



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

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

FILED  
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**PETITIONER'S RESPONSE TO THE COMMONWEALTH'S SECOND ANSWER AND  
BRIEF IN SUPPORT OF AN EVIDENTIARY HEARING**

AND NOW COMES, Petitioner, Gerald A. Sandusky, by and through his counsel, Alexander H. Lindsay, Jr., Esq., and J. Andrew Salemme, Esq., and the Lindsay Law Firm, P.C., and files this response to the Commonwealth's Second Answer and brief in support of an evidentiary hearing and request for a new trial.

**Evidentiary Hearing Standard**

Mr. Sandusky, in his Supplemental Amended Petition averred:

A petitioner is entitled to an evidentiary hearing by rule whenever his petition or the Commonwealth's answer raise a material issue of fact. *See* Pa.R.Crim.P. 908(A)(2); *Commonwealth v. Miller*, 102 A.3d 988, 992 (Pa. Super. 2014) ("It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence.") (emphasis added). Where a proposed witness' testimony is different from that of a victim or another critical witness, an evidentiary hearing is warranted. *See Commonwealth v. Khalifah*, 852 A.2d 1238 (Pa. Super. 2004). A PCRA court can elect to have an evidentiary hearing on a limited number of claims. *See* Pa.R.Crim.P. 907(3). A judge is only permitted to summarily dismiss a petition without an evidentiary hearing "in certain limited cases." Comment to Pa.R.Crim.P. 907. Only where the "petition is patently frivolous and without support in the record," or "the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact" can a court dismiss a petition without a hearing. *Id.*; *Miller, supra*.

Thus, PCRA evidentiary hearings are generally favored on first time petitions. *Commonwealth v. Walls*, 993 A.2d 289, 296-97 (Pa. Super. 2010) (quoting *Commonwealth v. Wallace*, 641 A.2d 321, 327 (Pa. Super. 1994), and stating, "when an arguable claim of ineffective assistance of counsel has been made, and there has been no

evidentiary hearing in the trial court to permit the defendant to develop evidence on the record to support the claim, and to provide the Commonwealth an opportunity to rebut the claim, this Court will remand for such a hearing.”); *see also Commonwealth v. Keaton*, 45 A.3d 1050, 1095 (Pa. 2012) (Saylor, J., concurring and dissenting).

Here, Mr. Sandusky’s petition is neither patently frivolous nor has he failed to allege facts that if proven would still not entitle him to relief. Further, both the Commonwealth’s prior answer and Mr. Sandusky’s underlying allegations and averments contained in this petition and his prior petitions raise numerous genuine issues of material fact that would warrant an evidentiary hearing and relief under the PCRA.

*See* Supplemental Amended Petition, 3/7/16, at 29-30.

The Commonwealth in both of its Answers neglects to recognize the fact that evidentiary hearings are favored on first-time petitions nor does it discuss or mention the applicable rules of procedure or pertinent case law discussing that evidentiary hearings are warranted when genuine issues of fact exist. *See also Commonwealth v. Hutchinson*, 25 A.3d 277, 321 (Pa. 2011) (“the intent behind these rules is to ensure that an evidentiary hearing is held when a PCRA petition raises factual issues that must be resolved.”); *Id.* at 325-326 (Saylor, J., dissenting) (discussing importance of evidentiary hearing where issues of material fact arise in death-penalty case). (The Pennsylvania Supreme Court in 2015 proposed a rule change for capital cases that would have mandated an evidentiary hearing on all first time capital cases to ensure appropriate fact-finding occurred in those complex cases). Indeed, the Commonwealth appears to believe, in derogation of the procedural rules, that the petition alone must satisfy Mr. Sandusky’s burden of proof. This is obviously not the law since there would be no need for evidentiary hearings if one was required by law to meet his burden for each claim solely based on his petition. Rather, a petition must raise genuine issues of fact. Pa.R.Crim.P. 908(A)(2); Pa.R.Crim.P. 907(1); *see also Walls, supra*.

The petitioner then must present evidence at an evidentiary hearing to meet his burden of proof, which is only by a preponderance of the evidence. A petition and its supporting documents must merely show that material facts are in question and that an evidentiary record should be developed

*Walls, supra; Hutchinson, supra; see id.* at 325 (Saylor, J., dissenting) (“Our rules only require that a petitioner provide ‘affidavits, records, documents, or other evidence which show the facts stated’ in a PCRA petition. Pa.R.Crim.P. 902(D). Declarations have long been accepted by the Court to assist in evaluating whether a hearing is required on a petitioner’s proffer. In light of the limited purposes for which such documents are submitted—which is not to prove a claim, but merely to demonstrate that material facts are in issue and an evidentiary record should be developed—I do not see why the distinction between the different forms of submissions continues to be highlighted in our opinions.”).

The Commonwealth’s refusal to acknowledge the important distinction between a petitioner’s burden of pleading and ultimate burden of proof leads it to argue for dismissal of claims that its own Answers demonstrate present genuine issues of fact. Only patently frivolous petitions should be dismissed without a hearing. *See* Comment to Pa.R.Crim.P. 907. A sampling of those types of petitions is set forth in the comment to the applicable rule and includes untimely petitions, *see id.*, and petitions based on claims that were previously litigated. *Id.* (“A summary dismissal would also be authorized under this rule if the judge determines that a previous petition involving the same issue or issues was finally determined adversely to the defendant.”).

In addition, evidentiary hearings are unnecessary to resolve pure questions of law, such as when a sentence was illegal because it exceeded a statutory maximum. *See* Pa.R.Crim.P. 907(2) (“A petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.”). With this in mind, it is apparent that Mr. Sandusky is entitled to an evidentiary hearing on a host of his claims. Furthermore, he is entitled to relief as a matter of law on several other issues.

### **The Commonwealth’s Second Answer**

The Commonwealth opens its Second Answer by asserting that counsel for Mr. Sandusky cast

aspersions on school officials, Children and Youth Services (“CYS”), law enforcement, the judiciary, and the Office of Attorney General (“OAG”). While Mr. Sandusky has vigorously argued his claims, counsel have refrained from making *ad hominem* attacks or making allegations not based on law or facts. The Moulton Report, sanctioned by the OAG itself, made judgments against school officials, CYS, law enforcement and the OAG. Indeed, Aaron Fisher and Mike Gillum, in their book, *Silent No More*, have called into question the actions of school officials, law enforcement and the OAG. Mr. Gillum was particularly harsh in his assessment of the investigation in his response to the Moulton Report. *See* PCRA Appendix, at 330, Moulton Report, Response by Mike Gillum. One of the leading campaign themes for Attorney General Kathleen Kane was calling into question the actions of the OAG and affiliated law enforcement during the Sandusky investigation. This unquestionably angered members of the OAG and law enforcement, who felt under attack.

Instantly, PCRA counsel is permitted to argue that trial counsel performed ineffectively and Mr. Sandusky is allowed to raise claims of prosecutorial or governmental misconduct. That is one of the primary purposes of the PCRA statute. Further, the Commonwealth takes umbrage at Mr. Sandusky actually proclaiming his innocence. The Commonwealth is entitled to take the opposite position, and argue in good faith against that assertion. However, the fact that it appears to be implying that PCRA counsel are acting improperly in advancing their clients claims is troubling. Of course, Mr. Sandusky asserts his innocence; that is the essence of the PCRA statute.

More importantly, the Commonwealth's Second Answer demonstrates a fundamental misapprehension of governing law with respect to the PCRA. To cite the most egregious example, the Commonwealth claims that Mr. Sandusky was required to raise an after-discovered evidence claim within sixty days of discovery. This argument evidences either willful misrepresentation of the law or a misapprehension of the law. In either event, the Commonwealth confuses the after-discovered merits based provision of the PCRA statute with the newly-discovered fact timeliness exception. *Compare* 42

Pa.C.S. § 9543(a)(2)(vi) with 42 Pa.C.S. § 9545(b)(1)(ii); *see also* J. Andrew Salemme, *Guilty Until Proven Innocent: A Practitioner's and Judge's Guide to the Pennsylvania Post-Conviction Relief Act (PCRA)*, at 127 (2016 ed.) (“both the PCRA court and appellate courts are reminded that there are two separate and distinct areas of the PCRA statute that refer to after or newly-discovered evidence...These sections should not be confused and require different analysis. *See Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005); *Commonwealth v. Bennett*, 930 A.2d1264 (Pa. 2007)”); *see also id.* at 163.

This error can perhaps be overlooked because the Superior Court in a series of decisions had made a similar, though not identical, mistake. *See Commonwealth v. Johnson*, 841 A.2d 136 (Pa. Super. 2003); *Commonwealth v. Baker*, 828 A.2d 1146 (Pa. Super. 2003); *Commonwealth v. Palmer*, 814 A.2d 700 (Pa. Super. 2002) (each conflating the newly-discovered fact timeliness exception with the after-discovered evidence analysis). Nonetheless, it is beyond cavil that only where the newly-discovered facts pertain to a timeliness exception must a petitioner raise the issue within sixty days of learning of the claim. *See* 42 Pa.C.S. § 9545(b)(2); 42 Pa.C.S. § 9545(b)(1)(ii).

Where the after-discovered evidence claim is unrelated to a timeliness exception and is raised in a timely petition, as occurred herein, there is no requirement that the issue be raised within sixty days of its discovery. *See* 42 Pa.C.S. § 9543(a)(2)(vi). Such a position would reduce the time period in which PCRA petitioner's raising after-discovered based claims from one year to sixty days in those cases where the evidence was discovered after a direct appeal—in derogation of the statutory language. Only where the newly-discovered evidence/fact is recovered during the pendency of a **PCRA appeal**, does a petitioner have sixty days from the conclusion of the state appellate process to raise the claim, again under the timeliness exception. *See Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000). Indeed, had the Commonwealth read the statutory provisions bolded in its block quote from the comment to Pa.R.Crim.P. 720, it would have learned of its patent mistake. The Commonwealth's error in this regard, however, is unfortunately symptomatic of its misapprehension of the governing statute, rules of

criminal procedure, and certain arguments raised by Mr. Sandusky.

Having outlined the Commonwealth's most significant misstatement of the law, Mr. Sandusky will address the Commonwealth's remaining arguments to show why he is entitled to relief and an evidentiary hearing. First, Mr. Sandusky notes that the Commonwealth did not address his claims in the order they were raised in his most recent Supplemental Petition. For ease of the PCRA court's review when it references back to Mr. Sandusky's Supplemental Petition, Mr. Sandusky will respond to the Commonwealth's arguments in the order that his issues were presented in his Supplemental Petition rather than based on the manner in which the Commonwealth elected to address the issues.

**Issue 1: Prosecutor's False Statement Regarding Victim 2 being Known only to God<sup>1</sup>**

The Commonwealth, after acknowledging that there were two unidentified alleged victims, and quoting from the prosecutor's closing statement in which he refers to victims only known to God but whose status as victims are known, claims that Mr. Sandusky is self-servingly assuming that the prosecutor was referencing Allan Myers.<sup>2</sup> It is apparent from the face of the prosecutor's argument that he was referring to Victim 2 and Victim 8. Whether Mr. Myers was Victim 2, to the extent the Commonwealth disputes that position, presents a genuine issue of material fact. The Commonwealth's own Answer therefore entitles Mr. Sandusky to a hearing to establish Mr. Myers, who has steadfastly maintained that he was the person involved in the McQueary incident, was the boy in the public shower room with Mr. Sandusky.

To the extent that the Commonwealth claims that there is no basis to find the prosecutor lied, Mr. Sandusky has provided evidence that the Commonwealth did know Mr. Myers was the boy observed by McQueary, and it is clear from the record that the prosecutor stated that the individual was

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1 The arguments of the Commonwealth can be found at pages 7-10 of its Second Answer.

2 The Commonwealth repeatedly uses language such as "self-serving" and "cherry-picked" in describing various positions of Mr. Sandusky as if it expects Mr. Sandusky to make arguments in favor of the Commonwealth. The role of PCRA counsel is to advocate in favor of his client in an ethical but vigorous manner, not to present the Commonwealth's position.

unknown. While the Commonwealth is entitled to disbelieve that evidence or refute that evidence, that must be done at an evidentiary hearing. The Commonwealth attempts to escape that conclusion by engaging in a *non-sequitur*.

It states that Karl Rominger's affidavit sets forth that he had some misgivings about calling Mr. Myers.<sup>3</sup> It then follows that it is questionable whether everyone knew Mr. Myers was Victim 2. That Mr. Rominger and Mr. Amendola may have had some misgivings about calling Mr. Myers does not show that the parties did not believe he was Victim 2. The two do not automatically follow from one another. Rather, it could just as easily be interpreted that Attorney Fina and Attorney McGettigan did believe he was Victim 2, but did not want to present him because he could call into question the testimony of Mike McQueary. Testimony, it should be remembered, that was at odds with the actions of McQueary's father, Dr. Dranov, Joe Paterno, Tim Curley, Gary Schultz, and Graham Spanier, and indeed inconsistent with McQueary's own actions—which did not involve taking any action to stop an alleged rape aside from closing a locker door. Moreover, if the Commonwealth did not believe Mr. Myers and that he was being controlled by his attorney: Andrew Shubin, then it was its duty under *Brady* to disclose that fact since they could not have known at that point whether Mr. Amendola would present Mr. Myers.

Furthermore, contrary to the Commonwealth's assertion, Mr. Sandusky has not ignored that there were two unnamed victims and that the Commonwealth presented witnesses regarding those alleged victims. He has consistently recognized that fact, highlighting that one of those victims is a

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<sup>3</sup> This appears to be a less than clear reference to whether counsel had a reasonable basis for not calling Mr. Myers, which is a separate issue. The Supreme Court also has consistently highlighted the importance of evidentiary hearings to determine the basis for counsel's actions or inactions. *Commonwealth v. Duffey*, 855 A.2d 764, 775 (Pa. 2004); *see also Hutchinson, supra* at 323 (Saylor, J., dissenting) (“we do not have counsel's explanation for why he did not object, and in this void, the majority's attribution of a reason for such omission (see Majority Opinion, at 299–300) appears to me to represent extra-record gleaning of motivations and strategies, a practice this Court has previously eschewed.”); *Cf. Commonwealth v. Colavita*, 993 A.2d 874 (Pa. 2010) (court should not attribute that counsel had no reasonable basis for his action/inaction absent a hearing).

phantom victim and the other, Mr. Myers, denied being abused after Mr. Sandusky's trial. The Commonwealth improperly casts aspersions on PCRA counsel by asserting that we are being disingenuous and making a nonsensical argument. It also baldly claims that Mr. Rominger's averment that Mr. McGettigan lied during his closing is an outrageous suggestion, yet nowhere posits that Mr. McGettigan and Mr. Fina did not know of Allan Myers and his claims to being Victim 2. Mr. Sandusky agrees that it would be outrageous if Mr. McGettigan knowingly misled the jury, which is precisely the argument and why the issue is ineffectiveness for not raising prosecutorial misconduct.

The Commonwealth appears to be asserting that Mr. McGettigan did not know Allan Myers was Victim 2, claiming he was indeed known only to God. Mr. Sandusky, however, has presented evidence to the contrary. An evidentiary hearing is warranted to resolve the question of fact. Pointedly, Mr. Sandusky has presented evidence that Allan Myers was the person observed by Mike McQueary. He has further provided evidence that the Commonwealth knew of that fact. Mr. Sandusky's argument is neither disingenuous nor nonsensical. It is rooted in evidence and statements made by Allan Myers, Mr. Rominger, and even Attorney Frank Fina. The Commonwealth can vigorously contest that evidence at a hearing, but it is improper for it to claim that counsel is making a disingenuous and nonsensical argument without legal or factual support. Mr. Sandusky's claims related to Allan Myers and prosecutorial misconduct unequivocally raises genuine issues of material fact. Indeed, the Commonwealth's own Answers highlight those genuine issues of fact. Testimony from Mr. McGettigan, Frank Fina, Attorney Amendola, and Karl Rominger is necessary to resolve this issue.

#### **Issue 2: After-Discovered Evidence: Recantation and Allan Myers<sup>4</sup>**

The Commonwealth, with respect to this issue, engages in the argument that PCRA counsel have previously shown is a misunderstanding of PCRA law—that Mr. Sandusky was required to raise an after-discovered evidence claim within sixty-days of learning of the evidence. Unlike Mr.

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<sup>4</sup> The Commonwealth's position with regard to this issue can be located at pages 10-13 of its Second Answer. It labels the issue as Claim 3(c).



Sandusky's positions that the Commonwealth derisively refers to as nonsensical, this argument has no legal basis. Had the Commonwealth read the statute and governing law it would have been aware of its mischaracterization.

As is evident from its Answer, the Commonwealth has not distinguished the concept of after-discovered evidence and newly-discovered facts relative to the timeliness section of the PCRA. It states that because the recantation was the same as prior statements it cannot be newly-discovered evidence. The evidence in question is newly-discovered because it was a recantation that occurred after trial. The recantation could not have been discovered before trial since it was not made prior to trial. *See Commonwealth v. D'Amato*, 856 A.2d 806 (Pa. 2004) (Eakin, J., concurring). The Commonwealth confuses the new recantation evidence with Mr. Myers earlier statements by contending that Mr. Myers earlier statements, that were consistent with the recantation, could have been discovered before trial. Those prior statements are not new evidence nor does Mr. Sandusky make that claim. Instead, Mr. Sandusky in his petition carefully explained the law regarding when a statement is after-discovered. The Commonwealth does not challenge that law, likely because it cannot.

Moreover, the Commonwealth is simply wrong when it asserts that the recantation evidence would only be used for impeachment purposes. Indeed, it cites the fact that Allan Myers did not testify as a reason that his recantation would only be used for impeachment purposes. This argument is untenable, and the opposite is true. If Allan Myers testified at trial consistent with his recantation, the evidence would be substantive evidence of Mr. Sandusky's innocence, in addition to impeaching Mr. McQueary. Thus, it would not be used **solely** for impeachment purposes, and certainly not impeaching character evidence. Simply because evidence would serve as impeachment evidence does not mean that the evidence would only serve that purpose. Exculpatory testimony would not serve solely as impeachment evidence.

What is more, the Commonwealth claims that Mr. Myers changes in his stories indicate he is unreliable. Mr. Myers, however, tracked the pattern of other accusers. Were the Commonwealth to apply this same test to the accusers who testified at trial then they too would all be considered unreliable since they too provided numerous inconsistent statements, even some doing so between their direct examination testimony and cross-examination.<sup>5</sup> Finally, in this regard, credibility determinations are to be made following an evidentiary hearing. *See Commonwealth v. Johnson*, 966 A.2d 523 (Pa. 2009); *see also D'Amato, supra* (remanding for evidentiary hearing on after-discovered evidence claim for court to assess credibility of witness). Thus, the Commonwealth's Answer implicitly concedes the necessity of a hearing regarding this issue.

### **Issue 3: Agreement Not to Call Allan Myers<sup>6</sup>**

Without making any legitimate legal argument, the Commonwealth states in boilerplate fashion that insisting Mr. Myers would have testified had he been issued a subpoena would not have had any effect on the outcome of the trial. This statement is without support in both the law and logic. If Mr. Myers testified at trial that he was Victim 2 and that he was not abused, there is at least a reasonable probability that the outcome of the trial would have been different. It is apparent from the Commonwealth's Answer that a genuine issue of fact exists as to the agreement between the Commonwealth and Mr. Amendola regarding Allan Myers.

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<sup>5</sup> The Commonwealth also incorrectly maintains that Ken Cummings is an investigator employed by PCRA counsel, which leads it to claim that it is curious that PCRA counsel seek to depose Allan Myers.

<sup>6</sup> The Commonwealth includes this argument on page 14 of its Answer, setting forth Mr. Sandusky's position as Claim 3(d).

#### **Issue 4: Failing to Present Exculpatory Statements from Allan Myers**<sup>7</sup>

The Commonwealth, apparently unbeknownst to itself, acknowledges a genuine issue of fact by asserting that Mr. Sandusky's claim that counsel should have presented Mr. Myers exculpatory statements to police presupposes Mr. Myers is Victim 2. If the Commonwealth is disputing that fact, as noted previously, then a genuine issue of fact exists. The Commonwealth also contends that since it was difficult to find Mr. Myers, based on the apparent actions of his attorney, he was unavailable to testify. If Mr. Myers could not have been found this would be true. If it was only difficult to find him then it is clearly not true. The Commonwealth suggests that there is no evidence that Mr. Myers was available or willing to testify. If this is accurate, then his recantation statement is classic after-discovered exculpatory evidence that entitles Mr. Sandusky to a hearing and a new trial. Further, the question of whether he was willing to testify if subpoenaed is a question of material fact. (The federal and state constitutions guarantee compulsory process to call witnesses on one's behalf).

Insofar as the Commonwealth asserts that had counsel introduced Mr. Myers statements to police in which he denied being abused, it would have been able to introduce his statements to the contrary on the same grounds—it is mistaken. Mr. Sandusky has confrontation clause rights under both the federal and state constitutions, the Commonwealth does not—statements to law enforcement are classic testimonial statements. *See Crawford v. Washington*, 541 U.S. 36 (2004). Mr. Myers statements could not have been introduced as substantive evidence against Mr. Sandusky because they run afoul of the confrontation clauses. Further, the introduction of Mr. Myers non-exculpatory statements could not be used to rehabilitate Mr. McQueary because they are not prior consistent statements made by Mr. McQueary and Mr. Myers would not have been given an opportunity to explain the statement. *See* Pa.R.E. 613. Thus, while Mr. Myers's statements that he was the McQueary shower child and that Mr. Sandusky did not molest him would have been admissible to impeach Mr.

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<sup>7</sup> The Commonwealth's response to this position is included on pages 14-16, and it forwards the issue as Claim 3(e).

McQueary, the Commonwealth is incorrect as a matter of law that it could have introduced any contrary statements by Mr. Myers.

**Issue 5: Jurisdiction and the Grand Jury Investigation**<sup>8</sup>

The Commonwealth, in responding to Mr. Sandusky's arguments relative to the jurisdiction of a multi-county grand jury, addresses straw men arguments not actually made by Mr. Sandusky. Mr. Sandusky nowhere argued that police or law enforcement could not investigate sex offenses. Nor did Mr. Sandusky make the ridiculous assertion that the OAG cannot investigate crimes. The position that was leveled was that the grand jury investigation into Aaron Fisher's allegation was improper because the crime alleged did not involve public corruption or organized crime.

Mr. Sandusky does not nor has he ever claimed that compliance with the Child Protective Services Law ("CPSL") is necessary for criminal charges to be filed. He does submit that by failing to comply with the CPSL, he was denied due process of law—a position the Commonwealth does not address because it cannot refute that the CPSL was not followed. Pointedly, the Commonwealth misapprehends Mr. Sandusky's actual argument by stating that the Crimes Code applies to criminal proceedings, something never disputed by Mr. Sandusky. Since the Commonwealth cannot refute that the CPSL was not followed, Mr. Sandusky is entitled to a new trial without an evidentiary hearing, *see* Pa.R.Crim.P. 907(2), where his structural due process rights were violated and prejudice ensued as argued in Mr. Sandusky's Supplemental Petition.

The Commonwealth further suggests that Mr. Sandusky conflates the empanelment of a grand jury with its power to investigate crimes. Again, the Commonwealth swings at shadows. Mr. Sandusky does not dispute that a grand jury can be impaneled and that it has power to investigate crimes that occur in the respective counties in question. Mr. Sandusky does contest that a multi-county

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<sup>8</sup> The Commonwealth's Answer in this regard can be found at pages 22-25, and labels the issue as Claim 5(d).

grand jury has jurisdiction to investigate all crimes that are wholly unrelated to public corruption, organized crime, or crimes arising out of actual testimony before the grand jury. The plain language of the statute supports this position. The Commonwealth's citation to 42 Pa.C.S. § 4548 does not alter that perspective. That section of the statute must be read *in pari materia* with 42 Pa.C.S. § 4542 and § 4544. *See* 1 Pa.C.S. § 1932.

“Statutory interpretation presents a question of law and is evaluated *de novo*.” *In re C.S.*, 63 A.3d 351, 354 (Pa. Super. 2013); *Commonwealth v. Sarapa*, 13 A.3d 961, 962 (Pa.Super.2011). “In interpreting a statute, [courts] are called to ‘ascertain and effectuate the intention of the General Assembly.’” *Commonwealth v. Hale*, 85 A.3d 570, 580 (Pa. Super. 2014), *affirmed*, 128 A.3d 781 (Pa. 2015). “Every statute shall be construed, if possible, **to give effect to all its provisions**. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* (emphasis added). A court “may not render language superfluous or assume language to be mere surplusage.” *Id.*

Where the words of a statute are not explicit, a court discerns the original intent of the General Assembly by looking to:

(1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other statutes upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such statute. 1 Pa.C.S. § 1921.

*In re C.S.*, *supra* at 355.

By its very definition, a multi-county grand jury only has jurisdiction over public corruption and organized crime. 42 Pa.C.S. § 4542 (“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.”). Section 4548 allows a grand jury to

investigate any crime, such as murder, drug dealing, prostitution, etc... that is related to or arose out of public corruption and organized crime. It does not have jurisdiction to investigate crimes untethered from public corruption or organized crime. *See* 42 Pa.C.S. § 4542. To interpret the Grand Jury Act in another manner would render language of the statute surplusage. *See also* 1 Pa.C.S. § 1922 (presumption exists “That the General Assembly intends the entire statute to be effective and certain.”).

Further, the case relied on by the Commonwealth, *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006), rejected a newspapers argument, as specifically framed therein, which did not invoke Section 4542, and actually argued, in trying to avoid a subpoena to turn over hard drives, that the claims that public corruption and organized crime were involved were false. The issue herein does not involve the issuance of subpoenas to investigate potential public corruption nor is the argument that claims of public corruption or organized crime are false. Rather, Mr. Sandusky's position is that the investigation was wholly unrelated to any allegation of organized crime or public corruption. Section 4542 plainly provides that a multi-county grand jury only has jurisdiction over investigations into crimes that arise out of public corruption and/or organized crime. This is consistent with the empanelment aspect of the statute and the section relied upon by the Commonwealth.

Since the crimes being investigated in the case cited by the Commonwealth were related to an investigation into public corruption, it is inapposite. Section 4542 necessarily limits the power of an investigating grand jury as outlined in § 4548. The correct reading of § 4548 is that an investigating multi-county grand jury has power to investigate any crime occurring within those counties that are related to public corruption or organized crime. However, it has no jurisdiction to investigate into a crime totally unaffiliated with organized crime or public corruption simply because it occurred in one of the counties. Taking the Commonwealth's position to its logical conclusion would mean that an investigating grand jury could investigate DUI crimes entirely unrelated to organized crime or public corruption as well as countless other crimes that transpired in the counties regardless of any connection

to organized crime or public corruption. This was obviously not the intent of the General Assembly in promulgating the Grand Jury Act and would have the potential effect of eviscerating the traditional criminal complaint process in those counties where a grand jury sits. The intent of the General Assembly is paramount and is determined by the language of the statute. The language of the statute does not give a grand jury *carte blanche* to investigate all crimes that occur in a county once a grand jury is impaneled. Since the Commonwealth is incorrect that the law belies Mr. Sandusky's claim, and the Commonwealth's position is based on incomplete and inaccurate statutory interpretation, Mr. Sandusky is entitled to relief as a matter of law. *See* Pa.R.Crim.P. 907(2).

#### **Issue 6: Grand Jury Leak Claims**<sup>9</sup>

The Commonwealth also claims that Mr. Sandusky's position regarding a grand jury leak is a simple rehashing of its prior arguments. Setting aside that this is inaccurate, Mr. Sandusky has provided additional legal citations to Pennsylvania cases quashing charges arising out of grand jury presentments, the Commonwealth posits that Mr. Sandusky begins from the false premise that a law enforcement official close to Sara Ganim leaked information. Of course, this presents a genuine issue of fact—whether an investigator or other member of the Commonwealth leaked the information or whether the information came from a witness or relative prior to the grand jury judge's sealing order is an issue of fact. The Commonwealth's own position entitles Mr. Sandusky to a hearing.

Moreover, significant portions of the information in the Sara Ganim story could not have come from the witnesses. Aaron Fisher and Mike Gillum both have publicly denied being the source of the leak and asserted in their book that a leak existed. *See Silent No More*, at 139, 149-150. Critical portions of Ms. Ganim's story related to information directly pertaining to Aaron Fisher. The Commonwealth continues to state that the information could have come from somewhere other than itself, but does not recognize that this is a genuine issue of fact and that Aaron Fisher, his mother, and

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<sup>9</sup> The Commonwealth's response to this claim is set forth at pages 17-21 of its Answer and is included as Claim 5(a). The Commonwealth does not include a Claim 5(b).

psychologist, Mike Gillum, all have denied that the information came from them. The Second Mile also specifically declined to comment for the story; thus, removing that entity as the source of the information, although one board member merely commented that the organization knew of an investigation. With regard to the 1998 shower incident involving Z.K., which was investigated and, in violation of the law, not expunged, it is apparent from the Ganim story itself that the officer who investigated the matter did not provide the information. Mr. Sandusky has provided evidence that neither Z.K. nor his mother were the source of information relating to the 1998 matter. In sum, the evidence reveals that the source of the allegedly leaked information was not a witness or close family member and most likely came from the Commonwealth.

It is also somewhat troubling that the Commonwealth continually maintains that it is PCRA counsel who are misrepresenting facts. Claiming that a grand jury leak occurred is not misrepresenting any facts, but raising a genuine issue of fact. Moreover, two special prosecutors were appointed to investigate grand jury leaks during the Sandusky investigation—the coordinate jurisdiction rule, therefore, demonstrates that a colorable argument of a grand jury leak has already been made. *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995); *Commonwealth v. King*, 999 A.2d 598 (Pa. Super. 2010). Those prosecutors, who were appointed by the grand jury supervising judge, never completed their investigation and it is publicly known that they did not receive cooperation from the OAG. As noted, Aaron Fisher and Mike Gillum have maintained that there were grand jury leaks by the Commonwealth. *Silent No More*, at 139, 149-150. The Commonwealth cannot state with certainty that no grand jury leak occurred, it can only suggest that information MAY have come from another source.<sup>10</sup> It is well established that there have been serial problems in the OAG with grand jury leaks.

Additionally, the Commonwealth claims that counsel's failure to file a motion to quash the

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<sup>10</sup> An ESPN story regarding Joe Paterno's grand jury testimony also appears to be based on leaked information. See [http://espn.go.com/espn/otl/story/\\_/id/7770996/in-wake-joe-paterno-death-sandusky-sex-abuse-scandal-power-struggle-spread-penn-state-state-capital](http://espn.go.com/espn/otl/story/_/id/7770996/in-wake-joe-paterno-death-sandusky-sex-abuse-scandal-power-struggle-spread-penn-state-state-capital)



presentment is meritless and that only a special prosecutor can investigate such leaks. Whether a special prosecutor/master can investigate grand jury leaks has nothing whatsoever to do with whether counsel can file a motion to quash. Not only is the Commonwealth's position a complete *non-sequitur*, it sidesteps the critical issue. The Commonwealth adds that a leak would only result in a finding of contempt. There is, however, nothing in the law that precludes greater sanctions and the very case it cites demonstrates the falsity of its position. It is true that a person who leaked information can be found in contempt. That does not mean there are no other remedies. Pointedly, the non-precedential case cited by the Commonwealth suggests the opposite. That decision concluded that a presentment could be quashed if the presentment was substantially influenced by misconduct, but found no such substantial influence therein. *In re County Investigating Grand Jury VIII*, 2003, 2005 WL 3985351 (Lack. Com. Pl. 2005). Mr. Sandusky's claim, and why he referenced prosecutorial malfeasance by Mr. Fina in the Penn State administration cases, is that the presentment was substantially influenced by prosecutorial/law enforcement misconduct. Prosecutorial misconduct was used as grounds for quashing charges arising out of a grand jury presentment in the Penn State administration cases. *See Commonwealth v. Schultz*, 2016 WL 285506 (Pa. Super. 2016); *Commonwealth v. Curley*, 2016 WL 285707 (Pa. Super. 2016); *Commonwealth v. Spanier*, 2016 WL 285663 (Pa. Super. 2016).

It cannot be denied that the grand jury was greatly influenced by information that came after the alleged leak. Further, Mr. Sandusky has not misrepresented the facts. Mr. Sandusky alleges a leak occurred. The Commonwealth may dispute that it leaked the information, but that does not make Mr. Sandusky's position a misrepresentation. Insofar as the Commonwealth makes the semantic argument that Mr. Moulton stated that there was a prospect of a leak and Mr. Sandusky avers that a leak occurred, it should be highlighted that Mr. Sandusky directly quoted the Moulton Report. Further, the distinction raised by the Commonwealth does not remove the fact that a genuine issue of material fact exists as to whether the Commonwealth leaked the information or if it came from a person not involved in the

investigation. Indeed, Mr. Sandusky has presented compelling evidence that the leak could not have come from a witness. Hence, Mr. Sandusky's claim cannot be rejected outright and, by law, he is entitled to an evidentiary hearing. *See* Pa.R.Crim.P. 908.

#### **Issue 7: Grand Jury Judge Bias<sup>11</sup>**

Next, the Commonwealth posits that an email conclusively establishing Judge Barry Feudale's bias in sex offense cases and more specifically the Sandusky and Penn State administration cases raises no issue of fact and that it is illogical to conclude that Judge Feudale's determinations can be considered unreliable. A former Pennsylvania Supreme Court Justice, J. Michael Eakin, has been fined by the Court of Judicial Discipline and resigned his position precisely because his email exchanges were considered to raise questions regarding whether he served with bias in certain types of cases. *See* <http://www.post-gazette.com/news/statc/2016/03/30/Pennsylvania-Supreme-Court-Justice-Debra-McCloskey-Todd-calls-for-review-of-emails-of-everyone-in-state-porn-scandal/stories/201603300139>.

Unlike Justice Eakin's emails, which did not pertain to litigation, Judge Feudale's email directly related to cases that were before him. The email exchange is but one obvious example and evidence of bias. To conclude otherwise is untenable. It is not Mr. Sandusky who is being illogical in concluding that Judge Feudale has shown that he was and is biased. It should be added that the OAG actually requested Judge Feudale be removed as a grand jury supervising judge, due to its belief that he acted unprofessionally and he was in fact removed as the supervising grand jury judge. He has since been stripped of his judicial responsibilities as a senior grand jury judge by the Pennsylvania Supreme Court as a likely result of public accusations he leveled against Kathleen Kane. Further, he was chastised by the Superior Court for his handling of grand jury matters relative to Cynthia Baldwin's representation of Tim Curley, Gary Schultz, and Graham Spanier. Judge Feudale's actions therefore are not above reproach.

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<sup>11</sup> This position is addressed by the Commonwealth in its Answer on pages 21-22 as Claim 5(c).

### **Issues 8-10: Jury Selection Ineffectiveness Claims**<sup>12</sup>

In yet another apparent caustic swipe at PCRA counsel, the Commonwealth begins its argument relative to Mr. Sandusky's jury selection issues by asserting that Mr. Sandusky is insinuating that a jury consultant is in a better position to determine the appropriate venue than the trial court. A trial court, however, does not advocate for a party and is a neutral arbitrator who decides matters based on arguments presented to it. Mr. Sandusky's position is not that a jury consultant is in a better position than the trial court to decide venue, but that by failing to retain such an expert, Mr. Sandusky's counsel did not present compelling arguments and evidence that would have aided the trial court in determining venue—which should be noted, the Commonwealth argued should have been changed. Had Mr. Sandusky retained an expert, his counsel would not have contested the Commonwealth's request; thereby leading to more than a reasonable probability of the outcome of jury selection and the trial itself being different.

The Commonwealth cites Mr. Amendola's answer to the Commonwealth's motion to change venire in support of its argument. This position ignores that Mr. Sandusky is alleging that the very answer by Mr. Amendola was the result of ineffective assistance of counsel because it was not adequately informed by a jury consulting expert. Contrary to the Commonwealth's comment, the reason for retaining an expert was not to learn what counsel already knew, *i.e.*, that the pre-trial publicity was extensive. The point of obtaining the report would be to know whether a Centre County jury was actually "uniquely best suited to hear his cases." As is demonstrated by the expert report attached to Mr. Sandusky's petition, that proposition cannot be supported by extensive research on jury selection in high profile cases. For the Commonwealth, who argued in favor of a change of venue or

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<sup>12</sup> These issues are labeled as Claims 16, 17, and 18 by the Commonwealth in its most recent Answer and its discussion can be found on pages 49-57.

venire, to now argue that its own positions were totally devoid of merit is somewhat remarkable. Furthermore, it is untenable to utilize a document that Mr. Sandusky is alleging shows ineffective assistance of counsel as grounds for denying an evidentiary hearing on the question of why counsel filed a motion opposing the Commonwealth's request to change venue/venire.

The Commonwealth's additional bald assertion that a motion for change of venue would have been denied, and its footnote 37, also overlook that the trial court would have had **both** the Commonwealth and trial counsel arguing in favor of a change of venue, not simply Mr. Sandusky. While a court is permitted to reject a legal position taken by both parties, it is highly unusual. If both trial counsel and the Commonwealth stipulated to a change of venue, it is evident that there is a reasonable probability that the trial court would have agreed. For the Commonwealth to submit the opposite defies logic. Pointedly, it would likely be unprecedented in Pennsylvania for a court to not change venire or venue if both sides argued in favor of such a change. The Commonwealth's failure to even acknowledge the distinction between Mr. Sandusky arguing against the Commonwealth for a change of venire/venue and joining in the Commonwealth's motion renders its entire argument irrelevant.

Further, the Commonwealth erroneously asserts that Mr. Sandusky did not identify any jurors whose impartiality were even arguably questionable. Mr. Sandusky in his Supplemental Petition specifically cited to two such jurors. Additionally, the research contained in the expert report provided with Mr. Sandusky's Supplemental Petition shows that, absent adequately tailored *voir dire* by counsel, jurors' answers to traditional *voir dire* questions regarding publicity have the perverse effect of that intended. Mr. Sandusky has presented compelling evidence that without proper *voir dire* the jurors in this matter could not be impartial. Moreover, there are genuine issues of fact regarding trial counsel's decision not to utilize an expert, or contest the Commonwealth's request to change venue/venire, and why counsel did not adequately inquire with the jurors into the prejudicial pre-trial information that the

jurors were admittedly aware.

The Commonwealth also maintains that because counsel requested a continuance, unrelated to a cooling off period, they cannot be ineffective for not presenting argument in favor of the cooling-off position. It then cites this Court's statement in which it denied the continuance request.<sup>13</sup> The Commonwealth's position is specious. Mr. Sandusky's position is that had the court been presented with this information, and in light of the Commonwealth's own motion regarding venire/venue, there is a reasonable probability that the court's decision would have been different. The Commonwealth's position is the equivalent of saying that a court would have made the same decision regarding an evidentiary ruling based on two distinct objections, one of which was meritorious but not made and the other that was not meritorious but was made.

Mr. Sandusky adds that the Commonwealth contends that "it is quite curious that Sandusky fails to acknowledge in either his first or second amended PCRA petitions that he had in fact agreed with the position of his trial counsel when they argued against the Commonwealth's motion for change of venue." Commonwealth's Second Answer, at 53. Demonstrating a fundamental misapprehension of the PCRA, the Commonwealth maintains that Mr. Sandusky is abandoning his earlier position. However, Mr. Sandusky's actual claim is that his counsel were ineffective in failing to take steps to adequately inform both themselves and him regarding the ability to achieve a fair trial with a Centre County jury at that particular time, especially absent proper *voir dire* questioning. To the extent the Commonwealth maintains that Mr. Sandusky did not adequately develop his claim, the position is inconsistent with the record and case law actually discussing boilerplate claims. A boilerplate claim is one without citation to the record and/or governing law. *Commonwealth v. Lambert*, 797 A.2d 232, 241 (Pa. 2001). Mr. Sandusky has presented extensive arguments on jury selection, the position is not

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<sup>13</sup> The Commonwealth also makes much of the fact that Mr. Sandusky altered his Supplemental Petition regarding the position offered in his first Amended Petition that no change of venue or venire would have reduced the prejudice. The Commonwealth apparently has not heard of the well-known legal tactic of arguing in the alternative.

boilerplate. If the Commonwealth believes that Mr. Sandusky's claim is boilerplate it is difficult to imagine what it would believe constitutes a non-boilerplate position. Furthermore, counsel is prepared at an evidentiary hearing to bring in a parade of attorneys, if desired by the Commonwealth, to testify that no reasonable attorney would have decided not to oppose a change of venue in this matter without an adequate investigation.

In short, this is another example of the Commonwealth misapprehending governing law with respect to boilerplate claims. Indeed, Mr. Sandusky noted in his prior petition that under the rules of procedure he is not even required to cite case law in his petition, *see* Pa.R.Crim.P. 902, and that the cases relied on by the Commonwealth regarding boilerplate claims dealt with inadequate appellate briefs. The Commonwealth's next contention is that Dr. Patterson's report shows that counsel were not ineffective for failing to seek a change of venue. While Dr. Patterson recommended specialized *voir dire*, his report conclusively supports Mr. Sandusky's position that a cooling off period was warranted and strongly suggests that venue in Centre County could not result in a fair trial at that time. The Commonwealth's position to the contrary is unsupported by an objective reading of the report.<sup>14</sup>

Finally, the Commonwealth addresses an argument not made by asserting that there is no evidence that the trial court abused its discretion in questioning the jurors. Mr. Sandusky is not challenging the trial court's actions. Rather, Mr. Sandusky's position is that in light of the trial court's questioning, and based on extensive research on jury selection provided in the expert report attached to Mr. Sandusky's Supplemental Petition, trial counsel was ineffective in failing to follow up with the jurors regarding questions dealing with the information that they knew. The trial judge would still have interpreted the jurors' answers and demeanor, but was deprived of that opportunity with respect to material questions of the exact prejudicial information that was known, because trial counsel did not

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<sup>14</sup> The Commonwealth posits that Mr. Sandusky suggested that the media participated in jury selection. As is abundantly clear from a reading of Mr. Sandusky's Supplemental Petition, he was noting the presence of the media during jury selection not that they actively asked questions.

ask the jurors those questions. In failing to ask specialized questions, a genuine issue of material fact exists as to why counsel elected not to inquire into what pre-trial information the jurors had learned.

**Issue 11: Ineffectiveness for Waiving the Preliminary Hearing**<sup>15</sup>

The Commonwealth's response to Mr. Sandusky's preliminary hearing claim begins by citing to case law maintaining that preliminary hearings are not constitutionally mandated. That fact is beside the point.<sup>16</sup> Mr. Sandusky, nevertheless, provided case law that unequivocally provides that a preliminary hearing, when authorized by law, is considered a critical stage of a criminal proceeding and that individual's are entitled to counsel. The Commonwealth's further reliance on *Commonwealth v. McBride*, 570 A.2d 539 (Pa. Super. 1990), is also unavailing. The petitioner therein made only a general assertion of prejudice. Here, Mr. Sandusky's petition contains extensive legal discussion and specific allegations of prejudice.

The Commonwealth, again without recognition of the PCRA process, which does not require a showing of certitude, submits that Mr. Sandusky's claim is merely speculative. While Mr. Sandusky cannot conclusively establish what the accusers would have said at the preliminary hearing that does not mean he has not articulated how the waiver of the hearing prejudiced him or that the claim is purely speculative. A review of Mr. Sandusky's petition refutes the Commonwealth's bald assertion that he has not provided a discussion of how he was prejudiced. Seasoned trial attorneys know of the importance of a preliminary hearing in cross-examining witnesses on the record. Under the Commonwealth's theory, there is no purpose to allowing a defendant to cross-examine or call witnesses. In this respect,

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<sup>15</sup> This issue is labeled by the Commonwealth as Claim 15(a), and discussed at pages 43-45.

<sup>16</sup> Mr. Sandusky would note that there is actually a due process right to a preliminary hearing whenever the government, by rule or statute, provides for preliminary hearings. This constitutional right would not be infringed if the State elected to rescind such a law. However, once the law is in place, procedural due process guarantees defendant's the right to such a hearing so long as it is mandated by rule or statute. Thus, the Commonwealth's position is less than precise. *Compare Commonwealth v. Ricker*, 120 A.3d 349, 360 (Pa. Super. 2015) ("the law of the land in Pennsylvania provides a limited rule-based right to confront witnesses at the preliminary hearing level.").

it cites a string of cases stating that credibility is not at issue at a preliminary hearing. Of course, that is well-established and not disputed by Mr. Sandusky. Credibility, however, is at issue at trial. The purpose of the preliminary hearing for a defense attorney is obviously not identical to the purpose of the Commonwealth. The Commonwealth's goal is establish *prima facie* evidence that a crime occurred and that the accused committed that crime. Mr. Sandusky has not contested that well-established law. However, just one example of how counsel could have asked entirely proper questions of Aaron Fisher demonstrates the paucity of the Commonwealth's legal position.

Counsel could have asked, "In your original statement to school officials, you made no allegation of oral sex, correct?" That could have been followed up by the question, "you did not accuse Mr. Sandusky of committing oral sex in your initial interview with CYS, correct?" Finally, "after undergoing therapy and counseling with Mr. Gillum, you did accuse Mr. Sandusky of sex acts, correct?" These entirely appropriate and proper questions at the preliminary hearing would have enabled trial counsel to impeach the accusers at trial with any inconsistent testimony they gave either at trial or in their grand jury testimony. Moreover, while these questions would not have a bearing on credibility at the preliminary hearing stage, the answers would be relevant at trial. The Commonwealth's position taken to its extreme would preclude a defense attorney from using preliminary hearing testimony to impeach a witness at trial because counsel would not have been able to ask pertinent questions at the preliminary hearing. For the reasons more fully articulated in Mr. Sandusky's Supplemental Petition, he is entitled to an evidentiary hearing. Indeed, it is evident that issues of material fact regarding both the advice Mr. Amendola provided with respect to waiving the preliminary hearing and whether he had any legally reasonable basis for foregoing the opportunity to cross-examine the accusers exist.



## **Issue 12: Failing to Interview Witnesses and Investigate**<sup>17</sup>

Despite having directly quoted from the case, *Commonwealth v. Stewart*, 84 A.3d 701 (Pa. Super. 2013) (*en banc*), the Commonwealth posits that Mr. Sandusky misleadingly cites the case. In truth, the Commonwealth believes the case is factually distinguishable. There is a critical distinction between a misleading citation and an argument that a case is factually different. Mr. Sandusky relies on *Stewart* for the sound legal principle espoused: that counsel has a duty to investigate and interview witnesses. That *Stewart* specifically involved an alibi witness does not mean that an attorney can only cite the case when alibi testimony is in question. The *Stewart* decision, in fact, collected other cases where counsel failed to investigate or interview other types of witnesses. For example, failing to interview an eyewitness was held ineffective in *Commonwealth v. Jones*, 437 A.2d 958 (Pa. 1981), and *Commonwealth Mabie*, 359 A.2d 369 (Pa. 1976). As the *Mabie* Court opined,

However hostile these witnesses may have appeared to be, there is no basis for the decision neither to interview them nor to attempt to do so. While hostile witnesses at trial may have presented added difficulties to appellant's case, the question here is the decision not to interview them, not the decision to refrain from calling them at trial. Accordingly, there was no danger of hostile witnesses inflaming a jury during an interview to determine what each saw and their degree of potential hostility

*Id.* at 374. What is more, in that case, trial counsel based his decision on what occurred at a preliminary hearing. Here, counsel did not even elect to have a preliminary hearing. Hence, Mr. Sandusky did not misleadingly cite *Stewart*. As set forth in Mr. Sandusky's Supplemental Petition, there are genuine issues of fact not limited to why counsel chose to forego interviewing key witnesses. The Commonwealth's bald averment that Mr. Sandusky did not explain how counsel was ineffective is belied by the record. Moreover, should the Commonwealth believe that Mr. Sandusky is required to provide a comprehensive sample of how the accusers should have been cross-examined, that can be established at an evidentiary hearing.

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<sup>17</sup> The Commonwealth sets forth this issue as Claim 19 and addresses it on pages 57-58 of its Second Answer.

### **Issue 13: Collateral Appeal Ineffectiveness Claim**<sup>18</sup>

The initial position the Commonwealth addresses is Mr. Sandusky's claim that his attorneys should have filed an appeal under the collateral order doctrine in order to permit them to withdraw when they represented that they could not ethically and adequately represent Mr. Sandusky. This claim was outlined in Mr. Sandusky's Supplemental Petition as issue 13 beginning at page 87. The Commonwealth apparently concedes that Mr. Sandusky's claim that counsel were ineffective in failing to file a collateral appeal challenging the court's denial of their withdrawal motion has arguable merit and ignores the reasonable basis aspect of the test since that raises a genuine issue of material fact as to why counsel did not appeal.

It baldly avers that Mr. Sandusky cannot establish that the outcome of his trial would have been different had counsel filed such an appeal. It presents no argument aside from this cursory statement. Of course, had Mr. Sandusky been represented by effective lead counsel, there is a reasonable probability that the outcome of his trial would have been different. Further, the critical question is whether there is a reasonable probability that counsel would have been permitted to withdraw by the Pennsylvania Superior Court since the appellate court would have been confronted with attorneys arguing, in good faith, that they could not adequately represent their client. A finding that counsel could not withdraw would mean that the court determined that Attorney Amendola, an officer of the court, was lying. Here, Mr. Sandusky has provided affidavits from Karl Rominger and Lindsay Kowalski who both worked extremely closely with Mr. Amendola and have maintained that he was overwhelmed by the task of defending Mr. Sandusky when he made his motion to withdraw. Mr. Sandusky's additional claims demonstrate that Mr. Amendola was unable to effectively represent Mr. Sandusky. Mr. Amendola has already made a record-based statement that he could not effectively represent Mr. Sandusky.

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<sup>18</sup> This is the first issue addressed by the Commonwealth in its Second Answer, which it labels as Claim 2.

According to the Rominger Affidavit, the trial court's reason for not permitting counsel to withdraw was based on its belief that Mr. Amendola and Mr. Rominger would have a significant period to review continuing discovery while trial was ongoing. However, that period proved to be illusory because, as it turned out, the time frame the court assumed it would take for the Commonwealth to present its case did not factually materialize. Mr. Amendola was left with far less time to review discovery than had been anticipated. Thus, the given reason for denying Mr. Amendola's original request is not supported by the facts that transpired.

Issues of fact exist as to why Mr. Amendola elected not to appeal the court's denial of his and Mr. Rominger's withdrawal motion. In light of the affidavit from Ms. Kowalski, it is evident that Mr. Amendola was being forthright with the court regarding his inability to adequately and ethically represent Mr. Sandusky. Had Mr. Amendola appealed, there is a reasonable probability that he would have been permitted to withdraw where the case was not yet a year old at the time (it was only seven months from the filing of the first information to the start of trial), he had not requested serial continuances, the case was highly complex involving eight accusers and ten alleged victims with over forty charges, and in excess of 12,000 pages of discovery. Even an attorney who can read at an absurdly high rate of speed cannot adequately digest the sheer amount of discovery in this case without significant time. The Moulton investigation itself, took in excess of a year to adequately review the case. Pointedly, as demonstrated by Mr. Sandusky's Supplemental Petition, it is evident that Mr. Amendola did not completely review the discovery in this case. Since Mr. Sandusky's petition, Mr. Amendola's record based statements, and the affidavits of Mr. Rominger and Ms. Kowalski raise genuine issues of fact, Mr. Sandusky is at least entitled to a hearing on this issue.

#### **Issue 14: Inadequate Review of Discovery**

The Commonwealth concludes its discussion of Mr. Sandusky's ineffectiveness discovery claim by asserting that Mr. Sandusky's position is vacuous. Thus, it is setting forth that Mr. Sandusky's issue

lacks intelligent or serious thought. This “argument” ignores the facts. Mr. Amendola and Mr. Rominger have stated on the record that they did not fully review discovery, including Matt Sandusky's grand jury testimony, which unquestionably impacted the advice Mr. Amendola gave to Mr. Sandusky regarding testifying. Mr. Amendola and Mr. Rominger also did not review the James Calhoun tape from discovery. The affidavit of Mr. Rominger, in addition to the aforementioned facts, raises genuine issues of fact, as does the Kowalski affidavit. The Commonwealth itself states that Mr. Sandusky's claim requires evidence to support the statements by Mr. Rominger.

The affidavits and record statements are evidence and the purpose of an evidentiary hearing is to prove the claims forwarded in the petition. Mr. Amendola would testify, as would Mr. Rominger, as to how they would have presented the case differently with respect to discovery. Further, contrary to the manner in which the Commonwealth has disparaged PCRA counsel throughout this filing, Mr. Rominger did not disparage Mr. Amendola in the section quoted by the Commonwealth. He simply stated that he would have disagreed with Mr. Amendola's testimony at the post-sentence motion proceeding. The Commonwealth's rhetoric notwithstanding, issues of material fact exist regarding counsel's inadequate review of discovery and Mr. Amendola's erroneous assertion that he would not have changed his trial conduct.

#### **Issues 15-17: The Three Repressed Memory Claims**<sup>19</sup>

In direct contradiction to statements made on the record, and after-discovered statements made by D.S., as well as Matt Sandusky, the Commonwealth maintains that there is no evidence that a number of the accusers underwent a type of therapy that brought forth alleged repressed memories. Mr. Sandusky has presented evidence via citations to the record and after-discovered evidence in his petition that various accusers did undergo such therapy and that is why they testified at trial as to why

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<sup>19</sup> The Commonwealth's response to these issues can be found on pages 25-27, and 29-31. It sets forth the issues as Claim 6(a), (c), and (d).

their stories changed over time.<sup>20</sup> Since the Commonwealth disputes that the victims underwent such therapy, a genuine issue of material fact exists. *See* Pa.R.Crim.P. 908.

The Commonwealth's first defense is its continued reliance on *Commonwealth v. Crawford*, 718 A.2d 768 (Pa. 1998), and its position that an expert could not be called because it would invade the jury's credibility determining function. This position was revealed to be legally flawed in Mr. Sandusky's Supplemental Petition because the expert would not be testifying as to the witness's credibility or implying that they were being untruthful. Rather, the testimony would show that they actually legitimately believe in their repressed memories but that such memories are scientifically unreliable. The Commonwealth's claim that there was no reason for counsel to retain an expert because it was not at issue in trial and the Commonwealth itself never offered expert testimony on the subject reveals a misunderstanding of Mr. Sandusky's claim and the law.

An example will demonstrate the incoherence of the argument. Simply because the Commonwealth does not call an expert on eyewitness identification would not preclude a defense attorney from presenting eyewitness expert testimony where a person testifies as an eyewitness and identifies the defendant. The same is true with respect to a forensic psychologist presenting expert testimony in this matter. That the Commonwealth did not present expert testimony does not preclude a defendant from doing so. Here, Z.K. testified to blacking things out, B.S.H. testified to remembering events that he had forgot, Aaron Fisher and Mike Gillum have made statements in their book that infer that Mr. Gillum helped Aaron Fisher remember being abused. Mr. Gillum is part of an organization that supports and/or adheres to repressed memory therapy. Although the Commonwealth maintains that Matt Sandusky's revelations are irrelevant because he did not testify, this demonstrates a flawed view of the Commonwealth's obligations under *Brady*. Once Matt Sandusky came forward against his

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<sup>20</sup> The Commonwealth still has not requested the interview by D.S., in which he makes statements indicating that he was undergoing repressed memory therapy. PCRA counsel, therefore, shall supply it to the PCRA court and the Commonwealth before the date of the May 2, 2016 argument.

father with his repressed memory claims, the Commonwealth would have had a duty to inform counsel that his change of heart was based on repressed memory therapy if that is what he told them. This would have affected the advice trial counsel provided to Mr. Sandusky regarding his decision to testify. Further, the revelations by Matt Sandusky raise the distinct possibility that other accusers who did testify were undergoing the same therapy since Matt Sandusky had spoken with the same attorney that had been involved with other accusers before going to the Commonwealth.

The Commonwealth does not dispute that the accusers underwent such therapy nor does it even set forth that it was unaware of this therapy. Instead, it derisively posits that Mr. Sandusky is manufacturing his claim and baldly averring that several accusers did not have an independent recollection of the abuse prior to therapy. Yet, in Mr. Sandusky's petition he outlined those accuser that originally denied any allegations of oral sex or other types of sexual abuse. These stories changed over time after many of the accusers entered into therapy, sometimes at the behest of their civil attorneys. The Commonwealth's failure to aver that the accusers did not undergo such therapy or that it was not aware that they were undergoing that therapy is telling. Mr. Sandusky's position is not a reckless accusation. Matt Sandusky, D.S., and Aaron Fisher have all made statements regarding therapy and possible repressed memories. Z.K. testified to undergoing therapy and blacking out his 1998 shower with Mr. Sandusky. B.S.H. testified at trial to suppressing memories and that they had recently come to light. An attorney for Z.K. publicly stated that the alleged victims had buried the events deep in their subconscious.

The Commonwealth without even a solitary reference to law states that it disputes that the statements that arose after trial are evidence. Evidence is defined by Black's Law dictionary as something that tends to prove the existence of an alleged fact. A statement that the accusers were undergoing repressed memory therapy and that is what helped them to recall the alleged abuse plainly falls within that definition. The Commonwealth's one sentence assertion that the evidence would only

be used for impeachment purpose is inaccurate since it would also have supported the expert testimony proffered in Mr. Sandusky's petition, which would not have attacked the credibility of the witnesses since it acknowledges their belief in what they recall, and such repressed memory evidence also would have supported a motion regarding impaired memory and the preclusion of any testimony that was the result of hypnosis or other repressed memory styled therapy. Further, as pointed out in Mr. Sandusky's petition, if the after-discovered evidence is **Brady** evidence, it can be used solely for impeachment purposes.

Phrased succinctly, Mr. Sandusky has set forth numerous genuine issues of material fact regarding the accusers' ability to recall the alleged abuse, which undisputedly significantly changed over time. Mr. Sandusky is entitled to a hearing on these claims.

#### **Issue 18: Suggestive and Improper Police Questioning**<sup>21</sup>

The Commonwealth argues that a "taint-hearing" only applies to child witnesses. This is not wholly accurate. *See Commonwealth v. Kosh*, 157 A. 479, 482 (Pa. 1931) (in a case not involving a child witness, the High Court opined, "If a party knows before trial that a witness is incompetent on account of his mental condition, he must make his objection before the witness has given any testimony."). The Commonwealth is correct that it is presumed that an adult witness is competent to testify. That presumption, however, can be rebutted.<sup>22</sup> The rules of evidence discussed by Mr.

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<sup>21</sup> The Commonwealth labels this issue as Claim 6(b), and advances its arguments on page 27-29 of its Second Answer.

<sup>22</sup> Although *Commonwealth v. Delbridge*, 855 A.2d 27 (Pa. 2003), dealt with competency hearings for child witnesses, it also noted that competency hearings are appropriate when a witness's memory "may have been corrupted by insanity, mental retardation or hypnosis," the Court added, "we see no reason to alter it in cases where the memory of the witness is allegedly compromised by tainted interview techniques." *Id.* at 40. The *Delbridge* Court added, "An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." *Id.*

Sandusky do not limit the court to determining that a witness has an impaired memory to child victims or child witnesses. Pa.R.E. 601; *see also Commonwealth v. Baker*, 353 A.2d 454, 457 (Pa. 1976) (“whether the witness...has the ability to remember the event which was observed or perceived”). There are material questions of fact regarding whether the accusers memories were impaired and refreshed through suggestive police questioning and therapy. The record conclusively establishes that police told those it was interviewing certain pieces of evidence. It is also apparent that law enforcement actually misled certain accusers and informed them, inaccurately in many respects, regarding what others had said regarding allegations of oral sex. The Commonwealth does not address the plain language of the rule of evidence and case law regarding expert testimony on impaired memories because it is plain that the rule does not *per se* preclude a separate hearing when there is evidence of impaired memory and tainted investigative techniques. Mr. Sandusky has more fully explained in his Supplemental Petition why he is entitled to an evidentiary hearing and relief on this claim. Nothing in the Commonwealth’s Second Answer refutes the evidence demonstrating improper police questioning and impaired memory and that the accusers’ statements were unreliable (which is distinct from credibility).<sup>23</sup> Indeed, numerous accusers testified at trial that the reason their testimony changed was based on having remembered additional facts between their police interviews, grand jury testimony and trial. Mr. Sandusky is entitled to a hearing on this ineffectiveness claim.

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



**Issue 19: Failure to Introduce Exculpatory Statement by James Calhoun**<sup>24</sup>

The entirety of the Commonwealth's response to Mr. Sandusky's position is that Mr. Calhoun suffered from dementia when police interrogated him and he offered the exculpatory statement. This, however, goes to the weight of the evidence, not trial counsel's decision not to present the evidence in the first instance. No attorney would elect not to present evidence that directly contradicts the sole basis on which the government seeks a conviction. Pointedly, Mr. Sandusky is entitled to relief on this claim as a matter of law, as this is one of those rare instances that counsel need not even testify regarding a reasonable basis for not introducing the taped statement because there is none. In the alternative, an evidentiary hearing is warranted where the evidence relative to Phantom Victim #8 was recognized by the trial court, when it conducted sentencing, as being weak, and by the Commonwealth when it set forth that it barely cleared the hurdle of admission of Mr. Petrosky's testimony.

**Issue 20: Failure to Call James Calhoun**<sup>25</sup>

Contrary to the Commonwealth's representation, Mr. Sandusky does not lament that trial counsel failed to present Mr. Calhoun, he alleges under the PCRA that trial counsel was constitutionally ineffective. That Mr. Calhoun was deemed incompetent is the precise grounds under which Mr. Sandusky could have called Mr. Calhoun with respect to Rule 806. The Commonwealth, again ignoring that in the PCRA setting there is no requirement to establish to an absolute certainty what would have transpired, submits that it is wildly speculative what Mr. Calhoun would have testified too. This is less than accurate. Mr. Calhoun's memory could have been refreshed by the playing of the tape in which he denied seeing Mr. Sandusky commit the crime in question. This testimony would obviously have been helpful to Mr. Sandusky and even if Mr. Calhoun could not remember the taped

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<sup>24</sup> The Commonwealth's reply to Mr. Sandusky's argument is found at pages 35-36 under the heading Claim 10(a).

<sup>25</sup> This issue is addressed by the Commonwealth on page 36 of its Answer as Claim 10(b).

statement, the tape still would have been played for the jury. The Commonwealth certainly could have chosen to grill Mr. Calhoun regarding what he told Mr. Petrosky, but that does not make what Mr. Calhoun would have testified to after having his memory refreshed wildly speculative. The Commonwealth's argument is baseless.

**Issue 21: Appellate Counsel, Phantom Victim # 8, and Excited Utterance**<sup>26</sup>

In reliance on a decision that does not support its position, the Commonwealth erroneously submits that a conviction can be based solely on hearsay evidence. This is contrary to case law cited in Mr. Sandusky's petition. Indeed, **the rules of criminal procedure had to be changed to authorize hearsay alone to be considered for the much lower *prima facie* burden at a preliminary hearing.** *See Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015) (discussing change in law and rule of procedure with respect to hearsay at a preliminary hearing). The case cited by the Commonwealth is *Commonwealth v. Sanford*, 580 A.2d 784 (Pa. Super. 1990). Reliance on that case is misplaced. *Sanford* did not involve a case where the sole evidence of a crime was hearsay. Therein, a doctor had examined the child and there was corroborating physical evidence. Thus, the very case the Commonwealth relies on does not state what it alleges. Instantly, there was no corroborating physical evidence as to Phantom Victim #8. Frankly, the Commonwealth's discussion of *Sanford* does not support its conclusion because *Sanford* involved evidence beyond the hearsay. Thus, *Sanford* is not inconsistent with the case law presented by Mr. Sandusky in his Supplemental Petition. In its zeal to avoid acknowledging that Mr. Sandusky is at least entitled to an evidentiary hearing, the Commonwealth twists a case beyond the legal proposition for which it stands. The Commonwealth's cursory response is without legal merit. Mr. Sandusky is entitled to relief as a matter of law, or in the alternative, an evidentiary hearing as to why appellate counsel did not present this meritorious claim.

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<sup>26</sup> The Commonwealth's response to this argument is located at page 37 and listed as Claim 10(c).

**Issue 22: Appellate Counsel Ineffectiveness and the Confrontation Clauses**<sup>27</sup>

The Commonwealth relies on its prior answer with respect to this issue, which maintained that because Mr. Calhoun's statement to Mr. Petrosky was not testimonial the federal and state constitutions did not preclude the evidence. Mr. Sandusky relies on the arguments forwarded in his petitions and notes that appellate counsel's decision not to raise the issue presents a genuine issue of fact.

**Issue 23: Appellate Counsel Ineffectiveness and Sufficiency Regarding Phantom Victim #8**<sup>28</sup>

After setting forth a brief synopsis of the facts regarding Phantom Victim #8, the Commonwealth takes exception to the factually accurate position that Mr. Calhoun denied that Mr. Sandusky was involved in any such shower incident. The Commonwealth submits that it subjected Mr. Calhoun to the interview in which he provided that answer while Mr. Calhoun was suffering from dementia. Whether Mr. Calhoun was not cognitively lucid at the time the Commonwealth interviewed him and had a compromised mental state would have gone to the weight of the evidence. It does not dispel that he factually stated something directly contradictory to what Mr. Petrosky testified. As discussed previously, no attorney would choose not to present evidence that directly contradicts the sole basis on which the government seeks a conviction. Mr. Sandusky is entitled to relief on this claim as a matter of law. In the alternative, an evidentiary hearing is warranted. As to prejudice, the preponderance of evidence standard is not particularly heightened and in light of the exceptionally meager evidence of the Commonwealth regarding Victim #8, there is a reasonable probability that the jury would have found that the unidentified victim was not assaulted by Mr. Sandusky had the tape been played.

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<sup>27</sup> The Commonwealth lists this issue as Claim 10(d) at page 37. It then skips to what it lists as Claim 13.

<sup>28</sup> The Commonwealth sets forth this issue as Claim 9 and presents its argument on pages 32-35.

#### **Issue 24: Ineffective Opening Statement**<sup>29</sup>

The Commonwealth's response relative to Mr. Sandusky's claim regarding Mr. Amendola's opening statement relies on asserting that trial counsel had a reasonable basis for erroneously asserting in his opening statement that the Commonwealth had overwhelming evidence against Mr. Sandusky. Whether counsel had a reasonable basis for his actions must be determined at an evidentiary hearing. *See Duffey, supra; Colavita, supra; Hutchinson, supra* (Saylor, J., dissenting). For reasons more fully outlined in his petition, Mr. Sandusky is entitled to a hearing on this claim.<sup>30</sup>

#### **Issue 25: Prosecutorial Misconduct-References to Silence**<sup>31</sup>

The Commonwealth does not fully address Mr. Sandusky's ineffectiveness claims regarding the prosecutor's improper references to Mr. Sandusky's silence. In his Supplemental Petition, Mr. Sandusky's twenty-fifth and twenty-sixth claims pertained to issues related to the Bob Costas interview. *See* Supplemental Petition, at 125-133. Indeed, Mr. Sandusky raised both federal and state constitutional claims, relying on an interpretation of the federal constitution by the Superior Court and the state constitution by the Pennsylvania Supreme Court. The Commonwealth does not acknowledge certain portions of the prosecutor's closing referenced by Mr. Sandusky or that there are federal and state constitutional arguments. Moreover, the Commonwealth does not address footnote 75 of his

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<sup>29</sup> The Commonwealth forwards its reply to this position on pages 46-48 at Claim 15(c) of its Answer.

<sup>30</sup> The Commonwealth takes issue with Mr. Sandusky severing the first four sentences from Mr. Amendola's opening statement. Of course, in a petition in excess of 150 pages, it would be unwieldy to include the entire opening statement. The additional provisions of the opening statement provided by the Commonwealth do not actually reflect much better on trial counsel. While Mr. Amendola did state on several occasions that Mr. Sandusky was innocent, he also equated his task as "similar to climbing Mount Everest from the bottom of the hill. It's David and Goliath." Moreover, it is simply untrue that Mr. Amendola was saying "at first blush the evidence against Mr. Sandusky appeared to be overwhelming[.]" *See* Commonwealth's Second Answer, at 48. What Mr. Amendola stated was, "The Commonwealth has overwhelming evidence against Mr. Sandusky." *See* N.T., 6/11/12, at 4. This is a critical distinction and Mr. Amendola, contrary to the Commonwealth's wishes, did not argue that the evidence appeared to be overwhelming.

<sup>31</sup> The Commonwealth responds to this issue on pages 5-7 of its Answer, labeling the issue as Claim 3(a).

Supplemental Petition, as it cannot, where Mr. Sandusky highlighted that the Commonwealth cannot point to anywhere in the record where Mr. Amendola made statements that would open the door to allowing the Commonwealth to comment on Mr. Sandusky not testifying. Frankly, had Mr. Amendola done so it would be ineffective assistance of counsel.

The prosecutor stated twice that he only heard Mr. Sandusky on television. This is an obvious reference to the fact that Mr. Sandusky did not testify at trial, and is the only part of the prosecutor's closing statement that the Commonwealth addresses. Remarkably, the Commonwealth, without citation to any authority, suggests that the prosecutor was not arguing that the jury should make an adverse inference from Mr. Sandusky speaking to Bob Costas but not testifying. The Superior Court, on direct appeal, did not accept this position—finding Mr. Sandusky's underlying claim of error waived due to counsel not seeking a mistrial. Further, a reading of the argument quoted by the Commonwealth directly contradicts that position. That the Commonwealth believes that the prosecutor's argument was perfectly reasonable demonstrates how far afield prosecutors believe they can go in making a closing summation. The Commonwealth purports to rely on its prior answer in further response. Therein, however, the Commonwealth failed to cite a single case that was remotely analogous. It simply baldly posited that there was a “reasonable basis for the prosecutor's comments and he was careful not to exceed the bounds of oratorical flair.” Commonwealth's First Answer, at 23.

Pointedly, Mr. Sandusky is entitled to a new trial even without an evidentiary hearing relative to this claim. As a matter of law, the prosecutor's statements that he only heard Mr. Sandusky on television along with his three references that Mr. Sandusky could have provided the jury with answers that would have solved many problems are grounds for a new trial. Specifically, unaddressed by the Commonwealth was the prosecutor's statement that Mr. Sandusky, “didn't provide you with something that could have been enormously helpful to us, could have solved many problems today,” N.T., 6/21/12, at 145. Nor does the Commonwealth acknowledge that the prosecutor also posited, “he could

have provided it to anybody at anytime,” and, “he didn't provide that name to anybody, ever[.]” *Id.* at 146. Thus, at least five separate times, the prosecutor pointed out to the jury that Mr. Sandusky had not testified or provided information to anyone that would have showed his innocence.

As the learned Justice Musmanno has opined, “if a prosecuting attorney or judge makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him...a new trial is imperative.” *Commonwealth v. Dravecz*, 227 A.2d 904, 906 (Pa. 1967). Moreover, the Commonwealth completely fails to address Mr. Sandusky's claim that counsel was ineffective in allowing him to be interviewed by Bob Costas. That issue entitles Mr. Sandusky to an evidentiary hearing to determine the manner of preparation and advice trial counsel provided to Mr. Sandusky prior to his televised interview. Since the Commonwealth does not address the issue, it is apparent that Mr. Sandusky is entitled to a hearing on the claim.<sup>32</sup>

#### **Issue 26: Costas Interview**

Since the Commonwealth does not address this issue, Mr. Sandusky need not respond. However, as pointed out above, the Commonwealth's Second Answer demonstrates that a genuine issue of fact exists regarding the advice/lack of advice and preparation Mr. Amendola provided Mr. Sandusky relative to the Costas interview. As such, an evidentiary hearing is plainly warranted by the rules of procedure. *See* Pa.R.Crim.P. 908.

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<sup>32</sup> The Commonwealth continues to reference the absence of affidavits. It apparently is unfamiliar with *Commonwealth v. Pander*, 100 A.3d 626 (Pa. Super. 2014) (*en banc*), in which a unanimous *en banc* Superior Court held that affidavits are not required to entitle a person to an evidentiary hearing. That case interprets both the statute, legislative history, and the rules of procedure in wholly rejecting the suggestion of the Commonwealth that affidavits are required to entitle a petitioner to a hearing. Mr. Sandusky has provided a witness certification that Mr. Amendola would testify regarding the Costas interview as would Mr. Sandusky. It is apparent from the Commonwealth's answer that it implicitly concedes that an evidentiary hearing is needed on this issue since it provides that it cannot adequately address the claim.

### **Issue 27: Grand Jury Testimony of Penn State Administrator's**<sup>33</sup>

The Commonwealth's answer to this position contains several significant legal errors. The record clearly establishes that two of the three Penn State administrators were unwilling to testify. That the Commonwealth posits that Mr. Sandusky has not established that Mr. Spanier was unavailable raises a genuine issue of material fact regarding Mr. Spanier, entitling Mr. Sandusky to an evidentiary hearing. With respect to the merits of Mr. Sandusky's argument, the Commonwealth maintains that it could have introduced e-mails by Mr. Curley, Mr. Schultz, and Graham Spanier and handwritten notes by Mr. Schultz for impeachment purposes. None of those emails or notes, however, reveals that Mr. Sandusky molested Allan Myers, alleged Victim #2. The emails indicate that the Penn State administrators were aware of a shower incident, but not anal rape. This is consistent with Joe Paterno's actions, Mike McQueary's father's actions, Dr. Dranov's actions, and the fact that Michael McQueary actually did nothing to stop the alleged rape. The emails do not impeach the grand jury testimony of Mr. Curley with respect to what he was told and the actions he took. Insofar as the Commonwealth contends that counsel's actions were reasonable, it appears unaware of the case law that warrants evidentiary hearings to determine counsel's basis for action or inaction. *See Duffey, supra; Colavita, supra*. Further, the Commonwealth overlooks that counsel was trying to pursue the introduction of this testimony. Mr. Sandusky's position is that they ineffectively failed to pursue the avenues that would have allowed the testimony to be introduced. As more fully articulated in the Supplemental Petition, and not countered by the Commonwealth, the prosecution could not have introduced as a matter of law that Mr. Curley and Mr. Schultz were charged with crimes.

Finally, the Commonwealth's footnote 43 and argument relative to the Commonwealth's alleged different motive to ask questions at the grand jury proceeding fails to acknowledge the facts of this case. First, a similar motive and not an identical motive is all that is necessary under the rule. Mr. Fina

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<sup>33</sup> The Commonwealth's Answer responds to this issue on pages 58-66, and lists issue as Claim 20.

stated on the record to Judge Feudale that the OAG believed Penn State Administrator's covered up Sandusky's alleged crimes. *See Schultz, supra*. His examination of those witnesses was based on questioning them with proving that purpose—this would have been the exact same type of questioning employed had they testified on behalf of Mr. Sandusky. That is, in both instances, the prosecution was attempting to show that the Penn State administrators covered up allegations against Mr. Sandusky and knew that he had committed an alleged rape on Penn State's campus. Here, the Commonwealth at the grand jury hearing was not just questioning an "exonerating witness" but believed that those witnesses were guilty of crimes themselves. Thus, the motives in both situations are the same: establishing that the Penn State administrators were untruthful. Hence, the Commonwealth's one sentence assertion, without any case law in support thereof, that there were different motivations for questioning the witnesses is without legal merit. In sum, the Commonwealth's own Answer again demonstrates the need for an evidentiary hearing.

#### **Issue 28: Unqualified Expert**<sup>34</sup>

The Commonwealth relies on its prior response with respect to Ms. Dershem's testimony. The testimony offered by Ms. Dershem is more fully articulated in Mr. Sandusky's petitions, but reveals that Ms. Dershem was asked questions implying that she was an expert in determining whether children had been abused and that Mr. Sandusky engaged in inappropriate behavior with Aaron Fisher. She was asked to provide insight, based on her professional opinion, into the mental state of Aaron Fisher and opine on whether Mr. Sandusky acted inappropriately. Mr. Sandusky again notes that the Commonwealth complains that he isolates the testimony in question. Naturally, Mr. Sandusky addresses the objectionable testimony and not the entirety of Ms. Dershem's testimony. To do otherwise would be to unnecessarily encumber the PCRA court. The record establishes Ms. Dershem

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<sup>34</sup> The Commonwealth's Second Answer labels this as Claim 8, and discusses the issue on pages 31-32.



was permitted to testify regarding her professional opinion with respect to Aaron Fisher's mental state and whether Mr. Sandusky's non-criminal actions were inappropriate without objection from trial counsel. A genuine issue of fact as to why trial counsel did not object exists.

**Issue 29: Dr. Atkins**<sup>35</sup>

The Commonwealth candidly concedes that Mr. Sandusky's counsel made a regrettable choice to present the expert testimony of Dr. Elliot Atkins. It then complains that Mr. Sandusky "cherry-picked" the damaging portion of Dr. Atkins testimony. The Commonwealth in both its Answer maintains that counsel's decision had a reasonable basis. This, of course, entitles Mr. Sandusky to an evidentiary hearing to explore the strategic non-record reasons trial counsel elected to present Dr. Atkins. *See Duffey, supra; Commonwealth v. Smith*, 844 A.2d 549 (Pa. 2004) (per curiam order); *Commonwealth v. Dennis*, 950 A.2d 945 (Pa. 2008); *D'Amato, supra*. Thus, the Commonwealth's own Answers warrant a hearing on this claim.

**Issue 30: Promising Mr. Sandusky Would Testify and Not Presenting Him**<sup>36</sup>

The Commonwealth, factually incorrectly, maintains that Mr. Sandusky did not add to his argument from his May 6<sup>th</sup> petition. In its original Answer, the Commonwealth maintained that Mr. Sandusky's counsel did not promise that he would testify and that the persuasive case law from other jurisdictions cited by Mr. Sandusky should not control because it was not decided by Pennsylvania courts. Mr. Sandusky added a substantive footnote in his Supplemental Petition that refuted the Commonwealth's suggestion that Mr. Amendola did not promise the jury that Mr. Sandusky would testify by citing to the record. The Commonwealth now takes the position that because events changed regarding Matt Sandusky that Mr. Amendola was not ineffective.

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<sup>35</sup> The Commonwealth addresses this issue on page 42 of its answer and identifies the issue as Claim 14.

<sup>36</sup> The Commonwealth sets forth this issue as Claim 13 in its Second Answer.

However, the Commonwealth does not address this issue in the context of Mr. Sandusky's following two claims, in which it is evident that counsel incorrectly advised Mr. Sandusky that Matt Sandusky would be permitted to testify in rebuttal and that he could be cross-examined beyond the scope of his direct examination regarding Matt Sandusky's statements to police. These issues must be considered together. Since Mr. Amendola promised the jury that Mr. Sandusky would testify and then incorrectly informed him regarding the Commonwealth's ability to present Matt Sandusky or question him about Matt Sandusky, counsel was ineffective in not presenting Mr. Sandusky's testimony.

**Issues 31-32: Matt Sandusky's Proposed Rebuttal Testimony and the Failure to Testify**<sup>37</sup>

The Commonwealth in addressing these claims, posits that Mr. Sandusky relied on a factually incorrect statement of events and then in citing to the actual record defeats its own argument. The Commonwealth posits that the Commonwealth expressly agreed not to call Matt Sandusky as a rebuttal witness. Mr. Fina originally stated, "We certainly have represented to Attorney Amendola, I personally did, that we would not use Mr. Matt Sandusky's testimony in our case in chief; that **we would reserve him for rebuttal and use him only if his testimony would be admissible and relevant to rebuttal.**" Thereafter, Mr. Fina did admit that they agreed not to use Matt Sandusky in rebuttal after further discussions, but stated that it would cross-examine Mr. Sandusky regarding Matt Sandusky.

As argued in Mr. Sandusky's Supplemental Petition, and not disputed by the Commonwealth in its answer, such cross examination would have been beyond the scope of any direct examination. Moreover, by stating that they would question Mr. Sandusky regarding Matt Sandusky necessarily means that it could call Matt Sandusky in rebuttal based on Mr. Sandusky's answers to the questions posed by the Commonwealth. The Commonwealth's position to the contrary raises genuine issues of fact regarding what Mr. McGettigan and Mr. Fina told Mr. Amendola regarding if they would call Matt Sandusky based on Mr. Sandusky's answers during cross-examination. Frankly, it makes little sense to

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<sup>37</sup> The Commonwealth's Second Answer levels its response to these claims at pages 38-41.

ask questions on cross-examination regarding Matt Sandusky if it did not intend to place Matt Sandusky on the stand based on the answers provided by Mr. Sandusky because that would mean the Commonwealth would simply let Mr. Sandusky's testimony stand without any rebuttal.

Furthermore, it is evident that a question of fact exists as to what advice Mr. Amendola gave to Mr. Sandusky regarding whether Matt would testify in rebuttal. While the Commonwealth holds a portion of Mr. Amendola's representation to the trial court on why Mr. Sandusky did not testify, regarding the Commonwealth's promise not to call Matt Sandusky in rebuttal, it casually overlooks the following statement on the record: **"We discussed it with Mr. Sandusky—that there's no way we see that we would call him to the stand under the current circumstances and PROTECT HIM FROM BEING EXPOSED TO MATTHEW SANDUSKY BEING CALLED AS A COMMONWEALTH WITNESS ON REBUTTAL."** N.T., 6/21/12, at 69 (emphasis added).

As is apparent from the Commonwealth's own answer, and the record, a question of fact exists as to Mr. Amendola telling Mr. Sandusky that Matt would be called in rebuttal. Mr. Sandusky has averred that Mr. Amendola told him that he should not testify based on fear of the Commonwealth **both** calling Matt Sandusky and asking questions regarding Matt Sandusky, the representations by Mr. Amendola on the record support that contention. Indeed, Mr. Amendola's advice and statement on the record is even more ineffective in light of the Commonwealth now claiming that it would not call Matt Sandusky at all. As thoroughly argued in Mr. Sandusky's Supplemental Petition, and not refuted by any discussion of the case law by the Commonwealth, Mr. Sandusky is entitled to an evidentiary hearing. *See Commonwealth v. Walker*, 110 A.3d 1000 (Pa. Super. 2015) (*en banc*).

### **Issue 33: Jury Instruction Error**

The Commonwealth acknowledges error in the instruction, but contends that the error is technical. In its view, the error was not reversible. Mr. Sandusky would note that his position is that trial counsel was ineffective in not objecting to the error in the instruction. A jury is presumed to

follow an instruction. If the jury followed the court's erroneous instruction, prejudice necessarily results. Had counsel objected, the error would have been corrected; therefore, counsel can have no reasonable basis for not objecting. To the extent any basis could exist, an evidentiary hearing is needed.

#### **Issue 34: Cumulative Error Claim**

The Commonwealth untenably claims that none of Mr. Sandusky's claims have arguable merit and asserts that it cannot adequately respond to one of Mr. Sandusky's issues. This reveals that it does not adequately comprehend the definition of arguable merit. A claim has arguable merit, if the facts upon which it are based, if true, establish a legally meritorious claim. *Stewart, supra*. The claim need not entitle a petitioner to relief for it to have arguable merit. While the Commonwealth may assert, after a hearing, that trial counsel had a reasonable basis for a limited number of their actions, or argue that no actual prejudice exists, it cannot argue in good faith that none of Mr. Sandusky's claims have arguable merit.

As outlined in this filing and in his prior petitions, each of Mr. Sandusky's claims have arguable merit—that is, they are not legally or factually frivolous. Just taking Mr. Sandusky's final two issues, reveals the falsity of the Commonwealth's assertion. The Commonwealth itself acknowledges that the trial court's character evidence instruction was in error, though it attempts to imply, in derogation of the law, Pa.R.A.P. 1922; Pa.R.A.P. 1926(a), that the stenographer erred. A claim that counsel was ineffective in failing to object to a jury instruction that improperly informed the jury to find Mr. Sandusky guilty plainly has arguable merit. The Commonwealth's own argument in its Answer pertains to actual prejudice. It is legally erroneous for it to maintain that this issue has no arguable merit. Further, as argued in Mr. Sandusky's Supplemental Petition, this was not the only instructional error that occurred. The Superior Court determined that the trial court erred in neglecting to give a prompt complaint instruction. While the Superior Court found that error harmless, it did not view that error in

conjunction with additional errors as must be done in evaluating a cumulative error claim.

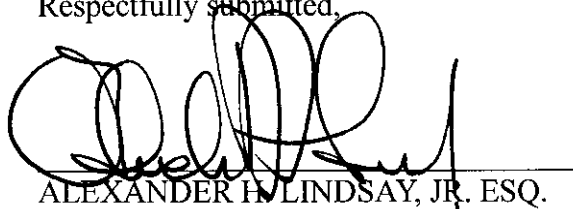
Further, to suggest that Mr. Sandusky's ineffectiveness claim related to the advice he was given regarding his decision not to testify does not have arguable merit disregards over two hundred years of constitutional law that permits a defendant to have the opportunity to testify. Here, much of the advice given to Mr. Sandusky is extra-record, though Mr. Amendola did provide on the record, erroneously even by the Commonwealth's own argument, that Mr. Sandusky would not testify because Matt Sandusky could testify in rebuttal. Mr. Sandusky has provided evidence and averments that, if true, would show that his decision not to testify was not knowing and intelligent. Counsel had not reviewed Matt Sandusky's grand jury testimony, yet advised Mr. Sandusky not to testify because of the possibility that Matt Sandusky would be called to rebut Mr. Sandusky's testimony. As more fully argued, if Mr. Sandusky would have testified, under *Walker, supra*, he establishes actual prejudice. An argument that counsel was ineffective in advising his client not to testify by giving him legally erroneous advice obviously has arguable merit.

Mr. Sandusky has provided comprehensive argument in both this filing and his petitions regarding why his additional claims have arguable merit. Accordingly, he will not reiterate those positions. However, it should be highlighted that both trial attorneys stated on the record that they could not effectively represent Mr. Sandusky. The Commonwealth's position necessarily must be that they were being less than forthright with the court and did effectively represent Mr. Sandusky. This question alone establishes an issue of fact as to whether counsel lied to or made misrepresentations to the court when they asserted that they were unable to effectively represent Mr. Sandusky.

In sum, setting aside the Commonwealth's hyperbole, its Answers and Mr. Sandusky's petitions, along with the governing rules of procedure and case law, all demonstrate that Mr. Sandusky is entitled to an evidentiary hearing on a host of claims and in fact, with regard to several issues, he is entitled to relief as a matter of law. For the reasons set forth herein and more fully delineated in Mr. Sandusky's

Supplemental Petition, Mr. Sandusky is entitled to a new trial and, at the very least, an evidentiary hearing. Attached for the Court's convenience and review is a table outlining and summarizing the parties' positions and the issues of fact that have been raised.

Respectfully submitted,



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**TABLE IN SUPPORT OF AN EVIDENTIARY HEARING/RELIEF AS A MATTER OF  
LAW**

<b><u>Mr. Sandusky's Positions</u></b>	<b><u>Issues of Fact</u></b>	<b><u>Commonwealth's Answer</u></b>
1. Counsel was ineffective for not objecting to the prosecutor's statement that Victim #2 was known only to God. <i>See</i> Supplemental Petition, at 33-39; Response to Answer, at 6-8.	Whether Allan Myers was alleged Victim #2. Was the prosecution aware of Allan Myers and his claim to being the McQueary shower child.	The prosecutor did not lie because he did not know that Allan Myers was alleged Victim #2. Commonwealth's Second Answer, at 5-7.
2. After-discovered exculpatory evidence via Mr. Myers recanting and stating that Mr. Sandusky did not abuse him during the McQueary episode. <i>See</i> Supplemental Petition, at 39-42; Response to Answer, at 4-5, 8-10.	Whether Mr. Myers is alleged Victim #2. Under <i>Commonwealth v. D'Amato</i> , 856 A.2d 806 (Pa. 2004), Mr. Sandusky is entitled to a hearing.	Mr. Myers is not credible. Erroneously maintains that Mr. Sandusky had sixty days to forward the claim from the interview. Posits that evidence would only be used to impeach, despite it being substantive evidence of innocence of the McQueary shower allegation. Commonwealth's Second Answer, at 10-13.
3. Mr. Amendola was ineffective in not informing Mr. Sandusky that there was an agreement that neither the Commonwealth nor he would present Mr. Myers. <i>See</i> Supplemental Petition, at 42; Response to Answer, at 10.	Whether an agreement existed as alleged by Mr. Rominger. Whether the Commonwealth knew of possible tampering with a witness.	No agreement existed and even if Mr. Myers testified that he was not abused the jury would still have found Mr. Sandusky guilty. Commonwealth's Second Answer, at 14.
4. Counsel was ineffective in not calling Mr. Myers or using his prior exculpatory statements to impeach Mr. McQueary or as substantive evidence of innocence. <i>See</i> Supplemental Petition, at 43-44; Response to Answer, at 11-12.	Whether Mr. Myers was available. In the alternative, what basis did counsel have for not introducing the exculpatory evidence when the Commonwealth, as a matter of law, could not introduce Mr. Myers other statements.	Mr. Myers was not available. Mr. Myers testimony that Mr. Sandusky did not abuse him would not have altered the outcome of trial. Legally erroneous argues that Mr. Myers inconsistent statements could be used by the Commonwealth. Commonwealth's Second Answer, at 14-16.
5. Counsel were ineffective in not alleging a violation of the Child Protective Services Law violated Mr. Sandusky's due	As a matter of law, Mr. Sandusky is entitled to relief. The CPSL was not followed and the grand jury, under a	Does not argue that the CPSL was not violated. Claims a grand jury, once instituted, can investigate any crime without

process rights and seeking to quash the presentment based on the grand jury lacking subject matter jurisdiction to investigate the Aaron Fisher allegation. <i>See</i> Supplemental Petition, at 44-50; Response to Answer, at 12-15.	plain reading of the law, only could investigate a crime if it was connected in some manner to public corruption or organized crime. In the alternative, a genuine issue of fact exists as to the reasonable basis of counsel's inaction.	regard to any connection to public corruption or organized crime. Commonwealth's Second Answer, at 22-25.
6. Counsel were ineffective in failing to file a motion to quash based on governmental misconduct based on improper leaks of grand jury information. <i>See</i> Supplemental Petition, at 50-63; Response to Answer, at 15-18.	Whether the government leaked the information to move the investigation forward to find additional accusers or whether it was learned legitimately? What reasonable basis did counsel have for not filing a motion to quash based on governmental misconduct?	The leaked information may not have been leaked but could have come from a witness. Legally erroneously maintains that a finding of contempt is the only remedy in contradiction to the very case it cites. Commonwealth's Second Answer, at 17-21.
7. The Grand Jury Judge was biased and deprived Mr. Sandusky of <b><i>Brady</i></b> impeachment evidence. The bias was not learned until after trial. <i>See</i> Supplemental Petition, at 64-65; Response to Answer, at 18.	Whether the grand jury exhibits could have served as impeachment evidence?	The email from Judge Feudale does not show bias and it is illogical to conclude that he was biased. Commonwealth's Second Answer, at 22.
8. Trial counsel was ineffective in failing to investigate juror bias by retaining an expert and in opposing the Commonwealth's motion to change venue. An expert report would have demonstrated the necessity for either a change of venue/venire, a cooling period, or carefully tailored <i>voir dire</i> by counsel. <i>See</i> Supplemental Petition, at 65-71; Response to Answer, at 19-22.	What basis did counsel have for not retaining an expert to investigate potential juror bias in Centre County in deciding to oppose the Commonwealth's motion?	The trial court would not have granted a motion to change venue/venire even if both sides were in agreement. Trial counsel filed a motion opposing a change of venue and was aware of the pre-trial publicity. Commonwealth's Second Answer, at 49-56.
9. Trial counsel was ineffective for not seeking a change of venue/venire or seeking a cooling period. <i>See</i>	Whether counsel had a reasonable basis for opposing a change of venue/venire or not seeking a cooling period	Since counsel sought a continuance on wholly unrelated grounds they can't be ineffective for seeking a



Supplemental Petition, at 71-80; Response to Answer, at 19-22.	where he conducted no investigation regarding jury selection?	cooling period. The trial court would not have granted a change of venue/venire even if both sides agreed. Commonwealth's Second Answer, at 51-56.
10. Trial counsel was ineffective in failing to ask additional <i>voir dire</i> questions regarding what prejudicial information the jurors admittedly acknowledged being in possession. See Supplemental Petition, at 80-81; Response to Answer, at 22-23.	What reasonable basis existed for not further inquiring with the proposed jurors what specific prejudicial information they had learned from the extensive media coverage?	The trial court did not abuse its discretion in conducting <i>voir dire</i> . (This is non-responsive). No specific jurors were alleged to have been biased. (This is not accurate). Commonwealth's Second Answer, at 49-51.
11. Mr. Amendola was ineffective for waiving Mr. Sandusky's preliminary hearing whereby he would have learned of what testimony the accusers would have provided, whether they were in therapy, and could have used any statements that were inconsistent with grand jury testimony or testimony at trial as impeachment evidence at trial. See Supplemental Petition, at 81-85; Response to Answer, at 23-24.	What basis did counsel have for waiving the preliminary hearing in a case involving multiple accusers, numerous felony sex charges, and where he was having issues with discovery and did not or could not interview various witnesses and co-counsel himself had advised on his own website against making similar blunders.	Non-responsively contends there is no constitutional right to a preliminary hearing. Relies on a case in which the person baldly asserted counsel was ineffective for waiving the preliminary hearing. Posits that because credibility is not in question at a preliminary hearing Mr. Sandusky could not have called into question there credibility at the hearing. Commonwealth's Second Answer, at 43-45.
12. Trial counsel was ineffective in failing to interview the accusers, Mike McQueary, Mr. Petrosky, and Mr. Calhoun. See Supplemental Petition, at 85-88; Response to Answer, at 25.	What basis did counsel have for not interviewing any of the accusers who testified, Mike McQueary, Mr. Petrosky, and Mr. Calhoun? Whether any accuser would have agreed to be interviewed by the defense team?	The accusers would not have agreed to be interviewed. The <i>Stewart</i> case relied on by Mr. Sandusky pertains to alibi witnesses. Mr. Calhoun, though interviewed by the Commonwealth, was suffering from dementia. Commonwealth's Second Answer, at 57-58.
13. Counsel were ineffective in failing to file a collateral appeal of the order denying their motion to withdraw. See Supplemental Petition, at 88-	Why did trial counsel, who did file a collateral appeal on another issue, not elect to appeal when the court did not permit them to withdraw when	Cursorily asserts that Mr. Sandusky cannot show the outcome of the trial would be different had counsel been permitted to withdraw.

91; Response to Answer, at 26-27.	they represented that they ethically could not adequately represent Mr. Sandusky?	Commonwealth's Second Answer, at 4.
14. Counsel inadequately reviewed discovery and Mr. Amendola erroneously stated that his trial strategy would not have changed with additional review of discovery where he did not play the Calhoun tape or review Matt Sandusky's grand jury testimony. <i>See</i> Supplemental Petition, at 92-93; Response to Answer, at 27-28.	Why did counsel not adequately review the discovery, including the Calhoun tape and Matt Sandusky's testimony? What other aspects of discovery did counsel not review? Whether Mr. Amendola or Mr. Rominger would have presented the Calhoun tape had they been aware of it—were they aware of it? Kowalski and Rominger affidavits raise issue of fact.	States the claim is vacuous and that Mr. Rominger is disparaging co-counsel. Commonwealth's Second Answer, at 45-46.
15. The Commonwealth violated <b>Brady</b> by not disclosing that it was aware that the accusers underwent a type of repressed memory therapy. <i>See</i> Supplemental Petition, at 94-96; Response to Answer, at 28-30.	Did the accusers tell the Commonwealth that they were undergoing therapy and that was why they could remember events or why they changed their story? Did any therapists, such as Mike Gillum, explain that the accusers had repressed memories of the events?	Does not dispute that accusers underwent therapy, but states there is no evidence of a violation of <b>Brady</b> . Asserts that Mr. Sandusky is manufacturing his claim. (Despite record testimony and post-trial statements). Claims that Mr. Sandusky is making a reckless accusation but does not deny that it was aware of therapy impacting the accusers accounts. Commonwealth's Second Answer, at 30-31.
16. After-discovered evidence via Mr. Fisher's book, an interview by D.S., and statements made post-trial by Matt Sandusky reveals that it was therapy that enabled them to recall the alleged abuse. <i>See</i> Supplemental Petition, at 96-99; Response to Answer, at 30-31.	Whether Mr. Fisher, D.S., and Matt Sandusky remembered abuse outside of undergoing therapy? Whether it was therapy that cause them to remember the alleged sexual abuse?	Asserts since Matt Sandusky did not testify that his claims are irrelevant. Posits that the statements are not actually evidence. Commonwealth's Second Answer, at 29-31.
17. Trial counsel was ineffective for not seeking to preclude testimony based on it being a recovered memory or presenting expert testimony on	What reasonable basis did counsel have for not retaining an expert to support a motion to preclude the testimony of some of the accusers where it	Since the Commonwealth did not present an expert on repressed memories, Mr. Sandusky could not and the jury could determine the

the lack of scientific basis for repressed memories. <i>See</i> Supplemental Petition, at 99-106; Response to Answer, at 28-31.	was evident that their stories changed significantly over time and that only after undergoing therapy did the sexual allegations come forward? Whether the accusers underwent repressed memory therapy?	credibility of the accusers. (Mr. Sandusky notes that repressed memory expert testimony does not challenge credibility—i.e., accuse those of lying). There was no reason to present expert testimony because it was not an issue. (PCRA counsel adds that it was not in issue because counsel were ineffective). Commonwealth's Second Answer, at 26-27.
18. Counsel were ineffective for failing to file a motion to preclude testimony/the use of certain statements which were the result of suggestive and improper police interviews. <i>See</i> Supplemental Petition, at 106-115; Response to Answer, at 31-32.	How many accusers did the police do the same thing that they did with B.S.H.? Was it a routine practice to tell the accusers that they thought there was more that the accusers were not telling? Did police misinform accusers regarding what they had been told?	Incorrectly asserts that competency hearings only pertain to child witnesses. Commonwealth's Second Answer, at 28.
19. Counsel were ineffective in not introducing exculpatory evidence in the nature of a statement by Mr. Calhoun denying witnessing Mr. Sandusky commit any sex offense in a shower. <i>See</i> Supplemental Petition, at 116-118; Response to Answer, at 33.	What reasonable basis exists for not presenting exculpatory evidence where the sole evidence against Mr. Sandusky was hearsay testimony. Indeed, counsel avers that Mr. Sandusky is entitled to relief on this claim as a matter of law.	Mr. Calhoun suffered from dementia at the time the Commonwealth subjected him to the interrogation. Commonwealth's Second Answer, at 35.
20. Counsel were ineffective in failing to call Mr. Calhoun under Rule 806. <i>See</i> Supplemental Petition, at 119-120; Response to Answer, at 33-34.	What reasonable basis counsel had for not calling Mr. Calhoun, who even if suffering from dementia, could have had his memory refreshed with the taped interview.	Mr. Calhoun suffered from dementia and therefore it cannot be shown what he would have stated. Commonwealth's Second Answer, at 36.
21. Appellate counsel was ineffective for not challenging the admissibility of the excited utterance testimony where case law holds that such	What basis did appellate counsel have for not challenging the convictions relative to Phantom Victim #8, which was based solely on	A conviction can be based solely on hearsay evidence without violating due process. Cites a case that does not support that position.

testimony cannot be admitted if it is the sole evidence of the crime. <i>See</i> Supplemental Petition, at 120-121; Response to Answer, at 34.	hearsay evidence.	Commonwealth's Second Answer, at 2-35.
22. Appellate counsel was ineffective in not raising a federal and state confrontation clause claim relative to the hearsay evidence regarding Phantom Victim #8. <i>See</i> Supplemental Petition, at 121-123 ; Response to Answer, at 35.	What reasonable basis did appellate counsel have for not raising this issue on appeal where a confrontation clause analysis is based on the totality of the circumstances.	Mr. Calhoun's statements were not testimonial and that is the only test relative to the federal confrontation clause. Commonwealth's Second Answer, at 37.
23. Appellate counsel was ineffective in failing to contest the sufficiency of the evidence with regard to Phantom Victim #8 where the sole evidence was hearsay evidence and therefore any conviction deprived him of his due process rights. <i>See</i> Supplemental Petition, at 123-124; Response to Answer, at 35.	Mr. Sandusky contends he is entitled to relief as a matter of law because no reasonable attorney would not have challenged this issue. In the alternative, Mr. Sandusky is entitled to a hearing to prove that counsel had no reasonable basis for not appealing the sufficiency of the evidence as to Victim #8.	Reiterates that a conviction can be based solely on hearsay in a case not involving a child witness. Commonwealth's Second Answer, at 33-35.
24. Counsel was ineffective in making an opening statement in which he erroneously stated that the Commonwealth had overwhelming evidence against Mr. Sandusky. <i>See</i> Supplemental Petition, at 125-127; Response to Answer, at 36.	What basis did counsel have for incorrectly stating that the Commonwealth's evidence was overwhelming, as well as that his task was daunting, it was the equivalent of David vs. Goliath and climbing Mount Everest	Since counsel also at several other junctures asserted that Mr. Sandusky was innocent, his opening was not that bad. Commonwealth's Second Answer, at 47-48.
25. Counsel were ineffective in failing to move for a mistrial where the prosecutor improperly referred to Mr. Sandusky's right to remain silent at least five times. <i>See</i> Supplemental Petition, at 127-131 ; Response to Answer, at 36-38.	As a matter of law, Mr. Sandusky is entitled to a new trial. Alternatively, a hearing is warranted to determine what reasonable basis did counsel have for not seeking a mistrial where he objected to the serial instances of improper references to Mr. Sandusky speaking with Mr. Costas but not to the jury.	The prosecutor's comments were fair response and within the bounds of permissible argument or were oratorical flair. The prosecutor's closing was not evidence. (Did not address all of the prosecutor's references). Commonwealth's Second Answer, at 7.

26. Mr. Amendola was ineffective in not advising Mr. Sandusky not to be interviewed and in failing to adequately prepare him for the interview with Bob Costas, allowing the Commonwealth to use his responses against Mr. Sandusky at trial. <i>See</i> Supplemental Petition, at 131-134; Response to Answer, at 38.	What advice did Mr. Amendola provide to Mr. Sandusky regarding the Costas interview. What preparation did Mr. Amendola engage in. Did Mr. Amendola conduct a mock interview. Did Mr. Amendola represent that he would speak to Mr. Costas.	Does not address the issue and implicitly concedes a hearing is warranted.
27. Counsel were ineffective in not introducing the grand jury testimony of Mr. Curley, Mr. Schultz, and Dr. Graham Spanier. <i>See</i> Supplemental Petition, at 135-137; Response to Answer, at 39-40.	What differing basis did Mr. Fina have for questioning the Penn State administrators at trial vs. their grand jury testimony. Whether counsel had a reasonable basis not to introduce this testimony when they vigorously argued in favor of presenting these witnesses and their testimony?	Contends that Frank Fina did not have the same reason for questioning these witnesses during their grand jury testimony as he would have during trial. Also, avers that their grand jury testimony could have been impeached with emails and notes that did not show they knew of an allegation of anal rape but were aware that Mr. Sandusky showered with a minor boy. <i>See</i> Commonwealth's Second Answer, at 58-66.
28. Trial counsel was ineffective in failing to object to key portions of Ms. Dershem's testimony as being improper. <i>See</i> Supplemental Petition, at 137-139; Response to Answer, at 40-41.	What reasonable basis did trial counsel have for not objecting to testimony from Ms. Dershem that suggested she was an expert in determining that a child had been abused and in opining that Aaron Fisher was not being truthful when he first came forward and that Mr. Sandusky engaged in inappropriate behavior?	Ms. Dershem was not testifying as an expert. <i>See</i> Commonwealth's Second Answer, at 32.
29. Trial counsel were ineffective in calling Dr. Atkins and opening the door for damaging testimony where Mr. Sandusky's defense was that he was innocent of the charges. <i>See</i> Supplemental	What reasonable basis did counsel have for presenting Dr. Atkins when the defense was that Mr. Sandusky did not commit the crimes?	Trial counsel had a reasonable basis for calling Dr. Atkins. This concedes the necessity of a hearing. Commonwealth's Second Answer, at 42.

Petition, at 139-141; Response to Answer, at 41.		
30. Mr. Amendola was ineffective in promising that Mr. Sandusky would testify and then not presenting Mr. Sandusky's testimony. <i>See</i> Supplemental Petition, at 141-143; Response to Answer, at 41-42.	What reasonable basis did Mr. Amendola have for not calling Mr. Sandusky after he promised that he would in his opening when Matt Sandusky either could not or the Commonwealth promised he would not testify in rebuttal?	Trial counsel had a reasonable basis to argue this and then not present Mr. Sandusky because of Matt Sandusky coming forward. Commonwealth's Second Answer, at 38-41.
31. Trial counsel were ineffective in failing to move to preclude Matt Sandusky from being allowed to testify and failing to advise Mr. Sandusky how they could proceed if the Commonwealth attempted to question him about Matt or present Matt. <i>See</i> Supplemental Petition, at 143-146; Response to Answer, at 42-43.	Whether Mr. Amendola told Mr. Sandusky that Matt Sandusky could not testify in rebuttal or would not testify based on a binding agreement with the Commonwealth. Whether Frank Fina and Joe McGettigan did not intend to call Matt Sandusky when they stated that he intended to cross-examine Mr. Sandusky about Matt Sandusky (which would have been beyond the scope of any direct).	The Commonwealth promised that Matt Sandusky would not testify. <i>See</i> Commonwealth's Second Answer, at 38-41.
32. Trial counsel were ineffective in not calling Mr. Sandusky where Matt Sandusky could not testify in rebuttal. <i>See</i> Supplemental Petition, at 147-148; Response to Answer, at 42-43.	Did the Commonwealth promise that Matt Sandusky would not testify? What advice did trial counsel provide regarding the inadmissibility of Matt Sandusky's testimony?	The Commonwealth promised that Matt Sandusky would not testify—(this actually supports Mr. Sandusky's position that counsel were ineffective). <i>See</i> Commonwealth's Second Answer, at 38-41.
33. Trial counsel were ineffective in failing to object to the erroneous character evidence instruction. <i>See</i> Supplemental Petition, at 148-150; Response to Answer, at 42-43.	Mr. Sandusky is entitled to relief as a matter of law—since the court's confusing and erroneous instruction permitted the jury to find Mr. Sandusky guilty even if his character evidence demonstrated that he was innocent and a jury is presumed to follow a court's instruction. (If the jury followed the court's instruction, there is prejudice)	The jury instruction error was minor. <i>See</i> Commonwealth's Second Answer, at 66-67.
34. Cumulative error claim. <i>See</i> Supplemental Petition, at	<i>See</i> above for issues of fact relative to each claim.	Contents that NO issues have arguable merit, despite

150-155; Response to Answer, at 43-45.		conceding several issues have arguable merit but that there was no prejudice. <i>See</i> Commonwealth's Second Answer, at 67-68.
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This table is not in lieu of the more extensive arguments contained in Mr. Sandusky's Petitions or his Response to the Commonwealth's Answer but is intended as a convenient quick reference guide to highlight the numerous genuine issues of fact that have been raised.

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8<sup>th</sup> day of April, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

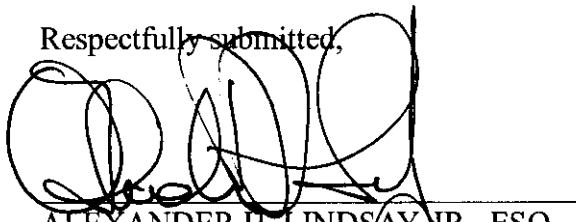
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Honorable John M. Cleland, Sr. Judge c/o Office of the Court Administrator and  
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Respectfully submitted,



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