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

COMMONWEALTH : NO. CP-14-CR-2421-2011
: NO. CP-14-CR-2422-2011
VS :

GERALD A. SANDUSKY :

TRANSCRIPT OF PROCEEDINGS
(Pretrial Motions)

BEFORE: John M. Cleland, Senior Judge
DATE: May 30, 2012
PLACE: Centre County Courthouse
Courtroom No. 1
102 South Allegheny Street
Bellefonte, PA 16823

APPEARANCES:

FOR THE COMMONWEALTH:
Joseph McGettigan, Esq.
Deputy Attorney General
Jonelle H. Eshbach, Esq.
Senior Deputy Attorney General
Frank G. Fina, Esq.
Deputy Attorney General

FOR THE DEFENDANT:
Joseph Amendola, Esq.
Karl Rominger, Esq.

ALSO PRESENT:
Maxine O. Ishler, Court Administrator

INDEX TO THE WITNESSES

	DIRECT	CROSS	REDIRECT	RECROSS
COMMONWEALTH:				
(None)				
DEFENDANT:				
(None)				

INDEX TO THE EXHIBITS

		ADMITTED:
COMMONWEALTH:		
(None)		
DEFENDANT:		
No. 4	Handwritten note/Medical Records	33

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P R O C E E D I N G S

THE COURT: The purpose of the proceeding this afternoon is to hear argument on the defendant's pretrial motion in limine to dismiss and on the habeas corpus petition. This has really been very well briefed. I have read the briefs. I think I'm pretty familiar with the issues. I'd like to suggest that you might consider standing on your briefs on the habeas corpus question and on Victims -- Alleged Victims 2 and 6 -- and focus the argument on the counts involving Alleged Victim 8. However, having said that, I'll let you make whatever record or argument that you want to make with that in mind.

Mr. Amendola.

MR. AMENDOLA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. AMENDOLA: And counsel is acutely aware that the Court has read the briefs and I'm not here to recite the briefs and the information in the briefs. I would simply suggest to the Court in regard to Accuser No. 8 -- actually, Alleged Victim No. 8, since that

person is unknown or unidentified, that, as the Court is aware, the hearsay rules initially really are strictly construed and hearsay testimony is generally not favored. The Commonwealth, it was clear from the beginning of this prosecution, was going to attempt to get the comments made by Mr. Calhoun in using the excited utterance exception to the hearsay rule. Assuming arguendo, because I know the Court has given glimpses of its feelings about that particular part of the accusations related to No. 8 before, I'd rather focus my attention on whether or not -- even assuming the hearsay testimony or hearsay statements of Mr. Calhoun are admissible -- whether or not that's sufficient to sustain the charges.

THE COURT: Fine.

MR. AMENDOLA: And I would suggest to the Court that under *Barnes*, and there's a couple cases that followed *Barnes*, that it's not, because the Commonwealth has no evidence, hasn't indicated it has any evidence other than what custodians can say that Mr. Calhoun said to them at various points, supposedly the same night that he made observations, but then I

would suggest to the Court there's no independent corroborative evidence to establish that any sort of crime occurred. Now, the Commonwealth in its brief has referred to testimony or statements from one of the custodians that he saw somebody in the shower earlier that night, and the Commonwealth has indicated in its brief that that should be sufficient as corroborative evidence or testimony to substantiate the hearsay evidence to get us beyond the *Barnes* decision -- which my understanding is, is still the law -- but I would submit to the Court that the *Barnes* decision is the law. It's been followed relatively recently, and that, based on that decision and based on the lack of any corroboration regarding whatever Mr. Calhoun saw or didn't see, that his testimony, even if admissible under the hearsay exception or the excited utterance exception, that there's no corroboration and those charges should be dismissed.

THE COURT: Before you sit down, maybe I should ask with regard to Alleged Victim 2 and Alleged Victim 6, I understand your

argument, but doesn't the jury get to hear the witnesses and then decide? I mean, basically, if I'm reading it properly, it appears it's a credibility, essentially, argument. I suppose Mr. McQueary could give a more-amplified testimony at trial than he gave at the preliminary hearing, and Mr. Curley and Mr. Shultz. Wouldn't it be up to the jury to resolve that? Or how do you get around that problem?

MR. AMENDOLA: Well, Your Honor, I have two answers to that. The first answer is the purpose of a writ of habeas corpus at the pretrial stage, as opposed to the preliminary hearing stage, which is a whole different feature of our criminal justice system, is for the Commonwealth to have the right, when challenged, to present testimony at the writ of habeas corpus proceeding. And, quite honestly, when I filed that, and I've done that a number of times over the years in other cases where for various reasons the preliminary hearing was waived, whether it was to apply for ARD, whether it was because the Commonwealth made a representation there would be a better deal in

line which maybe didn't pan out and that thereafter we filed a writ of habeas corpus, at which, just as recently as a couple weeks ago in this very courthouse, the Commonwealth brought in witnesses -- there had been no preliminary hearing -- and put on a writ of habeas corpus, and established their case, by the way. But they did that. And my position has always been that the writ is very different, a fundamental constitutional right as opposed to a legislative right, which is what a preliminary hearing is, and I would simply suggest to the Court that that would be the remedy for the Commonwealth to put its witnesses on, or at least enough to establish a prima facie case if it could, and if it did to the Court's satisfaction, it would proceed. But waiving the preliminary hearing did not mean -- on our format here in Centre County, there's no indication in our waiver of preliminary hearing that you are conceding there is a prima facie case. But that would be my first answer.

The second answer would be my understanding from the testimony, which we

attached to our original omnibus pretrial motion, was that Mr. McQueary said he could not say he saw sexual intercourse. My understanding from what I've gleaned from some of the testimony that was made by other witnesses, such as Dr. Dranov, was that he asked Mr. McQueary several times if he had seen actual sexual intercourse and he said no. I would submit to the Court that if that is the case, although there hasn't been testimony taken, unless those testimonies are going to change dramatically, I would suggest at least some of the charges related to No. 2 might not be appropriate to go before the jury. And the problem that we face, Your Honor, in regard to No. 6 -- maybe I'll address that first -- taking all the evidence we have on No. 6, because that was fully investigated, No. 6 says nothing sexual ever occurred. If nothing sexual ever occurred, we've always believed and have submitted to the Court -- that's why we raised that particular set of charges in the writ of habeas corpus -- that there's no crime that's been committed, which was the initial conclusion of the then-sitting, then-presiding

District Attorney of Centre County, who was a seasoned prosecutor. Having said that, I would suggest to the Court that we're faced with a myriad of charges, and the more charges that are presented to the jury, even if the Court dismisses them following the Commonwealth's case, that the more charges that are presented to the jury, the more likely it is they're going to feel that something must have happened from all of these various accusers that have come forward, all these accusations that he made. And all we have done, Your Honor, is make a very, very strong attempt to kind of glean what we believe is a true credibility issue, as is the case in a number of the other accuser's situations, from those where it's pretty obvious on its face there are some real questions. And we're not even saying that they have to be conceded. All we're saying is that in those cases where we filed a writ of habeas corpus, I think the rules call and allow us to have a hearing on those issues, and if the rules do and the Court agrees with that, then the Court could make that determination whether those charges should be presented to the jury.

THE COURT: I never in my judicial career thought I'd have the opportunity to quote William Blackstone, but I looked up some Blackstone the other night thinking about this problem of habeas corpus. And historically and traditionally, once there is a process issued by a court of jurisdiction pursuant to statute, that's sufficient to prove the lawfulness of the confinement. So how do you get around the argument that the process was issued by the district justice -- that would be a court with jurisdiction -- pursuant to the statute as a result of a waiver, no question about that -- and I'm not questioning the strategy of the waiver. I understand why you did that. But now the only challenge is to the sufficiency of the evidence. Now, if there had been some other reason to challenge beyond the mere sufficiency question, I could see how the habeas corpus would lie, but I'm a little confused as to how, having waived, when the only challenge now is the sufficiency, why anything has changed from the lawfulness of the original writ or the original process, if I made myself clear. Maybe I was confusing.

MR. AMENDOLA: No, I think you have, Your Honor, and that's certainly an excellent argument that can be made on the other side of this case as to why maybe we shouldn't have the right to have a hearing on the writ of habeas corpus. But I would suggest to the Court, and I mentioned the cases in my brief to the Court -- I think one was *Commonwealth versus Kelly*, where the Supreme Court actually addressed sufficiency issues that were raised at a writ of habeas corpus where the charges were dismissed and the Commonwealth appealed. And in the one case, and I believe it was *Kelly* without referring to my brief, but I believe Mr. Kelly had waived his preliminary hearing and the Court nevertheless, when those charges were dismissed, addressed the charges and never indicated once that because Kelly had waived his preliminary hearing, that the Court had no need to address those charges because they should never have been addressed in a writ of habeas corpus. So although the Supreme Court hasn't said a person has the right to argue a writ of habeas corpus who waives his preliminary hearing, I think implicitly, if you

read cases like *Kelly,* where that issue came up and the Court did not address it when it had every right to address it, that the Court's failure to address it was implicitly saying that a person can raise sufficiency arguments on a writ of habeas corpus even though he has waived his preliminary hearing. And that's all we've done here. And as the Court knows, we didn't raise those documents where there was a credibility issue because we realize credibility is a fact for the jury to decide. We raised those issues where we felt that we had legitimate sufficiency grounds for the Court to consider pretrial so that if the Court agreed after a hearing -- and I agree right now there's no factual basis. That's why we asked for hearing on it. As the Court may recall, I filed that with my omnibus pretrial motion initially.

THE COURT: Right.

MR. AMENDOLA: And so what we said was, after a hearing, if the Court agrees with us that there's insufficient evidence, those charges or some of those charges would get dismissed and then we'd have fewer things to

worry about, fewer charges for the jury to consider and perhaps prejudice the defendant.

THE COURT: Okay, but the purpose of the writ is to test the lawfulness of the confinement, correct?

MR. AMENDOLA: I would agree.

THE COURT: You're asking that the writ issue and the charges be dismissed on the charges involving Alleged Victim 2, 6, and 8, correct?

MR. AMENDOLA: Correct, Your Honor.

THE COURT: So you're not including the other alleged victims, charges involving the other alleged victims?

MR. AMENDOLA: That's correct.

THE COURT: And if any one of those charges were sustained, then the confinement would be lawful?

MR. AMENDOLA: Yes, but not on those charges.

THE COURT: Okay, but the practical result is the defendant is still confined and that's what the purpose of the writ is, isn't it, is to test the lawfulness of confinement for any purpose?

MR. AMENDOLA: But for any number of reasons, Your Honor, that the person may not be still confined, because let's say hypothetically the Court had a hearing and the Court agreed all the charges related to 2, 6, and 8 should be dismissed. That would then give Mr. Sandusky the right to request lower bail, to request maybe a release from in-home detention, so that he still would have the right to re-argue the issue of being held in custody, as he is right now under in-home detention. So again I'm suggesting to the Court that there is a basis, I think, in our fundamental constitutional rights for someone to raise these issues. And quite honestly, Your Honor, I've only raised them, as the Court knows, in regard to certain sets of charges.

THE COURT: Oh, no, I understand that. I'm not suggesting you're overreaching. Now, the statute says the hearing has to be held within 20 days. As a practical matter, why doesn't the trial substitute as a hearing for the writ?

MR. AMENDOLA: And the trial could, except our position is that by presenting it

that way, Your Honor, we're prejudicing the defendant.

THE COURT: Yeah. Okay. That's a different --

MR. AMENDOLA: And that's a due process issue.

THE COURT: -- issue.

MR. AMENDOLA: Yes.

THE COURT: That's a due process question. Okay. I've got you. Anything more you want to --

MR. AMENDOLA: No, Your Honor.

THE COURT: Okay. All right. Thank you.

Mr. Fina, are you arguing?

MR. FINA: I am, Your Honor.

THE COURT: Okay.

MR. FINA: Your Honor, as the Court has already observed, I believe that, by and large, these issues have been well briefed by the parties, although I suppose I feel the necessity to address some baseline facts here. I mean, the Commonwealth is in a difficult posture of arguing sufficiency of evidence when there is no evidence before the Court.

THE COURT: I understand.

MR. FINA: I mean, there's an extraordinary situation here where there is not a single fact of record in this case. I mean, absolutely none. And that is, I think fair to say, solely as a result of the decisions of the defense pretrial.

THE COURT: Although as regards Alleged Victim 8, the facts aren't really in dispute, are they, about what you're going to try to prove?

MR. FINA: I think --

THE COURT: At least they are in your brief.

MR. FINA: Well, I think they are, Judge, and I'll address that when we get to Victim 8.

THE COURT: Okay.

MR. FINA: But I think, just to -- I think it's fair to make a blanket statement that facts are necessary for Victim 2, Victim 6, or Victim 8 to make any decision in this case in terms of the sufficiency, in terms of the excited utterance, and indeed even in terms of *Crawford,* wherein I think the courts have

been very clear that the first determination that has to be made is whether it's a statement that's testimonial in nature. And, you know, part and parcel of that would be in this case the conduct, whether it's an excited utterance, and I'll go through that law then, Judge, but both the United States Supreme and the Pennsylvania Supreme Court has held very clearly, actually explicitly, that an excited utterance is not testimonial for the purposes of *Crawford*. So again --

THE COURT: How do you get it in as -- how do you lay the groundwork that the excited event actually occurred but for the excited utterance? So you've got that circular logic. I mean, isn't the case law you have to have independent evidence or evidence independent of the statement itself that there was actually an exciting event?

MR. FINA: I think that the case law is such, and I could talk about that, Your Honor. I would refer the Court specifically to a case -- well, *Commonwealth versus Gray,* and this is not in our brief.

THE COURT: Commonwealth versus?

MR. FINA: *Gray*, G-R-A-Y, and it's at 867 A.2d 560. It's a 2005 Superior Court case, and this case really has -- all in one case -- has a fantastic discussion, Your Honor, of almost all the issues that present themselves here, for example, the notion of sufficiency of evidence where really the primary evidence, if not the only evidence, are hearsay statements, and it has, I think, an exceptional discussion about state law and federal law in that area, ultimately coming out, I believe correctly, that hearsay statements can indeed be sufficient enough for a conviction, for a finding of beyond a reasonable doubt. And it further has the discussion of what kind of evidence will assist in vesting reliability in the truthfulness, the accuracy, of the excited utterance, and this is reflective of a series of Supreme Court cases, Pennsylvania Supreme Court cases, that we do cite, I think *Chamberlain, Copeland*. I think *Washington* is the third one that we talk about.

It's interesting, I think, Judge, and I don't want to invest too much in this, but I know the *Barnes* case is out there. I don't run

away from the *Barnes* case, but I think the *Barnes* case has a holding that can be distinguished from this case and that, you know, I don't think the Supreme Court has adopted the holding in the *Barnes* case. They haven't overturned it, but if you look at the Supreme Court cases on excited utterances and compare them to *Barnes*, I think that it can be distinguished. I think *Barnes* may have overstated things a little bit. It left the door open to circumstantial, additional evidence that could vest reliability, but I think they're a little bit different than the Supreme Court. But *Gray* talks about that. And I think if you look at *Gray* it's interesting, because *Gray* was a situation where it's very clear that the excited utterance was the sole linchpin, and I use that term because that's a term that's been used in Pennsylvania cases, stating that an excited utterance, a hearsay statement, can serve as the sole linchpin between the crime and the defendant. So I think, Your Honor, that that can happen in these cases.

In *Gray*, there was no other evidence

other than the fact that a police officer could testify that, after-the-fact, the scene was consistent in what it was described and that it was apparent from the scene that a crime had been committed, but he had no evidence that the defendant was the one who committed the crime, and that's consistent, by the way, with the case that we cited in our brief -- I think it was *Shaffer*, Your Honor -- about the linchpin quote. So, Judge, I don't think that we have to provide another eyewitness. I think if we provide other evidence that can be contextual in nature, that that's sufficient to get us where we need to be.

And I think in addition, Your Honor -- going back to my original argument -- I think that evidence has to be heard before any determination can be made, because I don't know how you can possibly weigh this evidence without ever having heard any of it and make a legal determination.

THE COURT: Yeah, I understand that point, but take this example: Four people see an automobile accident here in front of the courthouse and nobody sees what happens, but

obviously the cars collided and steam is going up and someone says, "Gee, that guy just ran the red light." Now, there's no question that there is an exciting event and therefore prompted the excited utterance. Here, you have got no one seeing an accident and someone saying, "A while ago there was an accident at this corner and that guy caused it." Isn't that the problem that we are trying to deal with? Or am I misstating this in some way?

MR. FINA: I think -- but we do, Your Honor, have an eyewitness, and it's the person who makes the excited utterance.

THE COURT: Right, but the question is whether you can get the excited utterance into evidence.

MR. FINA: Right. And there has to be a viewing of the evidence. There has to be -- you have to see it. You have to weigh the nature of it, the timing of it, the tone, eyewitnesses, how they describe the person, the individual who made the statement, all of those --

THE COURT: I'm not worried about that part of the foundation. I'm curious about how

you're going to establish the exciting event itself.

MR. FINA: Your Honor, I don't think it's any different than the homicide case law that we cite, where --

THE COURT: Except that the police officer goes there and sees the body.

MR. FINA: Right, but he doesn't see the defendant, so he has no, you know --

THE COURT: But he knows there's a crime.

MR. FINA: He knows there's a crime, correct.

THE COURT: Independently, he knows there's a crime.

MR. FINA: Yes. Yes.

THE COURT: Independently, how do you know there's a crime involving Victim 8?

MR. FINA: What I'm saying, Judge, is, well, I think there's contextual evidence that we're going to introduce --

THE COURT: Okay.

MR. FINA: -- that would be consistent with what the excited utterer says, and I don't think that that is necessary. I don't think

there's a case out there, not even *Barnes*, that says it is absolutely necessary to have another eyewitness or to have other direct evidence of the criminal act.

THE COURT: Oh, no, I didn't say that, but there has to be evidence of a crime other than the exciting utterance.

MR. FINA: I agree, Judge.

THE COURT: Okay. All right.

MR. FINA: I'm not disputing that, but what I'm saying is that I guess we're talking about degrees here, and let's talk about *Barnes*, which I think is the best example of what you're talking about. In *Barnes*, you have an elderly gentlemen who calls the police and says, "I've been knocked down and so-and-so robbed me. He took $300." The police go there. I think Mr. Barnes -- or the victim at that point was unconscious. He dies from completely unrelated events, according to the case. I'm not sure how that would have happened, but he dies from unrelated events, and so literally all they put on at trial is this statement. They don't even try in any way to determine whether *Barnes* was even in that

building or even in that room or even knew the defendant, for that matter. They simply put on the police officer who says, "This is what he said when he called." I think, Judge, I have no dispute with that case, but I don't think that their holding in that case therefore means that you can't have contextual circumstantial evidence. I think if the Commonwealth had presented in that case that the victim was in the apartment with Mr. Barnes, for example, if they had interviewed Mr. Barnes and Mr. Barnes admitted, "Yeah, I was there with him at such-and-such time and, yeah, I knew he had $300 in that drawer, but I didn't take it," that would change things.

THE COURT: Okay. So your representation is you've got more than just the hearsay statement?

MR. FINA: Yes.

THE COURT: Does this push *Crawford* to its limits?

MR. FINA: I don't think it does, Judge, because like I said before, both the United States Supreme Court and the Pennsylvania Supreme Court have, I think, very

clearly said that an excited utterance isn't testimonial and doesn't fall under *Crawford*. And I think that answers the question.

THE COURT: No, I'm not suggesting *Crawford* is controlling, but the principle of *Crawford* is can you put a guy in prison when he doesn't have a chance to cross-examine his accuser?

MR. FINA: Judge, I agree that's the principle of *Crawford*. The appellate courts in both Pennsylvania and in the federal system have declined to extend it to the extent that you're suggesting.

THE COURT: I know I'm overstating it.

MR. FINA: Yeah, I mean, they recognize that principle, but they have limited it. They have recognized, as with excited utterance and a number of other examples, where it doesn't extend that far. There are circumstances -- I mean, the U.S. Supreme Court and the Pennsylvania Supreme Court have said, "We have historically vested such faith and reliability in excited utterances. We view those as innately truthful because of the nature in which they're issued that we are

going to allow these to stand and act as exception, not only to hearsay, but to *Crawford*, and also to stand as -- they can form the basis, the linchpin, for a conviction." And, you know, there are a number of cases and we cite them. I mean, *Gray* is another one where that's precisely what happened. *Gray* is straight up an excited utterance case where that was the evidence that convicted Gray.

THE COURT: Pre-*Crawford*?

MR. FINA: No.

THE COURT: *Crawford* is a 2008 case, right?

MR. FINA: Your Honor, *Crawford* is discussed extensively in *Gray*.

THE COURT: I thought you said *Gray* was a 2005 case. Maybe I misunderstood. But, in any event, if it is, I will certainly take a look at it.

MR. FINA: Your Honor, in the *Gray* case there is a really extensive discussion of the U.S. Supreme Court holding in *Crawford*, which is, I believe, a 2004 case.

THE COURT: Okay. I could be entirely wrong on that. I'll take a look at it. Okay.

I see the problem. Anything more you want to argue, Mr. Fina?

MR. FINA: I'll defer to you, Your Honor, if there's anything else you want to hear about --

THE COURT: No, I said I think I have interrupted your argument enough. Go ahead if there's anything more you want to put on the record or anything you want to say.

MR. FINA: I'm content, Your Honor.

THE COURT: Mr. Amendola, any rebuttal?

MR. AMENDOLA: Your Honor, again we've briefed this. We have no doubt the Court is well aware of the issues and we're confident the Court will make the proper decisions.

THE COURT: Thank you. Was there anything else that we needed to do by way of -- do you want to make any further argument? I don't want to cut you off.

MR. FINA: Your Honor, my colleague, Attorney McGettigan, had, I think, a good response to the car crash.

THE COURT: Oh, okay. I'm anxious to hear it.

MR. FINA: I mean, just to -- I mean --

THE COURT: Sure. Go ahead.

MR. FINA: He said that the -- I mean, the evidence that we will produce regarding the janitors and the shower episode, No. 8, would be the equivalent -- we have people who will have observed the before and after. So, in other words, in the car crash example it would be you have an individual who sees the car crash and issues an excited utterance about it and then perhaps is unavailable, and then you would have witnesses who come upon the crash scene afterwards who can establish that there was a crash, and you have witnesses who can testify to seeing the cars racing towards each other, but not seeing the actual crash. So it would be circumstantial evidence before and after that indeed the event had occurred.

THE COURT: Okay. All right. Was there anything else that I didn't mention that you wanted to discuss this afternoon?

MR. AMENDOLA: Yes, Your Honor. If we could see Your Honor in chambers?

THE COURT: Yeah, we're going to do

that. We're going to have a supplemental pretrial.

MR. AMENDOLA: Yes. But there are some matters related to yesterday I'd like to just clarify.

THE COURT: Okay. Very well.

MR. AMENDOLA: For which we should have a court reporter.

THE COURT: Okay. All right. Anything further?

(No response.)

THE COURT: Okay. We'll take about a 10-minute recess and then meet in chambers. All right. Thank you very much.

(Whereupon, the proceedings were recessed.)

E N D O F P R O C E E D I N G S

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me upon the hearing of the within matter, and that this copy is a correct transcript of the same.

_____

Date Thomas C. Bitsko, CVR-CM
Official Court Reporter

APPROVAL OF COURT

The foregoing record of the proceedings had upon the hearing in the within case is hereby approved and directed to be filed.

_____

Date John M. Cleland, Senior Judge