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

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

2016 MAR -7 PM 3:44

TYPE OF PLEADING:

SECOND AMENDED PETITION FOR POST CONVICTION RELIEF

FILED ON BEHALF OF:

PETITIONER, GERALD A. SANDUSKY

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SECOND AMENDED PETITION FOR RELIEF PURSUANT TO THE PENNSYLVANIA POST CONVICTION RELIEF ACT, 42 Pa.C.S. §§ 9541 et seq.

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 supplemental Amended PCRA petition, seeking an evidentiary hearing, a new trial and dismissal of the charges against him, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. This Supplemental Amended Petition is not a substitute for the Petition for Relief Pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.* filed by Mr. Sandusky on April 2, 2015, currently under seal, or the Amended Petition filed on May 6, 2015, but is a supplement thereto. Mr. Sandusky is not waiving any issues contained in the original or amended petition.

Nonetheless, for the ease of the PCRA court's review, Mr. Sandusky will note those issues that are related to claims previously leveled and where those issues can be found in his prior petition. In addition, Mr. Sandusky will mention where his claims are additional issues that were not included in his previous filings. Finally, Mr. Sandusky sets forth that the following

claim in his prior petitions is not re-addressed in this petition, except insofar as it must be considered with his cumulative error claim:

> The Unavailability of Spanier, Curley, and Schultz Due to the Commonwealth's Disingenuous Charges Against them Violated Sandusky's Right to Present Witnesses and Compulsory Process.

In addition, to facilitate easier review for the PCRA court, Mr. Sandusky has included the remaining issues previously outlined in his May 6, 2015 petition herein. This petition includes new claims, though some of these issues were discussed in part in the prior petition.

Mr. Sandusky maintains that he is factually innocent of the charges for which he was convicted, and that his conviction was the result of a violation of his constitutional rights under both the federal constitution and the Pennsylvania Constitution, including but not limited to the ineffective assistance of trial and direct appellate counsel.

Attorney Joseph L. Amendola (hereinafter "Mr. Amendola") represented Mr. Sandusky upon his arrest, during pretrial proceedings, at trial, and on direct appeal. Attorney Karl E. Rominger also represented Mr. Sandusky pretrial and during trial. Attorney Norris E. Gelman, Esq., represented Mr. Sandusky during post-sentence motions and on direct appeal to the Pennsylvania Superior Court and Supreme Court of Pennsylvania.

FACTUAL AND PROCEDURAL BACKGROUND: "Making A Child Predator"

This is a story of how the media, overzealous law enforcement, a biased grand jury judge, an abused grand jury process, prosecutorial malfeasance, a discredited and pseudoscientific type of therapy, greed, and serial instances of ineffective assistance of counsel resulted in transforming an innocent man into one of this country's most infamous "child predators."

In 1998, contrary to media reports and the Freeh Report implying that Pennsylvania State University (hereinafter "Penn State" or "Penn State University") covered up allegations of sexual

misconduct on the part of Mr. Sandusky in 1998, law enforcement investigated an incident involving Mr. Sandusky and Z.K., then a minor child. Officer Ronald Schreffler interviewed Z.K. on May 4, 1998, after receiving a call from his mother, who informed police that her son and Mr. Sandusky had taken a shower in a locker room shower at Penn State University. The interview is attached to the May 6, 2015 Appendix at 488.[1] That interview reveals why no charges were filed. Z.K. consistently maintained throughout that investigation that Mr. Sandusky did not sexually assault him. Indeed, police had interviewed Z.K. earlier that same day and he insisted that no sexual abuse occurred. Z.K. was also interviewed by Dr. Alycia Chambers at 3:00 p.m., before the tape recorded interview by police. He did not say that Mr. Sandusky abused him in any manner. Ms. Chambers spoke with police prior to their recorded interview. During the recorded police interview, Z.K. was asked if Mr. Sandusky ever had an erection, which Z.K. denied. Z.K. stated that Mr. Sandusky did not touch Z.K.'s private parts or ask him to touch Mr. Sandusky's penis. Despite largely improper questioning techniques, Z.K. never revealed any remotely illegal behavior. Z.K. did disclose that in the past Mr. Sandusky had kissed him on the top of his head like a parent does with a child, and that he had picked him up and hugged him in the shower.

Police also interviewed another child that day who had previously showered with Mr. Sandusky in a locker room shower. That individual similarly denied that any wrongdoing occurred with him. On May 7, 1998, Jerry Lauro, an official with the regional Department of Public Welfare ("DPW") met with Detective Scheffler, and pursuant to the Child Protective

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1 All references to the Appendix refer to the May 6, 2015 Appendix attached to Mr. Sandusky's petition filed that same date. Mr. Sandusky has attached to this petition an affidavit from Attorney Rominger, an expert report issued relative to jury bias in cases against Timothy Curley and Gary Schultz, publications on repressed memory, and an email from Judge Barry Feudale.

Service Law ("CPSL"), informed him that because Mr. Sandusky was affiliated with the Second Mile, an agent of the Centre County Children and Youth Services agency, the regional DPW office would assume the investigation. Mr. Lauro's supervisor, the next day, directed that a psychological exam be performed on Z.K. Mr. Lauro also interviewed Z.K.'s mother. The psychological exam was completed and turned over to Centre County CYS on May 20, 1998.

After an extensive investigation that included police surreptitiously eavesdropping on conversations between Mr. Sandusky and Z.K.'s mother, which were not recorded, the Commonwealth did not file charges. Pointedly, there were no criminal allegations to pursue. In fact, a psychologist, John Seasock, interviewed Z.K. for an hour regarding the incident and concluded that he found no indication of any type of child abuse. In derogation of the law, specifically the CPSL, despite the investigation revealing that Mr. Sandusky had done nothing illegal and any report of abuse was unfounded, the investigation report was not expunged in 1999 as was required. Indeed, while the DPW did expunge its record, the Penn State and State College police failed to expunge their records.

Z.K. continued to remain in contact with Mr. Sandusky into his adulthood,[2] even soliciting him for support to a mission trip to Mexico in 2010. Even at trial Z.K. did not accuse Mr. Sandusky of sexual abuse; however, having obtained a lawyer, he did now suddenly find that Mr. Sandusky's actions were inappropriate and implied that something may have occurred, but he simply did not remember it.[3]

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2 Z.K. as an adult sent a text message to Mr. Sandusky, stating, "I'm glad God has placed U in my life. Ur an awesome friend! Love ya!"

3 Harvard psychology professor, Richard McNally, has written, "The notion that the mind protects itself by repressing or dissociating memories of trauma is a piece of psychiatric folklore devoid of convincing empirical support." Richard McNally, *Remembering Trauma* (2005). Drs. Harrison Pope and James Hudson have similarly opined, "Traumatic events are memorable. Even years later, we can recall terrible and frightening experiences in vivid detail." Dr. Harrison

Over ten years later, following a disagreement with his mother regarding her insistence that he go with Mr. Sandusky rather than with his friends, Aaron Fisher, then fifteen, told his mother that Mr. Sandusky touched him inappropriately overtop his clothing. Aaron Fisher's mother contacted the Central Mountain High School principal and guidance counselor on November 18, 2008.[4] A witness testified at trial to hearing Aaron Fisher's mother proclaim that she would own Mr. Sandusky's house.[5] On November, 19, 2008, Aaron Fisher met with the principal and guidance counselor. He did not allege that Mr. Sandusky engaged in oral or anal sex. Although the principal later denied it, it was reported by a CYS employee that the principal had been skeptical of the allegation based on Aaron Fisher's reputation. Aaron Fisher himself indicated that school officials did not believe his initial vague account. Two other teachers would inform investigators that Aaron Fisher had a reputation of being a liar and untruthful.

Importantly, as detailed in the Moulton Report, Clinton County failed to follow the CPSL by failing to have in place an investigative team. ***See also*** 23 Pa.C.S. § 6365(c). The CPSL required an administrator, in this case the school principal, to report to the Department of Public Welfare. 23 Pa.C.S. § 6302. Law enforcement officials at that stage are not the investigating body; rather, it is the county protective services agency. ***See id.***; ***see also*** 23 Pa.C.S. 6362 ("The county agency shall be the sole civil agency responsible for receiving and investigating all

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Pope & Dr. James Hudson, Repressed Memories: Scientific Status, in *Modern Scientific Evidence: The Law and Science of Expert Testimony*, at 828 (David Faigman et al. ed., 2012). Other leading scholars have published works questioning and debunking the pseudoscientific theory of repressed memory. ***See*** Paul McHugh, *Try to Remember* (2008); Richard Ofshe and Ethan Watters, *Making Monsters* (1994); Elizabeth Loftus, *The Myth of Repressed Memory* (1994); Dr. Paul Simpson, *Second Thoughts* (1996).

4 Central Mountain High School is located in Clinton County, Pennsylvania.

5 Following the settlement with Penn State University, Aaron Fisher's mother purchased both a new home and three new high priced vehicles. Aaron Fisher also posted a picture of himself and his girlfriend rolling in cash.

reports of child abuse made pursuant to this chapter"). The investigating county agency is to determine if a report is founded or indicated. ***See*** 23 Pa.C.S. § 6338; ***see also*** 23 Pa.C.S. § 6343(a) (noting that the county agency is to investigate the report of abuse).

In the event that a school employee was involved and there was a report of sexual abuse or exploitation, the law required the principal to notify law enforcement and the appropriate district attorney. 23 Pa.C.S. 6353. Here, Aaron Fisher's initial disclosure did not involve claims of sexual abuse nor was Mr. Sandusky a school employee, although he volunteered as a coach. Law enforcement is to report the allegation to the administrative agency in the county charged with conducting an investigation, *i.e.*, the regional DPW office since the Second Mile was an agent of the Clinton County CYS. 55 Pa. Code § 3490.81 ("(When the suspected abuse has been committed by an agent of the county agency, **the regional staff** shall investigate the report under section 6362 of the CPSL (relating to responsibilities of county agency for child protective services) and this chapter. ... (c) **Regional staff** shall conduct the investigation regardless of the relationship of the agent to the subject child." (emphases added).

Rather than follow the law, which actually precluded Clinton County CYS from investigating the matter, on November 20, 2008, Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky. Again, without apparent statutory authority, Jessica Dershem, a twenty-five year old Clinton County caseworker interviewed Aaron Fisher for one hour. That interview was taped. Aaron Fisher did not disclose that sexual intercourse of any type occurred. Instead, Aaron Fisher stated that Mr. Sandusky cracked his back approximately thirty times. Ms. Dershem apparently reported to Mr. Rosamilia that Aaron Fisher was uncooperative because he did not actually disclose any sexual abuse. The pair then sent Aaron Fisher to Michael Gillum, a psychologist.

In her report, Ms. Dershem wrote that Mr. Sandusky was involved in ten back cracking episodes and she notified Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing. In that report she misstated that Aaron Fisher alleged Mr. Sandusky sexually abused or exploited him. Michael Gillum would acknowledge in his book with Aaron Fisher, *Silent No More*, that he wrote the report and provided it to Ms. Dershem.

Police then interviewed Aaron Fisher, specifically Trooper Joseph Cavanaugh and Joseph Akers. Also present was Ms. Dershem. Trooper Cavanaugh intentionally did not tape-record the interview because he believed that such a recording would aid a defense attorney. However, it is known that Aaron Fisher denied that Mr. Sandusky touched Aaron Fisher's genitalia and, Ms. Dershem, as detailed in *Silent No More*, reported to Mr. Gillum that Aaron Fisher denied that oral sex occurred. Aaron Fisher, nevertheless, continued to see Mr. Gillum, an apparent staunch believer in repressed memory therapy despite its questionable scientific veracity. Only through these therapy sessions did Aaron Fisher come to maintain that Mr. Sandusky had sexually abused him. As of December 12, 2008, Aaron Fisher still had yet to inform authorities that Mr. Sandusky had done anything criminal. In fact, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire. Trooper Cavanaugh's interviews with four additional students with ties to Mr. Sandusky revealed no sexual allegations.

Mr. Sandusky himself was questioned in January of 2009. This too, however, was in actual violation of the law. Importantly, Clinton County CYS was not the proper investigating body. However, Ms. Dershem informed Mr. Sandusky on January 2, 2009, that he was the subject of a report of suspected child abuse. Aaron Fisher had not at this time made any allegations relative to sexual misconduct. Without proper statutory authority, Ms. Dershem and

Clinton County CYS solicitor, Michael Angelelli, interviewed Mr. Sandusky. He acknowledged cracking Aaron Fisher's back, as well as hugging him and kissing him on the forehead the way a father does with a child. However, he adamantly denied that anything sexual had ever occurred. Nonetheless, Ms. Dershem, after a conference with service director Gerald Rosamalia and Angelelli, notified Childline. She also apparently misstated to police the next day that Mr. Sandusky had refused to answer questions when informing them of the interview.

Ultimately, Trooper Cavanaugh met with Clinton County District Attorney Michael Salisbury regarding the allegation of inappropriate touching. District Attorney Salisbury transferred the case to Centre County because the alleged conduct occurred in that county. Nevertheless, this procedure also failed to comply with the CPSL. Law enforcement and the Clinton County District Attorney were charged under the CPSL with transferring the matter to the Centre County CYS office, not the District Attorney's office. This would have resulted in the regional DPW office investigating the case. Instead, the Center County District Attorney had a conflict of interest based on his wife being the sister of the adopted daughter of Mr. Sandusky. Accordingly, he referred the case to the Office of Attorney General ("OAG"). The OAG assumed jurisdiction over the matter on March 18, 2009. Rather than pursue the case as a prosecution for sexual misconduct under the ordinary process of filing a criminal information, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009.[6] Another problem with the procedure was that the matter was submitted on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. Setting aside that that entity could not investigate the matter by law, a founded report could only

6 The initial state trooper assigned to the case after it went to the OAG, Timothy Lear, was removed from the case after he assaulted a former girlfriend.

exist where there had been a judicial determination that Aaron Fisher had been abused. 23 Pa.C.S § 6303.

Troopers would interview Frankie Probst, Frankie Aveni, and Matt Sandusky. All denied that Mr. Sandusky every abused them. Probst and Avenie did say that Mr. Sandusky would hug them or put his hand on their knees. Although only witnesses and their attorneys are generally permitted before a grand jury, along with a court stenographer, the prosecution team, and law enforcement involved in the investigation, 42 Pa.C.S. § 4549, Aaron Fisher's psychologistm Mr. Gillum, was permitted to attend the grand jury testimony in clear violation of the law. Mr. Gillum and the prosecutor, Jonelle Eshbach continued to coach Aaron Fisher after the first grand jury did not issue a presentment. In fact, Aaron Fisher testified twice before the 30th Investigating Grand Jury, without any result. He would later be permitted to read his testimony before the Thirty-Third Statewide Investigating Grand Jury. It is believed that Mr. Gillum drafted or aided in drafting that testimony.

By March 2010, Senior Deputy Attorney General Jonelle Eshbach circulated a draft grand jury presentment to her supervisors for review. Her supervisors expressed serious concern about the likelihood of a successful prosecution due to problems with Aaron Fisher's credibility, and the lack of other victims. On November 3, 2010, Centre County Assistant District Attorney Stacy Parks Miller received an anonymous email tip suggesting that investigators speak to Penn State assistant football coach Michael McQueary, as he "may have witnessed something involving Jerry Sandusky and a child that would be pertinent to the investigation." Moulton Report, at 153.

On December 14, 2010, Michael McQueary testified before the 30th Investigating Grand Jury. Mr. McQueary's testimony would be the subject of a materially false statement in the later

presentment Thereafter, the OAG issued subpoenas to Penn State head football Coach Joe Paterno, Athletic Director Timothy Curley, and Vice President Gary Schultz. In spite of believing Mr. McQueary's testimony, the OAG informed counsel for Penn State University, who also represented that she was representing Mr. Curley and Mr. Schultz, that Mr. Curley and Mr. Schultz were not targets of the investigation. This appears to have been deliberately misleading as Attorney Frank Fina later told then Supervising Grand Jury Judge Barry Feudale that they were looking into these high ranking University officials. ***Commonwealth v. Schultz***, 2016 WL 285506, at *28 n.8 (Pa. Super. 2016).

Although Mr. McQueary had testified, no additional witnesses were presented to the Thirtieth Statewide Investigating Grand Jury by the time its term expired in January 2011. On March 31, 2011, The Centre Daily Times and The Patriot-News published stories, written by Sara Ganim, describing leaked information from the grand jury investigation of Mr. Sandusky. Grand jury leaks are against the law and have resulted in the current Attorney General being charged criminally in an unrelated grand jury matter.

The unlawful leak of grand jury information resulted in Ronald Petrosky, a former janitor, reporting a hearsay statement from another individual that Mr. Sandusky sexually assaulted a child in a shower at Penn State University. That individual, James Calhoun, nonetheless, provided a tape recorded statement to police denying that Mr. Sandusky was involved. That tape was not played at trial and Mr. Calhoun did not testify due to alleged mental infirmity.[7]

7 Counsel did not attempt to interview Mr. Calhoun to ascertain the accuracy of this representation by the Commonwealth.

Also, following the unlawful leak of grand jury material,[8] Attorney Benjamin Andreozzi, a civil attorney, who advertises that he represents abused victims, contacted investigators regarding a new alleged victim. Mr. Andreozzi had been contacted by the father of B.S.H., an adult who had been highly involved with Mr. Sandusky and the Second Mile. Subsequent to the leaked information of the grand jury, a grand jury session was held on April 11, 2011. During this session, Chief Deputy Attorney General Frank Fina requested a secrecy order, prohibiting the grand jury witnesses from discussing the facts or substance of their testimony before the grand jury to anyone other than the witnesses' own attorneys. This order was prospective only, and did not apply to witnesses who previously testified before the grand jury.

It was also during this session that Aaron Fisher testified for the third time, as well as four other witnesses; notably D.S. D.S. denied that Mr. Sandusky had every touched or fondled him, but his testimony would change after he retained Attorney Andrew Shubin, who also would come to represent Allan Myers, the alleged victim seen by Michael McQueary. D.S. would testify at trial that he did not know the contents of his contingency fee agreement with Attorney Shubin. D.S.'s trial testimony would be significantly different than his original grand jury testimony as he claimed Mr. Sandusky touched his penis, nipples, blew on his stomach, and grabbed him in the shower. He asserted that based on counseling he was now remembering things that he had not remembered, *i.e.*, that he had repressed. His trial testimony also revealed that he and Z.K. had been in contact and discussed whether each were remembering anything due to counseling.

In an interview after Mr. Sandusky's conviction, D.S. acknowledged that before the news of the allegations broke he was really unaware of Mr. Sandusky's alleged abuse and could only

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8 To the extent the Commonwealth maintains that a grand jury witness could have lawfully provided the information, such an issue raises a genuine issue of material fact warranting an evidentiary hearing. Moreover, it is evident from the material that was disclosed and statements in his book, *Silent No More*, that Aaron Fisher did not disclose the information.

vaguely remember spending the night and Mr. Sandusky putting his hand on his leg while driving.

After his original police interview, D.S. contacted therapists for psychological assistance. Only after seeking therapy did D.S. come forward with more serious allegations and detailed memories. In his post-trial interview, he stated that his therapy sessions helped him to remember the alleged abuse. The interview suggests that D.S. had no independent recollection of sexual abuse until he sought therapy. D.S. also asserted that even after remembering some type of abuse on one occasion after going to a football game with Mr. Sandusky, he again forgot.

On May 19, 2011, Ronald Petrosky and B.S.H. (Victim 4) testified to the grand jury. *Id.* at 160. Mr. Petrosky's grand jury testimony, which relayed hearsay evidence, would be critically different than his trial testimony. Mr. Petrosky first told police that he recalled a fall 2000 shower incident in which another janitor, James Calhoun, told him that he saw Mr. Sandusky performing oral sex on a boy. In his grand jury testimony, Mr. Petrosky would maintain that he cleaned the assistant coaches' locker room showers before encountering Mr. Calhoun. After cleaning the showers, not a small task, he unhooked his hose, wound it up, and then saw Mr. Calhoun. Mr. Petrosky himself estimated it would take fifteen minutes before the chemical he used would take effect before he would spray the shower walls. Mr. Petrosky then observed Mr. Sandusky exit the building with a boy before seeing Mr. Calhoun. This amounts to no small delay and would have possibly created a hurdle to introducing the statement of Mr. Calhoun as an excited utterance since he would have seen the alleged abuse approximately thirty minutes earlier before Mr. Petrosky cleaned the showers.

At trial, Mr. Petrosky's story would change, coincidently to aid the Commonwealth's attempt to overcome the prohibition against an excited utterance being introduced, where it was

the only evidence of the crime. In this recollection, Mr. Petrosky waited for what he assumed was Mr. Sandusky and a boy to exit a shower in the staff locker room, not the assistant coaches' locker room. This was significant because the Commonwealth would argue that a course of conduct involving showers entitled them to use the hearsay statement since other victims alleged abuse occurred in that locker room. Mr. Petrosky submitted that he then returned to clean the shower only to encounter James Calhoun. According to his trial story, Mr. Petrosky took Mr. Calhoun to a meeting room, where Mr. Calhoun told approximately five other janitors that he had seen Mr. Sandusky lick a young boy's penis. Apparently, despite being right outside the shower area waiting to clean the shower, Mr. Petrosky heard nothing sexual transpire. Mr. Calhoun apparently, however, managed to continue to clean the toilets in the shower area while seeing the abuse. Mr. Calhoun, a Korean War vet, did not intervene. Of course, a taped statement by Mr. Calhoun existed in which he denied seeing Mr. Sandusky molest a child. Inexplicably, that evidence was not introduced by trial counsel.

The other witness to testify at the May 19, 2011 grand jury proceeding was B.S.H. B.S.H. had a troubled history, having stolen a car and been in drug rehab. At trial, one woman testified that B.S.H. was well known for being dishonest. B.S.H. would bring his three year old son and girlfriend over to the Sandusky house in 2010, a strange occurrence for someone abused by Mr. Sandusky. B.S.H. lived in the same apartment complex as J.S., another alleged victim discussed below, but would assert that he and J.S. had little contact and were not friends, in part because B.S.H. had bullied J.S. when they were younger.

B.S.H.'s father with whom he had little relationship, would call and tell him that he should retain an attorney after he had read the leaked Ganim story. B.S.H. then hired Benjamin Andreozzi, a sexual assault civil attorney. When police first asked to speak with B.S.H., he

declined and said he needed to speak to his lawyer. When police did interview B.S.H. his attorney was present. Police inadvertently recorded part of their interview, which demonstrates poor investigative techniques and suggestive interviewing. Part of the transcript of that interview is provided in the body of this petition. One officer asked a fellow trooper, while B.S.H. was not present, if they could tell B.S.H. that other kids had told them that sexual intercourse had occurred. That trooper responded that he had done that with all of the other alleged victims.

When B.S.H. returned, police informed him that other victims, about nine, had come forward and that what he was telling them was repeating almost word for word what others had already told them. Ignored was the possibility that the very similarity in the stories was the result of the suggestive questioning. Further, the representations by law enforcement were misleading. At that point, Aaron Fisher was the only person to say oral sex had occurred. Z.K. continued to deny any sexual assaults transpired and D.S. had said that he touched Mr. Sandusky's genitalia.

B.S.H. then told police that Mr. Sandusky had touched his genitals in a swimming pool and that shower soap battles became physical in a sexual way. After prodding by police, B.S.H. would make allegations involving oral sex. Trooper Scott Rossman, who was involved in the interview, would testify at trial that he did not see anything improper with the technique of suggesting to the interviewee that others had come forward and made similar statements. Trooper Rossman also improperly violated a sequestration order at trial by speaking with the other officer involved in the interview and then lied or misstated that on the stand.

B.S.H.'s testimony before the grand jury would be markedly different than his recorded interview. He claimed to have been touched in a swimming pool, abused at a golf resort, and that Mr. Sandusky would insert his penis into B.S.H.'s mouth during soap battle wrestling matches and ejaculate into B.S.H.'s mouth. B.S.H. also recounted, that when he was 15, he was

repeatedly sexually assaulted in a sauna on the Penn State campus. Additionally, he set forth that Mr. Sandusky purchased marijuana and cigarettes for him.

B.S.H.'s trial testimony would be largely inconsistent with his interview and grand jury testimony. By this time, he was now in therapy with Michael Gillum, Aaron Fisher's therapist. Mr. Gillum believed that B.S.H. had repressed alleged abuse by Mr. Sandusky. B.S.H. in his trial testimony now claimed that he performed oral sex on Mr. Sandusky approximately forty times and Mr. Sandusky had attempted anal sex with him in a shower. Additionally, he asserted that Mr. Sandusky and he would play basketball from 6 p.m. to 9 p.m. alone, at times that coincided with pre-season football and the actual season itself. B.S.H. would assert that he had spent years burying the abuse in his mind. B.S.H. also posited that he had been abused some fifty times in the shower in the Lasch Building, which required no key code and was an open facility.

Police interviewed M.K., another alleged victim, on June 7, 2011. M.K., as with countless other individuals, initially denied that any sexual improprieties occurred, saying only that he had showered once with Mr. Sandusky and that, like his uncle, Mr. Sandusky would put his hand on his knee. In a June 16, 2011 interview, M.K. stated that he took a shower with Mr. Sandusky but nothing sexual happened. Police conducted a search of Mr. Sandusky's home and computer on June 21, 2011. In the affidavit of probable cause, police indicated that evidence of child pornography might be found and that even deleted files on computers would be able to be recovered. No child pornography was discovered on Mr. Sandusky's computer or in his home.

M.K. changed his story on September 9, 2011. For the first time, M.K. stated that Mr. Sandusky reached around him from behind and grabbed M.K.'s penis and that Mr. Sandusky took M.K.'s hand and placed it on Mr. Sandusky's erect penis and moved it up and down. During his

grand jury testimony, M.K. contended that the incident occurred in 1998, but would change his story at trial to 2001 or 2002. Interestingly, M.K. was friends with D.S.

On July 1, 2011, police questioned J.S., who was identified as victim 3. J.S., in the initial interview, denied that anything untoward happened with him and Mr. Sandusky. Only after retaining Attorney Andrew Shubin did his story change. He testified before the grand jury on August 18, 2011, claiming that Mr. Sandusky had twice touched his penis through his shorts. His trial testimony would be different. He asserted that Mr. Sandusky touched him almost fifty times and washed his buttocks. J.S. admitted talking with his attorney before his trial testimony but could not remember what type of fee agreement he signed.

On November 3, 2011, the Grand Jury voted to approve a presentment recommending charges against Mr. Sandusky, Penn State Athletic Director Timothy Curley, and Vice President Gary Schultz. Mr. Sandusky surrendered to authorities, was arraigned, and released on bail on November 5, 2011.

Within forty-eight hours of Mr. Sandusky's arrest and preliminary arraignment, the Commonwealth charged Tim Curley and Gary Schultz with crimes, the Attorney General of Pennsylvania announced an investigation into Penn State University, and a groundswell of public outcry for Joe Paterno and Graham Spanier to be held accountable for the accusations against Mr. Sandusky began. ***See*** *Curley, Schultz Step Aside; Penn State Announces Safety Steps.* A copy of the State College.com article is attached at Appendix, at 398. On November 9, 2011, the Penn State University Board of Trustees fired Penn State legend Joe Paterno and President Graham Spanier, and the students rioted in State College. *See* Nate Schweber, *Penn State Students Clash With Police in Unrest After Announcement*, N.Y. Times, November 10, 2011. A

copy of the Schweber article is attached to the May 6, 2015 Amended Petition at Appendix, pg. 386.

On November 11, 2011, "several thousand students" held a candlelight vigil for Mr. Sandusky's alleged "victims." Bill Pennington, *100,000 Football Fans at Penn State Cheer, but the Mood Is Numb*, N.Y. Times, November 12, 2011. A copy of the Pennington article is attached to the May 6, 2015 Amended Petition at Appendix, at 390. Three days later, on November 14, 2011, Mr. Sandusky's trial counsel inexplicably and ineffectively advised him to sit for an interview with NBC Sports journalist Bob Costas, without any notice that he would be interviewed or preparation for any interview. Indeed, Mr. Sandusky was advised that Mr. Costas was only going to speak to trial counsel.

In addition, after Mr. Sandusky's arrest, during the upheaval at Penn State University, then-Governor Tom Corbett fanned the flames of the conflagration, attending his first meeting of the Penn State Board of Trustees to discuss whether Mr. Paterno should be fired by telephone. During the meeting, Corbett stated, "Remember the children. Remember that little boy in the shower." ***See*** Don Van Natta, Jr., *Fight On State*, ESPN The Magazine, April 16, 2012. A copy of the Van Natta article is attached at Appendix, at 371. Additionally, in February 2012, after Sandusky was charged but before he was tried, then Governor Corbett again went to the media making comments about the case. Specifically, in a February 8, 2012, interview with WJAC-TV, the Governor stated regarding the Penn State trustee meeting, "The only thing I said is that they have to remember the children." ***Id.*** In this case, the Governor of the fifth largest state in the country, and the former Attorney General of this state, tasked with the initial investigation, was making highly prejudicial comments regarding Mr. Sandusky to the media prior to the trial.

Governor Corbett was not alone. On November 11, 2011, only days after Mr. Sandusky's arrest, even President Barack Obama weighed in and publicly opined, calling the case "heartbreaking," stating:

> But I think it's a good time for us to do some soul searching — every institution, not just Penn State — about what our priorities are, and making sure that we understand that our first priority is protecting our kids, and we all have a responsibility -- we can't leave it to a system, we can't leave it to somebody else. Each of us have to take it upon ourselves to make sure that our kids have the love and support and protection that they deserve.

See David Nakamura, "Obama calls Penn State scandal 'heartbreaking,'" Washington Post, November 11, 2011. A copy of the Nakamura article is attached at Appendix, at 396.

On November 18, 2011, the NCAA announced an investigation into Penn State University's football and athletic programs, and indicated that severe sanctions may result, up to and including the "death penalty" — all before the NCAA began the investigation. *See* Michael Sanserino, *NCAA Launches PSU Inquiry*, Pittsburgh Post-Gazette, November 19, 2011.[9] A copy of the Sanserino article is attached to the May 6, 2015 Amended Petition at Appendix, pg. 394.

Attorney General Linda Kelly and Pennsylvania State Police Commissioner Frank Noonan issued statements concerning the Sandusky investigation, including a request that anyone with information about the case should call the Office of Attorney General or Pennsylvania State Police. Less than a month later a grand jury session on December 5, 2011 brought about testimony from two new purported victims, S.P. and R.R.

S.P.'s mother had contacted her son's high school and asked a person to call the hotline referenced by Linda Kelly. Police soon thereafter interviewed him. S.P. testified before a grand

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9 *Available at* http://www.post-gazette.com/sports/psu/2011/11/19/NCAA-launches-PSU *inquiry/stories/201111190153.*

jury on November 9, 2011. He maintained that Mr. Sandusky essentially kept him in the Sandusky's basement and forced him to perform oral sex and that Mr. Sandusky attempted to anally rape him approximately sixteen times. According to S.P., Mrs. Sandusky was home on these occasions but despite his screams never came to his aid. S.P. described Mr. Sandusky as extremely aggressive and that no other kids were ever present. At trial, S.P. would claim that Mr. Sandusky actually withheld food from him for entire weekends. Remarkably, before S.P. made these stunning allegations, Mr. Sandusky had asked him to serve as a character witness. As with most of the other victims, S.P. would seek extensive remuneration from Penn State University.

R.R. also came forward after the initial charges. He had known J.S. and was his roommate at the Second Mile summer camp. R.R. had been jailed for assaulting a man and served twenty-one months in jail in 2009. He retained Attorney Andrew Shubin, who, as mentioned, represented several other victims that would testify. Attorney Shubin also represented Allan Myers, alleged Victim 2, the infamous McQueary shower child.

In his first interview with law enforcement, R.R. maintained that Mr. Sandusky groped him in a swimming pool. He added to that story in a second interview, claiming that he performed oral sex on Mr. Sandusky in a silver convertible, which Mr. Sandusky never owned. In his later trial testimony he would set forth that Mr. Sandusky performed oral sex on him in the Sandusky's basement. Unlike the other identified victims, R.R. was unknown to Mrs. Sandusky and was not close to the family before the allegations.

On December 7, 2011, the Grand Jury voted to approve a new presentment describing S.P. and R.R. as victims. ***See*** May 6, 2015 Amended Petition, Appendix, at 300. The December 7, 2011, presentment incorporated the previously identified victims, and recommended charges for involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, attempt

to commit indecent assault, unlawful contact with a minor, corruption of minors, and endangering welfare of children. That same day, Mr. Sandusky was arrested on the additional charges in Criminal Information No. CP-14-CR-2421-2011. Mr. Sandusky posted bail and was released on December 8, 2011. ***Id.*** On December 13, 2011, Mr. Amendola waived Mr. Sandusky's preliminary hearing, and the charges were held for the Centre County Court of Common Pleas.

Mr. Sandusky was formally arraigned on the instant charges on January 11, 2012. The Commonwealth produced discovery to Mr. Sandusky on January 17, and 23, March 7, 12, & 27, April 27, May 4, 9, 14, 16, 18, 24, and 31, and June 4, 8, and 15, 2012. On January 22, 2012 — only eleven days after Mr. Sandusky's formal arraignment, Joe Paterno died from lung cancer. Media reports reporting Paterno's death placed the blame for Mr. Paterno's downfall squarely at the feet of Jerry Sandusky. ***See e.g.,*** Bob Flounders, *Joe Paterno is Dead: College Football's Most Successful Coach Leaves an Unmatched Legacy Forever Shadowed by his Life's Astonishing Final Chapter*, Harrisburg Patriot News, January 22, 2012; ***see also,*** Alice Park, "'Broken Heart'? What Really Killed Joe Paterno," Time, January 25, 2012. A copy of the Park article is attached to the May 6, 2015 Amended Petition, Appendix, at 400, and a copy of the Bennett and Bernstein article is attached at Appendix, at 402.

Despite the overwhelming negative pre-trial publicity in Centre County, trial counsel, without conducting any investigation into potential jury bias, did not move to change venue or venire or request that the court delay the trial until the pre-trial publicity sufficiently cooled. Jury selection occurred on June 5 and 6, 2012, 146 days from Mr. Sandusky's formal arraignment on January 11, 2012. The Honorable John M. Cleland, Senior Judge, presided at the jury trial of this matter. The trial court questioned every juror by presupposing that the prospective juror had

extensive knowledge of the case from newspaper, television, radio, and the internet. Trial counsel, however, did not query these jurors as to the specific information that they had heard as a result of the media blitz. During *voir dire*, two reporters were actually present with the juror, court, and attorneys, potentially leading to a chilling effect on how jurors would answer traditional questions regarding whether they could be fair.

At the time of jury selection the court advised trial counsel that the trial would be three weeks, providing ample opportunity to continue to review discovery. The Commonwealth estimated it would require two weeks to put in its case. Trial commenced on June 11, 2012 – a mere 152 days from the date Mr. Sandusky was formally arraigned on January 11, 2012.[10] When trial commenced, the specter of the NCAA "death penalty" continued to hang over the Penn State University football program. At trial, eight alleged victims testified. Additionally, the Commonwealth presented evidence relating to two accusers who were not identified to the jury. Mr. Sandusky was convicted, after jury trial, on June 22, 2012, of 45 of 48 charges against him related to allegations that he sexually abused ten men (during their minority), eight of whom were identified at trial.[11] This verdict came in the wake of grand jury leaks, a presentment that falsely set forth that Mike McQueary observed Mr. Sandusky sodomize a child, the firing of Penn State icon Joe Paterno and his subsequent tainted reputation, his death just days after Mr.

10 A search of public dockets in Centre County at this time would demonstrate that this matter went to trial far quicker than ordinary matters. Testimony at an evidentiary hearing would certainly confirm this fact. Furthermore, this case went to trial much faster than other high profile cases that involved grand jury presentments. For example, Timothy Curley, Gary Schultz, Graham Spanier, and Kathleen Kane.

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

Sandusky's formal arraignment, and a media frenzy that encouraged an impassioned community to rally around the alleged victims.

Mr. Sandusky filed an interlocutory appeal based on the collateral order doctrine, prior to sentencing, to challenge a protective order regarding the leak of discovery materials to the media; specifically, a tape-recorded interview of Matt Sandusky by police that occurred during Mr. Sandusky's trial. Somewhat shockingly, Mr. Amendola and Mr. Rominger both acknowledged during proceedings involving the leak that they had not reviewed Matt Sandusky's earlier grand jury testimony. This again belies the notion that Mr. Amendola adequately reviewed discovery.

In the meantime, Judge Cleland sentenced Mr. Sandusky on October 9, 2012, to an aggregate sentence of 30 to 60 years' imprisonment, with credit for 112 days served on the aforementioned counts.[12] On October 18, 2012, counsel filed timely post-sentence motions on Mr. Sandusky's behalf. Specifically, the motions included a motion in arrest of judgment and/or for a new trial, a motion for reconsideration, a motion for modification of sentence, motion for hearing on court ordered restitution and court costs, motion for leave of court to file amended post-sentence motion *nunc pro tunc*, and a reservation for ineffective assistance of counsel claims.

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12 Notably, in the trial court's sentencing statement, the court stated:

> I state for the record, however, that the convictions regarding Victim number 8 – Counts 36 through 40 at 2422-2011 -- are specifically intended to run concurrently, and if those convictions should happen to be reversed on appeal it will make no difference to the sentence structure as a whole and will not require a remand for resentencing.

See Judge Cleland's Sentencing Statement, filed October 11, 2012, at p. 6. Victim 8 was the unidentified shower victim from Mr. Petrosky's testimony.

On January 30, 2013, the trial court denied Mr. Sandusky's post-sentence motions. Mr. Sandusky sought reversal of his convictions and the judgment of sentence on direct appeal to the Superior Court on February 21, 2013, by timely filing a notice of appeal. The Superior Court heard oral argument on September 17, 2013. In his direct appeal, Mr. Sandusky raised the following claims:

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

See Sandusky Direct Appeal Brief, 6/20/13, at 14.

On October 2, 2013, a mere fifteen days after oral argument, the Pennsylvania Superior Court affirmed all of Mr. Sandusky's convictions. ***See Commonwealth v. Sandusky***, 77 A.3d 663 (Pa. Super. 2013).[13] Thereafter, Mr. Sandusky filed a petition for allowance of appeal with

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13 In light of the extensive record, it appears that the panel had decided the case prior to oral argument or the author had at least circulated a proposed decision in advance.

the Pennsylvania Supreme Court. The Supreme Court denied Mr. Sandusky's petition for allowance of appeal on April 2, 2014. ***See Commonwealth v. Sandusky***, 81 A.3d 77 (Pa. 2014). Mr. Sandusky did not seek review with the United States Supreme Court. He is currently incarcerated, serving the sentence imposed at State Correctional Institute-Greene, 169 Progress Drive, Waynesburg, PA 15370.

Under 42 Pa.C.S. § 9545(b)(3), Mr. Sandusky's judgment of sentence became final on July 1, 2014, (upon the expiration of the 90-day period for Mr. Sandusky to seek a writ of *certiorari* from the Supreme Court of the United States). Therefore, Mr. Sandusky's original PCRA petition was timely filed on April 2, 2015.[14] Mr. Sandusky filed an amended petition on May 6, 2015. The Commonwealth filed a response on September 1, 2015. This supplemental petition followed with permission of the PCRA court. ***See*** Pa.R.Crim.P. 905.

Mr. Sandusky now requests an evidentiary hearing pursuant to Pa.R.Crim.P. 908 to establish that he is entitled to a new trial, and/or dismissal of the charges against him and raises the following issues in support thereof.

ISSUES

Allan Myers and the Mythical Unknown McQueary Victim: Pgs. 33-44

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

2. Mr. Sandusky is entitled to an evidentiary hearing and a new trial based on after-discovered evidence in the nature of a recantation statement by Allan Myers, contradicting Mr. McQueary's testimony at trial.

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

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

4. Trial counsel were ineffective in failing to call Allan Myers to the stand or using Mr. Myers prior statement to police that Mr. Sandusky did not molest him in the 2001 shower incident to impeach Mr. McQueary.

The Polluted Charging Process: Pgs. 44-65

5. Trial counsel were ineffective for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law and not seeking to quash the grand jury presentment based on the grand jury lacking subject matter jurisdiction.

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

7. The Supervising Judge of the Grand Jury was unfairly biased and the Commonwealth acted in concert to deprive Mr. Sandusky of relevant exculpatory evidence under ***Brady v. Maryland***, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The Flawed Jury Selection Process: Pgs. 65-80

8. Trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or continuance was warranted.

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

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

Who Needs a Pre-Trial and Trial Strategy? Maybe They Were Telling the Truth—Trial Counsel Admit They Cannot Adequately Represent their Client: Pgs. 80-92

11. Trial counsel were ineffective in waiving Mr. Sandusky's preliminary hearing and failing to use that proceeding for both discovery and to cross-examine the witnesses who had given numerous prior inconsistent statements.

12. Trial counsel were ineffective in failing to interview the victims, other than Allan Myers, as well as Mr. McQueary, Mr. Petrosky, and Mr. Calhoun.

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

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

The Repressed Memory Myth: Pgs. 92-105

15. The Commonwealth violated ***Brady*** by failing to disclose material impeachment evidence based on the fact that numerous victims not limited to Aaron Fisher, D.S., B.S.H. and J.S. were undergoing repressed memory therapy and, due to patient-doctor privilege, trial counsel could not have learned this information from any other source until trial and the Commonwealth was aware of that information.

16. Mr. Sandusky has after-discovered evidence that Aaron Fisher, D.S., and Matt Sandusky had no independent recollection of the crimes alleged outside of receiving repressed memory therapy, which if presented at trial would have led to a reasonable probability that the outcome of the trial would have been different.

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

Spoon Feeding the Accusers and their Attorneys: Pgs. 105-114

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

Phantom Victim #8 and the Calhoun Affair: Pgs. 114-123

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

20. Trial counsel were ineffective for failing to argue that under Pa.R.E. 806, Mr. Sandusky had the right to cross-examine James Calhoun about the excited utterance introduced through Mr. Petrosky.

21. Appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony, relative to Mr. Calhoun's hearsay statement, was inadmissible as an excited

utterance as there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim.

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

23. Trial counsel and Direct Appellate Counsel were ineffective for failing to appeal Mr. Sandusky's convictions relating to Victim #8 as lacking sufficient evidence.

Amendola Opens and Seals Mr. Sandusky's Fate: Pgs. 123-125

24. Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky.

What Right to Remain Silent?: Pgs. 125-133

25. Trial counsel were ineffective by not seeking a mistrial after the prosecutor improperly made comments based on Mr. Sandusky's silence.

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

The Trio that Still Have Not Been Tried: Pgs. 133-135

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

The Commonwealth's Faux Expert and Trial Counsel's Decision to Call an Expert: Pgs. 135-140

28. Trial counsel were ineffective for failing to object to improper opinion testimony by an unqualified expert.

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

Why Didn't He Testify?: Pgs. 140-146

30. Mr. Amendola was ineffective for promising the jury that Mr. Sandusky would testify at trial and not calling him.

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

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

Instructional Error: Pgs. 146-148

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

Tallying Up the Prejudice--Cumulative Error and Guilt by Reason of Ineffectiveness: Pgs. 148-153

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

LEGAL STANDARD

The Pennsylvania Post Conviction Relief Act ("PCRA") establishes an individual's right to relief in section 9543 of the Act. In order to be eligible for relief, a petitioner must be convicted of a Pennsylvania crime and be serving his sentence at the time relief is granted. 42 Pa.C.S. § 9543(a)(1)-(2). Relevant hereto, the PCRA statute provides that an individual is entitled to relief if his conviction or sentence was the result of a federal or state constitutional violation that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i).[15] Such violations include but are not limited to the ineffective assistance of counsel. 42 Pa.C.S. § 9543(a)(2)(ii). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the

15 The word "innocence" in the statute is superfluous as defendants found innocent cannot be retried and have no need to seek PCRA relief.

errors of counsel **cannot be shown by a preponderance of the evidence** to have determined the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) (emphasis added).[16]

In addition, a person is entitled to PCRA relief if exculpatory evidence that was unavailable at trial becomes available and "would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S. § 9543(a)(2)(vi). Further, the issues cannot have been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). Mr. Sandusky contends that his convictions resulted from a violation of the Constitution of this Commonwealth and the Constitution of the United States under § 9543(a)(2)(i), and the ineffective assistance of counsel under § 9543(a)(2)(ii), and the availability of after-discovered evidence that became available after trial and there is a reasonable probability that it would have changed the outcome of trial.

Under section 9546 of the PCRA, if this Court rules in Mr. Sandusky's favor, it "shall order appropriate relief and issue supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper." 42 Pa.C.S. § 9546. Accordingly, Mr. Sandusky seeks an order vacating his convictions, retrial, and/or discharge or dismissal of the charges.

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**

16 The Commonwealth incorrectly maintained in original answer that a petitioner must show "the outcome of the proceedings would have been different." Commonwealth's Original Response, at 6. The proper test requires a reasonable probability that the outcome would be different. The Commonwealth's position is inconsistent with ***Strickland*** and erroneous. Insofar as certain cases in Pennsylvania have imprecisely repeated the ***Strickland*** standard, it is beyond cavil that a petitioner is not required to demonstrate certainty in the change of the outcome of the proceeding.

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."); s***ee 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.

Therefore, Mr. Sandusky requests this Court to schedule a hearing on the instant petition to develop the factual record and elicit testimony from trial counsel and direct appellate counsel to explain their failure to act on numerous instances that would warrant relief, as well as to present the testimony of additional witnesses. Additionally, should this Court grant a hearing, Mr. Sandusky requests leave of court to submit a post-hearing brief based on the evidence elicited at the PCRA hearing.[17]

The majority of Mr. Sandusky's claims leveled below and in his prior petitions relate to the ineffective assistance of counsel. To sustain such a claim, a petitioner must demonstrate: (1) The underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Spotz***, 896 A.2d 1191, 1209-10 (Pa. 2006). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" ***Commonwealth v. Stewart***, 84 A.3d 701, 707 (Pa. Super. 2013) (*en banc*). "[*T*]*he 'reasonable probability' test is not a 'stringent one*[.]'" ***Id.*** at 715 (citing ***Commonwealth v. Rathfon***, 899 A.2d 365, 370 (Pa. Super. 2006) (emphasis in original), and ***Strickland***, ***supra*** at 694).

A claim has arguable merit when the facts upon which it are based, if true, could entitle the petitioner to relief. ***Stewart***, ***supra***. Ordinarily, "where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis to effectuate his client's interests." ***Commonwealth v. Colavita***, 993 A.2d 874, 884 (Pa. 2010) (internal citations and quotations omitted). However, as the Pennsylvania Supreme Court noted in ***Colavita***, "A finding that a chosen strategy lacked a

17 Mr. Sandusky notes that the PCRA court has provided in a telephone conference that it would grant oral argument on why an evidentiary hearing is warranted in this matter.

reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Colavita, supra*** at 887. The converse of the ***Colavita*** ruling is that a chosen strategy can be proven to have lacked a reasonable basis if a petitioner establishes that an alternative that trial counsel failed to pursue did, in fact, offer a potential for success substantially greater than the course that trial counsel pursued. ***Colavita, supra.***

Moreover, while the general rule is that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually," ***Commonwealth v. Washington***, 927 A.2d 586, 617 (Pa. 2007) (internal quotations and citations omitted), the Pennsylvania Supreme Court has recognized that "if multiple instances of deficient performance are found, the assessment of prejudice may be premised upon cumulation." ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). In such circumstances, the court considers "each specific lapse as pertaining to a single, overarching ineffectiveness claim based on trial counsel's failure to adequately investigate and prepare for trial." ***Id.*** Thus, so long as the petitioner's claims have arguable merit, the PCRA court must consider the issues together in determining actual prejudice. ***See id.***

Additionally, even if an underlying claim was previously litigated, it is proper to present any claims for ineffective assistance of counsel related to those claims. ***See Commonwealth v. Collins***, 888 A.2d 564, 573 (Pa. 2005) (ineffectiveness claim is distinct from the underlying issue being raised). Finally, where the error violated a defendant's constitutional rights, the claim may merit relief even where the claim does not directly implicate the adjudication of guilt or innocence. ***See Commonwealth v. Hackett***, 956 A.2d 978 (Pa. 2008); ***Commonwealth v. Judge***, 916 A.2d 511 (Pa. 2007).

ARGUMENT

Allan Myers and the Mythical Unknown McQueary Victim:

Contrary to media reports and the prosecution's own closing summation, the person viewed by Michael McQueary in the shower with Mr. Sandusky was neither unknown nor a ten-year old. The Commonwealth knew the identity of that victim: Allan Myers. However, the Commonwealth intentionally elected not to present him; indeed, one agent had expressed the belief that Mr. Myers attorney, Andrew Shubin, was behind a statement made by Mr. Myers in which he changed his steadfast denial that wrongdoing occurred to stating that Mr. Sandusky had abused him. Mr. Myers, both before and after trial, however, has maintained that Mr. Sandusky did not sexually abuse him in the shower.

1. Trial counsel was ineffective in not objecting to prosecutorial misconduct that occurred during the closing statement when the prosecutor falsely stated that the 2001 shower victim was unknown.[18]

In addition to his improper commentary on Mr. Sandusky's exercise of his right not to testify at trial, the prosecuting attorney made a blatantly false statement to the jury in his closing argument. During the prosecutor's closing argument, he stated the following:

> I don't want to tug at your heart strings. I want to remind you of what the substance of this case is about, because it's what happened to those boys.
>
> You know what? Not just those boys, **to others unknown to us, to others presently known to God but not to us**, but we know what the defendant did to them because adults saw them and adults told you about them.

N.T., 6/21/12, at 111. This statement was a lie, as both the prosecution and defense well knew, *see* Attachment A, Rominger Affidavit, that Victim #2 was an individual whose name was Allan

18 This position was included in Mr. Sandusky's prior petition at paragraphs 169-204.

Myers. The history related to Victim #2, Allan C. Myers, was also known to the prosecution and the defense in this case. A brief summary of that history is necessary to explain how the statement made by the prosecution was patently false and why this misrepresentation was so significant.

On May 6, 2011, Allan Myers submitted a letter to a publication, see May 6, 2015 Amended Petition Appendix, at 432, wherein he stated the following in relevant part:

> I am one of those many Second Mile kids who became a part of Jerry's "family." He has been a best friend, tutor, workout mentor and more. We've worked together, competed together, travelled together and laughed together. I lived with Jerry and Dottie for three months. Jerry's been there for me for 13 years and stood beside me at my senior parent's football night.
>
> I drove 12 hours to attend his mom's funeral. I don't know what I would have done without him

Prior to the trial, Mr. Sandusky engaged an investigator, Curtis Everhart, who interviewed Allan Myers about the allegations related to Mr. Sandusky. Subsequent to the interview, Curtis Everhart reduced the information received by Mr. Myers to a written summary. A copy of this summary was attached as part of the Appendix to the May 6, 2015 Amended Petition at 433. As stated in the summary of the interview:

> A. The interview then began to focus on specific questions regarding Jerry's conduct with Myers. I asked the specific question: "Did Jerry ever touch you in a manner that you felt to be improper, or caused you to feel concern about his invading your personal space?" Myers answered with a very pronounced "Never, ever, did anything like that occur."
>
> B. Myers stated, "Never in my life while with Jerry did I ever feel uncomfortable or violated. I think of Jerry as the Father I never had."
>
> C. "I invited Jerry and Dottie to my wedding. Why would I ask Jerry my father figure at senior night, ask Jerry and Dottie to

be at my wedding, and the school asked me to ask Jerry to speak at my graduation, which he did, if there was a problem?"

D. At this point I went into very specific questions regarding Myers and Jerry at the PSU complex.

E. I asked Myers about a specific time period in 2002 when he would work out with Jerry. Myers stated it would have been the night that was described as alleged Victim Number Two (2) in the grand jury report. The day was March 1, 2002, I am very positive."[19]

F. Myers stated he and Jerry had just finished a workout and went into the shower area to shower and leave. "I would usually work out one or two days a week, but this particular night is very clear in my mind. We were in the shower and Jerry and I were slapping towels at each other trying to sting each other. I would slap the walls and would slide on the shower floor, which I am sure you could have heard from the wooden locker area. While we were engaged in fun as I described, I heard the sound of a wooden locker close, a sound I have heard before. I never saw who closed the locker. The grand jury report says Coach McQueary said he observed Jerry and I engaged in sexual activity. This is not the truth and McQueary is not telling the truth. Nothing occurred that night in the shower."

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

H. I asked Myers, "Did PSU officials ever contact you?" Myers said, "Never. The next contact I had was when PSP troopers interviewed me regarding the Sandusky case." Myers

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19 This date, referenced originally by the prosecution based on Mr. McQueary's unclear recollection of the date, was incorrect.

> again stated, "At no time that night, March 1, 2002, did Jerry sexually assault me with anal or oral intercourse, nor did I perform such on Jerry. This is wrong not to tell the truth." Myers said again, "I am alleged Victim Number Two (2) on the grand jury report as the events described match that night in exact details except that Jerry never sexually assaulted me. I would be very sure if something like that happened and I would have called the police. What McQueary said he observed is wrong. I can't understand why this was said. It is not the truth."
>
> I. Myers described, "I told PSP about numerous trips I would take with Jerry and nothing ever happened except Jerry putting his right hand on my left knee. I described that I would stay at Jerry's home, sometimes have meals, sometimes stay overnight. I would shower separate from Jerry at this home. I felt very uncomfortable with the PSP interview process as they would try to put words in my mouth, take my statement out of context. The PSP investigators were clearly angry and upset when I would not say what they wanted to hear. My final words to the PSP were, "I will never have anything bad to say about Jerry."

On September 20, 2011, Corporal Joseph Leiter and Trooper James Ellis interviewed Allan Myers whereby Mr. Myers indicated that Mr. Sandusky never did anything to him that was inappropriate and never did anything to make Mr. Myers feel uncomfortable, thus confirming his initial interview with Mr. Curtis Everhart. A copy of a Pennsylvania State Police Report pages 154-155, dated September 22, 2011 and signed by Corporal Joseph Leiter was attached to the May 6, 2015 Appendix, at 436.

Inspector Corricelli interviewed Allan Myers, on February 28, 2012, regarding his relationship with Mr. Sandusky. There was no mention of inappropriate contact with Mr. Sandusky. On March 8, 2012, Inspector Corricelli again interviewed Mr. Myers. On this occasion, Mr. Myers related that he was ready to discuss his alleged sexual abuse. He further alleged that he was abused on at least three trips he took with Mr. Sandusky outside of Pennsylvania.

On March 16, 2012, Inspector Corricelli interviewed Mr. Myers regarding the allegations Mr. Myers raised in his March 8, 2012 interview. Mr. Myers inconsistently indicated that the only time where there was sexual contact by Mr. Sandusky occurred at the Lasch Building on the Pennsylvania State University campus. Mr. Myers estimated sexual contact occurred ten or so times, culminating in 2002 when Michael McQueary was present. In March of 2012, three months before the trial in this case, trial counsel Joseph Amendola was informed by a private attorney that he, the private attorney, was now representing Allan C. Myers in a claim against Penn State.

The aforementioned private attorney attempted to have law enforcement interview Allan C. Myers as a victim but insisted that he, the private attorney, be present for any such interview. Trial counsel Karl Rominger was informed by Attorney Frank Fina that in order to keep law enforcement officers from interviewing Allan Myers outside of this attorney's presence, the private attorney secreted Mr. Myers in an undisclosed location so that he was unable to be contacted by law enforcement officials. The prosecution suggested that private counsel was attempting to tamper with the witness. An email from an investigator, Agent Sassano, reflected that he believed that Mr. Myers attorney, Andrew Shubin, had written allegations against Mr. Sandusky. Although trial counsel was fully aware of this lawyer's activities, though not that email, there was no attempt to institute an investigation into the attorney's conduct.

The foregoing scenario, which raises genuine issues of fact, placed the Commonwealth in an awkward position in that if Mr. Myers was called as a witness there was a substantial risk of undermining the testimony of a star witness, Michael McQueary. If the Commonwealth did not call the witness, the jury would be left to surmise why the witness had not been called. The prosecution resolved this dilemma by misleading the jury and suggesting that this witness was

"known to God but not to us". In telling the jury that Victim #2 was "unknown to us...known to God but not to us," the prosecutor violated his duty to limit his comments to the evidence and the fair inferences drawn therefrom. ***Commonwealth v. Joyner***, 365 A.2d 1233, 1236 (Pa. 1976). Indeed, the Supreme Court has recognized, "In advocating the cause for this Commonwealth, prosecutors are to seek justice, not only convictions." ***Commonwealth v. Cherry***, 378 A.2d 800, 803 (Pa. 1977).

Finally, Rule 3.3 of the Pennsylvania Rules of Professional Conduct states "A lawyer shall not knowingly ... make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Pa.R.P.C. 3.3(a)(1). The American Bar Association Minimum Standards of Criminal Justice provide:

> Section 3-2.8 – Relations with the Courts and Bar
>
> (a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.

In the present case, by advocating to the jury that they should convict Defendant based on victims known only "to God", the prosecutor exceeded the bounds of permissible argument, and indeed, made a blatant misrepresentation to the jury. By making this statement purporting to have no knowledge about the identity of Victim #2, the Commonwealth violated its sacred duty of candor to the tribunal by making a materially false statement of fact to the jury. When he made a materially false representation to the jury, the prosecutor committed prosecutorial misconduct and violated Mr. Sandusky's right to due process and a fair trial. Inexplicably, trial counsel did not object to this statement or move for a mistrial based on prosecutorial misconduct. Trial counsel had no reasonable basis for failing to object to this statement, given its evident falsity. Moreover, trial counsel had no reasonable basis for failing to object to this statement or

demand a mistrial, since the prosecution was asking the jury to consider the likelihood that Mr. Sandusky committed criminal acts on unknown victims. Had trial counsel objected and demanded a mistrial, the outcome of the proceedings would likely have been different, as Mr. Sandusky should have received a new trial, and at the very least, a cautionary instruction would have issued. Accordingly, trial counsel was ineffective for failing to object to this wholly improper statement, and Mr. Sandusky is entitled to a new trial.

2. Mr. Sandusky is entitled to an evidentiary hearing and a new trial based on after-discovered evidence in the nature of a recantation statement by Allan Myers, contradicting Mr. McQueary's testimony at trial and in the alternative trial counsel was ineffective in failing to ascertain such a recantation statement.[20]

Subsequent to the trial in this case, an investigator, Ken Cummings, located Allan Myers and interviewed him concerning whether or not his original statement made to Curtis Everhart was true. Ken Cummings indicated that Allan Myers reaffirmed the original statement given to Curtis Everhart that no abuse on the part of Mr. Sandusky had occurred.

The law on after-discovered evidence in Pennsylvania goes back until at least 1819. In ***Moore v. Philadelphia***, 5 Serg. & Rawle 41 (Pa. 1819), the High Court opined that to be entitled to a new trial based on after-discovered evidence a party must show: "1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to want of due diligence, that it did not come sooner; and 3d, that it would probably produce a different verdict, if a new trial were granted." In ***Commonwealth v. Flanagan***, 7 Watts & Serg. 415 (Pa. 1844), the Supreme Court also reasoned that the after-discovered evidence, testimony in that case, must not be solely for the purpose of impeaching a witness that testified but must go to the merits of the case. More recently, the Superior Court has posited that a petitioner must demonstrate that the evidence "(1)

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20 This claim is new, although the facts in support of the issue were advanced in the prior petition.

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

Where evidence contradicts factual testimony as to a material issue in question, it is not considered as being used solely for impeachment purposes. ***See People ex rel. Oelricks v. Superior Court of City of New York***, 10 Wend. 285, 292 (1833) (evidence must go to the merits of the case and not solely to impeach the character of a witness); ***Commonwealth v. Mosteller***, 284 A.2d 786 (Pa. 1971) (after-discovered evidence in the nature of a recantation by a child victim entitled defendant to relief); ***Commonwealth v. Krick***, 67 A.2d 746 (Pa. Super. 1949).

In this respect, the impeachment aspect of the after-discovered evidence test has been called into question by a series of secondary opinions from the Pennsylvania Superior Court and does not apply to ***Brady*** evidence. ***Commonwealth v. Choice***, 830 A.2d 1005 (Pa. Super. 2003 (Klein, J., dissenting); ***Commonwealth v. Perrin***, 59 A.3d 663 (Pa. Super. 2013) (Wecht, J., concurring); ***Commonwealth v. Foreman***, 55 A.3d 532 (Pa. Super. 2012) (Wecht, J., concurring). Further, a study of how the after-discovered evidence test came about reveals that the impeachment aspect of the test related to impeaching the character of a witness.

In ***Flanagan, supra***, the Pennsylvania Supreme Court first articulated the impeachment aspect of the after-discovered evidence test in criminal cases. ***Flanagan*** relied on ***Oelricks, supra***. That decision provided:

> With respect to granting *new trials on the ground of newly discovered testimony,* there are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative. 4

> *Johns. R.* 425. 5 ***id.*** 248. It cannot be denied in this case that the testimony offered was material to sustain the point of defence; and that it is not liable to the objection that it goes to impeach the plaintiff's witness. Russell says nothing about the character of the witness Heckscher, but contradicts the fact sworn to by him.

Id. at 292 (italics in original).

While factual testimony that contradicts the testimony of a witness may be impeachment evidence, it is not evidence that impeaches the character of a witness nor is it always evidence that is used SOLELY to impeach a witness. The earlier New York case cited therein reasoned, "A new trial is not to be granted, merely on the discovery of new evidence, which would impeach the character of a witness at the trial. There would be no end of new trials on that ground." ***Shumway v. Fowler***, 4 Johns. 425 (N.Y.Sup.1809). Accordingly, the historical antecedents of the after-discovered evidence test demonstrate that the impeachment evidence referred to by the early courts was in reference to impeaching the character of a witness or impeachment as to non-material facts.

Phrased differently, if the evidence contradicted factual testimony as to a material issue, it was not considered as being used solely for impeachment purposes. ***See Oelricks, supra.*** This nuance has been applied in Pennsylvania in ***Mosteller, supra*** and ***Krick, supra.*** The alleged after-discovered evidence in those matters involved recantation from a victim. The testimony in those cases would have impeached the victim's earlier testimony, but also was material factual testimony that contradicted facts sworn by that person and was exculpatory in nature. Similarly, in this case, the evidence would not solely be used for impeachment purposes as it is material exculpatory evidence.

Here, Mr. Myers recantation could not have been obtained prior to the conclusion of trial based on his civil attorney's secreting of him and his reluctance to state the truth of Mr. Sandusky's innocence regarding the alleged McQueary shower incident. In the alternative, trial

counsel would be ineffective for not interviewing Mr. Myers, and obtaining an exculpatory statement. The recantation by Mr. Myers also is not cumulative of any evidence since trial counsel declined to present any evidence of Mr. Myers other statements denying the allegations made by Mr. McQueary. Further, while the evidence would be used to impeach Mr. McQueary, that would not be its sole purpose as it is substantive evidence of Mr. Sandusky's innocence. ***See Mosteller, supra; Krick, supra.*** In sum, this issue raises genuine issues of fact and mandates a hearing. Furthermore, such recantation evidence would entitle Mr. Sandusky to a new trial.

3. Counsel was ineffective in neglecting to inform Mr. Sandusky of the agreement between Mr. Amendola and the Commonwealth that neither side would call Mr. Myers.[21]

Here, the decision not to present Allan Myers was not a minor strategic decision. Failing to inform a client that there was an agreement with the Commonwealth that neither party would present Mr. Myers is the type of information that must be relayed to the client. Had counsel informed Mr. Sandusky of this decision, there is a reasonable probability that he would have insisted on Mr. Myers being presented. As outlined in the following section of this petition, had Mr. Myers testified there is a reasonable probability that the outcome of the trial would have been different. Counsel can have no reasonable basis for not telling his client that he has entered into an agreement with the Commonwealth regarding the presentation of a critical witness, who was alleged to have been a victim. Insofar as the Commonwealth would maintain that no such agreement existed, this raises a genuine issue of fact, entitling Mr. Sandusky to an evidentiary hearing.

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21 This claim was not advanced in Mr. Sandusky's previous filings.

4. Trial counsel was ineffective in failing to call Allan C. Myers to the stand or using Mr. Myers prior statement to police that Mr. Sandusky did not molest him in the 2001 shower incident to impeach Mr. McQueary.[22]

Trial counsel was ineffective in failing to present Mr. Myers to show both Mr. Sandusky's innocence of the McQueary shower allegation and to impeach Mr. McQueary's testimony. Mr. Myers provided numerous statements that contradicted Mr. McQueary's account. While, after securing a civil attorney, Mr. Myers did relay several inconsistent stories that Mr. Sandusky committed abuse, the fact that the Commonwealth refused to call Mr. Myers raises an issue of material fact whether Mr. Myers' testimony would have benefited Mr. Sandusky.

Insofar as the Commonwealth might allege that Mr. Amendola had a reasonable basis not to call Mr. Myers, that presents a genuine issue of material fact that requires an evidentiary hearing. Mr. Sandusky adds that if the Commonwealth considers Mr. Myers was unavailable to testify based on his civil attorney's actions, Mr. Sandusky would have been denied compulsory process and the statements made by Mr. Myers to police and others that exculpated Mr. Sandusky would have been admissible as impeachment evidence, and, if falling within a hearsay exception, as substantive evidence.

For example, on September 20, 2011, Corporal Joseph Leiter and Trooper James Ellis interviewed Mr. Myers and he stated that Mr. Sandusky never did anything to him that was inappropriate or made him feel uncomfortable. A copy of a Pennsylvania State Police Report pages 154-155, dated September 22, 2011 and signed by Corporal Joseph Leiter was attached to the May 6, 2015 Appendix, at 436. This statement would have been admissible under the business records hearsay exception. ***See Shaffer, supra***. Similarly, Inspector Corricelli

22 This issue was not included in Mr. Sandusky's prior petition.

interviewed Allan Myers, on February 28, 2012, regarding his relationship with Mr. Sandusky. There was no mention of inappropriate contact with Mr. Sandusky.

Accordingly, trial counsel should have introduced those statements by Mr. Myers that demonstrated that Mr. Sandusky did not commit any sexual offense against him. The alternative chosen, not impeaching Mr. McQueary with Mr. Myers, nor introducing substantive evidence of his innocence, lacked a reasonable basis. Testimony and evidence that Mr. Myers was not sexually abused in the shower would have led to a reasonable probability that the outcome of the trial would have been different, especially where a significant portion of the Commonwealth's case rested on allegations regarding shower incidents.

The Polluted Charging Process:

Combine the lack of an investigative team required by law under the CPSL with improperly proceeding to a grand jury investigation without jurisdiction, serial grand jury leaks, and a grand jury judge who is biased against anyone accused of child sex crimes, with counsel's failure to adequately address these issues and the result is a recipe for gross violations of due process. The Commonwealth's failure to abide by statutory law because of who the accused was and counsels' failure to raise these claims deprived an innocent man, Jerry Sandusky, of a fair trial.

5. Ineffective assistance of trial counsel for failing to raise a structural due process claim where the Commonwealth violated Mr. Sandusky's due process rights by neglecting to abide by the Child Protective Services Law and seeking to quash the grand jury presentment based on the grand jury lacking subject matter jurisdiction.[23]

In this case, the Commonwealth referred the original allegations by a single victim to a statewide investigating grand jury to issue a presentment. Ordinarily, the grand jury process is used to investigate public corruption and organized crime; not traditional crimes such as murder,

23 This issue is a distinct claim that was not raised previously.

robbery, rape, or other sex offenses. In fact, a statewide, *i.e.*, multicounty, investigating grand jury is only to be convened because it is "necessary **because of organized crime or public corruption or both** involving more than one county of the Commonwealth and that, in [the Attorney General's] judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543." 42 Pa.C.S. § 4544(a) (emphasis added). Further, the very definition of a multicounty investigating grand jury precluded the investigation by a grand jury. That definition provides that a multicounty investigating grand jury is "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 investing grand jury." 42 Pa.C.S. § 4542 (emphasis added).

Aaron Fisher's allegations hardly could have been considered to amount to public corruption or organized crime. Also, the manner in which the case was transferred to the OAG was improper because Clinton County, under the CPSL, should have transferred the case to Centre County CYS, which would have referred the matter to the regional DPW office based on the CYS conflict due to Second Mile involvement. In sum, the grand jury process as used in the instant case amounted to an unconstitutional deprivation of Mr. Sandusky's due process of law rights.

As early as 1642, Lord Edward Coke, in his then influential Institutes, posited that "due process of law" is synonymous with the phrase, "law of the land." Thus, both the federal and Pennsylvania Constitution protect due process of law. ***See also Norman v. Heist***, 5 Watts & Serg. 171 (Pa. 1843). "[T]he due process of law clause of the federal constitution and the law of the land provision of the Pennsylvania Constitution have, even under a restricted view of those

provisions, been read to require that proceedings follow written constitutional and statutory law." ***See*** J. Andrew Salemme, *Guilty Until Proven Innocent: A Practitioner's & Judge's Guide to the Pennsylvania Post-Conviction Relief Act (PCRA),* at 233 (2016 ed.).

Instantly, statutory law, specifically the Child Protective Services Law, was intended to govern the initial investigation into the allegations against Mr. Sandusky. The failure to abide by those procedures is a classic example of violating procedural due process insofar as the government was supposed to follow a certain statutorily mandated procedure, but failed to do so. By not following the law, Mr. Sandusky's rights were seriously infringed insofar as the grand jury investigation resulted in serial leaks, improper police investigative tactics, and the issuance of a presentment by a grand jury without jurisdiction.

Here, Aaron Fisher's initial disclosure did not involve claims of sexual abuse. In this case, his allegations should have been forwarded to the regional DPW office because the Second Mile was an agent of the Clinton County CYS and a conflict existed with CYS. Despite being the improper agency to investigate, on November 20, 2008, Clinton County CYS reported "inappropriate conduct" by Mr. Sandusky. Again, without statutory authority, Jessica Dershem, a Clinton County caseworker interviewed Aaron Fisher for one hour. That interview was taped. As mentioned in the facts portion of this petition, Aaron Fisher did not disclose that sexual intercourse of any type occurred. Rather, Aaron Fisher posited that Mr. Sandusky cracked his back approximately thirty times.

Apparently frustrated by Aaron Fisher's statements, Ms. Dershem told her supervisor, Mr. Rosamilia, that Aaron Fisher was uncooperative. As a result, they referred Aaron Fisher to psychologist Michael Gillum. Ms. Dershem informed Pennsylvania State Police of Aaron Fisher's allegation that Mr. Sandusky touched him inappropriately over his clothing. In doing so

she misstated that Aaron Fisher alleged Mr. Sandusky sexually abused or exploited him. Importantly, it was Michael Gillum, who would acknowledge in his book with Aaron Fisher, *Silent No More*, that he wrote the report and provided it to Ms. Dershem.

Police then interviewed Aaron Fisher in the presence of Ms. Dershem. It is known that Aaron Fisher denied that Mr. Sandusky touched Aaron Fisher's genitalia and, Ms. Dershem, as detailed in *Silent No More*, reported to Mr. Gillum that Aaron Fisher denied that oral sex occurred. As of December 12, 2008, Aaron Fisher had not made any criminal allegations against Mr. Sandusky. Critically important, Aaron Fisher told state police that Mr. Sandusky had not touched his penis nor did oral sex transpire.

Mr. Sandusky himself was questioned in January of 2009 by Clinton County CYS. This too, however, was in actual violation of the law since Clinton County CYS was not the proper investigating body. Ms. Dershem informed Mr. Sandusky on January 2, 2009, that he was the subject of a report of suspected child abuse. Ms. Dershem and Clinton County CYS solicitor, Michael Angelelli, interviewed Mr. Sandusky. He acknowledged cracking Aaron Fisher's back, as well as hugging him and kissing him on the forehead, but strenuously denied that anything sexual had ever occurred. Ms. Dershem notified Childline. She also apparently misstated to police the next day that Mr. Sandusky had refused to answer questions when informing them of the interview.

When police consulted with the Clinton County District Attorney, it was decided that the matter should be transferred to Centre County where the alleged conduct had happened. Under the CPSL, the district attorney was supposed to transfer the case to the regional DPW office for Centre County because the Centre County CYS office had a conflict. Instead of referring the case to the appropriate investigative agency, the Clinton County District Attorney transferred the

case to the Centre County District Attorney. However, the Center County District Attorney had a conflict of interest and referred the case to the Office of Attorney General ("OAG"). Thus, despite the OAG not being the proper investigating authority under established statutory law, the matter arrived before the OAG in March of 2009.

The OAG assumed jurisdiction over the investigation on March 18, 2009. Instead of proceeding under the ordinary process of filing a criminal information, the OAG elected to submit the case to the Thirtieth Statewide Investigation Grand Jury on May 1, 2009.[24] In doing so, however, the OAG submitted the case on the grounds that a "founded" report of sexual abuse had been determined by the Clinton County CYS. Of course, Clinton County CYS was not the proper investigating authority due to a conflict, and a founded report would only exist if there had been a judicial determination that Aaron Fisher suffered serious bodily injury, or sexual abuse or exploitation. ***See*** 23 Pa.C.S. § 6303 ("founded report." A child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that child who is subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.").

Accordingly, the OAG had no statutory authority to conduct a grand jury investigation based on the allegation by Aaron Fisher and the report was not founded. This error deprived Mr. Sandusky of important structural due process rights. Pointedly, a grand jury was without subject matter jurisdiction to investigate the allegations made by Aaron Fisher. A multi-county grand jury only has jurisdiction to investigate public corruption and organized crime: not an allegation

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24 The initial state trooper assigned to the case after it went to the OAG, Timothy Lear, was removed from the case after he assaulted a former girlfriend.

of child abuse. 42 Pa.C.S. § 4543 (describing jurisdiction of multi-county grand jury). Aaron Fisher's statements at the time the grand jury investigation began did not give rise to the suggestion of crimes involving public corruption or organized crime. Therefore, it is evident that the grand jury had no subject matter jurisdiction to investigate.

Subject matter jurisdiction relates to the competency of a governmental body to take action and can never be waived. ***Commonwealth v. Bethea***, 828 A.2d 1066 (Pa. 2003). In this respect, Mr. Sandusky need not even raise his allegation as one of trial counsel error, but to the extent that the PCRA court would construe this claim as dealing with the power of the grand jury to investigate, we set forth the issue under the ineffectiveness test. Here, a multi-county grand jury was not competent and without power to investigate a child abuse allegation since it did not involve public corruption or organized crime. The proper mode of investigating fell under the ambit of the CPSL.

Mr. Sandusky's arguments have arguable merit as the language of the investigating grand jury statute and the CPSL indicate that a multi-county investigating grand jury is an improper mode of investigating alleged child abuse made to a school official, as Aaron Fisher's original statements were. Pursuant to 23 Pa.C.S. § 6311, a school administrator, and law enforcement, are required reporters. An oral report is to be made to the Department of Public Welfare and can be made to a county CYS agency. 23 Pa.C.S. § 6313. Under 23 Pa.C.S. § 6334, the DPW is to transmit notice of the complaint to the appropriate county agency. Where the county agency, in this case, Clinton County CYS, has a conflict, the matter is to be investigated by the regional DPW office, not an investigating grand jury. 55 Pa. Code § 3490.81. These proceedings are highly secretive; thus, any suggestion by the Commonwealth that grand jury proceedings were warranted to keep the matter secret are without merit. While law enforcement are to work with

the investigative agency, this is to be done as part of the investigative team required by the CPSL. This did not occur. As a result, law enforcement officials unfamiliar with appropriate questioning techniques investigated the matter, at times encouraging and almost spoon feeding alleged victims to make ever wilder accusations against Mr. Sandusky.

Counsel could not have any reasonable basis for not seeking to quash the presentment, where the Commonwealth failed to abide by the CPSL, and the proper investigating authority was not the investigating grand jury, as it lacked jurisdiction or power to investigate the original allegation made by Aaron Fisher Absent the improper grand jury investigation, no grand jury presentment could have issued and the Commonwealth would have only been left with charging Mr. Sandusky based on allegations made by Aaron Fisher Furthermore, if the grand jury investigation would not have occurred, the resulting leaks that severely prejudiced Mr. Sandusky could not have happened. Thus, it is apparent that Mr. Sandusky suffered actual prejudice as the outcome of his trial would have been different had the Commonwealth followed the CPSL and not initiated an improper grand jury investigation.

6. Ineffective assistance of trial counsel for failing to file a motion to quash the grand jury presentment and charges arising therefrom relative to at least Victims 2 through 10 based on governmental misconduct in tainting the grand jury process.[25]

Setting aside the impropriety of the grand jury investigation itself and the lack of jurisdiction, counsel was ineffective for failing to move to quash the presentment on separate grounds. Judge Barry Feudale was the supervising judge of the grand jury who oversaw the investigation into the allegations against Mr. Sandusky, and Frank Fina was the then-Senior Deputy Attorney General investigating Sandusky. After the verdict in this case, in 2013, upon a request from Attorney General Kathleen Kane, Judge Feudale was removed from the role of

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25 This argument was contained, in part, in Mr. Sandusky's immediate prior petition at paragraphs 219-269.

supervising judge of the Statewide Investigating Grand Jury. The Supreme Court order removing Judge Feudale from that role is sealed, and has not been made public. Further, according to the Philadelphia Inquirer an email between Judge Feudale and Attorney Fina showed that "the judge also disparaged a review Kane has launched into how the office pursued Penn State child molester Jerry Sandusky."

Despite requests from Mr. Sandusky's current counsel, the Commonwealth has declined to disclose the emails between Mr. Fina and Judge Feudale. Since the Commonwealth has not disclosed the emails to counsel, Mr. Sandusky believes and avers that exceptional circumstances have been presented under Pa.R.Crim.P. 902(E)(1), and he is entitled to discovery for reasons as more fully set forth in Sandusky's original petition currently under seal by order of court. This is especially true in light of the Moulton Report, commissioned by Attorney General Kane. To summarize, the Moulton Report recognized that the investigation had stalled until Sara Ganim published leaked details of the investigation in the Harrisburg Patriot-News. ***See*** Moulton Report at Appendix, at 40-56. According to the Moulton Report:

a. In March 2009, Senior Deputy Attorney General Jonelle H. Eshbach was assigned to investigate Sandusky once the case was referred to the Pennsylvania Office of Attorney General. Moulton Report at Appendix, at43.

b. On May 1, 2009, Attorney Fina decided to refer the investigation into Mr. Sandusky to the Thirtieth Statewide Investigating Grand Jury. *Id.* at Appendix, P.45-46. ("According to Fina, while many sexual-assault cases are not necessarily appropriate for referral to an investigating grand jury, this one was, particularly because of the perceived need to keep the investigation secret.").

c. At the time of the referral, the only alleged victim to come forward of which the Commonwealth was aware was Aaron Fisher, a/k/a Victim #1. ***Id.*** at Appendix, at 43-49.

d. The Commonwealth sought to identify additional victims, but was unable to do so at that time. ***Id.*** at Appendix, at 50-53.

e. By the end of 2009, the Commonwealth only identified one victim willing to testify. ***Id.*** In December 2009, Eshbach advised the grand jurors, "As of now, we haven't found any other victims. **We're still trying. I suspect, although I don't know for sure, that perhaps when this becomes public, we might have some other people turn up.** That sometimes happens, but we have been trying pretty hard to find some other folks and so far have not." ***Id.*** (emphasis added) at Appendix, at 55.

f. In March 2010, Eshbach prepared a draft presentment related solely to Aaron Fisher, because "she believed that after a year of looking, the investigation was unlikely to find additional victims, at least until after charges were filed, and because she felt that Aaron Fisher deserved to have his allegations heard in court. Eshbach had no illusions that a case against Sandusky, with Aaron Fisher as the sole victim, would be easy. Nevertheless, she believed she had adequate corroboration at that time to charge and try Sandusky; she also hoped that once Aaron Fisher's allegations against Sandusky were made public, other victims would come forward." Moulton Report at Appendix, at 57.

g. Attorney Fina had reservations about the draft presentment. According to the Moulton Report, "Fina recalls that his first reaction to the presentment was the "very strong" belief that the case was too weak to go forward; he believed that Sandusky would be acquitted at trial (if the case got that far), both because Aaron Fisher was not a strong witness and because Sandusky had significant resources and an outstanding reputation in the community. Moreover, he believed that an acquittal would likely doom any subsequent prosecution. In Fina's view, the key was finding more victims before the case was charged." ***Id.*** at Appendix, P. 59-60.

h. The investigation continued to stall through the summer of 2010 because the prosecution was not able to identify any other victims. ***Id.*** at Appendix, at 59-64. ("Between Fina's August 12 [2010] admonition that the investigation 'must do everything possible to find other victims' and the end of October [2010], the investigation did not succeed in identifying any new victims.").

i. The investigation had completely stalled until a November 3, 2010, anonymous email to Centre County Assistant District Attorney Stacy Parks Miller suggested investigators interview Michael McQueary. ***Id.*** at Appendix, at 66.

j. Despite McQueary coming forward, no additional witnesses were presented to the Thirtieth Statewide Investigating Grand Jury by the time its term expired in January 2011, and the case was again referred to the Thirty-Third Statewide Investigating Grand Jury. ***Id.*** at Appendix, at 71.

k. On March 31, the Harrisburg Patriot-News and the Centre Daily Times published a story written by Sara Ganim providing details of the supposedly confidential investigation. ***Id.*** at Appendix, at 73.

l. The Moulton Report credits the Ganim story with opening the floodgates of the investigation, stating, "The publication of Ganim's story had two almost immediate consequences. **First, it raised within the investigation the alarming prospect of a leak of grand jury information. Second, it generated two significant leads on additional criminal conduct by Sandusky.**" ***Id.*** at Appendix, at 74. (emphasis added).

m. Specifically, according to the Moulton Report, Ronald Petrosky called the Pennsylvania State Police on the afternoon the Ganim article was published, stating that he had information relevant to the case. ***Id.*** at Appendix, at 74-75.

n. In the aftermath of Ms. Ganim's report, Attorney Benjamin Andreozzi contacted investigators claiming to represent an alleged victim of abuse, B.S.H. In addition, two other alleged victims, D.S., and M.S., appeared before the grand jury. Additionally, Attorney Fina sought and received an order from Judge Feudale prohibiting the witnesses who testified on or after April 14, 2011 from disclosing "the fact or substance of their testimony" to anyone other than the witness's attorney. ***Id.*** at Appendix, at 77-78.

This chain of facts shows that the Commonwealth's case, which had remained essentially stalled since it opened in May 2009, rapidly advanced in the summer of 2011, after the investigation was unlawfully leaked to Ms. Ganim.[26] Moreover, there is evidence that Ms. Ganim directly contacted Deb McCord, mother of Z.K. and told her that she should reach out to investigators. Specifically, on March 30, 2011, Corporal Joseph Leiter wrote a report detailing a conversation with Ms. McCord, stating:

> On Thursday, March 24, 2011, I received a telephone call from Deb McCord relative being again contacted by Sara Ganim, Harrisburg Patriot News, apologizing for not writing the Jerry Sandusky article earlier as she had previously told McCord she would do but that she was going to print the article over the weekend of March 26 and Ganim was calling McCord to see if she wanted to add anything to her previous statements. McCord advised Ganim that she did not make any previous statement and that she had nothing to speak to her about. Ganim then told McCord that the State Police were not going to do anything with this investigation and that Ganim was providing McCord with an

26 Should the Commonwealth contend that no grand jury leaks occurred up to that time, it raises a genuine issue of material fact regarding potential governmental misconduct.

> opportunity to have her story told. Again McCord advised Ganim that she had nothing to say to her and hung up.
>
> On Monday, March 28, 2011 I received a telephone call from Deb McCord who related that she had received a text message from Sara Ganim on this date at 0930 hours. Ganim said in the text, "Debra. It's Sara from the Patriot. I just want to pass along this agent's name and number. The attorney general has expressed interest in helping you." McCord did not respond. A copy of this text is attached to the station copy of this report.

A copy of Corporal Leiter's report is attached at Appendix, at 458.

Here, there is evidence that governmental officials involved in the Sandusky investigation intentionally leaked grand jury information to Ms. Ganim after the investigation had stalled. Indeed, Judge Barry Feudale ultimately appointed two special prosecutors, James Reeder and Kenneth Brown to investigate any possible grand jury leaks.[27] However, prior to Mr. Reeder and Mr. Brown completing their task, Judge Feudale was removed as the supervising grand jury judge. Judge Feudale has publicly revealed correspondence with Mr. Reeder, which revealed that the OAG was not cooperating with the investigation.

Mr. Sandusky contends that the leaking of the information, during the time that the Commonwealth's investigation had stalled, was a deliberate act by the prosecution and its agents, or other agents of the Thirtieth and/or Thirty-Third Statewide Investigating Grand Jury to advance the investigation and spur other alleged victims to come forward. Indeed, Ms. Eshbach had expressly stated that the prosecution was unlikely to identify any additional witnesses until the investigation became public. The leak of grand jury information had the express result that

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27 Mr. Sandusky has filed a Petition for Review with the Pennsylvania Supreme Court regarding issues relative to the appointment of a special prosecutor or master. Despite Mr. Sandusky's attempts to shine the light on various proceedings and requests to unseal various information, the orders involved and Petition for Review are currently under seal. Accordingly, Mr. Sandusky's counsel is prohibited from discussing those issues herein.

Attorney Fina and others in the OAG desired, additional witnesses came forward before the Commonwealth filed charges against Mr. Sandusky.

The leak of grand jury information, in violation of the "secrecy" required, greatly prejudiced Mr. Sandusky and created an incentive for people to fabricate accounts of abuse because of the attention drawn to the investigation and a thirst for financial reward. While the fact that someone leaked details of the investigation to Ms. Ganim was known to the defense upon publication of her article, and should have resulted in the filing of a motion to quash the grand jury presentment, the entire scope of the leak and how it impacted the investigation was difficult to discern. Hence, in the alternative to the argument that trial counsel was ineffective, this information qualifies as after-discovered evidence, which would have altered the outcome of Mr. Sandusky's trial. Phrased differently, if the court finds that counsel could not have learned of the information regarding the grand jury leaks and governmental misconduct until the Moulton Report, then it falls under the after-discovered evidence rubric. The law on after-discovered evidence has previously been outlined with respect to a prior claim.

In the event that the court finds that trial counsel failed to investigate or question an obvious available source of information, then the issue is more properly an ineffective assistance of counsel claim. It should be noted that Ms. Ganim invoked journalistic privilege to protect her source and maintained that she would not testify regarding how she received information or who provided it. Further, as discussed previously, Judge Feudale appointed two special prosecutors to investigate the grand jury leaks, and the OAG declined to cooperate before Judge Feudale was removed as grand jury judge.

Since there has been no testimony regarding the grand jury leaks and those with the requisite knowledge have been unwilling to come forward, the evidence of grand jury leaks,

tainting the grand jury presentment process, fits within the after-discovered evidence paradigm. It would not be used solely to impeach a witness nor is it cumulative. Evidence that the government committed serious misconduct by tainting the grand jury investigation through the leak of information could potentially lead to a different outcome because certain charges arising from the presentment could have been quashed. ***See Schultz, supra*** (quashal of charges from grand jury presentment appropriate, based in part on the fact that the prosecution acted improperly). Additionally, it would have permitted counsel to litigate various motions to preclude testimony and or quash the presentments as discussed above.

Moreover, it is apparent that this case is one more example of how the investigating grand jury system has irreparably broken down in Pennsylvania by irresponsible prosecutors and lack of oversight by supervising judges.[28] Indeed, the citizens of Pennsylvania are now being confronted with the unseemly spectacle of leaks from a current investigating grand jury charged with investigating leaks from another investigating grand jury. *See* Wallace McKelvey, *Kathleen Kane Should Be Charged in Connection with Leaks, Grand Jury Says: Report*, Harrisburg Patriot-News, January 8, 2015, *available at* http://www.pennlive.com/politics/index.ssf/2015/01/kathleen_kane_leaked_secret_in.html. *See* Appendix, at 459.

Recently our Supreme Court reaffirmed the inherent power of the supervising judge of the Grand Jury to investigate leaks and indeed has a duty to do the same. In the case of ***In re Thirty-Fifth Statewide Investigating Grand Jury***, 112 A.3d 624, 626 (Pa. 2015) (OAJC), the

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28 The Pennsylvania Superior Court recently chastised Attorney Frank Fina and Judge Feudale regarding their respective roles in the Sandusky grand jury investigation. The Superior Court maintained that Mr. Fina acted "highly improper" in making certain representations to the grand jury judge. ***Commonwealth v. Schultz***, 2016 WL 285506, at *28 n.14 (Pa. Super. 2016).

Supreme Court, citing ***In re Dauphin County Fourth Investigating Grand Jury***, 19 A.3d 491 (Pa. 2011), opined:

> t]he very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings" and indicated that, "[w]hen there are colorable allegations or indications that the sanctity of the grand jury process has been breached those allegations warrant investigation, the appointment of a special prosecutor to conduct such an investigation is appropriate." ***Id.*** at 318, 19 A.3d at 503-04.

Further, the supervising judge commented:

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

In re Thirty-Fifth Statewide Investigating Grand Jury, ***supra*** at 626. The Supreme Court also quoted from the lower court opinion in ***In re Thirty-Fifth Statewide Investigating Grand Jury***, stating:

> A supervising judge of an investigating grand jury must possess [the] inherent power to enforce the traditional rule of secrecy over grand jury proceedings because of the very nature of those proceedings.

Id. at 627. The Supreme Court further reasoned:

> We observe that, via the Investigating Grand Jury Act, the Legislature has charged supervising judges with the substantial responsibility of maintaining the required confidentiality of grand jury proceedings, on pain of contempt sanctions. ***See*** 42 Pa.C.S. §45499(b).

Id. at 629. The Supreme Court added:

> Although a supervising judge, in his or her discretion, may regard a historical breach in a different light than a present one, both are equally affronts to the dominant and ongoing requirement of confidentiality which supervising judges are charged with enforcing.

Id. at 632.

Based on the foregoing, it is evident that, to the extent the investigating grand jury system had been abused by unauthorized leaks, it falls on the role of the supervising judge to monitor for abuses and in the appropriate case appoint a special prosecutor or master. There is authority that holds that in circumstances where there is concern about the leaking of information from a supposedly secret grand jury proceeding, there should be at least an evidentiary hearing into the source of the leaks and the prejudice the defendant suffered. ***See In re Grand Jury Investigation (Appeal of Lance)***, 610 F.2d 202 (5th Cir. 1980); ***Commonwealth v. Schwartz***, 115 A.2d 826 (Pa. Super. 1955); ***Commonwealth v. Wecht***, 20 Pa. D. & C.3d 627 (C.P. Allegheny County February 27, 1981).

In ***Wecht***, the Court adopted the five-point test set forth in the Fifth Circuit decision ***Lance*** which requires an examination of: (1) a clear indication that media reports disclosed information about matters occurring before the grand jury; (2) the articles must indicate that the source of the information is one of the parties who is not permitted to disclose such information under 42 Pa.C.S. § 4549(b)[29]; (3) in determining if a *prima facie* case to warrant a hearing exists,

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29 42 Pa.C.S. § 4549 states:

> **Disclosure of proceedings by participants other than witnesses.**--Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Commonwealth for use in the performance of their duties. The attorneys for the Commonwealth may with the approval of the supervising judge disclose matters occurring before the investigating grand jury including transcripts of testimony to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret.

the court must assume that the statements in the news report are requested; (4) the nature of the requested relief must be balanced; and (5) the court should "weigh any evidence presented by the prosecution to rebut the assumed truthfulness of reports which may otherwise make a prima facie case of misconduct." 20 Pa. D.& C.3d at 639-40.

It is also generally accepted in federal court that prosecutorial misconduct in a grand jury proceeding may warrant dismissal of an indictment if the defendant suffers actual prejudice by the misconduct. ***See Bank of Nova Scotia v. United States***, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228, (1988). In ***Bank of Nova Scotia***, the Supreme Court held that it is appropriate to dismiss an indictment where "the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." ***Id.*** at 256, 108 S.Ct. at 2374, 101 L.Ed.2d at 238 (***quoting United States v. Mechanik***, 475 U.S. 66, 78, 106 S.Ct. 938, 946, 89 L.Ed.2d 50 (1986)). Finally, the Court recognized, however, that prejudice to a defendant may be presumed where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." ***Id.*** at 257.

In the instant case, Mr. Sandusky was not indicted by the grand jury; rather, Pennsylvania utilizes investigating grand juries. An investigating grand jury recommends charges and the Commonwealth then determines whether it should proceed. Contrary to the arguments of the Commonwealth in its initial response, Pennsylvania law does permit the quashal of charges and a grand jury presentment. As illustrated by ***Schultz, supra***, ***Commonwealth v. Curley***, 2016 WL 285707, and ***Commonwealth v. Spanier***, 2016 WL 285663, quashal can be appropriate where the

grand jury process was abused.[30] Specifically, where a grand jury presentment has been tainted by governmental misconduct or a grand jury otherwise receives improper evidence, it is appropriate to quash charges arising therefrom. ***Schultz, supra***; ***Curley, supra***; ***Spanier, supra***; ***see also Commonwealth v. McCloskey***, 277 A.2d 764 (Pa. 1971); ***Commonwealth v. Cohen***, 289 A.2d 96 (Pa. Super. 1972) (plurality). In ***Schultz***, the Court concluded that the prosecutor's actions in improperly procuring privileged information before a grand jury warranted quashing various charges. Quoting from a Hawaii Supreme Court decision, the *Schultz* Court stated, "Where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy." ***Schultz, supra*** at *27.

Instantly, Mr. Sandusky's right to an impartial grand jury proceeding was unquestionably prejudiced because the government, in violation of grand jury secrecy laws that are intended to protect not only victims and witnesses but also those being investigated, leaked information to the media. This leak resulted in various individuals coming forward to make similar accusations against Mr. Sandusky after repeated suggestive and overzealous interviews conducted by law enforcement. Since the government violated grand jury secrecy in order to advance their case, which certain prosecutors such as Attorney Fina believed to be weak, Mr. Sandusky's right to an impartial grand jury was infringed. Absent the leak, the Commonwealth could not have charged Mr. Sandusky with alleged crimes against any victim other than Aaron Fisher.

The leak also further tainted the grand jury process because it made public certain information that could be adopted by other alleged victims to establish a level of credibility. As

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30 Although the ***Schultz, Curley***, and ***Spanier*** cases were decided after Mr. Sandusky's trial; they are not new constitutional rules or new rules of law but based on pre-existing precedent and standards. Further, a number of the charges against Mr. Schultz and Mr. Curley were brought at the same time as those against Mr. Sandusky.

the ***Schultz*** Court opined, citing, ***Berger v. United States***, 295 U.S. 78, 88 (1935), the government "may prosecute with earnestness and vigor—indeed, [it] should do so. But, while [it] may strike hard blows, [it] is not at liberty to strike foul ones. It is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." ***Schultz, supra*** at *28.

Moreover, Mr. Sandusky notes that the principles underlying the exclusionary rule, as set forth in ***Commonwealth v. Edmunds***, 586 A.2d 887 (Pa. 1991), when law enforcement commit misconduct. Further, even when an issue does not involve a suppression claim, instances of governmental conduct, such as ***Brady*** violations, also warrant strong sanctions, which include the award of a new trial. In Pennsylvania, the purpose of the exclusionary rule is, largely, "the safeguarding of privacy," ***Edmunds, supra*** at 899, in addition to the deterrent effect the rule has on police misconduct. Here, the investigating grand jury system was abused so fundamentally that the only adequate remedy is to either exclude the evidence derived from the grand jury investigation, including all the witnesses who came forward after the leak to Ms. Ganim, or to have quashed the grand jury presentment.

In the present case, in light of the Moulton Report's indication that the leak of the grand jury material is what drove the case from being a flawed case with a single unreliable victim to the litany of alleged victims with stories of abuse, it is beyond cavil that Mr. Sandusky was prejudiced by the leaking of grand jury material. Under the test set forth in ***Wecht***, the Ganim report clearly disclosed information about matters occurring before the grand jury. Ganim's article does not disclose on its face that the source of the information is one of the persons proscribed from disclosing the investigation under § 4549(b), but as mentioned, Mr. Sandusky should be entitled to a hearing and limited discovery on this question. Frankly, the

Commonwealth cannot escape that an issue of material fact exists as to whether governmental misconduct resulted in grand jury leaks. Indeed, if the PCRA court assumes that the statements in the Ganim report were true, then a *prima facie* case of improper leaks is apparent.[31]

Dismissal of the charges against Mr. Sandusky is the appropriate remedy, as it is evident that the Commonwealth would not have identified victims 3-10 without the grand jury leak to the media. Mr. Sandusky avers that the Commonwealth may have intentionally leaked the grand jury investigation as a last-ditch effort to attempt to identify more victims, and to bolster the case relating to Aaron Fisher that the internal supervisors in OAG believed was too weak to stand on its own. It is undeniable that the leak of the grand jury investigation directly contributed to the "lynch mob" mentality that grew in Centre County and contributed to the prejudicial atmosphere that warranted a delay in trial under ***Sheppard, supra***. This toxic environment only worsened after the presentment was released with false information relating to Michael McQueary.

Accordingly, as set forth in ***Wecht, supra***, and ***Schultz, supra***, the charges against Mr. Sandusky relating to victims 3-10 should all have been dismissed. Moreover, evidence obtained in violation of a defendant's constitutional rights is excluded as the fruit of the poisonous tree. ***See Commonwealth v. Hess***, 666 A.2d 705 (Pa. Super. 1995). The leak to Ms. Ganim unconstitutionally violated Mr. Sandusky's due process right to a not only a fair trial, but a fair grand jury investigation.

Since the allegations relating to Victims 3-10 should never have been presented to a jury, Mr. Sandusky is also entitled to a new trial on the charges relating to Aaron Fisher and Victim 2, as it is impossible to delineate how the prejudicial impact of the improperly admitted evidence

31 Mr. Sandusky believes and avers that the Commonwealth cannot present any evidence establishing that the Ganim report was not true, as the trial ultimately disclosed that the report was, in fact, accurate.

bled through and bolstered the case as to those accusers. Indeed, the prosecution itself argued that Mr. Sandusky's course of conduct demonstrated his guilt.

Additionally, given how this case illustrates the continued breakdown of the grand jury process, filled with serial leaks and a general lack of the secrecy required, "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." ***Bank of Nova Scotia, supra***; ***see also Schultz, supra***; ***Curley, supra***; ***Spanier, supra.*** In sum, trial counsel failed to preserve the issue of the inherent prejudice Mr. Sandusky suffered as a result of either governmental or prosecutorial misconduct.[32] Mr. Sandusky respectfully requests this Court order a hearing to investigate the nature and extent of the leaks, and whether the leaks were prosecutorial misconduct that warrant relief under the Post Conviction Relief Act.

7. The Supervising Judge of the Grand Jury was unfairly biased and the Commonwealth acted in concert to deprive Mr. Sandusky of relevant exculpatory and or impeachment evidence under Brady v. Maryland, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[33]

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32 There is at a minimum, a genuine issue of material fact as to whether:

> The prosecution intentionally leaked secret grand jury materials to "shake the tree" and see if more victims would come forward or for any other reason;
>
> Whether Sandusky's right to a fair trial was tainted by the inappropriate leak;
>
> Whether the extreme prejudice Sandusky suffered due to the fundamental breakdown in the Pennsylvania grand jury process warranted a dismissal of all charges; and
>
> Whether trial counsel could have raised this argument before trial, or if the information was not able to be discovered until the issuance of the Moulton Report after Mr. Sandusky's conviction.

33 This claim, in part, was leveled in Mr. Sandusky's May 6, 2015 petition at paragraphs 286-294.

In preparing for trial in this matter, trial counsel made a discovery request of the supervising judge of the grand jury to view exhibits that were entered and utilized during the grand jury investigation. Attorney Karl Rominger will testify that the supervising judge informed him that none of the exhibits entered or utilized in the grand jury were exculpatory under ***Brady v. Maryland***, 383 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). ***Brady*** material, however, is not limited only to exculpatory evidence; rather, evidence that tends to go towards impeaching the prosecution's witnesses must also be disclosed under ***Brady***. ***See Napue v. Illinois***, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); ***Commonwealth v. Strong***, 761 A.2d 1167, 1171 (Pa. 2000).

In the present case, the Commonwealth did not disclose a single exhibit used during the testimony of any of the grand jury witnesses, on the basis of the supervising judge's unilateral determination that none of the evidence was exculpatory. Mr. Sandusky avers that it was improper for the supervising judge to make this *ex parte* determination, as he was not privy to the defense theory of the case to know whether any of the evidence could have been relevant impeachment material under ***Brady***. Since none of the grand jury exhibits were disclosed, Mr. Sandusky submits that extraordinary circumstances exist under Pa.R.Crim.P. 902(E)(1), such that discovery is warranted to determine if any exculpatory or relevant, material impeachment evidence should have been disclosed. The failure to disclose <u>any</u> of the grand jury exhibits in this matter amounts to a deprivation of Mr. Sandusky's due process rights under ***Strong, supra***. Accordingly, Mr. Sandusky requests discovery of the grand jury exhibits to determine if material impeachment or exculpatory evidence was not disclosed to the defense prior to trial in this case. Further, in light of publicly disclosed emails from Judge Feudale, questions of his impartiality have arisen. In one email, Judge Feudale remarked,

> No prosecution, prosecutor or grand jury judge is perfect. Again the. "slow walk" is PATENT POLITICAL BULLSHIT". IT IS ABOUT THE VICTIMIZED BY A SEXUAL PREDATOR WHO WILL PROBABLY DIE IN JAIL. It is about how three men "allegedly" had information about the sexual abuse of kids and committed "alleged" criminal acts of commission or omission and turned deaf eyes and ears to such a horrible thing. Just like some in the catholic church and boy scouts. When "good" men do nothing, our system fails, the vulnerable we are empowered to protect.
>
> Bottom line "I will not be intimidated by anyone. The price (even if its means I am done working as A Judge) of silence is to high. I spent 4 years of my life investigating sexual abuse of children, 4 years civilly prosecuting such as Child welfare Solicitor , and 25 years as a Judge who specialized and testified and wrote about the handling of such cases. I will not abandon those kids.! I, Fina (who in my mind is a great man of courage and perseverance), Eshbach, and many agents and state police witnessed the pain and shame in the faces of the many kids who at times (with reluctance) testified about the 'horrors" committed upon them. I will not join such a "conspiracy of silence". You can not put a price on your integrity. If what I characterize ast he Sandusky el al cases are abandoned, it will be a "travesty of Justice" unlike anything I have experienced in my professioanl career.

Barry F. Feudale email to Craig McCoy of the Philadelphia Inquirer, 7/14/13 (emphases, spelling and grammatical mistakes in original), email attached hereto. The tone and tenor of this email suggests that Judge Feudale hardly served as an impartial judge during the grand jury process. It is therefore highly questionable whether his decision regarding ***Brady*** material can be considered reliable. Since there are genuine issue of material fact regarding ***Brady*** impeachment material, an evidentiary hearing is warranted on this claim.

The Flawed Jury Selection Process:

A governor, President Obama, and virtually the entire media, concluded Jerry Sandusky was guilty before a single juror was selected. Media reports saturated the jury pool with information that opined that Mr. Sandusky was guilty of some of the most heinous crimes imaginable. Mr. Sandusky was not only judged guilty by the court of public opinion as a monster, but he was blamed for the death of Joe Paterno and the ruination of the reputation of

Mr. Paterno and Penn State University. Yet, with all of the prejudicial media attention, counsel inexplicably did not investigate whether a fair jury could be obtained at that time in Centre County. With over two-hundred and fifty reporters, including several reporters permitted access to individual *voir dire*, no other case in Pennsylvania history had ever garnered such attention. Trial counsel's failure to appropriately consider a change of venue, venire, or adequately argue for a cooling period is a text-book example of deficient performance.

8. *Trial counsel were ineffective in declining to investigate juror bias in Centre County and failing to procure an expert report that would have shown that a change of venue or venire or a cooling period was warranted.*[34]

The failure to investigate and adequately prepare pre-trial is a claim of arguable merit. ***See Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994); ***Commonwealth v. Brooks***, 839 A.2d 245, 248 (Pa. 2003) ("counsel's failure to prepare for trial is 'simply an abdication of the minimum performance required of defense counsel.'"). In this case, despite the overwhelming amount of negative pre-trial publicity, counsel elected to try the case in Centre County, the center of the storm. This strategic choice could not have been made effectively in a high profile case such as this without adequately researching the issue of whether a jury could be selected that was not tainted by the flood of negative media attention. Anecdotal evidence that Mr. Sandusky was a beloved figure in State College overlooks that Centre County extends beyond State College and that Mr. Sandusky was being blamed for the death of Joe Paterno, an even more beloved figure, and the downfall of both Penn State football, and staining the reputation of the larger Penn State University community.

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34 This claim was not raised in Mr. Sandusky's prior petitions, but is related to his claim regarding jury bias and that counsel was ineffective in failing to move for a change of venue or venire or adequately argue for a continuance to allow for a cooling off period.

Moreover, trial counsel recognized the importance of a jury consultant by retaining Beth Bochnak to assist in actual jury selection in Centre County. Ms. Bochnak, however, was involved in a murder trial in Puerto Rico and was unavailable to participate in jury selection in this matter. The trial court denied counsel's continuance request to allow Ms. Bochnak to participate.[35]

Counsel, nevertheless, did not retain the services of a consultant to conduct research or provide a report as to the ability to select an unbiased jury in Centre County that would have aided in determining whether a jury could be selected in Centre County that did not have significant knowledge of highly prejudicial information. While counsel is not ineffective for declining to call an expert witness where he can adequately cross-examine a Commonwealth expert, ***Commonwealth v. Marinelli***, 810 A.2d 1257, 1269 (Pa. 2002), this issue does not relate to calling an expert to testify. Instead, the issue centers on retaining an expert to assist and prepare a report regarding jury bias in a case with extensive prejudicial pre-trial publicity. Thus, trial counsel could not rely on questioning another expert.

Here, a survey of Centre County residents almost certainly would have revealed that, regardless of any proclamations to the contrary, it was impossible to achieve a fair trial in Centre County at that time. The trial court itself began individual *voir dire* of every juror by conceding that EACH juror had heard or read about the case in the media. The information that those jurors would have read or heard involved extraordinarily prejudicial information and involved reports that judged Mr. Sandusky guilty before his trial even began.

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35 It appears that the Commonwealth had undertaken jury selection research, and trial counsel was denied the benefit of that research, despite not being granted a continuance to conduct its own investigation into jury selection.

In the present case, a Google search for jury consultants in Pennsylvania revealed a consulting firm in State College: DecisionQuest. Admittedly, that firm would have been unable to assist Mr. Sandusky unless they had been retained before Gary Schultz and Tim Curley because that company was and is involved in that litigation. Nevertheless, DecisionQuest could have provided contact information for additional jury consultants to determine whether venue would have been appropriate in Centre County. In this regard, the American Society of Trial Consultants could have provided a consultant to aid Mr. Sandusky.

Mr. Sandusky notes that this claim is not a failure to call a witness to testify claim. Nonetheless, to the extent that the court would require a witness certification regarding such a consultant, Mr. Sandusky requests permission to supplement this petition prior to any scheduled hearing or decision on this claim. Additionally, because the consultant can no longer conduct the necessary research as trial has passed, it would be improper to require Mr. Sandusky to submit an expert report regarding what those findings would have been. However, based on similar research done in Dauphin County relative to Tim Curley, Gary Schultz, and Graham Spanier, it is apparent that a Centre County jury could not have dispassionately considered the evidence without a cooling period no matter what type of questioning was engaged in by a court to ameliorate the prejudice. In the alternative, trial counsel would not have objected to the Commonwealth's change of venue request, thereby resulting in the outcome of jury selection being different and thus a reasonable probability that the outcome of the trial would been altered as it would only take one juror to result in a mistrial.

The expert report in the cases involving Tim Curley and Gary Schultz, attached herein at Attachment A, provides a glimpse of what information trial counsel could have learned had they retained such an expert. For example, the consultant therein conducted an extensive phone

survey of 710 individuals: 410 in Dauphin County, and 100 each in Erie, Chester, and Luzerne Counties. Large majorities in each county believed that Tim Curley, Gary Schultz, and Graham Spanier were definitely or probably guilty of allegedly covering up Mr. Sandusky's actions. Significant majorities, in excess of seventy percent in each of Dauphin, Luzerne, and Chester Counties, had been exposed to television reports. A large percentage were also familiar with newspaper reports and via word of mouth discussions.

The report, citing Neil Vidmar and Valeria P. Hans, *American Juries, The Verdict*, at 113 (2007), asserted,

> A phenomenon known as generic prejudice may also come into play in high-profile cases. Public attention to the issues of child abuse, including child pornography, sexual violations, and physical harm, gained widespread attention in the 1980s that continues to this day. At a 1990 symposium, Judge Abner Mikva coined the term generic prejudice and explained: 'I do not think that you can get a fair child abuse trial before a jury anywhere in the country...when they hear that a child has been abused, a piece of their mind closes up.'

See Report of Arthur H. Patterson, PH.D., In Support of Gary Schultz and Timothy Curley Motion to Request Supplemental *Voir Dire* Measures, at 16 (attached hereto at Attachment B).

Citing an additional source, the report noted,

> In the entire social scientific literature on jury decision-making, spanning many decades, the effect of pretrial publicity (PTP) on a defendant's right to a fair trial is one of the most thoroughly studied subjects. As a result of this extensive research literature, **there is a strong consensus of opinion among leading researchers in the field that such publicity seriously undermines the ability of a defendant to receive a fair trial and is poorly remedied by mitigation measures typically employed by our courts.**
>
> For example, one recent reference work, summarizing decades of research into the effects of and remedies for pretrial publicity concluded, 'In sum, it appears that **the effects of PTP can find their way into the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and can persevere not only through deliberation, but may also actually intensify.**"

Id. at 17 (citing Studebaker & Penrod, *Pretrial Publicity and its Influence on Juror Decision Making*, Psychology and Law, at 265-266 (Brewer & Williams, 2005 ed.)) (emphases added).

Additionally, the report quoted from yet another respected source, stating,

> The belief that voir dire is an effective remedy for the effects of pretrial publicity assumes that prospective jurors are capable of assessing their own biases and that they are willing to admit to such biases during the jury selection process. It also requires that judges and attorneys be able to identify those who should appropriately be challenged for cause. Research suggests that none of these is a safe assumption.

Id. at 17-18 (quoting Posey and Wrightman, *Trial Consulting*, at 58 (2005)). According to the report,

> the conclusion of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.
>
> Instructions from the Court are unlikely to alleviate the problem. **Admonitions from the bench to 'set aside one's biases' have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity**.

Id. at 18 (emphasis added).

That report concluded to a reasonable degree of scientific certainty that, "**The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury**." *Id.* at 19-20. This applies with equal if not more force to the actual trial of Mr. Sandusky, who was at the center of the negative media. Counsel had no reasonable basis for not investigating jury bias in light of the extensive negative pre-trial publicity. Had counsel retained an expert and received a similar report, he would have moved for a change of venue and/or had convincing empirical evidence to

continue the trial, thereby leading to a reasonable probability that the outcome of jury selection and trial would have been different.

9. Trial counsel were ineffective for not requesting a change of venue or venire or seeking a cooling off period prior to the start of trial.[36]

It is axiomatic that under the Pennsylvania Constitution and the Constitution of the United States, all defendants are guaranteed a right to a fair trial by jury. Trial counsel's decision that Mr. Sandusky would benefit from the local Centre County jury pool due to Mr. Sandusky's long time connection to the community was made in spite of the fact that he had retained a jury consultant who was forced to decline the case due to prior federal court commitments and this Court's refusal to make an accommodation by granting a continuance. Given the nature of this case, including the ancillary consequences of the charges resulting in Coach Paterno's termination from Penn State University and the stained reputation of that institution, it was not reasonable for a seasoned defense attorney to believe that the Centre County jury could fairly and dispassionately sit in judgment of Jerry Sandusky. Indeed, as discussed extensively above and incorporated herein, no amount of admonitions from the court could have prevented the prejudicial impact of the pre-trial publicity.

The trial court acknowledged the extensive media circus surrounding the trial in its *voir dire* questioning and placed on the record that there were "250-some reporters here and stories are going to be stories." N.T., 6/6/12, at 8. It opined, "With all this press, with all this media, with 240 some reporters that are credentialed and 30-some trucks, why are we not going to sequester you?" N.T., 6/5/12, at 8. Thus, there were 240 to 250 reporters and approximately thirty television trucks at the actual trial. This highlights the pervasive media attention

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36 This claim is derived from Mr. Sandusky's May 6, 2015 petition, paragraphs 76-127.

surrounding the case. In fact, in what appears to both undersigned counsel to be unprecedented, two reporters were permitted to take part in the individual *voir dire* proceedings. ***See*** N.T., 6/5/12, at 22 ("There are two pool reporters and a member of the public seated here."); ***Id.*** at 121 ("We have members of the press and public here[.]"). While the court did inform jurors that if they were uncomfortable revealing in any information in front of the media that he would ask the media to leave, it is hard to measure how jurors would react to traditional questions of whether they could be fair when media members were listening to the *voir dire*.

The court inquired with **every** prospective juror by using a question that in one form or another conceded extensive knowledge of prejudicial information. For example, "Do you know anything about the case **other than what you have read in the newspapers or heard or seen on television or radio TV news**[.]" N.T., 6/5/12, at 23. Similarly, "There's been a lot of information about this case in the newspapers, television, radio, Internet. Do you know anything about the case other than what has been in general circulation." ***Id.*** at 41.[37] The problem with

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37 ***See also*** N.T., 6/5/12, at 51 ("There's obviously been a lot about this case on the television, radio, Internet. Have you been following it?"); ***Id.*** at 79 ("There has been, obviously, a lot of information out about this case, newspapers, television, radio, Internet, so forth. Do you know anything about the case **beyond what would be in the general news circulation?**") (emphasis added); ***Id.*** at 91 ("Newspapers, radio, television, Internet, **Other than what's generally in the general realm of knowledge, do you have any special knowledge about this case?**") (emphasis added); ***Id.*** at 108 ("There's been an awful lot of this in the newspapers, radio, television, Internet as you know?); ***Id.*** at 121-122 ("There's obviously been a lot written and spoken and talked about this case...Do you know anything about the case **other than what's been in the general universe of the media**?"); ***Id.*** at 132-133("I think I have already discussed the fact that I know that Penn State has a pervasive atmosphere, influence in the community. The defense knew that when they opposed the motion for change of venire."); ***Id.*** at 143 ("Of course, you know, we all know there's been a lot on the radio, television, newspapers, Internet about this. **Beyond what has been in that general discussion, do you know anything about the case or know any of the people involved.**");

Id. at 148 ("other than what you've read in the papers, heard on the radio, television, maybe looked at on the Internet? Do you have any information beyond what is in the general public?); ***Id.*** at 161-62 (There's been a lot written about this case in newspapers, radios,

these inquiries and counsel's failure to follow up with additional questions, which will be discussed in the next claim, is that what was in general circulation included highly prejudicial and damaging evidence ranging from the grand jury presentments, some of which were leaked and inaccurately summarized the evidence that was presented to the grand jury, negative articles from ESPN, the New York Times, Washington Post, USA Today, as well as news stories blaming Mr. Sandusky for the death of Joe Paterno and ruining the reputation of Penn State University. One prospective juror accurately noted, speaking of an internal University investigation, that, "Everyone has heard of it." ***Id.*** at 72. Indeed, in response to a juror stating he attempted to avoid news stories about the Sandusky case, the court responded, "You must be one of the only people in Centre County." ***Id.*** at 135.

The prosecution in its own opening set forth, "And, you know, up until now, these young men have been known as, in public—some of you read the papers. We all read the paper—Victim No. 1, Victim No. 2, Victim No. 3[.]" N.T., 6/11/12, at 8. While public access to

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television, Internet, blogs. Do you know anything about the case beyond that sort of common information?); ***Id.*** at 169 ("There's been, you know, an awful lot written about this and some television, radio, Internet. Do you know anything about the case beyond what has just in that arena?"); ***Id.*** at 180 (There's obviously, been a lot in the newspapers, on television, radio, Internet about this. Beyond the general information that everybody knows about or is there anything unusual particularly you know about the case, any unusual knowledge?").

Id. at 188-189 ("There's been obviously a lot written about the case, television, radio, Internet. Beyond what generally people would know from that, do you know anything else about the case?"); ***Id.*** at 197 ("There has been obviously a lot written about this case. There's been on the radio, television, Internet. Beyond the general information that everybody knows, do you have any other particular unique information about this case?); ***Id.*** at 206 ("There's been an awful lot written in the newspapers, radio, television, Internet, and I suppose you are generally familiar with all of that?); ***Id.*** at 222 ("There's been a lot about this case on radio, television, newspapers, Internet. Beyond what is in the general atmosphere of information, do you know anything about this case?"); ***Id.*** at 233 ("There's been an awful lot written about this case on television, radio, newspaper, radio. Beyond what's generally been circulated, do you have any particular information about this case?"); ***Id.*** at 235; ***Id.*** at 248; ***Id.*** at 265; ***Id.*** at 280; ***Id.*** at 291; ***Id.*** at 301; ***Id.*** at 306; ***Id.*** at 309-311; ***Id.*** at 314.

trials is important, the Supreme Court of the United States has cautioned that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." ***Bridges v. California***, 314 U.S. 252, 271 (1941). The High Court has also stated that an accused may not be punished without "a charge fairly made and fairly tried **in a public tribunal free of prejudice, passion, excitement, and tyrannical power.**" ***Chambers v. Florida***, 309 U.S. 227, 236-37, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940) (emphasis added). The Court also noted:

> It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.

Estes v. Texas, 381 U.S. 532, 542-43 (1965). Under this rubric, the Supreme Court held in ***Sheppard v. Maxwell***, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, that where a trial is held in a circus-like atmosphere of media attention, where a jury is not sequestered, and no change of venue or venire is granted, when viewed in the totality of the trial court's other rulings, the defendant's due process right to a fair trial was indisputably violated. As in ***Sheppard***, the media coverage was pervasive and virulent, making Jerry Sandusky's name synonymous with child molester. It is difficult to imagine a Pennsylvania case involving more negative and prejudicial media coverage. The ***Sheppard*** Court concluded its decision by noting that even in 1966, media scrutiny of trials was increasing, and trial courts must take proactive efforts to protect an accused's right to fair trial, stating

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is **never** weighed against the accused.... Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom. **But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should**

> **continue the case until the threat abates, or transfer it to another county not so permeated with publicity**. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

Id. at 362-63 (emphasis added).

The media has significantly evolved and become more ever present today than in 1966. The Pennsylvania Supreme Court adopted ***Sheppard***, holding that certain circumstances warrant a finding that a trial was inherently lacking in due process. ***Commonwealth v. Pierce***, 303 A.2d 210, 212 (Pa. 1973). ***See also Commonwealth v. Long***, 871 A.2d 1262, 1274 (Pa. Super. 2005) ("The Supreme Court's concerns in *Sheppard* hold true today."), *reversed on other grounds,* 922 A.2d 892 (Pa. 2007).

The Pennsylvania Supreme Court has further noted that in certain circumstances, before a defendant can receive a fair trial, a "cooling off" period may be necessary. ***Commonwealth v. Robinson***, 864 A.2d 460, 484 (Pa. 2004); ***see also Commonwealth v. Briggs***, 12 A.3d 291 (Pa. 2011). In ***Robinson***, the court was faced with the question of whether a cooling off period is necessary where pretrial publicity potentially tainted a jury pool warranting a defense request for a change of venue or venire. In this case, given the statewide interest resulting from the impact and consequences the allegations against Mr. Sandusky had against Penn State University as a whole, its highly popular football program, and one of the all-time icons in collegiate sports, Mr. Sandusky submits that absent a change of venue or venire prejudice was inevitable.

To the extent that the trial court could conclude that pre-trial publicity was equally excessive across Pennsylvania because of the enormous amount of media scrutiny, under ***Sheppard***, trial counsel should have requested that the trial court continue the trial to allow the general animus against Mr. Sandusky and Penn State University to dissipate, and trial counsel was ineffective for failing to make a record of this reasoning to the trial court. The media

attention on Mr. Sandusky and Penn State University was not confined to mere local media interest. The reporting and coverage of this case extended well beyond the Centre County community and became the subject of intense state, national and international media attention in print, radio, television and on the internet.

In Mr. Sandusky's case, it is apparent that given the highly prejudicial pretrial atmosphere, and the attendant circumstances involving Penn State University, the firing and subsequent death of Joe Paterno, the intense scrutiny of the local, national and international media in the case, and the improper leaking of information, Mr. Sandusky's due process right to a fair trial was not only infringed, it was crushed under a stampede of vitriol, rage, and prejudice that mandates a new trial in this case. Moreover, fueling the fire of the prejudicial pretrial environment in this case, in clear violation of the order sealing the presentment, the charges against Mr. Sandusky were posted on a website of the Pennsylvania Unified Judicial System, "apparently by mistake." ***See*** May 6, 2015 Amended Petition, Appendix, at 26. Curiously, apparently the only person to discover the mistaken posting of the charges against Mr. Sandusky, prior to the official public release, was Sara Ganim – the reporter who also mysteriously received the leaked confidential grand jury material in March 2011. ***See*** Appendix, at 22, 88. Additionally, in an apparent effort designed to poison the well with misinformation, the initial grand jury presentment, drafted by the prosecution, contained factually false information. To-wit, the initial presentment stated:

> As the graduate assistant [Michael McQueary] put the sneakers in his locker, he looked into the shower. He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky. The graduate assistant was shocked but noticed that both Victim 2 and Sandusky saw him. The graduate assistant left immediately, distraught.

See Grand Jury Presentment No. 12 at 6. This misrepresentation appeared to be a deliberate act designed to, and having the effect of, further poisoning the atmosphere against Sandusky by sensationalizing, inflating and improperly bolstering what Mr. McQueary actually saw into scandalous and outrageous conduct unsupported by Mr. McQueary's actual testimony.

Mr. Sandusky was prejudiced by the pervasive media attention in Centre County, and by the fact that the community's overriding sentiment to see Mr. Sandusky convicted based on questionable allegations, and the downfall of Joe Paterno, had not abated. As evidence that the passions of the community had not cooled, on the night the verdict against Mr. Sandusky was announced, a crowd of "hundreds" of people in Bellefonte gathered in the square to hear the verdict. ***See*** Nikki Krize, *Sandusky Guilty Verdict Reaction*, WNEP, June 23, 2012, *available at* http://wnep.com/2012/06/23/sandusky-guilty-verdict-reaction/. The following quote from Ms. Krize's report accurately reflects the public perception of Mr. Sandusky: "'We're so excited. This is what needed to happen. He is absolutely guilty. We knew it–we're excited,' Tammy Watkins of Bellefonte said." ***Id.***

Trial counsel and/or direct appellate counsel had no reasonable basis for failing to include this relevant information of the pervasive media attention and the hostile atmosphere in Centre County in their motion for continuance, in post-sentence motions, or on direct appeal. Similarly, trial counsel failed to undertake an investigation or to determine if the passions against Mr. Sandusky had dissipated in Centre County or anywhere else. Mr. Sandusky believes and therefore avers that had the trial court been presented with this overwhelming community sense of anger at Mr. Sandusky, the trial court would have granted the Commonwealth's motion for a change of venire. Moreover, Mr. Sandusky maintains that had this information been properly

presented to the trial court before the trial, the court would have had no choice but to continue the trial to avoid undue prejudice to Mr. Sandusky.

The end result of forcing Mr. Sandusky to trial only seven months after his arrest and 141 days after his arraignment, in an environment already polluted with inappropriate leaks from the grand jury and false information in the grand jury presentment, resulted in a trial that failed to comport with the ideals of modern American jurisprudence. Under ***Sheppard***, the trial court would have had an absolute duty to continue this case to allow the passions of the community to ameliorate prior to letting that same community sit in judgment of Jerry Sandusky had counsel properly addressed the issue.

The Commonwealth itself has cited a case that recognized that "pretrial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias[.]" Commonwealth's Response, at 10 (quoting ***Commonwealth v. Drumheller***, 808 A.2d 902-902 (Pa. 2002)). While the ***Drumheller*** Court added that such a case "would be a most unusual case[,]" perhaps no other case in Pennsylvania history can be said to have garnered the type of local, statewide, and national negative media attention. If ever an exceptional case existed, it is this matter.

While the Commonwealth maintained that Mr. Sandusky did not identify any juror selected whose partiality could be questioned, as the attached expert report delineates and Mr. Sandusky's prior arguments show, the fairness of all the jurors selected can be questioned since they all knew of the negative pre-trial publicity and empirical science and research conclusively demonstrates that no manner of questioning by a court can secure an unbiased jury in a case like Mr. Sandusky's absent an adequate change of venue or cooling period.

Thus, the Commonwealth's reliance on the trial court's jury instruction misses the mark. As has been demonstrated, learned commentators have concluded that in a high profile sex abuse case such as Mr. Sandusky's, jury instructions have a perverse effect. Moreover, the argument advanced by the Commonwealth ignores that Mr. Sandusky's positions relative to jury selection relate to the very jurors that would have been selected had a change of venue, venire, or cooling period occurred. Had one different juror from another county been selected that believed Mr. Sandusky was not guilty, then there is a reasonable probability that the proceeding would have been different. Further, under the context of these jury selection claims, Mr. Sandusky avers that the outcome of the proceeding is not the trial itself, but the decision of whether to hold the trial in Centre County. ***See Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015) (waiver of right to testify does not require a showing that the outcome of the trial would probably have been different); ***Commonwealth v. Mallory***, 941 A.2d 686 (Pa. 2008) (waiver of jury trial right claim only requires showing that person would not have waived right, not that outcome of trial would have likely been different). In addition, a Penn State student who stated he had opinions about the case and as a student, "hear[d] everything" was accepted on the jury. Similarly, a retired bus driver explained that she had strong feelings about protecting kids and did not want to see children hurt and only indicated that she "probably could be fair." This juror also was seated. This refutes the Commonwealth's claim that there were not biased jurors.

Mr. Sandusky went to trial at the height of the public anger and community hostility against him, with the Penn State faithful blaming him for the downfall of Joe Paterno and Penn State University's football program. Due to trial counsel's ineffectiveness he was deprived of his right to a fair trial. Since trial counsel failed to support his arguments for continuance with the clear evidence of the community's continued thirst for Jerry Sandusky to be convicted

irrespective of the evidence actually introduced against him. Had trial and direct appellate counsel preserved this issue and cited the publications referenced in this petition above, Mr. Sandusky would have received a new trial free of the undue prejudice.

10. Trial counsel were ineffective during voir dire in neglecting to question the jurors specifically about the information they had learned from the media where the trial court's opening question to each witness conceded that due to the extensive media coverage the juror had knowledge of highly prejudicial information.[38]

In footnote 39 above, Mr. Sandusky highlighted many of the instances in which the trial court openly acknowledged to prospective jurors the extensive media coverage of the case. The court's questions, as set forth in Mr. Sandusky's prior argument, conceded the existence of extensive knowledge of the allegations on the part of the jurors. Pointedly, the general information in the press was extensive and highly prejudicial. Despite counsel electing to keep the case in Centre County, counsel did not *voir dire* the jurors on precisely what information they knew based on the media coverage. Since the "general information" included grand jury presentments, one of which erroneously indicated that Michael McQueary saw anal intercourse, counsel was derelict in neglecting to question the potential jurors further regarding the facts that they knew about the case. For example, counsel should have asked each juror if they had read the grand jury presentments. Concomitantly, counsel also should have probed into whether the jurors had read stories placing blame for the firing and death of Joe Paterno on Mr. Sandusky.

Because counsel elected to try the case in Centre County, and the court's *voir dire* questioning presumed extensive knowledge of the case, trial counsel had no reasonable basis in declining to ask the jurors about the general information that they acknowledged that they had heard and learned from the media. Trial counsel's failure to properly question the proposed

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38 This is a new claim, but is derived from issues previously raised regarding prejudicial pre-trial publicity.

jurors about the information that saturated Centre County resulted in the selection of jurors that, despite any statements to the contrary, could not fairly consider the evidence. ***See*** Studebaker & Penrod, *Pretrial Publicity and its Influence on Juror Decision Making* in Psychology and Law, at 265-266 (2005 ed. Brewer & Williams); Posey and Wrightsman, *Trial Consulting*, at 58 (2005). Further, as noted above, the court seated two jurors who, had counsel not been ineffective, would not have made it on the jury.

Who Needs a Pre-Trial and Trial Strategy? Maybe They Were Telling the Truth—Trial Counsel Admit They Cannot Adequately Represent their Client:

Mr. Amendola candidly placed on the record that he could not adequately represent Mr. Sandusky. The sheer amount of discovery clearly overwhelmed Mr. Amendola and his staff. Mr. Amendola was not lying or exaggerating when he stated in exasperation that he could not adequately represent Mr. Sandusky. The task was made even more difficult when Mr. Amendola inexplicably waived Mr. Sandusky's preliminary hearing and failed to interview critical witnesses. These were more than mere tactical blunders, they hamstrung counsel to such a degree that Mr. Amendola and Mr. Rominger were prevented from rendering constutionally effective representation.

11. Trial counsel was ineffective in waiving Mr. Sandusky's preliminary hearing and failing to use that proceeding for both discovery and to cross-examine the witnesses who had given numerous prior inconsistent statements.[39]

In ***Commonwealth v. Stultz***, 114 A.3d 865 (Pa. Super. 2015), the Superior Court held that claims related to counsel's performance at a preliminary hearing are cognizable under the PCRA. Since trial counsel waived the preliminary hearing, the cognizability of the issue is distinct but analogous. Further, the ***Stultz*** Court relied on ***Commonwealth v. Lyons***, 568 A.2d 1266 (Pa.

39 This issue was not raised in Mr. Sandusky's prior petitions.

Super. 1989), where no preliminary hearing occurred because the defendant had absconded. Ultimately, the ***Lyons*** panel opined that the absence of the preliminary hearing did not impair the truth-determining process at trial and that Lyons had failed to show that "the absence of a preliminary hearing in any way undermined the truth determining process so as to render unreliable the trial court's finding of guilt." ***Id.*** at 1269. Nonetheless, it is evident that such a claim is cognizable and may present an issue of arguable merit.

Furthermore, in contrast to ***Lyons***, the truth-determining process herein was rendered unreliable by trial counsel's waiver of the preliminary hearing. Moreover, Lyons' counsel therein did seek to have a preliminary hearing, but that hearing was denied. Instantly, Mr. Sandusky acknowledges that the purpose of a preliminary hearing relative to the Commonwealth is to establish a *prima facie* case of guilt. Mr. Sandusky does not contend that his charges would have been dismissed at a preliminary hearing in light of the fact that he was ultimately convicted. Rather, Mr. Sandusky's position is that by waiving the preliminary hearing, trial counsel was inadequately prepared to cross-examine the victims herein. The purpose of a preliminary hearing with respect to defense counsel is most often to discover what the witnesses will testify to at trial. Even in the event that a witness testifies inconsistently at trial from their preliminary hearing testimony, it is well settled that counsel can impeach that witness using the prior inconsistent testimony.

Indeed, then Attorney Rominger had posted on his website in September of 2011 an article entitled "What is a Preliminary Hearing?" and opined that it is ordinarily a common mistake to waive a preliminary hearing.[40] By electing to waive the preliminary hearing and not

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40 http://www.huffingtonpost.com/2011/12/15/karl-rominger-jerry-sandusky-lawyer-showering_n_1151323.html.

question the witnesses, Mr. Amendola was unable to obtain valuable information for purposes of trial. Accordingly, this issue has arguable merit. Pointedly, in an article discussing counsel's decision, well known Philadelphia Attorney and former prosecutor Jack McMahon opined, "In a preliminary hearing, you have the right to confront your accusers, you have the right to cross-examine witnesses. It's a very helpful and powerful tool for a trial lawyer[.]" He added, "**It doesn't make sense to give up that important right.**"[41] (emphasis added). A preliminary hearing is considered a critical stage of the criminal proceedings. ***Commonwealth v. Carver***, 436 A.2d 1209, 1211 (Pa. Super. 1981) ("It is axiomatic that the preliminary hearing is a "critical stage" of a criminal proceeding, at which Appellant is entitled to the assistance of effective counsel."); ***Commonwealth v. Tarver***, 384 A.2d 1292, 1295-1296 (Pa. 1978) (discussing U.S. Supreme Court cases). Further, under the criminal rules of procedure, as mentioned, a defense attorney is entitled to cross-examine the witnesses, inspect evidence, and call witnesses on the defendant's behalf. ***See*** Pa.Crim.P. 542. Thus, Pennsylvania law recognizes that the purpose of preliminary hearing for a defendant goes beyond refuting a Commonwealth's *prima facie* case.

Mr. Sandusky adds that trial counsel had no reasonable basis to waive the preliminary hearing since this case involved accusations of child sex abuse without any physical evidence. The Commonwealth failed to uncover any child pornography in Mr. Sandusky's home, including on his computer. This despite police in their affidavit for a search warrant reasoning that, "The individual may save sexually explicit or suggestive materials in a variety of media (example: photographs, digital images, videos, drawings)." ***See*** May 6, 2015 PCRA Appendix at 265, Affidavit of Probable Cause. The affidavit further set forth that such "individuals sometimes

41 http://www.bloomberg.com/news/articles/2011-12-13/jerry-sandusky-waives-preliminary-hearing-in-penn-state-sex-abuse-case.

possess and maintain their 'libraries' of child pornographic materials in the privacy and security of their home or another secured location." ***Id.*** According to the affidavit, "computer files or remnants of such files can be recovered months or even years aft they have been downloaded onto a hard drive, deleted or viewed via the Internet...even when such files have been deleted, they can be recovered months or years later using readily available forensics tools." ***Id.*** However, police recovered no evidence of child porn from Mr. Sandusky.

In light of the complete absence of physical evidence, the case rested almost entirely on the credibility of the alleged victims. Further, the victims had already provided numerous inconsistent statements regarding Mr. Sandusky. Hence, it was critical to examine these witnesses under oath in order to prepare for their testimony at trial. Such questioning could have determined whether the accusers' therapy was what led to ever changing disclosures. To the extent that the PCRA court believes that trial counsel could provide some reasonable basis in this case for waiving such a critically important proceeding, it raises a genuine issue of fact that warrants a hearing.

Finally, Mr. Sandusky suffered actual prejudice. "To properly determine whether prejudice resulted from the quality of counsel's representation, we must focus on counsel's overall trial strategy and view his performance as a whole." ***Commonwealth v. Weiss***, 606 A.2d 439, 443 (Pa. 1992). As noted by Attorney Rominger in his affidavit, Mr. Amendola did not adequately develop an overall trial strategy. Mr. Amendola himself stated on the record that he could not effectively represent Mr. Sandusky due to the overwhelming discovery.

Had counsel not waived the preliminary hearing, he would have been able to learn critical information relevant to trial preparation, lessening his reliance on sorting through the discovery materials for such preparation. This could have at least included potential information regarding

the alleged victims' therapy and how repressed memory therapy is what resulted in them coming forward with these serious allegations. Even assuming *arguendo* that each witness would have testified identically at trial as in the preliminary hearing, trial counsel could have better exploited the numerous inconsistent statements made by the various victims by having conducted a preliminary hearing. Since the case rested almost entirely on credibility, more effectively impeaching the victims at trial would have likely led to a different outcome. ***Commonwealth v. Gillespie***, 620 A.2d 1143, 1145 (Pa. Super. 1993) ("It is well-settled that where there are only two direct witnesses of a particular incident, as in the instant case, the complainant and the appellant, the credibility of those witnesses is of the utmost importance").

12. Trial counsel was ineffective in failing to interview the victims who testified, James Calhoun, and critical Commonwealth witnesses such as Ronald Petrosky and Michael McQueary.[42]

Since trial counsel waived the preliminary hearing, it was essential for him to interview various Commonwealth witnesses. "A claim that trial counsel did not conduct an investigation or interview known witnesses presents an issue of arguable merit where the record demonstrates that counsel did not perform an investigation." ***Stewart, supra*** at 712 (collecting cases). "In [***Commonwealth v.***] ***Jones,*** [437 A.2d 281 (Pa. 1981),] our Supreme Court specifically found trial counsel ineffective for failing to interview a witness where the key issue turned on the credibility of the defendant and an undercover police officer." ***Id.***

In ***Perry, supra***, the Pennsylvania Supreme Court held that the "[f]ailure to prepare is not an example of forgoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel." Although ***Perry*** involved

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42 This issue is related to Mr. Sandusky's claim in his Amended Petitions regarding counsel being ineffective for failing to interview the victims. Those claims can be found at paragraphs 270-285.

a capital matter, the allegations in this case are no less serious. Moreover, "the right to effective counsel attaches to "the capital defendant, the felon, and the misdemeanant alike." ***Stewart, supra*** at 712. As in ***Stewart***, where the *en banc* Superior Court held it was "untenable to conceive a reasonable justification for appearing in a first-degree murder case without thorough preparation," which included failing to interview a known witness, it was ineffective to fail to interview witnesses in this case where counsel waived the preliminary hearing and his opportunity to question those witnesses. The ***Stewart*** Court continued,

> As our Supreme Court said in [***Commonwealth v.***] ***Mabie***, [359 A.2d 369 (Pa. 1976)],
>
> > the question here is the decision not to interview the witnesses, not the decision to refrain from calling them at trial.... the value of the interview is to inform counsel of the facts of the case so that he may formulate strategy.

Stewart, supra at 713. Again, Mr. Rominger's affidavit raises questions of fact regarding trial counsel's lack of a trial strategy. Insofar as a question arises as to whether the accusers, or Mr. McQueary, or Mr. Petrosky would have met with trial counsel, a material issue of fact is at issue. Further, even if all of these witnesses would not have met with counsel, this highlights the importance of having conducted a preliminary hearing. Had counsel interviewed the witnesses who testified or conducted a preliminary hearing, they would have learned that many of the victims allegations changed over time based on having received psychological treatment and that they were claiming to have repressed their memories of abuse. This would have allowed counsel to prepare for trial by contacting the numerous experts in this country on repressed memory therapy and its extensive problems, file a motion *in limine* regarding repressed memory testimony that, similar to hypnotically refreshed testimony, should have been precluded, and/or sought an expert witness to testify that repressed memory therapy is no longer considered by leading academics to be reliable. These issues will be explored further in separate issues.

Mr. Sandusky further posits that counsel's failure to interview Mr. Calhoun had no reasonable basis and resulted in actual prejudice. Mr. Calhoun provided a statement to police that indicated that Mr. Sandusky was not involved in the shower incident described by Mr. Petrosky. The charge against Mr. Sandusky relative to the unnamed victim described by Mr. Petrosky hinged on whether the jury believed that Mr. Calhoun exclaimed that Jerry Sandusky was performing oral sex on a minor. Mr. Calhoun, however, had denied that he saw Mr. Sandusky commit that crime.

Had counsel interviewed Mr. Calhoun he could have learned that information. Additionally, counsel could have learned if Mr. Calhoun could have been presented as a witness or if he in fact was too mentally infirm to testify. The evidence with respect to the unnamed victim described by Mr. Petrosky was not overwhelming. Frankly, the Commonwealth itself conceded that even allowing Mr. Petrosky to testify to the hearsay statement by Mr. Calhoun was a close call because there was not significant corroborating evidence. ***See*** N.T., 6/13/12, at 216 (Attorney Fina arguing in favor of introducing the hearsay testimony and stating, "certainly novel, Judge, but I would assert we have gotten the ball over the finish line her. Maybe by a hair.").

Had trial counsel interviewed Mr. Calhoun, he could have determined whether he should have been presented and if in fact he actually was not competent to testify. However, no claim of a reasonable strategy attaches to a decision not to meaningfully interview the witness before trial. ***Stewart, supra*** at 713. With respect to the unnamed victim, the evidence was not overwhelming and the charge hinged on whether the jury believed Mr. Petrosky accurately relayed Mr. Calhoun's out-of-court statement. Thus, trial counsel's failure to interview Mr. Calhoun and present, at least, his statement to police denying Mr. Sandusky was involved resulted in actual

prejudice. ***See id.***; ***see also Commonwealth v. Matias***, 63 A.3d 807 (Pa. Super. 2013) (*en banc*) (counsel ineffective for not calling daughter of defendant to refute testimony of sex assault victim). Lastly, this issue raises genuine issues of fact as to why counsel neglected to conduct any interviews with the victims and witnesses mentioned above.

13. Trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky.[43]

As discussed in Mr. Sandusky's prior petitions and noted in the facts herein, the extreme rush in which trial occurred in this matter, despite reasonable requests for continuance by defense counsel, was such that trial counsel could not provide effective assistance in this matter given the mountains of discovery that was continually disclosed, especially as such disclosures continued up to the eve of trial.[44] Pointedly, it is evident from the trial record itself that the sheer amount of discovery overwhelmed trial counsel. Cognizant of the fact that they were unprepared to try this case in June 2012, after the trial court denied their request for a continuance, trial counsel half-heartedly moved to withdraw in this matter. N.T., 6/5/12, stating:

> I intend to file a motion to withdraw as counsel, Mr. Rominger and I, fully realizing the court will deny it based on the lack of preparation of all of the things that are going most notably the absence of our experts and jury consultant and the issue concerning the potential issues which are apparently becoming public which is based on what I told you yesterday...I feel that

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43 This claim was previously leveled in Mr. Sandusky's May 6, 2015 petition at paragraphs 128-144.

44 The Pennsylvania Superior Court in Mr. Sandusky's direct appeal acknowledged that discovery consisted of 9,450 pages of documentation, 674 pages of Grand Jury transcripts, and 2,140 pages from subpoenas *duces tecum* just in the period of January 28, 2012 until June 15, 2012. The time needed to comprehensively review twelve thousand pages of discovery is significant. Both trial attorneys acknowledged that they did not review discovery completely, as it is a matter of record that they did not read Matt Sandusky's grand jury testimony in favor of his father. Further, as discussed, counsel did not listen to the Calhoun tape that exculpated Mr. Sandusky.

> we're duty bound ethically to tell the court we're not prepared to go to trial at this time.... So we feel compelled to file this motion, again, fully cognizant of the fact that the court will deny but at least there will be a record.

N.T. Motion to Withdraw, 6/5/12, at 3-5.

Messrs. Amendola and Rominger specifically advised the trial court that they had an ethical duty to withdraw, citing the Pennsylvania Rules of Professional Conduct. ***Id.*** Mr. Rominger advised the court that he had contacted and consulted with the Pennsylvania Ethics Hotline, which actually indicated that it was reluctant to issue a formal opinion because they suspected which case was involved.[45] The trial court denied the motion.

Under Rule 1.1 of the Pennsylvania Rules of Professional Conduct, "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, **and preparation reasonably necessary for the representation.**" ***Id.*** (emphasis added). Trial counsel failed to prepare as reasonably necessary for representing Mr. Sandusky at trial; indeed they specifically advised the trial court they could not, to no avail. A copy of Rule 1.16 of the Pennsylvania Rules of Professional Conduct is attached hereto at Appendix, P. 361.

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
> (3) the lawyer is discharged.
>
> * * *

45 Mr. Amendola, in exasperation, exclaimed, "My staff is ready to quit."

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

Under Rule 1.16(a), trial counsel's withdrawal was **mandatory**. When the trial court denied the motion, trial counsel did not request permission for an interlocutory appeal, either by permission under Pennsylvania Rule of Appellate Procedure 312, or as a collateral order under Pa.R.A.P. 313. Even if the trial court would not have certified the question for purposes of a permissive interlocutory appeal, the issue of being compelled to represent Mr. Sandusky in violation of the canons of ethics would have been appealable by right under Pa.R.A.P. 313, which states:

> (a) *General Rule*. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) *Definition*. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Id.; see also Schultz, supra.

The question of whether an attorney may be compelled to represent a defendant at trial in violation of the attorney's ethical duties is separable from and collateral to the main cause of action, which is determining Mr. Sandusky's guilt on the charges against him. Second, the right involved is too important to be denied review if a true good faith ethical conflict exists. That is the right to effective and ethical representation. Finally, if the review is postponed until final judgment, the claim is now irreparably lost because Mr. Sandusky was tried and convicted as a result of counsel who had an ethical conflict and could not provide him with effective assistance of counsel. Trial counsel had no reasonable basis for failing to seek review of this question

under the collateral order doctrine. This is especially true since Attorney Rominger invoked the doctrine to appeal the trial court's June 26, 2012 order.

Trial counsel, after failing to seek review of this question under the collateral order doctrine, chose to proceed to represent the defendant even though they were fully cognizant that their representation was in direct violation of the Pennsylvania Rules of Professional Conduct. Put simply, they should have refused to go forward. Mr. Sandusky suffered indisputable prejudice as a result, as he was represented at trial by attorneys who were admittedly proceeding in violation of Rule 1.1 and 1.16 of the Pennsylvania Rules of Professional Conduct, and in violation of their ethical duties to him.

There is a reasonable likelihood that the outcome of this case would have been different had trial counsel appealed this order under the collateral order doctrine. Given counsels' own admissions that they could not provide constitutionally effective counsel and would be proceeding in violation of the canons of ethics, (an issue of material fact exists), and the appellate courts reasonably should have reversed the trial court's ruling and permitted trial counsel to withdraw from the case rather than violate their ethical duty to their client.

Finally, since the Rules of Professional Conduct mandate counsel's withdrawal if they cannot ethically represent Mr. Sandusky, as they affirmatively stated to the Court, trial counsel had a duty to refuse to represent Mr. Sandusky at trial, and they should not have proceeded to trial. Counsel's failure to seek a collateral appeal of the denial of either the motion to continue or the motion to withdraw, and counsel's failure to refuse to represent Mr. Sandusky at trial constitutes ineffectiveness, and Mr. Sandusky should be granted a new trial.

14. Trial counsel was ineffective for neglecting to adequately review discovery and erroneously stating that nothing in discovery would have changed his trial presentation.[46]

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

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

N.T., Post-Sentence Motion Hearing, January 10, 2013, at 39-40, Appendix, at 688.[47]

Trial counsel was ineffective for testifying in this regard because trial counsel did not review after the trial all the discovery materials he had lacked time to examine before trial.

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46 This issue was addressed in Mr. Sandusky's May 6, 2015 petition.

47 In the Commonwealth's response, it relies heavily on this statement by Mr. Amendola and the Superior Court decision on direct appeal. What it overlooks is that Mr. Sandusky's position is that Mr. Amendola's representation itself was ineffective assistance and inaccurate. Mr. Rominger, as discussed in the body of this petition, has raised a material issue of fact by calling into question Mr. Amendola's statement. In addition, it is averred that Mr. Amendola would submit that his strategy and preparation would have been different had he been afforded adequate time to review the discovery. More importantly, it is plain that Mr. Amendola's statement is inaccurate. As argued, trial counsel did not review discovery fully as they failed to uncover or present Mr. Calhoun's taped recorded statement denying Mr. Sandusky committed any crime against unidentified Victim 8. Furthermore, trial counsel both acknowledged that they had never reviewed Matt Sandusky's grand jury testimony. This indicates not only had they not reviewed all of the discovery but that they could not have provided sound advice as to whether Mr. Sandusky should testify.

Indeed, neither trial attorney ever reviewed Matt Sandusky's grand jury testimony, which would have been critical in advising Mr. Sandusky about his right to testify. Since the Superior Court relied on this statement in affirming Mr. Sandusky's convictions, and an issue of material fact exists, as to whether counsel did thoroughly review discovery, including but not limited to Mr. Calhoun's statement to police discussed *infra*, Mr. Sandusky is entitled to a hearing to establish actual prejudice.

Additionally, in light of the Superior Court leaning on this statement to affirm Mr. Sandusky's conviction, it is evident that he suffered prejudice because the statement by counsel was inaccurate. Indeed, Mr. Rominger's affidavit confirms that had he been called at the post-sentence motion hearing, in which Mr. Amendola made the aforementioned statement, he "would have strongly disagreed with Attorney Amendola. We would have in fact presented the case very differently if we had time to review and digest the discovery." Affidavit of Mr. Rominger, at 9. Thus, this claim entitles Mr. Sandusky to relief or at minimum an evidentiary hearing.

The Repressed Memory Myth:

Perhaps the greatest myth perpetrated on the jury in this case was the view that a person without suffering from a brain injury or amnesia could completely forget or block out traumatic life occurrences only to have them surface as a result of therapy. Here, the Commonwealth knew that many of the victims stories evolved based on their therapy, yet never disclosed that the victims had no independent recollection of sexual abuse. Trial counsel, upon hearing such testimony, failed to make the connection and present expert testimony showing that the overwhelming sentiment in the scientific community is that repressed memory therapy is junk science that is more likely to lead to false memories than accurate recollection. Indeed, an

impaired memory or a memory that has been refreshed through hypnotic or other similar type of therapy is grounds for precluding any such testimony.

15. The Commonwealth violated Brady by failing to disclose that numerous victims not limited to Aaron Fisher, D.S., B.S.H. and J.S. were undergoing repressed memory therapy and due to patient-doctor privilege trial counsel could not have learned this information from any other source.[48]

The undersigned, in his book on the PCRA has opined:

> In ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutorial suppression of evidence that is material to guilt or punishment violates due process. A ***Brady*** claim is specifically cognizable under the PCRA. 42 Pa. C.S. § 9543(a)(2)(vi). ***Commonwealth v. Simpson***, 66 A.3d 253, 264 n.16 (Pa. 2013).
>
> > A ***Brady*** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. No violation occurs if the evidence at issue is available to the defense from non-governmental sources. More importantly, a ***Brady*** violation only exists when the evidence is material to guilt or punishment, *i.e.*, when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'
>
> ***Commonwealth v. Tedford***, 960 A.2d 1, 30 (Pa. 2008) (citations omitted). Evidence is material where it affects the credibility of a witness. ***Commonwealth v. Ly***, 980 A.2d 61 (Pa. 2009). However, evidence is not to be considered exculpatory merely because a petitioner alleges the evidence is exculpatory. ***Commonwealth v. Lambert***, 884 A.2d 848 (Pa. 2005). A ***Brady*** claim, unlike a non-***Brady*** after-discovered evidence issue, can succeed if the after-discovered evidence would have been used solely to impeach a witness. ***Commonwealth v. Galloway***, 640 A.2d 454 (Pa. Super. 1994).

J. Andrew Salemme, *Guilty Until Proven Innocent: A Practitioner's and Judge's Guide to the Pennsylvania Post-Conviction Relief Act (PCRA)*, at 123-124 (2016).

Instantly, evidence that certain accusers did not have independent recollection of any crimes committed by Mr. Sandusky is material impeachment evidence that should have been

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48 This is a new position.

disclosed pre-trial. The Commonwealth itself acknowledged in its response to Mr. Sandusky's prior petition that repressed memory issues can go to credibility. Commonwealth's Response, at 44-45. Thus, any evidence that the accuser's memory had been impaired and was refreshed by psychiatric treatment was material impeachment evidence. Since the Commonwealth possessed this information,[49] and Mr. Sandusky's counsel was unable to learn of this information through a non-governmental source, due to the psychiatrist-patient privilege, it violated ***Brady*** by failing to disclose this evidence.

Had this evidence been disclosed, Mr. Sandusky could have filed a motion *in limine* to preclude such testimony under ***Commonwealth v. Nazarovitch***, 436 A.2d 170 (Pa. 1981), and Pa.R.E. 601, and argued that repressed memory therapy did not meet the requirements of ***Topa/Frye*** and therefore any testimony based on that non-scientific therapy was improper. Alternatively, counsel could have called an expert to provide expert testimony on the theory of false memory and repressed memory therapy and the unreliability of such memories. Mr. Sandusky avers that Dr. Paul Simpson and Dr. Phillip Epsilin were available to testify and that their testimony regarding false memory and repressed memory therapy would have led to a reasonable probability that the outcome of the trial would have been different. This position is explored in more detail below.

Misleadingly, the Commonwealth cites ***Commonwealth v. Crawford***, 718 A.2d 768 (Pa. 1998), for the proposition that expert testimony on the phenomena of false memory/repressed memory therapy was unnecessary because the jury was capable of assessing credibility. That decision did not address whether expert testimony on repressed memory was admissible and expressly opined, "the record demonstrates that revived repressed memory was not truly at issue

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49 Any claim to the contrary by the Commonwealth raises a material question of fact entitling Mr. Sandusky to an evidentiary hearing.

in this case." *Id.* at 773. Here, the Commonwealth's answer suggests that it was well aware that a number of the victims were involved in such therapy. Mr. Gillum, himself, was treating Aaron Fisher and B.S.H. Even absent presentation of an expert on repressed memory therapy and the phenomena of false memories, Mr. Sandusky was prejudiced by the Commonwealth's failure to disclose this vital impeachment evidence. Had the jury known in clearer detail that numerous victims had no independent recollection of any abuse outside of having received this type of therapy, there is a reasonably probability that it would have acquitted Mr. Sandusky as to at least one charge or a mistrial could have resulted.

16. Mr. Sandusky is entitled to relief based on after-discovered evidence that demonstrates that Aaron Fisher and D.S. and Matt Sandusky had no independent recollection of the crimes alleged outside of receiving repressed memory therapy.[50]

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

In an interview following Mr. Sandusky's trial, D.S. admitted that before he entered into therapy he had no memory of being abused. He admitted that before the allegations of abuse

50 This argument was not advanced in the prior petition.

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

This information, since it was not revealed until after trial, constitutes after-discovered evidence that would warrant a new trial. As previously delineated, to succeed on an after-discovered evidence claim, a petitioner must generally show that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Padillas***, ***supra*** at 363. While due diligence does not exist where counsel could have questioned or investigated an obvious available source of information, in this case, the doctor-patient privilege precluded counsel from questioning the accusers therapists regarding whether they were engaged in repressed memory treatment. To the extent the Commonwealth or PCRA court would contend that counsel could have learned this information by interviewing the accusers or having a preliminary hearing, Mr. Sandusky has already alleged that counsel were ineffective in

this regard. Thus, if the court determines counsel could have learned the specific statements made by Aaron Fisher, D.S., and Matt Sandusky, counsel was ineffective in failing to uncover this information as detailed.

The critical issue for after-discovered evidence is not the availability or existence of the witness, but their testimony. In ***Commonwealth v. Bulted***, 279 A.2d 158 (Pa. 1971), the defendant was convicted of killing his wife. At trial, he alleged that he discovered his wife with Francisco Matos and fought with him. When he returned to his house, he alleged his wife pulled a gun on him and in the struggle she was shot. Matos, who was known, did not testify. He later provided a statement to police corroborating the earlier fight. The statement was considered after-discovered evidence. In addition, in ***Commonwealth v. Cooney***, 282 A.2d 29 (Pa. 1971), the Supreme Court awarded a new trial based on after-discovered evidence despite the physical evidence technically being known and available. There, the defendant was convicted of first-degree murder. He claimed the victim shot him first and then shot herself during a struggle or in suicidal remorse. An X-ray of the defendant taken after trial confirmed that he had been shot in the head.

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

Moreover, as set forth above, a study of how the after-discovered evidence test came about reveals that the impeachment aspect of the test related to impeaching the character of a witness. Phrased differently, if the evidence contradicts factual testimony as to a material issue, it is not considered as being used solely for impeachment purposes. ***See Oelricks, supra***; ***Mosteller, supra***; ***Krick, supra***. Similarly, in this case, the evidence would not solely be used for impeachment purposes; indeed, Matt Sandusky never testified.

In this regard, those who undergo repressed memory therapy are not actually lying, they simply are relaying false memories. Had this evidence been revealed, trial counsel could have presented expert testimony on repressed memory therapy or filed a motion *in limine* to preclude any testimony based on repressed memory therapy. ***See Nazarovitch***; ***compare also Commonwealth v. Henkel***, 938 A.2d 433 (Pa. Super. 2007). For example, some leading experts have opined, "the best way to protect the public is to prohibit the use of questionable memories as evidence." ***See*** Attachment C. These positions are explored in more detail in the following ineffectiveness argument. That the alleged victims actually had no independent recollection of the abuse is exculpatory evidence and would have altered counsel's trial strategy regarding the filing of motions or presentation of expert witnesses. This after-discovered evidence is not mere impeachment evidence and it would likely have changed the outcome of the case.

17. Trial counsel were ineffective in declining to present either a motion in limine to preclude any testimony based on repressed memory therapy or expert testimony that called into question the theory of repressed memory.[51]

Mr. Sandusky further alleges that counsel were ineffective in not seeking to preclude the testimony of the accusers that was based on repressed memory therapy or present expert testimony on false memories/repressed memory therapy. If the PCRA court concludes that

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51 This claim is new, but is related to a portion of an argument set forth in the prior petition.

evidence of the use of repressed memory therapy was recoverable by Mr. Sandusky's attorney's through due diligence or from a source outside the government, then it is evident that counsel were ineffective. Moreover, if the PCRA court determines that trial counsel could not have specifically learned of the after-discovered statements made above, there was still sufficient testimony from the victims to warrant trial counsel exploring the fact that numerous victims were claiming that therapy helped them to remember the abuse and present expert testimony.

For example, at trial D.S. testified, "That doorway that I had close has since been reopening more. More things have been coming back and things have changed since that grand jury testimony. Through counseling and different things, I can remember a lot more detail that I had pushed aside than I did at that point." N.T., 6/13/12, at 143. J.S. also testified, "Everything that's coming out now is because I thought about it more. I tried to block this out of my brain for years." N.T., 6/14/12, at 122. B.S.H. added, "I have spent, you know, so many years burying this in the back of my mind forever." N.T., 6/11/12, at 162-163. Z.K.'s civil attorney made a public statement during the trial that the victims "create a bit of a Chinese wall in their minds. They bury these events that were so painful to them deep in their subconscious."

In ***Nazarovitch, supra***, the Pennsylvania Supreme Court recognized the importance of having the trial court make the preliminary determination of whether evidence concerning a repressed or recovered memory is sufficiently reliable to permit admission at trial in the case of testimony "recovered" by hypnosis. The Supreme Court of the United States has acknowledged that certain circumstances warrant a court's pretrial assessment of a witness's reliability as a predicate to admissibility of evidence. ***See e.g., Jackson v. Denno***, 378 U.S. 368 (1964) (authorizing a pretrial determination as to whether a defendant's confession was voluntary); ***Manson v. Brathwaite***, 432 U.S. 98 (1977) (pretrial hearing into reliability of identification in

cases involving suggestive lineups). Repressed memory therapy is analogous to hypnosis and in fact hypnosis is a technique sometimes used in that type of therapy. Both hypnosis and repressed memory therapy have their origin and derive from psychologists and psychiatrists and treatment of patients.

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

Similarly, Dr. Harrison Pope, Jr., and Dr. James Hudson have opined, "Decades of research on victims of trauma have shown that individuals remember traumatic events very well, and often much more vividly than non-traumatic events." Modern Scientific Evidence: The Law and Science of Expert Testimony (2011-2012), *Repressed Memories: Scientific Status*, (ed. Faigman et al.), at 850. That work contains a table of 33 scientific publications that question the validity of repressed and recovered memory. ***See*** Attachment C. Thus, had counsel presented a motion *in limine* with supporting citations to the numerous scholarly books, learned treatises, and articles,[52] on the unreliability of refreshed memory through therapy there is a reasonable probability that the court would have precluded any testimony based on memories that were offered only after undergoing such therapy. ***See also State v. King***, 733 S.E.2d 535 (N.C. 2012); ***State v. Hungerford***, 697 A.2d 916 (N.H. 1997); ***State v. Quattrocchi***, 1999 WL 284882, at *13

52 Mr. Sandusky attaches a small sampling at the end of his petition at Attachment C.

(R.I. Super. 1999); ***U.S. v. D.W.B.***, 74 M.J. 630, 644 (Navy-Marine Crim. App. 2015); ***Isely v. Capuchin Province***, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995) ("[T]here is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst.").

Absent this therapeutically refreshed testimony, the outcome of the trial would likely have been different since the accusers had little to no independent recollection of criminal behavior, and only remembered events such as showering with Mr. Sandusky and Mr. Sandusky putting his hand on their knee. Should the Commonwealth assert that the victims did not undergo this type of therapy, a material issue of fact exists. Additionally, if the Commonwealth acknowledges that it knew such therapy occurred, then it is in essence conceding a ***Brady*** violation.

Mr. Sandusky adds that he is requesting a licensed psychologist/expert, such as Dr. Paul Simpson, be permitted to review, *in camera*, with the PCRA court, the notes of those therapists treating the victims at the time of trial, including but not limited to Mr. Gillum to aide in determining if improper and suggestive techniques were used to elicit various accusers allegations. Should this request be denied based on privilege, then Mr. Sandusky's ***Brady*** and after-discovered evidence claims are buttressed by his inability to have obtained this information pre-trial in order to adequately prepare for trial.

Of course, once the accusers testified at trial as to being able to remember abuse after undergoing therapy when they had no independent recollection during prior statements, trial counsel should have presented an expert on false memory and repressed memory therapy to opine that repressed memory therapy is not an accepted science. The test for ineffectiveness for failing to call a witness requires the petitioner show that the witness exists, was available to

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

Instantly, such an expert exists; indeed, numerous experts on the subject exist. In this case, Dr. Paul Simpson and Dr. Phillip Esplin. Dr. Esplin, at an evidentiary hearing, can testify to the necessity of using expert testimony in cases involving repressed or recovered memory, manufactured memory and suggestive questioning and questioning protocol in cases of alleged sexual abuse.[53] Dr. Simpson, a nationally known expert on the subject, and forensic psychologist who has been qualified to testify in numerous courts, also would have been available to provide testimony during trial to explain the phenomena of false memories based on repressed memory therapy and how the science of repressed memory therapy is unreliable. Dr. Simpson also could relay this testimony at an evidentiary hearing and could have provided an expert report.[54]

Counsel should have or through reasonable diligence could have discovered this witness. Dr. Simpson is a published author on the subject and has a website with links to various information discussing false memory and repressed memory therapy. Dr. Simpson was and is willing to testify as to repressed memory therapy and false memories. Finally, such testimony would have likely led to a different outcome at trial. Dr. Simpson has written that:

> False memories occur when a person's identity and interpersonal relationships are strongly centered around a memory of an experience that did not actually take place. These false memories are often of a traumatic life experience and can

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53 The Commonwealth in its original answer asserted that Mr. Sandusky failed to aver that Dr. Esplin would have been available. Mr. Sandusky believes and avers that Dr. Esplin would have been available and any question as to that availability raises a question of material fact.

54 Dr. Simpson can prepare an expert report prior to any scheduled evidentiary hearing and Mr. Sandusky requests permission to supplement this petition with that report upon its completion.

> become very detrimental to everyday life. False memories are often the result of leading questions in a therapeutic practice termed Recovered Memory Therapy."
>
> He continued,
>
> there are instances of reported cases in which individuals falsely recall sexual abuse and pursue justice. These cases are extremely painful to both the accuser and to the accused, and may result in wrongful conviction. Due to incidents like these, false memories have lost most of their validity and reliability in a court of law.

www.drpaulsimpson.com/wp-content/uploads/2014/06/Memory-Talk-Handout.pdf.

> Additionally, Dr. Simpson has posited,
>
> therapeutic memory recovery is the perfect storm of distortion-maximizing influences...Therapeutically recovered memories are more unreliable than freestanding memories, or spontaneously recovered memories. Also, if the abuse was understood as sexual and traumatic, and the place it occurred and the offender were continuously present in the accuser's life, any recovered memory is less likely to be accurate, since those factors all make it forgetting the abuse in the first place highly unlikely.

See Id. (Memory in the Courtroom, at 94). This is but a small sampling of the information that Dr. Simpson could have provided regarding repressed memory therapy and false memories. Dr. Simpson, himself, was a former advocate of repressed memory therapy; hence, the title of his book on the subject after he came to critically analyze that practice, *Second Thoughts*.

Here, Mr. Sandusky's expert would be testifying that repressed memory therapy is neither scientific nor are the results reliable; however, he would not be testifying to an ultimate issue in the case nor attacking the actual accusers beliefs that they are telling the truth. Expert testimony on false memory and repressed memory therapy does not improperly infringe on the jury's credibility determining function anymore then using prior inconsistent statements and is beyond the ken of the ordinary training, knowledge, intelligence, and experience of a lay person. ***See*** Pa.R.E. 702. The expert testimony would not have improperly infringed on the jury's credibility

determining function as the testimony would have been limited to repressed memory therapy and how it can lead to false memories.

This testimony does not indicate that a person is not telling the truth; instead, the expert would acknowledge that the person who underwent the therapy is not lying and believes in the memory. In this case, the expert testimony would have been helpful and relevant with respect to the accuser's allegations that they had blocked out the abuse. The expert testimony would be to establish what repressed memory therapy is and how it can lead to false memories. Phrased differently, expert testimony on repressed memory therapy and false memory does not directly speak to whether an accuser is untrustworthy because the expert is not rendering an opinion on whether a specific witness is lying. ***Compare Commonwealth v. Alicia***, 92 A.3d 753, 760 (Pa. 2014) (concluding that expert testimony on false confessions was inadmissible and opining, "We have consistently maintained that a lay jury is capable of determining whether a witness is lying, and thus expert testimony is not permissible as to the question of witness credibility."); ***see also id.*** 762 n.12 ("In assessing the reliability of an eyewitness identification, **the issue is generally not whether the victim or witness is telling the truth—the victim or witness is often entirely and honestly convinced**, and convincing to the fact-finder, that he or she has correctly identified the true perpetrator. The issue is rather whether the witness's identification is indeed accurate.") (emphases added).

Here, the issue is not whether the accusers who underwent repressed memory therapy were telling the truth about recovered memories, as they are honestly convinced, but the issue is whether the memory is accurate. Unlike eyewitness expert testimony, which was not authorized in Pennsylvania until ***Commonwealth v. Walker***, 92 A.3d 766 (Pa. 20114), after Mr. Sandusky's trial, there was no case prohibiting expert testimony on the **lack of scientific basis for repressed**

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

Spoon Feeding the Accusers and their Attorneys:

It is the rare case where police are caught on tape feeding accusers information to support their preconceived conclusion. Yet, in this case, law enforcement openly engaged in suggestive questioning rather than asking open ended questions and informed accusers, inaccurately, regarding allegations made against Mr. Sandusky. In doing so they all but begged the accusers to make ever more serious allegations and were egged on in at least one case by a civil attorney seeking significant remuneration.

18. Trial counsel were ineffective by neglecting to file a motion in limine to preclude the use at trial of the victims' prior statements to police that were gleaned by suggestive and improper police questioning. [55]

In the present case, the alleged victims had given multitudes of inconsistent statements throughout the course of the investigation during interviews, grand jury testimony, media accounts, and ultimately at trial. The variety of inconsistent statements rendered these witnesses'

55 This position was set forth in part in Mr. Sandusky's May 6, 2015 Amended Petition at paragraphs 295-326.

testimony so unreliable that any probative value of the testimony was significantly outweighed by the prejudice suffered by the defense. ***See*** Pa.R.E. 403.

Moreover, any witness may be disqualified and deemed incompetent if, *inter alia*, the witness has "an impaired memory." Pa.R.E. 601(b)(3). As the official comment to Rule 601 states, "The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104." Pa.R.E. 601, cmt. The Pennsylvania appellate courts have ruled that expert testimony is permitted to assist the court in ruling if competency under Rule 601 is an issue. ***Id.***; ***see also Commonwealth v. Baker***, 353 A.2d 454 (Pa. 1976); ***Commonwealth v. Gaerttner***, 484 A.2d 92 (Pa. Super. 1984).

In this case, the witnesses' testimony concerned issues of "repressed memories," *see e.g.*, N.T., 6/11/12, at 162, 168 (Appendix, P. 462); N.T., 6/12/12, at 71 (Appendix, P. 464); N.T., 6/13/12, at 146, 152 (Appendix, P. 465); N.T., 6/14/12, at 122 (Appendix, P. 467). Moreover, there is a material question of fact as to whether the "memories" in this case were manufactured for either financial motive or the product of serial suggestive interviews by law enforcement, psychiatric professionals and other authorities from the Clinton County Office of Children, Youth, and Families. As outlined above, trial counsel should have either sought to preclude testimony regarding repressed memories as lacking any scientific basis or presented expert testimony on the phenomenon known as repressed memories and its lack of scientific support.

On April 5, 2011, following the leaking of the grand jury investigation to Sara Ganim, B.S.H.'s attorney, Ben Andreozzi, met with investigators and told them he had a client who may have information relevant to the case. Two days later, on April 7, 2011, B.S.H. and Attorney Andreozzi met with Pennsylvania State Police and gave some statements, though the content of

those initial statements is unknown.[56] On April 21, 2011, B.S.H. again met with investigators and described conduct of inappropriate touching, but he denied that oral sex or any penetration occurred. In light of this statement, it appears that whatever B.S.H. told investigators on the prior occasion is material ***Brady*** evidence. Almost a month later, on May 19, 2011, B.S.H. testified to the grand jury, and his story cascaded to include tales of oral sex, an attempted anal penetration and two attempts at digital penetration. ***See*** N.T. Grand Jury, May 19, 2011, testimony of B.S.H. at 25-32, 53-60, 85-88 at Appendix, P.698.

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

> We interviewed about nine. Again, I called them kids. I apologize. Nine adults we have interviewed and you're doing very well. It is amazing if this was a book, you would have been repeating word for word pretty much what a lot of people have already told us. It is very similar. A lot of things you have told us is very similar to what we have heard from the others and we know from listening to these other young adults talk to us and tell us what has taken place that there is a pretty well-defined progression in the way that he operated and still operates I guess to some degree and that often times this progression, especially when it goes on for an extended period of time, leads to more than just touching and feeling. That's been actual oral sex that has taken place by both parties and there's – we unfortunately found that there's been -- classifies as a rape has occurred and I don't want you to feel that again. As Trooper Rossman said, I don't want you to feel ashamed because you're a victim in this whole thing. What happened happened. He took advantage of you but when I -- when we first started, we talked and we needed to get details of what took place. So these type of things happened. We need you to tell us this is what happened. Again, we

56 Any statement by B.S.H. that was not consistent with his trial testimony is impeachment evidence that must be turned over pursuant to ***Brady***.

> are not going to look at you any differently other than the fact that you are a victim of this crime, and it is going to be taken care of accordingly. But we need you to tell us as graphically as you can what took place as we get through this whole procedure. I just want you to understand that you are not alone in this. By no means are you alone in this.

See N.T. , 6/19/12 at 57-58 at Appendix, at.468.

This portion of the interview was not supposed to be recorded. ***See id.*** at 83, 99-100, Appendix, P. 470. Moreover, this is also consistent with Corporal Leiter's conversation with Attorney Andreozzi during the unintentional recording, which was recounted during Corporal Leiter's cross-examination as follows:

> Q. I'm going to read part of that. We'll play the tape after we have a chance to set it up but a comment was made that purported to you, has your initial on it, Mr. Andrcozzi asked you during the course that you have a witness that's conveyed and your response was we have two that have seen him. We can't find the victim but he may be in there. And then Andreozzi, the attorney, says oh you're kidding. The time frame matches up. Can we at some point in time say to him, listen, we have interviewed other kids and other kids have told us there was intercourse and they have admitted it. You know, is there anything else that you want to tell us?
>
> Purportedly your responses [SIC] was, yeah, we do that with all the other kids. Say, listen, this is what we found so far. You fit the same pattern of all the other ones. This is the way he operates and we know the progression of the way he operates and the other kids we dealt with have told us that this happened after this has happened that. Did that happen to you?
>
> Do you recall that conversation back and forth with Mr. Andreozzi?
>
> A. I don't recall it but if it's been recorded, it's there.

N.T. , 6/19/12, at 55-56 (Appendix, at 473-74).

The actual tape reveals the following:

> Mr. Andreozzi: Can we at some point in time say to him, Listen, we've interviewed other kids, other kids have told us that there was intercourse,

and that they've admitted this, you know, um, is there anything else you want to tell us?

Trooper Leiter: We do that with all the other kids, say, 'Hey listen. This is what we've found so far, you fit the same pattern as all the others, it's the way he operates, and we know the progression of the way he operates, and the other kids we've dealt with have told us that this has happened after this and that. Did that happen to you?

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

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

a. Aaron Fisher gave statements in 2008 that no direct sexual activity occurred; after six months of interviews, and therapy with Mr. Gillum, Aaron Fisher claims that oral sex occurred. A copy of Jessica Dershem's Child Protective Services Investigation Report dated November 20, 2008, at Appendix, at 475. **In the grand jury testimony on November 16, 2009, Aaron Fisher denies that oral sex occurred until the prosecutor reminded Aaron Fisher that he previously stated it occurred.** ***See*** Transcript of Grand Jury, November 16, 2009, at pgs. 2-9, Appendix, P. 703. Thus, Aaron Fisher's story began with not being uncomfortable with Mr. Sandusky to claims of giving and receiving oral sex. **Aaron Fisher further specifically admits that his "memories" developed as his therapist, Mike Gillum, asked suggestive questions.** ***See*** Aaron Fisher, *Silent No More*, at p. 71 at Appendix, at 481. This admission occurred after Mr. Sandusky's trial.

b. Allan Myers was interviewed in September 2011, and confirmed that there was never any inappropriate contact between he and Sandusky. A copy of Corporal Joseph Leiter's Pennsylvania State Police Report dated September 22, 2011, is attached at Appendix, at 436. Additionally, he indicated that he was uncomfortable with his feeling that the Pennsylvania State Police were trying to put words in his mouth, and that the police became angry when he did not respond the way they hoped he would. A copy of Allan Myers Interview with Curtis Everhart, dated November 9, 2011, is attached at Appendix, P. 433. After several more interviews, in March 2012, Allan Myers claimed he was abused at some point. A copy of Inspector M. J. Corricelli's Memorandum of Interview, dated

March 8, 2012, at Appendix, at 441. Following trial, Mr. Myers recanted. He was never called to testify.

c. J.S. was first interviewed on July 19, 2011, and he denied that any inappropriate or sexual contact occurred. A copy of Trooper Mark Yakicic's Pennsylvania State Police Report, dated July 19, 2011, is attached at Appendix, at 482. On August 18, 2011, he stated that some inappropriate contact occurred, but there was no abuse. ***See*** Transcript of Grand Jury, August 18, 2011 at pgs. 10-14, 17-19, 21-23, Appendix, P. 706. When J.S. testified at trial, he claimed of the 50 nights he spent at the Sandusky residence, sexual contact occurred on almost every occasion. N.T., 6/14/12, at 108 at Appendix, at 483.

d. M.K. was first interviewed in June 2011, and denied any oral sex occurred one time they showered together, but that Mr. Sandusky forced M.K. to touch Mr. Sandusky's penis. A copy of Trooper Scott Rossman's Pennsylvania State Police report dated June 9, 2011, is attached hereto at Appendix, at 484. In November 2011, the story escalated to Mr. Sandusky forcing M.K. to touch Mr. Sandusky's penis and Mr. Sandusky also putting his hands on M.K.'s genitals, but that no oral sex occurred. A copy of Corporal Leiter's Pennsylvania State Police report, dated November 10, 2011, is attached hereto at Appendix, at 487. After several interviews and the publicity swell, M.K. testified at trial that Mr. Sandusky assaulted him in a sauna. Mr. Sandusky was acquitted of the charge of indecent assault relating to M.K.

e. Z.K. was initially interviewed in 1998 and stated that no inappropriate contact occurred. A copy of Z.K.'s interview with Ronald Schreffler, dated May 4, 1998, is attached hereto at Appendix, at 488. In January 2011, Z.K. was interviewed again, and he denied that any sexual contact occurred. In June of 2011, Z.K. testified to the grand jury that although Sandusky made him uncomfortable, they did not have sexual contact. ***See*** N.T. Grand Jury, June 17, 2011, at 11-21 at Appendix, P. 720. When Z.K. testified at trial, he still did not state he was abused, but suggested that he may have blocked it out. ***See*** N.T., 6/14/12, at 8, 15-17, and 26-27 at Appendix, at 507.

f. D.S. was first interviewed in February 2011, and he stated that Mr. Sandusky never actually touched his genitals. A copy of Corporal Leiter's Pennsylvania State Police report, dated February 4, 2011, is attached at Appendix, at 513. When he testified to the grand jury in April 2011, he stated he recalled no actual sexual contact. At trial, D.S. testified that memories that were essentially repressed were being recovered, and that he now recalled Mr. Sandusky assaulted him as well. ***See*** N.T., 6/13/12, at 95, 98, 101-103, 105-113, 116, 118-119, 140-146, 152, and 155 at Appendix, at 515. Following trial, D.S. was interviewed[57]

57 A copy of that audio interview can be forwarded to the Commonwealth upon request and will be provided to the court.

and admitted that he initially only recalled spending the night with Mr. Sandusky and Mr. Sandusky putting his hand on his leg while driving. After his police interview, he contacted therapists for psychological assistance. Only after seeking therapy did D.S. make any allegations of sexual misconduct. In the same post-trial interview, he stated that his therapy sessions helped him to remember the alleged abuse. The interview suggests that D.S. had no independent recollection of sexual abuse until he sought therapy. D.S. also asserted that even after remembering some type of abuse on one occasion after going to a football game with Mr. Sandusky, he again forgot.

g. S.P. was first interviewed in November 2011, and denied being sexual with Mr. Sandusky. A copy of Christina Short's written statement regarding S.P. is attached at Appendix, P. 541. In December 2011, he testified to the grand jury that he engaged in oral sex with Mr. Sandusky, but not anal intercourse, although Mr. Sandusky attempted anal intercourse.[58] ***See*** Transcript of Proceedings of Grand Jury, dated December 5, 2011, Witness S.P., at 17-20, 31-32, Appendix, P. 715. At trial, S.P.'s story evolved to include an allegation that he and Sandusky actually engaged in anal intercourse. ***See*** N.T., 6/14/12, at 217-18, 221, 232-33, 236, and 245 at Appendix, at 545.

a. R.R. was first interviewed in November 2011, and he claimed that Sandusky asked for oral sex, but he refused. A copy of the Office of Attorney General Investigative Report Supplemental 53, dated November 29, 2011, is attached hereto at Appendix, at 552. By the time R.R. testified at trial, he claimed multiple instances of oral sex and digital manipulation that he did not disclose during interviews. ***See*** N.T. Trial, June 13, 2012, at 32, 41-42, 46, 49-50, 52, 56-59, and 63-67 at Appendix, at 554.

The history of how the stories evolved due to continued interviews was consistent with essentially all of the witnesses against Mr. Sandusky. With the inadvertent recording of the interview with B.S.H., it is evident that law enforcement officers were engaged in suggestive interviewing that tainted the victims' testimony. Trial counsel possessed this information before trial, nevertheless, counsel did not file a motion *in limine* to either preclude introduction of prior consistent statements based on the suggestive questioning or present expert testimony and have

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

the Court make the initial determination as to whether the purported victims' statements were the result of improper suggestive interviewing.

Moreover, the timeline above establishes that most of these alleged victims did not come forward with stories of alleged abuse until after the leak of grand jury investigation to Sara Ganim, and some did not occur until after Mr. Sandusky's arrest. Given the national press attention to Sandusky case, the ongoing lawsuits against Penn State University, and the book contracts that several of the purported victims' received, the motive to fabricate was so significant that trial counsel should have sought a judicial hearing with sworn testimony to explore the financial motives the witnesses may have had to fabricate their testimonies, including any contingent fee agreements with plaintiffs' lawyers. [59]

Trial counsel should have sought a hearing at which expert testimony on the reliability and competency would have been presented for the Court to at least make the initial determination of competency and reliability or moved to preclude the Commonwealth from being able to rehabilitate the witnesses with consistent statements that were the result of improper suggestive interviewing techniques. In the instant case, the suggestive interviewing by law enforcement and the Clinton County Office of Children, Youth, and Family caseworkers, combined with the witnesses' evolving tales warranted a pretrial hearing into whether the evidence was even reliable before a fact finder could pass on the question of credibility. Given

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59 At trial, Attorney Andreozzi testified that his practice largely consisted of representing crime victims in civil lawsuits. N.T., 6/19/12 at 71-72. Moreover, upon information and belief Allan Myers, J.S., Victim 7, and R.R. were all represented by Attorney Andrew Shubin, who also had a financial incentive in recruiting claimants against Mr. Sandusky. Mr. Sandusky avers that Attorney Shubin, as well as the attorneys representing all of the other victims, received significant payment as a result of civil settlements with Penn State University, and Mr. Sandusky requests an evidentiary hearing to determine if the taint and interference with the witnesses extended to their civil counsel.

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

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

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

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

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

In this regard, Mr. Sandusky submits that the Commonwealth's case was built on establishing a pattern or practice by Mr. Sandusky, whereby each victim's credibility was bolstered by other victims' testimony. Moreover, even if none of the witnesses were excluded,

trial counsel, at a minimum, could have obtained relevant evidence for impeaching the witnesses at trial, including the fee arrangements with private counsel, ongoing book contract negotiations, and other evidence establishing a motive to fabricate their testimony. Instead, trial counsel "flew blind" on cross examining these witnesses without any real evidence to support allegations of motive or bias to cause them to testify falsely.

Indeed, despite the assertions of the media and Mr. Sandusky's trial counsel that the evidence against Mr. Sandusky was "overwhelming," once the witnesses' competency and reliability are properly questioned, before even passing on the question of their credibility, the evidence in this case was highly questionable. The Commonwealth's entire case rested on testimony that trial counsel should have exposed as incompetent, unreliable, and inadmissible. The failure to even attempt to do so is inexcusable. As a result, trial counsel was ineffective for failing to file a motion *in limine* and seek the trial court's preliminary ruling on the competency of the witnesses, and Mr. Sandusky is entitled to a new trial.

Phantom Victim #8 and the Calhoun Affair:

Mr. Amendola's claim that his review of discovery after trial would not have changed his trial strategy is clearly false. No attorney would not present a tape-recorded interview of a witness that denied seeing the accused commit a heinous crime where the Commonwealth introduced hearsay testimony from that person to establish guilt. However, despite there being a tape-recorded statement in discovery in which James Calhoun refuted the testimony of fellow janitor "Buck" Petrosky, counsel did not present that evidence. Thus, the jury convicted Jerry Sandusky of a crime in which there was no victim based solely on hearsay evidence that was actually refuted by the very person who supposedly made the statement. Both trial and appellate counsel's handling of issues relative to Mr. Calhoun are simply mind-boggling.

19. Ineffective assistance of counsel for failing to introduce a tape recorded statement by James Calhoun in which he contradicted Mr. Petrosky's hearsay testimony and Mr. Calhoun denied observing Mr. Sandusky performing any sex acts with a boy in a shower.[60]

In the present case, two alleged victims in this matter did not come forward to testify. One of those alleged victims was a child described by Mr. Petrosky, a janitor at Penn State University to testify as to a hearsay statement Jim Calhoun made to him.[61] Over trial counsel's objection to introduction of Mr. Calhoun's statement to Mr. Petrosky as an excited utterance, Mr. Petrosky testified that Mr. Calhoun told him that Mr. Calhoun saw Jerry Sandusky performing oral sex on a minor child. Despite Mr. Calhoun having informed police that he did not observe Mr. Sandusky molest a child, trial counsel failed to present this impeachment evidence. Specifically, in discovery in this matter, the Commonwealth disclosed a tape recorded interview Mr. Calhoun gave to the Commonwealth's investigator, Trooper Yakicik, on May 15, 2011. In the tape recording, Trooper Yakicic asks Mr. Calhoun about a time he observed an older man committing sexual assault on a young boy. After Mr. Calhoun describes seeing the assault in graphic detail, the following exchange occurs:

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

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60 This issue can be found at paragraphs 363-372 in Mr. Sandusky's May 2015 petition.

61 Mr. Calhoun did not testify at trial and the Commonwealth alleged he was unavailable because he suffered from dementia.

Audio tape recording, 5/15/11, at 43:20-44:15 at Appendix, P. 639.

Attorney Rominger has represented that, due to the massive discovery, he was unaware of this evidence.[62] Certainly, had counsel been aware of this evidence it would have had to have been presented. This therefore belies Mr. Amendola's statement relied on by the Superior Court in Mr. Sandusky's prior direct appeal that had he had adequate time to review discovery his trial strategy and presentation would not have been different. This issue will be discussed in more detail *infra*.[63]

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62 The Commonwealth also violated ***Brady***, by performing late-hour "open file" document dumps in discovery, where boxes of paper documents were disclosed on the eve of trial with the hopes that trial counsel would not find relevant ***Brady*** material. ***See United States v, Skilling***, 554 F.3d 529, 577 (5th Cir. 2009). In ***Skilling***, the Court noted:

> [E]vidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious ***Brady*** issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide ***Brady*** material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under ***Brady***.

554 F.3d at 577. Mr. Sandusky submits that the evidence would demonstrate that the Commonwealth was acting in bad faith in the manner in which it performed its obligations under ***Brady*** by hiding ***Brady*** material in a huge open file of tens of thousands of pages of documents, hoping that trial counsel would be overwhelmed and unable to find it. To the extent the Commonwealth would argue that trial counsel waived this ***Brady*** claim, counsel was ineffective. Mr. Amendola could not have any reasonable basis for not presenting this issue when he sought a continuance because of the huge amount of discovery. The issue also resulted in actual prejudice because, as discussed in this petition, Mr. Amendola would have discovered additional evidence, for example the Calhoun tape, that would have aided in the defense.

63 Direct appellate counsel was also ineffective for failing to ask questions of Attorney Amendola on re-direct examination, wherein Attorney Amendola would have stated that he would have done many things differently had the Court granted a continuance, including increased investigation, and he would have had expert testimony from an expert who simply could not render an opinion for the defense in the time frame required by the trial court. Since the Superior Court relied so heavily on Mr. Amendola's statement in affirming Mr. Sandusky's

Failing to present this critical evidence, which directly contradicted the Commonwealth's sole evidence as to that unnamed victim, is a claim of arguable merit. ***See Khalifah, supra*** (evidence that directly contradicted testimony of a victim warranted evidentiary hearing); ***Commonwealth v. Shaffer***, 763 A.2d 411 (Pa. Super. 2000) (counsel ineffective for failing to introduce a police report as a business record that demonstrated that the victim's testimony was inconsistent with information in the report). In addition, counsel could have no reasonable basis for not using this evidence when both trial attorneys opposed the very introduction of Mr. Petrosky's testimony. ***See also Commonwealth v. Murphy***, 591 A.2d 278 (Pa. 1991) (failing to impeach a prosecution eyewitness held to be ineffective assistance). Under Pa.R.E. 806, a defendant is permitted to impeach the testimony of a declarant that has been introduced via a hearsay exception.

It is beyond cavil that there is a reasonable probability of a different outcome as to the unnamed shower victim had a statement from the witness who allegedly viewed the crime been presented that was in direct opposition to the Commonwealth's evidence. ***See Stewart, supra*** (failure to present alibi witness that would have directly contradicted Commonwealth's evidence was ineffective assistance); ***Matias, supra***; ***Shaffer, supra***; ***Murphy, supra***. Finally, Petitioner is, at the very least, entitled to an evidentiary hearing as this claim presents genuine issues of fact.[64]

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convictions, it is apparent that Mr. Sandusky's claim has both arguable merit and he can establish actual prejudice. If appellate counsel had properly questioned Mr. Amendola, there is a reasonable probability that the Superior Court would have found prejudice in the trial court's denial of trial counsel's continuance motion.

64 Mr. Sandusky submits that although the Commonwealth made a proffer that Mr. Calhoun was not competent to testify, nothing was ever placed on record establishing that Mr. Calhoun was, in fact, incompetent to testify. Petitioner has submitted that trial counsel was

20. Ineffective assistance of counsel for failing to argue that under Pa.R.E. 806, Mr. Sandusky had the right to cross-examine James Calhoun about the excited utterance introduced through Mr. Petrosky.[65]

Pursuant to Pa.R.E. 806,[66] when a hearsay statement is admitted into evidence, the credibility of the declarant, in this case Mr. Calhoun, can be attacked by any evidence which would be admissible as if the witness testified. Further, under the rule, evidence of an inconsistent statement is admissible even if the declarant was not afforded an opportunity to deny or explain it. In ***Commonwealth v. Haber***, 505 A.2d 273 (Pa. Super. 1986),[67] the Superior Court held that it was error for the trial court to preclude a defendant from calling a child witness in a sex case in order to cross-examine her, after she had been held incompetent to testify, but her mother testified regarding what the victim had told the mother. Thus, Mr. Sandusky had the absolute right to present Mr. Calhoun to testify, despite the Commonwealth's representation that he was not competent. Accordingly, Mr. Sandusky would have been able to establish that Mr. Calhoun did not identify Mr. Sandusky as the perpetrator of any sex crime as alleged by Mr. Petrosky.

Because Rule 806 and ***Haber*** establish that Mr. Sandusky could have presented Mr. Calhoun and his prior statement to police denying that Mr. Sandusky committed the atrocity he was accused of, his claim has arguable merit. Further, the issue raises a genuine issue of fact as

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ineffective for failing to interview Mr. Calhoun in order to find some *indicia* of incompetence beyond simply the Commonwealth's proffer.

65 This claim was not included in Mr. Sandusky's previous filings.

66 The Pennsylvania Supreme Court promulgated new rules of evidence that took effect March 18, 2013, after Mr. Sandusky's trial. The rules did not make substantive changes. ***See Schmalz v. Manufacturers & Traders Trust Co.***, 67 A.3d 800, 804 (Pa. Super. 2013).

67 ***Haber*** was superseded by statute with respect to child victims, but not as it relates herein.

to the reason trial counsel did not present this evidence. Pointedly, trial counsel could not have had a reasonable basis to contest Mr. Petrosky's testimony because the "need to cross-examine [Mr. Calhoun] concerning [his] accusation against him was greater than if [he] had made it from the witness stand, because [he] made it without benefit of oath, not subject to the penalty of perjury, and without the presence of the trier of fact." ***Haber***, ***supra*** at 276-277. Furthermore, Mr. Sandusky suffered actual prejudice because there is a reasonable probability that had evidence been introduced refuting Mr. Petrosky's testimony, Mr. Sandusky would not have been convicted of the charges relative to that victim.

21. Appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony, relative to Mr. Calhoun's hearsay statement, was inadmissible as an excited utterance because there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim.[68]

Trial counsel objected to allowing Mr. Petrosky to testify regarding the alleged hearsay statement from Mr. Calhoun, citing ***Commonwealth v. Barnes***, 456 A.2d 1037 (Pa. Super. 1983). That case held that, "[w]here there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule." ***Barnes***, ***supra*** at 1040; ***see also Commonwealth v. Keys***, 814 A.2d 1256 (Pa. Super. 2003) (lack of corroboration of hearsay statement by a spousal abuse victim was inadmissible). In ***Barnes***, the victim alleged that someone had broken into his home and beaten and robbed him. Here, there is no evidence that Mr. Sandusky performed oral sex on an unidentified victim other than the hearsay statement itself. The Commonwealth acknowledged the issue was close, stating it had enough based on a course of conduct theory and that Mr. Petrosky saw Mr. Sandusky leave the building with a young boy. However, the critical inquiry is whether there was corroboration of

68 This claim was not addressed in Mr. Sandusky's prior petitions, although a related issue dealing with appellate counsel's failure to raise a sufficiency of the evidence position with respect to the unidentified alleged victim was proffered.

the crime, not innocuous and innocent behavior. Taking a shower with a child in a locker room and walking out with a child is not criminal behavior. The only evidence of the crime was the hearsay evidence.

Since the Commonwealth could not corroborate that a crime occurred outside of the hearsay evidence, admission of Mr. Petrosky's testimony was in error and had counsel raised this issue on direct appeal there is a reasonable probability that Mr. Sandusky would have been entitled to a new trial at least as to that alleged victim. ***See Barnes, supra.***

22. Direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to Mr. Calhoun on appeal.[69]

In opposing Mr. Petrosky's testimony, trial counsel opposed Mr. Petrosky testifying as to Mr. Calhoun's hearsay statement, in part, on the grounds that the testimony violated Mr. Sandusky's rights confrontation clause. ***See*** N.T., 6/13/12, at 207-209. In that argument, trial counsel conceded that Mr. Calhoun's hearsay statement was not "testimonial" hearsay for purposes of a confrontation clause argument under ***Crawford v. Washington***, 541 U.S. 36 (2004), and its progeny. ***Id.*** Mr. Calhoun's statement was clearly hearsay offered for the truth of the matter asserted; and Mr. Sandusky was never afforded the opportunity to cross-examine Mr. Calhoun. Irrespective of whether a hearsay statement meets an exception to the general rule against hearsay, a statement may not be admitted if it would violate a defendant's constitutional right to confront the witnesses against him. ***See e.g. Crawford v. Washington***, 541 U.S. 36 (2004).

In ***Crawford***, the U.S. Supreme Court noted that the crux of the inquiry concerns whether the statement against the accused is "testimonial" in nature, such that the accused has a right to

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69 This position was advanced in Mr. Sandusky's prior petition at paragraphs 391-407.

test the statement "in the crucible of cross-examination." ***Id.*** at 61. In ***Davis v. Washington***, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court developed one, non-exhaustive test for determining whether a statement is "testimonial" in nature – to-wit, the question turns on whether the admission of the statement is a "weaker substitute for live testimony." In ***Commonwealth v. Allshouse***, 985 A.2d 847 (Pa. 2009), the Pennsylvania Supreme Court interpreted ***Davis*** as creating a "primary purpose test," and that a statement is not "testimonial" if it "is made with the purpose of enabling police to meet an ongoing emergency." ***Id.*** at 854. Alternatively, a statement is testimonial if it is not made in the context of an ongoing emergency and if the primary objective of the questioning is to "to establish or prove past events." ***Id.*** In ***Commonwealth v. Abrue***, 11 A.3d 484 (Pa. Super. 2010), the Superior Court recognized that the ***Davis/Allshouse*** primary purpose test is not always decisive on whether a statement is testimonial; indeed, ***Davis*** expressly stated so. 11 A.3d at 492 (***citing Davis***, 547 U.S. at 822 n.1 and ***Allshouse***, 985 A.2d at 854). Rather, the totality of the circumstances must be examined.

In the present case, Mr. Calhoun's statement was not made during interrogation by the police; however, it similarly was not made in the context of assisting police to respond to an ongoing emergency. The critical inquiry is how the statement was used. In the instant case, the hearsay statement from Mr. Calhoun was used as a weaker substitute for live testimony identifying Mr. Sandusky as the perpetrator of a crime.

Given that Mr. Calhoun's hearsay statement was the **only** direct evidence of the charges related to Victim #8, this issue should have been raised on direct appeal, and if it had, the Superior Court likely would have reversed Mr. Sandusky's convictions on all charges relating to Victim #8. Since the hearsay statement of identification was a weaker substitute for live

testimony, it could only be used if Mr. Calhoun was unavailable and the accused had a prior opportunity to cross-examine him. ***See e.g. Crawford***, 541 U.S. at 68; ***Abrue***, 11 A.3d at 493.

23. Trial counsel and Direct Appellate Counsel were ineffective for failing to appeal Mr. Sandusky's convictions relating to Victim #8 as lacking sufficient evidence.[70]

In post-sentence motions, trial counsel raised a vague, boilerplate allegation that the evidence against Sandusky was insufficient to sustain the guilty verdicts. Nevertheless, especially with respect to the charges relating to unidentified Victim #8, the alleged boy in the shower viewed by Mr. Calhoun, direct appellate counsel failed to raise a claim on appeal that those convictions were supported by insufficient evidence. To-wit, Mr. Sandusky was convicted on the hearsay statement of a witness whom the Commonwealth made no showing of unavailability. Moreover, no victim ever came forward and asserted that Mr. Sandusky committed this assault against him in the incident to which Mr. Petrosky testified. The conviction, based on a statement that was either recanted or contradicted by the witness who provided the only evidence against him, clearly lacked sufficient evidence to be sustained by the Superior Court.

Indeed, the trial court expressly recognized the potential problem with the convictions relating to Victim #8 in his sentencing statement. The Court stated:

> I state for the record, however, that the convictions regarding Victim number 8 – Counts 36 through 40 at 2422-2011 -- are specifically intended to run concurrently, and if those convictions should happen to be reversed on appeal it will make no difference to the sentence structure as a whole and will not require a remand for resentencing.

See Judge Cleland's Sentencing Statement, filed October 11, 2012, at p. 6.

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70 This claim was discussed in Mr. Sandusky's previous petition in paragraphs 355-362.

Nevertheless, direct appellate counsel inexplicably abandoned this claim on appeal without any rational basis. Had this claim been preserved, it likely would have resulted in a reversal of those convictions since the Pennsylvania Supreme Court has recognized that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." ***Commonwealth ex rel. Buchanan v. Verbonitz***, 581 A.2d 172, 174 (Pa. 1990) (plurality).[71] Since the elements of the crimes could only be established based on hearsay testimony, the evidence was insufficient and deprived Mr. Sandusky of due process. As a result, Mr. Sandusky should be awarded a new trial based on the ineffectiveness of trial and appellate counsel for failing to preserve this issue, and this Court should enter judgment of acquittal on the charges relating to Victim #8.

Amendola Opens and Seals Mr. Sandusky's Fate:

Trial advocacy 101 is that counsel should not erroneously concede that overwhelming evidence against his client exists. Mr. Amendola's opening statement all but sealed Mr. Sandusky's fate when he contended that the Commonwealth actually had significant evidence against Mr. Sandusky. While the Commonwealth had a significant number of accusers, 8, its entire case rested on the credibility of these accusers, many of whom had no independent recollection of abuse and others whose stories continued to evolve into ever more outlandish claims. The result: a modern day Salem Witch Trial.

24. Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky.[72]

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71 Although a plurality decision, a majority of justices agreed with this proposition since the secondary opinion in that case, authored by Justice Flaherty and joined by Justice Cappy, relied on a due process analysis to conclude that hearsay alone could not be used at a preliminary hearing. That aspect of the case is no longer valid due to the adoption of Pa.R.Crim.P. 543(e).

72 This issue was suggested but not fully developed in Mr. Sandusky's prior petition.

Mr. Amendola opened to the jury by stating, "This is a daunting task. I'll be honest with you. I'm not sure how to approach it. The Commonwealth has overwhelming evidence against Mr. Sandusky." N.T. Opening Remarks, 6/11/12, at 3. This statement was prejudicial and inaccurate. While the Commonwealth had a large number of alleged victims, they did not have overwhelming evidence. There was no physical evidence and in the instance in which there was an alleged eyewitness, the victim himself did not testify, and the eyewitness did not see a sexual assault but simply assumed that was what occurred. Further, with respect to the charges related to a second unidentified victim, only hearsay testimony was provided.

This case primarily involved testimony from the alleged victims, victims who had provided multiple inconsistent statements, including repeatedly indicating that Mr. Sandusky had not abused them. The evidence was far from overwhelming. To the contrary, this case rested on the credibility of the alleged victims. Mr. Amendola himself stated in his closing summation, "there is absolutely no direct evidence other than what came from the mouths of those individuals who testified in court, the eight young men, about these allegations. There's no physical evidence, not one piece of physical evidence. In two of the cases the Commonwealth brought, we don't even have victims—not a victim in two of the cases." N.T., 6/21/12, at 37.

Mr. Amendola's opening statement stands in stark contrast to his closing argument. "The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved[.]" ***Commonwealth v. Montgomery***, 626 A.2d 109, 113 (Pa. 1993). In ***Commonwealth v. Parker***, 919 A.2d 943, 950 (Pa. 2007), the High Court posited that "as a practical matter **the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case.**" ***See also Montgomery, supra*** at 113 (emphasis added).

While the decision on whether to provide an opening statement is one of trial strategy, at the very least an issue of material fact exists as to why Mr. Amendola would incorrectly tell the jury that the Commonwealth had overwhelming evidence. Precisely at the moment that the jury was forming its first and lasting impression of the case, ***see Parker, supra***, Mr. Amendola erroneously conceded that the Commonwealth had strong evidence of guilt. There can be no reasonable basis for making this statement when it was inaccurate, ***cf. Commonwealth v. Reed***, 42 A.3d 314 (Pa. Super. 2012) (trial counsel's mistake of law was not reasonable); ***Commonwealth v. Moore***, 715 A.2d 448, 452 (Pa. Super. 1998) (trial counsel ineffective for introducing defendant's criminal history on mistaken interpretation of law); ***Commonwealth v. Hull***, 982 A.2d 1020 (Pa. Super. 2009) (trial counsel ineffective when decision not to call character witnesses based on a misunderstanding of the role of character evidence in defense). and counsel knew of the deficiencies of the Commonwealth's case as evidenced by his closing remarks. Mr. Amendola's statement could not have been reasonably calculated to advance Mr. Sandusky's interests.

Equally important, Mr. Amendola's statement prejudiced Mr. Sandusky because, at the most critical stage of the trial, instead of vigorously contesting the strength of the Commonwealth's case, he incorrectly aided the Commonwealth by saying it had overwhelming evidence. Mr. Rominger, in his affidavit, articulates the obvious, "Mr. Amendola's statement during opening that there was overwhelming evidence against our client cast Mr. Sandusky as guilty in the minds of the jurors and that by the end of the testimony by the third witness our defense was largely crippled." Affidavit of Karl Rominger, at 6 ¶ 12. This gaffe is even more problematic when considered in the context of Mr. Amendola stating that Mr. Sandusky would testify and then electing not to present Mr. Sandusky's testimony. In sum, this claim has

arguable merit and counsel could have no reasonable basis for erroneously telling the jury that the Commonwealth had overwhelming evidence at perhaps the most critical part of the trial, which thereby caused actual prejudice.

What Right to Remain Silent?

> A defendant is not required to deny any accusation levelled at him in a trial no matter how inculpatory. He may be charged with the most serious of offenses, including murder and high treason. A cloud of witnesses may testify to circumstances, events, episodes which wrap him in a serpent's embrace of incrimination, but no inference of guilt may be drawn from his failure to reply or to take the witness stand. Indeed, and properly so, ***if the prosecuting attorney*** or the judge ***makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him,*** and a verdict of guilt follows, ***a new trial is imperative***.
>
> . . . .
>
> A tacit admission is still an unwilling performance. It is more gentle because it is silent, but it is as insidious as monoxide gas which does not proclaim its presence through sound or smell. A forced confession is a steam-chugging locomotive moving down the track, blowing its whistle and clanging its bell with the victim tied to the rails. A tacit admission is a diesel locomotive silently but relentlessly moving forward without audible signals and striking the victim unawares. The approach is different, the effect is the same.

Commonwealth v. Dravecz, 227 A.2d 904, 906-907 (1967) (emphasis added). In his carefully crafted summation, but still as insidious as monoxide gas and as dangerous as a runaway locomotive, the prosecutor in this case attempted to skillfully but decidely infer Mr. Sandusky was guilty because of what he did not say to Bob Costas and because he did not testify. A "new trial is imperative." ***Id.*** at 906.

25. Trial counsel were ineffective by not seeking a mistrial after the prosecutor improperly made comments based on Mr. Sandusky's silence.[73]

During closing arguments, the prosecution inappropriately referenced the fact that Mr. Sandusky elected not to testify at trial in this matter (while simultaneously commenting on the

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73 This issue was raised in paragraphs 152-176 in Mr. Sandusky's May 2015 petition.

fact that Mr. Sandusky participated in an ill-advised pre-trial media interview with Bob Costas of NBC Sports). [74] It is axiomatic that in Pennsylvania, "defendants have an 'absolute right to remain silent and not to present evidence at trial' and that prosecutors cannot comment on a defendant's refusal to testify." ***Commonwealth v. Molina***, 104 A.3d 430, 435 (Pa. 2014) (hereinafter "***Molina II***") (*citing* ***Griffin v. California***, 380 U.S. 609, 615 (1965)) (internal quotations omitted).

A court may grant a new trial on the basis of improper commentary by a prosecutor if "the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would then prevent them from properly weighing the evidence and rendering a true verdict." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004). In ***Molina II***, the Pennsylvania Supreme Court recently conclusively and unequivocally ruled that the jurisprudence and public policy of Pennsylvania, as embedded in the Pennsylvania Constitution, "prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense." ***Id.*** at 451. The Pennsylvania Superior Court in ***Commonwealth v. Molina***, 33 A.3d 51 (Pa. Super. 2011) (*en banc*), ("***Molina I***"), ruled similarly with regard to the Fifth Amendment.

At trial in this matter, the attorney for the Commonwealth stated:

> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question

74 As noted in the instant petition, trial counsel's action in advising Mr. Sandusky to submit to a pretrial interview with Bob Costas was ineffective assistance, and given that it was highly relevant evidence used by the Commonwealth at trial in this matter, it was sufficiently prejudicial under ***Strickland*** to warrant a new trial.

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

N.T., 6/21/12 at 140-142 (emphasis added). The prosecutor again improperly commented on Mr. Sandusky's refusal to testify throughout his closing argument as follows:

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

Id. at 145-46. (emphasis added).

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

Since Mr. Sandusky did not testify at trial, the comments were not fair impeachment of his trial testimony. Read in context, the statements could not be construed as a fair response to Mr. Sandusky's arguments. Instead, the Commonwealth sought to accentuate the fact that Mr. Sandusky explained himself to the media, but he did not explain himself to the jury - a tactic solely designed to prejudice Mr. Sandusky and imply to the jury that he was afraid to testify.

In fact, the prosecutor's comment was not "fair rebuttal" to a defense argument; rather it was an effort to bolster the Commonwealth's own evidence regarding the interviews and to draw attention to the fact that Mr. Sandusky did not to testify at trial in this matter. ***Compare Commonwealth v. Culver***, 51 A.3d 866, 876 (Pa. Super. 2012) (recognizing that an improper comment by a prosecutor may be appropriate if it amounts to a fair rebuttal to a defense comment or argument or is merely "oratorical flair") *with* ***Poplawski***, ***supra*** (holding that statements were improper commentary by a prosecutor invoking the jury to consider issues of general community interest beyond the facts of the case by "sending a message").[75]

Here, the prosecutor's repeated comments to the fact that Mr. Sandusky failed to testify crossed the line from fair rebuttal or oratorical flair to highlighting Mr. Sandusky's silence and directly pleading to the jury to draw an adverse inference from his failure to testify. As such, the commentary is beyond the pale, and a new trial would have been warranted on direct appeal had trial counsel properly preserved an objection. This conduct was more prejudicial than that in

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

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

Trial counsel had no reasonable strategic basis for failing to move for a mistrial or request **any** remedy for the Commonwealth's misconduct. Had trial counsel not waived this issue for appellate review, given the violation of Mr. Sandusky's right to remain silent, there is a reasonable probability that the Superior Court would have vacated Mr. Sandusky's conviction and remanded this matter for a new trial. Since the Commonwealth violated Mr. Sandusky's rights under Article I, Section 9 of the Pennsylvania Constitution, ***Molina II, supra***, and the Fifth Amendment to the Constitution of the United States, ***Molina I***, and since trial counsel had no reasonable basis for failing to move for a mistrial based on the inappropriate argument, this Court must grant Mr. Sandusky a new trial.

26. Trial counsel was ineffective in permitting Mr. Sandusky to be interviewed by Bob Costas without adequately advising him and preparing him for the interview and thereby providing the Commonwealth with additional evidence.[76]

In the instant matter, the Commonwealth introduced the Costas interview into evidence, used it against Mr. Sandusky in its case in chief, and then the Commonwealth repeatedly commented on the facts that: (1) the prosecuting attorney never had the opportunity to question Mr. Sandusky that Bob Costas did; and (2) Mr. Sandusky made statements in that interview that

76 This issue is not entirely new, but is more thoroughly developed herein.

he could have clarified "to anybody at any time." N.T., 6/21/12, at 145. The intent of these statements and the inferences that the prosecution wished to raise was to prejudice Mr. Sandusky to the jury based on the fact that he did not testify at trial but had given pretrial interviews to the media. Specifically, the Commonwealth sought to fix a bias and hostility against Mr. Sandusky in the jury's minds based on the fact that Mr. Sandusky was willing to talk to the media about his case, but he did not take the stand and talk to this jury directly.

Here, an issue of genuine fact exists as to the preparation and advice Mr. Amendola provided Mr. Sandusky before the interview. ***See Commonwealth v. Thomas***, 539 A.2d 829 (Pa. Super. 1989) (PCHA hearing held to address counsel's pre-trial preparation and only resolved in favor of Commonwealth based on a credibility determination). Mr. Sandusky submits that counsel did not adequately prepare him for the interview. This is akin to failing to prepare a defendant and adequately advise him regarding his rights relative to testifying since Mr. Sandusky was, in essence, testifying, albeit not in a court. ***Cf. Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015) (alleged improper advice regarding a defendant's right to testify warranted an evidentiary hearing); ***Perry***, ***supra*** 709 (failure to interview defendant and otherwise prepare for trial was claim of arguable merit).

As discussed previously, trial counsel did not provide notice that Mr. Sandusky would be interviewed or prepare him for the interview. Mr. Sandusky was advised that Mr. Costas was only going to speak to trial counsel. Failing to properly advise a defendant or properly prepare an individual for an interview that can be used against him is a claim of arguable merit since any statements a defendant makes could be used to convict. Here, the Commonwealth asked the jury to infer from the Costas interview that Mr. Sandusky was guilty of the crimes charged because he did not immediately answer the questions and repeated questions before answering them.

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

Finally, Mr. Sandusky suffered actual prejudice. If counsel properly advised Mr. Sandusky about the implications of providing an interview or adequately prepared him, Mr. Sandusky either would not have given the interview or would not have provided fodder for the Commonwealth to use to imply that he was a sexual predator. Absent the Costas interview, the prosecution could not have commented on that interview and set forth that Mr. Sandusky "had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas." N.T., 6/21/12, at 140. The prosecution would have been unable to argue, "Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him?" ***Id.***

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

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

The Trio that Still Have Not Been Tried:

In no small part due to prosecutorial misconduct and because of the failures of the grand jury judge, the Penn State Three: Timothy Curley, Gary Schultz, and Graham Spanier have yet to be tried. Those men, consistent with the actions of Joe Paterno, Michael McQueary's father, and Dr. Dranov, did not consider Michael McQueary to have viewed a horrible sex act. Why? Because Michael McQueary did not describe seeing a child being anally raped. What he heard was slapping sounds and he assumed the worst. Admittedly, had Mr. Curley and Mr. Schultz more thoroughly investigated the matter at the time there would be no case because Allan Myers would have said what he has told investigators both before and after trial: no abuse happended.

27. Counsel were ineffective in failing to present the grand jury testimony of Tim Curley and Graham Spanier.[77]

77 This claim is an additional issue not included in Mr. Sandusky's previous filings.

At trial in this matter, Mr. Sandusky's trial counsel made it clear to the trial court that Graham Spanier, Tim Curley, and Gary Schultz were critical defense witnesses. ***See*** Sandusky Motion In Limine To Admit The Out Of Court Statements Of Unavailable Witnesses Spanier, Curly, Shultz, filed June 11, 2012. Nevertheless, the Court denied the motion *in limine*. Despite this fact, trial counsel could have presented the grand jury testimony of these men under Pa.R.E. 804(b)(1), which governs former testimony. In order for former testimony to be admissible, the declarant must be unavailable. ***See*** Pa.R.E. 804.

Under the rules of evidence, a person is unavailable if he refuses to testify. ***Id.*** In this case, the Commonwealth itself acknowledged that Mr. Curley, Mr. Schultz, and Mr. Spanier were unavailable because they would not testify due to pending charges. Thus, the first aspect of the rule allowing former testimony is met. Further, it should be noted that the Commonwealth has no confrontation clause rights, which only applies to a criminal defendant. In this respect, however, the rules of evidence did provide that former testimony at a hearing is admissible against a party if that party had an opportunity and similar motive to develop it by direct examination. ***See*** Pa.R.E. 804(b). Instantly, the Commonwealth at the grand jury proceeding clearly had the opportunity to explore the testimony on direct examination. Under Rule 804, the grand jury testimony of these men would have been admissible.

Insofar as the Commonwealth argued at trial that it would be allowed to introduce that these men had been charged with perjury, this was legally inaccurate. Pursuant to Pa.R.E. 609, a witness's credibility can be attacked regarding crimes only if the witness has been convicted of a crime of dishonesty. The rule explicitly is limited to convictions and does not authorize admission into evidence of charges of a crime. Hence, the Commonwealth would have been precluded from introducing that these three men, innocent until proven guilty, had been charged

with perjury in order to impeach their testimony. The grand jury testimony of these three men, in combination with testimony from Allan Myers or even without Mr. Myers testimony, could have cast serious doubt on the credibility of Mr. McQueary. This would have undermined the Commonwealth's case that Mr. Sandusky was a serial shower rapist. Indeed, Mr. McQueary himself at the time of the incident never told his father or Dr. Dranov, who asked him explicitly three times, that he saw sexual abuse.

It is simply inexplicable that a six foot five inch, 240 lbs twenty-six year old, former football player who saw a child being raped would have done nothing. Dr. Dranov, a mandated reporter, did not report the incident after Mr. McQueary told him what he observed. Thus, Mr. McQueary's statements to the doctor were almost certainly the same as those relayed to Mr. Curley and Mr. Schultz and Joe Paterno. That is he heard slapping sounds. Even Joe Paterno's grand jury testimony does not support Mr. McQueary's claims that he clearly related that he thought he saw Mr. Sandusky sodomizing a child. Had counsel introduced this testimony in combination with showing that Mr. McQueary took part in Mr. Sandusky's celebrity golf tournament shortly thereafter, also participated in a charity related flag-football fund raiser in 2002 and 2004, as well as another golf outing in 2003, the jury would have been left with serious doubt as to the credibility of Mr. McQueary.

Counsel had no reasonable basis not to present this testimony when they argued extensively to be permitted to call these witnesses to testify and argued that they should be allowed to introduce their grand jury testimony and the apparent reason that they did not present the testimony was based on the incorrect assumption that the Commonwealth could impeach these witnesses with charges that had not resulted in convictions. Further, this presents a question of material fact as to the reason they did not utilize the grand jury testimony. Finally,

there is a reasonable probability that the outcome of the trial would have been different as the testimony would have further undermined the Commonwealth's theme that Mr. Sandusky regularly abused children in the shower and the crux of the trial rested on credibility.

The Commonwealth's Faux Expert and Trial Counsel's Decision to Call an Expert:

Despite not even being statutorily authorized to investigate due to a conflict, Ms. Dershem not only investigated this matter, but allowed another individual to complete a report on her behalf and incorrectly maintained that Aaron Fisher had initially made sexual allegations. Ms. Dershem then was permitted to testify as though she were an expert and opine on the mental state of Aaron Fisher. To make matters worse, trial counsel presented expert testimony that opened the door to testimony that Mr. Sandusky might suffer from a sexual disorder. This case presents a best hits of what not to do at trial.

28. Trial Counsel was ineffective for failing to object to improper opinion testimony by an unqualified expert.[78]

At trial, the Commonwealth elicited the testimony of Jessica Dershem, a caseworker with Clinton County Children and Youth Services. N.T., 6/12/12 at 123-24. During her direct examination, Ms. Dershem testified to numerous unfounded and irrelevant facts, and she was permitted to render an expert "professional" opinion, as well as her own personal opinion, without being qualified or offered as an expert in any particular field of expertise. Specifically, Ms. Dershem testified to the following inadmissible or irrelevant facts:

a. That during her interview with Aaron Fisher, she thought that he was withholding information and lying to her because she believed "he was uncomfortable talking about the incidents." ***Id.*** 127-129, Appendix, at 628. Ms. Dershem had no basis to opine as to Mr. Fisher's mental state or thoughts during the interview, and trial counsel should have objected.

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78 This issue can be found in Mr. Sandusky's prior petition at paragraphs 357-370.

b. That Centre County CYF did not send out the usual letter it sends with regard to the investigation involving Aaron Fisher because of a concern of retaliation against Mr. Fisher, despite the lack of any evidence of any threats or factual basis for the alleged concern. ***Id.*** at 131 at Appendix, at 631;

c. That she thought certain behavior that Mr. Sandusky admitted to engaging in, though not illegal, was "unusual" – a legally irrelevant and prejudicial fact and belief. ***Id.*** at 138-39 at Appendix, at 632;

d. That Trooper Cavanaugh of the Pennsylvania State Police advised her that following the interview with Mr. Sandusky, he believed there was sufficient evidence to charge Mr. Sandusky with indecent assault – a charge that was not filed at the time and amounted to prejudicial, irrelevant hearsay. ***Id.*** at 159-160 at Appendix, at 634.

Inexplicably, this information came from a leading question from trial counsel. Moreover, Ms. Dershem was permitted to express an expert opinion without having been offered or qualified as an expert in the following matters:

a. Ms. Dershem stated as a "trained professional" that she believed there was an "inappropriate" relationship between a middle aged adult and a small child. N.T. Trial June 12, 2012 at 181, Appendix, P. 636. Not only was Ms. Dershem not offered or qualified to render an expert opinion, the opinion on which the question is based is legally irrelevant, as the charges against Sandusky required proof of more than merely "inappropriate" behavior;

b. The Commonwealth asked Ms. Dershem, "in both [her] professional opinion and personal opinion, does the first portion of those things that I have read to you wrapped up in Aaron for three years, blowing on his stomach, lying on top, can't honestly answer if my hands were below his pants, sounds like someone who has an inappropriate relationship?" N.T. Trial, June 6, 2012, at 182-183 at Appendix, P. 637. First, Ms. Dershem was not offered as an expert and not qualified to give her "professional opinion" or her personal opinion on any matter at issue, and second, as noted above, the issue of an "inappropriate relationship" was not only legally irrelevant, but highly prejudicial as the entire line of questioning seeks to prejudice Mr. Sandusky with the jury to convict him on the grounds of inappropriate conduct.

Despite the impropriety of this testimony, the fact that Ms. Dershem was never once offered as an expert witness on any subject, and the fact that she was permitted to state her "professional opinion" without identifying that it was to a degree of reasonable certainty in any

field whatsoever, trial counsel failed to object to this highly prejudicial and totally irrelevant line of questioning. By permitting Ms. Dershem to testify as to her faux "expert" opinion, without objection, trial counsel gave significance and weight to the notion that Mr. Sandusky could be convicted of "inappropriate" conduct.

The Pennsylvania Superior Court has noted that "Pennsylvania Rule of Evidence 701 limits a lay witness's opinion testimony to "those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge[.]" ***Cominsky v. Donovan***, 846 A.2d 1256, 1259 (Pa. Super. 2004). Here, Ms. Dershem was presented as a lay witness, but the Commonwealth asked her to present opinion testimony based on her specialized knowledge, training, and experience as a caseworker with the Clinton County office of Children and Youth Services. Had trial counsel made an objection, the trial court would not have permitted her unfounded expert opinion.

Mr. Sandusky was prejudiced because Ms. Dershem was never offered as an expert, but the jury was permitted to consider her as if she were an expert because trial counsel allowed her improper testimony to come in without any opposition. Since trial counsel can have no rational basis for failing to object to this issue, trial counsel was ineffective for failing to object to this issue. Trial counsel was ineffective for failing to preserve this issue.

29. Trial counsel were ineffective in eliciting inculpatory evidence against Mr. Sandusky and opening the door for the Commonwealth to introduce additional rebuttal evidence.[79]

At trial, trial counsel presented the testimony of psychologist Elliot Atkins, "to explain the letters and the purpose of the letters" that Mr. Sandusky wrote to several of the victims. N.T.,

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79 This claim was presented in Mr. Sandusky's May 6, 2015 petition at paragraphs 449-463.

6/19/12 at 164. Dr. Atkins concluded that Mr. Sandusky suffered from "histrionic personality disorder." ***Id.*** at 169, 172. Despite the fact that the testimony was offered only to explain Mr. Sandusky's letters, Dr. Atkins went beyond the scope of the proffer and testified as to Mr. Sandusky's relationships and his broader behavior, including his sexual behavior. *See generally id.* As a result, the Commonwealth elicited from Dr. Atkins on cross-examination that the same symptoms underlying the histrionic personality disorder also support a psychosexual disorder. ***Id.*** at 215-17, Appendix, at 676. Indeed, Dr. Atkins stated "If, in fact, the things he is accused of are true, then he would have a psychosexual disorder." ***Id.*** at 216-17 at Appendix, at 677.

Because of the ill-considered decision to present Dr. Atkins, trial counsel opened the door to psychiatrist Dr. John O'Brien testifying on rebuttal for the Commonwealth that he opined that Mr. Sandusky suffered from "psychosexual disorder with a focus on adolescence or preadolescence." ***Id.*** at 295. In ***Ramos v. Lawler***, 695 F.Supp.2d 347 (M.D. Pa. 2009), the U.S. District Court, in ruling on a federal *habeas corpus* review of a Pennsylvania state conviction, held that where defense counsel elicits inculpatory evidence in a jury trial that opens the door to the prosecution introducing evidence that would otherwise not have been admissible, counsel is ineffective.

In this case, as in ***Ramos***, trial counsel's direct examination of Elliot Atkins opened the door to Dr. O'Brien's testimony that Defendant exhibited psychosexual disorder with a focus on adolescence or preadolescence. The claim therefore has arguable merit. Had trial counsel not introduced the testimony of Elliot Atkins, the outcome of the proceedings would have likely been different, as the Commonwealth would not have been able to present Dr. O'Brien's expert opinion on rebuttal relating to Mr. Sandusky's alleged psychosexual disorder.

Moreover, the testimony of Dr. Atkins was irrelevant to Mr. Sandusky's defense that the charged conduct did not occur. Hence, trial counsel had no reasonable basis for presenting the testimony of Dr. Elliot Atkins. Mr. Sandusky submits that trial counsel presented the testimony of Dr. Atkins after receiving his expert opinion at the eleventh hour before trial simply because they believed it necessary to present some degree of expert testimony to explain Mr. Sandusky's alleged behavior.

Critically, Dr. Atkins's testimony also caused confusion with the jury, as the jury was presented with evidence of a mental infirmity of a sort that would, in theory, explain or excuse the alleged criminal behavior, when Mr. Sandusky's contention was and is that there was no criminal behavior. Accordingly, trial counsel was ineffective for presenting the testimony of Elliot Atkins, and Defendant is entitled to a new trial.

Why Didn't He Testify?

Mr. Sandusky had to testify, he had to explain that he was innocent. Mr. Sandusky wanted to take the stand and vigorously deny the allegations made against men whom he himself had in some cases contacted to come to his aide. Yet, even after promising that his client would testify, Mr. Amendola failed to properly advise Mr. Sandusky about testifying once the Commonwealth alleged that they could call Matt Sandusky to rebut Mr. Sandusky's denial that he committed the crimes alleged. Instead, overwhelmed, Mr. Amendola instructed his client not to testify due to fear that the Commonwealth might present testimony that should not even have been allowed and even if it were somehow permitted, he could not effectively inform Mr. Sandusky of his options because he had not read Matt Sandusky's grand jury testimony defending his father.

30. Trial counsel was ineffective for promising the jury that Mr. Sandusky would testify at trial and then not calling him to the stand.[80]

During Mr. Amendola's opening statement, Mr. Amendola made several promises to the jury that Mr. Sandusky would testify. ***See*** N.T. , 6/11/12, Vol. 2, at 9, 26.[81] Numerous courts have held that where defense counsel makes a promise in opening statements and fails to see that promise through, counsel is ineffective. ***See Ouber v. Guarino***, 293 F.3d 19, 33-34 (1st Cir. 2002) (holding that counsel's failure to present defendant's testimony as to knowledge was "egregious" error that "but for its commission, a different outcome might well have eventuated."); ***Anderson v. Butler***, 858 F.2d 16, 18 (1st Cir. 1988) (broken promise from opening statement to present expert psychiatric testimony resulted in finding of ineffective assistance); ***McAleese v. Mazurkiewicz***, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffective assistance of counsel."); ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219, 259 (7th Cir. 2003) ("Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that

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80 This argument was forwarded in paragraphs 441-448 in Mr. Sandusky's May 2015 petition.

81 The Commonwealth contended in its earlier answer that the only statement in Mr. Amendola's opening that suggests Mr. Sandusky would testify is when he set forth, "[Mr. Sandusky] will tell you later probably, advice was given don't go[,]" to a CYS proceeding. The commonwealth overlooks that counsel also averred, "What you're going to hear is that Jerry Sandusky grew up in Washington, PA. That's a little town in the southwest part of the state southwest of Pittsburgh. He grew up in Washington, PA. He grew up an only child. His parents loved kids but they only had jerry. And growing up his mom and dad loved kids so much they agreed to take over a recreation center." N.T., Opening Statement, 6/11/12, at 18. Counsel continued relating matters that clearly were items that Mr. Sandusky would have testified to. In fact, counsel added, "After going to Penn State---and he'll tell you about his Penn State life." ***Id.*** at 19. It is evident from the entire context of Mr. Amendola's argument that he was maintaining that Mr. Sandusky would testify. To the extent the Commonwealth claims otherwise, it raises a genuine issue of material fact that warrants an evidentiary hearing.

the testimony would have been adverse to his client and may also question the attorney's credibility."); ***Harris v. Reed***, 894 F.2d 871, 879 (7th Cir. 1990) ("When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up to the claims he made in the opening.").

In the present case, trial counsel promised the jury that they would hear Mr. Sandusky deny the conduct for which he was charged and explain his interaction with the men involved. Trial counsel, having promised the jury that Mr. Sandusky would speak to them and explain his side of events, broke that promise, undermining the defense and completely destroyed the defense's credibility. Mr. Sandusky was prejudiced by the broken promise. ***See Harris, supra; McAleese, supra.***

31. Trial counsel were ineffective for not making a motion to preclude Matt Sandusky from testifying as a rebuttal witness and failing to advise Mr. Sandusky regarding any strategy regarding if Mr. Sandusky would testify after the Commonwealth indicated it would call Matt Sandusky.[82]

Instantly, the Commonwealth maintained that it would call Matt Sandusky as a rebuttal witness if Mr. Sandusky testified. However, had trial counsel performed effectively, he would have argued that Matt could not serve as a proper rebuttal witness. First, trial counsel during his direct examination of Mr. Sandusky would have only focused on the alleged victims. For example, asking questions such as:

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

2. Did you perform oral sex on victim X?

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

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

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82 This argument was not contained in Mr. Sandusky's prior petitions.

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

Trial counsel also could and should have provided a motion *in limine* to prevent the Commonwealth from improperly asking questions beyond the scope of the direct examination such as: are you a pedophile, or are you attracted to children, or have you ever abused anyone, which would have served as an improper attempt to open the door to introducing testimony from Matt Sandusky. ***See Commonwealth v. Cheatham***, 239 A.2d 293, 296 (Pa. 1968) ("ordinarily cross-examination is limited to matters brought out on direct examination, it is clear that an exception exists where the cross-examiner seeks to show bias on the part of the witness."). At the very least, trial counsel should have ascertained a ruling from the court as to whether it would permit the Commonwealth to ask such questions on cross-examination in order to adequately inform Mr. Sandusky regarding his right to testify.

Counsel could have no reasonable basis for not taking these actions as without a definitive ruling that Matt Sandusky could not testify in rebuttal or would be permitted to testify, counsel could not adequately inform his client to testify. Thus, irrespective of what the court's ruling would have been, Mr. Sandusky's waiver of his right to testify was not knowing and intelligent because counsel did not explain that Matt Sandusky could not testify in rebuttal or that if he did, how counsel would have approached cross-examining him and impeaching him with both his own and his siblings testimony.

Further, evidence of uncharged other crimes, wrongs, or acts are inadmissible when the potential for prejudice outweighs its probative value. ***See*** Pa.R.E. 404(b). Here, evidence that Mr. Sandusky allegedly did anything inappropriate with Matt Sandusky, contrary to Matt's earlier testimony under oath, would have been highly prejudicial. In essence, the Commonwealth would be able to introduce uncharged crimes after the filing of its criminal information thereby significantly altering the defense strategy. In the context of permitting the Commonwealth to amend a criminal information, it is well-settled that such a practice is prohibited where prejudice would result. The rule against allowing additional or different charges to be included is " to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." ***Commonwealth v. Roser,*** 914 A.2d 447, 453 (Pa. Super. 2006). In ascertaining prejudice when the Commonwealth seeks to introduce new crimes and amend its information the court considers:

(1) whether the amendment changes the factual scenario supporting the charges;

(2) whether the amendment adds new facts previously unknown to the defendant;

(3) whether the entire factual scenario was developed during a preliminary hearing;

(4) whether the description of the charges changed with the amendment;

(5) whether a change in defense strategy was necessitated by the amendment; and

(6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

See Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006).

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

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

Further, the Commonwealth could not establish good cause to excuse its absence of pretrial notice regarding whether it would present other non-charged bad acts evidence. ***See*** Pa.R.E. 404(b). Although the Commonwealth represented that Matt Sandusky had only recently come forward, it had ample opportunity to question Matt Sandusky prior to trial. Also, as previously noted, Matt Sandusky could not offer proper rebuttal to the testimony that Mr. Sandusky would have offered, *i.e.*, that he had never abused the alleged victims in this case. Additionally, even if the trial court were to have permitted the Commonwealth to ask questions on cross-examination like "are you a pedophile" in an attempt to open the door to Matt Sandusky, trial counsel needed to adequately advise Mr. Sandusky as to how they would have questioned Matt had he testified. Without explaining that they could have impeached Matt's testimony with his vigorous prior defenses of his father as well as presented Mr. Sandusky's other children to rebut Matt's sudden change, Mr. Sandusky could not making a knowing and informed decision on whether or not to testify.

Mr. Sandusky suffered prejudice, because as is also outlined in the following issue, prejudice relative to the decision to testify does not require a showing that the outcome of the trial would be different. Rather, if the petitioner's decision to testify would have been different, then he has shown actual prejudice. ***See Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015).

32. Ineffective assistance of counsel for not calling Mr. Sandusky to testify and inadequately advising him regarding testifying after the Commonwealth provided that it would seek to call Matt Sandusky for rebuttal purposes.[83]

While Mr. Sandusky did undergo a colloquy on his right to testify, the information supplied by counsel rendered that colloquy void. ***Commonwealth v. Nieves***, 746 A.2d 1102 (Pa. 2000). In ***Commonwealth v. Nieves***, 746 A.2d 1102 (Pa. 2000), counsel incorrectly informed his client regarding the admissibility of prior crimes evidence if the defendant testified and the Supreme Court found trial counsel ineffective. Where trial counsel gives advice that is unreasonable, it can vitiate a knowing and intelligent waiver of the right to testify. ***Id.*** In ***Nieves***, the defendant had been colloquied. ***See Nieves, supra*** at 1103 ("Appellant was colloquied and indicated that he did not wish to testify and that he had no witnesses he wished to call. He also indicated that he was satisfied with his attorney's representation."). Similarly, in ***Commonwealth v. Strader***, 396 A.2d 697 (Pa. Super. 1978), ***Commonwealth v. Henderson***, 444 A.2d 720 (Pa. Super. 1982), ***Commonwealth v. Farnwalt***, 429 A.2d 664 (Pa. Super. 1981), and ***Commonwealth v. McCall***, 406 A.2d 1077 (Pa. Super. 1979), the Superior Court directed post-conviction courts to conduct evidentiary hearings on whether counsel's incorrect advise caused a defendant to enter an invalid guilty plea despite the defendants' having completed a colloquy. Here, the question as to what information counsel provided Mr. Sandusky relative to Mr. Sandusky's decision not to testify creates a genuine issue of material fact.

Moreover, the advice provided to Mr. Sandusky did cause an unknowing waiver of his right to testify. Specifically, counsel incorrectly told Mr. Sandusky that Matt Sandusky would be permitted to rebut his testimony. While the Commonwealth maintained that they would call Matt Sandusky in rebuttal, Matt could not testify in rebuttal for the reasons outlined above. Finally,

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83 This claim was not presented in Mr. Sandusky's prior filings.

the prejudice required for a claim relative to being deprived of the right to testify on one's own behalf is not whether the outcome of the trial would have been different, but only whether the decision to testify would have been altered. ***See Commonwealth v. Walker***, 110 A.3d 1000 (Pa. Super. 2015).

Mr. Sandusky avers that had he been adequately informed that Matt Sandusky either would not be allowed to testify or if he did testify, how counsel would have counteracted that testimony, Mr. Sandusky would have taken the stand. Since Mr. Sandusky would have testified, based on ***Walker***, actual prejudice exists.

Instructional Error:

As though the preceding claims of ineffectiveness were not enough, counsel's decision not to object to a confusing and erroneous character evidence instruction put the proverbial icing on the prejudice cake. Knowing that the trial court, as it turned out, erroneously, denied counsel's request for a prompt complaint instruction, trial counsel's failure to object to the character evidence instruction, which expressly informs the jury that they may acquit solely based on good character evidence, was inexecusable.

33. Counsel were ineffective in neglecting to object to the trial court's erroneous guilt instruction as part of its character evidence instruction.[84]

Since Mr. Sandusky presented testimony by character witnesses, he was entitled to an instruction that character evidence alone could give rise to a reasonable doubt. ***See Weiss, supra***. In instructing the jury regarding character evidence, however, the court incorrectly instructed the

84 This argument is new and is not contained in Mr. Sandusky's prior petitions.

jury.[85] Specifically, it stated, "If on all the evidence you are **NOT** satisfied beyond a reasonable doubt he is guilty, you should find—that he is guilty, you should find him guilty." N.T., 6/21/12, at 22 (emphasis added). The correct instruction would have been, "if on all the evidence you are satisfied beyond a reasonable doubt that he is guilty, you should find him guilty." Trial counsel did not object to this erroneous instruction. This issue is one of arguable merit. ***Cf. Commonwealth v. Billa***, 555 A.2d 835 (Pa. 1989) (counsel ineffective for not seeking a limiting instruction); ***Commonwealth v. Reyes-Rodriguez***, 111 A.3d 775 (Pa. Super. 2015) (*en banc*) (evidentiary hearing held to afford petitioner an opportunity to establish counsel was ineffective in failing to request a character evidence instruction that such evidence along could establish reasonable doubt).

Further, counsel could have no reasonable basis for not objecting to an erroneous character evidence instruction that incorrectly told the jury to find Mr. Sandusky guilty even if it was not satisfied beyond a reasonable doubt that Mr. Sandusky was guilty. The mistake is also more serious because it occurred in the context of an instruction on character evidence and how such evidence is itself sufficient to raise a reasonable doubt. Moreover, in sex offense cases, character evidence is of paramount importance. ***Weiss, supra; see also Commonwealth v. Hull***, 982 A.2d 1020 (Pa. Super. 2009) (discussing importance of character evidence). An improper character witness instruction is therefore more prejudicial in such cases.

Although "trial courts are invested with broad discretion in crafting jury instructions," ***Commonwealth v. Simpson***, 66 A.3d 253, 274 (Pa. 2013), the instruction must "clearly and accurately present the law to the jury for its consideration." ***Id.*** Even considering the character

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85 It should be noted that the Superior Court found the trial court's decision not to issue a prompt complaint instruction to be error, but concluded that the error was harmless. When viewed in combination with this error in the jury instructions the two issues together are not harmless.

jury instruction in its entirety reveals that the court confusingly and misleadingly provided that Mr. Sandusky could be found guilty even if the jury determined that the weight of the character evidence was sufficient to show a reasonable doubt. Since it is presumed that a jury follows the courts instruction, ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1184 (Pa. 2011), and the jury was confusingly and erroneously instructed to find Mr. Sandusky guilty even if it was "not satisfied beyond a reasonable doubt he is guilty," Mr. Sandusky suffered actual prejudice.

Tallying Up the Prejudice--Cumulative Error and Guilt by Reason of Ineffectiveness:

If a text book were to be written on how not to try a sex offense case involving overwhelming media attention, this case would provide the model. The serial instances of ineffectiveness demonstrate how an innocent person can be found guilty by reason of the ineffective assistance of his attorney.

34. Based on the aforementioned claims that raise issues of arguable merit, the cumulative effect of these errors and those raised in his prior petitions resulted in actual prejudice to Mr. Sandusky.[86]

This petition as well as Mr. Sandusky's prior petitions, along with any evidence developed at an evidentiary hearing, which in light of the numerous issues of material fact presented herein is mandated, demonstrate that trial counsel was so patently ineffective, that he left Mr. Sandusky without an adequate defense.

Trial counsel failed to adequately consult with Mr. Sandusky regarding the interview with Bob Costas, resulting in harmful evidence being utilized by the Commonwealth at trial. The Commonwealth extensively commented on the interview and argued that Mr. Sandusky "didn't provide [the jury] with something that could have been enormously helpful to us, could have

86 Although mentioned, this claim was not fully developed in Mr. Sandusky's earlier filings.

solved many problems today." N.T., 6/21/12, at 145-46, Appendix, at 425. The prosecution continued, "One thing he didn't which he could have provided to Bob Costas, **he could have provided it to anybody at any time.** He had the complete capacity and exonerate himself at the time and just say who was there because this is a day – remember, Mike McQueary, why remember him and not the little boy you're soaping and just being innocently cleansing to? **But he didn't provide that name to anybody, ever,** certainly not to Bob Costas, no. He forgot that." ***Id.***

The claim that Mr. Rominger was ineffective in not seeking a mistrial when the prosecution commented on Mr. Sandusky not testifying, but instead having provided a media interview is of arguable merit. In addition, the issue of trial counsel not making a motion to preclude Matt Sandusky from being allowed to testify, since he could not serve as a proper rebuttal witness, clearly has arguable merit. Concomitantly, the position that counsel was ineffective in telling the jury that Mr. Sandusky would testify and then inadequately advising him not to testify, is one of arguable merit. Counsel were also ineffective in not calling Mr. Sandusky to the stand.

Counsel also did not develop a rational and unified defense strategy; waived Mr. Sandusky's preliminary hearing; failed to interview key witnesses or investigate whether the alleged victims private attorney's induced the witnesses to alter their stories for financial reasons; and did not sufficiently review the Commonwealth's discovery and incorrectly told the jury during opening statements that the evidence against Mr. Sandusky was "overwhelming," N.T., 6/11/12, Vol. 2, at 3. Furthermore, according to Mr. Rominger, Mr. Amendola's lack of preparation ran so deep that he asked Attorney Rominger to cross-examine Michael McQueary, the Commonwealth's key witness, with only approximately thirty minutes' notice.

Trial counsel also had retained Lindsay Kowalski as a case analyst/consultant to assist with trial. ***See generally*** Kowalski Affidavit contained in the May 5, 2015 Appendix, at 690. On February 28, 2012, Ms. Kowalski was contacted by a mutual acquaintance with trial counsel about working on the case; however, trial counsel did not follow up with her timely manner. ***Id.*** at ¶¶ 2-3. Subsequently, on April 26, 2012, only weeks before trial, Ms. Kowalski contacted Attorney Amendola again about participating in the defense. ***Id.*** at ¶ 3. Attorney Amendola did not meet with Ms. Kowalski until May 11, 2012, one month before trial commenced. ***Id.*** at ¶ 4. Ms. Kowalski was not actually hired until May 22, 2012, less than three weeks before opening statements occurred on June 11, 2012. ***Id.*** at ¶ 10.

Ms. Kowalski states that when she met with Attorney Amendola on May 11, 2012, he emphasized how he was overwhelmed with trying to organize the paperwork in the case and prepare for trial. ***Id.*** at ¶ 5. Once Ms. Kowalski was retained, her initial tasks were to organize the files for potential witnesses, to read discovery documents to identify the parties, and to organize copies of relevant documents for witness files. ***Id.*** at ¶¶ 11-13. Ms. Kowalski also created an inventory sheet of discovery material and identified missing discovery material. ***Id.*** at ¶ 14. She prepared charts demonstrating graphic representations of the alleged victims' relationships and inconsistent statements. ***Id.*** at ¶ 16. For reasons unknown to Ms. Kowalski, trial counsel failed to utilize any of the graphic aids Ms. Kowalski created. Ms. Kowalski states that she was unaware of any cohesive trial strategy, despite having worked with trial counsel up to and during the trial. ***Id.*** at ¶ 18.

Trial counsel elected not to present a tape recorded statement taken by police in which Mr. Calhoun contradicted Mr. Petrosky's hearsay testimony about Mr. Calhoun observing Mr. Sandusky performing any sex acts with a boy in a shower. Counsel also did not argue that

because he had a rule based right under Pa.R.E. 806 to cross examine Mr. Calhoun as the declarant of the excited utterance, but Mr. Calhoun was unavailable, he was deprived of due process of law when the court allowed Mr. Petrosky's testimony.

Further, the position that appellate counsel was ineffective in not arguing on appeal that Mr. Petrosky's testimony was inadmissible as an excited utterance because there was no corroborating evidence that Mr. Sandusky sexually abused the alleged victim is one of arguable merit. ***See Barnes, supra.*** Similarly, the claim that direct appeal counsel was ineffective for failing to raise the issue of the violation of Mr. Sandusky's federal and state confrontation clause rights relating to admission of hearsay statements from Mr. Calhoun via Mr. Petrosky is an issue with arguable merit.

The argument that trial counsel were ineffective in not filing a collateral appeal after the denial of their motion to withdraw where they stated that they ethically could not effectively represent Mr. Sandusky and Mr. Amendola rendered ineffective assistance by erroneously stating in his opening statement that there was overwhelming evidence against Mr. Sandusky is of arguable merit. Counsel also failed in his duty to represent his client effectively by not presenting evidence that Allan Myers refuted the testimony of Michael McQueary and not objecting to the factually erroneous statement by the prosecutor during his summation that only God knew the identity of the McQueary shower child. These issues have arguable merit.

In addition to these errors, counsel did not fully discuss the substance and potential risks of Elliot Atkins's testimony with Mr. Sandusky prior to Atkins's testimony at trial or move for a mistrial when Trooper Scott Rossman admitted to violating the witness sequestration order by speaking with another trooper. Counsels' failure to object to the court's erroneous guilt instruction on character evidence is of arguable merit. Counsel also did not request that the trial

court declare witnesses such as Scott Rossman, Joseph Leiter, Benjamin Andreozzi, or Dawn Daniels, hostile or adverse witnesses, thus enabling trial counsel to ask probing leading questions; or object to the prosecution's improper leading of its witness, Michael McQueary. Counsel also should have objected to the improper expert testimony of an unqualified expert in Jessica Dershem and presented the grand jury testimony of Tim Curley, Gary Schultz, and Graham Spanier.

It is impossible to precisely measure the prejudice Mr. Sandusky suffered as a result of his counsel's ineffective representation and the serial instances of a lack of strategic decision making. Trial counsels' deficient performance, combined with allegations of sexual abuse, and pervasive negative media attention, made this case a perfect storm resulting in a factually innocent man being incarcerated. Here, the CPSL law was not properly followed and the grand jury process was improperly invoked. Serial leaks of grand jury information and an inaccurate original presentment led to highly prejudicial and inflammatory information being revealed to the public. Journalists were permitted to be present for jury *voir dire*, chilling any answers a proposed juror might give regarding whether he or she could be fair in the case.

Trial counsel did not explore the actual knowledge the prospective and selected jurors had of the case based on the prejudicial pre-trial publicity even where every juror was asked whether, aside from all of the internet, radio, television, and newspaper coverage, they knew anything else about the case. One victim was never identified and has never come forward and the hearsay testimony leading to Mr. Sandusky's conviction relative to that phantom victim was contradicted by the eyewitness. That latter evidence, however, was not presented. The alleged shower victim observed by Mr. McQueary was known yet the prosecutor referred to him as only being known by God. That individual has recanted that he was abused, which is consistent with

his numerous prior statements that Mr. Sandusky did not molest him. Police conducted suggestive interviews and utilized improper questioning techniques and were caught on tape doing so.

Numerous accusers underwent repressed memory therapy before they made disclosures regarding sexual abuse and had no independent recollection of sexual abuse prior to therapy. The Commonwealth did not turn over this material impeachment evidence and several accusers have made statements after trial that it was only due to therapy that they could recall any of the alleged abuse. Trial counsel, despite testimony suggesting that the accusers were undergoing therapy and that this treatment is what altered their stories, failed to present any expert testimony on false memories and the problems inherent with repressed memory therapy. Several of the accusers were seeing the same therapist and additional accusers shared an attorney. Trial counsel permitted Mr. Sandusky to be interviewed by Bob Costas without adequately preparing him or advising him of the consequences, which allowed the Commonwealth to use that interview and improperly comment on Mr. Sandusky's failure to testify. As a result, Mr. Sandusky, an innocent man, must be awarded a new trial no matter the public perception.

REQUEST FOR DISCOVERY

Mr. Sandusky, without waiving any prior or additional discovery requests that have or may arise, renews his averments that this case presents extraordinary circumstances under Pa.R.Crim.P. 902(E)(1), which warrant discovery into the following areas:

a. Whether the Commonwealth failed to disclose relevant ***Brady*** material in the form of grand jury exhibits that were never disclosed to the defense;[87]

87 The Commonwealth has a continuing duty under ***Brady***, even in the context of PCRA proceedings. ***Commonwealth v. Williams***, 732 A.2d 1167, 1175-1176 (Pa. 1999) ("the Commonwealth's obligations under ***Brady*** continue through all stages of the judicial process").

b. Whether the victims in this matter who had attorneys committed perjury or misstated their knowledge regarding private fee agreements the victims had with private counsel, which are required by law, and/or publishers that creates a financial incentive to fabricate allegations against Mr. Sandusky;

c. Whether communications between prosecutors, especially Attorney Frank Fina, and the supervising judge of the grand jury investigation operated to prejudice Mr. Sandusky;

d. The circumstances of the grand jury leaks of information which occurred in March and November of 2011;

e. Whether Mr. Sandusky's constitutional rights were violated by activities of law enforcement and private attorneys regarding Allan C. Myers;

f. Mr. Sandusky requests that his expert, Dr. Paul Simpson, be permitted an in camera review with the PCRA court, of any therapy notes relative to those accusers who have undergone repressed memory therapy.

THE UNDERSIGNED Alexander H. Lindsay, Jr. and J. Andrew Salemme incorporate by reference the prior witness certifications contained in the May 6, 2015 Amended Petition as it relates to the proposed testimony that will be presented. In addition, we certify that testimony may be presented from the following witnesses:

Dr. Paul Simpson (forensic psychologist)
D.O.B.: Unknown
Address: 7618 N. La Cholla Blvd., Tuscon, AZ 85741
Proposed Testimony: Dr. Simpson will testify as an expert forensic psychologist regarding repressed memory therapy and false memory and the claims related to that topic raised herein.

D.S.--Adverse
D.O.B.: 10/10/84
Address: Unknown
Proposed Testimony: D.S. will testify regarding the issues raised in the PCRA petition including the type of therapy he received and how repressed memory therapy resulted in him making the allegations against Mr. Sandusky.

Attorney Andrew Shubin--Adverse
D.O.B.: Unknown
Address: 333 S. Allen Street, Suite 102, State College, PA 16801

Proposed Testimony: Mr. Shubin will testify regarding those facts and issues raised herein dealing with financial agreements, those clients he represented, and whether he wrote Allan Myers allegations.

Michael Gillum--Adverse
D.O.B.: Unknown
Address: 454 Pine Street, Suite 1B Williamsport, PA 17701
Proposed Testimony: Mr. Gillum will testify regarding the claims raised herein, especially those issues involving the type of therapy he used on those victims who testified at Mr. Sandusky's trial.

Thomas N. Farrell
D.O.B. Unknown
Address: 100 Ross Street, Suite 1, Pittsburgh, PA 15219
Proposed Testimony: Mr. Farrell will testify regarding general trial strategy and tactics.

In addition to the foregoing, at an evidentiary hearing, Mr. Sandusky will testify on his own behalf and may use any document generated during the grand jury investigation, civil actions filed in conjunction with the events forming the prosecution against him, motions (and exhibits) as well as hearing and trial transcripts. Mr. Sandusky reserves the right to amend the foregoing witness list, as the record is fully developed, to include, should the court permit, discovery as requested.

WHEREFORE, for the foregoing reasons, Petitioner Gerald Sandusky respectfully requests this Honorable Court grant an evidentiary hearing and the relief requested in his PCRA petitions, and ultimately vacate Mr. Sandusky's convictions and set the matter for a new trial or dismiss the charges against Mr. Sandusky as set forth herein.

Respectfully submitted,

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

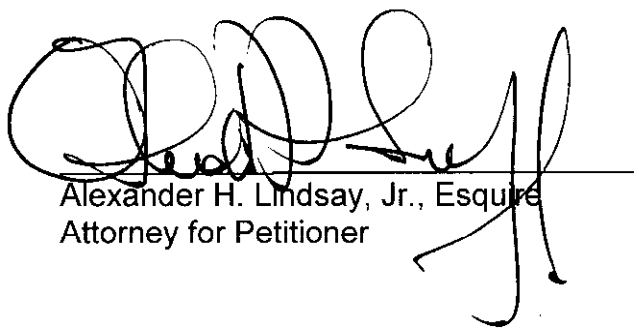


J. ANDREW SALEMME, ESQ.
Pa. Supreme court Id. No. 208257

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

ATTORNEY VERIFICATION

On this 7th day of March, 2016, Alexander H. Lindsay, Jr., Esquire, the undersigned, states that he is the attorney for the Gerald Sandusky and that he is authorized to make this verification on behalf of Gerald Sandusky; that the facts set forth in the foregoing Second Amended Petition for PCRA Relief are true and correct, not of his own knowledge, but from information supplied to him by Gerald Sandusky; that the purpose of this verification is to expedite the litigation, that a verification of the Petitioner will be supplied if demanded, all subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.



Alexander H. Lindsay, Jr., Esquire
Attorney for Petitioner

ATTACHMENT A

AFFIDAVIT OF KARL E. ROMINGER

I, KARL E. ROMINGER, being duly sworn depose and say as follows:

1. From 1998 until 2014 I was an attorney licensed to practice law in the Commonwealth of Pennsylvania. My practice was foremost known for the defense of criminal matters in dozens of counties in Pennsylvania.

2. In November 2011, shortly after Jerry Sandusky was interviewed by Bob Costas, I was contacted by Curtis Everhardt an investigator for Attorney Joe Amendola who was counsel to Jerry Sandusky. Mr. Sandusky was being prosecuted by the Office of Attorney General in Centre County, Pennsylvania. I had worked with Mr. Everhardt on prior occasions including two death penalty cases. Mr. Everhardt asked if I would be able to assist with the defense of the Sandusky matter. Mr. Everhardt said that it was clear that Mr. Amendola could use help and that he was overwhelmed by the demands of the case.

3. As a result of Mr. Everhardt's request, I agreed to meet with Attorney Amendola and Mr. Sandusky. After meeting with them I was convinced that Mr. Everhardt's

assessment that Mr. Amendola was overwhelmed by the demands of the case was indeed correct.

4. My status in the defense of the case was that I would be second chair to Mr. Amendola. It was clear to me that Mr. Sandusky had a close relationship with Mr. Amendola. On many occasions, I disagreed with Mr. Amendola, however, I did not voice my disagreement because I did not want to undermine Mr. Amendola who had the relationship with Mr. Sandusky. Mr. Amendola would request that I assist him with specific areas – I was not into the whole file. During the representation it became clear to me by observation, and discussion of reputation with others, including Sheriffs and Court Personnel that Mr. Amendola as an attorney who practiced in the area of criminal law with skill, but who hadn't recently taken many major cases to trial, opting instead to undertake representation on cases that would likely resolve themselves by entry of a plea. I felt that I would be able to assist with trial objections and evidentiary issues more ably than Mr. Amendola.

5. As the Sandusky matter progressed, it became clear to me that there was no overall strategy developed, discussed or explained by Attorney Amendola. The Sandusky defense team was always playing catch up. Thousands of pages of discovery were being delivered and we were working hard to keep up with it. I did not enter an Appearance until Judge Cleland told me if I did not enter an Appearance, not to come back. Thereafter, I filed with the Clerk an Entry of Appearance. which included a Signing Statement that I again incorporate by reference.

6. I was unable to devote my full attention to the case because I continued to work my practice in Carlisle working there and then periodically then traveling to State College to work on the Sandusky matter. We often worked late into the night reading and evaluating discovery, conducting research and writing motions. Nonetheless, because of the extensive discovery we were unable to adequately prepare by the scheduled June 2012 trial date and we decided to ask Judge Cleland for a continuance.

7. We determined that we could not effectively represent Mr. Sandusky and we believed that if the Judge held us to the trial date we could not ethically proceed. A motion was prepared and filed, however, Judge Cleland had granted one prior continuance and Mr. Amendola had unfortunately made the representation in the initial continuance motion that a second continuance would not be sought.

8. Judge Cleland held a hearing on the continuance motion and he denied our motion. He advised us that we would have at least two weeks to continue preparation as the Commonwealth had informed him that it would take two weeks for them to put in their case. Judge Cleland told us that this would give us the evenings, after trial, and weekends to continue preparation.

9. I considered withdrawing or advising the court that it could hold me in contempt, that there was no possible way I could effectively represent this client, however, I believed that if I withdrew it would leave the client effectively without seasoned criminal representation and I felt it would be abandoning both Mr. Amendola and Mr. Sandusky. It

was apparent to me that Mr. Amendola was going forward with or without him and I felt he (Attorney Amendola) would not take a hard stance. Indeed, Mr. Amendola prefaced his argument to Judge Cleland by stating that he knew the Judge was going to deny the request – in essence, giving him a way out. Judge Cleland denied the motion to continue but did discuss that perhaps the trial would have to be redone.

10. Prior to trial, I discussed with Attorney Amendola several matters I thought should be addressed to assure effective representation including: (i) a Motion in Limine to preclude Jonelle Eschbach's leading questions in the grand jury proceedings; (ii) Attorney Amendola's phone conference with Grand Jury Judge Barry Feudale to address the Motion To Compel production of *Brady* evidence in which Judge Feudale advised that he had reviewed Grand Jury materials for *Brady* material and that no Brady impeachment or exculpatory evidence was found therein; (iii) the misuse of grand jury proceedings by the Attorney General's office on what clearly should have been a CYS investigation and process.

11. As it turned out, the prosecution collapsed their schedule and put their case on in less than one week, which denied the defense precious additional time needed to continue preparation. Additionally, it meant that the defense had to contact all of our witnesses and tell them they would now have to come to State College, be prepared for testimony and appear a week early. This also cost us valuable preparation time which we never regained.

12. I believed that Mr. Amendola's statement during opening that there was overwhelming evidence against our client cast Mr. Sandusky as guilty in the minds of the jurors and that by the end of the testimony by the third witness our defense was largely crippled. Further weakening our case was Mr. Amendola's statement to the jury that Mr. Sandusky would testify, particularly, when it was later decided that Mr. Sandusky would not testify.

13. The lack of preparation was evident. Approximately one hour prior to the direct examination of Mike McQueary, the prosecution's star witness, I was handed the file

by Attorney Amendola and told I would be conducting the cross. This lack of notice or preparation on my part limited by ability to conduct a thorough and probing cross examination. This is but one example of what I considered to be a lack of an overall strategy.

14. As trial progressed, I had several conversations with prosecutor Frank Fina. During one of the conversations, Attorney Fina and I discussed Andrew Shubin. Mr. Shubin was an attorney representing an alleged victim, Allan Myers. Mr. Fina accused Shubin of "tampering" with the witness. Fina told me that the Commonwealth had trouble finding the kid (Allan Myers) and when the Commonwealth attempted to interview him, they could not find him. According to Fina the prosecution later found out that Mr. Shubin had Myers hiding out in the country to keep him out of investigator's reach. Mr. Shubin later produced Myers but only on the condition that he be present during the interview.

15. According to Curtis Everhart, as to Allan Myers, Mr. Shubin remembered that Myers was a Second Mile kid. He had represented Myers in a DUI. After seeing Mr.

Shubin, Myers reversed his story from what he had sworn out to the investigator and others. With the difficulty in finding Myers and with both the prosecution and Mr. Amendola having misgivings about putting him on the stand, Mr. Amendola and Mr. Fina agreed not to put him on the stand, however, everyone knew the identity of the second victim.

16. Everyone who was privy to the agreement not to identify or call Allan Myers knew his identity. Mr. McGettigan lied during his closing summation and, in my opinion, despite an obligation to be candid, was not truthful to the tribunal.

17. I disagreed with the decision to defer objections during closing and particularly, not asking for a mistrial at the time prosecutor McGettigan made his statements regarding interviewing Mr. Sandusky which I considered to be a backhanded comment on his failure to testify.

18. Post trial, I was asked to participate in the filing of motions and did prepare a number of issues for post sentence, which were not used despite my belief they were

necessary. By the time of the hearing on Post Sentencing matters, I was essentially locked out of the case and did not participate in the filing of an appeal.

19. I was not called to testify at the post sentencing hearing, but I would have strongly disagreed with Attorney Amendola. We would have in fact presented the case very differently if we had time to review and digest the discovery.

20. I believe with better preparation, reasonable periods of time do digest thousands of pages, and with an appropriate and aggressive strategy forwarded by counsel experienced in major sex allegations and defense, centered around the leading investigations and taint present, and full inquiry as to the civil settlements being sought, that an acquittal would have ensued.

Feb 18, 2016

FURTHER YOUR AFFIANT SAYETH NOT.

SWORN TO AND SUBCRIBED
BEFORE ME THIS 18TH DAY OF
FEBRUARY, 2016

Patricia Lindsay

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
PATRICIA LINDSAY
Notary Public
BUTLER CITY., BUTLER COUNTY
My Commission Expires Jan 16, 2018

_____

NOTARY PUBLIC

ATTACHMENT

B

COMMONWEALTH OF PENNSYLVANIA v. Timothy M. Curley and Gary C. Schultz Defendants	**IN THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA** **AFFIDAVIT OF ARTHUR H. PATTERSON, PH.D. IN SUPPORT OF DEFENDANTS' MOTION TO REQUEST SUPPLEMENTAL VOIR DIRE MEASURES**

EXHIBIT H

1. My name is Arthur H. Patterson. I am a Senior Vice President of DecisionQuest, a national jury consulting firm. I have been conducting jury research since 1982. I am over twenty-one (21) years of age, and I am competent to give the testimony contained in this affidavit. I have personal knowledge that the facts stated in this affidavit are true and correct, or where I do not have personal knowledge of the facts, they are of a type reasonably relied upon by experts in my field in forming opinions or inferences.

QUALIFICATIONS

2. In my current position, I both consult and supervise the consulting activities of consultants at DecisionQuest, a firm whose business (among many services) is to study the social and psychological processes that are involved in jury trials. DecisionQuest assists litigators in understanding the attitudes, perceptions, and decision-making processes of jurors, including any biases and prejudices those jurors may bring to the courtroom.

3. I have a B.A. degree (with Honors in Psychology) from Clark University in Worcester, Massachusetts. My M.A. and Ph.D. are in Social Psychology from Northwestern University in Chicago, Illinois. I was previously a tenured Associate Professor of Administration of Justice at the Pennsylvania State University.

4. I have provided jury consulting services to counsel for both plaintiffs and defendants in civil trials, criminal defense counsel, public defenders, and federal and state prosecutors in federal and state court cases throughout the United States.

I have been qualified as an expert on jury issues, or have had my affidavits accepted for use by the Court, in federal and state courts throughout the country. I have lectured on juries to organizations such as the American Bar Association (at annual meetings, as well as at Litigation Section and Tort and Insurance Practice Section National Institutes), the National Institute of Justice, the Pennsylvania Bar Association, the Philadelphia Bar Association, the Connecticut States Attorneys Association, the Florida Bar Association, the Delaware Bar Association, the Washington, D.C., Bar Association, the North Carolina Bar Association, the Kansas District Attorneys Association, the Georgia Prosecuting Attorneys Council, the Department of Justice, the American Psychological Association, the American Society of Criminology, and the Academy of Criminal Justice Sciences. I have also been a member of the faculty for various continuing legal education seminars, including the National Institute for Trial Advocacy (NITA), ALI-ABA, and the Practicing Law Institute. I have published articles on the psychology of jurors in both legal and psychological publications.

5. In my work as a consultant to trial counsel on jury issues in hundreds of civil and criminal cases throughout the country, I have conducted over 100 juror attitude surveys, including change of venue research, observed and assisted counsel in hundreds of jury selections, conducted hundreds of mock trials for research purposes, conducted post-trial interviews with the actual jurors in many of these cases, and conducted numerous empirical studies of juror attitudes.

6. I have taught university undergraduate and graduate-level courses on research methods, social psychology, the administration of justice, and the American jury.

I have received research grants to conduct survey research from federal and private agencies. A copy of my curriculum vita is attached as Exhibit 1.

7. DecisionQuest has offices in Atlanta, Boston, Chicago, Los Angeles, Minneapolis, New York, Philadelphia, State College, Pennsylvania, and Washington, DC.

8. DecisionQuest is a firm engaged in the business of understanding the social and psychological processes involved in juror behavior. DecisionQuest maintains a full-time staff of Ph.D. specialists in psychology, social psychology, sociology, communication sciences, statistics, computer analysis, and research design. DecisionQuest assists attorneys in understanding the perceptions that jurors bring with them into the courtroom. These may include certain biases and prejudices.

9. The principals of DecisionQuest have conducted research in more than 14,000 civil and criminal cases throughout the United States and abroad. Over the last 25 years, we have frequently been asked to analyze venue questions, particularly to determine a party's ability to obtain a fair trial in a given venue.

10. At the request of counsel for Gary C. Schultz and Timothy M. Curley, a venue study was commissioned to investigate the extent and impact of pretrial publicity in the above-styled case.

SURVEY METHODOLOGY

11. The survey was conducted by Bernett Research, a firm DecisionQuest regularly uses to perform such work. Bernett Research assured DecisionQuest that the sampling techniques met the methodological standards necessary for academic and legal research.

12. Between September 6 and 27, 2012, jury-eligible residents of the jurisdictions of Dauphin, Erie, Chester, and Luzerne Counties, Pennsylvania were contacted using random digit dialing with replicate sampling. Replicate sampling is a standard technique used for academic and legal research that maximizes the representativeness of the sample.

13. The sample was built in replicates of 400 telephone numbers each for the Dauphin study and 300 each for the Erie, Chester and Luzerne study. The replicates were randomized. This gives each household with a telephone an equal opportunity to participate in the survey.

14. Bernett Research completed 710 interviews, 410 in Dauphin County and 100 each in Erie, Chester, and Luzerne Counties. Each phone number was dialed four times for the Dauphin study and six times for the Erie, Chester and Luzerne study, or until the number was resolved (whichever came first). A resolved number is a number where the respondent completed the survey, a number was found to be a disconnected phone, or some other final resolution. Calls were made on both weekdays and weekend days and at different times during the day beginning at or after 11:00 AM and ending at or before 9:00 PM respondent time.

15. The sample size was determined to obtain a margin of error of approximately 5% for Dauphin County.

16. In conjunction with another venue study, Dr. Robert F. Bettler, Jr., Ph.D. of DecisionQuest visited Bernett Research's call center in Pocatello, Idaho, on October 7 and 8, 2004, and observed their operation.

a. As part of his observations, he reviewed their training and operation manuals used to train the interviewers and guide their interviewing procedures.

b. In this visit he confirmed that nothing in the training revealed to the interviewers the purpose of this research. In that study, as in the present one, he ascertained that all Bernett personnel at all levels were blind as to the purpose and sponsorship of the research.

c. He randomly monitored several hours of live calls.

d. He randomly monitored call supervisors and quality controllers. Bernett managers inform us that they randomly monitor 10% of all completed interviews for quality control purposes and another 15% of randomly selected respondents are called back to check the validity of the interviewing records. Both of these operations were observed by Dr. Bettler.

e. To the best of his knowledge, it was his observation that managers, supervisors, programmers, and interviewers at all levels of the organization followed appropriate methodological procedures. Bernett assures us that in the interim nothing has changed about their methodology.

17. Respondent suitability.

a. In order to qualify for the survey, respondents had to be jury-eligible in each venue.

18. Instrument design.

a. DecisionQuest created the survey instrument in accordance with established guidelines.

b. A complete copy of the survey instrument is included as Exhibit 2 to this affidavit.

19. Supplemental analyses, readability.

a. To ensure respondents understood the questions posed to them, the survey text was analyzed using Microsoft Word's built-in readability statistics.

b. By this measure, the text had a Flesch-Kincaid Grade Level of 5.6, meaning that an elementary school student in the latter half of the 5th grade should be able understand the survey.

20. Supplemental analyses, interview break-offs.

a. At various points in the interview a small number of respondents terminated the survey. Out of 765 who began the interview, 55 broke off, or 7% of the total.

b. This is an unusually low number, as compared to other venue studies DecisionQuest has conducted, and could be an indirect indicator of the strength of the feelings Pennsylvanians have about this case.

21. Supplemental analyses, order effect.

a. Participants who reported some familiarity with the case were asked whether they felt the defendants were guilty or not guilty. About half were given the response options with "definitely guilty" first, and about half were given options beginning with "definitely not guilty."

b. To check whether the order of these options had any impact on the presumption of guilt, a statistical analysis was conducted on this order effect.

c. No difference in the guilty versus not guilty or "don't know" responses was observed as a function of this response option order.

22. Supplemental analyses, gender and age.

a. Since the sample's gender and age distributions departed somewhat from Census Bureau estimates, supplemental analyses were conducted to determine what impact, if any, this might have on the survey's findings with respect to familiarity with the Curley and Schultz cases and the defendants' guilt or innocence.

i. Gender:

a. Men were more likely to recall one of the defendants' names or titles freely, but on the second prompt, when respondents were reminded of the names and charges, men and women were equally likely to recall the cases. Since any prospective jurors called for the case will also be reminded of the defendants' names and the charges against them, the difference observed in free recall in this study is inconsequential.

b. There was no gender difference in presumptions of guilt or innocence: With both men and women, over 60% of the respondents felt the defendants were guilty.

ii. Age:

a. Older respondents were slightly more likely to be familiar with the case than were younger ones, both in a free recall question and in a prompted recall question. Small age differences are often observed in research of this sort because older respondents tend to be more informed about events in the news. This is not expected to pose a threat to the validity of the findings reported below.

b. There was no correlation between guilt ratings and age.

23. Supplemental analyses, cell phone sample versus landline sample.

a. The published literature on the subject, as well as DecisionQuest's experience, suggest that there are generally minimal attitudinal or opinion differences between survey respondents reached by cell phone and those reached by landlines.

b. Nevertheless, approximately 50 Dauphin County respondents were reached by cell phone, and an analysis was conducted to determine whether this sampling difference was associated with differences in responses to key items on the survey.

i. Although landline respondents were more likely to recall one of the defendant's names or titles without a prompt, no difference was observed in prompted recall by sample source (cell or landline). This probably reflects the age difference noted above in free recall of the defendants' names or titles since respondents reached by cell

phone tend to be younger, on average, than those reached by landline.

ii. No difference was observed between presumed guilt/innocence and sample source.

24. These findings are consistent with my experience in such matters and the published literature relevant to each issue. It is therefore my opinion that these factors pose no threat to the validity of the study.

PRINCIPAL FINDINGS

25. The focus of this venue evaluation was a comparison of the responses of potential jurors in four Pennsylvania counties to questions in five general categories:

a. Familiarity with the case,

b. Presumptions about the guilt of the defendants,

c. The extent of exposure to pretrial publicity and impressions of the evidence against the defendants,

d. Familiarity with and reactions to the Freeh report, and

e. Beliefs and opinions related to the case.

26. Familiarity with the case.

a. Familiarity with the case was gauged in two ways. First, respondents were asked whether they could freely recall the names or titles of the defendants. Then, respondents were prompted with the names and titles of the defendants and asked whether they were familiar with the defendants' cases.

	Dauphin	Luzerne	Chester	Erie
Familiarity* (unprompted recall)	32.3%	21.2%	23.6%	11.5
Familiarity (prompted recall)	85.8%	80.6%	85.3%	68.3%

*NOTE: In this and the following tables the wording of the survey questions has been abbreviated. See Exhibit 2 for full wording.

b. Only a minority in each county was able to recall the defendants' names or titles without a prompt. On the other hand, given a minimal prompt, large majorities in all four counties reported they were familiar with the cases of defendants Curley and Schultz.

c. Note that if respondents denied any familiarity with the case after this prompt, they exited the interview.

27. Presumptions about guilt.

	Dauphin	Luzerne	Chester	Erie
Curley: Definitely or probably guilty*	65.0%	72.3%	68.9%	75.7%
Schultz: Definitely or probably guilty	65.6%	78.0%	70.5%	81.4%

*NOTE: As described above in the methodology section, a small number of respondents broke off the interview at various points. The percentages given in this and the following tables are for respondents remaining at this point in the survey.

a. Large majorities in all four counties reported feeling that the defendants are definitely or probably guilty.

b. Respondents were also asked whether they thought "...most people in your county would feel that Curley and Schultz are guilty of these

crimes." By large margins in all four counties people reported that this would indeed be the case.

	Dauphin	Luzerne	Chester	Erie
Definitely or probably yes	73.2%	74.4%	70.5%	78.6%
Definitely or probably no, Don't know, not sure	26.8%	25.6%	29.5%	21.5%

28. Exposure to pretrial publicity and impressions of the evidence against the defendants.

a. Exposure to pretrial publicity was assessed in a series of questions, asking respondents whether they had read or heard about the Curley and Schultz cases from any of six different media sources.

	Dauphin	Luzerne	Chester	Erie
TV reports	75.7%	82.5%	71.4%	58.8%
Newspaper reports	66.0%	81.2%	71.4%	64.7%
Radio reports	37.3%	33.7%	40.0%	26.5%
Internet reports or 'blogs	21.5%	15.0%	28.6%	2.9%
Word of mouth, conversations	62.9%	63.7%	63.1%	41.2%
Emails	7.6%	3.7%	15.5%	1.5%

b. Over 90% of the respondents reported having heard or read about the charges against defendants Curley and Schultz from at least one source.

Only 49 people, or 8.6%, denied exposure to all six sources of pretrial publicity.

c. Given this level of exposure, many have formed the impression that there is substantial evidence against defendants Curley and Schultz.

Respondents were also asked, "Based on what you know about this case, how much evidence would you say there is against Curley and Schultz?"

	Dauphin	Luzerne	Chester	Erie
Some or a lot of evidence	67.3%	74.4%	73.6%	65.7%
A little, none, not sure	32.4%*	25.6%	26.4%	34.3%

*NOTE: One Dauphin respondent said there was a lot or some evidence against Mr. Schultz, but was not sure about Mr. Curley.

d. In all four counties, about two-thirds, or more, of the respondents had formed the impression that the evidence against the defendants was substantial.

29. Familiarity with and reactions to the Freeh report.

a. Respondents were prompted with a brief reminder about the Freeh report and its conclusions and asked several questions to gauge their familiarity with that report and their thoughts about its implications.

	Dauphin	Luzerne	Chester	Erie
Familiar with Freeh report	73.8%	72.8%	73.3%	52.9%
Does Freeh report conclude Curley and Schultz covered up Sandusky abuse?*	75.8%	67.8%	81.0%	75.0%
If Freeh concluded cover-up, then are Curley and Schultz guilty of a crime?*	68.1%	72.4%	69.8%	75.0%

*NOTE: These questions were only administered to those who were familiar with the Freeh report.

b. Large majorities in three of the four counties reported being familiar with the Freeh report and in all four, large majorities of those familiar with the report agreed that it concludes the defendants covered up Mr. Sandusky's abuse of young boys.

c. Similarly, large majorities of those familiar with the Freeh report felt its conclusions would mean the defendants are guilty of the charges against them.

30. Beliefs and opinions related to the case.

a. The last few items in the survey asked respondents whether they agreed or disagreed with various opinions about Penn State and how an alleged "culture" at the university might have "tolerated" Mr. Sandusky's behavior.

b. Note that many opinions of this sort have appeared, not only in the Freeh report, but in the media coverage of this matter as well.

	Dauphin	Luzerne	Chester	Erie
Even if Penn State officials like Curley and Schultz did nothing illegal, they still should be punished.	46.9%	55.0%	50.0%	64.2%
From very early on, officials like Curley and Schultz knew exactly what was going on with Sandusky.	70.0%	71.3%	73.8%	77.6%
The culture at Penn State and in the Penn State athletic department tolerated Sandusky's behavior.	64.9%	72.6%	72.6%	68.6%
Curley and Schultz helped to create the culture at Penn State that tolerated Sandusky's behavior.	62.6%	65.0%	59.5%	65.7%

c. About half or more of the respondents in every county agreed that the defendants in this case should be punished, even if they did nothing illegal.

d. Beyond that, large majorities in all four counties agreed that the defendants knew about Mr. Sandusky's actions and that they helped to create the culture at Penn State that tolerated his behavior.

31. To sum up:

a. In all four of the counties examined in this study two-thirds to almost three-quarters of jury-eligible Pennsylvanians were familiar with this case.

b. Of those familiar with the Curley and Schultz cases—in all four counties—two-thirds or more felt the defendants are probably or definitely guilty of the crimes of which they are accused.

c. Very few of the respondents in this study have not heard or read news reports about these accusations.

d. About two-thirds or more have gotten the impression from these news reports (and from other sources) that there is substantial evidence against these defendants.

e. In all four counties examined in this study, majorities report being familiar with the Freeh report and its conclusions regarding the defendants, Mr. Curley and Mr. Schultz. And in all four counties, two-thirds to three-quarters of those familiar with the Freeh report feel the report's

conclusions mean the defendants are guilty of the crimes of which they are accused.

i. That these conclusions come from an investigation and report by a former head of the Federal Bureau of Investigation and a former Federal judge make them unusually influential over jurors' thinking—as clearly indicated by the results summarized above.

f. Finally, by large margins, jury-eligible respondents in these four counties hold beliefs and opinions about a culture at Penn State that at least tolerated Mr. Sandusky's behavior and, further, that defendants Curley and Schultz helped to create that culture.

32. These results are consistent with what has been observed in the literature on cases of this sort. For example, Vidmar and Hans (2007, *American Juries, The Verdict*) write:

> "A phenomenon known as *generic prejudice* may also come into play in high-profile cases. Public attention to the issues of child abuse, including child pornography, sexual violations, and physical harm, gained widespread attention in the 1980s that continues to this day. At a 1990 symposium, Judge Abner Mikva coined the term *generic prejudice* and explained: 'I do not think that you can get a fair child abuse trial before a jury anywhere in the county…when they hear that a child has been abused, a piece of their mind closes up…'" (p. 113, internal citations omitted).

DISCUSSION

33. In the entire social scientific literature on jury decision-making, spanning many decades, the effect of pretrial publicity (PTP) on a defendant's right to a fair trial is one of the most thoroughly studied subjects. As a result of this extensive research literature, there is a strong consensus of opinion among leading researchers in the field that such publicity seriously undermines the ability of a defendant to receive a fair trial and is poorly remedied by mitigation measures typically employed by our courts.

    a. For example, one recent reference work, summarizing decades of research into the effects of and remedies for pretrial publicity concluded, "In sum, it appears that the effects of PTP can find their way into the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and can persevere not only through deliberation, but may also actually intensify." (Studebaker & Penrod, 2005, Pretrial publicity and its influence on juror decision making, in Brewer & Williams, Editors, *Psychology and Law*, pp. 265-266).

    b. Other recognized authorities in this realm strongly concur, for example, Posey and Wrightsman in *Trial Consulting* (2005) write, "...the belief that voir dire is an effective remedy for the effects of pretrial publicity assumes that prospective jurors are capable of assessing their own biases and that they are willing to admit to such biases during the jury selection process. It also requires that judges and attorneys be able to identify those who

should appropriately be challenged for cause. Research suggests that none of these is a safe assumption" (p. 58).

c. Thus, the conclusions of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.

34. Instructions from the Court are unlikely to alleviate the problem. Admonitions from the bench to "set aside one's biases" have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity.

35. One cannot expect the deliberation process to reduce the effect of pretrial publicity either. As noted by Studebaker and Penrod (2005), and in line with research on small group dynamics, discussions among jurors can actually intensify the biases caused by pretrial publicity.

36. Ordinarily, a change of venue or venire might offer the best opportunity for reducing the threat to the defendants' rights to a fair trial, but the findings summarized above, from counties all around Pennsylvania, suggest these options would do little to reduce that threat. Given the feelings expressed in this survey by potential jurors from one end of the Pennsylvania to the other, neither changing venue nor using an imported venire would be effective. Indeed, these results make it difficult to imagine how the defendants could get a fair jury trial anywhere in the Commonwealth.

37. In short, few subjects in the history of jury research have b pretrial publicity and that research does not offer much hoj impartial jury in this case.

38. Although the prospects are not particularly promising, it is especially thorough and extensive voir dire process, some defendants' rights could be at least partially reduced.

39. To this end, some of the measures the Court could conside

a. A written juror questionnaire constructed in accord scientific methods for the assessment of knowledg relevant to the issues in this case.

b. A relatively intensive sequestered voir dire intervie juror. It must be emphasized, however, that to be r this voir dire will probably need to employ intervie patterned after the structured interview protocols u quality social scientific research.

c. Expanded criteria for excusing prospective jurors f

d. An increase in the routine number of peremptory s

40. In conclusion then, to a reasonable degree of scientific cer that:

a. The pretrial publicity surrounding the Sandusky m far-reaching and intense in the Commonwealth of

b. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury.

c. The survey results outlined above show that the Freeh report has probably magnified the generic biases inherent in a child sexual abuse case to what, in my experience, is an unprecedented degree. The wide-spread publicity about the Freeh report, wherein a highly authoritative former FBI Director and Federal judge is understood to have pronounced the defendants guilty of criminal acts, is a unique situation in my experience.

d. Given the extent of that publicity and the intensity of the negative opinions about anyone connected with the Sandusky matter, even a change of venue—normally one of the best remedies for pretrial publicity—holds little promise of helping the Court to seat an impartial jury. The same would be true for a change of venire.

e. In my opinion, although extremely difficult, it may be possible to move, at least incrementally, in the direction of seating an impartial jury by designing and implementing a comprehensive juror assessment program along the lines described above. Most importantly, whatever their ultimate forms, the questionnaire administered to prospective jurors and the interview protocol for individual voir dire must conform to the best available social scientific assessment methodologies. It is very unlikely that any mere variation on a "routine" voir dire will meet those standards or have the desired result.

37. In short, few subjects in the history of jury research have been studied as much as pretrial publicity and that research does not offer much hope for seating a truly impartial jury in this case.

38. Although the prospects are not particularly promising, it is possible that with an especially thorough and extensive voir dire process, some of the threats to the defendants' rights could be at least partially reduced.

39. To this end, some of the measures the Court could consider include:

    a. A written juror questionnaire constructed in accordance with proven social scientific methods for the assessment of knowledge, beliefs and attitudes relevant to the issues in this case.

    b. A relatively intensive sequestered voir dire interview with each individual juror. It must be emphasized, however, that to be maximally effective, this voir dire will probably need to employ interviewing techniques patterned after the structured interview protocols utilized in the highest quality social scientific research.

    c. Expanded criteria for excusing prospective jurors for cause.

    d. An increase in the routine number of peremptory strikes.

40. In conclusion then, to a reasonable degree of scientific certainty, it is my opinion that:

    a. The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania.

I declare under penalty of perjury that the foregoing is true and correct. Executed on,

October 24 *2012.* Arthur H Patterson

Notary Public State of Florida
Penelope Murphy
My Commission EE148798
Expires 01/03/2016

AS to ARTHUR H. PATTERSON
ON THIS DATE Oct 24, 2012
Sarasota, Florida

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EXHIBIT 1 – CURRICULUM VITAE

CURRICULUM VITAE

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EDUCATION

1970 - 1972	Ph.D., Social Psychology Northwestern University.
1968 - 1970	M.A., Psychology Northwestern University.
1966 - 1968	B.A., Psychology, Clark University.

PROFESSIONAL EXPERIENCE

1998 -	Senior Vice President, DecisionQuest.
1992 - 1998	Senior Vice President, Director of Jury Analysts Group, FTI.
1984 - 1992	President, Jury Analysts, Inc.
1983 - 1988	Associate Professor of Administration of Justice, The Pennsylvania State University.
1978 - 1982	Associate Professor of Environment and Behavior, The Pennsylvania State University.
1972 - 1978	Assistant Professor of Man-Environment Relations, The Pennsylvania State University.

PAPERS AND PRESENTATIONS

Jury issues involving the internet. Presentation to the ABA Commission on the American Jury Project, National Symposium on the American Jury System, Chicago, IL, October 2012.

Jury Studies: The psychology of the modern fact finder. Presentation to the Florida Bar Association, 5th Annual Construction Law Institute, Orlando, FL, March 2012

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From 1973 through 1982, 32 presentations were made to professional and academic organizations on a variety of social psychological issues. Full citations available upon request.

RESEARCH AND PUBLICATIONS

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Community and Residential Environments. Session co-chaired at the Gerontological Society Annual Meeting, San Francisco, August 1977.

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The prevention of crime through architectural design. Symposium organized and chaired at the American Psychological Association, New Orleans, August 1974.

REVIEWING AND EDITING

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Judicature
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Journal of Sports Psychology
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Society for the Psychology Study of Social Issues (SPSSI)
Harper and Row
Brooks/Cole
Ronald Press
W.B. Saunders, Publishing

CONSULTING

Research and strategic consulting on litigation from a social psychological perspective for over 200 law firm, governmental, and corporate clients, 1982-present.

Expert testimony and affidavits on venue and other jury issues in various State and Federal Courts, 1982-present.

Media Magic Marketing, 1981-1983. Environmental issues in marketing.

The Rand Corporation, 1978-1979. Crime prevention through environmental design.

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U.S. House Select Committee on Aging, Subcommittee on Housing, 1977-1978. Crime and the elderly.

City of Harrisburg, Department of Community Development (Planning Bureau), 1976-1977. Elderly housing.

RTKL Associates, Architects and Planners, 1975-1976. Urban pedestrian behavior.

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UNIVERSITY COURSES TAUGHT

Administration of Justice
Crime and the Elderly
The American Jury
Social Psychology
Introductory Psychology
Environmental Psychology
Introduction to Man-Environment Relations
Research Methods
Environments for the Elderly

HONORS, AWARDS, AND GRANTS

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National Endowment of the Arts Graduate Internship Sponsor, 1979.

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E. Marlin Butts, Guestship, Oberlin College, 1978.

Administration on Aging (HEW) Training Grant: Design, Planning, and Managing of Living Arrangements for the Elderly, 1978-1979.

Gerontological Society Summer Institute Fellowship, 1976.

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N.I.M.H. Training Grant: Environmental Design and Mental Health, Acting Director, 1976-1977.

U.S. Department of Labor Contract: Work, Non-work Linkages, 1974-1975.

Environmental Policy Center Grant: Decreasing Fuel Oil Consumption Through Positive Feedback, 1973-1974.

Dissertation Year Fellow, Northwestern University, 1971-1972.

N.S.F. Trainee in Social Psychology, 1968-1971.

Honors B.A., Clark University, 1968.

Travelli Foundation Award, 1967-1968.

MAJOR MEDIA APPEARANCES

National media presentations:

The Today Show, National Broadcasting Company (NBC);
Cable Network News (CNN);
National Education Television (WPSX);
National Educational Radio (Morning Edition);
Larry King Show, Mutual Broadcasting (National Radio);
Sunday Today, National Broadcasting Company (NBC).
MSNBC (Debra Norville Show)
CNNFN

[Revised October, 2012]

EXHIBIT 2 – TELEPHONE SURVEY INSTRU

PA VENUE STUDY

Hello, this is _____calling from Bernett Research. We are conducting a brief study about recent events in your area and would like to include your opinions. I am not trying to sell anything and your answers will be kept strictly confidential. There are no right or wrong answers, if at any point you don't know, please just say so.

Q1INT. These first few questions are for classification purposes only

Q1. Which of the following age groups best describes you? (READ LIST UNTIL VALID RESPONSE IS GIVEN) [CLASSIFY INTO CENSUS BUREAU CATEGORIES]

Under 18	1 [TERMINATE]
18 to 24	2
25 to 34	3
35 to 44	4
45 to 54	5
55 to 64	6
65 to 74	7
75 or older	8
(DO NOT READ) Don't Know/Refused	9 [TERMINATE]

Q24. INTERVIEWER: RECORD GENDER BY OBSERVATION

Male	1
Female	2
(DO NOT READ) Don't Know/Refused	3

Q2. Are you a U.S. citizen?

Yes	1
No	2 [TERMINATE]
(DO NOT READ) Don't Know/Refused	3 [TERMINATE]

Q3. Do you currently live in Dauphin (daw-fin) County, Pennsylvania? [INTERVIEWER: READ LIST IF NECESSARY]

Yes	1
No	2 [TERMINATE]
(DO NOT READ) Don't Know/Refused	3 [TERMINATE]

Q3A. In which Pennsylvania County do you live? (READ LIST IF NECESSARY)

1. Luzerne (loo-ZERN)

2. Chester
3. Erie (eer-ee)
4. or, some other county [TERMINATE]
5. (DO NOT READ) Don't Know/Refused [TERMINATE]

Q4. Do you have a valid Pennsylvania driver's license?

Yes	1
No	2
(DO NOT READ) Don't Know/Refused	3

[IF LUZERNE COUNTY IN Q3A AND NO/DK/REF TERMINATE, ELSE CONTINUE]
[IF CHESTER COUNTY IN Q3A CONTINUE]
[IF ERIE COUNT IN Q3A CONTINUE]

Q4A. Are you registered to vote in [INSERT COUNTY FROM Q3A]?

Yes	1
No	2
(DO NOT READ) Don't Know/Refused	3

[IF LUZERNE COUNTY IN Q3A CONTINUE]
[IF CHESTER COUNTY IN Q3A AND NO/DK/REF TERMINATE, ELSE CONTINUE]
[IF ERIE COUNTY IN Q3A AND NO/DK/REF IN Q3A AND Q4A TERMINATE, IF YES TO AT LEAST 1 CONTINUE.

Q5. Have you heard about the trial and conviction of Jerry Sandusky, the former Penn State coach, for the sexual abuse of young boys?

Yes	1
No	2
(DO NOT READ) Don't know/Refused/Not Sure/Can't Say	3

Q6. There have been other officials at Penn State who have been charged with crimes in connection with the Sandusky scandal. Do you recall the names or the titles or the positions of any Penn State officials who have been charged in connection with this incident?

Yes	1 [CONTINUE TO Q6A]
No	2 [SKIP TO Q7]
(DO NOT READ) Don't Know/Refused	3 [SKIP TO Q7]

Q6A. What are the specific names, titles or positions, that you recall, of any Penn State officials who have been charged in connection with the incident? (DO NOT READ LIST, CODE ACCORDINGLY)

Timothy M. Curley, Athletic Director, last name or title mentioned 1
Gary C. Schultz, University Vice President, last name or title mentioned 2
Both mentioned 3
Neither/Don't Know/Not Sure 4

Q7. Criminal charges have been filed against the university's Athletic Director, Timothy M. Curley, and against a Senior Vice President, Gary C. Schultz for failing to report Sandusky's abuse to law enforcement and for lying to a grand jury. Have you heard about these charges?

Yes 1 [GO TO Q8A]
No 2 [GO TO VNAME]
(DO NOT READ) Don't Know/Refused/Not Sure/Can't Say 3 [GO TO VNAME]

Q8A. Mr. Curley was the Athletic Director at Penn State while Mr. Sandusky worked there. He is accused of covering up Sandusky's behavior and lying to a grand jury about it. Given what you know about these accusations, would you say that Mr. Curley is... (READ LIST)? [PROGRAMMER: REVERSE LIST RANDOMLY FOR APPROXIMATELY 50% OF RESPONDENTS]

Definitely guilty 1
Probably guilty 2
Probably not guilty 3
Definitely not guilty 4
(DO NOT READ) Don't know/refused/not sure 5

Q8B. Mr. Schultz was a Senior Vice President at Penn State while Mr. Sandusky worked there. He is also accused of covering up Sandusky's behavior and lying to a grand jury about it. Given what you know about these accusations, would you say that Mr. Schultz is... (READ LIST)? [PROGRAMMER: REVERSE LIST RANDOMLY FOR APPROXIMATELY 50% OF RESPONDENTS]

Definitely guilty 1
Probably guilty 2
Probably not guilty 3
Definitely not guilty 4
(DO NOT READ) Don't know/refused/not sure 5

Q8C. [PROGRAMMER: RECORD ORDER OF Q8A & Q8B PRESENTATION, ROTATE BOTH QUESTIONS IN SAME ORDER]

Definitely guilty to definitely not guilty (1 to 4) 1
Definitely not guilty to definitely guilty (4 to 1) 2

Q9. Regardless of how you personally feel, do you think most pec
COUNTY FROM Q3A] County would feel that Curley and Schult
crimes? (READ LIST)

Definitely yes	1
Probably yes	2
Probably no	3
Definitely no	4
(DO NOT READ) Don't know/refused/not sure	5
(DO NOT READ) Curley yes, Schultz no	6
(DO NOT READ) Schultz yes, Curley no	7

Q10. Based on what you know about this case, how much eviden
is against Curley and Schultz? (READ LIST)

A lot
Some
A little
None
(DO NOT READ) Don't know/refused/not sure
(DO NOT READ) Curley a lot/some, Schultz a little/none
(DO NOT READ) Schultz a lot/some, Curley a little/none

Q11. In November of 2011, Penn State hired Louis (LOO-iss) Fi
B-I director and Federal judge, to conduct an investigation into tl
July of 2012, Mr. Freeh (Free) submitted his report. Have you
about the Freeh (Free) report? (READ LIS

Yes
No
(DO NOT READ) Don't know/refused/not sure

Q12. From what you know of it, does the Freeh (Free) report co
Schultz tried to cover up Sandusky's abuse of young boys

Yes
No
(DO NOT READ) Don't know/refused/not sure

Q13. If the Freeh (Free) report concludes that Curley and Schultz
behavior, do you think that for most people in [INSERT COUNT
this would automatically mean that Curley and Schultz are guilty
LIST)

Definitely yes	1

Probably yes	2
Probably no	3
Definitely no	4
(DO NOT READ) Don't know/refused/not sure	5

Q14. Setting aside the Sandusky case and focusing only on the ch and Schultz, have you seen TV reports about their case? (READ L

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q15. Again, with respect to the charges against Curley and Schul newspaper reports about their case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q16. Have you listened to radio reports or radio talk shows about case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q17. Have you read reports, discussions or blogs on the Internet Schultz's case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q18. Have you had conversations with other people, like family, about the Curley and Schultz case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3

No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q19. Have you sent or received emails where the cases of Curley and Schultz were mentioned? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q20. Even if Penn State officials like Curley and Schultz did nothing illegal, they still should be punished. Do you… (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q21. From very early on, officials like Curley and Schultz knew exactly what was going on with Sandusky. Do you… (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q22. The culture at Penn State and in the Penn State athletic department tolerated Sandusky's behavior. Do you… (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q23. Curley and Schultz helped to create the culture at Penn State that tolerated Sandusky's behavior. Do you… (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4

(DO NOT READ) Don't know/refused/not sure 5

Q25. [PROGRAMMER: RECORD SAMPLE SOURCE]

Landline	1
Cell	2

FOLLOW-UP FOR QUALITY CONTROL PURPOSES (MAY VARY BY VENDOR)

ATTACHMENT C

COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY

SIXTH EDITION

David Faust

BASED ON THE ORIGINAL WORK BY

Jay Ziskin

ADVISORY BOARD

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David Fa

29

RECOVERED MEMORY EVIDENCE IN THE COURTROOM

FACTS AND FALLACIES

Stephen Porter, Kristine A. Peace, Rebecca L. Douglas, and Naomi L. Doucette

OVERVIEW OF CHAPTER

KEY IDEAS

- Historical overview of repressed/recovered memories
- The modern debate and inconsistent legal response
- Public perceptions of repressed memories
- Are recovered memories valid? Should they be allowed as evidence in the courtroom?
- The false memory phenomenon

PRACTICE GUIDELINES FOR EVALUATING CLAIMS OF RECOVERED MEMORIES IN COURT

- Seek corroboration
- Determine the context of the memory recovery and initial allegations
- Evaluate the content of the recovered memory
- Seek a psychological evaluation of the claimant's personality characteristics and susceptibility to memory distortion
- Present expert testimony on memory processes and delayed recall

SUGGESTIONS FOR ATTORNEYS IN QUESTIONING COMPLAINANTS AND EXPERT WITNESSES

As we highlighted in an earlier edition of this text (Porter & Marxsen, 1998), the reliability of witness memory has been brought into question throughout the history of our legal system. For example, evidence from many legal cases has established that eyewitness memory is malleable and highly prone to errors. In a 2001 inquiry into a wrongful murder conviction in Canada, Justice Cory stated that mistakes by "honest, right-thinking eyewitnesses" have been responsible for many injustices. His cogent observation on the potential fallibility of memory is supported by a large body of research (e.g., Yarmey, 2003).

In the present chapter, we examine one of the most controversial of human memory phenomena sometimes entered as evidence in the courtroom—the repressed or delayed memory. Any type of contested historical allegation can pose great challenges for the judiciary, and an allegation based on a "recovered" recollection of a crime can make credibility assessment especially difficult. Porter, Campbell, Birt, and Woodworth (2003a) gave an example of a historical case and the problem of credibility assessment therein:

> Imagine being a juror in a trial that is based on a middle-aged woman's allegation that her neighbor sexually assaulted her after giving her a ride home forty years earlier. She recounts a vivid and emotional memory of the accused person attacking her and comes across as a confident witness. As in many sexual assault cases, the defendant denies the allegation and there is no other evidence to corroborate either testimonial. Additionally, the defense team points to inconsistencies in the complainant's testimony relating to dates and locations. How would you evaluate the evidence in this case? Noting the factual errors, some jurors might be skeptical. However, others might view the testimony as highly credible and consider the errors to be minor and the result of the passage of time. A factor that might further complicate decision-making is the complainant's report that her memory of the incident was only recently "recovered." (p. 190)

This hypothetical scenario has been played out in many civil and criminal cases in courtrooms throughout North America. For example, in our home province of Nova Scotia, former premier Gerald Regan was charged in the 1990s with numerous counts of sexual offenses against 13 women. The complaints concerned incidents ranging from fondling to rape and were alleged to have occurred from the 1950s to the 1970s. Ultimately, Regan was acquitted on several of the charges and the prosecutors elected not to pursue the remaining counts because of the low likelihood of conviction. Such cases involving alleged "historical" violence have created major challenges for the legal system. As we have pointed out elsewhere (Porter, Birt, Yuille, & Herve, 2001), the courts have demonstrated no consistent response to allegations based on recovered memories, some accepting them and others rejecting

them as evidence. This is highly problematic given the growing prevalence of claims of repressed memories from the 1980s to the present day, both in therapeutic and in legal contexts (McNally, 2003b; Porter & Marxsen, 1998). Using archival data, Canadian researchers (Connolly & Read, 2003) examined a sampling of more than 1,200 cases of sexual assault from the 1980s and 1990s and found that evidence for recovered or delayed memories has emerged in more than 5% of all sexual assault cases. Despite the inconsistent response of the legal system (documented later), the scientific community has come to a much firmer conclusion about the reliability of recovered memories since the 1998 edition of this book.

ORIGINS OF THE REPRESSION CONCEPT

> Remembrance has a rear and front,-
> 'Tis something like a house;
> It has a garret also
> For refuse and the mouse.
>
> —Emily Dickinson (Reeves, 1959)

Can a person hide unpleasant childhood events in the recesses of the unconscious? Part of the rich legacy of psychoanalysis (see Ellenberger, 1970; Sulloway, 1992), repression is commonly evoked—often in forensic settings—as an explanation for failures to recollect emotional events from childhood. Variations of the term *repression* have been around since at least the 1300s (much earlier, Socrates had considered the idea of holding a memory but losing conscious awareness of it). *Represseu* is thought to have its origin in the Latin and Old French languages (*repressus*; *represser*) and had a number of denotations in Middle English language including *(a)* to overcome, put down, or suppress a riot, rebellion, or disagreement; *(b)* to suppress sin or error; *(c)* to counteract venom or pain; *(d)* to weaken in effect or function; and *(e)* to reduce in size (Middle English Dictionary, 1984). The second usage of the term is most like the modern psychological version and, although it is not known to have referred directly to the suppression of a traumatic memory, it did sometimes concern the suppression of immorality, especially sexual urges (the Middle English dictionary [c. 1456/1984] provides many cases including: "God . . . wol represse and putte doune fromе ye alle ye bestial desires.") However, it appears that few if any historical observers of human nature witnessed cases of repression. Although Matthew Arnold once wrote, "We forget because we must, And not because we will," it is unclear whether he was referring to repression.

Although the origin of the contemporary idea of repression usually has been attributed to Freud, 18th- and 19th-century German philosophers were among the first to consider the phenomenon. In his principal work, *The World as Will and Idea*, Schopenhauer (1818/1896) outlined the weaknesses of the human intellect, one of which is the requirement that we store certain important thoughts in the unconscious in order to attend to more immediate ideas:

> Therefore after a certain time, which varies with the individual, we must for the present give up every meditation or deliberation which has had the fortune to remain undisturbed, but yet has not been brought to an end, even if it concerns a matter which is most important and pertinent to us; and we must dismiss from our consciousness the subject which interests us so much, however heavily our anxiety about it may weigh upon us, in order to occupy ourselves now with insignificant and indifferent things. During this time that important subject no longer exists for us; it is like the heat in cold water, *latent*. (p. 331)

Schopenhauer asserted that such "dismissed" thoughts were retrievable but would influence future ideas because the physical composition of the humors and tensions of the nerves change over time (in the Aristotelian tradition, Schopenhauer believed they left an echo behind them, "the tone of which influences the ideas which follow," p. 331). He noted that humans are able to unconsciously suppress negative thoughts, observing, "It is a curious fact that in bad days we can very vividly recall the good time that is now no more; but that in good days we have only a very cold and imperfect memory of the bad" (1851/1974, p. 49). Not generally known as a man awash with optimism, Schopenhauer concluded that human memory is a fallible process, it is incomplete, and the little that is recalled is inaccurate.

Half a century later, Freud introduced his version of repression, surpassed by few other concepts in its influence on psychological thought in this century. The influence of repressed memories was a key foundation of psychoanalysis, reflected in the declaration of Breuer and Freud (1895/1955): "hysterics suffer mainly from reminiscences" (p. 7). In the 1890s, Freud postulated his seduction theory, based on his analysis of women afflicted with what was known at the time as "hysteria." Initially, Freud believed that these physical symptoms were rooted in childhood traumas. He specified several types of defense mechanisms that individuals utilized to cope with painful events and unconscious impulses; the most widely known and controversial being repression (Freud, 1922). Freud viewed repression as a mechanism by which painful or traumatic memories were detached from a person's conscious awareness. According to Freud (1922), repression involves an emotional event being actively buried in the unconscious, a process independent of ordinary forgetting. Freud defined trauma in terms of the economy of psychological energy expended during an event resulting from excessive stress or "stimulation." The traumatic event was one that "within a very short space of time subjects the mind to such a very high increase of stimulation that assimilation or elaboration of it can no longer be effected by normal means, so that lasting disturbances must result in the distribution of the available energy in the mind" (p. 232). The memory remained intact but inaccessible because a "connection . . . had been broken" (p. 239). To clarify the process, Freud used the metaphor of an anteroom containing the unconscious and a smaller reception room containing the conscious. On the threshold of the two rooms is a doorkeeper who examines the various "mental excitations," censors them, and decides whether to admit them to the reception room or the consciousness. Those excitations

that are turned back by the doorkeeper are repressed (Freud, 1922). Thus, repression is a type of amnesia in which the psyche defends itself against intolerably painful knowledge. Memory for a traumatic psychological event is not permitted—via unconscious controls—into a person's conscious awareness.

Despite the "burying" of trauma in the unconscious, it was argued that these repressed incidents could still exert some degree of influence on behavior or symptomology in adulthood (e.g., anxiety, dislike or unexplained fear of certain places, physical ailments, depression). In his view, in order to treat hysteria, these painful experiences must be brought to the surface or "recovered" from the recesses of the unconscious and reexperienced for complete integration to occur. The typical means of achieving this recovery included hypnosis, free association, and deep introspection (Freud, 1922). Freud's patients often began to remember traumatic incidents from childhood through these procedures, and the "recovery" of such memories led him to conclude that emotions have the power to block memory.

The modern psychodynamic view, like Freud's, is that such repressed material can continue to exert psychological effects on the person over the life span and that a fundamental goal of therapy is to recover the memory (Breuer & Freud, 1893/1957; Earleywine & Gann, 1995; Freud, 1922; Myerson, 1977). Modern-day theorists argue that it is not solely the nature of trauma that causes repression, but the intrapsychic conflict created by perceiving family members/relatives or authority figures as both abusers and caretakers (Smith-Lee, 1996). Some argue that the nature of sexually abusive relationships, often involving concealment, threats, and blackmail, causes children to internalize their psychological injury and repress all memories of the abuse (e.g., Freyd, 1996).

"Recovered memories" refer to those memories that were previously repressed and have been brought into conscious awareness. According to some clinicians, the recovery of traumatic memories can be triggered by visual stimuli, body sensations, highly emotional events, therapeutic intervention, or other cues that bring forth the buried memory (e.g., Brady, 1996; Herman, 1992; Terr, 1994). The recovery of traumatic memories is said to occur when the psychological and environmental circumstances of the individual promote a "safe" atmosphere to deal with the trauma in adulthood (e.g., Gannon, 1989; Mollon, 1998).

THE MODERN DEBATE AND LEGAL RESPONSE

After a century of near-blind acceptance by the mental health professions of the aforementioned conceptualization of repression, a heated debate arose in the 1980s over the validity of recovered memories for experiences of past childhood abuse. At the same time, such memories began to serve as evidence in courts throughout North America. As the debate became increasingly polemical, some argued that those who questioned the validity of recovered memories were attempting to deny the reality of sexual abuse. However, few if anyone would deny that sexual abuse is a serious problem in today's society. Estimates suggest that one in eight males and one in four females have been sexually victimized (Finkelhor, Hotaling, Lewis, & Smith, 1990) and that approximately 10%–25% of women have been sexually assaulted in adulthood (Koss, 1993). The vast majority of allegations stemming from such experiences are based on continuous memories.

Despite the acknowledged widespread problem of abuse, it soon became apparent that that not all reports of historical abuse based on recovered memories were accurate (e.g., Lindsay & Read, 1994a; Porter, Yuille, & Lehman, 1999). In fact, many such memories were actually mistaken (e.g., Bruck, Ceci, & Hembrooke, 1998; Loftus, 1993, 1998, 2003b). In many cases, the individual who recalled the event later recanted his or her story in coming to the realization that the memory had been mistaken. For example, in a 1992 case, Beth Rutherford "recovered" memories of her father raping her between the ages of 7 and 14 years while her mother held her down (Loftus, 1997). She also remembered being impregnated twice and being forced to abort the fetus with a coat hanger. However, a medical examination ruled out the credibility of these memories; in fact, she was a virgin. The daughter sued the church counselor who had helped her "retrieve" the memory and received a million-dollar settlement in 1996. In Canada, "Donna Cole" recovered memories of being sexually abused by her father at the age of 18 months (see Porter, Spencer, & Birt, 2003). She reported that her father put her in a roasting pan in an oven, butchered a female hitchhiker, and raped the family dog. Based on her outlandish testimony, her father was convicted. Such cases led to the development of an intense debate on the validity of allegations based on recovered or "delayed" memories (e.g., Prout & Dobson, 1998).

Unfortunately, the courts still have no consistent approach for assessing recovered memory claims (e.g., Porter & Marxsen, 1998; Seniuk & Yuille, 1995). In a Maryland case (*Jane Doe et al. v. Joseph Maskell*, 1996), a court asserted that repression is not a valid phenomenon. By contrast, an Ontario court judge viewed repressed memories as valid (see Porter et al., 2003a). Criminal charges were founded on allegations by a 15-year-old girl that her grandfather had sexually abused her between the ages of 5 and 8 years. The girl had originally been receiving counseling from a pastor to deal with her parents' divorce, during which the pastor repeatedly asked her whether her grandfather had ever touched her sexually. Although initially the girl could recall nothing, she was told that she had buried the memories. The vivid memories eventually began to "flood into her mind." Although the defendant denied the story, the trial judge theorized that he "himself may have repressed or dissociated from any recollection of what to his moral background and makeup would be repulsive and horrible acts. . . I could take it that [defendant] could be testifying honestly as to what he recalls, and he does not and cannot recall these acts." This notion by the judge gave the grounds for an appeal and the conviction was reversed (*Regina vs. Campbell*, 1996).

In recent years, civil cases tend to be the foremost arena for repression in the courts. Civil damages in excess of $5 million have been rewarded to victims of alleged abuse based on their recovered memories (e.g., Bannon, 1994). More recently,

the legal system has seen another trend, in which complainants have recanted their recovered memories and sued therapists for leading them to develop false memories (Kisch, 1996).

To highlight the various judicial approaches to repressed memory in the courts, several cases are worthy of note. In the landmark case *Tyson v. Tyson*, supra (1986), the Washington Supreme Court ruled that the statute of limitations would apply and refused to admit recovered memory testimony as evidence in trial. The judge in this case argued that the length of time between the alleged events and the claim of forgotten abuse influenced the likelihood of inaccurate recollections of events. In addition, the court found that psychological or psychiatric testimony in support of the possibility of repressed memories does not reduce the subjectivity of the memory (see Bickel, 1991). However, one judge dissented, stating that the statue of limitations should begin at the point when the individual became aware that the abuse took place, not from the date of the actual incident (*Tyson v. Tyson*, supra, 1986). Subsequently, there have been several cases in the United States that have applied what has become known as the delayed discovery doctrine to cases of historical abuse (e.g., Brown, Scheflin, & Hammond, 1998; Gothard & Ivker, 2000; Porter et al., 2003a). Further specifications for the application of the discovery rule were highlighted in *Johnson v. Johnson* (1988). The judge argued that cases involving historical memories should be subdivided into two categories: Type I refers to cases where the plaintiff had repressed all memories of the abuse until they were later recovered at some point in time, whereas Type II cases refer to when the plaintiff continuously recalled memories of abuse but was unable to understand the causal link between the abuse and continuing emotional distress until the present (Gerstenblith, 1994). This distinction has been used in subsequent cases, and judges tend to reject the discovery doctrine more often in Type II cases (e.g., Garza, 2003). However, some courts have been more wary of recovered memories and refuse to apply the discovery rule unless there is corroborating evidence (Kisch, 1996). Apart from legal doctrines pertaining to the statute of limitations, several important judicial rulings about the admissibility of repressed memory evidence have been made. In *Rock v. Arkansas* (1987), hypnotically refreshed or revived memories were not permitted as evidence, due to the court's concerns about hypnosis as a potential source of bias in recall. Furthermore, Justice Groff refused to admit repressed memory testimony and ruled that "memory repression is not generally accepted in the field of psychology" in *State of New Hampshire v. Hungerford* (1995, p. 15).

In the Canadian courts, there has been much disparity in the judicial response to repressed/recovered memory evidence. In two cases, *R. v. O'Dell* (2001) and *R. v. R.J.H.* (2000), judges accepted the testimony of the complainant as accurate and credible. In the first case, a male complainant testified that he was sexually abused over the course of several years by a Catholic priest and that he had blocked the memories of the abuse until his 20s. Although the reliability and credibility of recovered memories was a significant concern at the trial, the judge believed the complainant. By relying in part on expert testimony, the judge concluded that the complainant's memory difficulties were due to "imperfect retrieval of memory resulting from traumatic amnesia" (*R. v. O'Dell*, 2001, para 16). The accused was found guilty, and on appeal, the conviction was upheld. In the second case, *R. v. R.J.H.* (2000), two sisters accused their father of sexual abuse, claiming that they had no memory of the abuse until their memory was triggered by another incident. The judge concluded that both witnesses were credible and believable and found the accused guilty of two counts of sexual assault. Similarly, Justice Robins in *R. v. Francois* (1993) stated that repression is a "widely recognized psychological [process]." This opinion was also upheld in the Supreme Court of Canada in *(K.) M. v. (H.) M.* (1992), where Justice La Forest extended the limitations in such claims by applying the doctrine of reasonable discoverability. Legal decisions such as these are widely cited by legal scholars as having validated the notion of repressed memories and substantiated their credibility (e.g., Brady, 1996). In contrast to the aforementioned cases, other Canadian judges have ruled against the admissibility of repressed memory evidence. In *Justice v. Doucet* (2000), the Manitoba Court of Appeals expressed concern over the way in which the complainant's memories had been uncovered. The judge ruled that there was a lack of sufficient evidence or reason to believe that the recovered memories had actually taken place. Likewise, Justice Hanssen dismissed a case based on repressed memory evidence and stated that the abuse was "merely a product of [the complainant's] mind" (*R. v. R.L.B.*, 1994, paras 4 & 5).

As indicated, there is no consistent approach by the courts in evaluating and validating claims of recovered (previously repressed) memories of childhood abuse or trauma (Porter & Marxsen, 1998). Convictions have been obtained, cases have been dismissed, and convictions have been overturned (Connolly & Read, 2003). Ernsdorff and Loftus (1993) offer four recommendations to address the problem of repressed memory testimony in court: *(1)* not tolling the statute of limitations for cases concerning a recovered memory; *(2)* requiring corroborating evidence in support of a returned memory; *(3)* adopting specific procedural requirements in cases involving the return of repressed memories; and *(4)* admitting expert testimony on the reliability of memories. However, with respect to the last point, it is important to acknowledge that experts on either side may present a biased view of the research and state of knowledge according to their perspective, and they are often polarized in this debate (Yuille, Daylen, Porter, & Marxsen, 1995). It is no easy task to determine what the appropriate course of action should be. Disagreement between members of the mental health profession (e.g., Reagan, 1999) and lack of clear guidelines on repressed memory cases have led to a case-by-case approach within the legal system of considering repressed memory evidence as fact or fiction.

Some have gone so far as to argue that "since the very field which researches recovered memories cannot agree on their validity, the best way to protect the public is to prohibit the use of questionable memories as evidence" (Kisch, 1996, p. 209). However, we have argued that "it is not our role as psychologists to make policy decisions for the legal system, just as it is not our role to comment on whether recovered

memory evidence should be admissible in the courtroom" (Porter, Campbell, Birt, & Woodworth, 2003b, p. 213). Instead, psychologists should serve in the dissemination of relevant psychological information to aid legal professionals in their decision-making processes. Canadian courts have not eliminated or excluded the use of recovered memory evidence to date; this furthers the need for established guidelines to help legal decision makers be triers of "fact" rather than "fiction."

PUBLIC PERCEPTIONS OF REPRESSED MEMORIES

What does the public (potential jurors) think of recovered memory reports? Research on people's perceptions of witnesses indicates that laypersons have traditionally given much credence to accounts of events and identification of perpetrators (e.g., Bell & Loftus, 1988). Vivid accounts with a high degree of expressed confidence have been found to be especially persuasive (e.g., Penrod & Cutler, 1995). Loftus, Weingardt, and Hoffman (1993) examined how people react to claims of recovered childhood memories. Participants answered questions about a legal case arising out of allegations of sexual assault. In one version of the allegation, the complainant claimed to have repressed the memory for 10 years and recovered it in therapy, whereas in the other, she showed continuous recall for the incidents but did not report them for 10 years. Participants, particularly males, judging the allegations tended to be more skeptical of the repression case. Additionally, the repressed and nonrepressed cases evoked different considerations; participants skeptical of the repressed memory viewed it as honest but false, whereas skeptics of the nonrepressed memory thought that the complainant may have been lying. Using a similar approach, Key, Warren, and Ross (1996) found that participants were more likely to convict a defendant when testimony concerned a continuous memory for sexual abuse (67%) than a recovered repressed memory (58%). There appears to be an acceptance of the concept of repression but a mild skepticism for particular cases among university students (Golding, Sego, Sanchez, & Hasemann, 1995). Additional research by Golding, Sego, and Sanchez (1999) studied the believability of repression in the courtroom when cases involved multiple incidents of forgotten childhood sexual abuse. They reported that mock jurors rated the alleged abuse as more believable when there were multiple assaults, as compared with a single incident of sexual abuse, regardless of the reporting condition. In addition, female "jurors" in this study were more likely than males to believe the victim's memory and rule in her favor regardless of whether the abuse was reported immediately or delayed (repression and no-repression conditions). Perceptions about the context of recall have also been examined in case simulations. For example, Coleman, Stevens, and Reeder (2001) found that mock jurors rated recovered memories elicited under hypnosis as more credible and valid than those recovered via other treatment techniques, and they ruled more favorable verdicts for the complainant. However, in cases involving therapeutic malpractice, participants rated hypnosis as most highly related to the generation of false memories, as compared with other techniques, and gave less favorable verdicts to the therapist (Coleman et al., 2001).

ARE REPRESSED AND RECOVERED MEMORIES VALID?

Clearly, there is great variability in the credibility given to repressed memories both in and out of the courtroom. Within the scientific community, many researchers strongly question the validity of such memory reports (see Porter et al., 2003a, for a review). In fact, the existence of repression remains unverified by scientific research, and many scholars are questioning the claim that memories could be stored intact and unaltered for decades in the unconscious (e.g., Loftus, 2003b). Freud himself began to question the reliability of memories of childhood events (Freud, 1962): "What seemed to be very vivid memories of real occurrences in childhood often turn out to be contradicted by clearly established facts" (cited in Fancher, 1973, p. 108). Freud argued that the "scenes" being "replayed" in therapy represented the fantasies of the patient and deviated from objective and historical fact (e.g., Orne, 1981). Thus, Freud's seduction theory, which was initially rooted in repression, became rooted in fantasy (Richardson, 1999). Despite this, many clinicians and even some researchers have tenaciously held on to the notion of repression as a valid explanation for lost memories of trauma that resurface years or decades after the alleged events (see McNally, 2003b; Schacter, 1996). For this reason, we will discuss the empirical evidence on both sides of the debate and provide the reader with a clear indication of the new psychological consensus that is emerging in the literature.

EVIDENCE FOR REPRESSION?

The following arguments have been offered as evidence for the existence for repression as a mechanism that blocks memories of traumatic events from awareness until alleged victims are psychologically prepared to recover them.

ACCEPTANCE OF REPRESSION BY EXPERTS/THERAPISTS

Many clinicians not only endorse, but may devote their entire practice to, the recovery of traumatic memories (e.g., Herman, 1992). In the 1990s, survey research has indicated that the concept of repression is widely accepted among many practicing therapists (e.g., Poole, Lindsay, Memon, & Bull, 1995), despite the strong criticisms of repression that dominate the empirical literature (e.g., Loftus, 1997; Porter et al., 2003a). Many "recovered memory therapists" are poorly trained or self-professed specialists in the field (Leo, 1997). The use of directive and suggestive processes to retrieve buried traumas casts doubt on the recovered memory representing true historical fact (see later in chapter). In addition, therapists who

are trained in treating child sexual abuse victims may inadvertently engage in a form of self-confirming bias, by seeking out or "recovering" information from memory that supports their theory of suspected abuse.

PSYCHOGENIC AMNESIA IS A WIDELY ACCEPTED PHENOMENON

Proponents of repressed memories cite the fact that psychogenic or dissociative amnesia—a mental disorder in the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV-TR*, APA, 2000)—operates like repression. In cases of psychogenic amnesia, memories and personal information are lost after exposure to a traumatic event. This is argued to be akin to repression, in that the brain can "forget" events that are too painful to exist in conscious awareness (Smith-Lee, 1996). However, psychogenic amnesias are poorly understood pathological conditions and are very rare (Yuille et al., 1995). There is no evidence whatsoever for the involvement of a repressed memory process. Furthermore, in general, unlike the single event typically preceding psychogenic amnesia, recovered memories often concern multiple episodes of trauma over time, while memories for intermediary events (e.g., birthdays, summer holidays) are retained (McNally, 2003b; Yuille et al., 1995).

MEMORY PROBLEMS ARE ASSOCIATED WITH POSTTRAUMATIC STRESS DISORDER

Many people who have experienced traumatic events, including childhood sexual abuse, may develop posttraumatic stress disorder (PTSD) in the months and years following these experiences (Schiraldi, 2000). Furthermore, people who have reported recovered memories often show high levels of PTSD symptoms, such as intrusion, avoidance, and hyperarousal (McNally, 2003a). Although memory problems are part of the diagnostic criteria for PTSD, including an "inability to recall an important aspect of the trauma" (*DSM-IV-TR*, APA, 2000), this provides no proof of repression. In fact, people with PTSD are often unable to forget the traumatic experience(s) due to flashbacks, nightmares, and reliving the event (Berntsen, Willert, & Rubin, 2003; Carlson, 1997). Furthermore, memory gaps that are associated with some cases rarely encompass the entire traumatic event (e.g., Christianson & Nilsson, 1989).

REPRESSION IS SUPPORTED BY SCIENTIFIC RESEARCH

Advocates of repressed memory cite three key studies as scientific evidence that repression exists. In one study, Williams (1994a) interviewed 129 women who had documented histories of sexual victimization, from fondling to rape. When the women were asked about a specific incident of abuse, 38% failed to report the abuse (Williams, 1994a, 1994b). Another study looked at a sample of 53 women who were in a group therapy setting for survivors of abuse (Herman & Schatzow, 1987). The authors reported that 40% of the sample had corroboration for the abuse, and that 28% did not recall the abusive incidents. Finally, Briere and Conte (1993) interviewed 450 self-reported abuse victims in therapy. Of this group, 59% reported a period of time when they could not recall the abuse (also see Melchert, 1996).

The findings from these studies are used to support the notion that repression occurs at a high rate among sexual abuse survivors. However, advocates of repression typically have not considered several alternative explanations for the studies' findings (e.g., Loftus, 1993; Loftus & Ketcham, 1994; Ofshe & Watters, 1994). For example, the women in the study by Williams (1994a, 1994b) may have chosen not to disclose the abuse to researchers because they were not comfortable doing so. Furthermore, of the 49 women who did not report memories for the abuse, 33 discussed other incidents of child sexual abuse, indicating that all memories for the abuse were not repressed. In addition, the sexual experiences selected in this sample occurred between the age of 10 months and 10 years. Williams (1994a) failed to consider the role of infantile/childhood amnesia in the lack of reporting (e.g., Howe, Courage, & Peterson, 1996). Of the 16 women who did not report any abusive incidents, 63% were under the age of 6 years when the experience occurred. Therefore, the claim that 38% of women repressed memories of childhood sexual abuse is uninterpretable. Similar problems can be found in the studies by Herman and Schatzow (1987) and Briere and Conte (1993) (see Leo, 1997, for review). Researchers have argued that the three main studies used in support of repression are so methodologically flawed that they have failed in two respects: *(1)* to demonstrate the existence of repression, or *(2)* to add to the scientific understanding about the relationship between trauma and memory (Loftus, 2003b; Ofshe & Watters, 1994). There remains no strong empirical evidence that supports the construct of repression (e.g., Holmes, 1990; Loftus, 2003a; McNally, 2003a).

MEMORIES FOR TRAUMATIC EVENTS CANNOT BE "CREATED"

Repressed memory advocates argue that there is no proof that experiences as traumatic as sexual abuse can be implanted. However, Rosen, Sagemen, and Loftus (2004) discuss the historical case of Bernheim, who implanted a false traumatic memory of torture and rape in one of his patients in 1889. The history of the generation of false memories is well established (see later in this chapter), and there is a concerted international effort devoted to the study of mistaken memories. As will be described later, there are numerous studies that have demonstrated the ability of researchers and clinicians to implant partial and complete false memories of a variety of events, from mundane to traumatic in nature (e.g., Loftus, 1979; Porter et al., 1999).

PEOPLE WHO HAVE EXPERIENCED SEVERE TRAUMATIC EVENTS OFTEN HAVE POOR MEMORIES

Although case studies have been reported on traumatic memory loss (e.g., Christianson & Nilsson, 1989; Terr, 1994), memory "gaps" are often associated with temporary forgetting

or suppression, as opposed to widespread repression. In fact, research on traumatic memories demonstrated that severe traumas are recalled better than those lower in severity (Porter & Birt, 2001). Furthermore, Peace and Porter (2004) found that traumatic memories were detailed, vivid, and consistently (and continuously) recalled over time.

THE HIGH PREVALENCE OF REPORTED RECOVERED MEMORIES SUGGESTS A REAL PHENOMENON

Supporters of the validity of repressed memories have claimed that the presence of so many people that do report recovered memories validates the theory that traumatic memories can be repressed and later recovered (Smith-Lee, 1996). However, a high prevalence of such reports could reflect a high prevalence of mistaken recollections.

REPRESSED MEMORIES ARE TOO DETAILED AND REALISTIC TO BE FALSE

This argument has been widely accepted by therapists and the public (e.g., Loftus, 2004). However, research and anecdotes have demonstrated that false memories also often are detailed, emotional, and vivid accounts of childhood experiences (e.g., McNally, 2003a; Porter et al., 1999). For example, there have been cases involving detailed claims of mass satanic ritual abuse, in which ritualistic sacrifice of infants, fetuses, and adults allegedly occurred (Victor, 1993). Despite massive investigations, no physical evidence has been found to substantiate the claims (see Ofshe & Watters, 1994, for a review). Nowhere is this more evident than in the devastating and widely publicized case of Paul Ingram (see Wright, 1994 for a review).

Overall, none of these commonly cited pieces of evidence for repression carries much weight. As noted in our chapter in an earlier edition of this book (Porter & Marxsen, 1998), the argument that repressed and later recovered memories remain dormant and completely unaltered is unconvincing. Since our writing, the scientific community is now overwhelmingly skeptical of this memory phenomenon, one that is still supported by many mental health professionals. While some therapists continue to use suggestive techniques to "recover" memories (deemed necessary to alleviate the symptoms of the patient), researchers continue to search for evidence to confirm or disconfirm the possibility that repression exists. The vast majority of research does not support the existence of a repression mechanism and suggests that memories of childhood abuse are subject to normal cognitive processes such as forgetting (e.g., Epstein & Bottoms, 2002; Loftus, 2003a; Reagan, 1999).

THE MALLEABILITY OF MEMORY: SOME REPRESSED MEMORIES ARE FALSE MEMORIES

If repressed memories have little empirical support, what is the alternative? The best explanation is that many or most reports of recovered memories are completely mistaken. Throughout the past century, research has established that memories are not flawless and that numerous factors can result in memory alterations (see Loftus, 2002, 2003b, 2004). It is now clear that people can forget complete events, recall events that have never taken place (e.g., Porter et al, 1999), and misremember details of events that have occurred (e.g., Porter et al., 2003). The controversy here, of course, is whether "repressed" or "delayed" memories represent a true clinical phenomenon or another variation of memory distortion.

Since the last edition of this text, applied memory research has evolved in focus in two ways, and it provides useful information in the current context. Whereas most eyewitness studies had traditionally focused on memory for relatively benign events, researchers are now paying greater attention to emotional or traumatic events (e.g., McNally, 2003b; Read & Lindsay, 1997). Furthermore, complainants often relate an experience after a long passage of time, pointing to the need for prospective research on traumatic memory. A better understanding of how such traumatic memories are reported and change over time would have the potential to improve credibility assessment in many cases. Secondly, research has addressed whether false memories for emotional events can be implanted.

The importance of memory researchers focusing on traumatic experiences stems from the conclusion that trauma is recalled differently from other types of memories. In the debate over traumatic memories, there are two main theoretical perspectives (see Porter & Birt, 2001). According to the *traumatic memory argument* (TMA), traumatic events result in memory impairment such that the recollections contain sensory/emotional images but lack a coherent verbal narrative (e.g., Herman, 1992). Conversely, the *trauma superiority argument* (TSA) asserts that trauma may enhance memory rather than impair it. There is increasing evidence for the validity of the TSA. For example, Porter and Birt (2001) asked 306 adults to describe their most traumatic and their most positive experience. It was found that traumatic memories were more detailed, but both memory types were vivid and coherent. Also, trauma severity did not impair memory quality, despite a prediction of the TMA. Peace and Porter (2004) conducted a prospective study of 59 participants who had experienced a recent trauma (e.g., witnessing the death of a loved one). They recalled both the traumatic and another emotional experience in interviews separated by 3 months. At Time 2, traumatic memories were more vivid and reliable than other memories, lending further support for the TSA. In general, the literature suggests that traumatic events are recalled better (more vividly and more accurately)—not worse—than other types of events.

Secondly, memory *distortion* has become a prominent focus of research in contemporary cognitive psychology and neuroscience (e.g., Bjorklund, 2000; Loftus, 2004; McNally, 2003a). Although the level of interest in this phenomenon clearly has been heightened by recent forensic and clinical cases, memory distortion has been the subject of empirical research for more than a century (e.g., Bartlett, 1932; Burnham, 1889a, 1889b), and it can be traced back thousands of years in

philosophical writings (see Knoche, 2001). During this time, two major perspectives on how memory operates can be seen. By far the more dominant spatial or storehouse view maintained that memories are stored somewhere in the mind (such as repression), and memory problems are construed as failures of retrieval. Proponents of the more recent and better-supported *constructive* view have observed that memory is alterable, constructive, and architectural (e.g., Loftus, 1997, 2003a; Porter et al., 1999; Wade, Garry, Read, & Lindsay, 2002). The constructive view received its strongest support through research demonstrating that people can recall entirely false events.

The *false memory* phenomenon currently attracts such interest because of its relevance to basic human cognition and its practical implications. False memories have important theoretical implications because they indicate that memory is the product of constructive processes, contrary to the traditional conceptualization of memory as a virtual reproduction of the original perception (e.g., Atkinson & Shiffrin, 1968). According to the constructive memory framework (e.g., Schacter & Dodson, 2002), memories consist of a pattern of features that represent a record of the processes (sensory and perceptual) that were active during encoding. Recalling the event involves reactivating such features across different parts of the brain, a type of "pattern completion." However, various encoding and retrieval factors can influence the extent to which details in memory deviate from reality.

Consistent with a constructive memory framework, research findings show that memory is greatly affected by the conditions of encoding and retrieval (e.g., Loftus, 2003b). In the case of a crime, encoding would refer to how the witness or victim experienced the event, and retrieval would refer to the act of recalling the event privately or to another person such as a police officer. Although false memories have been studied for more than 70 years (Bartlett, 1932), the catalyst for the enormous level of interest in the phenomenon at present was Elizabeth Loftus's *postevent misinformation paradigm*, developed in the 1970s. In the original paradigm, participants were shown a slide presentation of a crime or accident (e.g., Loftus, Miller, & Burns, 1978). Some witnesses then received misinformation after which they answered questions about the event. For example, in studies using a slide sequence depicting a car accident, experimental witnesses were provided misinformation such as "Did the car stop at the stop sign?" when, in fact, there had been a yield sign. On a recognition test, misled witnesses chose a stop sign far more often than did control witnesses. Another advance in the area was the Deese-Roediger-McDermott (DRM) paradigm (e.g., Roediger & McDermott, 1995), inspiring numerous false memory studies since the 1990s. This work established that after participants encode related words (e.g., rest, bed, awake), many later misremember a related word (e.g., sleep) that was not presented. The premise of the DRM is that memory is associative; when items are associated semantically, processing one tends to activate the other in recall.

Building upon these experiments, recent studies have established that it is not only minor details that can be altered in memory. With misleading questions and other suggestive techniques sometimes used by police, false memories are possible for major details in a scene or even entire personal experiences. Within the context of the recovered/repressed memory debate, the focus has been on the possibility of implanting false memories for personal, childhood events. Research has now shown that it is possible to lead individuals to believe in, and have memories of, childhood events that did not actually occur. One of the earliest studies to document this finding involved participants creating a memory of being lost in a shopping mall (Loftus & Pickrell, 1995). Researchers questioned participants about several childhood events: both true events that their parents had reported having happened and a false event of having been lost in a shopping mall. Participants were informed that their parents had reported that they were lost in the mall when they were 5 years old; after several days of working on remembering this event, 29% of participants came to have partial or complete memories of the fictitious childhood occurrence. Several subsequent studies also have found similar rates of false memory creation. Using a modification of the "lost in the shopping mall" procedure, approximately 25% of participants come to "remember" at least some aspects of false childhood events, such as spilling a punch bowl onto the bride's parents at a wedding (Hyman & Billings, 1998; Hyman, Husband & Billings, 1995; Hyman & Pentland, 1996).

Some researchers have been critical of these early false autobiographical memory studies, charging that events like spilling a punch bowl or being lost in a mall are not analogous to childhood sexual abuse, and that it cannot be conclusively determined that they did not actually happen to the participants (and would therefore actually be true memories). Furthermore, it has been argued that having a parent claim that a false event has occurred is not analogous to a therapy situation in which the parent is accused of abuse. Subsequent research has attempted to address these criticisms. Although it is obviously unethical to attempt to implant memories of childhood sexual abuse, researchers have now demonstrated that participants can be led to develop false memories for emotional childhood events. Porter et al. (1999) investigated whether false memories were possible for more negative, stressful events. Parents of the participants were asked to provide information about several negative events (e.g., medical procedure, animal attack) that may have happened to their child. Participants then were questioned about a real and false event in three suggestive interviews over 2 weeks. Results indicated that 26% of participants came to fully recall the false event, while another 30% recalled something about it. In addition, researchers have implanted false memories for events that can be conclusively ruled out as ever having happened; in one such study over 20% of British participants developed a memory of having a strip of skin removed from their finger—a procedure that is never performed in the United Kingdom (Mazzoni & Memon, 2003). The potentially problematic use of parental feedback has also been addressed. Using a paradigm more analogous to a suggestive therapy setting, participants who have completed bogus test materials and who subsequently received feedback that their resulting "profile" was consistent with having experienced a given childhood event have also developed false memories (Mazzoni, Loftus, & Kirsh, 2001).

Although these findings demonstrate that people can develop false memories for stressful childhood events, it has been argued that an event must be plausible to be incorporated as a false memory. Difficulty implanting memories for a religious ritual of another religion, and of a rectal enema, has led some to suggest that the development of false memories is related to the degree to which the event is plausible to that individual, and whether the individual has a "script" for the event (Pezdek, Finger, & Hodge, 1997). However, given the number of books, movies, and other mediums that have been devoted to the important topic of child abuse, it seems possible that many people could imagine, or have a "script" for, this type of abuse. In addition, although some have suggested that child abuse would not be a plausible event for someone with no memory of such, research has suggested that given the right set of circumstances, it appears possible to convince someone of being a victim of child abuse. A distressed person seeking answers in therapy, along with suggestive therapy techniques and "laundry lists" of abuse symptoms, may provide the context for the development of false memories of childhood abuse (e.g., Leo, 1997).

RISK FACTORS FOR MEMORY DISTORTION AND THE DEVELOPMENT OF FALSE MEMORIES

Researchers have identified various characteristics of both individuals and therapy techniques that appear to increase the likelihood of false memory creation.

INDIVIDUAL CHARACTERISTICS

One finding concerning suggestibility is that individuals who are more prone to dissociation (disruption in the integration of consciousness, memory, identity, or perception) are more likely to believe events that they have only imagined to have occurred (Heaps & Nash, 1999; Paddock et al., 1998; Porter, Birt, Yuille, & Lehman, 2000). Individuals who are more prone to dissociation have also been found to be more susceptible to induction of false childhood memories in laboratory experiments (Hyman & Billings, 1998; Porter et al., 2000). One study found an association between hypnotizability and false memory creation (Spanos, Burgess, Burgess, Samuels, & Blois, 1999). Hypnotizability has been linked to a susceptibility to believe that imagined events have actually occurred (Heaps & Nash, 1999). Furthermore, individuals with alien abduction "memories" are also more hypnotically suggestible (Clancy, McNally, Schacter, Lensenweger, & Pitman, 2002).

Magical thinking, fantasy-proneness, and imaginative capability also have all been linked to memory distortion or false memory creation (Clancy et al., 2002; Hyman & Billings, 1998; McNally et al., 2004; Spanos et al., 1999). In addition, several other individual characteristics have been linked to memory distortion, including having an external locus of control (tendency to attribute outcomes to external factors; Paddock et al., 1998), lower extraversion (Porter et al., 2000), and higher empathy (Tomes & Katz, 1997); however, these findings require replication. Furthermore, one study has found that individuals with a history of traumatic experience are more likely to develop false memories, and that the creation of false memories was related to having a more anxious personality and PTSD symptom severity (Zoellner, Foa, Brigidi, & Przeworski, 2000). Finally, one team of researchers has suggested that some patients who have experienced features of a sleep disorder, such as sleep paralysis and associated hypnopompic hallucinations (hallucinations upon wakening), in addition to other risk factors, may attribute such experiences to resurfacing memories of abuse (Lynn, Stafford, Malinoski, & Pintar, 1997).

Little research has focused on personality characteristics of the interviewer/therapist that may increase the likelihood for false memory creation in a patient. However, one study found that higher extraversion in interviewers was associated with the creation of false-negative childhood memories (Porter et al., 2000). Although this appears to be the only research finding concerning interviewer personality and false memory induction, there has been a great deal of research regarding the therapy techniques used by the interviewer/therapist, and their relation to false memory creation.

THERAPY TECHNIQUES

Various therapy techniques, often referred to collectively as "memory work" or "memory recovery therapies," have been implicated in many cases of false memories in legal contexts (see Loftus, 2003a; Porter et al., 2003a). Such techniques include hypnosis and age regression, guided imagery, journaling and writing exercises, misleading bibliotherapy, and suggestive questioning (see Lindsay & Read, 1994b; Loftus, 1993, 1994), each of which is discussed in turn the following sections.

HYPNOSIS AND "AGE REGRESSION"

Although it continues to be used as a tool to uncover repressed memories, there is no evidence that hypnosis increases memory accuracy, and the procedure may in fact increase spontaneous errors in memory (e.g., Wrightsman & Porter, 2005). Furthermore, hypnosis increases the confidence in the accuracy of memory reports (Lynn, Lock, Myers, & Payne, 1997). "Age regression" (imagining or mentally recreating childhood experiences) may also have a similar influence; one study found that both hypnosis combined with age regression and age regression alone, along with suggestive interviewing techniques, led to both thoughts and dreams of early infancy (Spanos et al., 1999). Due to the developmental phenomenon of infantile amnesia, such thoughts and dreams cannot be accurate memorial representations. Concern about the use of hypnosis is not new: An American Medical Association Council on Scientific Affairs (1986) report regarding the scientific status of hypnosis as a memory enhancement tool concluded that ". . . recollections obtained during hypnosis can involve confabulations and pseudomemories and not only fail to be more accurate, but actually appear to be less reliable than nonhypnotic recall" (p. 1).

GUIDED IMAGERY/VISUALIZATION

Much research has established that guided imagery or visualization, which involves imagining/visualizing certain scenarios, can result in memory distortion. Simply imagining a childhood event increases the likelihood that an individual will believe that it actually happened (Garry, Manning, Loftus, & Sherman, 1996; Paddock et al., 1998). Imagining alone also increased the number of participants who subsequently had memories of a nonexistent medical procedure during childhood (Mazzoni & Memon, 2003). In addition, guided imagery, along with suggestive questioning and false information from a parent, has resulted in false memories for childhood events in several studies (e.g., Heaps & Nash, 2001; Hyman & Pentland, 1996; Porter et al., 1999).

USE OF CHILDHOOD PHOTOGRAPHS

In a procedure somewhat similar to guided imagery, but with a concrete cue, some therapists recommend viewing childhood photographs to trigger forgotten memories of abuse (see Poole et al., 1995). However, such perceptual images may be combined with other sources of information to create convincing false memories. One study found that using a real class photograph from the same time period in early childhood as a false suggested event, along with other suggestive procedures, resulted in 65% of participants developing some memories of the false event (Lindsay, Hagen, Read, Wade, & Garry, 2004).

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In these types of writing exercises, often recommended in self-help books (e.g., Bass & Davis, 1988, 1994), patients are instructed to write down emerging memories of childhood abuse and may be asked to read them aloud. Often using a stream-of-consciousness approach, these exercises may increase the likelihood of false memory formation, especially in conjunction with other suggestive techniques or feedback, such as being told that journaling will bring about accurate memories (see Lindsay & Read, 1994a).

BIBLIOTHERAPY

To supplement ongoing treatment, therapists often recommend self-help books for patients; this practice is known as "bibliotherapy." Although not inherently problematic, some books that are recommended may be written by individuals with no professional mental health training and may contain recommendations for suggestive techniques, such as those described earlier. These materials may also contain misinformation about the nature of human memory and provide invalidated symptom checklists to help readers determine whether they have been abused (see Loftus, 1993). A survey of 800 doctoral-level psychologists conducted by the American Psychological Association found that *The Courage to Heal* (Bass & Davis, 1988, 1994), a book characterized by the features listed earlier, was the self-help book most commonly recommended to patients (Clifford & Norcross, 1998).

SUGGESTIVE QUESTIONING

In addition to the procedures described earlier, therapists may use other suggestive questioning techniques. Some examples include insisting a patient has a history of abuse despite no evidence of such, based on a nonspecific symptom "profile"; informing patients that various techniques will lead to the retrieval of abuse memories; and describing abuse as a plausible explanation for the patient's presentation (see Loftus, 1993). Several laboratory paradigms have examined the influence of these types of suggestion on memory distortion. For example, the use of repeated suggestive questioning, along with guided imagery, has led to false memories for stressful childhood events (Porter et al., 1999). Furthermore, suggestive information from an authoritative source regarding the plausibility and likelihood of having witnessed a demonic possession increased how plausible and likely participants felt that they had actually witnessed the event (Mazzoni, Loftus, & Kirsch, 2001).

As of the 1990s, the techniques described earlier appear to be used relatively frequently; 71% of surveyed clinicians in the United States and the United Kingdom reported using techniques such as hypnosis/age regression, guided imagery, use of family photographs, and journaling to help recover abuse memories (Poole et al., 1995). Having an authority figure (i.e., a therapist) provide a patient with a rationale for believing that memories are likely to be recovered, especially through the use of certain suggestive procedures, may provide a context in which false memories can be created (Spanos et al., 1999). As noted by Ceci and Loftus (1994, p. 359), "The point is not that suggestive memory work techniques unalterably lead to false memory, but merely that they *may* do so. . ."

OFFICIAL RESPONSES TO RECOVERED MEMORY CLAIMS

In light of the growing research literature demonstrating the fallibility of memory, both psychological and psychiatric organizations have issued statements on the validity of repressed memories. For example, the Canadian Psychological Association has concluded that recovered memories should never be accepted without corroboration due to their questionable reliability (Blackshaw, Chandarana, Garneau, Merskey, & Moscarello, 1996). The American Psychological Association (1995) has taken a similar stance in concluding that the vast majority of victims of child sexual abuse can continuously recall at least a portion of what happened. Furthermore, they have acknowledged that there are gaps in our knowledge about what contributes to accurate and inaccurate recall of abuse (Alpert et al., 1996).

CAN TRUE AND FALSE MEMORIES BE DISTINGUISHED?

Given the potential clinical and legal implications of a false memory of childhood abuse, for both the accuser and accused, the differentiation of true and mistaken memories is an important task. At present, the issue is still hotly debated.

The American Medical Association has stated that there is no scientific method that can be used to assess the accuracy or veracity of a recovered memory (Anonymous, 1995). However, some psychologists have felt sufficiently confident in their ability to identify recovered repressed memories that they have provided guidelines publicly. For example, following the highly controversial 1995 CBC Passionate Eye documentary "Divided Memories," the host asked a panel of mental health professionals, "Is there any formula . . . is there any way to tell when a memory is real?" A research psychologist responded that there are two specific attributes almost invariably associated with true recovered memories of abuse—appropriate levels and types of emotional and sensory experience will accompany the memory being recovered, and the memory recovery will be involuntary ("out of the blue") and of a fragmentary nature, rather than sudden and complete. At the time, this was pure conjecture.

Proponents of repressed memories have argued that there are three factors that determine whether a recovered memory is likely to be a valid historical account of abuse or an inaccurate recollection: *(1)* the patient's symptoms; *(2)* level of detail of the memory; and *(3)* level of emotion associated with the memory report (Terr, 1994). According to these "criteria," if a recovered memory is associated with emotional disturbance and a high level of detail and is highly emotional, then the memory is likely to be a truthful account of a traumatic event (Terr, 1994). However, researchers have begun to identify additional factors that may help make such a distinction. One study found that false memories for emotional events were less vivid, less coherent, and held with less confidence (Porter et al., 1999). However, this study did not account for rehearsal; while the true memories of early childhood may have been thought about many times, the false memories of early childhood were new "memories," with little rehearsal opportunity. When rehearsal is taken into account, differences in emotional intensity and amount of details between true and mistaken memories are not evident (Heaps & Nash, 2001). Others have also confirmed that emotional response is not a good indicator of memory veracity. Participants reporting memories of alien abduction have exhibited greater psychophysiological responses, in addition to self-reported arousal, fear, and surprise while listening to abduction scripts than non-"abductees" (McNally, Clancy, Macklin, Pitman, & Orr, 2004), despite the implausibility of the abduction memories. Nor is confidence a good determinant of memory accuracy; research on eyewitness memory has found that the relationship between confidence and accuracy is nonexistent when misinformation has been suggested (Tomes & Katz, 2000). Researchers also have examined whether true and false memories differ in terms of perspective. However, while Porter et al. (1999) found that a "participant" perspective was more common in false memories, Heaps and Nash (2001) found the opposite to be true—false memories were more likely to have an observer perspective. Given these findings, it is clear that more research must be undertaken in this area before memory veracity can be evaluated reliably based on qualitative characteristics.

More recently, researchers have started to examine potential differences in the way in which the brain processes true and mistaken memories. For example, brain electrical activity (Gonsalves & Paller, 2000) and neural processing (Okado & Stark, 2003) differences have been found during the processing of true and false memories. However, neither of these experiments examined false memories for childhood events. Although promising, to date these types of procedures cannot be used to determine whether any given "memory" is true or false.

Given these findings, it is not surprising that people generally have difficulty distinguishing true and false memories. One study found that lay judges correctly identified mistaken memories as false only 60% of the time, while correct memories were accurately identified only 53% of the time (Campbell & Porter, 2002). More important, if lay judges are not able to distinguish between genuine and false claims of victimization, how do the courts treat such recovered memory claims?

APPLICATIONS IN THE COURTROOM

Based on our review of the literature, there are several recommendations that we suggest be implemented in cases of reported repressed/recovered memories of childhood abuse or trauma. The general guidelines that we provide next may be of assistance during attorney interactions with psychological experts, as well as provide a guide to the investigation and understanding of the veracity of each claim. In addition, we have provided several specific guidelines pertaining to legal questioning in such cases.

GENERAL GUIDELINES

There are five primary considerations that may be useful in the legal decision-making process regarding claims of recovered memories. First, *seek corroboration for all claims of alleged abuse or trauma based on recovered memory evidence.* Although there may be difficulties in finding objective and verifiable evidence of abuse when dealing with cases of repressed or delayed recall, any evidence that refutes or supports the allegation is essential. Many psychological and legal scholars have argued that without corroboration, these claims should not proceed in the criminal justice system and legal doctrines should be modified to reflect this requirement (e.g., Loftus, 2003a; Montoya, 1996; Weber, 1997). Corroboration can sometimes be obtained by interviewing potential witnesses (e.g., relatives, neighbors) and reviewing any official documentation that may exist (e.g., hospital records). Some courts in the United States (e.g., South Carolina) require that objective, verifiable evidence be present due to concerns about the reliability of repressed memories, such as physical evidence, written statements of abuser (e.g., diaries, letters), photographs or recordings, eyewitness accounts, or evidence that the accused committed similar substantiated acts of abuse against others (Bannon, 1994; Johnson, 2000). Lack of corroborating evidence will cast doubt on the allegations and credibility of the memory (Porter et al., 2003a).

Second, *determine the context of the memory recovery and the initial allegations.* Many repressed memories for childhood

trauma have been recovered in therapeutic settings (McNally, 2003b). Although well intentioned, the use of certain therapeutic methods (discussed earlier in this chapter) have been associated with increased susceptibility to suggestions and memory distortion, including "memory work," guided imagery, sodium amytal, hypnosis, "survivor" literature and groups, journaling, and suggestive questioning (e.g., Bannon, 1994; Kisch, 1996; Read & Lindsay, 1994). The use of such techniques should cause the legal professional to carefully question the veracity of the claims. To fully consider the context of recall, it is necessary to evaluate therapeutic records and notes, as well as police interviews, and to conduct interviews with the alleged victim (Porter et al., 2003a). In addition, an evaluation of the context in which the memory was initially recalled is critical. Memories of trauma that are spontaneously recovered prior to therapy may be more credible and not as susceptible to suggestive influences. Fletcher (2003) advocates that spontaneously recovered memories should be given more evidentiary weight in court, as opposed to those elicited by therapeutic techniques. It is also important to evaluate what types of information on repressed/recovered memories the claimant has been exposed to in contexts other than therapy, because therapy is not the only source of suggestive material (e.g., TV, magazines, self-help books). Regardless, it has been argued that the courts should focus on the context of recall, the recovery methods used, the biasing nature of such methods, and present expert evidence on memory distortion (Fletcher, 2003; Yamini, 1996).

Third, it is important to *evaluate the content of the recovered memory.* As we have discussed previously (Porter et al., 2003a), content differences have been found between real and mistaken memories. Although more research is required to validate its utility, one of the more sophisticated and empirically based guides to assessing the credibility of historical memory reports is the Memory Assessment Procedure (Porter et al., 1999; Porter & Birt, 2001). This tool may assist trained experts in structuring their evaluation of memory content. As reviewed earlier, historical memories tend to remain vivid for the central details of the event, while less personally significant peripheral information (times, dates, locations) may become distorted with time. Hence, it is reasonable to expect some decay in the memory, while the key details should remain consistent with time. A related important component to the evaluation of historical memories is the determination of whether the memory has been continuously held by the complainant versus not recalled for an extended period of time and later "recovered." Even if the complainant has a continuous memory of the alleged incident, the context in which the allegations were made to the authorities should be examined to identify possible distorting factors.

Fourth, have a *psychological evaluation of the claimant's personality characteristics and susceptibility to memory distortion* conducted by a consulting psychologist trained in this area. As noted in the section on mistaken memories, certain personality characteristics (e.g., dissociation, introversion, imaginative abilities, suggestibility) have been associated with an increased proneness to memory distortion and should be considered through standardized testing (e.g., Clancy et al., 2002; McNally et al., 2004; Porter et al., 2000). Measures such as the Dissociative Experiences Scale (Bernstein & Putnam, 1986), Creative Imagination Scale (Wilson & Barber, 1978), and the NEO Five Factor Inventory (Costa & McCrae, 1992) would be useful in this respect. This guideline also extends to evaluation of other recognized psychological disorders (e.g., PTSD, psychogenic fugue) because these may mediate the extent to which an individual's memory of traumatic events was delayed or forgotten (e.g., McNally, 2003a).

Fifth, *seek objective expert testimony on memory processes and delayed recall.* As suggested throughout this chapter, effectively dealing with cases of repressed/recovered memories should encompass consultation with a trained psychologist specializing in traumatic memory phenomenon. Psychological experts can assist with the assessment and questioning of the claimant, as well as investigation and understanding of the content and context of recall (Porter et al., 2003). In addition, legal scholars may find it useful to review materials relevant to normal memory functioning (e.g., Tulving & Craik, 2000), and the literature about repressed/recovered memories and false memories (McNally, 2003b; Porter et al., 2003a; Reagan, 1999).

SUGGESTIONS FOR QUESTIONING COMPLAINANTS

Prior to testifying, it is recommended that as much information as possible be gathered regarding the claimant, including family history and relevant medical/psychiatric/psychological records. We suggest that the following questions be considered in order to elicit information from or about the claimant that will be most useful in establishing the validity of their testimony:

1. Was the memory continuously held or repressed/recovered?
2. Were there any delays in making the allegations? If so, why?
3. Was the memory recovered spontaneously or in therapy?
4. Was the claimant in therapy pre or post memory recovery?
5. What was the original purpose for seeking therapy?
6. What types of procedures have been used in therapy? Were any "memory recovery" techniques used?
7. Has the claimant been involved in any group therapy for survivors of abuse?
   a. Has the claimant read any self-help books on abuse that may be potentially biasing or contain abuse "checklists" (e.g., *Courage to Heal*, Bass & Davis, 1988; *Secret Survivors*, Blume, 1990)?
8. What types of materials regarding memory and sexual abuse has the claimant been exposed to?
9. What are the psychological characteristics of the claimant (e.g., hypnotizable, dissociable, suggestible)?

10. Does the claimant have a history of psychological problems or mental disorders?
11. Has the claimant ever made allegations of abuse previously? If so, what was the context?
12. What is the nature of the claim (e.g., satanic ritual abuse)?
13. How old was the claimant at the time the alleged event(s) occurred?
14. How well does the claimant remember other events from around the same time period (positive, negative, and neutral)?
15. Is there any external corroboration?

This information should be of assistance to attorneys in devising their questioning strategies. Furthermore, some research has suggested that complex questions (e.g., use of double negatives, leading questions, multipart questions) may confuse witnesses/claimants and result in decreased accuracy of the testimony (e.g., Kebbell & Johnson, 2000). Thus, lawyers should use caution when questioning claimants in recovered memory cases because their recall may be highly subjective and based on a blend of both historical fact and inaccurate perceptions. It is essential to get the best representation of the truth to support or refute his or her memory for past traumatic events.

SUGGESTIONS FOR QUESTIONING EXPERT WITNESSES

Many psychological and legal studies have examined the role of the psychologist as expert witness in the courtroom (e.g., Bannon, 1994; Johnson, 2000; Kisch, 1996; Loftus, 2003a). In a previous edition of this text, Porter and Marxsen (1998) argued that "an 'expert' on repression should be questioned on his/her knowledge of the shortcomings of the research, the literature on dissociative amnesia, and how he/she reconciles Freudian repression with how autobiographical memory functions generally" (p. 118). In addition, we suggest that legal professionals present the psychological expert testimony in a manner that is clear and understandable to the "layperson." We argue that such testimony should also focus on the following: the empirical support for possible false memory implantation of negative, stressful, childhood events; characteristics of certain therapies (as detailed earlier) that may lead to increased likelihood for mistaken memories of abuse; the interaction between the claimant's personality characteristics and the recall context; normal memory functioning and processes; and false memory syndrome. Finally, lawyers should also have the expert address the finding that strong emotion and confidence in a memory are not indicative of veracity (McNally et al., 2004; Tomes & Katz, 2000).

CONCLUSIONS

The purpose of this chapter has been to provide information to legal professionals who may have to deal with claims of recovered memories of childhood abuse. We have reviewed the evidence surrounding repression and recovered memories and discussed the possibility of false memories as an alternative explanation to memory recovery. In addition, we outlined conditions that may increase the likelihood of memory distortion and presented current findings concerning the differentiation of true and mistaken memories. Finally, we provided concrete suggestions for use in legal cases involving claims of recovered memory. These recommendations should provide a scientific foundation when dealing with both complainants and expert witnesses.

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nomenon of repressed memory.

§ 20:21 Areas of scientific disagreement—Trauma is generally well remembered

Decades of research on victims of trauma have shown that individuals remember traumatic events very well, and often much more vividly than non-traumatic events. To illustrate this fact, we performed a nonselective literature search for examples of studies between 1960 and 1999 where the investigators performed psychological assessments on groups of survivors of specific, historically documented traumatic events. There is no shortage of such studies. Indeed, 77 studies are cited in Appendix A and summarized in Appendix B, both of which are published at the end of this chapter. These studies cover more than 11,000 victims of all manner of traumas. Aside from two fragmentary case reports of partial amnesia for the traumatic event,[1] the studies contain no mention of anyone who was *unable* to remember the entire event for any reason other than the ordinary known causes of amnesia listed in Table 1 above, such as 1) head injury, drug intoxication, or other biological insults to the brain; 2) the amnesia of early childhood; or 3) amnesia for individual elements of a traumatic event as a result of "incomplete encoding."

It will be seen that most of the studies in our reference list involve traumas other than childhood sexual abuse. However, our list can be augmented by further studies from an exhaustive review of the aftereffects of childhood sexual abuse, published by Kendall-Tackett, Williams, and Finkelhor in 1993.[2] This review examined 45 studies covering 3369 victims of childhood sexual abuse. Although the review documents numerous sequelae of sexual abuse reported by the various studies, "repressed memory" for the abuse never appears anywhere in the review. This finding is particularly remarkable when it is considered that Linda Williams, one of the co-authors of this article, was the same Williams whose 1994 study,[3] described in detail in section 20:24 part 5c below) is often cited as evidence of repressed memory by proponents of this hypothesis.

Adding up the more than 14,000 victims reported in more than 120 studies covered by the above reviews, there seems virtually no evidence that trauma victims would be able to spontaneously develop amnesia for

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[Section 20:21]

[1]S.M. Weine, D.F Becker, T.H. McGlashan, D. Laub, S. Lazrove, D. Vojvoda, & L. Hyman, Psychiatric Consequences of "Ethnic Cleansing": Clinical Assessments and Trauma Testimonies of Newly Resettled Bosnian Refugees, 152(4) The American Journal of Psychiatry 536 (1995); R. Krell, Child Survivors of the Holocaust—Strategies of Adaptation, 38(6) Canadian Journal of Psychiatry 384 (1993).

[2]K.A. Kendall-Tackett, L.M. Williams, & D. Finkelhor, Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies, 113(1) Psychological Bulletin 164 (1993).

[3]L.M Williams, Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse, 62(6) Journal of Consulting and Clinical Psychology 1167 (1994).

an otherwise memorable traumatic event. Stated another way, if repressed memory were a valid phenomenon, one would surely expect that at least some cases would have been noted among this vast number of victims in these many studies. Of course, it should be acknowledged that the investigators in many of the 120 studies did not specifically ask the study participants point-blank about repressed memory *per se*. But again, if repressed memory were a genuine phenomenon, it is hard to imagine that none of the investigators in any of the 120 studies would have commented, even in passing, about even a single case of repressed memory among the 14,000 trauma victims.

This survey reemphasizes the issue of burden of proof just described: we must start with the assumption that, after excluding known causes of forgetfulness or amnesia, people do *not* lose their memory of traumatic events. Therefore, the burden falls on proponents of repressed memory to show that there are exceptions to this rule, and that there are indeed some people who can lose all conscious memory of a traumatic event for a prolonged period of time, and then later "recover" the lost memory. Does this hypothesis have scientific support? In response, we go through the four *Daubert* criteria typically used to test such a question.

§ 20:22 Areas of scientific disagreement—The hypothesis of repressed memory is not generally accepted in the relevant scientific community

One of the criteria of *Daubert*, as well as the earlier *Frye* standard of admissibility, is that a scientific theory must be generally accepted in the relevant scientific community. Note that to establish *general* acceptance, one would need to show that the great majority of scientists accept the theory. By contrast, if one could show that the theory was *controversial*, with a fair number of scientists who did not accept the theory, then one could not claim general acceptance; it is logically not possible for something to be simultaneously controversial and *generally* accepted. Therefore, if repressed memory were shown to be a controversial scientific theory, or a theory that was not accepted by a fair proportion of scientists, then the standard of "general acceptance" would not be met.

An inspection of the scientific literature quickly shows that repressed memory does not even remotely approach the level of general acceptance in the scientific community.

1. *Numerous prestigious peer-reviewed scientific papers, book chapters, and books have questioned the validity of repressed and recovered memory.* In Table 2 below, we provide a list of 33 examples of major scientific publications, appearing over the last 22 years, questioning the validity of the hypotheses of repressed and/or recovered memory. These include peer-reviewed articles in many of the world's most prestigious medical and psychiatric journals, such as the *New England Journal of Medicine*, the *Lancet*, the *American Journal of Psychiatry*, and many

others. Well-recognized scientists in these publications have referred to repressed memory variously as "a piece of psychiatric folklore,"[1] a "fairy tale belief,"[2] and the "clinician's cold fusion."[3] In the face of these publications and commentaries, it would be impossible to assert that there is any general acceptance of the repressed memory hypothesis in the relevant scientific community; in fact, there is widespread and vociferous skepticism.

Indeed, as we have also noted in a recent survey,[4] scientific studies of repressed memory rose to a sharp peak in the 1990's, and then have rapidly waned, with a large portion of recent papers expressing skepticism of repressed and/or recovered memory. We will discuss this survey, looking at the number of scientific studies regarding repressed memory over the last two decades, in greater detail below.

Table 2. Examples of Papers and Books from 1990–2009 Questioning the Validity of Repressed and Recovered Memory

1. Holmes D.: *The Evidence for Repression: An Examination of Sixty Years of Research.* In Singer J., Editor. *Repression and Dissociation: Implications for Personality, the Psychopathology and Health.* Chicago, University of Chicago Press, 1990, pp. 85–102.
2. Loftus E.: *The Reality of Repressed Memories.* Am Psychol 48:518–537, 1993.
3. Frankel F.H.: *Adult Reconstruction of Childhood Events in the Multiple Personality Literature.* Am J Psychiatry 150:954–958, 1993.
4. Ofshe R.J., Singer M.T.: *Recovered-Memory Therapy and Robust Repression: Influence and Pseudomemories.* Int J Clin Exp Hypn 42:391–410, 1994.
5. Lindsay D.S., Read J.D.: *"Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional, and Personal Issues.* Psychology Public Policy Law 1:846–908, 1995.
6. Pope H.G. Jr., Hudson J.I.: *Can Memories of Childhood Sexual Abuse Be Repressed?* Psychol Med. 1995;25:121–26.
7. Campbell T.W.: *Repressed Memories and Statutes of Limitations: Examining the Data and Weighing the Consequences.* Am J Forensic Psychiatry 16:25–51, 1995.
8. Frankel F.H.: *Discovering New Memories in Psychotherapy—Child-*

[Section 20:22]

[1]R. McNally, Remembering Trauma (2003).

[2]G.A. Bonanno, The Illusion of Repressed Memory, 29 Behavioral and Brain Science 515 (2006).

[3]H. Hayne, M. Gary, & E. Loftus, On the Continuing Lack of Scientific Evidence for Repression, 29 Behavioral and Brain Science 521 (2006).

[4]H.G. Pope, S. Barry, A. Bodkin, & J.I. Hudson, Tracking Scientific Interest in the Dissociative Disorders: A Study of Scientific Publication Output 1984–2003, 75(1) Psychotherapy and Psychosomatics 19 (2006).

hood Revisited, Fantasy, or Both? New Eng J Med 333:591:594, 1995.
9. Boakes J.: *False Memory Syndrome.* Lancet 346:1048–109, 1995.
10. Loftus E.F., Pickrell J.E.: *The Formation of False Memories.* Psychiatric Annals 25:720–725, 1995.
11. Schacter D.L., Curran T.: *The Cognitive Neuroscience of False Memories.* Psychiatric Annals 25:726–730, 1995.
12. McElroy S.L., Keck P.E. Jr. *Recovered Memory Therapy: False Memory Syndrome and Other Complications.* Psychiatric Annals 25:731–735, 1995.
13. McHugh P.R.: *Witches, Multiple Personalities, and Other Psychiatric Artifacts.* Nature Medicine 1:110–114, 1995.
14. Paris J.: *A Critical Review of Recovered Memories in Psychotherapy: Part I—Trauma and Memory, and Part II—Trauma and Therapy.* Can J Psychiatry 41:201–210, 1996.
15. Merskey H.: *Ethical Issues in the Search for Repressed Memories.* Am J Psychotherapy 50:323–335, 1996.
16. Kihlstrom J.F.: *Suffering from Reminiscences: Exhumed Memory, Implicit Memory, and the Return of the Repressed.* In Conway M.A., Editor. *Recovered Memories and False Memories.* Oxford: Oxford University Press, 1997, pp. 100–117.
17. Piper A.: *What Science Says—and Doesn't Say—About Repressed Memories: A Critique of Scheflin and Brown.* J Psychiatry & Law, Winter 1997:615–636.
18. Brandon S., Boakes J., Glaser D., Green R.: *Recovered Memories of Childhood Sexual Abuse: Implications for Clinical Practice.* Br J Psychiatry 172:296–307, 1998.
19. Pope H.G. Jr., Hudson J.I., Bodkin J.A., Oliva P.S.: *Questionable Validity of "Dissociative Amnesia" in Trauma Victims: Evidence from Prospective Studies,* Br J Psychiatry 1998; 172:210–215.
20. Piper A. Jr., Pope H.G. Jr., Borowiecki J.J.: *Custer's Last Stand: Brown, Scheflin, and Whitfield's Latest Attempt to Salvage "Dissociative Amnesia."* J Psychiatry Law 2000;28 Summer:149–213.
21. Epstein M.A., Bottoms B.L.: *Explaining the Forgetting and Recovery of Abuse and Trauma Memories: Possible Mechanisms.* Child Maltreatment 7:210–225, 2002.
22. McNally R.: *Remembering Trauma.* Cambridge, MA: Harvard University Press, 2003.
23. Goodman G.S., Ghetti S., Quas J.A., Edelstein R.S., Alexander K.W., Redlich A.D., Cordan I.M., Jones D.P. *A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy.* Psychol Sci 2003;14:113–118.
24. Lynn S.J., Lock T., Loftus E.F., Krackow E, Lilienfeld S.O.: *The remembrance of things past: Problematic memory recovery techniques in psychotherapy.* In Lilienfeld S.O., Lynn S.J., Lohr J.M., Editors. *Science and pseudoscience in clinical psychology.* New York: Guilford

Press, 2003, pp. 205–239.
25. Lief H.I.: *Questions raised by the controversy over recovered memories of incest.* J Am Acad Psychoanalysis Dynam Psychitray 2003;31:381–395.
26. Kihlstrom J.F.: *An unbalanced balancing act: blocked, recovered, and false memories in the laboratory and clinic.* Clinical Psychology: Science and Practice 11:34–41, 2004.
27. Pope H.G. Jr., Oliva P., Hudson J.I.: *Repressed memories. The scientific status of research on repressed memories.* In Faigman D., Kaye D., Saks M., Sanders J., Editors. Modern Scientific Evidence: The Law and Science of Expert Testimony—Social and Behavioral Science, 2005–2006 Edition. Eagen, MN, West Group, 2005, pp 408–447
28. Bonanno G.A.: *The illusion of repressed memory.* Behav Brain Sci 2006; 29:515–516.
29. Hayne H., Gary M., Loftus E.F.: *On the continuing lack of scientific evidence for repression.* Behav Brain Sci 29:2006; 521–522.
30. McNally R.J.: *Dispelling confusion about traumatic dissociative amnesia.* Mayo Clinic Proceedings 2007; 82:1083–1090.
31. Rofe Y. *Does repression exist? Memory, pathogenic, unconscious and clinical evidence.* Rev Gen Psychology 2008; 12:63–85.
32. Piper A., Lillevik L., Kritzner R. *What's wrong with believing in repression? A review for legal professionals.* Psychology Public Policy and Law 2008; 14:223–242.
33. McNally R.J., Geraerts E. *A New Solution to the Recovered Memory Debate. Perspectives.* Psychological Science 2009; 4:126–134.

2. Even if the "relevant scientific community" were narrowed down from the overall scientific literature to actual psychiatrists, evidence demonstrates that there is still no "general acceptance" of the "repressed memory" hypothesis: Even if one were to assume that the writers of the 33 publications in Table 2 could somehow be dismissed or ignored—perhaps by alleging that the authors were not truly members of the "relevant scientific community," and that the real "relevant scientific community" is instead represented by the opinions of actual psychiatrists—the evidence still shows no general acceptance of repressed memory. Specifically, in a 1999 study,[5] we surveyed 301 randomly selected board-certified psychiatrists and asked them if they felt that "dissociative amnesia" should be included without reservations in *DSM-IV*,[6] if this manual were to be revised currently. Only 35% of the psychiatrists responded that

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[5]H.G. Pope Jr., P.S. Oliva, J.I. Hudson, J.A. Bodkin, & A.J. Gruber, Attitudes Toward DSM-IV Dissociative Disorders Diagnoses Among Board-Certified American Psychiatrists, 156(2) The American Journal of Psychiatry 321 (1999).

[6]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) (1994).

eventually recover a memory of abuse at the hands of a plausible person. It will often be a close male with whom the client feels emotional distance or conflict and who was alone with them one or more times.

APA Working Group on Investigation of Memories of Childhood Abuse

The American Psychological Association Working Group on Investigation of Memories of Childhood Abuse rejects the idea that any symptom patter is an indicator of child sexual abuse. But they go further, noting:

> When clients report what they phenomenologically experience as memories of previously unrecollected trauma, therapists should take ... steps to avoid imposing a particular version of reality on these experiences and to reduce risks of the creation of pseudomemories.... It is important to remember that the goal of therapy is not archeology; recollection of trauma is only helpful insofar as it is integrated in to a therapy emphasizing improvement of functioning.
>
> Therapists should carefully consider all alternative hypotheses, including that the retrieved material is (a) a reasonably accurate memory of real events; (b) a distorted memory of real events, with distortions due to developmental factors or source contaminations; (c) a confabulation emerging from underlying psychopathology or difficulties with reality testing; (d) a pseudomemory emerging from exposure to suggestions; or (e) a form of self-suggestion emerging from the client's internal suggestive mechanisms.[41]

Such an approach will limit the logical fallacy, and expertise influences warned of above.

Recovered Memory Therapy

Any therapeutic memory recovery that relies primarily on the client's memory or that of his or her allies, and does not early on include memories from person's with contrary viewpoints, public records, common sense, and fact checking, will tend toward distortion of the memory. Therapist-initiated therapy based on observed symptomology without freestanding memories of abuse is an egregious logical and clinical error that further encourages confabulation. It often leads to pseudomemories.

Receiving accusations based on therapeutically recovered memory

Memory is not a videotape of the past. Normal memory processes can include many types of distortion. Other evidence must corroborate any person's recall. However, therapeutic memory recovery is the perfect storm of distortion-maximizing influences. It can and has generated pseudomemories and distortion. These could include distortions of the perpetrator's identity, time and place of the event, and the exact nature of the event. Therapeutically recovered memories are more unreliable than freestanding memories, or spontaneously recovered memories.[42] Also, if the abuse was understood as sexual and traumatic, and the place it occurred and the offender were continuously present in the accuser's life, any recovered memory is less likely to be accurate, since those factors all make it forgetting the abuse in the first place highly unlikely. Further, discontinuous memories that were recovered all at once are more reliable than those recovered one detail at a time over an extended period.[43]

Use of remote memory in assessing accusations

Our everyday memory is usually accurate about the most important elements of a memory, but over time it can decay and details can be reconstructed allowing misattribution and suggestion effects. Other details can be lost through decay or blocking. Upon hearing of an accusation,...*(forensic investigators)*... should get as detailed a statement as possible while influencing that detail as little as possible. Use non-directive language.

ATTACHMENT D

From:	Barry F Feudale <flynjudg@ptdprolog.net>
Sent:	Sunday, July 14, 2013 3:16 PM
To:	flynjudg@ptd.net
Cc:	Fina, Frank G.
Subject:	Fw: portrait. final comments
Attachments:	BFFeudale-portrait.jpg

fyi
----- Original Message -----
From: "Barry F Feudale" <flynjudg@ptdprolog.net>
To: <acouloumbis@phillynews.com>; "McCoy, Craig" <cmccoy@phillynews.com>
Sent: Sunday, July 14, 2013 3:15 PM
Subject: Fw: portrait. final comments

> Angela and Craig: looks like Matt got my photo to you. As I indicated I
> did
> not think Kane would respond. I suspect her strategy is to wait for the
> article, then claim I am a knife wielding disgruntled former Grand Jury
> Judge who has violated secrecy of Grand Jury proceedings as well ignoring
> an
> unclear sealing of Application for writ and various responses. I have been
> advised by more then one to keep my mouth shut. While I know I did not
> violate secrecy she will claim such. Secrecy is something she will use or
> abuse as it suits her purposes. As to the sealing of the Writ etc., I am
> less clear ,but if it was done for my protection ,I sure as hell did not
> feel "protected" by such an arbitrary and capricious procedure. What Grand
> Jury Judge in his/her right mind would want to work under a scenario where
> doing your job results in such an outcome. I would not go back for triple
> the salary.
>
> As to the opportunity to continue working as a Senior Judge, that would of
> been nice (esp as to handling child abuse cases). However when I started
> to
> hear comments from people (who seemed in the know) that the Spanier/
> Curley/
> Schultz cases may not be prosecuted ,the price (silence) was to high. We
> shall see if your article results in the reconsideration or revocation of
> my
> approval to handle cases in Northumberland County.
>
> Lets get back to my removal and your article. The story is not as Kane
> asserts that the Sandusky case was slow walked by Corbett, Fina, or even
> impliedly me. There are many factual and logical reasons for such ,both of
> record, and yet to be disclosed. I dont think Kane and or Prof Moulton
> want
> to hear such. No prosecution ,prosecutor or grand jury judge is perfect.
> Again the "slow walk" is PATENT POLITICAL BULLSHIT". IT IS ABOUT THE

> VICTIMIZED
> BY A SEXUAL PREDATOR WHO WILL PROBABLY DIE IN JAIL. It Is about how three
> men "allegedly " had information about the sexual abuse of kids and
> committed "alleged "crimial acts of commission or omission and turned
> deaf
> eyes and ears to such a horrible thing. Just like some in the catholic
> church and boy scouts. When "good" men do nothing, our system fails ,the
> vulnerable we are empowered to protect.
>
> Bottom line "I will not be intimidated by anyone. The price (even if it
> means I am done working as A Judge) of silence is to high. I spent 4 years
> of my life investigating sexual abuse of children, 4 years civilly
> prosecuting such as a Child welfare Solicitor , and 25 years as a Judge
> who
> specialized and testified and wrote about the handling of such cases. I
> will not abandon those kids.I I, Fina (who in my mind is a great man of
> courage and perseverance) Eshbach, and many agents and state police
> witnessed the pain and shame in the faces of the many kids who at times
> (with reluctance) testified about the 'horrors" committed upon them. I
> will
> not join such a "conspiracy of silence". You can not put a price on your
> integrity. If what I characterize ast he Sandusky el al cases are
> abandoned, it will be a "travesty of Justice" unlike anything I have
> experienced in my professioanl career. Even my Munchinski case pales in
> comparison.
>
> I will accept the consequences of my actions! Those kids will carry their
> abuse throughout their lives. To do nothing would be a cowardly act. I
> will be fine.Barry
> ----- Original Message -----
> From: "flynjudg" <flynjudg@ptd.net>
> To: <acouloumbis@phillynews.com>
> Cc: "Flynjudg" <flynjudg@ptd.net>
> Sent: Sunday, July 14, 2013 2:00 PM
> Subject: portrait
>
>
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>

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of March, 2016 he caused an exact copy of the foregoing Second Amended Petition for PCRA Relief to be served in the manner specified, upon the following:

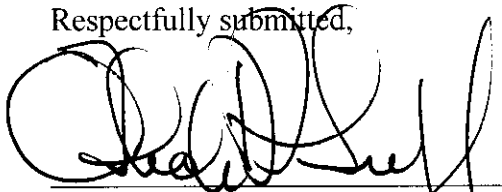
Hand Delivery

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

First Class United States Mail

Assistant Attorney General Jennifer Peterson
Office of the Attorney General – Criminal Prosecutions Section
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Respectfully submitted,



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