assertion that Calhoun's statements were testimonial, and though that was not the reason he declined to pursue any claims related to Victim #8, Gelman recognized as much. (*See* PCRA, 05/11/2017, p. 37). Because an attorney cannot be deemed ineffective for failing to raise a meritless claim, therefore, Gelman was not ineffective for failing to invoke the Confrontation Clause as a means of challenging the convictions obtained through Petrosky's testimony.

Whether or not Gelman could have convinced the Superior Court that Calhoun's hearsay statements should have been excluded for want of independent corroborating evidence, moreover, the fact that he employed a well-reasoned strategy in foregoing that issue defeats Claim 21.

A seasoned attorney with an enviable appellate record, Gelman explained his "studied and strategic omission" as follows:

> I recall specifically rejecting it as something that was not to be raised. And I rejected it because even if we won the issue and if the hearsay identification were to have been held to be invalid, and if we had won everything that there was to win about that claim and that incident, it would not have benefitted Jerry Sandusky at all. One, because it was only one count of many and his sentence would have stood for the others. And two, the trial judge had run his sentence on that count, the Calhoun count, concurrently with other sentences. So one concurrent sentence would have fallen. It would not have made a difference to Mr. Sandusky's total sentence. And it would have distracted the Court because it wasn't [sic] an arresting [sic] issue. And it would have drawn their attention from my other issues, which could have benefitted Jerry tremendously for the sake of negating a sentence that was concurrent and did not involve giving Jerry any more or less time.
>
> . . .
>
> This was – this issue was not touched on direct appeal. It would divert the attention of the judges from other more substantial issues which could benefit Jerry. Winning this issue would not have benefitted him at all, as the sentence was concurrent. And it was an interesting issue. And with limited time, I thought the Court would invest too much time in this issue because it was of interest.

(PCRA, 05/11/2017, p. 30, 36).[16]

Sandusky interprets Gelman's answer as reflecting an erroneous belief that a beneficial ruling on either the sufficiency issue or the evidentiary question would have garnered the same relief: an arrest of judgment at counts 36-40, and thus asks the Court to find that he did not even understand the legal implications of his decision. That is not what Gelman said or implied, though; he only said that Judge Cleland's sentencing structure made it pointless, as a practical matter, to challenge the evidence pertaining to Victim #8. When asked specifically what he understood to be the respective remedies for a successful challenge to the sufficiency of the evidence versus its admissibility, in fact, Gelman answered without hesitation, "Well, if it's a sufficiency problem, then judgment is arrested. If it's an evidentiary problem, you get a new trial on that." (*Id.* at 34-35). He plainly knew what Sandusky suggests he did not.

What Gelman also knew, it seems, was that even the remedy of a new trial would not have benefited his client.

The evidence at issue here—Calhoun's hearsay statements—pertained only to Victim #8 and was thus relevant only to counts 36-40 as charged at CP-14-CR-2422-2011, and as Gelman observed, Judge Cleland carefully instructed the jurors on their duty to consider each accuser's statements separately. (PCRA, 05/11/2017, p. 36).[17] In doing so, he created the presumption that they did not allow Calhoun's testimony to affect their deliberations as to any other counts. *See Commonwealth v. Hawkins*, 701 A.2d 492, 503 (Pa. 1997) ("Our law presumes that juries follow the court's instructions as to the applicable law"). Even assuming that the hearsay evidence was inadmissible and prejudicial, therefore, its prejudicial effect did not extend beyond counts 36-40. Thus, what Sandusky likely would have gained from a successful appellate challenge to the admissibility of Calhoun's statements was a new trial on counts 36-40 only, not on all the charges. *See e.g., Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994) (granting a new trial for only the charge of homicide when the court's erroneous instructions did not adequately convey

[16] As the record reflects, Sandusky actually sustained five convictions related to Victim #8. Each related sentence was indeed concurrent to an unrelated sentence, however.

[17] Judge Cleland instructed the jurors, "Each count, each crime alleged stands independently and should be separately considered. You may find the defendant guilty on all counts, not guilty on all counts, or guilty on some counts and not guilty on other counts. So I'll deal with each charge separately and state for you the necessary elements or facts which must be found to be true beyond a reasonable doubt before you may return a guilty verdict. (TT, 06/21/2012, p. 23). He further explained that Calhoun's statements related solely to counts 36-40, or Victim #8. (*Id.* at 31-32).

that the jury had to find that the defendant intended to kill the deceased); *Commonwealth v. McClendon*, 385 A.2d 1337 (Pa. Pa. 1978 (granting a new trial only on the defendant's homicide conviction where the trial judge's instructions effectively told the jury which degree of homicide it should find); *Commonwealth v. Reed*, 644 A.2d 1223 (Pa. Super. 1994) (granting a new trial limited to the indecent assault charge where the judge's ruling, which violated the defendant's rights under the Confrontation Clause, affected only that charge). As his testimony implied, Gelman understood as much; an experienced appellate advocate, he appreciated the appellate courts' preference not to disturb convictions validly obtained.

Citing *Commonwealth v. Brown*, 52 A.3d 320 (Pa. Super. 2012), Sandusky suggests that he would have been granted a new trial on all counts. *Brown*, however, was a case where the improper evidence, admitted under the *res gestae* exception to the rule against hearsay, was so extensive that it necessarily tainted the entire verdict. That was not true in this case. *Brown*, therefore, is inapposite.

Even had the Superior Court agreed that Calhoun's statements constituted inadmissible hearsay, however, Gelman could not have successfully advanced a claim that the evidence was insufficient to sustain the verdict at Counts 36-40. *Commonwealth v. Palmer*, 751 A.2d 223 (Pa. Super. 2000), makes that clear.

In *Palmer*, the Court reiterated that the record to be reviewed in response to a claim that the evidence was insufficient to sustain a conviction was the record in its entirety, not a truncated version exclusive of any evidence deemed by the appellate courts to be inadmissible. *Id.* at 227. "The law is clear," it said, "that we are required to consider all evidence that was actually received, without consideration as to the admissibility of that evidence or whether the trial court's rulings were correct." *Id. See also Commonwealth v. Nelson*, 467 A.2d 638, 641 (Pa. Super. 1983) ("In passing upon the sufficiency of the evidence, we are not to exclude evidence that may have been erroneously received or considered and then evaluate the issue on the balance of the evidence. On the contrary, we are to consider *all* of the evidence whether erroneously received or not and evaluate the sufficiency of the evidence on that basis") (emphasis in original).

Had Gelman asked the Superior Court to review counts 36-40 for their legal sufficiency, therefore, the panel would have reviewed Petrosky's testimony in its entirety and, giving credit to the jury's obvious credibility assessment, decided on that basis whether the Commonwealth

had established the elements necessary for those convictions. *See id.* at 640 ("[A] reviewing court is not permitted to substitute its judgment for that of the fact finder, but is restricted to assessing the evidence in the light most favorable to the verdict winner and drawing all proper inferences that the evidence suggests in that party's favor[, and] [i]t is within the province of the trier of fact, [i.e., the jury], in a criminal prosecution, to pass upon the credibility of witnesses and the weight to be accorded the evidence produced"). Gelman thus could not have prevailed by raising a sufficiency of the evidence claim, as Petrosky's unredacted testimony was unquestionably sufficient to sustain the charges leveled at counts 36-40. The issue underlying the ineffectiveness allegation raised in Claim 23, therefore, is without merit.

Gelman's ultimate assessment, then, was correct. Had he appealed Judge Cleland's evidentiary ruling and gotten the defendant a new trial, and had a subsequent trial resulted in an acquittal on all of the charges related to Victim #8, the defendant's circumstances would not have changed. Because Judge Cleland ran the relevant sentences concurrent to unrelated sentences, the aggregate sentence would have been wholly unaffected.

Finally, the Court does not agree that Gelman's decision to advance an issue not properly preserved at trial was evidence of ineffectiveness.

As he reviewed the record, Gelman knew that Rominger's naked objection to McGettigan's purported references to Sandusky's silence was insufficient to overcome a claim of waiver. He concurred with trial counsel's position that the prosecutor had impermissibly implicated the defendant's right to remain silent, however, (PCRA, 05/11/2017, pp. 37-38), and decided to test the waters, so to speak. To that end, he inserted the issue into his post-sentence motions and, when no one objected, decided to pursue it in the Superior Court, as well. (*Id.*). As he had hoped, the Commonwealth again did not argue waiver, which reasonably invited his argument that the question of waiver had itself been waived. (*Id.* at 38). As the record demonstrates, that strategy was ultimately unsuccessful. Gelman's decision to pursue it, however, does not suggest that his overall strategy, including the decision not to challenge the admissibility of Calhoun's hearsay statements, was unreasonable. Rather, the circumspect manner in which he approached the waived issue evidenced his competence and professional discretion.

Curley, Schultz, and Spanier's Grand Jury Testimony (Claim 27):

On June 11, 2012, defense counsel filed a motion, authored by Attorney Rominger, seeking leave to introduce statements that Timothy Curley, Gary Schultz, and Graham Spanier made under oath to the grand jury. Because the men were unavailable, he argued, their statements were admissible under Rule 804(b)(3) of the Rules of Evidence. Mot. in Limine, 06/11/2012. That provision says in relevant part that an unavailable declarant's earlier statements may be admitted at a subsequent trial when their very utterance tended to expose the declarant to criminal liability. Rule 804(b)(3). Rominger did not bolster his request with reference to subsection (b)(1), under which an unavailable declarant's former sworn testimony is admissible at trial if the party against whom it is being offered had an opportunity and similar motive to develop it at the first proceeding. *Id.*

During oral arguments the following week, Rominger, who by then had read the relevant grand jury transcripts, narrowed the scope of his motion to pages 3 – 8 of Curley's testimony. (TT, 06/18/2012, p. 162). Its purpose, he averred, was to impeach McQueary by demonstrating that the assistant coach's report to Curley was more ambivalent than he had led the jury to believe. (*Id.* at 163). He acknowledged, though, that the evidence could turn out merely to be cumulative if Jonathan Dranov confirmed that the nature of the conduct McQueary described to them was equivocal, (*id.* at 172-73), which he did. (*Id.*, 06/20/2012, pp. 8-16). Judge Cleland later denied the motion, and Sandusky now alleges that counsel were ineffective for failing to incorporate 804(b)(1) into their motion. He is wrong.

To prove that his claim has merit, the defendant has to show a reasonable probability not only that the proposed testimony was admissible under Rule 804(b)(1), but also that Judge Cleland would have granted his motion under the alternative legal theory. The record actually indicates quite the opposite.

Judge Cleland did not question whether Rule 804 sanctioned what the defendant was asking. (*See* TT, 06/18/2012, p. 167). His concerns pertained to the potential adverse effects it could have on both Sandusky and the rights of the declarants, two of whom were then facing perjury charges based on their grand jury testimony and the last of whom would likely be charged. (*See id.* at 167-75). The argument, "But they're also admissible under Rule 804(b)(1)," would not have alleviated those concerns.

Where the inquiry is what Judge Cleland would have done, moreover, it is immaterial whether he rightly posited that the Commonwealth could have referenced the declarants' pending perjury charges or introduced their hand-written notes and e-mails as impeachment evidence.[18] He believed each to be admissible at the time—a belief that would not have been affected by the insertion of Rule 804(b)(1)—and based his decision, at least in part, on that consideration.

The Court need not consider the likelihood of counsel effectively impeaching McQueary with the proposed grand jury testimony, then, because the defendant has not even demonstrated a reasonable probability that Judge Cleland would have allowed counsel to use it pursuant to Rule 804(b)(1). This claim, then, fails for want of merit.

Repressed Memory/*Brady *Allegations (Claims 15-17):

Here the defendant alleges that the Commonwealth violated *Commonwealth v. Brady*, 373 U.S. 83 (1963), by failing to disclose that some of the victims' memories had been recovered through repressed memory therapy, which information, he says, was otherwise unlearnable because of the doctor-patient privilege. Whereas it was not revealed after trial that Aaron Fisher, D.S., and Matt Sandusky only recalled their abuse because of the therapy, he adds, a new trial is warranted based on after-discovered evidence. Alternatively, he contends that the victims' pre-trial statements reasonably indicated therapy-based memory reproduction such that counsel should have filed a motion *in limine* to preclude their testimony and/or retained an expert to discuss the unreliability of such memories. All three claims fail for want of merit.

Although he was denied access to the victims' psychological records, Sandusky was permitted to call witnesses to explore whether the victims had undergone repressed memory therapy prior to trial, and he did explore that subject with Dustin Struble ("Struble"), Michael Gillum, Aaron Fisher, Brett Houtz, and Dr. Elizabeth Loftus, none of whom affirmed the defendant's hypothesis.

During his direct testimony, Gillum, Fisher's treating therapist, plainly and credibly stated, "I don't deal with repressed memory [and] I don't work with anyone who claims to have repressed memories or anything along those lines." (PCRA, 03/24/2017, p. 159). He further

[18] The Rules of Evidence—Rule 609, specifically—allow for the impeaching of witnesses with prior convictions for crimes of dishonesty. Because a criminal defendant is presumed innocent until proven guilty, however, the Commonwealth may not use unproven charges to impeach. *Commonwealth v. Doswell*, 621 A.2d 104, 106 (Pa. 1993). Assuming the Commonwealth could have authenticated them, though, Curley and Schultz's handwritten notes and e-mails would indeed have been admissible under Rule 804 as statements against interest. Because their purpose would have been to impeach Curley's statements, not as substantive evidence against Sandusky, moreover, the Confrontation Clause would not have protected Sandusky against their admission.

articulated his negative assessment of repressed memory therapy and why he did not engage in it. (*Id.* at 164-65). While Struble acknowledged that he and his therapist had discussed methods of unearthing repressed memories, moreover, he stated definitively that he had not undergone that type of therapy prior to the defendant's trial. (*Id.*, 05/11/2017, p. 20).

Dr. Loftus had a different opinion based on "impressions" from Gillum's book, statements Struble made two years after the trial, and the fact that the victims whose excerpted trial testimony she reviewed did not give consistent stories to the police, the grand jury, and the trial jury. (*Id.* at 71-90). Having been rendered after an uncritical review of an absurdly incomplete record carefully dissected to include only pieces of information tending to support Sandusky's repressed memory theory, however, that opinion was entirely ineffective to rebut Gillum's and Struble's definitive denials.

There is no reason, then, to conclude that the Commonwealth was not telling Amendola the truth when it represented to him that it had no information regarding repressed memories. (*See id.*, 03/24/2017, pp. 104-06) (Amendola testifying that he asked the Commonwealth for information pertaining to the issue and was told that none existed). Accordingly, there is no basis for the Court to conclude that the Commonwealth violated its *Brady* obligations, as the Commonwealth necessarily must be in possession of the exculpatory or impeachment information before it has any duty to disclose it.

Sandusky further contends that the Commonwealth violated its *Brady* obligations by withholding information that some of the victims added previously undisclosed details about their abuse while interviewing with Attorney McGettigan prior to trial. As he accurately observes, that information constituted impeachment evidence that the Commonwealth was obliged to disclose pursuant to *Brady* and its progeny. That does not mean, however, that the omission warrants a new trial.

Proving a *Brady* violation is a tripartite proposition. The defendant must establish that the evidence at issue was either exculpatory or could have been used to impeach a witness, that it was deliberately or inadvertently suppressed by the Commonwealth, and that he suffered prejudice because of it. *Commonwealth v. Paddy*, 15 A.3d 431, 450 (Pa. 2011). Prejudice results when the suppressed evidence was material, meaning that there is a reasonable probability that the result of the proceeding would have been different had it been provided to the defense. *Id.*

In this instance, there is no question that the victims' late revelations were useful for impeachment purposes or that the Commonwealth failed to disclose them. Thoroughly familiar with the witnesses' prior recorded statements and testimony, though, Amendola recognized the newest discrepancies and capitalized on them during cross-examination. In that regard, he was able to show the jurors not only that the victims continued to change their stories, but also that the prosecutor they were supposed to trust was being less than forthcoming. Thus, while the Court certainly does not condone the Commonwealth suppressing evidence under any circumstance, the fact is that Amendola's preparedness turned the Commonwealth's dereliction into a defensive advantage.

Because proof of a *Brady* violation requires proof of prejudice, therefore, the defendant has also failed to establish that this second layer of his *Brady* claim has merit. What the record does establish, though, is that Amendola, because he was alert to the changes in the witnesses' accounts and exploited them accordingly, had no basis for filing a *Brady* motion either during the trial or afterward.[19]

Returning now to the issue of repressed memories, the foregoing analysis of the *Brady* question means that Amendola, having had no concrete evidence that any of the victims had undergone repressed memory therapy, had no basis for filing a motion *in limine* to exclude their testimony. Cognizant of the absolute protection then accorded therapeutic communications between a therapist and his client under 42 Pa. C.S.A. § 5944, Judge Cleland likely would not have permitted him to explore his suspicions either through discovery or at a hearing. That much is evident from the order he filed May 10, 2012 in which he cited the statutory privilege to prevent counsel from gaining access to confidential communications between the victims shared with Gillum. (*See also* PCRA, 03/24/2017, p. 106 ("[M]y recollection today is that we requested that information. And we were told by the Court, I believe . . . that we were told that that was privileged. I mean, we tried to get psychiatric history, too, at one point"). Certainly that order was well-supported by the plethora of case law confirming § 5944's near inviolability. *See e.g., In re S.T.S., Jr.*, 76 A.3d 24 (Pa. Super. 2013); *Commonwealth v. Dowling*, 883 A.2d 570 (Pa. 2005).[20] Without independent evidence to support the contention that the victims had undergone

[19] PCRA counsel discussed this issue with Amendola at the March 24, 2017 hearing date. Their exchange can be found at pages 88-104.

[20] Since Sandusky's trial, our Superior Court has declared that § 5944 must be construed narrowly in the face of competing constitutional claims. *Com. v. T.J.W.*, 114 A.3d 1098 (Pa. Super. 2015). In 2012, however, the appellate

repressed memory therapy, moreover, Amendola would have had no reason to involve an expert, as his or her testimony would have been irrelevant. He thus was not ineffective for failing to pursue either course of action.

"Suggestive" Police Questioning (Claim 18):

In a related claim, Sandusky contends that Amendola should have filed a motion *in limine* to preclude some or all of the victims' testimony as having been the product of suggestive and improper police questioning. Had he done so, the defendant proffers, Judge Cleland would have declared them to be incompetent to testify, effectively eliminating the bulk of the charges and evidence against him. The Court cannot agree.

As a general rule, every person is deemed competent to testify. Pa.R.Evid. 601(a). Exceptions under the Rule include individuals who "because of a mental condition or immaturity" cannot accurately perceive the events about which he or she is being called to testify, are unable to adequately express themselves, suffer from an impaired memory, or do not understand their duty to tell the truth. Rule 601(b).

Though the Rule is very specific regarding the bases for finding incompetency, the defendant has neither pled nor proven that any given victim met even one of its threshold requirements, let alone that a mental condition or immaturity caused a lack of perception, impaired his memory, or rendered him unable to adequately convey himself or comprehend his duty to tell the truth. Rather, he alludes to his repressed memory claims and contends that suggestive police questioning caused the victims to falsely accuse him and alter their narratives to fit with the theme the Commonwealth wanted to establish. The Court has already rejected the proposal that the victims' memories were demonstrably "refreshed" through repressed memory therapy, however, and suggestive police questioning alone does not implicate Rule 601(b). Whether any given victim tailored his story to mesh with what the police or other victims were saying was instead a matter to be explored during cross-examination, which is precisely what Amendola did. Accordingly, the attorney was not ineffective for failing to file a motion to disqualify the victims as witnesses on account of the allegedly improper police interviews.

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courts remained highly deferential to the statute, and as the record makes clear, Judge Cleland was highly deferential to existing precedent. There is no reason to believe, therefore, that he would have sanctioned any attempt by Amendola to obtain the victims' mental health records simply to confirm or disconfirm his suspicions.

Matt Sandusky and the Defendant's Promised Testimony: (Claims 30-32):

The jurors knew from Judge Cleland's initial instructions that Sandusky had an absolute right not to testify and that they could not hold it against him if he decided to exercise that right. (*See* TT, 06/11/2012, pp. 6-8). Amendola insinuated in his opening statement that his client would testify, however. (*id.* (Defense Opening) at 9, 26), because that was the plan. (PCRA, 08/12/2016, pp. 152, 175-76). It was the plan until mid-way through trial, when the Commonwealth advised Amendola that Matt, who had previously been his father's advocate, was now identifying himself as one of his father's victims. (*See* TT, 06/20/2012, pp. 65-66).

Amendola certainly could not have anticipated Matt's change of heart. The younger Sandusky had been privately and publicly supporting the defendant from the beginning. He had defended him in front of the grand jury, and he was slated to do the same at trial. (PCRA, 03/24/2017, p. 84). When Amendola delivered his opening statement, therefore, he fully expected to put his client on the stand. When what transpired later that week culminated in Sandusky's decision not to testify, counsel's contrary allusions to the jury were rendered inaccurate, of course. When he made them, though, he had no reason not to think Sandusky would not testify.

The defendant cites a series of non-binding federal decisions for the proposition that counsel is ineffective when he fails to fulfill a promise made in his opening statement. In each of those cases, though, the attorney's failure to call the defendant or otherwise deliver on the subject promise(s) effectively left the defendant without a defense under circumstances where there was no compelling reason for the attorney not to produce the promised evidence. Conversely, not calling Sandusky in this case did not substantially affect Amendola's defense strategy, which was to suggest to the jury that the victims' memories could not be trusted or that they were falsely accusing the defendant for financial gain. (*See id.* at 135-37).

More fundamentally, the fact that Matt blindsided the defense with his eleventh-hour revelation made it entirely reasonable for Amendola not to call his client even after implying that he would, and at least two of the federal courts Sandusky cites would agree. The court in *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), allowed that "unexpected developments sometimes may warrant changes in previously announced trial strategies," *id.* at 29, and the court in *United States ex tel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003), concurred "Turnabouts of this sort[, i.e., failing to produce the evidence promised in the opening statement] may be

justified when 'unexpected developments . . . warrant . . . changes in previously announced trial strategies,'" it said. *Id.* (quoting *Ouber*). The Court cannot imagine that the unexpected circumstances facing the Sandusky defense would not qualify in either circuit court.

The Court would note, moreover, that Amendola was aware and made his client aware that electing not to testify would be antithetical to what he had suggested in his opening. (TT, 06/20/2012, pp. 67-70). It thus was not a situation where counsel whimsically or unilaterally decided to depart from his announced trial strategy. He understood the potential risk of not eliciting the defendant's testimony but, with the defendant's knowledge and assent, decided that the risks associated with him taking the witness stand were greater than the risk of not fulfilling the jury's expectation that he would testify.

Was it ineffective, though, for Amendola to advise his client that Matt could be called as a rebuttal witness if he testified or for failing to file a motion to either preclude his testimony preclude the Commonwealth from asking questions outside the scope of direct examination? The answer, once again, is no.

After initially advising Amendola that they intended to use Matt at trial, Attorneys McGettigan and Fina narrowed the possibilities, saying they would relegate him to rebuttal "should evidence come out at trial that would allow him to testify and more specifically, obviously, if Mr. Sandusky testified at trial." (*Id.* at 65-67). Cognizant that his testimony would almost certainly invite Matt's testimony, therefore, Sandusky elected not to testify. (*Id.* at 67-68). At an in-chambers conference a couple of days later, though, the Commonwealth retreated even further, further agreeing not to call Matt in rebuttal if the defendant testified. (*Id.* at 68). Amendola advised his client of that latest concession. (*Id.*). Unable to secure the additional concession that McGettigan would not ask about Matt even if Sandusky opened the door during cross-examination, however, Amendola still believed it was too risky and advised his client accordingly. (*Id.* at 68-69). As he explained to Judge Cleland, "I can assure the Court that we have researched this, Mr. Rominger and I. We discussed it with Mr. Sandusky – that there's no way we see that we would call him to the stand under the current circumstances and protect him from being exposed to Matthew Sandusky being called as a Commonwealth witness on rebuttal." (*Id.* at 69).

Once the conference concluded, Sandusky, whom the record indicates was present during the foregoing discussion, was sworn in and colloquied regarding his decision not to testify. With Amendola leading the inquiry, the following exchange ensued:

> Q. Have we discussed on a number of occasions, but more recently, most recently within the last half hour to 45 minutes, your right to testify on your own behalf at your trial?
>
> A. Yes.
>
> Q. And have we discussed that on many different occasions since you were charged with these offenses since last November?
>
> A. Yes.
>
> Q. And prior to learning about your son, Matt Sandusky's, statement to the attorney general that somehow you inappropriately sexually touched him, was it your intention to testify at this proceeding?
>
> A. Yes.
>
> . . .
>
> Q. You have the absolute right to testify; you understand that?
>
> A. Yes.
>
> . . .
>
> Q. Have counsel discussed with you the pros and cons of testifying?
>
> A. Yes.
>
> Q. The advantages and disadvantages?
>
> A. Yes.
>
> Q. And the likelihood in this instance that 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, Matt Sandusky, as a witness against in you rebuttal?
>
> A. Yes.
>
> Q. And is that the reason why you have chosen not to testify?
>
> A. Yes.

(*Id.* at 75-79).

Concerned that Amendola had misrepresented the situation to his client, McGettigan immediately sought to clarify the Commonwealth's position, interjecting, "[T]he Commonwealth after hearing Mr. Amendola's first representation about his client's basis for not testifying, came back and . . . advised we would not call Matt Sandusky in rebuttal if the defendant were to testify and that is our position presently." (*Id.* at 80). He then suggested that Amendola's colloquy did not paint an accurate picture in that regard and asked Judge Cleland to strike his questions regarding the basis of the defendant's decision not to testify. (*Id.* at 80-81). "[W]e have already agreed Matt would not testify [and] 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," he said. (*Id.* at 81-82). Judge Cleland, however, denied McGettigan's motion. (*Id.* at 82).

Five years later, Amendola reiterated the substance of what he conveyed to his client, stating,

> Well, when you said did I discuss how they could introduce [Matt's testimony], it could be used as impeachment evidence, and I explained that, that they could bring it in in rebuttal because obviously, they were going to cross-examine him concerning his contact with various people. Not only the witnesses who had testified, but in light of the new information, they were going to cross-examine him about the possibility he had abused other kids.

(PCRA, 08/12/2016, p. 153). The threat of Matt's testimony was not the only downside they discussed, he continued. (*Id.* at 154). In expounding on that answer, however, he implicitly confirmed that Matt was the driving force behind his advice that Sandusky not testify. "But the point is . . . he would have been subjected to cross-examination generally, and in the course of that cross-examination generally, I was concerned, and I expressed my concern to Jerry, that he could open the door quite easily to them getting Matt's testimony in,." he explained. (*Id.*). That result, he opened, would have been catastrophic. (*Id.* at 154-55). Sandusky, he added, agreed with that assessment. (*Id.* at 155).

Asked, then, whether he had considered filing a motion *in limine* to preclude the Commonwealth from calling Matt in rebuttal or questioning the defendant about his allegations, Amendola said he had not. (*Id.* at 156). "And even if I had," he stated, "it still would have been subject to trial circumstances because the judge could not predict what was going to be said if Jerry testified." (*Id.*). The substance of Sandusky's testimony, he continued, could have changed any initial ruling in his favor. (*Id.* at 156-57). That was accurate assessment.

An experienced criminal attorney, Amendola understood the realities of trial; he appreciated that it was an evolving, sometimes unwieldy event subject to unexpected developments that could change the whole tenor of a case. More specifically, he knew that the Commonwealth was not guaranteeing absolutely that it would not call Matt in rebuttal if Sandusky testified. On the record, McGettigan only conceded that "that is our position *presently*," (TT, 06/20/2012, p. 80) (emphasis added), and the Court can reasonably infer that he prosecutor had likewise declined to extend absolute guarantee off the record. Amendola understood, moreover, that evidentiary rulings are generally subject to change in response to

unfolding circumstances such that a favorable ruling secured in advance of Sandusky's testimony could have been undone by Sandusky himself. After all, however well one may prepare a witness, one cannot control what actually comes out of his or her mouth on the witness stand, and Sandusky's misstep during the Costas interview told Amendola that his client was just as prone as anyone to saying the wrong thing or the right thing in the wrong way.

While it is theoretically possible that Judge Cleland would have agreed that the Commonwealth could not ask questions outside the scope of Sandusky's direct testimony, moreover, the proposition that Amendola could have protected his client by asking a series of narrowly-tailored questions is unrealistic. As a general rule, an attorney questioning his or her own witness must develop that witness's narrative through non-leading questions, and given Judge Cleland's propensity to enforce and demand compliance with the Rules, it is highly unlikely that he would have permitted the drastic departure Sandusky now suggests. Even had he granted such an order, moreover, his ruling would have been limited by Rule 607 of the Rules of Evidence, which provides that "[t]he credibility of any witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules." *Id.* That being the case, one need not strain to imagine the ease with which McGettigan, whom Amendola acknowledged was a talented cross-examiner, could have led Sandusky to open the door to damaging questions about Matt's allegations, if not his rebuttal testimony.

Whether the Commonwealth called him as a rebuttal witness or was limited to cross-examining the defendant, then, Matt Sandusky's allegations almost certainly would have reached the jurors' ears. Amendola did not want them to hear that his client's son had become an accuser, though, and neither did the defendant. They wanted to suppress that evidence—to forestall the jury from hearing the substance of Matt's accusations, not just his appearance on the witness stand. The only sure way to accomplish that was for Sandusky not to testify. That was what Amendola accurately conveyed, and that was the ultimate consideration that convinced Sandusky to waive his right to testify. Whereas the advice, "The Commonwealth cannot call Matt in rebuttal if you testify," even if legally sound, would not have changed the fact that Sandusky's testimony could easily have paved the way for the Commonwealth to introduce Matt's allegations, therefore, it is fanciful to postulate that the defendant would have elected to testify had his attorney uttered them.

Dr. Atkins' Testimony (Claim 29):

On the first day of trial, the Commonwealth introduced letters the defendant had written to Brett Houtz ("Houtz") that read like missives one would compose to his love interest. Amendola knew they would be part of the evidence and, recognizing that his client's behavior with kids seemed odd to many people, wanted the jury to hear from an expert that the psychology behind his anomalous conduct had nothing to do with pedophilia. (PCRA, 08/12/2016, pp. 161-63). He thus called Dr. Elliott Atkins solely to explain the letters, not to disestablish specific intent to commit the alleged crimes. (Trial Transcript ("TT"), 06/19/2012, pp. 161-63).

Establishing for the jury the intended parameters of Dr. Atkins' testimony, Judge Cleland prefaced it with the: "The purpose of this testimony . . . is to offer an explanation concerning the letters which you had previously seen projected onto the screen." (*Id.* at 163). He further explained that the doctor was not attempting to rebut the evidence or excuse any criminal conduct and reiterated, stating "So this is offered for a very limited purpose, simply to explain the letters and the motivation of the defendant in writing the letters." (*Id.*).[21] Dr. Atkins then detailed the characteristics of histrionic personality disorder—the psychological condition with which he had diagnosed Sandusky—and explained how the tone and content of the subject letters was consistent with that diagnosis. (*Id.* at 169-87).

Based on Dr. Atkins having discussed in general the traits of histrionic personality disorder, Attorneys McGettigan and Fina attorneys argued that his testimony functioned to negate criminal intent and, therefore, that Sandusky had opened the door to a broader inquiry into his sexual behavior. (*Id.* at 187-90). Judge Cleland rejected that argument but agreed that the Commonwealth could inquire about whether the same traits defining histrionic personality disorder were also characteristic of certain psychosexual disorders. (*Id.* at 190-91).

During cross-examination, Dr. Atkins acknowledged the diagnostic overlap. (*Id.* at 216). He clarified, however, that he had not seen evidence to support a psychosexual diagnosis. (*Id.*). "There is no clear pattern or clear diagnosis of a psychosexual disorder without certain behaviors and Mr. Sandusky denied those behaviors," he stated. (*Id.*). Asked, then, whether his conclusion was thus based in part on the defendant's denial, Dr. Atkins conceded, "If, in fact, the things that

[21] Judge Cleland reiterated the limited purpose of the testimony in a longer instruction encompassed within his final charge. (*See* TT, 06/21/2012, pp. 19-21).

he is accused of are true, then he would have a psychosexual disorder." He did not concede their truth, however, but added, "I found nothing to support that that's the case." (*Id.* at 216-17).

Testifying in rebuttal, Dr. John O'Brien disagreed with Dr. Atkins' diagnosis, (*id.* at 278-94), and, in response to McGettigan's pointed question, opined that the subject letters were also consistent with a psychosexual disorder with a focus on adolescence or preadolescence. (*Id.* at 295). He acknowledged, though, that his opinion was valid only if the facts were as the Commonwealth alleged them to be. "Part of the difficulty is that in doing such an evaluation," he explained, "you're considering evidence that hasn't been proven . . .. So it's difficult to draw factual conclusions – impossible to draw factual conclusions from that sort of information." (*Id.*).

The expert testimony, therefore, was not as damning as Sandusky proposes. Neither expert characterized him as a pedophile, and neither actually stated that he had a psychosexual disorder. Dr. Atkins said that would be the case *if the facts were as the Commonwealth alleged*, which is the same thing Dr. O'Brien indicated. Neither suggested which facts the jury should believe, however. Accordingly, neither suggested that the letters or anything else were in fact indicative of the defendant being a pedophile. On the contrary, both made it clear that the paradigm into which the letters ultimately fit depended on what the factfinder believed about the Commonwealth's allegations. That function, as Judge Cleland made abundantly clear, was reserved to the jury. That being the case, Amendola's decision to call Dr. Atkins did not "open the door" to the expert opinion that his client was a pedophile.[22]

Amendola's decision to call Dr. Atkins, moreover, was reasonably strategic. The attorney was cognizant that calling him created a potential risk but thought it even riskier not to call him. (PCRA, 0812/2016, p. 163). Though *he* interpreted the letters as "Jerry being Jerry," Amendola recognized that his client's behavior seemed "off the wall" to the average citizen. (*Id.*). He thus wanted the jury to hear that "pedophile" was not the only reasonable explanation for it, (*id.*), and believed Dr. Atkins could do that without prejudicing his client. (*Id.* at 167). Looking back four years later, Amendola said he would not pursue the same course today. (*Id.* at 164). Effectiveness is not measured by a hindsight comparison between the strategy employed

[22] In his Brief and Proposed Findings, Sandusky also argues that Amendola was ineffective for failing to advise him that Dr. Atkins' testimony could open the door to the opinion that he was a pedophile, and he cites Lindsay Kowalski's testimony as proof. The defendant did not allege this purported avenue of ineffectiveness in his Petitions, however, and may not add new issues in a brief. That being said, the Court would add that the issue has no merit. While no one disputes that the defendant did not like that the jury was going to be informed that he had a personality disorder, the fact is that he and Amendola discussed it ahead of time; he participated in the psychological evaluation, and he did not tell Amendola to keep Dr. Atkins off the witness stand. (PCRA, 08/12/2016, pp. 161-63).

and alternatives not pursued, however. *Commonwealth v. Puksar*, 951 A.2d 267, 277 (Pa. 2008). The operative question is whether counsel's choice had a reasonable basis designed to effectuate his client's interests. *Id.* Since Amendola's did in this instance, the defendant could only prevail by proving that an alternate course of action would have offered a substantially greater chance of success, *Fletcher*, 986 A.2d at 772, which he did not.

Jessica Dershem's Testimony (Claim 28):

During re-direct examination, Attorney McGettigan twice asked Clinton County CYS caseworker Jessica Dershem whether, in her "professional and personal opinion," what she learned in late 2008 and early 2009 indicated that Sandusky had fostered an "inappropriate relationship" with Aaron Fisher. (TT, 06/12/2012, pp. 181-82). Amendola did not object to McGettigan's question or to Dershem's answer either time. (*See id.*). He later agreed that the Commonwealth was implicitly suggesting she was an expert, though, (PCRA, 03/24/2017, p. 130), and could not say nearly five years later why he did not object at trial. (*Id.* at 130-31).

Sandusky posits that Amendola's silence amounted to ineffectiveness. The jury was led to believe not only that Dershem was an expert qualified to render an opinion, he says, but also that the existence of an "inappropriate relationship" with Fisher was a sufficient reason to convict him. To agree with the latter conclusion, though, the Court would have to assume that the jury disregarded the fact that Judge Cleland identified only Drs. Atkins and O'Brien as experts, (*see* TT, 06/21,2012, pp. 19-21), and ignored the elements of the criminal offenses with which he was actually charged, as clearly defined by Judge Cleland. (*See id.* at 23-31). It would further have to assume that the jury ignored his careful and lengthy delineation between criminal and non-criminal physical contact:

> Now, I will submit that at some point in your deliberations you'll have to confront the question: When does otherwise innocent conduct become criminal? Perhaps I can offer some guidance that might be useful.
>
> Let us begin with the obvious proposition that it is not necessarily a crime for an adult to touch a child. It's not a crime, for example, for a downhill skiing racing coach to take hold of a child's leg to demonstrate how to properly position it over a ski or for a wrestling coach, in very close contact with an athlete, to demonstrate a wrestling move or for a teacher to put a comforting arm around a crying child.
>
> Now, it is obviously a crime, as I will explain to you, for a man to have oral sex with a boy or for the man to have the boy perform oral sex on him. And if you believe that testimony that it happened in this case, then you may find the defendant guilty.

> But other forms of physical contact are more problematic. It's not necessarily a crime, for example, for a man to take a shower with a boy. It's not necessarily [a] crime for a man to wash a boy's hair or to lather his back or shoulders or to engage in back rubbing or back cracking.
>
> If you believe the defendant does those things – did those things, it does not necessarily mean that you must find the defendant guilty. You may believe he exercised poor judgment, but poor judgment does not in and of itself amount to criminality.
>
> Similarly, an adult's behavior is not a crime simply because the behavior of the adult makes the child feel uncomfortable. A child's reaction may be evidence for you to consider in deciding whether a crime has been committed but it's not determinative. What makes this kind of ambiguous contact a crime is the intent with which it is done. You must distinguish an expression of familiar or family affection from an act of lust. A display of innocent affection is not a crime, but what appears to be otherwise innocent conduct when performed with a sexual motive, when performed with the intent to sexually arose [sic] an adult and to satisfy an adult's sexual desire at the expense of a child, that is a crime.
>
> . . .
>
> So the issue is not what the child felt. The issue is what the defendant intended. It is the defendant's intent, not the child's reaction that determines if a crime was committed. Of course, how a child reacted is not irrelevant to the extent it assists you in assessing the defendant's attempt, you may consider.
>
> If you decide that the defendant engaged in the various behaviors that have been described during the trial, then you must decide which acts, if any, he did with the intention to satisfy his own sexual desires. Any behavior motivated by sexual desire was a crime. If he did not act out of sexual desire, then he committed no crime even if he did display poor judgment.

(*Id.* at 12-15). Whether or not the jury may have otherwise inferred that Dershem was offering an expert opinion, and whether or not her testimony gave the impression that an "inappropriate relationship" was enough to support a conviction, therefore, Judge Cleland unequivocally corrected any such misapprehension. The law presumes, after all, that a jury follows the judge's instructions. *Commonwealth v. Hawkins*, 701 A.2d 492, 503 (Pa. 1997). Accordingly, Sandusky was not prejudiced by Amendola's failure to object to Dershem's "expert" opinions.

It is not want of prejudice, however, but want of merit that defeats that portion of Claim 28 wherein Sandusky suggests that Dershem opined on Fisher's credibility.

After Dershem described her initial interview with Fisher, McGettigan asked her to define its purpose. (TT, 06/12/2012, pp. 124-28). "The interview was . . . to determine whether or not we had enough information to consider it child abuse," she explained, thus prompting the attorney to ask what conclusion she had reached that day. (*Id.* at 128). She responded, "[W]e felt

that Aaron had some more stuff to talk about," adding that she and her coworkers felt after the second interview that they had enough information to conclude that the report alleging that Sandusky had sexually abused Fisher was indicated. (*Id.*). McGettigan next asked whether Dershem's initial impression stemmed from a belief that Fisher "was lying to you, making something up, or merely withholding and failing to fully disclose," (*id.* 129), and the caseworker clarified, "Just withholding because he was uncomfortable talking about the incidents." (*Id.*).[23]

In eliciting Dershem's opinion about why Fisher did not fully disclose during their first interview, says Sandusky, the Commonwealth violated the prohibition against experts testifying on the issue of a witness's credibility. *E.g., Commonwealth v. McClure*, 144 A.2d 970, 877 (Pa. Super. 2016). Read in context, though, her comments do not reasonably lend themselves to that interpretation.

When she made the allegedly objectionable observations, Dershem was speaking within the confines of how she had perceived Fisher's conduct at one interview she had facilitated more than three-and-a-half years earlier. She did not stray beyond that: She did not attempt to characterize Fisher as generally truthful; to suggest that either he or the larger population of children who had been sexually abused tended not to fully disclose initially; or to intimate that the jury should give credence to his or any of the victims' testimony. In short, there was nothing about Dershem's testimony from which one could reasonably infer that she was opining about Fisher's credibility in 2008 or 2012. Accordingly, Amendola had no basis to object that she was opining on a witness's credibility, whether as an expert or as a layperson.

Closing Arguments and the Right to Remain Silent (Claim 25):

Here Sandusky alleges that Amendola was ineffective for failing to request a mistrial after the prosecutor improperly referenced his election not to testify while commenting about his interview with Bob Costas. Invoking *Commonwealth v. Molina*, 104 A.2d 430 (Pa. 2014), he notes that defendants have the absolute, constitutionally protected right not to testify and that prosecutors, as a result, may not comment on their decision to exercise that right. Had Amendola thus moved for a mistrial on account of McGettigan's comments, he posits, he would have preserved the issue for appellate review and the Superior Court likely would have remanded

[23] Sandusky suggests the following finding of fact: "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.'" Brief and Proposed Findings, p. 181. Dershem did not use the word "lying," though, and nor did she adopt it from McGettigan. On the contrary, when McGettigan proposed it as an explanation for Fisher's initial reluctance, Dershem implicitly rejected it.

for a new trial. Those comments occurred within the following excerpts of the prosecutor's closing remarks:

> 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 that I'm almost as good a questioner as Bob Costas, I think, or close.
>
> Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining – he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question[s]. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He just enjoys young children.
>
> . . .
>
> The defendant's explanation on television, is there anything else that you missed? Mr. Amendola read it with great animation. I'm not sure if there was anything – because he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today. I think he's talked about this, you know, the shower incident. He didn't say and that's little Johnny, who I know now ten years later who lives around the corner. He forgot a name. He remembered the incident clearly.
>
> Why did he remember it? I mean, he showered with a lot of boys. Why did he remember this particular incident? He remembered it because he had seen Mike McQueary and he knew this day would come. He remembered it. He remembered that day.
>
> One thing he didn't which he could have provided to Bob Costas, he could have provided it to anybody at any time. He had the complete capacity to exonerate himself at the time and just say who was there because this is a day – remember, Mike McQueary, why remember him and not the little boy you're soaping and just being innocently cleansing to? But he didn't provide that name to anybody, ever, certainly not to Bob Costas, no. He forgot that.

(TT, 06/21/2012, pp. 140-42, 145-46).

In his "Opinion Addressing the Defendant's Post-Sentence Motions," filed January 30, 2013, Judge Cleland addressed the substantive issue implicated here and reiterated his earlier

conclusion that McGettigan's comments were fair rebuttal to Amendola's closing. *Id.* at 16-17. He further noted how he had repeatedly instructed the jury that Sandusky had no obligation to testify and that its decision must be based solely on the evidence presented, *id.*—an observation well supported by the trial record.

In his brief opening instructions, Judge Cleland defined the parties' respective burdens in clear and unequivocal terms. "The burden of proving Mr. Sandusky's guilt is always on the prosecutor. Mr. Sandusky does not have any responsibility to prove anything," he began. (TT, 06/11/2012, p. 6). Giving substance to that admonition, he added, "He does not need to present any evidence to prove that he is not guilty. In addition, under both the United States and Pennsylvania Constitutions, he has an absolute right not to testify. If he decides not to testify, you cannot hold that fact against him or infer that he is guilty because he chooses not to testify." (*Id.* at 6-7). Judge Cleland returned to that theme after describing the procedural course the jury could expect as the trial progressed: "After the Commonwealth has presented its case," he said, "the defense may present evidence for the defendant, but, remember, the defendant has no obligation to present any evidence or to testify himself because the responsibility is always on the Commonwealth and only on the Commonwealth to prove its case beyond a reasonable doubt." (*Id.* at 7-8).

Having elected to instruct the jury before the attorneys delivered their closing statements, Judge Cleland rehearsed the same legal tenets at the outset of his final charge. He thus cautioned the jurors yet again,

> The second fundamental principle [to remember] is that under our system of criminal law the defendant is presumed to be innocent. The mere fact that he's been arrested, that he's been accused of a crime is not any evidence against him. He is assumed to be innocent throughout this trial and unless and until you conclude, based on a careful and impartial consideration of the evidence, that the Commonwealth has proved to your satisfaction that he is guilty beyond a reasonable doubt.
>
> It's not the defendant's burden to prove he's not guilty. It is the Commonwealth that always has the burden of proving that he is guilty by establishing each and every element or fact sufficient to support the crime charged and that he has been proven guilty beyond a reasonable doubt.
>
> The defendant, under our system of law, is not required to present any evidence or to prove anything in his own defense. The Commonwealth has the burden of proving the defendant's guilt.

(*Id.* 06/21/2012, at 9-10). He made numerous additional references to the Commonwealth's absolute burden throughout his closing instructions. (*See id.* at 10-35). After considering defense counsel's objection to Attorney McGettigan's alleged references to Sandusky's post-arrest silence, moreover, (*see id.*. at 157-58), Judge Cleland reminded the jury one last time, "You must decide those charges based on the evidence presented here in this courtroom and be reminded that the burden is on the Commonwealth to prove its case beyond a reasonable doubt and that the defendant has no obligation at any time to present any evidence in his own defense." (*Id.* at 160). Even if the jurors understood McGettigan's comments as references to the defendant's silence, then, Judge Cleland's instructions clearly reminded them that they could not apply a negative interpretation to his decision to exercise his constitutional right.

Independent of what Judge Cleland instructed the jury, his response to defense counsel's objection to McGettigan's remarks, i.e, his conclusion that they were fair rebuttal, tells the Court he would have denied a motion for mistrial. Accordingly, Sandusky's claim only has merit if the record shows a reasonable probability that the Superior Court would have reversed that ruling as an abuse of discretion. *See Commonwealth v. Smith*, 131 A.3d 467, 474-75 (Pa. 2015) ("We review the denial of a motion for mistrial under the abuse of discretion standard [because '[s] mistrial is an extreme remedy that is required only where the challenged event deprived the accused of a fair and impartial trial'"). That, however, is not the case.

In *Commonwealth v. Wright*, 961 A.2d 119 (Pa. 2008), our Supreme Court reaffirmed that a mere error in judgment is not tantamount to an abuse of discretion when the question is whether the trial court should have granted a mistrial because of a prosecutor's improper references to the defendant's decision not to testify. *Id.* at 142. An abuse of discretion may not be found, it said, unless the judge's decision overrode or misapplied the law, was manifestly unreasonable, or was the result of partiality, prejudice, bias, or ill-will. *Id.* "Atrial court may grant a mistrial," it added, "only 'where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.'" *Id.* (citation omitted). Turning next to the law as it related to a prosecutor's improper references to a defendant's silence at trial, the *Wright* Court observed that a comment is forbidden if its language intentionally invites the jury to infer guilt from the defendant's failure to testify or highlights the fact that only the non-testifying defendant can rebut the Commonwealth's evidence. *Id.*

The statements at issue in *Wright* were the prosecutor's dual references to the defendant's failure to testify and his corollary identification of the defendant as one of the Commonwealth's "best witnesses." *Id.* at 141. Even if not intended to implicate the defendant's right to remain silent, the Court concluded, those remarks were inappropriate. *Id.* at 142-43. "However, not every reference to a defendant's failure to testify automatically requires a new trial; the verdict can still be sustained if the error was harmless," it added. *Id.* at 143. If the record established beyond a reasonable doubt that the error could not have contributed to the verdict, the Court explained, there was no cause for redress. *Id.* Thence employing a harmless error analysis, it found that the overwhelming evidence of guilt and the trial judge's cautionary instruction rendered the error harmless. *See id.* at 144-45.

In this case, the allegedly improper comments, quoted above, were made while Attorney McGettigan was discussing Sandusky's interview with Bob Costas. He had already reviewed and commented on much of the Commonwealth's evidence at that point, (*see* TT, 06/21/2012, pp. 97-140), and was revisiting Sandusky's explanation of events, which Amendola had commented on extensively during his closing. (*See id.* at 66-73).

With respect to the latter portion of the above-quoted argument, the Court fully agrees with Judge Cleland's assessment that it was fair rebuttal. Sandusky parses out three discrete phrasings—"because he didn't provide you with something that could have been enormously helpful to us, could have solved many problems today"; "he could have provided it to anybody at any time;" and "But he didn't provide that name to anybody, ever"—and challenges them as impermissible references to his post-arrest silence. They do not lend themselves to that interpretation when read in their broader context, though, sandwiched, as they were, between musings pertaining unequivocally to the Costas interview.

In this case, the broader context also includes Amendola's references to the same portion of the interview. Although the defendant did not testify, the whole of the Costas interview was admitted into evidence, and Amendola utilized it during his summation to remind the jury of every exculpatory statement his client had made and to argue that his decision to give the interview was indicative of his innocence. Part of that interview focused on McQueary's observations, and Amendola, presumably in possession of a transcript, read the following exchange:

> Costas says, what about Mike McQueary, the grad assistant in 2008 – we'll talk about it in a minute – walked into the shower where he said in specific detail that you were forcibly raping a boy who appeared to be 10 or 11 years old. That his hands were up against the shower wall and he heard rhythmic slapping sounds and he described that as a rape.
>
> Jerry said, I would say that's false.
>
> What would be his motive to lie, Costas says. Jerry says, you would have to ask him.
>
> Costas, what did happen in the shower that night that Mike McQueary happened upon you with a young boy?
>
> Jerry, we were showering and horsing around and he actually turned all the showers on. This is in the shower stall at the, I guess, Lasch Building, and was actually sliding across the floor and we were, as I recall, possibly snapping a towel and horseplay.

(*Id.* at 68). Evaluating the parsed references within the context of Amendola's recitation and McGettigan's broader response, therefore, it is fanciful to imagine that the jury interpreted them as references to Sandusky's election to remain silent.

A closer question arises with respect to McGettigan's first alleged reference to the Sandusky's Fifth Amendment right, though.

Introducing his analysis of the Costas interview, McGettigan began by noting the defendant's decision to speak out on Costas' show and reflecting on his damaging response to the question of whether he was sexually attracted to young boys. (*Id.* at 140-41). He proceeded to remind the jury of Amendola's explanation: that his client tended to repeat questions before answering them, (*id.* at 141-42), and responded, "I wouldn't know. I only heard him on TV. Only heard him on TV." (*Id.* at 142).

While that language is reasonably susceptible to the interpretation Sandusky proposes, i.e,, that it is an impermissible reference to his post-arrest silence, it is equally susceptible to a far more innocent interpretation: that McGettigan could not use the one TV interview the defendant had given as a legitimate tool to assess the accuracy of Amendola's explanation.[24]

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[24] The defendant proffers as evidence of intentional misconduct McGettigan's testimony that Sandusky could have told him who Victim #2 was while they were sitting in a room together after his arrest. (*See* PCRA, 08/23/2016, p. 59). The Court rejects it as such. The topic of conversation at that point was whether McGettigan ever believed that Allen Myers was Victim #2—a topic PCRA counsel broached in exploring the defendant's claim that the prosecutor essentially lied to the jury by saying that only God knew the true identity of Victim #2. McGettigan's answer, read in context, was relevant to that inquiry alone; it had nothing to do with his summation as it related to the Costas interview. Pursuant to Judge Cleland's order(s) limiting the scope of the PCRA hearing, in fact, McGettigan's alleged references to Sandusky's post-arrest silence were not an authorized subject for inquiry when the former prosecutor testified.

The Court cannot say, of course, how each juror actually interpreted the prosecutor's comments. It can say, however, that they did not have the unavoidable effect of prejudicing the jury. Judge Cleland foreclosed that possibility with a timely and reiterative cautionary instruction delivered immediately before the jury retired to deliberate. According to *Wright*, however, "unavoidable effect" is the standard. That being the case, and as the foregoing discussion demonstrates, Sandusky cannot prove a reasonable probability that the Superior Court would have deemed McGettigan's allegedly improper comments to be grounds for a new trial had trial counsel properly preserved the issue for appellate review.

Character Evidence Instruction (Claim 33):

In his final trial-related claim, the defendant alleges that Amendola was ineffective for not objecting to Judge Cleland's erroneous statement of the law when he delivered the following instruction on character evidence:

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

(*Id.* at 22). Amendola did not object to the misstatement "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." His omission, however, did not amount to ineffective assistance of counsel.

Had the jurors heard no other instructions in this case, they may have been confused about how to weigh the character evidence. That instruction was only one of many, however, and cannot be viewed in isolation. Rather, whether an erroneous instruction created uncertainty or misinformed the jury regarding applicable legal principles is a question that must be answered with reference to the charge as a whole. *Commonwealth v. Barnett*, 121 A.3d 534, 545 (Pa. Super. 2015). *See also e.g., Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999) (same);

Commonwealth v. Faulkner, 595 A.2d 28, 40 (Pa. 1991) (same); *Commonwealth v. Wortham*, 369 A.2d 1287, 1289 (Pa. 1977) (same). If the charge in its entirety accurately reflects the applicable legal principles to be applied, an isolated error will not invalidate it. *Id.*

Though our Supreme Court has never retreated from that totality-driven analysis, Sandusky urges the Court to apply *Commonwealth v. Waller*'s anomalous conclusion that a defendant may suffer prejudice when a trial court issues a single instruction both correctly and incorrectly such that it cannot be ascertained which version the jury followed. 468 A.2d 1134, 1136 (Pa. Super. 1983). The *Barnett* Court rejected that proposal just two years ago, though, noting that *Waller* was a non-precedential decision issued by a three-judge panel, with one judge concurring in the result only and another dissenting. 121 A.2d at 523. Accordingly, it adhered to Pennsylvania's long history of evaluating the charge as a whole, *id.* at 545. This Court will do likewise, and a totality analysis reveals that the defendant's final challenge to Amendola's effectiveness at trial is unsustainable.

Judge Cleland plainly and repeatedly instructed the jury that it was the Commonwealth alone that had the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant did not have to prove anything in his own defense. (TT, 06/21/2012, pp. 10-12, 23, 25-28, 160, 163). That was in addition to several corollary references he had made during the opening charge. (*Id.*, 06/11/2012, pp. 6-9, 16-17). It is thus unfathomable that Judge Cleland's solitary misstatement left the jurors uncertain about the applicable standard of proof, particularly when he had just finished instructing them that "[e]vidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty."

Because the charge in its entirety plainly apprised the jury that the Commonwealth bore the burden of proving Sandusky guilty beyond a reasonable doubt and that his character defense alone could raise a reasonable doubt, therefore, he was not prejudiced by Amendola's failure to object to the Court's misstatement.

Cumulative Prejudice (Claim 34):

As the defendant recognizes, "[N]o number of failed ineffectiveness claims may collectively warrant relief if they fail to do so individually." *Commonwealth v. Koehler*, 36 A.3d 121, 161 (Pa. 2012). Under that rubric, it is impossible to prove cumulative prejudice based on individual claims rejected for lack of merit. *Id.* It may properly be assessed, however, where multiple claims have been rejected for want of prejudice. *Id.* Nonetheless, cumulative prejudice

is not assumed even where lack of prejudice drives the overall analysis; rather, the defendant must demonstrate how the particular cumulation requires a different analysis than that applicable to each claim individually. *Hutchinson*, 25 A.3d at 318-19. Where trial counsel's deficiencies, though non-prejudicial as assessed one-by-one, are so intertwined that their amalgamation casts doubt on the reliability of the verdict, for instance, the cumulative prejudice argument is a valid one. *See Commonwealth v. Johnson*, 966 A.2d 523 (Pa. 2009). In this case, however, the argument fails.

As the Court has detailed at length, the bulk of Sandusky's claims are meritless. Although the defendant incorporates each of them into his argument, therefore, the Court must exclude them for purposes of its own analysis. Those that remain, whether they fail for want of prejudice or because Amendola's actions or failure to act were informed by a reasonable strategy, do not combine to call into question the overall effectiveness of the defense counsel provided or the legitimacy of the verdict.

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CP-14-CR-2421-2011**
	:	**CP-14-CR-2422-2011**
GERALD A. SANDUSKY,	:	
Defendant.	:	

ORDER

AND NOW, this **18th day of October 2017**, for the reasons articulated in the foregoing Opinion, it is hereby **Ordered** and **Decreed** that the defendant's Petition for Post-Conviction Collateral Relief is **DISMISSED.** Accordingly, his request for a new trial or dismissal of the charges is **DENIED.**

If the defendant wishes to appeal this judgment to the Superior Court, he shall, within **THIRTY (30) DAYS** from the date this Order is filed, file and serve a Notice of Appeal as set forth in rules 901-906 of the *Pennsylvania Rules of Appellate Procedure*.

BY THE COURT,

Hon. John Henry Foradora,
Specially Presiding