IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

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

THE COMMONWEALTH OF PENNSYLVANIA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JOHN H. FORADORA, SPECIALLY PRESIDING:

NOW COMES the Commonwealth of Pennsylvania, by and through its attorneys, who submits proposed findings of fact and conclusions of law, and, in support thereof, avers as follows:

I. INTRODUCTION

Gerald A. Sandusky ("Sandusky"), convicted of the sexual abuse of 10 pre-teen and teenaged boys, filed a petition for relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"),[1] 42 Pa.C.S. § 9541 *et seq.*, wherein he requested a new trial. After the Commonwealth answered the petition, Sandusky was given the opportunity to submit a second amended PCRA petition. The second amended PCRA petition was filed on March 7, 2016. After the Commonwealth filed its answer to the second amended PCRA petition, Sandusky submitted a response to the Commonwealth's answer on April 16, 2016.

Collectively, Sandusky's pleadings contained a factual and procedural narrative replete with Sandusky's own personal assessment of the credibility of victims and witnesses, and the casting of aspersions upon school officials, Children and Youth Services ("CYS") workers, law

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

enforcement, the judiciary, his trial counsel and the Pennsylvania Office of Attorney General ("OAG"). Through no fault of his own, he claimed that he was transformed into one of the country's most infamous child predators. But his continued proclamations of innocence and preference for revisionist history do not offset the fact that he was convicted of eight counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); seven counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); nine counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); 10 counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); 10 counts of endangering the welfare of children, 18 Pa.C.S. § 4304; and one count of criminal attempt to commit indecent assault, 18 Pa.C.S. § 901 (18 Pa.C.S. § 3126). His case now in the post-conviction phase, the burden has shifted to Sandusky, requiring that he establish by a preponderance of the evidence that his sentence resulted from one or more of the enumerated errors or defects listed in 42 Pa.C.S. § 9543(a)(2). It is a burden he has not met due to the fact that he failed to offer any convincing and credible proof in support of his claims and/or his claims fail as a matter of law.

Initially, the Honorable John M. Cleland ("Judge Cleland"), specially presiding, granted Sandusky's request for an evidentiary hearing but limited the hearing to claims 1, 3, 6, 12, 26, 27, 29, 31, 32, and 33 by order dated June 15, 2016. Judge Cleland determined that all of the remaining issues raised by Sandusky could be decided without the necessity of a hearing, although additional briefs could be required.

The evidentiary hearing ultimately commenced on August 12, 2016 and continued on August 22, 2016, August 23, 2016, and November 4, 2016. During the course of the hearing, Sandusky presented the testimony of Joseph Amendola, Esquire, Karl Rominger, Lindsay Kowalski, Andrew Shubin, Esquire, Michael Gillum, Pennsylvania State Police ("PSP") Corporal

Scott Rossman, Joseph Leiter, OAG Special Agent Anthony Sassano, Jonelle Eshbach, Esquire, Frank Fina, Esquire, Joseph E. McGettigan, III, Esquire, and Allan Myers. Sandusky also testified on his own behalf. Following the conclusion of the hearing, Judge Cleland provided the parties with an opportunity to submit final briefs on any of the issues identified in Sandusky's second amended PCRA petition.

Following the submission of final briefs, Judge Cleland ultimately recused himself from the case and the Honorable John H. Foradora, President Judge of the Jefferson County Court of Common Pleas was appointed to specially preside over the post-conviction proceedings. This Court held evidentiary hearings on March 24, 2017 and May 11, 2017. During the course of those proceedings, Sandusky was permitted to elicit evidence and testimony pertaining to any and all claims that he raised in his petitions. To that end, he elected to present the following witnesses: Joseph Amendola, Esquire, Michael Gillum, Joseph Leiter, Corporal Scott Rossman, Dustin Struble, Norris Gelman, Esquire and Elizabeth Loftus, Ph.D. After the proceedings had closed, this Court directed the parties to submit proposed findings of fact and conclusions of law for the Court's consideration.

II. DISCUSSION OF CLAIMS

CLAIM I. TRIAL COUNSEL EMPLOYED A REASONABLE AND RATIONAL STRATEGY WHEN PERMITTING SANDUSKY TO BE INTERVIEWED BY BOB COSTAS[2]

Proposed findings of facts:

1. Joseph Amendola, Esquire ("Attorney Amendola") was admitted to practice law in October, 1973. (N.T. 8/12/16, p. 101)

2. For the past 30 years, his practice has primarily consisted of criminal defense litigation. *See id.* at 102.

3. Either in late 2008 or very early in 2009, he began representing Sandusky in connection with proceedings stemming from a report made by Aaron Fisher ("Mr. Fisher") to Clinton County CYS. *See id.*

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[2] The Commonwealth will follow the ordering of the claims as set forth in Sandusky's proposed findings of fact and conclusions of law for ease of reference. This particular claim was previously listed as Issue 26 in Sandusky's second amended PCRA petition.

It should be noted that Sandusky is no longer pursuing the following claims:

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

Post-Hearing Brief/Proposed Findings of Fact and Conclusions of Law, p. 9, n. 6.

4. After Sandusky's initial arrest in November, 2011, Sandusky's case was "virtually the only thing [Attorney Amendola] concentrated on." *Id.* at 171.

5. Attorney Amendola spoke with Sandusky often on a daily basis, sometimes multiple times throughout the course of a single day. *See id.* at 172.

6. Sandusky was very opinionated about what he wanted done in his case. (N.T. 3/24/17, pp. 132-133) Attorney Amendola explained:

> . . . I understand that certain people think that Jerry just listened to everything I said. That's not true. Jerry was a very independent thinker who has his own mind, had his own ways of doing things.
>
> ***
>
> What I'm getting at is, Jerry had his own mind. He made his own decisions.

Id. at 29-30. The Court finds that Attorney Amendola's testimony on this point is credible and worthy of belief.

7. After Sandusky was arrested on November 5, 2011, legendary Pennsylvania State University football coach Joseph Paterno was fired. (N.T. 8/12/16, p. 105) Thereafter, riots erupted in State College followed by a candlelight vigil for the victims on November 11, 2011. *See id.* at 105.

8. Attorney Amendola described the atmosphere at that time as follows:

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

Id.

9. Attorney Amendola was approached by numerous members of the media regarding an interview. He and Sandusky ultimately chose to accept Bob Costas' request for an interview:

> But Bob Costas, his people called. And I said, you know, here's a sports person,

> Jerry is a sports icon, I said if we're ever going to get a fair shake, here's the chance to get it. Jerry and I talked about, how do we handle that? Because Jerry agreed, let's get our side out, let's try to say to people we're innocent.
>
> And we talked about him potentially giving an interview. He was reluctant. And I said, 'Well, it's not mandatory, obviously. I can go to New York, I can do the interview.' But when I got to New York, during the course of the afternoon of Monday, which would have been I think November 14th, it became apparent that everybody, everybody who came up to me and approached me, was saying, well yeah, your client's guilty as heck, used different words.
>
> And I said at some point, you know, maybe it would be great, because Jerry and I had been together now - - you have to understand, this wasn't a situation where I was just brought into the case by Jerry a week earlier, Jerry and I had been together fighting Number 1 for the last couple of years. And he had always maintained his innocence and he always wanted to testify, he always wanted to give statements, he always wanted to explain that he was innocent. And I said, 'Here's a golden opportunity. All you have to say, if you go through with this interview,' when I called him the night before, before the interview but on the same night, I said, 'All you have to say is I'm innocent, we're going to prove my innocence at trial.' And although Jerry had some, I think, reservations, he agreed to do that.
>
> ***
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> . . . I thought about Jerry and his ability to express his innocence which he had done to me many times, that this was a golden opportunity for him to tell the national media, to tell the public that I'm not guilty, to hear it from him rather than his spin doctor, which was what most people think an attorney is.
>
> ***
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> This was a trial in a case unlike any one I've ever had where the entire public and media was convinced he was guilty. And yes, I said this would be a great time with Bob Costas to say I'm innocent and I intend to prove my innocence. It was a golden opportunity.

Id. at 105-107, 110, 117.

10. Attorney Amendola acknowledged that one part of the Bob Costas interview - - when there was a pregnant pause after Sandusky was asked whether he was sexually attracted to young boys - - did not go well for Sandusky. He stated:

> And I wanted to jump out of my chair when there was a pause because the obvious answer, and Jerry and I have talked about this many times, 'Of course not. I love kids, but I'm not sexually attracted to kids.' Never in the world did I anticipate that kind of response.

Id. at 112.

11. With respect to preparations for the interview, Attorney Amendola explained the details during the evidentiary hearing:

> Q: All right. And that discussion was that you were going to give the interview; correct?
>
> A: But we also discussed the possibility that Jerry could also give an interview.
>
> Q: At that time?
>
> A: During that week, before the interview, yes.
>
> Q: The interview - - did you discuss with him that he was going to do the interview with Costas?
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> A: We discussed that. He had reservations.
>
> Q: So it was decided that you would do the interview?
>
> A: That's how it was left when I went to New York.
>
> ***
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> Q: . . . I guess you contacted Mr. Sandusky prior to the interview; correct?
>
> A: Of course, yes.
>
> Q: All right. How long before the interview did that contact take place?
>
> A: I'm thinking maybe a half an hour, 45 minutes. I mean I'm not certain, but it would probably be in that time period.
>
> ***
>
> Q: In this telephone conversation, you recommended that he be interviewed?
>
> A: What I said to Jerry was that this was an opportunity for him to tell the world, because I knew there'd be millions of watchers, that he was innocent and that he intended to prove his innocence. It was a golden opportunity with a sports journalist and a sports icon to get his message out at least on a preliminary basis.

Id. at 110-111.

12. During the evidentiary hearing on March 24, 2017, Attorney Amendola further elaborated on their discussions:

> Then we discussed, would Jerry give an interview? And we kicked that around. Jerry had some apprehensions. But he never adamantly said no, he never said I won't do it. He was just reserved about it. Within that week following his arrest, we decided we'd do the Costas interview. And late in the week, as I recall, we decided that I would go to New York, Jerry would stay behind. And at that point we were still thinking I would do the interview, Jerry would not, but we still had left that door open, and we still had discussed it.

N.T. 3/24/17, p. 18.

13. The Court accepts Attorney Amendola's testimony on this point as credible and worthy of belief.

14. Sandusky testified at the evidentiary hearing that he only received 15 minutes advance notice that he would be participating in the Bob Costas interview. (N.T. 8/11/16, p. 16)

15. Sandusky claimed that Attorney Amendola called him just prior to the interview and stated, "Jerry, they want to interview you . . . All you have to do . . .I think you should do it. All you have to do is say you're innocent." *Id.*

16. When asked if there was any preparation for the interview, Sandusky stated, " No. I had no idea what was going to happen. My - - you know, I thought maybe they were just going to tape my response of innocence." *Id.*

17. The Court rejects Sandusky's testimony as not credible or worthy of belief.

18. The Court finds that Sandusky made an informed decision to participate in the interview. He admitted as much during the evidentiary hearing:

> Q: And you indicated on direct that Mr. Amendola told you that he thought you should do the interview; correct?
>
> A: Correct.
>
> Q: He didn't tell you you had to do the interview?

A: No. He didn't tell me that I had to do it, no. But it was strong what he said.

Q: And you didn't tell Mr. Amendola I want no parts of this, I don't want to do this interview? You didn't say that, did you?

A: No. I wouldn't have done that because I trusted him.

Id. at. 51.

19. The Court further finds that Sandusky was not the "novice" that he claimed to be with respect to interacting with members of the media:

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

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

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

A: Correct. At his suggestion.

Q: It was your choice; correct?

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

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

A: Very, very little.

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

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

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

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

(N.T. 8/12/16, pp. 49-50).

20. Kim Kaplan ("Ms. Kaplan") was the chief producer at NBC with whom Attorney Amendola communicated regarding the interview. (N.T. 3/24/17, p. 20).

21. When questioned as to whether there were any conditions that Ms. Kaplan imposed, Attorney Amendola responded, "Well, I wouldn't say there were conditions. I would say what Kim wanted was that interview to be the first interview. But there was no condition, it wasn't contingent upon that happening." *Id.*

22. The Bob Costas interview was not the first interview to air on television, however. Instead, the first interview to air was with CNN. *See id.* at 21-22. Attorney Amendola explained:

> That interview [with CNN] took place, I believe earlier during the day on Monday at one point. And the understanding was, it was a very specific understanding, that I told the CNN person, Jason Carroll, C-A-R-R-O-L-L, I told him I had made an agreement, a verbal agreement, nothing legally binding, nothing that would result in a lawsuit, but I'd give NBC my word that they would do the first interview on TV. Not the first interview - - because I had interviewed with lots of people in terms of giving them bits and pieces of information between the time of Jerry's arrest on the 5th and November 14. And so - - and so, I said to - - I said to Jason Carroll, we can do the interview now because he wanted to run it, I believe I didn't know who the person was at the time, Anderson Cooper, on CNN, and he said they would run it on the late show. And under those conditions, I gave them an interview.
>
> Now what I didn't know was that unlike me giving you my word to show up here at nine o'clock without you personally serving me with a subpoena and I show up, unfortunately the national media didn't turn out to be as upright. And unfortunately what he did and his bosses did is they ran that interview first. Not because I reneged on any agreement, not because I said that was okay and didn't give a darn about what I had told NBC. That's what they did, I learned a big lesson that night.

Id. at 22-23.

23. Ms. Kaplan was disappointed that the CNN interview aired first and Attorney Amendola explained to her that he had made the arrangement with CNN with the understanding that they would not air the interview until after the Bob Costas interview had aired. *See id.* at 25.

24. The Court specifically rejects any suggestion or implication that Attorney Amendola "served up" Jerry Sandusky to Bob Costas to make amends with Ms. Kaplan. *See id.* at 25-26. This is an accusation that Attorney Amendola vehemently denied and that this Court accepts as credible and worthy of belief. *See id.* at 26. As Attorney Amendola stated:

> And this isn't something, by the way, Mr. Lindsay, this isn't something that we just decided that night. I had represented Jerry since January of 2009 in a child molestation case out of Clinton County. We had gone over his position about he's not a monster, he's not a pedophile, he's not somebody who hurts kids, he loves kids. We had gone over that ad infinitum. This wasn't something where I walked in a week earlier and then go to New York to take some sort of junket and to get Jerry on the phone and say hey, you know, I just burned up NBC people so now why don't you talk to Bob Costas so I can make up with it. That's ridiculous.

Id. at 27-28.

25. The Court has considered and reviewed the witness certification that counsel submitted for Ms. Kaplan. As counsel by their own admission have never spoken with Ms. Kaplan, and Ms. Kaplan did not testify before the Court under oath and subject to cross-examination, the Court will not accept the contents of the witness certification as credible and worthy of belief.

26. Although the Commonwealth "put great stock" in the Costas interview, the defense was able to utilize the interview during its case at trial. *See id.* at 112. As Attorney Amendola explained:

> . . . we played into it also because as it turned out, when Matt Sandusky came forward and alleged that Jerry had abused him, and I said in my opening

> statement believing fully that Jerry would testify as he always wanted to do, that since we were in the process of deciding that Jerry maybe couldn't testify because of Matt, that this was a way for me to get in Jerry's statement that he was innocent. So we actually played it on our side, too, because of what happened with Matt Sandusky and Jerry's inability to testify.

Id. at 113.

27. Based on the history of conversations with Sandusky and his continued and adamant protestations of innocence, Attorney Amendola was surprised with Sandusky's answer to question of whether he was sexually attracted to young boys. Attorney Amendola explained:

> Q: . . . It was a question that said, are you attracted to young boys?
>
> A: Do you know how many times over the course of my experience with Jerry from January 20, 2009? Jerry and I spoke about that exact issue and Jerry each time said, "I am not a child molestor. I have never molested children. I love children. I've devoted half of my adulthood to helping kids." Why in the world would I think that was such a tough questions after scores of times over almost three years?

Id. at 36.

Proposed conclusions of law:

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

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

Commonwealth v. Lesko, 15 A.3d 345, 373–74 (Pa. 2011) (citing *Commonwealth v. Pierce,* 527 A.2d 973, 975 (Pa. 1987)).[3]

2. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs of the *Pierce* test, the claim may be disposed of on that basis alone, without a

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

determination of whether the other two prongs have been met. *See Commonwealth v. Basemore,* 744 A.2d 717, 738 n. 23 (Pa. 2000).

3. When determining whether counsel's actions or omissions were reasonable, a court does not question whether there were other more logical courses of actions which counsel could have pursued; rather the court must examine whether counsel's decisions had *any* reasonable basis. *See Commonwealth v. Rios,* 920 A.2d 790, 799 (Pa. 2007) (citation omitted) (emphasis added).

4. Our Supreme Court has long defined "reasonableness" as follows:

> Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had *some reasonable* basis designed to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.

Pierce, supra at 975 (quoting *Com. ex rel. Washington v. Maroney,* 235 A.2d 349 (Pa. 1967)) (emphasis in original).

5. In order to establish prejudice, a petitioner must demonstrate that "but for the act or omission in question, the outcome of the proceedings would have been different." *Id.* (citing *Commonwealth v. Rollins,* 738 A.2d 435, 441 (Pa. 1999)).

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

7. During the evidentiary hearing, the testimony of Attorney Amendola made clear that his strategy was to advance an innocence campaign on Sandusky's behalf due to the overwhelmingly negative media attention and court of public opinion that had already adjudged Sandusky guilty.

8. This was not a strategy that was undertaken lightly.

9. In light of the circumstances of this high profile case and the hostility that surrounded Sandusky, the Court concludes that Attorney Amendola's advice that Sandusky speak to Bob Costas was a reasonable strategy. Again, it was the plan for Sandusky to simply proclaim his innocence, a task that Attorney Amendola believed would be relatively easy for Sandusky to accomplish given the fact that Sandusky had been professing his innocence to Attorney Amendola for years.

CLAIM II. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A MISTRIAL BASED UPON THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT[4]

Proposed findings of facts:

28. Joseph E. McGettigan, III ("Attorney McGettigan") was employed with the OAG in 2012 and prosecuted Sandusky at trial. (N.T. 8/23/16, p. 47)

29. During the course of delivering his closing remarks to the jury, Attorney McGettigan submitted the following argument/observations in connection with the Costas interview:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close.

[4] This particular issue was previously listed as Issue 25 in Sandusky's second amended PCRA petition.

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 [*sic*]. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He enjoys young children.

(N.T. 6/21/12, pp. 140–142)

30. Additionally, Attorney McGettigan argued:

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

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One thing he didn't which he could have provided to Bob Costas, he could have provided it to anybody at any time. He had the complete capacity and exonerate himself at the time and just say who was there because this is a day – remember, Mike McQueary, why remember him and not the little boy you're soaping and just being innocently cleansing to? But he didn't provide that name to anybody, ever, certainly not Bob Costas, no. He forgot that.

Id. at 145-146

31. At the conclusion of closing arguments, Karl Rominger ("Mr. Rominger") who was co-counsel to Attorney Amendola, lodged an objection to these particular remarks.[5] Mr. Rominger stated:

> He commented extensively that the client could have come forward and broken his post-arrest silence and added more to his statement. We didn't put this statement in of the defendant. We didn't put any testimony of the defendant in. The Commonwealth is now saying he should have put more things forward, could have identified people in the shower, and done something in his own defense. They have other things on the same vein throughout their argument suggesting that the defendant should have come forward with something that would exonerate himself.
>
> They referenced that statement he made.
>
> We didn't put any statements in, Judge. . .

Id. at 156-157.

32. In response, the trial court observed that the prosecutor had engaged in fair rebuttal and that the jury had been cautioned "again and again" that Sandusky did not have an obligation to testify nor was he required to present any evidence on his behalf. *Id.* at 158.

33. Out of an abundance of caution, however, the trial court instructed the jury once more that Sandusky need not present any evidence in support of his own defense. *See id.* at 160.

34. Norris Gelman, Esquire ("Attorney Gelman") is a criminal defense attorney who has been practicing law since 1967. (N.T. 5/11/17, p. 40)

35. Attorney Gelman represented Sandusky during post-sentence motions and on direct appeal to the Superior Court of Pennsylvania. *See id.* at 26.

36. Attorney Gelman has represented high profile defendants including Nicodemo Scarfo and Ira Einhorn. *See id.* at 40.

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

37. Sandusky's case was not the first time he represented someone who was convicted of sexual assault. *See id.* He explained that he represented one Daniel Purtell who was convicted of sexual assault in Centre County. *See id.* at 40-41. Attorney Gelman pursued a successful appeal to the Superior Court which resulted in the reversal of all of Purtell's convictions. *See id.* at 41.

38. The Court reviewed Commonwealth Exhibit C-1 which was Attorney Gelman's curriculum vitae that highlighted his experience in trial and appellate work in both state and federal court. *See id.* at 42.

39. On direct appeal in Sandusky's case, Attorney Gelman raised, *inter alia*, the following issues:

> Did Reversible Error Occur When the Prosecutor Commented Adversely on the Defendant's Not Testifying at Trial?
>
> Can the Prosecutor's Adverse Comments as to Appellant Not Having Testified be Said to Have Been Harmless?

Commonwealth v. Sandusky, 2013 WL 8446392 (Pa.Super. 2013) (Appellate Brief), p. 14.

40. In an opinion dated October 2, 2013, a panel of the Superior Court affirmed Sandusky's judgment of sentence. *See Commonwealth v. Sandusky*, 77 A.3d 663 (Pa. Super. 2013).

41. In rejecting Attorney Gelman's challenge to the prosecutor's comments, the panel concluded that the issue was waived because Mr. Rominger did not move for a mistrial or request a curative instruction; instead, he merely lodged an objection. *See id.* at 670.

42. In a footnote, the Superior Court further observed:

> As noted, the record indicates that Sandusky agreed with the trial court's decision to "caution the jury again" as counsel indicated he had nothing further when asked by the trial court. Sandusky was apparently satisfied with the trial court's

> resolution of the alleged prosecutorial misconduct as he did not request any further remedy.

Id. at n.2.

43. Attorney Gelman acknowledged that the issue was "a little dicey" because Mr. Rominger only made a naked objection that did not have any follow-up motion, such as a motion for a mistrial, a motion for curative instructions, or a motion strike. (N.T. 5/11/17, p. 38)

44. Attorney Gelman explained that he waited for the OAG to argue during post-sentence motions that this claim was waived; however, the waiver argument was never presented. *See id.*

45. When Attorney Gelman received the brief for the Appellee once the case moved to the Superior Court, he checked to see if the waiver argument was presented but it was not. *See id.* Accordingly, Attorney Gelman proceeded to advance the following argument when appearing before the panel:

> And there was, I think, Judge Panella who said hold it, didn't you waive this by just making an objection with no follow up? My response was maybe. But because the Commonwealth had the opportunity at post-sentencing motions to argue waiver and had the opportunity in their brief to argue waiver, our position is that they [the Commonwealth] waived it. The defense is not the only entity that can be held to a waiver. But, they held it waived.

Id.

46. Even though he was concerned that the issue was waived, Attorney Gelman still found it significant enough to raise on direct appeal. *See id.* at 38-39. He explained: ". . . Even if we got a finding of waiver,that would preserve the prosecutorial misconduct claim for a PCRA, which in turn would preserve it for federal habeas corpus if you needed it." *Id.*

Proposed Conclusions of Law:

9. A criminal defendant's decision not to testify is protected by the Fifth Amendment of the United States Constitution[6] and Article I, § 9 of the Pennsylvania Constitution.[7F] and the legislature has provided statutory protection from such references since 1887.[8] *See Griffin v. California,* 380 U.S. 609, 611 (1965); *Commonwealth v. Trivigno,* 750 A.2d 243, 248 (Pa. 2000).

10. A prosecutor is not permitted to comment adversely upon a defendant's refusal to testify as to the merits of the charges against him because it compromises the privilege against self-incrimination and the defendant's constitutional presumption of innocence. *See Commonwealth v. Rolan,* 549 A.2d 553, 556 (Pa. 1988).

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[6] The Fifth Amendment in part provides: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . " U.S. Const. amend. V.

[7] Article 1, § 9 provides:

> In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself . . . The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

Art. 1, § 9.

[8] Section 5941(a) of Title 42 provides as follows:

> **Persons who may be compelled to testify**
>
> (a) General rule.—Except defendants actually upon trial in a criminal proceeding, any competent witness may be compelled to testify in any matter, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal proceeding, to offer himself as a witness, be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.

42 Pa.C.S. § 5941(a)

11. In making such a claim of misconduct, it "must be clear that the reference is to post-arrest silence." *Commonwealth v. Mitchell*, 839 A.2d 202, 213 (Pa. 2003).

12. The Court concludes that the prosecutor's remarks constituted fair rebuttal to the interpretation/explanation of the Bob Costas interview that was set forth by Attorney Amendola in his closing argument.

13. During his summation, Attorney Amendola argued, *inter alia*:

> Well, let's get back to the Costas interview. Think about this. He's arrested. This is going global. This isn't restricted to Pennsylvania. He has been painted as a monster, a predator. Administrators of Penn State and Coach Paterno have been fired.
>
> On November 14th, a Monday night, Jerry agrees to an interview with Costas. Jerry has been in sports all his life. He knows who Bob Costas is. He's a tough interview for any of you who have ever been involved in sports or ever watched the sports programs, when he interviews, they're tough interviews.
>
> Jerry decided he wanted to tell the world he was innocent. Was he nervous? I'm nervous right now with a courtroom filled with a couple hundred people. This was national, and it was advertised that he was going to talk. He didn't have to say a word. That's his constitutional right. He agreed to that interview knowing it his [*sic*] going to be tough.
>
> ***
>
> Costas says, what about Mike McQueary . . .who 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. . . 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.
>
> ***
>
> Costas says, are you sexually attracted to young boys - - and that's where the statement comes up - - underage boys?
>
> Jerry says, am I sexually attracted to young boys? Again, asking him the question just like he did previously.

> Costas says, yes.
>
> Jerry says, sexually attracted? I enjoy young people. I love to be around them but, no, I'm not sexually attracted to young people.
>
> Folks, what more could that man say? He went on national TV with a guy who probably was every bit as tough as Mr. McGettigan and any prosecutor could ask any tough questions. What more could he say? Costas asked tough questions. He gave tough answers. Denied he did this. Said he was innocent.

(N.T. 6/21/12, pp. 66, 68, 72-73)

14. The Court concludes that the prosecutor was not suggesting that the jury should draw an adverse inference from the fact that Sandusky failed to take the witness stand to explain his side of the story. Indeed, "the mere revelation of silence does not establish innate prejudice." *Commonwealth v. DiNicola,* 866 A.2d 329, 336–37 (Pa. 2005)); *see also Rolan,* 549 A.2d at 556–57 (prosecutor's comment that jury had heard absolutely no evidence which would indicate someone other than defendant shot the victim was not an impermissible comment on the defendant's failure to testify); *Commonwealth v. Young,* 383 A.2d 899, 901 (Pa. 1978) (prosecutor's closing argument that jurors did not know what was in defendant's mind at the time of the offense or at the time he cooperated with police was not an impermissible comment on the defendant's failure to testify).

15. There is a long-standing principle that a prosecutor must be free to present argument with logical force and vigor and that courts have permitted vigorous prosecutorial advocacy "as long as there is a reasonable basis in the record for the [prosecutor's] comments." *Commonwealth v. Robinson,* 864 A.2d 460, 516–17 (Pa. 2004).

16. Moreover, any challenged prosecutorial comment must not be viewed in isolation, but rather must be considered within the context in which it was offered. *See id.*

17. The Court concludes that there was a reasonable basis for the prosecutor's comments and he was careful not exceed the bounds of oratorical flair. Because counsel cannot be deemed ineffective for failing to raise a meritless claim, the challenge to Mr. Rominger's stewardship fails.

CLAIMS III, IV, V. TRIAL COUNSEL WAS NOT INEFFECTIVE IN CONNECTION WITH SANDUSKY'S ELECTION NOT TO TESTIFY[9]

***Proposed findings of facts* (Trial Counsel's Opening Statement to Jury):**

47. During his opening remarks to the jury, Attorney Amendola intimated that Sandusky may testify:

> By the way, the only reason that Jerry Sandusky was at that CYS hearing with me as counsel was because he wanted to defend against the allegation, because he said I'm innocent. I want to go to that hearing. And that was after, he'll tell you later ***probably***, advice was given don't go because CYS routinely found or finds that these things are illegitimate and you're wasting your time.
>
> ***
>
> . . . And Jerry got this deep-seeded love for helping kids and he said when I grow up - - you'll hear this on the stand - - when I grow up, I want to help kids who are at risk.
>
> After going to Penn State - - and he'll tell you about his Penn State life.

(N.T. 6/11/12, pp. 5, 19, 19) (emphasis added).

48. The trial court, however, informed the jury that Sandusky had no obligation to testify when it provided its opening instructions:

> Mr. Sandusky does not have any responsibility to prove anything. 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.
>
> ***
>
> After the Commonwealth has presented its case, the defense may present evidence for the defendant but, remember, the defendant has no obligation to present any

[9] These particular claims were previously identified as Issues 30, 31 and 32 in Sandusky's second amended PCRA petition.

> 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.

N.T. 6/11/12, pp. 5-7.

49. At the PCRA evidentiary hearing, Attorney Amendola testified that prior to trial "Jerry was looking forward to testifying." (N.T. 8/12/16, p. 149)

50. When asked if he prepared Sandusky to testify, Attorney Amendola stated:

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

Id. at 150.

51. The Court finds Attorney Amendola's testimony to be credible and worthy of belief.

52. The Court rejects Sandusky's testimony at the PCRA evidentiary hearing that Attorney Amendola did not prepare him to testify and "did not give me any questions he would ask." *Id.* at 29.

53. As will be discussed in more fully below, Matthew Sandusky revealed that he was a victim of abuse by his father during the trial and this, unexpectedly, prompted a shift in defense strategy.

54. The record reveals the following relevant exchange between Attorney Amendola and the trial court:

> ATTORNEY AMENDOLA: Having said that, I would ask the Court, because it was such a surprise to us and because it was such an integral part of our case that Mr. Sandusky testify that we feel we have really put ourselves in a tough situation with the jury, a situation because we inferred, if not stated specifically,

that Mr. Sandusky would testify and they would hear from him at some point in some fashion.

We would as a result of that move for a mistrial because of the extreme prejudice we feel which has occurred to our defense post beginning of trial, not having had an opportunity to cure this and kind of shift strategies prior to the commencement of trial. So our motion would be for a mistrial.

There's a further point of clarification, too. That is, Matt Sandusky had been a part of our defense and actually had told us he would testify for his dad . . .

***

For all those reasons, we feel that we should request -- make a motion for a mistrial and maybe ask the Court and the Commonwealth to address those issues at this time, and then I'll colloquy Mr. Sandusky.

***

THE COURT: First, with regard to the motion for mistrial, that motion will be denied. It is not an unusual circumstance that the theory of a party is thrown into disarray as the search for truth or the factual developments occur during a trial in ways that are not anticipated pretrial.

Counsel did mention in an earlier discussion of this off the record before Court this morning a concern about the fact that in the defense opening, there had been a reference to the defendant testifying. I don't recall exactly what that was. My impression that at the close of the opening statement was that I wasn't sure whether or not the defendant was going to testify. Of course, I have no idea what the jury thinks about that.

In any event, I will certainly affirm to the jury that the defendant has no obligation to present any evidence and certainly not to testify himself. He has an absolute constitutional right with regard to that and the jury cannot draw any inference or conclusion that he's guilty because he did not testify.

(N.T. 6/20/12, pp. 69-71,73-74)

***Proposed conclusions of law* (Trial Counsel's Opening Statement to Jury):**

18. The Court concludes that that counsel did not promise that Sandusky would explain his side of events and deny the conduct for which he was charged; rather, counsel suggested that Sandusky *may* offer testimony regarding the allegations underlying the CYS hearing.

19. Even if counsel's remarks could conceivably be construed as promise that he did not deliver, there was a strategic justification for the remarks must be examined. Here, the record indicates that counsel had certainly planned to call Sandusky as a witness during the defense case-in-chief.

20. Moreover, a jury is presumed to follow the court's instructions and here the jury was instructed appropriately. *See generally, Commonwealth v. Stokes,* 839 A.2d 226, 230 (Pa. 2003)

21. The Court concludes that counsel was not ineffective in connection with the remarks made during his opening statement.

***Proposed findings of facts* (Sandusky's Decision Not to Testify and Failure to make a motion with respect to Matthew Sandusky):**

35. Sandusky testified that when the first week of his trial ended on a Thursday, Attorney Amendola called him that evening and was upset because Matthew Sandusky who had been expected to testify on behalf of the defense had "flipped" and changed his story. (N.T. 8/12/16, p. 24) Sandusky continued, stating:

> We went through the weekend with a number of different issues to consider. On Monday morning, we were - - Joe - - Mr. Amendola was driving the car in which I was sitting in the front seat, our two sons, our one son John and our one son EJ were sitting in the backseat. They had planned to testify also. Okay? Mr. Amendola informed us on the trip, on the way, which is a about a 10 to 15 minute drive, he said, "I don't think any of you should testify. None of us should testify. Because all the prosecution had to do was ask one question to one person and it

> the question would be, was there anybody else, obviously we would have answered no, and then he said that they would bring forward Matt as a rebuttal testimony.

Id. at 25.

36. According to Attorney Amendola, after the Commonwealth revealed that Matthew Sandusky had advised that he was a victim, he had several conversations with Sandusky about the "pros and cons" of moving forward with Sandusky's plan to testify. *Id.* at. 153-154, 176. When asked how the revelation impacted the decision on whether Sandusky would testify, Attorney Amendola stated:

> Well, first we wanted to see exactly what the statement said. And then we had to analyze what the pros and cons were of going forward with Jerry's testimony and the possible impact that if Jerry testified or anyone else testified, that would enable the Commonwealth to call Matt Sandusky, the impact that would have on the trial.

Id. 152-53.

37. Contrary to Sandusky's assertion, Attorney Amendola denied that Sandusky's decision not to testify was the product of a single conversation in the car on the way to the courthouse. *See id.* at 176. The Court finds Attorney Amendola's testimony to be credible and worthy of belief and rejects Sandusky's testimony to the contrary.

38. Prior to the colloquy wherein Sandusky waived his right to testify in his own defense, the record reveals the following discussion:

> ATTORNEY AMENDOLA: The Commonwealth, as the Court knows, in a conference call with me and the Court, I believe Mr. McGettigan and Mr. Fina last Thursday evening, after the Commonwealth had all but closed, but late hour of the day, asked for permission to remain open pending an investigation that was occurring at that time.
>
> Contacted me by phone somewhere, I believe it was 8:00 or 8:30 p.m., and advised me that Matt Sandusky, Jerry Sandusky's son, had approached them, had interviewed

with them, and made a statement that his father had abused him and that they potentially intended to use this testimony, this evidence at trial.

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

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

***

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

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

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

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

> Following a recent conference, within the last 20 minutes or so, the Commonwealth advised us - - advised counsel for Mr. Sandusky that the Commonwealth would agree not to call Matthew Sandusky if Mr. Sandusky wanted to testify. As a follow-up and a clarification of that information, ***which we conveyed to Mr. Sandusky when we returned to chambers, I asked Mr. McGettigan, counsel for the Commonwealth, would that include cross-examination references or cross-examination of Mr. Sandusky as to Matthew Sandusky? He indicated it would not; that he would still leave the door open to cross-examine Mr. Sandusky about Matt Sandusky, I imagine any sort of inappropriate contact he had with him.***
>
> ***
>
> . . . I can assure the Court that we have researched this, Mr. Rominger and I. We discussed it with Mr. Sandusky-- that there's no way we see that we would call him to the stand under the current circumstances and protect him from being exposed to Matthew Sandusky being called as a Commonwealth witness on rebuttal.

(N.T. 6/20/12, pp. 65-69) (emphasis added).

39. The prosecutor then took the opportunity to clarify the Commonwealth's position with respect to the use of Matthew Sandusky's testimony:

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

Id. at 73 (emphasis added)

40. Thereafter, a full colloquy was conducted wherein Sandusky indicated that he was making an intelligent, informed decision, free from coercion, to forego testifying. *See id.* at 75-80.

41. Attorney McGettigan then made the following request of the trial court:

> . . . I would ask that the questions regarding the basis for his decision not to testify be stricken because the real basis for his declining to testify is a full understanding of his legal position and not on the one thing I'm concerned about is an appellate issue for that reason, because we have already agreed Matt would not testify. We withdrew him from our case in chief and now to claim that this is the sole on linchpin of his decision is unfair to the Commonwealth.

Id. at 81-82.

42. Attorney McGettigan's motion was denied by the trial court. *See id.* at 82.

43. During the PCRA evidentiary hearing, Attorney Amendola explained his discussions with Sandusky about his ultimate decision not to testify:

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

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

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

Id. at 156.

44. Attorney Amendola testified that after reviewing the "pros and cons," Sandusky stated, "You know, it's probably better I don't testify." *Id.* at 157. Attorney Amendola went on to state:

> Jerry and I agreed. You know, Jerry was a football coach at Penn State. He's not a wimp. Jerry would make his own decisions. Now, I gave him my opinions, absolutely. But ultimately, it was always up to Jerry. If Jerry had said to me, Joe, darn it I want to testify, I would have blessed myself and put him on the stand and hope for the best.

Id. at 159.

Proposed conclusions of law: **(Sandusky's Decision Not to Testify and Failure to make a motion with respect to Matthew Sandusky):**

22. The decision whether to testify in one's own behalf is ultimately to be made by the accused after full consultation with counsel. *See Commonwealth v. Rawles,* 462 A.2d 619, 624 n. 3 (Pa. 1983); *Commonwealth v. Fowler,* 523 A.2d 784, 787 (Pa. Super. 1987).

23 In order to support a claim that counsel was ineffective for "failing to call the appellant to the stand," [the appellant] must demonstrate either that: 1) Counsel interfered with his client's freedom to testify, or 2) Counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf. *See Commonwealth v. Thomas*, 783 A.2d 328, 334 (Pa. Super. 2001).

24. Further, where it is clear counsel discussed the right to testify with the defendant, counsel is not ineffective. *See Commonwealth v. Todd*, 820 A.2d 707, 711-12 (Pa. Super. 2003).

25. The appropriate standard for assessing whether a defendant was prejudiced by trial counsel's ineffectiveness regarding the waiver of his right to testify is whether the result of the *waiver proceeding* would have been different absent counsel's ineffectiveness, not whether the outcome of the trial itself would have been more favorable had the defendant taken the stand. *See Commonwealth v. Walker,* 110 A.3d 1000, 1005 (Pa. Super. 2015)

26. The Court concludes that Attorney Amendola did not interfere with Sandusky's right to testify and that his advice was not so unreasonable as to vitiate Sandusky's knowing and intelligent decision.

27. Indeed, as observed by Attorney Amendola, there was a legitimate concern about the implications and ramifications of cross-examination. This would sound advice and certainly reasonable under the circumstances.

28. Similarly, counsel was not ineffective for failing to make a motion to preclude and/or limit the cross-examination concerning Matthew Sandusky as the door could certainly be opened by Sandusky in his responses.

CLAIM VI. TRIAL COUNSEL WAS NOT INEFFECTIVE IN CONNECTION WITH HIS REVIEW OF DISCOVERY[10]

Proposed findings of facts:

45. On direct appeal, Sandusky had argued that the refusal to postpone his trial constituted a structural defect requiring automatic reversal of his judgment of sentence under the United States Constitution.

46. The Superior Court dismissed such an allegation outright, identifying the issue as being whether this Court's denial of Sandusky's continuance requests deprived him of his Sixth Amendment right to the effective assistance of counsel. The Superior Court summarized the requests made by counsel and the trial court's response as follows:

> Here, from January 28, 2012, until June 15, 2012, Sandusky received voluminous supplemental discovery. From the Commonwealth he received 9,450 pages of documentation, 674 pages of Grand Jury transcripts, and 2,140 pages from subpoenas *duces tecum.* Due to the high volume of discovery received so close to the trial date, counsel maintained they were unprepared for trial and requested continuances on March 22, 2012, May 9, 2012, and May 25, 2012.

[10] This particular claim was previously identified as Issue 14 in Sandusky's second amended PCRA petition.

In orders entered on February 29, 2012, and April 12, 2012, the trial court summarily denied the continuance requests. In an order entered on May 30, 2012, however, the trial court addressed Sandusky's claim regarding the need to postpone the trial due to the volume of material provided in discovery. The trial court explained its denial as follows:

> The amount of material that I have ordered the Commonwealth to provide in discovery has been significant. No doubt sorting the wheat from the chaff has been time consuming. Again, however, the defense team is assuredly capable, even as the trial is ongoing, of sorting through the material to determine what is useful to the defense and what is not.
>
> ***
>
> While I certainly do not doubt the sincerity of defense counsel in requesting a continuance, the reality of our system of justice is that no date for trial is ever perfect, but some dates are better than others. While June 5th does present its problems, on balance and considering all the interests involved - - the defendant's right to a fair trial, the alleged victims' right their day in court [*sic*], the Commonwealth's obligation to prosecute promptly, and the public's expectation that justice will be timely done - - no date will necessarily present a better alternative.
>
> Order, 5/30/12, at 3–4.

Sandusky, 77 A.3d at 672 (internal footnote omitted).

47. The Superior Court went on to conclude that the trial court's explanation denoted a careful consideration of the matter, did not reflect "a myopic insistence upon expeditiousness in the face of Sandusky's request" and was not an arbitrary denial. *Id.*

48. The Superior Court conceded that an error had occurred, for the sake of argument, in order to reach the question of whether such error was harmless. In concluding that Sandusky suffered no prejudice from the denial of his motions for continuance, the Superior Court referenced the testimony elicited during cross-examination of Attorney Amendola at the hearing on Sandusky's post-sentence motions:

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

***

A: The answer is none.

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

A: That's correct.

Id. at 672-673 (internal citation omitted).

49. The Superior Court stated, "As evidenced by counsel's own testimony, Sandusky suffered no prejudice from the trial court's denial of the continuance requests. Therefore, this claim fails." *Id.* at 673.

50. During the PCRA evidentiary hearing, Attorney Amendola clarified his answer from the post-sentence motion hearing:

> . . . But my no was based upon the question as I understood it to be Commonwealth materials that they provided to us. Not all the other materials and the other sources from which we had subpoenaed other materials so that we could properly prepare our case. I was only referring at that time to Commonwealth materials.

(N.T. 3/24/17, p. 80)

51. Thereafter, Attorney Amendola was questioned about whether he reviewed Matthew Sandusky's grand jury testimony. He stated that he believed that he reviewed Matthew Sandusky's testimony, but could not swear to it. He did note, significantly, that he was aware of the substance of the testimony because he had defended his father during the grand jury proceeding. *See id.* at 84.

Proposed conclusions of law:

29. Although Attorney Amendola was not able to review the Commonwealth discovery and the records subpoenaed by the defense line-by-line prior to trial, this does not

amount to ineffective assistance of counsel on its face. Sandusky must still establish prejudice.

30. The Court concludes that Sandusky's proffer of prejudice, namely, that counsel failed to review the grand jury transcript of Matthew Sandusky and that counsel should have reviewed and introduced into evidence the tape/transcript associated with the interview of former Pennsylvania State University janitor James Calhoun ("Mr. Calhoun"), is clearly insufficient to warrant relief on this claim.

CLAIM VII. TRIAL COUNSEL WAS NOT INEFFECTIVE IN CONNECTION WITH THE PRESENTATION OF DR. ELLIOTT ATKINS[11]

Proposed findings of facts:

52. During his case in chief, Sandusky presented the expert testimony of Elliot Atkins, a licensed psychologist ("Dr. Atkins"), who opined that Sandusky suffered from histrionic personality disorder. (N.T. 6/19/12, p. 145)

53. The express, limited purpose of this testimony was to offer an explanation/interpretation of the letters that Sandusky sent to Brett Houtz that had been characterized as "creepy love letters." The jury was specifically advised that the testimony was not being offered as a defense to the underlying charges. *See id.* at 140

54. During the PCRA evidentiary hearing, Attorney Amendola was asked how Dr. Atkins came to be involved in Sandusky's case. He explained:

> We initially had contacted Dr. Fred Berlin, B-E-R-L-I-N, who was a renowned national prominent psychiatrist dealing with child abuse cases. And we wanted to get him involved to help us, to assist us. The problem was, we ran into time problems. And when Dr. Berlin found out that this trial was going to take place in June, he said he couldn't possible evaluate the thousands of pages of material in that time and give us an opinion that would be helpful.
>
> ***

[11] This particular claim was previously identified as Issue 29 in Sandusky's second amended PCRA petition.

> We then contacted Dr. Atkins. Dr. Atkins agreed to meet with me and Jerry. . . And Dr. Atkins, in evaluating Jerry, said, you know, I've come up with this diagnosis of histrionics. And we were looking for someone who could explain that Jerry's behavior with kids, which was considered by many people to be different than ordinary people, that his behavior wasn't involving pedophilia. And so, Dr. Atkins said he thought he could help us.
>
> Now, Jerry wasn't thrilled with that. I mean, Jerry didn't like the idea at all about somebody saying that he had some sort of psychiatric or psychological problem, but we discussed this and we discussed the pros and cons. And people who thought Jerry was guilty simply because he was getting showers with kids for crying out loud, we had to get somebody who was going to explain, you know, it might be different than what we do, but it's not indicative of pedophilia. So that's how Dr. Atkins got involved . . . .

Id. at 161-162.

55. In 2012, Lindsay Kowalski ("Ms. Kowalski") worked as a criminal case consultant and provided assistance to Attorney Amendola. *See id.*at 183.

56. One week prior to the commencement of trial, Ms. Kowalski went to Sandusky's home where the defense team met with Dr. Atkins. She observed that Sandusky was not happy with Dr. Atkins' proposed testimony. *See id.* at 186.

57. The Court observes, however, that Ms. Kowalski was not privy to every single conversation that Sandusky had with Attorney Amendola regarding Dr. Atkins during the course of trial preparation. *See id.* at 188.

58. In explaining the importance and rational for obtaining an expert, Attorney Amendola further testified:

> To be honest with you, we thought not calling anyone to explain Jerry's behavior was just, if not, more dangerous because the average person though that what Jerry did with kids was off the wall. And we understood Jerry being Jerry, that was normal for Jerry. He was just an overgrown kid himself.

Id. at 163.

59. During the course of cross-examination at trial, Dr. Atkins agreed with the

premise that histrionic personality disorder does not preclude or limit the existence of another clinical diagnosis. (N.T. 6/19/12, p. 215). The following exchange then occurred:

> Q: . . . I am asking you if the elements that you saw, that you saw underlie in this defendant what you claim is a histrionic personality disorder also underlie or are congruent with, consistent with, not in everything you saw but in that which you did see, consistent with a psychosexual disorder which involves sex with adolescents; is that correct?
>
> A: I can't go that far. I can't say that. There is no clear pattern or clear diagnosis of a psychosexual disorder without certain behaviors and Mr. Sandusky denied those behaviors.
>
> Q: Oh. So, in part your conclusion is that based on his denial?
>
> A: If, in fact, the things that he is accused of are true, then he would have a psychosexual disorder. I found nothing to support that that's the case.

Id. at 216-17.

60. In rebuttal, the Commonwealth presented the testimony of John O'Brien, M.D. ("Dr. O'Brien") an expert in the area of forensic psychiatry. Dr. O'Brien quarreled with Dr. Atkins' determination that the letters were demonstrative of a person with histrionic personality disorder. *See id.* at 248.

61. Dr. O'Brien stated:

> And in my opinion, the letters are not consistent with a personality disorder per se. They're actually, in my opinion highly manipulative and utilize different techniques to try to draw the attention of the reader and to sway their intentions or their behavior in certain ways. And I don't see them as anything more than that.

Id. at 292.

62. Dr. O'Brien went on to testify that his review of the materials revealed the possibility of another diagnosis being present. When asked if that diagnosis would be a psychosexual disorder with a focus on adolescence or preadolescence, he responded:

> In my opinion, yes, it would.

> Part of the difficulty is that in doing such an evaluation, you're considering evidence that hasn't been proven, evidence which is still pre-trial evidence. So it's difficult to draw factual conclusions - - impossible to draw factual conclusions from that sort of information.

Id. at 295.

63. The Court finds that Dr. O'Brien's opinion as to whether Sandusky suffered from a psychosexual disorder was not without caveat, however. In fact, it was the same qualification referenced by Dr. Atkins; namely, that a diagnosis would depend on whether Sandusky committed the acts with which he was charged.

Proposed conclusions of law:

31. It is important to remember that the Constitution guarantees the accused a fair trial, not a perfect one. *See, e.g., Commonwealth v. Rasheed,* 640 A.2d 896, 898 (Pa. 1994).

32. "Although hindsight might reveal the comparative worth of alternatives not pursued, an ineffectiveness claim cannot succeed on that basis." *Commonwealth v. Chester*, 587 A.2d 1367, 1384 (Pa. 1991); *see also Commonwealth v. Daniels*, 104 A.3d 267, 285 (Pa. 2014) (When engaging in a *Strickland* assessment, "we appreciate that the task is not to identify various hindsight 'gotcha' scenarios: *i.e.*, counsel could have done this, or he should not have done that.").

33. Here, the Court concludes that the decision to call Dr. Atkins as a witness was one of reasonable and sound trial counsel strategy.

34. The law is clear that where counsel has made a strategic decision after a thorough investigation of law and facts, it is virtually unchallengeable; strategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. *See Commonwealth v. Rolan,* 964 A.2d 398, 406 (Pa. Super. 2008).

35. The Court concludes that because counsel introduced the testimony for a limited purpose and not as a defense to the charges, counsel's chosen path was reasonable. Indeed, the limitations on the testimony were made clear by the trial court in its closing instructions:

> As I noted, Dr. Atkins and Dr. O'Brien seemed to express conflicting opinions. Whether those opinions conflicted is up to you. But they -- but they expressed opinions regarding their diagnosis of Mr. Sandusky. I want to be sure that I have a clear understanding of the purpose of that evidence and how you may consider its effect and apply it during your deliberations.
>
> First, I repeat that you're not required to accept the testimony of a witness simply because he's been qualified as an expert. It's up to you to assess the credibility of the expert and decide whether the testimony is worthy of belief.
>
> Second, Dr. Atkins testified that Mr. Sandusky has a histrionic personality disorder. The purpose of that evidence was to offer an explanation about why he sent letters to Brett Houtz. The Commonwealth has characterized these as love letters and the defense presented Dr. Atkins to offer his contrary opinion that they might also be considered as manifestations of Mr. Sandusky's personality disorder rather than as love letters.
>
> Third, if you believe Mr. Sandusky committed any of the various sexual acts for which he has been charged, you may not use the testimony of Dr. Atkins to justify those acts or to excuse those acts or to conclude that Mr. Sandusky did not have the necessary intent to commit the acts and, therefore, find him not guilty.
>
> So even if you believe Mr. Sandusky suffers from a histrionic personality disorder that is not a defense to any of the crimes charged. The evidence was not presented for that purpose and may not be used by you for that purpose.
>
> In a case where the defendant offers mental illness as a defense to criminal charges, he must first admit that he committed the offenses and then offer the mental illness as a defense. That did not happen in this case. Mr. Sandusky has not admitted he committed the offenses charged and, therefore, he cannot offer mental illness as a defense.
>
> So I specifically instruct you that even if you believe Mr. Sandusky has been properly diagnosed as having a histrionic personality disorder, you may consider that evidence only to help you to evaluate the purpose and content of his letters to Brett Houtz. Any such diagnosis is not a defense to the charges brought against him. The diagnosis was only offered and may only be considered as an alternative explanation of why he sent the letters that had been introduced into evidence.

(N.T. 6/21/12, pp. 19-21)

CLAIM VIII. THE COMMONWEALTH DID NOT VIOLATE THE DICTATES OF *BRADY V. MARYLAND* IN FAILING TO TURN OVER MATERIAL IMPEACHMENT EVIDENCE; COUNSEL CANNOT BE DEEMED INEFFECTIVE IN FAILING TO RAISE THE ISSUE[12]

Proposed findings of facts:

64. During the PCRA evidentiary hearing, Attorney Amendola was questioned as to whether he received evidence of discrepancies in the victim's accounts in the form of oral statements provided to the prosecutor. Attorney Amendola advised that he did not receive evidence of oral statements made to Attorney McGettigan. (N.T. 8/12/16, p. 143)

65. Attorney Amendola observed:

> Quite frankly, listening to your answers, Mr. Lindsay, and the questions, I think we effectively showed that these people had changed their stories, which was a major part of our case, to show that they changed drastically and dramatically and kept adding things coincidentally after they spoke with attorneys, after they hired attorneys. So quite honestly, I thought we did an effective job of what we had.

Id. at 103.

66. The following exchange thereafter occurred:

> Q: . . . But the point is what you had. You were not given this information prior to trial by the prosecution?
>
> A: Not to my recollection, no.
>
> Q: And once again, did you believe at trial that this was a *Brady* issue?
>
> A: I don't know so much I thought of it in those terms as much as I thought it was great - - it was great impeachment testimony, which showed the jury the dramatic changes in these kids' - - these young people's stories coincidentally associated with hiring private counsels and looking for big dollars from agencies and institutions like Penn State. But I certainly didn't raise a *Brady* issue and ask

[12] This particular claim was previously identified as Issue 15 in Sandusky's second amended PCRA petition.

> for a mistrial. I thought, quite honestly, the fact that we elicited that information on the stand was very good for Jerry.

Id. at 103-104.

Proposed conclusions of law:

36. In *Brady v. Maryland,* 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87.

37. The Supreme Court subsequently held that the duty to disclose such evidence is applicable even if there has been no request by the accused, *United States v. Agurs,* 427 U.S. 97, 107 (1976), and that the duty may encompass impeachment evidence as well as directly exculpatory evidence, *United States v. Bagley,* 473 U.S. 667, 676–77 (1985).

38. On the question of materiality, the Court has noted that "[s]uch evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Strickler v. Greene,* 527 U.S. 263 (1999) (quoting *Bagley,* 473 U.S. at 682).

39. The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Strickler,* 527 U.S. at 290 (quoting *Kyles v. Whitley,* 514 U.S. at 419, 435 (2001).

40. "Thus, there are three necessary components that demonstrate a violation of the *Brady* strictures: The evidence was favorable to the accused, either because it is exculpatory or

because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." *Strickler,* 527 U.S. at 281–82.

41. Importantly, the Court has noted that the duty imposed upon the prosecution under *Brady* is a limited one. *See, e.g., Weatherford v. Bursey,* 429 U.S. 545, 559 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *see also Kyles,* 514 U.S. at 436–37 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense . . . We have never held that the Constitution demands an open file policy . . . ")

42. The Court concludes that the Commonwealth did not violate the dictates of *Brady* in this case and that counsel certainly was not ineffective for failing to pursue such an issue. Counsel clearly and effectively utilized the information to impeach the credibility of the witness.

43. With no prejudice established, the Court concludes that the claim fails.

CLAIM IX. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRSESENT EXPERT TESTIMONY THAT CALLED INTO QUESTION THE THEORY OF REPRESSED/FALSE MEMORIES[13]

Proposed findings of facts:

67. During the PCRA evidentiary hearing, Sandusky presented the testimony of Elizabeth Loftus, Ph.D. ("Dr. Loftus"). Dr. Loftus was recognized as an expert in the field of human memory. (N.T. 5/11/17, p. 62)

68. She stated that research has revealed that individual's memories can be distorted with respect to details of events that they actually witnessed. This is what is referred to a misinformation of facts. *See id.* at 63-64.

[13] This particular claim was previously identified as Issue 15 in Sandusky's second amended PCRA petition.

69. Dr. Loftus testified that false memories can also be implanted and that part of the problem is:

> False memories have characteristics that sometimes resemble true memories. So false memories, we can be very emotional about them, they can persist for a long time, we act on them. And it's virtually impossible to tell the difference without corroboration despite the fact that you will here and there find some mental health professionals who will claim that they can tell the difference.

Id. at 65-66.

70. When asked how she could have assisted the jury in Sandusky's case, Dr. Loftus stated:

> Well, I'll tell you what I've done in other cases. I've talked about the nature of memory, the malleability of memory, the content involved in memory, what science has shown about the characteristics of lost memory, how they develop, that people can be very emotion and detailed and confident about them even when they are false. . . I would possibly, as I've done in other cases, testify about the highly controversial nature of the whole concept of repressed. It is - - as a matter of fact, so controversial that in many other jurisdictions, accusers who claims to have repressed memories that have been recovered, the cases are even dismissed because of the controversial nature of that theory.

Id. at 73-74.

71. Dr. Loftus informed the Court that there were a number of indications of repressed memory based upon her review of materials in Sandusky's case. *See id.* at 74. She referenced the fact that Dustin Struble's therapist believed he had repressed memories. *See id.* at 75. She then stated that "there's a similar story with Mr. Fisher and the whole role of the therapist, you know, convincing the patients that he had repressed memories that needed to come back to the surface." *Id.*

72. During cross-examination, Dr. Loftus admitted that she could not state that Mr. Fisher, Mr. Struble and Brett Houtz were not sexually assaulted by Sandusky. *See id.* at 77-78.

73. The Court learned that Dr. Loftus is not licensed in psychology and has never treated any patients. *See id.* at 78.

74. She admitted that her work as an academician is different from the work of a psychologist in the clinical field insofar as she conducts experimental and case studies while a clinician actually treats individuals. *See id.*

75. The Court finds evidence of bias in Dr. Loftus' testimony based on this exchange with the prosecutor during cross-examination:

> Q: And let's be clear, you keep referring to them as accusers. Bu the jury convicted Mr. Sandusky based on their testimony, so we can agree that they are called victims now?
>
> ***
>
> A: You can use whatever term you want to.

Id. at 79-80.

76. Dr. Loftus was questioned about the materials that she reviewed in connection with Sandusky's case. This revealed she received a limited amount of materials that were hand-selected by counsel for Sandusky:

> A: Do you want me to go through the list that is already in the testimony?
>
> Q: Yes.
>
> A: Excerpts from grand jury testimony of Dustin Struble.
>
> Q: Let me stop you there. Excerpts. What portions of the testimony did you receive?
>
> A: Pages 17 through 24.
>
> Q: Did you ask for the entire transcript?
>
> A: No.
>
> Q: . . . What other grand jury testimony did you review?
>
> A: Testimony of Dustin Struble.

Q: And you reviewed his entire trial testimony?

A: No. The excerpts.

Q: And you did not request to have his full trial testimony; correct?

A: No.

Q: What's the next item that you reviewed?

A: Transcript of interview between Mark Pendergrast and Dustin Struble.

Q: And we can agree that that interview took place in October of 2014; correct?

A: I believe that's the statement, but I don't have it immediately handy.

Q: And that would have been two years after Mr. Sandusky's trial?

A: Yes.

Q: What was the next item that you reviewed?

A: Trial - - portion of trial testimony of Jason Simcisko.

Q: You did not ask to review his entire trial testimony; correct?

A: No.

Q: And Mr. Simcisko is not mentioned in your report?

A: I don't think - - I did not write that.

Q: What's the next item that you reviewed?

A: Portion of trial testimony of Brett Houtz.

Q: Again, you did not request to review the entire transcript of testimony of Brett Swisher Houtz?

A: No.

Q: What's the next item that you reviewed?

A: Excerpts of recorded police interview with Brett Houtz and his attorney, Benjamin Andreozzi.

Q: And again, you reference an excerpt. You didn't request or review the entire transcript?

Id. at 81-84.

77. Dr. Loftus never reviewed the grand jury testimony nor the trial testimony of Mr. Fisher. *See id.* at 85-86

78. Dr. Loftus was questioned about the portion of her report wherein she stated, "Moreover, from the information that Dustin provided during an interview with journalist Mark Pendergrast, he was apparently involved in 12 to 15 weeks of group sessions with others who were accusing Sandusky." *Id.* at 87

79. Dr. Loftus conceded that she did not know when those group sessions occurred. *See id.*

80. When asked whether there was any indication from any of the evidence or materials that she reviewed that Dustin Struble underwent repressed memory therapy prior to Ms. Sandusky's trial, she stated:

> The only information I have about him is that apparently he underwent therapy, group therapy, and had a therapist who thought he had repressed memory. I don't know when that would have occurred. I just don't have that information.

Id. at 88.

81. Dr. Loftus testified that she reviewed excerpts of the book, "Silent No More." *See id.* at 89.

82. When asked where in the book it indicated that Mr. Fisher underwent repressed memory therapy, she replied: "I can't tell you the page. It is my impression from the book and that story that he had a therapist who appeared to have convinced his patient that he had repressed memories of abuse." *Id.*

83. The following relevant exchange then occurred:

Q: I'm asking you if that would be significant if he underwent repressed memory therapy?

A: I think it would be. Yes, I do, because it could be responsible for what he claimed when he testified.

Q: And despite the fact that it is significant to you, you fail to include any reference to the page numbers in Silent No More where there was evidence that this repressed memory therapy occurred?

A: I did not include that in the report, you're correct.

Id. at 89-90.

84. Dr. Loftus agreed that repressed memory therapy includes techniques such as hypnosis, age regression, guided visualization and dream interpretation. *See id.* at 92.

85. Mr. Struble testified at the PCRA evidentiary hearing. Although he indicated that he underwent counseling which assisted him in recalling parts of the abuse, the Court finds that there was no evidence elicited that demonstrated or indicated that he underwent repressed memory therapy, a fact that is critical to the Court's analysis. The following testimony was elicited by the prosecutor during cross-examination:

Q: Do you know the difference between repressed memory therapy as opposed to regular psychotherapy?

A: Not really. I'm not a doctor, no.

Q: Did you therapist ever explain to you what would be involved in repressed memory therapy?

A: She had basically said that it would be very difficult and that I would have to essentially be in a strong state of mind, that it would be very difficult to go through.

Q: And did she explain to you that it would involve hypnosis?

A: Yes.

Q: Or some type of truth serum, something like that?

A: I don't know about truth serum. But she mentioned a couple of methods, yeah.

Q: All of those methods that she mentioned with respect to repressed memory therapy, did you undergo any of those methods before Jerry Sandusky's trial in June 2012?

A: No.

Id. at 20.

86. Michael William Gillum ("Mr. Gillum") is a licensed psychologist who testified at the PCRA evidentiary hearing. (N.T. 8/22/16, p. 62) Mr. Gillum treated Mr. Fisher through psychotherapy services beginning in November, 2008. *See id.* at 62; (N.T. 3/24/17, pp. 141, 145)

87. Mr. Gillum met Mr. Fisher through his contract with Clinton County CYS. *See id.* He testified that Mr. Fisher and his mother, Dawn Daniels, had arrived at the CYS Office in Lock Haven to report abuse by Sandusky. *See id.* at 142-143.

88. According to Mr. Gillum, psychotherapy services involve administering treatment to individuals suffering from psychological disorders, adjustment disorders and issues that are more significant than simple life adjustment problems which could be handled by a counselor. *See id.* When explaining his therapy sessions with Mr. Fisher, he stated that:

> as per the normal procedure for any therapist like myself working with any victim like Aaron, you give them time to gradually, it's kind of like peeling an onion, they usually will eventually give you more deviant or more significant sex acts that occurred, but only after they're feeling a greater degree of comfort trust in you. And usually at the same time, as is in this case, you're doing therapy with that victim to help them cope with anxiety, to help them cope with doubts they have about their identity, to help them cope with fears they have that other people will find out about this and will consider them gay or will consider them as some kind of strange anomaly. And that stigma is something they fear very much. So they tend to give it to you in layers if they trust you, and that's standard procedure.

Id. at 148-149.

89. Mr. Gillum informed the Court that he does not perform repressed memory therapy and that he does not work with anyone who claims to have repressed memories. *See id.* at 159.

90. Of significance to the Court then is the fact that Mr. Fisher did not undergo repressed memory therapy with Mr. Gillum. *See id.* at 164.

When asked why he does not perform repressed memory therapy, Mr. Gillum explained:

> Because that is not a solid field where there's been enough research and scientific data to prove validity and reliability in either the analysis, the assessment, the diagnosis, or the treatment. It's been more like a fad or area of interest in the mental health field where a small subset of therapists started to investigate that in repressed memories. However, in my training, I know that it's a very dangerous game to use certain methods like hypnosis because sometimes memory can get very confused. And if one talks about something that might have happened to somebody, they could develop what's called an artificial memory, or a false memory, you know, their unconscious mind or subconscious mind can actually pull together some memories or bits and pieces of real memories and sometimes come up with a memory that, in fact, is false. So it's simply not face [*sic*] or prudent to do that type of treatment or analysis.

Id. at 164-165.

91. During the PCRA evidentiary hearing, Attorney Amendola was questioned about why he did not retain an expert in repressed memory. He advised that he did not pursue that avenue because he did not think it was relevant. *See id.* at 108. According to Attorney Amendola, the prosecution advised him several times that there was no information concerning that issue. *See id.* at 109.

Proposed conclusions of law:

44. With absolutely no evidence that any of the victims underwent repressed memory therapy in Sandusky's case, it is axiomatic that Attorney Amendola cannot be deemed ineffective for failing to retain and present an expert on the subject.

CLAIM X. **THERE IS NO AFTER-DISCOVERED EVIDENCE THAT AARON FISHER, DUSTIN STRUBLE AND MATTHEW SANDUSKY UNDERWENT REPRESSED MEMORY THERAPY**[14]

Proposed findings of fact:

92. There was no evidence presented that Aaron Fisher, Dustin Struble and Matthew Sandusky underwent repressed memory therapy.

93. In response to Attorney Amendola's discovery requests, it was revealed that no such records existed.

Proposed conclusions of law:

45. Sandusky's after-discovered evidence claim is dismissed as meritless.

CLAIM XI. **COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION IN LIMINE SEEKING A HEARING TO PRECLUDE THE USE OF THE VICTIM'S STATEMENTS TO POLICE BECAUSE THEY WERE GLEANED BY IMPROPER AND SUGGESTIVE POLICE QUESTIONING**[15]

Proposed findings of facts:

94. The Court finds from a review of the record that Attorney Amendola employed a trial strategy of seeking to impeach the credibility of the victims by highlighting inconsistencies in their accounts of the abuse and suggesting financial motivations.

95. During the PCRA evidentiary hearing, the following exchange occurred:

> Q: Well, let me ask you this. Can we agree that there would have been - - there was a substantial issue in your mind that the credibility of these witnesses or the recollection of these witnesses - - let me try this question again. Would you agree that from what you heard, the recollection that these witnesses have, the memories

[14] This particular claim was previously identified as Issue 16 in Sandusky's second amended PCRA petition.

[15] This particular claim was previously identified as Issue 18 in Sandusky's second amended PCRA petition.

of these supposed assaults by Mr. Sandusky, was actually a product of suggestive questioning?

A: It certainly was. But we also had information that was totally inconsistent at points with virtually all of these young people who were appearing as accusers. So our theory was to cross-examine them, point out the inconsistencies that developed through the course of several interviews and their grand jury testimony, for example, and cross-examine them on that.

Q: Did it occur to you you might file a motion to disqualify them as witnesses on the issues of their memory?

A: I did not do that.

Q: Is there any reason you did not do it?

A: Because I didn't think it would succeed.

(N.T. 8/12/16, pp. at 115-116)

Proposed conclusions of law:

46. Every witness is presumed competent. *See* Pa.R.E. 601(a).

47. A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks "the minimal capacity . . . (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth." *Commonwealth v. Delbridge ("Delbridge I"),* 855 A.2d 27, 40 (Pa. 2003).

48. The concept of taint is particularly concerned with "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement . . . that are so unduly suggestive and coercive as to infect the memory of the child." *Commonwealth v. Davis,* 939 A.2d 905, 911 (Pa. Super. 2007).

49. Within the three-part test described above, "[t]aint speaks to the second prong . . . the mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that the witness is called upon to testify about." *Delbridge I,* 855 A.2d at at 40 (citation omitted,

emphasis in original, brackets omitted).

50. Pennsylvania courts have clearly and unequivocally stated, however, that taint is only "a legitimate question for examination in cases involving complaints of sexual abuse made by *young children.*" *Id.* at 39 (emphasis added).

51. When a witness is at least fourteen years old, he or she is entitled to the same presumption of competence as an adult witness. *See Rosche v. McCoy,* 156 A.2d 307, 310 (Pa. 1959).

52. In *Commonwealth v. Judd,* 897 A.2d 1224 (Pa. Super. 2006), *appeal denied,* 912 A.2d 1291 (Pa. 2006), the Superior Court held that because the juvenile sexual assault victim "was fifteen years old when she *testified at trial* . . ., any issue with her ability to correctly remember the events in question is properly a question of credibility not of taint." *Judd,* 897 A.2d at 1229 (emphasis added). Further, the concerns underlying the three-part test for evaluating the testimonial competency of minors "become less relevant as the witness's age increases, ultimately being rendered *totally irrelevant as a matter of law by age fourteen.*" *Id.* (emphasis added).

53. In *Commonwealth v. Moore,* 980 A.2d 647 (Pa. Super. 2009), the Superior Court reiterated that the critical age for purposes of conducting a taint hearing is *not the age at the time of the crime but the age at the time of trial. Moore,* 980 A.2d at 648, 652 (where the minor witness was thirteen at the time of the crime but fourteen at the time of trial, the witness "did not require a competency hearing.

54. Any issues regarding a witness' observation of the incident in question is a question of credibility and does not implicate taint. *See id.*

55. In Sandusky's case, all of the victims were over the age of 14 at the time that they testified at trial.[16] Accordingly, there was absolutely no basis for counsel to challenge their competency to testify

56. Moreover, by seeking to preclude the statements of the victims to law enforcement, Attorney Amendola would have been undercutting his own defense of impeachment by inconsistencies. Accordingly, Sandusky's claim must fail.

CLAIM XII. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTRODUCE A TAPE-RECORDED STATEMENT BY JAMES CALHOUN[17]

Proposed findings of facts:

96. The evidence supporting Sandusky's convictions in connection with Victim 8 was provided through the testimony of Ronald Petrosky ("Mr. Petrosky").

97. Mr. Petrosky told the jury that during the fall of 2000, he was employed as a janitor at Penn State and was responsible for, *inter alia*, cleaning the shower areas in the Lasch Building (football building) at night. (N.T. 6/13/12, p. 193)

98. He recalled that on one evening, as he approached the showers in the staff locker room, he saw two sets of legs, "one set of hairy legs and one set of skinny legs." *Id.* at 194.

99. Mr. Petrosky immediately went out into the hallway and, while he was standing there, Sandusky emerged from the shower area with a small boy. *See id.* at 195. Their hair was wet and they were carrying gym bags. *See id.* at 196.

100. Mr. Petrosky watched as the two of them walked down the hallway holding

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

[17] This particular claim was previously identified as Issue 19 in Sandusky's second amended PCRA petition.

hands. *See id.* at 209.

101. Mr. Petrosky thereafter encountered fellow janitor Mr. Calhoun who was emerging from the locker room. *See id.*

102. Mr. Petrosky told the jury that Mr. Calhoun was crying and shaking, stating that he saw Sandusky licking a boy's privates in the shower. *See id.*

103. Mr. Calhoun ultimately provided a tape-recorded statement in 2011 wherein he claimed that he did not see Sandusky in the shower. (N.T. 3/24/17, pp. 72-73)

104. Mr. Calhoun did not testify at Sandusky's trial due to the fact that he was suffering from dementia. *See id.* at 68.

105. Attorney Amendola informed the jury during closing argument that Mr. Calhoun "now suffers from senility." (N.T. 6/21/12, p. 84)

106. Sandusky was ultimately convicted of the crimes of involuntary deviate sexual intercourse, indecent assault, unlawful contact with minors, corruption of minors and endangering the welfare of children in connection with this incident.

107. During the PCRA evidentiary hearing, Attorney Amendola was questioned about why he failed to introduce the tape-recording that would have exculpated Sandusky. Attorney Amendola explained:

> But this was made by a man whose doctor was saying that he was incompetent and he would slide in and out of consciousness and ability to know which end was up at any given time. Whereas, the evidence presented by the other janitor the night that this incident allegedly occurred was very definitive.

Id. at 70.

Proposed conclusions of law:

57. The Court concludes that Attorney Amendola's decision not to utilize a piece of evidence where the competency of the witness was clearly at issue was certainly a reasonable one. Accordingly, he cannot be deemed to be ineffective.

58. Moreover, as discussed below, Attorney Amendola was able to attack the credibility of Mr. Calhoun's statements to Mr. Petrosky by arguing that Mr. Calhoun suffered from dementia.

CLAIMS XIII, XIV. DIRECT APPEAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT MR. CALHOUN'S HEARSAY STATEMENT WAS INADMISSIBLE AS AN EXCITED UTTERANCE AND THAT SANDUSKY'S CONVICTION BASED ON THIS TESTIMONY LACKED SUFFICIENT EVIDENCE[18]

Proposed findings of facts:

108. During Sandusky's trial, Mr. Petrosky was permitted - - over Sandusky's objection - - to share the hearsay statements of Mr. Calhoun with the jury:

> A: Yes, shortly after. I finished the chemicals and I grabbed my bottle and I started in the door and Jim [Calhoun] was coming out. There's double doors there before you go in to the locker and I met Jim in between the two doors, between the hall and where you entered the locker area.
>
> And I could see he was upset. His face was white. His hands was trembling. I thought it was a medical condition. I said, "Jim, what's wrong?" And this is how he said it to me. He said, "Buck," -- that's my nickname. He said. "Buck, I just witnessed something in there I'll never forget the rest of my life." I said, "What are you talking about, Jim." He said that man that just left, he had this -- the boy up against the shower wall licking on his privates. I said, "Are you sure that man that just left?" He said, "I'm sure." I said, "You know who that is?" I said, "That's Jerry Sandusky." He didn't know who he was but he knows what he seen that night.

[18] These particular claims were previously identified as Issues 19 and 23 in Sandusky's second amended PCRA petition.

Q: Okay. And now how long were you standing there with Jim before you went someplace else, if you did?

A: Probably like five minutes at the most.

Q: Now, where did you go right after that?

A: Well, I told -- I asked Jim if he wanted to call somebody or, you know, and he said he didn't. He was afraid I guess and so I calmed him down. We went down the hall. There was a meeting room off to the right and then the other guys come down from upstairs and took – because Jim was so shook up, you know, I called for other people to –

Q: When you were down there in that meeting room, was Jim still white, shaken, and upset?

A: Yes, he was crying and shaking.

Q: Did he say anything down there?

A: Pardon me?

Q: Did he say anything down at that meeting room about what he seen? Did he talk to you or to Mr. Witherite?

A: Yes. He told the other guys the same story then.

Q: What did he say?

A: He said that he told Jay and them, he said that, you know, he seen Sandusky holding that boy up licking on his privates.

Q: Okay. Did he say anything in addition to that that included a different description? I know you don't want to use the language.

A: Yes. Yeah, he said he was sucking on his dick is what he said.

Q: Was he still shaking and white when he was saying that?

A: Pardon me?

Q: Was he still shaking and white when he said that?

A: Yes, he was. We thought he was going to have a heart attack. We kept people with him all night throughout the night and made sure, you know, he was all right.

(N.T. 6/13/12, pp. 229-231)

109. In its closing instructions, the trial Court explicitly cautioned the jury that the statement of Calhoun, as related by Petroksy, was not sufficient - - standing alone - - to sustain a conviction, explaining that "you must be satisfied that there is other evidence that supports that a crime had been committed besides Mr. Calhoun's hearsay statement." *Id.* at 27.

110. The trial court noted that while the jury could consider the statement, they must also be satisfied that there is other evidence, either direct or circumstantial, which satisfied them that a crime has been committed. *See id.*[19]

111. During closing arguments, Attorney Amendola attacked the fact that there was no witness who identified himself as Victim 8 and raised questions about the credibility of Mr. Calhoun:

> The janitor case. The Commonwealth is asking you to convict Mr. Sandusky of very serious crimes based upon the hearsay testimony of another janitor who testified that a janitor who now suffers from senility told him this is what happened. This is what he saw. But do we know what he saw? Do we know what his mental health state was at that time? Do we know anything about the janitor who was the basis of this accusation having told the other janitor?
>
> Do we have a victim? Did someone come forward and say, hey, that was me. I'm the kind in that shower. Do we have any of that? Does that make sense?
>
> The Commonwealth is asking to convict him of something that is so serious, involuntary deviate sexual intercourse, without a victim, without the person who says he saw based upon what another janitor says he saw 11 years later or 12 years later. This is the kind of case they have. This is what we're looking at.

[19] The trial court repeated the instructions verbatim pursuant to a question submitted by the jury during their deliberations. (N.T. 6/22/12, pp. 16-19) Absent evidence to the contrary, a jury is presumed to follow the court's instructions. *See Commonwealth v. O'Hannon*, 732 A.2d 1193, 1196 (Pa. 1999).

(N.T. 6/21/12, p. 84)

112. In post-sentence motions, Attorney Gelman argued that the trial court had erred when it permitted the Commonwealth to introduce Mr. Calhoun's statement as an excited utterance. He submitted that the statement was inadmissible as an excited utterance based upon the lapse of time and due to the fact that there was no independent proof that the event in the shower ever occurred. *See* Defendant's Brief in Support of Post-Sentence Motions, p. 37.

113. Attorney Gelman did not pursue this issue on direct appeal to the Superior Court, however.

114. Additionally, Attorney Gelman did not challenge the sufficiency of the evidence underlying Sandusky's convictions with respect to Victim 8.

115. During the PCRA evidentiary hearing, Attorney Gelman was questioned as to why he failed to raise a sufficiency challenge or evidentiary challenge pertaining to the introduction of Mr. Calhoun statement, Attorney Gelman explained:

> . . .This issue was not touches 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 I this issue because it was of interest.

(N.T. 5/11/17, p. 36).

116. As further explanation for why he did not raise claims pertaining to the hearsay statement of Mr. Calhoun, Attorney Gelman explained the importance of winnowing the issues on appeal:

> The United States Supreme Court has held that it's the obligation of appellate counsel to select, pick, choose, evaluate, argue, brief, argue issues that he has winnowed out as his strongest or her strongest issues. And that's a primary

> obligation that we, as appellate lawyers, do not have to raise every nonfrivolous issue that the defendant wants or thinks should be raised.

Id. at 43.

117. Attorney Gelman stressed that such a decision is not undertaken lightly and requires considerable time and thought. *See id.*

Proposed conclusions of law:

59. The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion. *See Commonwealth v. Seilhamer,* 862 A.2d 1263, 1270 (Pa.Super.2004).

60. Hearsay is *per se* inadmissible except as provided in the Rules of Evidence. Pa.R.E., Rule 802, 42 Pa. Cons. Stat. Ann.

61. An excited utterance, as an exception to the hearsay rule, is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Pa.R.E., Rule 803(2), 42 Pa. Cons. Stat. Ann. The Comment to this exception states that "[t]his exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is startling." *Id.*

62. Further, "an excited utterance: 1) Need not describe . . . the startling event . . . it need only *relate* to it; and 2) Need not be made contemporaneously with, or immediately after, the startling event. *Id.*

63. The Court concludes that there was sufficient corroborating evidence in Sandusky's case to justify the admission of the hearsay statement based upon Mr. Petrosky's own observations that he made in the locker room area shortly before Mr. Calhoun emerged, trembling and upset.

64. The Court further concludes that Attorney Gelman's strategy not to pursue the admissibility of the statement, or the sufficiency of the evidence underlying the conviction, while pursuing a direct appeal was not unreasonable in this case.

CLAIM XV. DIRECT APPEAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT SANDUSKY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED THROUGH THE ADMISSION OF THE HEARSAY STATEMENTS OF MR. CALHOUN[20]

Proposed findings of facts:

118. Attorney Gelman did not pursue this issue on direct appeal to the Superior Court, however.

Proposed conclusions of law:

65. Under the Confrontation Clause,[21] a defendant has the right to confront any witnesses against him.

66. Prior to the decision in *Crawford v. Washington,* 541 U.S. 36 (2004), the United States Supreme Court took the view that "the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule." *Williams v. Illinois,* 132 S.Ct. 2221, 2223 (2012); *see Ohio v. Roberts,* 448 U.S. 56 (1980) (abrogated by *Crawford*).

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[20] This particular claim was previously identified as Issue 22 in Sandusky's second amended PCRA petition.

[21] Article I, Section 9 of the Pennsylvania Constitution was amended in 2003 to provide, in relevant part: "In all criminal prosecutions the accused hath a right to be confronted with the witnesses against him . . . " to make it identical to the Confrontation Clause of the Sixth Amendment to the United States Constitution. Art. 1, § 9.

67. However, the *Crawford* Court held that, "Testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford, supra* at 59.

68. The Supreme Court Court overruled *Roberts* as to "testimonial evidence," holding that "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. "Where nontestimonial hearsay is at issue," in contrast, the Court found it "wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.*

69. This Court concludes that the proper foundation was laid for the introduction of Mr. Calhoun's statement to Mr. Petrosky as an excited utterance.

70. With regard to the excited utterance exception, our Supreme Court has explained:

> As is well-settled, excited utterances fall under the common law concept of *res gestae. Res gestae* statements, such as excited utterances, present sense impressions, and expressions of present bodily conditions are normally excepted out of the hearsay rule, because the reliability of such statements are established by the statement being made contemporaneous with a provoking event. While the excited utterance exception has been codified as part of our rules of evidence since 1998, *see* Pa.R.E. 803(2), the common law definition of an excited utterance remains applicable, and has been often cited by this Court:
>
> > [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties . . . Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event.

> The circumstances surrounding the statements may be sufficient to establish the existence of a sufficiently startling event.

Commonwealth v. Murray, 83 A.3d 137, 157–158 (Pa. 2013) (citations omitted).

71. In the case of *Commonwealth v. Jones*, our Supreme Court expressly rejected the argument that Sandusky now advances: "Contrary to Jones' contention, *Crawford* did not abolish the excited utterance exception to the hearsay rule when the declarant is unavailable." 912 A.2d 268, 283 (Pa. 2006) [*Crawford, supra.* at 61] (declining to overrule *White v. Illinois,* 502 U.S. 346 (1992), which held, *inter alia,* that the admission at trial of a spontaneous declaration by an unavailable declarant did not violate the Confrontation Clause).

72. As Calhoun's statement was non-testimonial in nature, it was exempted from any Confrontation Clause scrutiny.

73. The Court concludes that Attorney Gelman's failure to pursue this issue on direct appeal did not constitute ineffective assistance of counsel

CLAIM XVI. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT THE GRAND JURY TESTIMONY OF TIMOTHY CURLEY, GARY SCHULTZ AND GRAHAM SPANIER PURSUANT TO PA.R.E. 801(B)(1)[22]

Proposed findings of facts:

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

120. Trial counsel averred that "Curley and Shultz are known to, and Spanier is believed to be likely to, invoke their right against self-incrimination and be unavailable." Motion

[22] This particular claim was previously identified as Issue 27 in Sandusky's second amended PCRA petition.

in Limine to Admit The Out of Court Statements of Unavailable Witnesses Spanier, Curley & Shultz, 6/11/12, p. 1.[23]

121. The motion averred that their out-of-court statements in the nature of grand jury testimony was admissible pursuant to Rule 804(b)(3) of the Pennsylvania Rules of Evidence.[24]

122. On June 18, 2012, the trial court entertained argument on Sandusky's motion in limine.

123. Counsel for Sandusky explained that it was necessary for the defense to admit the

---

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

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

> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> ***
>
> **b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> ***
>
> **(3) Statement Against Interest.** A statement that:
>
> **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

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

grand jury testimony of Curley, Schultz and Spanier because their statements exculpated Sandusky and impeached the testimony of Commonwealth witness, Michael McQueary ("Mr. McQueary") (N.T. 6/18/12, pp. 139-140):

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

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

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

Id.

124. The trial court, in turn, observed that it was not so much concerned with the introduction of the statement; rather, the concern was with the Commonwealth's response:

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

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

***

: I'm not going to mislead the jury. I recognized early on in this case that -- and I have expressed it -- that in this complex, constellation of litigation, some case had to go forward first and subsequent events may result in whoever went first has to be tried again. I don't know. If Curley and Schultz are convicted of perjury or some related count, then your issue becomes basically moot.

MR. ROMINGER: Correct.

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

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

***

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

ATTORNEY FINA: Yes.

ATTORNEY McGETTIGAN: Yes.

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

***

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

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

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

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

(N.T. 6/18/12, pp. 143-146) (emphasis added)

125. The motion to admit the grand jury testimony was ultimately denied.

126. At the time of Sandusky's trial, both Curley and Schultz had outstanding criminal charges pending against them and they indicated that they would exercise their right against self-incrimination if called to testify as defense witnesses. Accordingly, Curley and Schultz were not available to Sandusky as witnesses.

127. Spanier, however, was not charged by the Commonwealth until November 1, 2012, approximately four and one-half months after the conclusion of Sandusky's trial.

Proposed conclusions of law:

74. While it was represented in the defense motion in limine that Spanier "was believed to be likely to" invoke his right against self-incrimination, Sandusky failed to establish that Spanier would have been willing and able to testify on his behalf absent the invocation of his Fifth Amendment privilege, and that the absence of Spanier's testimony denied Sandusky the right to a fair trial. *See Commonwealth v. Sneed,* 45 A.3d 1096, 1108–09 (Pa. 2012).

75. The Court further concludes that counsel were not ineffective in failing to present the grand jury testimony of Curley, Schultz and Spanier on the theory that the testimony was admissible pursuant to another exception to Rule 804, specifically, the exception for "former testimony:"

76. Rule 804 provides as follows:

> **Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness**
>
> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> ***
>
> **b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

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

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

Pa.R.E. 804.

77. As noted above, the problem with the introduction of the grand jury testimony was that it would open up the door for the Commonwealth to introduce impeachment evidence in the nature of electronic mail messages and handwritten notes.

78. Secondly, although the Commonwealth had the opportunity to explore the testimony of Curley, Schultz and Spanier on direct examination during the grand jury proceedings, Rule 804(b)(1)(B) requires that Sandusky establish that the Commonwealth not only had an opportunity to explore the testimony, but a similar motive to develop it by direct, cross-examination or redirect examination.

79. The Court finds the following passage a persuasive summary of reasons why there may be a difference in how the prosecutor questions the witness before the grand jury and at trial:

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

> strong a motive to cross-examine an exonerating grand jury witness as he would at trial, where the prosecutor must prove guilt beyond a reasonable doubt. Finally, grand jury proceedings are nonadversarial in nature, and therefore lack the competitive climate which exists at trial, where the defendant, defense counsel and the prosecutor are all present.

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

80. Based on the foregoing, the Court concludes that trial counsel cannot be deemed ineffective.

CLAIM XVII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S CHARACTER EVIDENCE INSTRUCTION[25]

Proposed findings of facts:

128. The trial court issued the following charge to the jury regarding consideration of 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 law abiding, peaceable, nonviolent individual.
>
> The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.
>
> So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. ***However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find - that he is guilty, you should find him guilty.*** But in making that determination, you may consider evidence of good character which you believe to be true.

(N.T. 6/21/12, p. 22)(emphasis added)

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[25] This particular claim was previously identified as Issue 33 in Sandusky's second amended PCRA petition.

129. The Court finds that although the trial court had misspoken in its charge, this technical inaccuracy is not fatal.

Proposed conclusions of law:

80. Pennsylvania appellate courts have stated:

> We review a jury charge in its entirety to determine if it "clearly, adequately and accurately reflects the law." *Commonwealth v. Johnson,* 572 Pa. 283, 313, 815 A.2d 563, 580 (2002). The trial judge has broad discretion to choose the wording by which he explains legal concepts to the jury. *Id.* We therefore do not "rigidly inspect a jury charge, finding reversible error for every technical inaccuracy . . . rather [we] evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Jones,* 858 A.2d 1198, 1200 (Pa. Super. 2004) (*quoting Commonwealth v. Thompson,* 674 A.2d 217, 218–19 (Pa. 1996)).

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

81. Reviewing the charge on character evidence, the Court concludes that there are two portions that clearly benefit Sandusky: 1) "The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty;" and, 2) "So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty." (N.T. 6/21/12, p. 22).

82. The Court concludes that both portions were correctly stated to the jury and therefore, a lone, one word error in the following sentence cannot constitute reversible error in this case. Accordingly, the Court concludes that trial counsel were not ineffective for failing to lodge an objection.

CLAIM XVIII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO UTILIZE THE STATEMENTS OF ALLAN MYERS THAT SANDUSKY DID NOT MOLEST HIM[26]

Proposed findings of facts and Proposed Conclusions of Law: See Page 82

CLAIM XIX. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTERVIEW THE VICTIMS, AS WELL AS MR. MCQUEARY, MR. PETROSKY AND MR. CALHOUN[27]

Proposed findings of facts:

130. There was no evidence adduced that Attorney Amendola interviewed any of the victims prior to trial, nor did he attempt to interview Mr. McQueary, Mr. Petrosky or Mr. Calhoun.

Proposed conclusions of law:

83. In *Commonwealth v. Washington*, 927 A.2d 586 (Pa. 2007), the defendant argued on appeal that his attorney was ineffective because he failed to interview every Commonwealth witness prior to cross-examining him or her at trial. *See id.* at 598.

84. In rejecting this position, the Pennsylvania Supreme Court stated that, "we have never held that trial counsel is obligated to interview every Commonwealth witness prior to trial." *Id.*; *see also Commonwealth v. Smith,* 17 A.3d 873, 889 (Pa. 2011) (Counsel's conduct was not rendered ineffective solely because of his failure to interview Commonwealth witness where counsel engaged in aggressive defense by cross-examining witness thereby demonstrating that "he chose a particular course of action that had some reasonable basis designed to effectuate" the defendant's interests).

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[26] This particular claim was previously identified as Issue 12 in Sandusky's second amended PCRA petition.

[27] This particular claim was previously identified as Issue 4 in Sandusky's second amended PCRA petition.

85. The Court concludes that Sandusky merely espouses speculation and innuendo as to what the interviews would have unearthed for the defense. The Court finds that the failure to attempt to interview the Commonwealth witnesses was clearly not ineffective given the evidence adduced by trial counsel during cross-examination and the charted strategy that was demonstrated.

CLAIM XX, XXI, XXII TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A CHANGE OF VENUE OR VENIRE, FOR FAILING TO INVESTIGATE JUROR BIAS AND FOR FAILING TO QUESTION JURORS SPECIFICALLY ABOUT THE INFORMATION THEY HAD OBTAINED THROUGH MEDIA ACCOUNTS[28]

130. During the PCRA evidentiary hearing, Attorney Amendola was questioned about whether he contemplated the fact that Sandusky might have difficulty obtaining a fair trial in Centre County due to juror bias and he responded as follows:

> I don't think it made a difference if we tried him in Timbuktu, Mr. Lindsay. His case was so well know [*sic*], not only nationally, but across the entire continent where people spoke English. I was getting calls from London, England, from Toronto, Ontario about Jerry's case. My philosophy was, and Jerry and I discussed this, we discussed the jury issue, whether we should agree that there should be an out-of-county jury. And Jerry and I discussed the issues. And we came to the conclusion jointly, after discussing those issues many times if not here, where? In other words, where in the world were we going to go to get a jury that hasn't heard about his case? And it not our citizens in Centre County, who? What other citizens are going to give him a fair trial?
>
> We thought he had the best chance here because people here knew him. They knew all the wonderful things he had done. They knew all the work he had done, not only with the football team but with The Second Mile. So we thought, collectively, Jerry and I, we thought his best chance was to get people from Centre County who knew about Jerry personally . . .

Id. at 47-48.

[28] These particular claims were previously identified as Issues 9, 8 and 10 in Sandusky's second amended PCRA petition.

131. It was the Commonwealth who moved for a change of venire prior to the commencement of trial.

132. In the answer to the Commonwealth's motion for change of venire, trial counsel averred in relevant part:

> **4.** . . . The Defendant submits the Centre County community is as capable of providing a fair and objective jury pool from which a fair and objective jury can be selected to hear the defendant's cases as any other area in the state, or, for that matter, in the country given the complete saturation of the entire population of the United States and abroad by media coverage of the Defendant's cases since he was first arrested on November 5, 2011.
>
> **5.** . . . While the Defendant agrees the media coverage of these matters has been spectacular in its breadth and intensity, the media coverage has encompassed the entire nation as well as many areas outside our national borders. For these reasons, the Defendant submits there is no better community than Centre County to be found in the entire Commonwealth of Pennsylvania or outside its borders from which a fair and impartial jury can be selected to hear the Defendant's cases.
>
> **6.** . . . While the Defendant concedes local, state, national, and international reporters have produced the kind of publicity which must represent the very definition of extensive, sustained, and pervasive coverage of the Defendant's cases, the Defendant denies that this coverage is limited solely to Centre County or for that matter even the Commonwealth of Pennsylvania. To the contrary, this coverage extends beyond the borders of our nation as a result of which the Defendant submits there is no better community than Centre County to be found in the entire Commonwealth of Pennsylvania or even outside its borders from which a fair and impartial jury can be selected to hear his cases.
>
> **7.** . . . While the Defendant agrees with the Commonwealth that the media has been focused on his case to an unprecedented degree in our Commonwealth, nevertheless, the media's coverage of his cases has extended well beyond the borders of Centre County, the Commonwealth, and even our nation as a result of which the Defendant believes there is no better community than Centre County to be found anywhere in the Commonwealth from which a fair and impartial jury can be selected to hear his cases.
>
> **8.** . . . While the Defendant agrees with the Commonwealth that publicity alone does not require a change of venire, he disagrees with and denies the Commonwealth's representation that the combination of the pervasive publicity and the unique nature of the Penn State community requires that a non-Centre County jury be selected to hear his cases. To the contrary, given the extensive, sustained, and pervasive media coverage of these cases on a statewide, national,

and even international level, the Defendant submits a jury selected from the Centre County community will be uniquely best suited to hear his cases.

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

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

Answer to Commonwealth's Motion For Change of Venire, pp. 1-12.

133. The trial court provided the following summary of arguments in its February 13, 2012 Memorandum and Order:

The Commonwealth argues, in short, that a constellation of factors alight to prevent the selection of a fair and impartial jury in Centre County and the interests of justice require that a jury be selected elsewhere.

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

Memorandum & Order, 2/13/12, p. 3.

134. In denying the Commonwealth's motion, the trial court stated:

The extensive involvement of Penn State in the life of the citizens of Centre County, and the existence of the extraordinary mass media coverage of this case cannot be denied. It is the effect of those influences on the possibility of selecting a fair jury that is in dispute.

The Commonwealth argues that the effect of the influence of the University and the publicity surrounding this case cannot be overcome. The Defendant argues, on the other hand, that he would prefer to be tried by a jury selected from Centre County despite all the associated risks that entails for him.

> Both the Commonwealth and the Defendant are entitled to a trial conducted before a fair and impartial jury . . .
>
> As defense counsel points out, the answer to whether a juror can be fair and impartial, despite the myriad of influences to which he or she may be exposed, cannot be known until the juror is actually asked . . .
>
> The presumption should be in favor of at least making an effort to select a fair and impartial jury in the county where the Defendant has been charged.
>
> It is certainly obvious, however, that jury selection will present its challenges and if, after a reasonable attempt it is apparent that a jury cannot be selected within a reasonable time, then I will reconsider this ruling.

Memorandum & Order, 2/13/12, p. 3.

Proposed conclusions of law:

86. As the Supreme Court noted in the case of *Commonwealth v. Briggs*:

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

12 A.3d 291 (Pa. 2011)

87. A trial court's determination with respect to a motion for change of venue/venire is entitled to great deference. Indeed, the law is well-settled that:

> The trial court's decision on appellant's motions for change of venue/venire rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion. In reviewing the trial court's decision, our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity.
>
> A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury. In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice.

> Pretrial prejudice is presumed if: 1) The publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; 2) The publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and 3) The publicity is derived from police and prosecuting officer reports.
>
> Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the defendant also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated. In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. ***Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.***

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

88. The sole legitimate purpose of *voir dire* is to ensure selection of a competent, fair, and impartial jury. *See Commonwealth v. Drew,* 459 A.2d 318, 320 (Pa. 1983); *Commonwealth v. Hathaway,* 500 A.2d 443, 447 (Pa. Super. 1985).

89. It is the trial judge who must interpret the answers and demeanor of all potential jurors to evaluate their ability and willingness to render a fair verdict. *See Commonwealth v. Lane,* 555 A.2d 1246 (Pa. 1989).

90. This Court concludes that there is no evidence in the record or allegation suggesting that this Court abused its discretion in this regard. Because Sandusky can point to no discernable errors in the jury selection process, counsel cannot be faulted for failing to ask different questions.

CLAIM XIII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A COLLATERAL APPEAL FROM THE DENIAL OF THE PRE-TRIAL MOTION TO WITHDRAW[29]

Proposed findings of facts:

135. The following information was elicited during Attorney Amendola's testimony at the hearing on Sandusky's post-sentence motions:

Q: Okay. You knew who the witnesses were prior to trial?

A: Yes.

Q: Okay. You had the grand jury testimony at some point before you had to cross-examine them?

A: Yes.

Q: You had the police reports of what they told the state police this defendant did to them; did you not?

A: Yes.

Q: And you knew that was the substance of the case and you were able to cross-examine them based on that, weren't you?

A: Yes.

Q: Okay. You , in fact, said as much that this case - - you said it to the jury in fact, both in your opening and your closing that the rise and fall of this case is the credibility of the witnesses?

A: Yes.

Q: Okay. You were not prescribed or constrained in any way from cross-examination of those witnesses in any area, were you?

A: No.

Q: Okay. In fact, you cross-examined almost every one of them at great length?

---

[29] This particular claim was previously identified as Issue 13 in Sandusky's second amended PCRA petition.

A: Yes.

***

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

A: That's correct.

(N.T. 1/10/13, pp. 41-43)

136. Sandusky contends that his trial counsel had a duty to withdraw pursuant to Rule 1.16 of the Pennsylvania Rules of Professional Conduct[30] and that they should have pursued an

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[30]Rule 1.16 provides in relevant as follows:

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

***

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

***

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Pa.R.P.C. 1.16.

interlocutory appeal to the Superior Court pursuant to Pa.R.A.P. 312 or Pa.R.A.P. 313 after the trial court denied a motion to withdraw.

Proposed conclusions of law:

91. The Court concludes that Sandusky cannot establish that but for taking such an appeal, the outcome of his trial would have been any different. Because he cannot establish any prejudice, his ineffective assistance of counsel claim fails.

CLAIM XIV. TRIAL COUNSEL WAS NOT INEFFECTIVE IN CONNECTION WITH REMARKS MADE DURING HIS OPENING STATEMENT TO THE JURY[31]

Proposed findings of facts:

137. During his opening statement, Attorney Amendola made the following remarks:

> This is a daunting task. I'll be honest with you. I'm not sure how to approach it. The Commonwealth has overwhelming evidence against Mr. Sandusky. There's been a tidal wave of media coverage labeling these young men, now young men, as victims, a title wave of consensus among the public of how could someone be innocent with so many accusers? I'll be honest. I never had a case like this in my life, and I can assure you I never will again.
>
> But I'm here to make an opening statement and to tell you - - to tell you what Mr. Sandusky feels why he's here in this courtroom. We can pack it in now and say, gee whiz, we don't have a chance.
>
> You know, I have used phrases throughout the course of my representation that this is a task similar to climbing Mount Everest from the bottom of the hill. It's David and Goliath. It's the government with all its resources prosecuting one individual with limited resources. Boxes and boxes of materials to go through since this case was brought, trying to figure out how we can present Mr. Sandusky's case to you so **that you will understand that he's innocent.**
>
> In the opening statement presented by Mr. McGettigan, an outstanding prosecutor and an outstanding attorney, he referred to the pictures on the screen as pictures of victims. Ladies and gentlemen, let me say this - - and I've been saying this from November 5th of last year. There are no victims in this case. The only way and

[31] This particular claim was previously identified as Issue 24 in Sandusky's second amended PCRA petition.

the only time there will be victims in this case will be if, after you hear all the evidence, you listen to all the arguments, you hear the judge's instructions, and you deliberate, you determine beyond a reasonable doubt that Jerry Sandusky is guilty of some or all of the offenses will there be victims. **And it you don't get to that point, if you decide, after hearing all the evidence, that there's a reasonable doubt, then there will never be victims because victims only come about after you 12 determine they're victims.**

***

The accusers. You saws those eight photos. Cute kids. Why would they lie?

Folks, I don't know if any of you have been involved in family disputes involving money and how people, when it comes to money do a lot of things they wouldn't ordinarily do. What's the old saying? Money is the root of all evil.

***

What we believe, money is a very big factor in this case. We believe the evidence will show that these young men have a financial interest in this case in pursuing this case.

***

There's another aspect to this case and I think it will become apparent throughout the trial. Even the accusers were questioned multiple times. We believe when they were questioned and initially said nothing happened, the government went back until they got an answer they wanted to hear.

***

We have all had occasions where if you keep telling somebody something, after a while it's simpler and easier to say, yeah, that's what happened.

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

Proposed conclusions of law:

92. Placed into proper context, the Court finds that counsel's remarks clearly did not rise to the level of ineffective assistance of counsel and the claim should be dismissed.

CLAIM XV. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER OPINION TESTIMONY.[32]

Proposed findings of facts:

[32] This particular claim was previously identified as Issue 28 in Sandusky's second amended PCRA petition.

138. During its case-in-chief, the Commonwealth presented the testimony of Jessica Dershem ("Ms. Dershem"), a caseworker employed with Clinton County CYS.

139. Ms. Dershem received a referral made by the principal at Central Mountain High School regarding inappropriate contact between Sandusky and Mr. Fisher. (N.T. 6/12/12, p. 125) She informed the jury that at the end of her second interview with Mr. Fisher, there was enough evidence to "indicate" the case. *Id.* at 128.

140. She explained that the term "indicate" "means that we feel that there is enough information to meet the definition of child abuse, child sexual abuse." *Id.* at 128-29.

141. Following her interview with Sandusky, she observed that "there was a lot of consistencies between Aaron, what he talked about and what Mr. Sandusky admitted to." *Id.* at 144. Accordingly, she subsequently submitted a report to ChildLine advising of the indicated report of abuse. *See id.*

142. The Commonwealth did not argue to the jury that she had given an expert opinion. (N.T. 3/24/17, p. 137)

143. Judge Cleland did not instruct the jurors that she had given an expert opinion. *See id.*

Proposed conclusions of law:

93. In *Commonwealth v. Alicia*, the Pennsylvania Supreme Court summarized cases in which it held that expert psychiatric or psychological testimony, by providing a generalized explication of human behavior under certain particular circumstances, directly spoke to the issue of whether a witness was being truthful and, as such, was inadmissible:

> For example, in *Commonwealth v. Dunkle,* 602 A.2d 830, 836–38 (Pa. 1992), we held inadmissible expert testimony as to the reasons why child victims of sexual abuse often do not immediately report the abuse and often omit many details

> thereof.[33] We concluded that the reasons for such behavior in a child are well within the range of common experience, knowledge, and understanding of a jury, and expert testimony on the matter would improperly infringe upon the jury's ability and responsibility to assess the credibility of the child witness; *see also [Commonwealth v.] Balodis,* [747 A.2d 341,] 345–46 [2000] (relying on the same reasoning to reject expert testimony similar to that at issue in *Dunkle*). Similarly, in *Commonwealth v. Seese,* 517 A.2d 920 (Pa. 1986), we held inadmissible expert testimony that young children rarely lie about sexual abuse, reasoning that such testimony would opine on the veracity of an entire class of individuals, and thus would encroach on the province of the jury to assess the individual witness's credibility; *see also* [*Commonwealth v.*] *Davis,* [541 A.2d 315,] 316–17 [1988] (citing *Seese* in concluding that expert testimony as to the inability of young children to fantasize about sexual encounters was improper). In *Commonwealth v. Gallagher,* 547 A.2d 355 (Pa. 1988), we held that expert testimony on rape trauma syndrome was improperly admitted at the appellant's trial. The expert in *Gallagher* had opined that the victim was suffering from rape trauma syndrome, and thus her positive, in-court identification of the appellant as her assailant was not incompatible with her inability to identify him shortly after the rape, which had occurred five years earlier. *Id.* at 358. We determined that the only purpose of the *Gallagher* expert testimony was to enhance the credibility of the victim, and we concluded that "[s]uch testimony would invest the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the facility of the ordinary juror to assess." *Id.*

92 A.3d 753, 761 (Pa. 2014).

94. Here, Ms. Dershem was not offering an expert opinion on whether Aaron Fisher was credible, and as such, her testimony did not invade the province of the jury. Instead, she was merely explaining her observations and rationale for submitting a report to ChildLine.

95. Moreover, the Court concludes that in her employment as a caseworker, she was certainly entitled to offer an opinion on the human behavior that she observed during her interviews with Aaron Fisher and Sandusky. Indeed, Rule 701 of the Pennsylvania Rules of Evidence provides as follows:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

---

[33] *But see* 42 Pa.C.S.A. § 5920 (Section 2 of 2012, June 29, P.L. 656, No. 75, effective in 60 days [Aug. 28, 2012])

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa.R.E. 701.

96. Because the prosecutor did not elicit any improper evidence from Ms. Dershem and did not tell jury that they should assign special weight to her testimony because of her skill, knowledge and experience, there was no basis upon which trial counsel should have objected.

CLAIM XVI. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT[34]

Proposed findings of facts:

144. During the course of Sandusky's trial, the Commonwealth presented evidence that Sandusky had assaulted two young men who were unidentified: Victim 2 and Victim 8.

145. In closing argument, Attorney McGettigan told the jury:

I don't want to tug at your heart strings. I want to remind you of what the substance of this case is about, because it's what happened to those boys.

You know what? Not just those boys, to others unknown to us, to others presently known to God but not to us, but we know what the defendant did to them because adults saw them and adults told you about them.

N.T. 6/21/12, p. 111.

146. The evidence adduced at the PCRA evidentiary hearing established that prior to Sandusky's arrest, Mr. Myers told the Pennsylvania State Police that Sandusky never sexually assaulted him. Upon Sandusky's arrest, Mr. Myers then went to Attorney Amendola's office and

[34] This particular claim was previously identified as Issue 1 in Sandusky's second amended PCRA petition.

stated that he was Victim 2 and that no inappropriate contact had occurred that evening. (N.T. 8/12/16, p. 144)

147. Shortly thereafter, however, Attorney Amendola received a letter from Attorney Shubin indicated that he [Attorney Shubin] represented Mr. Myers. *See id.* at 145. Attorney Amendola then encountered Attorney Shubin at the courthouse where Attorney Shubin reported that Mr. Myers was a victim and that "he's probably the worst victim. He's been victimized by Jerry for years." *Id.* at 146.

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

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

Id. at 57.

149. Frank Fina, Esquire ("Attorney Fina") was previously employed with the OAG and was responsible for assisting in the grand jury investigation and prosecution of Sandusky. . (N.T. 8/23/16, p. 28).

150. Attorney Fina provided the following information about Mr. Myers during the PCRA evidentiary hearing:

> . . . Despite the fact that Mr. Myers had told state police that nothing had occurred between he and Mr. Sandusky, we, in the course of the investigation, sought to talk to him again. I'm going to say probably 2010, sometime in 2010, it might have been earlier than that, but I think it was around 2010 or maybe 2011. And we weren't able to find him . . . In the course of looking for him, I believe the agents became aware of Mr. Shubin, Attorney Shubin, and contacted him, and those communications did not result in us finding Mr. Myers. . .
>
> ***
>
> At some point, Mr. Myers was interviewed, yes.
>
> ***

> I think he was interviewed more than once. Again, the dates of those interviews, I can't remember, sometime in 2011 I'm going to suspect. The interviews were significantly different than Mr. Myers' prior interview. He now said that he had been sexually assaulted by Mr. Sandusky. He described various ways he had been sexually assaulted. Now, I'm giving you a cumulative answer. I don't recollect exactly what he said in the different interviews. I think there were various, you known, degrees that he described perhaps on the first interview, it was not as severe as what he described in the second interview. He essentially mirrored what Mike McQueary had testified to publicly in quite a few details, which we thought - - which caused us some concern.
>
> He specifically - - I recollect that he had the year wrong, he said he had been assaulted in the shower at Penn State by Jerry Sandusky in 2002. . . He was also, I think, asked to draw a diagram of the Lasch Building or the locker room or the shower or something, and what he drew was not accurate.

Id. at 31-32.

151. Attorney Fina went on to explain:

> . . . look, I had to make an evaluation in this case as I did with great many young men as to whether or not they could be used as witnesses and could be - - could withstand the scrutiny and the cross-examination and the due process that occurs in these cases. Many of these young men had profound issues in their lives. Many of them had been severely damaged by abuse and by their lives. Some had mental health issues. And some had given dramatically inconsistent statements and conducted themselves in ways that made them, I believe, unusable as witnesses in this case. Mr. Myers would have fallen in that category. I made that decision . . .

Id. at 34.

152. OAG Agent Anthony Sassano was the lead investigator assigned to the Sandusky case. (N.T. 8/22/16, pp. 90-91)

153. With respect to Mr. Myers, Agent Sassano observed that there were multiple versions of what he reported to various law enforcement sources. *See id.* at 97.

154. When Agent Sassano interviewed Mr. Myers, he asked him to draw a diagram of the locker room where he said that Sandusky had abused him. *See id.* at 98. Agent Sassano stated that Mr. Myers drew the completely wrong locker room. *See id.*

155. During the evidentiary hearing, Attorney McGettigan was specifically asked if he believed Mr. Myers to be Victim 2 and Attorney McGettigan responded, "I did not then. I do not now." *Id.* at 57. He explained:

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

Id. at. 57-58.

156. Attorney McGettigan replied that he was referring to Victim 2 and Victim 8 in his closing argument. *See id.*

Proposed conclusions of law:

97. There is no evidence to suggest that Attorney Amendola lied to the jury and that Attorney Amendola knew that a lie was committed and failed to object out of a dereliction of duty. Accordingly, counsel can be deemed ineffective here.

98. The facts above also support this Court's conclusion with respect to Claim XVIII, namely, that counsel was not ineffective for failing to introduce the statement that Mr. Myers

provided to Attorney Amendola's investigator. Clearly, the credibility of Mr. Myers was compromised from the perspective of both parties.

CLAIM XVII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ADVISING SANDUSKY TO WAIVE THE PRELIMINARY HEARING

Proposed findings of facts:

157. At the evidentiary hearing, Attorney Amendola explained that prior to the preliminary hearing, he was concerned that additional charges would be filed against Sandusky and that Sandusky's bail would be increased. (N.T. 8/12/16, p. 120)

158. In light of these concerns, Attorney Amendola approached the prosecution to discuss a proposed agreement for Sandusky to waive his preliminary hearing in exchange for Sandusky's guaranteed freedom from incarceration. Attorney Amendola explained:

> . . . I called Mr. McGettigan and I proposed to him that if we were to consider, I didn't make it a done deal, but if we considered waiving the preliminary hearing, could the Commonwealth give us a promise, a commitment, that they would not ask for additional bail moneys in the event that additional alleged victims were identified and charges were brought. Because you may recall, after the initial charges were filed, the Commonwealth was not very happy about the bail situation, which was unsecured.
>
> And they went out within several weeks, I think maybe four weeks, because the first charges were filed on the 4th, Jerry was arrest on the 5th of November. And the second series of charges were filed on, I believe, December 7th when Jerry was taken into custody again, but Jerry was put in jail. And I thought it was critical to our defense that Jerry not be incarcerated. As you know, when people are incarcerated, all their phone calls are recorded, all their visits are recorded except for privacy with their attorneys.
>
> And the last thing I needed was Jerry in a jail cell perhaps really really disabled in terms of helping himself prepare his defense. And Jerry obviously didn't want to be in jail, so I proposed to McGettigan if we waived the preliminary hearing, could we have a commitment from the Commonwealth, in the event there were other charges, other alleged victims, there be no increase in bail. And he came back, not right away, maybe the next day I believe and said he could make that commitment. So that was part one of it.

> But part two of that process was that we knew that the preliminary hearing was only going to be for Commonwealth witnesses to say what they said happened. We were not going to be able to expose or explore their motives. And it was going to be an ugly day in an ugly case where people had already been convinced that Jerry was guilty. So we saw it from two standpoints a, kind of, win win for us.

Id. at 121-122

159. The evening prior to the scheduled preliminary hearing, a meeting was held at the Hilton Garden Inn and attended by Attorney Amendola, counsel for the Commonwealth, Judge Cleland and the Magisterial District Judge wherein the waiver of the preliminary hearing was discussed. *See id.* at 122-123.

160. Attorney Amendola testified that he "never would have gone to the meeting with that proposal if Jerry hadn't been on board with it." *Id.* at 128.

161. Attorney Amendola explained the "pros and cons" of waiving the hearing with Sandusky. *Id.* at 123. He stated:

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

Id. at. 133-34.

162. According to Attorney Amendola, Sandusky never expressed any confusion about the decision to waive the preliminary hearing. *See id.* at 173. He went on to state:

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

Id. at 173-74.

163. The Court finds Attorney Amendola's testimony to be credible and worthy of belief.

164. The Court rejects Sandusky's testimony that he knew "very little" of what would occur at the preliminary hearing. *Id.* at 18. Indeed, Sandusky contradicted himself on this point during the following exchange on cross-examination:

> Q: You did not tell him [Attorney Amendola] you were confused about anything that day; correct?
>
> A: No, because I understood that he wanted to waive the preliminary hearing and why.

Id. at 45.

165. The Court rejects Sandusky's testimony that Attorney Amendola did not explain the advantages of moving forward with a preliminary hearing. *See id.* at 19.

166. The Court rejects Sandusky's testimony that he only spoke with Attorney Amendola for 15 minutes the night prior to the preliminary hearing. *See id.* at 18-19.

167. The Court rejects the testimony of Mr. Rominger as lacking in credibility and belief when he stated that he advised Attorney Amendola that waiving the preliminary hearing was a mistake. Instead, the Court accepts the testimony of Attorney Amendola that such a remark was never made to him. *See id.* at 173.

Proposed conclusions of law:

97. The purpose of a preliminary hearing is to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime. *See Commonwealth v. Wodjak* 466 A.2d 991 (Pa. 1983). Its purpose is not to prove defendant's guilt.

98. Once a defendant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial. *See Commonwealth v. Tyler,* 587 A.2d 326, 328 (Pa. Super. 1991).

99. The case of *Commonwealth v. McBride*, 570 A.2d 539 (Pa. Super. 1990) is dispositive here. In *McBride*, the defendant advanced the same complaint that his defense was hampered because he had not previously heard the Commonwealth's witnesses testify. *See id.* at 541. The Superior Court of Pennsylvania disagreed stating:

> This is too general to entitle appellant to relief. Counsel will not be found ineffective in a vacuum, and we will not consider claims of ineffectiveness without some showing of a factual predicate upon which counsel's assistance may be evaluated. In the absence of a more specific allegation regarding the prejudice suffered by appellant due to the waiver of a preliminary hearing, we find no basis upon which to find trial counsel ineffective with respect thereto.

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

100. Because counsel's actions were certainly reasonable and strategic, Sandusky's ineffective assistance of counsel claim fails on the second prong of the *Pierce* test. Moreover,

the Court concludes that Sandusky failed to articulate and establish how the waiver of the preliminary hearing caused any prejudice to him.

101. The Court concludes that his belief that he could have learned potential information regarding the victims' therapy and how repressed memory therapy caused them to come forward, this is speculative.

102. Because credibility is not an issue at a preliminary hearing, Attorney Amendola would have been unable to cross-examine the victims on that issue. *See Commonwealth v. Fox,* 619 A.2d 327 (Pa. Super. 1993)("Since the Commonwealth merely bears the burden of establishing a *prima facie* case against the defendant, credibility is not an issue at at preliminary hearing."); *see also Barber v. Page,* 390 U.S. 719, 725 (1968) (removing credibility as an issue at a preliminary hearing and limiting defense actions to negating the existence of a *prima facie* case conforms to the fact that a preliminary hearing is a much less searching exploration into the merits of the case); *Tyler, supra* at 328 (credibility is not an issue at a preliminary hearing); *Liciaga v. Court of Common Pleas of Lehigh County,* 566 A.2d 246, 248 (Pa. 1989) (magistrate is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing).

CLAIM XVIII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO QUASH THE GRAND JURY PRESENTMENT BASED ON GOVERNMENT MISCONDUCT

This claim was previously dismissed by Judge Cleland in an order dated October 16, 2016.

CLAIM XVIX. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO QUASH THE GRAND JURY PRESENTMENT BASED ON SUBJECT MATTER JURISDICTION GROUNDS[35]

Proposed findings of facts:

168. On March 3, 2009, Michael T. Madeira, Esquire, then District Attorney of Centre County ("District Attorney Madeira"), formally referred the investigation into allegations that Sandusky sexually assaulted Aaron Fisher to the Pennsylvania Office of Attorney General ("OAG"). *See* H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "B."

169. The case was referred to the OAG due to a conflict of interest; namely, that Sandusky was well-known to District Attorney Madeira and that Sandusky was the adoptive father of the brother of District Attorney Madeira's wife.

170. The OAG formally assumed jurisdiction of the case on March 18, 2009. *See id.*

171. On May 1, 2009, the OAG submitted a Notice of Submission of Investigation No. 29 ("Notice 29") to the Thirtieth Statewide Investigating Grand Jury ("30th SWIGJ). *See* H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "C."

172. Notice 29 provided, in relevant part, that the Pennsylvania State Police were pursuing an investigation into an alleged sexual assault by a Centre County male upon a juvenile

[35] This particular claim was previously identified as Issue 5 in Sandusky's second amended PCRA petition.

male with whom he had become acquainted through his sponsorship of a charity for disadvantaged youth. Notice 29 further stated that:

> The powers of the grand jury are needed in order for the investigation of this matter to advance to a satisfactory conclusion. In particular, the power of the grand jury to compel the attendance of witnesses is needed. Witnesses with knowledge may be too embarrassed or intimidate to admit their knowledge of the violations because the actor is well-regarded and influential and is also known as the founder of a charity that raises funds for and serves disadvantaged children. Young men who are potentially involved are in fear of revealing what they know due to the suspect's power and influence.
>
> The power of the grand jury to compel testimony under oath is needed. It is critical in a sexual assault case where no physical evidence exists to test the reliability of information provided by the witness and to obtain testimonial evidence which could be used at a criminal trial as substantive evidence if the witness testifies differently at trial.
>
> The power of the grand jury to subpoena documents is needed in order to obtain information that would not otherwise be available. Specifically, telephone records and business records may be needed to corroborate the testimony of the witnesses.

Id. (internal citation omitted)

173. Notice 29 was accepted by the supervising judge of the 30th SWIGJ on May 5, 2009. When the grand jury's term expired in January of 2011, the investigation was re-submitted to the 33rd SWIGJ as Notice 1 and accepted by the supervising judge.

174. On November 4, 2011, the 33rd SWIGJ issued a Presentment recommending that criminal charges be filed against Sandusky in connection with the sexual abuse of eight victims.[36] *See* H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "P."

[36] Specifically, the 33rd SWIGJ recommended that Sandusky be charged with seven counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); eight counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); eight counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); eight counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); eight counts of endangering the welfare of children, 18 Pa.C.S. § 4304; one count of criminal attempt to commit

175. Thereafter, on December 7, 2011, the grand jury issued another Presentment wherein it was recommended that criminal charges be filed against Sandusky in connection with the abuse of two additional victims.[37] *See* H. Geoffrey Moulton, Jr., *Report to the Attorney General on The Investigation of Gerald A. Sandusky* (2014); Exhibit "Q."

Proposed conclusions of law:

102. The sole source of the Attorney General's authority to institute and prosecute criminal cases is the Commonwealth Attorneys Act. *See* 71 P.S. § 732-101, *et seq.* Section 206 of this Act provides that:

> **(a) Law enforcement; criminal investigations.**--The Attorney General shall be the chief law enforcement officer of the Commonwealth; the district attorney shall be the chief law enforcement officer for the county in which he is elected. The ***Attorney General shall have the power to investigate any criminal offense which he has the power to prosecute under section 205*[FN1]**; he shall continue the existing programs relating to drug law enforcement. The Pennsylvania State Police shall cooperate with the Attorney General and furnish such services as the Attorney General shall request.
>
> **(b) Investigating grand juries.**--***The Attorney General shall convene and conduct investigating grand juries as provided in the act of November 22, 1978 (P.L. 1148, No. 271), known as the "Investigating Grand Jury Act."*[FN2]**
>
> FN1 71 P.S. § 732-205.
>
> FN2 19 P.S. § 265 et seq. (repealed); see now, 42 Pa.C.S.A. § 4541 *et seq.*

71 P.S. § 732-206 (emphasis added)

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indecent assault, 18 Pa.C.S. § 901 (18 Pa.C.S. § 3126(a)(8)); and one count of aggravated indecent assault, 18 Pa.C.S. § 3125 (a)(8).

[37] Specifically, the 33rd SWIGJ recommended that Sandusky be charged with four counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(7); two counts of indecent assault, 18 Pa.C.S. § 3126(a)(7) and (8); two counts of unlawful contact with a minor, 18 Pa.C.S. § 6318(a)(1)(5); two counts of corruption of minors, 18 Pa.C.S. § 6301(a)(ii); and two counts of endangering the welfare of children, 18 Pa.C.S. § 4304.

103. The plain wording of the statute thus makes clear that: 1) The OAG can investigate any criminal offense that it has the power to prosecute under Section 205 of the Commonwealth Attorneys Act; and 2) That the OAG shall utilize grand juries in connection with those investigations as provided for in the Investigating Grand Jury Act.

104. With respect to the OAG's power to prosecute, the Commonwealth Attorneys Act provides, in relevant part:

> **(a) Prosecutions.**--The Attorney General shall have the power to prosecute in any county criminal court the following cases:
>
> (1) Criminal charges against State officials or employees affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such State officials or employees or benefit from such influence or attempt to influence.
>
> (2) Criminal charges involving corrupt organizations as provided for in 18 Pa.C.S. § 911 (relating to corrupt organizations).
>
> ***(3) Upon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter or who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office.***
>
> (4) The Attorney General may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings. Upon the filing of the petition, the president judge shall request the Supreme Court to assign a judge to hear the matter. The judge assigned shall hear the matter within 30 days after appointment and make a determination as to whether to allow supersession within 60 days after the hearing. The district attorney shall be given notice of the hearing and may appear and oppose the granting of the petition. Supersession shall be ordered if the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.
>
> (5) When the president judge in the district having jurisdiction of any criminal proceeding has reason to believe that the case is a proper one for the intervention of the Commonwealth, he shall request the Attorney General to represent the Commonwealth in the proceeding and to investigate charges and prosecute the defendant. If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with the court and proceed as provided in

> paragraph (4). If the Attorney General determines that the case is not a proper case for intervention, he shall notify the president judge accordingly.
>
> (6) Criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision.
>
> (7) Indictments returned by an investigating grand jury obtained by the Attorney General.
>
> (8) Criminal charges arising out of activities of the State Medicaid Fraud Control Unit as authorized by Article XIV (relating to fraud and abuse control), act of June 13, 1967 (P.L. 31, No. 21), known as the "Public Welfare Code,"[1] and the Federal law known as the "Medicare-Medicaid Antifraud and Abuse Amendments.

71 P.S. § 732-205 (emphasis added).

105. The Commonwealth Attorney's Act of October 15, 1980, P.L. 950, No. 164 was enacted on the heels of the Investigating Grand Jury Act of October 5, 1980, P.L. 693, No. 142, § 216(a)(2). Section 4542 of Title 42 - - on which Sandusky relies for his jurisdictional argument - - sets forth the definitions for certain words and phrases in the Investigating Grand Jury Act. "Multicounty investigating grand jury" is defined as follows:

> A Statewide or regional investigating grand jury convened by the Supreme Court upon the application of the Attorney General and having jurisdiction to inquire into organized crime or public corruption or both under circumstances wherein more than one county is named in the order convening said investigating grand jury.

42 Pa.C.S. § 4542.

106. It strains logic to conclude that the legislature would enact the Commonwealth Attorney's Act - - providing the OAG with the power to investigate any of the eight types of cases set forth above at 71 P.S. § 732-205 and providing the OAG with the power to utilize the SWIGJ in connection with those investigations - - if the Grand Jury Act set forth such a marked limitation with respect to the type of case that a SWIGJ could investigate.

107. If Sandusky's narrow reading is correct, that would mean that the legislature never intended for the OAG to be able to utilize the investigative resources of the SWIGJ whenever a District Attorney's office referred a case to the OAG (that did not involve organized crime or public corruption),[38] and never intended for the OAG to utilize a SWIGJ to investigate allegations of Medicaid fraud.[39] [40] Such a conclusion is absurd and, therefore, contrary to the canons of statutory interpretation. *See* 1 Pa.C.S. § 1922(1) (in construing statutes, it is presumed that the legislature did not intend an absurd result).

108. The phrase "multicounty investigating grand jury" appears in the section of the Investigating Grand Jury Act pertaining to its **empanelment**. Section 4544 provides, in relevant part, as follows:

> **(a) General rule.**--Application for a multicounty investigating grand jury may be made by the Attorney General to the Supreme Court. In such application the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth and that, in his judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543 (relating to convening county investigating grand jury). The application shall specify for which counties the multicounty investigating grand jury is to be convened. Within ten days of receipt of such application, the court shall issue an order granting the same. Failure by an individual justice to grant such application shall be appealable to the entire Supreme Court.
>
> **(b) Contents of order.**--An order issued under subsection (a) shall:
>
> (1) convene a multicounty investigating grand jury having Statewide jurisdiction, or jurisdiction over all counties requested in the application by the Attorney General;

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[38] 71 P.S. § 732-205(a)(3)

[39] 71 P.S. § 732-205(a)(8)

[40] Additionally, as an aside it should be noted that the OAG is statutorily authorized to investigate insurance fraud, *see* Pa.C.S. 4117(h)(2) ("In addition to the authority conferred upon the Attorney General by the act of October 15, 1980 (P.L. 950, No 164), known as the

(2) designate a judge of a court of common pleas to be the supervising judge over such multicounty investigating grand jury and provide that such judge shall with respect to investigations, presentments, reports, and all other proper activities of said investigating multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty investigating grand jury;
(3) designate the counties which shall supply jurors and in what ratios;
(4) designate a location or locations for the multicounty investigating grand jury proceeding; and
(5) provide for such other incidental arrangements as may be necessary including the Commonwealth's share of expenses.

All matters to be included in such order shall be determined by the justice issuing the order in any manner which he deems appropriate, except that the Supreme Court may adopt general rules, consistent with the provisions of this section, establishing standard procedures for the convening of multicounty investigating grand juries.

42 Pa.C.S. § 4544.

109. This section immediately follows the statute that governs the process for convening a **county** investigating grand jury.

110. Thus, it is clear that the legislature intended to distinguish between county and multicounty (or statewide) investigating grand juries with respect to **empanelment** of those bodies.

111. Had the legislature intended to limit the **type** of case that a SWIGJ could investigate once it was impaneled, it could have expressly provided such limiting language in 42 Pa.C.S. § 4550. Instead, that section as written applies equally to both county and statewide investigating grand juries:

> **(a) General rule.**--Before submitting an investigation to the investigating grand jury the attorney for the Commonwealth shall submit a notice to the supervising judge. This notice shall allege that the matter in question should be brought to the attention of the investigating grand jury because the investigative resources of the grand jury are necessary for proper investigation. The notice shall allege that one or more of the investigative resources of the grand jury are required in order to adequately investigate the matter.

> **(b) Effect of notice.--**After the attorney for the Commonwealth has filed the notice submitting a matter to the investigating grand jury any or all of the investigative resources of the investigating grand jury may be used as regards the investigation.

42 Pa.C.S. § 4550.

112. The purpose of an investigating grand jury - - either county or statewide - - is singular: It is to provide resources to properly and adequately investigate crimes in the Commonwealth of Pennsylvania. The fact that the parameters for empanelment of the two different types of investigating grand juries are different does nothing to alter the purpose. The OAG certainly established the necessity for utilizing the resources of the SWIGJ to investigate Sandusky after the OAG received a proper referral pursuant to the Commonwealth Attorney's Act.

113. In *Commonwealth v. McCauley*, 588 A.2d 941 (Pa. Super. 1991), the defendant argued on appeal that the SWIGJ did not have authority to investigate and issue a Presentment recommending that he be charged with murder because Section 4544 of the Investigating Grand Jury Act (pertaining to empanelment) limited its jurisdiction to investigation of matters of organized crime or public corruption.

114. According to McCauley, had a county investigating grand jury been convened, the OAG would in fact have had the authority to utilize the resources of the grand jury. In rejecting this position, the Superior Court of Pennsylvania stated:

> Concededly, the investigating grand jury which issued the presentment against appellant had been impaneled for purposes of a multicounty investigation of public crime and corruption. However, the legitimate underlying purpose for which the grand jury is convened does not hinder investigations into other matters which may be brought before it. If, during an investigation of ongoing criminal activity, a grand jury comes upon criminal activity which has been completed, it is not required to close its eyes thereto. Where properly impaneled, the purpose for which a grand jury is convened does not restrict the grand jury from investigating actions which constitute either criminal activity or probable violations of the criminal laws of the Commonwealth. The State Attorney

> General's Office investigating the case chose to bring this murder case before the grand jury already impaneled rather than impanel a new one pursuant to section 4543. The purpose for which a grand jury is convened does not place a limitation on the grand jury's authority to investigate other crimes committed in a county. As explained in 42 Pa.C.S. § 4548, a grand jury's authority encompasses investigation into statutorily defined criminal offenses committed in the county or counties in which it is summoned.

Id. at 269-70 (internal citations).

115. The Supreme Court of Pennsylvania had the opportunity to review a challenge to the jurisdiction of the supervising judge of the SWIGJ in the case of *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa 2006).

116. In that particular case, it was argued that the SWIGJ could not be convened to investigate any matters except those involving organized crime and/or public corruption and spanning more than one county. Because the Notice of Submission did not involve those particular crimes, and the alleged criminal activity only occurred in Lancaster County, the Petitioner argued that the investigation should be quashed.

117. In response, the OAG asserted that the Petitioner had conflated the statutory prerequisites for empanelment of the SWIGJ with the powers of the SWIGJ to inquire into offenses against the criminal laws of the Commonwealth. Citing the *McCauley* case, the OAG further argued that there was no requirement that there be a complete overlap between the application to convene a SWIGJ and the particular matters that are later submitted to its attention.

118. The Supreme Court agreed with the OAG's argument, stating:

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

> inquire into criminal offenses once empanelled are different. *Compare* 42 Pa.C.S. § 4544(a), *with* 42 Pa.C.S. § 4548(a). For this reason, we reject Lancaster Newspapers' jurisdictional challenge to Notice 12, as it is presently framed.

Id. at 512.

119. This Court concludes that once properly empaneled, a SWIGJ's jurisdiction is not limited to investigation of cases that involve organized crime and/or public corruption.

CLAIM XXX. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE COMMONWEALTH FAILED TO ABIDE BY THE CHILD PROTECTIVE SERVICES LAW[41]

Proposed findings of facts:

168. Mr. Fisher's allegation of abuse were disclosed to Clinton County CYS.

169. Clinton County CYS notified ChildLine.

170. Because the offense was alleged to have occurred in Centre County, Clinton County authorities transferred the case to the Centre County District Attorney's Office.

171. Due to the conflict of interest on the part of the Centre County District Attorney's Office, the case was referred to OAG.

Proposed conclusions of law:

120. The Court rejects Sandusky's argument that law enforcement authorities cannot investigate allegations of child abuse unless and until the authorities charged with operating under the Child Protective Services Act, 23 Pa.C.S.A. § 6301 *et seq.* ("CPSL")[42] have properly discharged their duties.

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[41] This particular claim was previously identified as Issue 5 in Sandusky's second amended PCRA petition.

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

> (b) Purpose—It is the purpose of [the CPSL] to encourage more complete reporting of suspected child abuse; to the extent permitted by this chapter, to

121. Although CYS and law enforcement may initially work in tandem when there are allegations of child abuse, compliance with the CPSL does not impact whether or not criminal charges can be filed:

> While there is little doubt that the Crimes Code and the CPSL are linked in some ways, it is clear, as acknowledged by our Supreme Court in *P.R.*,[43] that the Crimes Code standard applies in criminal proceedings, while the CPSL standard applies to administrative proceedings.

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

CLAIM XXXI. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE COMMONWEALTH FAILED TO ABIDE BY THE CHILD PROTECTIVE SERVICES LAW

Proposed findings of facts:

172. The Commonwealth's foregoing findings of fact are incorporated by reference.

Proposed conclusions of law:

122. In *Commonwealth v. Johnson*, 966 A.2d 523 (Pa. 2009), the Pennsylvania Supreme Court recognized that if multiple instances of ineffectiveness are found, the assessment of prejudice properly may be premised upon cumulation." *Id.*, at 532 (citing *Commonwealth v. Perry*, 644 A.2d 705, 709 (1994) (finding multiple instances of ineffectiveness, "in

---

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

23 Pa.C.S. § 6302(b)

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

combination," prejudiced defendant)); *see also Commonwealth v. Koehler,* 36 A.3d 121, 161 (Pa. 2012) (to extent claims are rejected for lack of arguable merit, there is no basis for accumulation claim; however, when failure of individual claims is grounded in lack of prejudice, cumulative prejudice from those claims may properly be assessed).

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

124. This Court concludes that Sandusky's cumulative prejudice claim fails.

III. CONCLUSION

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

Respectfully submitted,

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Date: August 21, 2017

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
CRIMINAL DIVISION

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

CERTIFICATE OF SERVICE

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

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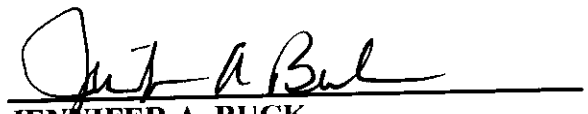

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Date: August 21, 2017