



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

GRAHAM B. SPANIER,

Plaintiff,

v.

LOUIS J. FREEH and FREEH SPORKIN
& SULLIVAN, LLP,

Defendants.

Docket No. 2013-2707

PAUL H. JURY
CENTRE COUNTY, PA
2015 JUL 30 PM 4:31

**MEMORANDUM OF DEFENDANTS
LOUIS J. FREEH AND FREEH SPORKIN & SULLIVAN LLP
IN RESPONSE TO THE COURT’S JUNE 30 ORDER**

Defendants Louis J. Freeh and Freeh Sporkin & Sullivan LLP (“FSS”) respectfully submit this Memorandum summarizing the current status of the above-captioned case in response to this Court’s June 30, 2015 Order.¹

I. PROCEDURAL TIMELINE

- July 11, 2013: Spanier initiates this suit by Praecipe for Writ of Summons.

¹ Defendants’ Memorandum is organized in the sequence directed by the Court in its Order. The Court may, however, find it useful to read section IV, which provides an overview of the factual background of the case, prior to reading the remaining sections.

- August 9, 2013: Spanier seeks reissuance of the writ of summons.
- September 12, 2013: Spanier seeks an amended writ of summons.
- September 30, 2013: Defendants file a Praecipe to File Complaint, seeking to compel Spanier to reveal the substance of his defamation claim against Defendants.
- October 18, 2013: Spanier moves for a stay of proceedings, which is opposed by Defendants. Spanier asserts that during the pendency of the criminal trial against Spanier and co-defendants Gary Schultz and Timothy Curley, Fifth Amendment concerns will prevent Spanier from litigating this case.
- February 25, 2014: The stay is granted.
- March 25, 2014: Defendants take an interlocutory appeal, arguing that the grant of a stay will violate their right to remove the case to federal court because it is not clear Defendants could remove before a complaint is filed, and the stay presented a risk that the one-year deadline for removal imposed by 28 U.S.C. § 1446 would expire prior to the filing of a complaint.
- June 30, 2014: The Superior Court relinquishes jurisdiction, finding that the stay order is not an appealable collateral order.
- July 9, 2014: Defendants file a Notice of Removal, seeking to remove this action to the U.S. District Court for the Middle District of Pennsylvania. Defendants explained that even though no complaint had been filed, complete diversity of citizenship (and thus federal jurisdiction) was present and that failing to timely remove the case could result in the expiration of the one-year deadline for removal imposed by 28 U.S.C. § 1446.
- August 8, 2014: Spanier files a Motion to Remand, arguing that removal is premature because no complaint has been filed.
- November 26, 2014: The U.S. District Court for the Middle District of Pennsylvania remands the case, finding that because no complaint has been filed, removal is premature. The Court noted, however, that the Pennsylvania Superior Court had rejected Defendants' appeal because a

federal court may “find an equitable reason to allow defendants to remove the case outside of the one-year statutory deadline for removal of diversity cases mandated by 28 U.S.C. § 1446.” *Spanier v. Freeh*, No. CIV.A. 4:14-1316, 2014 WL 6687323, at *2 (M.D. Pa. Nov. 26, 2014), attached as Ex. 1. The Court further distinguished cases holding that the one-year deadline is a strict bar to removal because unlike in those cases, here “defendants have acted diligently to protect their rights both in this court and in state court.” *Id.* at *4.

- March 18, 2015: Spanier files a Motion to Modify (but not completely remove) the Stay. Spanier recognizes that in light of his and other defendants’ appeals to the Superior Court, the delay in the criminal case may be “indefinite.” In contrast to his position at the time he initially moved for a stay, where he argued he would be prejudiced by the taking of any action in this case, Spanier now argues that he would suffer no prejudice from filing a complaint. Spanier also seeks to initiate discovery against Freeh and FSS.

Spanier simultaneously files a Motion for Leave to Join Additional Parties in which he seeks to join The Pennsylvania State University (“Penn State” OR “PSU”) and Freeh Group International Solutions LLC (“FGIS”) as parties. Spanier attaches as an exhibit to the Motion a 139-page, 432-paragraph Proposed Complaint, which for the first time, on two of the 139 pages, disclosed the allegations underlying his claims against Defendants.

In the Proposed Complaint, Spanier alleges Freeh and FSS “knowingly and maliciously published numerous false and defamatory statements concerning” Spanier, *see* Proposed Complaint ¶ 3, and that those statements were “made with actual knowledge of falsity or, at a minimum, a reckless disregard for the truth.” *Id.* at ¶ 153. Spanier also asserts claims for tortious interference with prospective contractual or business relations against Freeh and proposed defendant FGIS and breach of contract against proposed defendant PSU.

- April 10, 2015: Defendants move for appointment of an out-of-county judge. Defendants point out that an out-of-county judge had been appointed in the previous Sandusky-related cases filed in Centre County, and that this case involves elements of each of those prior cases.

- May 1, 2015: Judge Jonathan D. Grine recuses himself in response to the Motion.
- June 1, 2015: President Judge Thomas K. Kistler issues an order granting the appointment of an out-of-county judge.
- July 1, 2015: This Honorable Court, which was appointed to hear this matter, docketed an Order of Court requesting that the parties each file memoranda summarizing the status of this case.

II. THE PENDING MOTIONS

Currently pending before the Court are two motions: (i) Spanier's Motion to Modify the Stay, and (ii) Spanier's Motion for Leave to Join Additional Parties.

A. Motion to Modify the Stay

Defendants do not object to Spanier's Motion to Modify the Stay to the extent that Spanier seeks to lift the stay and file a complaint.² To the extent that Spanier's Motion seeks to impose lopsided rules on discovery, *see, e.g.* Pl.'s Mem. of Law in Support of Mot. to Modify Stay at 10 (suggesting that discovery should be "sequenced" to address a purported "information imbalance" between Plaintiff and Defendants), or to obtain an order setting the duration of third-party discovery, *id.* at 10-11, however, Defendants do oppose the Motion. Rather, the stay governing this action should be lifted in its entirety as to all parties, and any Fifth

² As noted, the Proposed Complaint contains 432 numbered paragraphs set forth in 139 pages. It is, in Defendants' view, exceedingly and unnecessarily prolix, and Defendants are considering filing a Motion to Strike to compel Spanier to file a new Complaint setting forth the gravamen of this alleged defamation without the lengthy and gratuitous public relations spin.

Amendment objection by a third party should be dealt with on a case-by-case basis if it ever arises.

B. Motion for Leave to Join Additional Parties

Defendants oppose Spanier's Motion for Leave to Join Additional Parties in its entirety. Joinder of Penn State and FGIS is improper and would result in prejudice to the existing defendants Freeh and FSS.

III. SUMMARY OF ANY OTHER KNOWN PROCEDURAL ISSUES

Judge Grine did not have the opportunity to enter a briefing schedule on Plaintiff's pending motions prior to his recusal. Accordingly, Defendants request that this Court enter a briefing schedule on Spanier's pending motions.

**IV. ADDITIONAL ISSUES FOR THE COURT'S ATTENTION:
BACKGROUND FACTS**

This case arises from the events surrounding the investigation by Freeh and FSS in 2011 and 2012 into the Gerald A. "Jerry" Sandusky child sex abuse scandal at PSU.³ Defendants respectfully suggest that the Court may find it useful to be acquainted with the factual background leading to this litigation.

³ Sandusky, the former Assistant Coach at PSU, retired in 1999, but had continued access to PSU facilities including the football locker room pursuant to the terms of his retirement agreement.

A. Improprieties Involving Sandusky Are Alleged in 1998 and 2001

1. The 1998 Incident

On May 4, 1998, the mother of one of the children who participated in the charity organization, The Second Mile, called the University Police Department, stating that her son had told her that Sandusky had hugged him while showering in a PSU locker room.

During a conversation between the boy's mother and Sandusky that was surreptitiously monitored by officers from the University police department, Sandusky admitted showering with the boy, but denied that any sexual conduct had occurred. The University police also conducted a separate interview of Sandusky, in which Sandusky again admitted showering with the child as well as with other children. Nevertheless, no charges were brought, and the investigation was closed.

Between May 4, 1998 and early June, when the investigation into Sandusky's conduct was closed, Curley and Schultz corresponded several times regarding the status of the investigation. In a May 6, 1998 email, on which Spanier was copied, Schultz informed Curley and Spanier that "the Public Welfare people will interview the individual Thursday." *See* Ex. 2. On June 9, 1998, Schultz emailed Curley an update on the investigation, informing them that the University police had "concluded that there was no criminal behavior" and the investigation was closed. *See* Ex. 3. Schultz again copied Spanier as well. At the preliminary

hearing on the charges levied against Schultz and Curley in 2011, Schultz testified that “it would have been a routine kind of way of handling things” for Schultz to have kept Spanier informed about the 1998 incident. *See* Transcript of Preliminary Hearing at 219, *Com. v. Schultz* (Com. Pl. Dauphin Cnty. Dec. 16, 2011) (excerpt attached as Ex. 4).

2. The 2001 Incident

In February 2001, Graduate Assistant Football Coach Michael McQueary reported another incident involving Sandusky. McQueary reported that he had come back to the support staff locker room on a Friday night and found Sandusky with a minor boy in the showers. He stated that Sandusky and the child were in what he described as a “sexual position.”

After Schultz and Curley were informed of the incident, Schultz, Spanier, and Curley arranged a meeting to occur on February 25, 2001. Handwritten notes taken by Schultz and dated the same day state, “(3) Tell chair[] of Board of Second Mile (2) Report to Dept of Welfare. (1) Tell JS to avoid bringing children alone into the Lasch Bldg.” *See* Ex. 5. As the judge presiding over Spanier’s criminal case noted, Schultz testified that he believed that he would have consulted with Spanier regarding this incident, and that he believed that Spanier was aware of the 1998 allegations at the time of the 2001 incident. *Mem. Op.* at 17, *Com. v. Curley, et al.*

(Com. Pl. Dauphin Cnty. Jan 14, 2015), attached as Ex. 6. Curley also testified that he had reported information regarding the event to Spanier. *See id.* at 14.

On Tuesday, February 27, 2001, Curley sent an email to Spanier and Schultz stating that he “was uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received.” *See* Ex. 7 (highlighting added). Curley further proposed that he “would indicate we feel there is a problem and we want to assist the individual to get professional help,” and that while he would not report the incident to an outside agency, he would tell “the individual” not to bring “his guests” to PSU facilities. *Id.*

Later in the day, Spanier responded to Curley’s email, stating that the approach Curley proposed is “acceptable to me.” Spanier further stated, “The only downside for us is if the message isn’t ‘heard’ and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.” *Id.*

No further action was taken with regard to this incident. Sandusky was not reported to the Department of Public Welfare or to the police and no further investigation occurred. No effort was made to identify the child or contact his parents.

According to the findings of the Thirty-Third Statewide Investigating Grand Jury (“Grand Jury”) impaneled to investigate the allegations against Sandusky, four other victims were assaulted between the time of this incident and the time when Sandusky was finally arrested and criminally charged in 2011.

B. A Grand Jury Investigates Allegations of Wrongdoing at PSU

In 2009, the Grand Jury was impaneled to investigate allegations of misconduct by various individuals in connection with the handling of the Sandusky child abuse scandal. Following its investigation, the Grand Jury issued a 23-page summary of its findings of fact on November 4, 2011. In its findings, the Grand Jury summarized the testimony on which its findings of fact were based:

Curley testified that [a Penn State] graduate assistant reported to [Curley and Schultz] that “inappropriate conduct” or activity that made him “uncomfortable” occurred in the Lasch Building shower in [2001]. . . . Curley testified that he also advised Penn State University President Graham Spanier of the information he had received . . . and the steps he had taken as a result. . . . Spanier testified to his approval of the approach taken by Curley. Curley did not report the incident to [PSU] Police, the police agency for the University Park campus or any other police agency. . . .

Schultz conceded that the report the graduate assistant made was of inappropriate sexual conduct by Sandusky. . . . Schultz confirmed that University President Graham Spanier was apprised in [2001] that a report of an incident involving Sandusky and a child in the showers on campus had been reported by an employee. Schultz testified that Spanier approved the decision to ban Sandusky from bringing children into the

football locker room and the decision to advise The Second Mile [charity organization] of the [2001] incident.

Graham Spanier . . . testified that Curley and Schultz came to him in [2001] to report an incident with Jerry Sandusky that made a member of Curley's staff "uncomfortable." Spanier described it as "Jerry Sandusky in the football building locker area in the shower [] with a younger child and that they were horsing around in the shower." . . . Spanier denied that it was reported to him as an incident that was sexual in nature and acknowledged that Curley and Schultz had not indicated any plan to report the matter to any law enforcement authority. . . . Spanier also denied being aware of a 1998 University Police investigation of Sandusky. . . .

Nov. 4, 2011 Grand Jury Presentment at 8-11, attached as Ex. 8. The Grand Jury found that "the sexual assault of a minor male in [2001] should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency," but that no report was made. *Id.* at 12.

C. Freeh and FSS Are Retained to Investigate PSU's Handling of the Sandusky Matter

Seventeen days after the Grand Jury's findings were revealed, PSU announced that former United States District Court Judge and Director of the Federal Bureau of Investigation Louis Freeh and the law firm FSS had been retained as Special Investigative Counsel to conduct an independent inquiry into PSU's handling of the allegations against Sandusky.

Over the next seven months, Freeh and FSS performed a far-ranging investigation of the facts surrounding the allegations against Sandusky. On July 12, 2012, FSS released the “Report of the Special Investigative Counsel Regarding Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky” (the “Report”).⁴ As detailed in the Report, Freeh and FSS conducted over 430 interviews of key PSU personnel and other knowledgeable individuals, reviewed over 3.5 million pieces of electronic data and documents, and summarized their findings in a 162-page report supported by over 700 footnoted citations to the various pieces of evidence gathered.

Consistent with the Grand Jury’s initial findings, the Report concluded, *inter alia*, that various PSU officials had been informed of inappropriate behavior by Sandusky on one or more occasions, but that no systematic investigation was undertaken and no report made to state authorities. The Report concluded, among other things, that “[d]espite their knowledge of the criminal investigation of Sandusky [in 1998], Spanier, Schultz, Paterno and Curley took no action to limit Sandusky’s access to Penn State facilities or took any measures to protect children on their campuses,” Report at 39, and that despite “having prior knowledge of the 1998 child sex abuse allegation against Sandusky,” Spanier, Schultz, and Curley

⁴ See <http://progress.psu.edu/the-freeh-report>.

did not inform any law enforcement agency about the allegation against Sandusky in 2001. *Id.* at 64.

D. Spanier Is Investigated and Criminally Charged

Based on newly discovered documentary evidence, including the emails cited *supra*, the Investigating Grand Jury issued a supplemental presentment on November 1, 2012. Nov. 1, 2012 Grand Jury Presentment, attached as Ex. 9. In the supplemental presentment, the Grand Jury concluded that Spanier had “engaged in a repeated pattern of behavior that evidenced a willful disregard for the safety and well-being of minor children on the Penn State campus.” *Id.* at 33. The Grand Jury found that “the first response [to the 2001 incident] should have been an immediate report to law enforcement,” *id.*, but instead, Spanier had “endorsed the plan of action that involved circumventing any outside agency” even though he “recognize[d] the potential consequences for their failure to report” that activity to authorities. *Id.* at 18.

The Grand Jury further concluded that Spanier, Curly, and Schultz “endangered the welfare of children by failing to report the [2001] incident witnessed by Michael McQueary to any law enforcement or child welfare agency,” and that “[t]here was never any effort made to locate, identify, or otherwise protect Victim 2 from foreseeable future harm.” *Id.* at 34. Instead, the Grand Jury found, “[t]he continued cover up of this incident and the ongoing failure to report placed

every minor male child who would come into contact with Sandusky in the future in grave jeopardy of being abused.” *Id.* at 35. The Grand Jury concluded that as a result of the failure to report the abuse, Spanier, Curly and Schultz “directly endangered” five victims and “allowed Sandusky to abuse them between 2001 and 2008.” *Id.*

The Grand Jury further determined that Spanier had committed perjury in his testimony before the Grand Jury, had “engage[d] in many acts to obstruct justice,” *id.* at 38, and failed to report an allegation of sexual assault that should have been reported to law enforcement. *Id.* at 39.

E. At the Preliminary Hearing on the Charges Against Spanier, the Court Finds Probable Cause to Hold Spanier Over for Trial

A preliminary hearing on the charges was held on July 29-30, 2013. The hearing lasted for two days, during which the Office of the Pennsylvania Attorney General and counsel for Defendants Spanier, Schultz, and Curley presented evidence and argument on the charges, and conducted examinations of eight witnesses. Following this adversarial presentation, Magisterial District Judge William Wenner found the evidence sufficient to establish a prima facie case against the defendants. Spanier was subsequently indicted on eight charges

including perjury, endangering the welfare of children, obstruction of an investigation, failure to report child abuse and criminal conspiracy.⁵

F. Spanier's Attack on the Charges Lodged Against Him

In response to his criminal indictment, Spanier has engaged in a multifaceted campaign to publicize his version of the events that occurred at PSU, including not only providing multiple interviews to media sources such as ABC News and The New Yorker magazine,⁶ but also the filing of this lawsuit almost a year after the Report was released. Spanier and his counsel have to this day been vocal regarding their views on the Penn State/Sandusky scandal, the Report, and this very suit, despite the fact that it has been stayed at Spanier's request since February 2014. Just this month, Spanier's counsel Libby Locke submitted a letter to the *Philadelphia Inquirer* referring to the Report as "character assassination" and

⁵ See, e.g., Jenna Johnson, *Former Penn State President Charged in Connection with Sandusky Case*, Washington Post (Nov. 1, 2012), http://www.washingtonpost.com/local/education/former-penn-state-president-graham-spanier-charged-in-connection-with-jerry-sandusky-case/2012/11/01/d7cdd282-243e-11e2-ba29-238a6ac36a08_story.html.

Spanier's criminal trial remains ongoing. On January 14, 2015, Judge Todd Hoover issued an order refusing to dismiss the criminal charges against Spanier and co-defendants Schultz and Curley. The defendants in the criminal case have appealed that ruling to the Superior Court, and the criminal case is stayed pending the resolution of the appeal.

⁶ In fact, this pattern of public statements began even before Spanier was criminally charged. See Nov. 1, 2012 Grand Jury Presentment at 39 n.25 ("It should be noted that Spanier continues to mislead with numerous public statements that contain demonstrably false statements.").

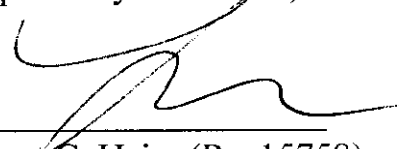
stating, “That is why Dr. Spanier, as my legal client, filed a defamation action against Louis Freeh.” Libby Locke, Letter to the Editor, Philadelphia Inquirer (July 1, 2015), <http://www.philly.com/philly/opinion/inquirer/311093531.html>.⁷

G. Spanier’s Claim for Defamation

Following the Investigating Grand Jury investigation and the indictment, Spanier filed a claim for defamation against Freeh and FSS based on the findings of the Report. Despite the prolixity of Spanier’s Proposed Complaint, the essence of his claim consists of the statements listed in a single paragraph on pages 107 and 108 of the Proposed Complaint, which Spanier alleges are defamatory. *See* Ex. 10. Spanier alleges that the Report defamed him by finding that he “failed to protect against a child sexual predator harming children for over a decade,” that he “empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University’s facilities and affiliation with the University’s prominent football program,” and that he “fail[ed] . . . to adequately report and responds to the actions of a serial sexual predator.” Proposed Complaint ¶ 283; *see* Ex. 10.

⁷ The Editorial to which Ms. Locke was responding had little, if anything, to do with Freeh or even the Sandusky affair.

Respectfully submitted,



Robert C. Heim (Pa. 15758)
Michael L. Kichline (Pa. 62293)
William T. McEnroe (Pa. 308821)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (phone)
(215) 994-2222 (facsimile)

Lisa M. Welsh (Pa. 307382)
MILLER, KISTLER & CAMPBELL
720 South Atherton Street, Suite 201
State College, PA 16801-4669
(814) 234-1500 (phone)
(814) 234-1549 (facsimile)

*Attorneys for Defendants Louis J.
Freeh and Freeh Sporkin & Sullivan,
LLP*

Dated: July 30, 2015

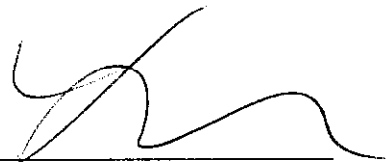
CERTIFICATE OF SERVICE

I, Lisa M. Welsh, hereby certify that I caused to be served on July 30, 2015,
a true and correct copy of the foregoing Memorandum by first-class mail upon the
following:

Kathleen V. Yurchak
GOODALL & YURCHAK P.C.
328 South Atherton Street
State College, PA 16801
(814) 237-4100
(814) 237-1497 (fax)
yurchak@centrelaw.com

Thomas A. Clare
Elizabeth M. Locke
Andrew C. Phillips
CLARE LOCKE LLP
902 Prince Street
Alexandria, VA 22314
(202) 628-7400
tom@clarelocke.com
libby@clarelocke.com
andy@clarelocke.com

Attorneys for Plaintiff



Lisa M. Welsh

EXHIBIT 1

2014 WL 6687323

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.

Graham B. SPANIER, Plaintiff

v.

Louis J. FREEH and Freeh Sporkin
& Sullivan LLP, Defendants.

Civil Action No. 4:14–
1316. | Signed Nov. 26, 2014.

Attorneys and Law Firms

Andrew C. Phillips, Elizabeth Locke, Thomas A. Clare, Clare Locke LLP, Alexandria, VA, Elizabeth Ainslie, Schnader Harrison Segal & Lewis LLP, Philadelphia, PA, for Plaintiff.

Asha T. Mehrotra, Michael L. Kichline, Robert C. Heim, William T. McEnroe, Dechert LLP, Philadelphia, PA, for Defendants.

MEMORANDUM

MALACHY E. MANNION, District Judge.

*1 This case's unusual procedural background has brought it before this court for a determination of whether its removal to this venue was proper and whether plaintiff's motion to remand the matter to the Centre County Court of Common Pleas must be granted. Pursuant to Pennsylvania procedure, plaintiff commenced this action by filing a writ of summons in state court on July 11, 2013. Because there is a criminal matter underlying the instant suit, the state court judge stayed the case pending resolution of the criminal case, and, despite defendants' attempts to fight the stay and force plaintiff to file a complaint, no complaint has yet been filed in the case. Anxious that if they did not remove the case within 28 U.S.C. § 1446(c)(1)'s one-year time limit on the removal of diversity cases, their path to federal court would be permanently barred, defendants removed the case on July 9, 2014 despite the fact that no complaint had been filed. Plaintiff moves to remand on several bases, including that the removal was premature because no initial pleading has been served in the case. After considering briefs and oral argument on the matter, the court has determined that the removal was premature and that the

case must be remanded to the Court of Common Pleas of Centre County.

I. BACKGROUND

Plaintiff Graham Spanier is a former president of the Pennsylvania State University ("Penn State"). During his tenure, the sexual abuse of children by former Penn State football coach Jerry Sandusky came to light. In November of 2012, plaintiff was charged with various crimes in Pennsylvania state court in connection with the Sandusky matter. No date has been set for trial in the plaintiff's criminal case.

Plaintiff instituted this suit against defendants Louis Freeh, Freeh Sporkin & Sullivan LLP ("FSS"), and Pepper Hamilton LLP by filing a writ of summons in the Centre County Court of Common Pleas on July 11, 2013. He filed an amended writ of summons against Louis Freeh and FSS on September 12, 2013, dropping Pepper Hamilton LLP from the case. The civil cover sheet for the state court writ indicates that "slander/libel/defamation" is the cause of action for the suit, (Doc. 1–2, at 2), a claim arising from the report issued by Freeh and FSS in connection with its investigation of the Sandusky matter.

After receiving the amended writ, defendants ruled plaintiff to file a complaint. (Doc. 1–5). Instead of doing so, plaintiff moved to stay the 2 proceedings in the civil case until his underlying criminal case is resolved. Defendants opposed the motion. A hearing on the stay was held in January 2014. Pennsylvania Court of Common Pleas Judge Jonathon Grine applied the six-part test governing whether a stay ought to be entered to protect a party's Fifth Amendment privilege, and determined that the balancing of the factors led to a conclusion that issuing the stay was appropriate on February 25, 2014. (Doc. 1–6). Defendants moved for reconsideration of the decision to impose a stay, but their motion was denied.

*2 Defendants then appealed the motion to stay to the Superior Court of Pennsylvania, arguing various positions, including that the decision to stay the case put their right to remove the case to federal court in jeopardy. The Superior Court denied the appeal for lack of jurisdiction on June 30, 2014, because the order to stay proceedings did not qualify as a final appealable order. The Superior Court noted its belief that the claim would not be irrevocably lost if review were postponed until judgment in the case was final, because there is a chance that a federal court would find an equitable reason to allow defendants to remove the case outside of the one-year statutory deadline for removal of diversity cases mandated

by 28 U.S.C. § 1446. Following the denial of their appeal, the defendants removed the case to this court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. (Doc. 1). Plaintiff moved to remand the case to the Court of Common Pleas of Centre County. (Doc. 7). The matter has been briefed, (Docs. 8, 18, 21), and the court heard oral argument on the motion to remand on November 14, 2014.

II. STANDARD OF REVIEW

“Under 28 U.S.C. § 1441(a), defendants may generally remove civil actions from state court to federal district court so long as the district court would have had subject-matter jurisdiction had the case been originally filed before it.” *A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 208 (3d Cir.2014). Upon a motion to remand a removed action, the removing party bears the burden of demonstrating that removal was proper. *Scanlin v. Utica First Ins. Co.*, 426 F.Supp.2d 243, 246 (M.D.Pa.2006) (citing *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir.1990)). “The party asserting jurisdiction bears the burden of showing the action is properly before the federal court.” *Id.* “[R]emoval statutes ‘are to be strictly construed against removal and all doubts should be resolved in favor of remand.’ “ *A.S. ex rel. Miller*, 769 F.3d, at 208 (quoting *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir.1992)).

III. DISCUSSION

Defendants removed this action despite that fact that no complaint has yet been filed in the case. Defendants represent that they took this course of action to protect their rights because, due to the stay of the proceedings in state court, their ability to remove the case within the constraints presented by various sections of 28 U.S.C. § 1446 has been jeopardized.

28 U.S.C. § 1446(b)(1) provides that:

“The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served

on the defendant, whichever period is shorter.

*3 While 28 U.S.C. § 1446(b)(3) provides that:

“... if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”

And finally, 28 U.S.C. § 1446(c)(1) states that:

“A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”

Defendants removed this case on July 9, 2014 in order that it not be beyond the one-year removal limit imposed by § 1446(c)(1), which some courts have ruled is an absolute bar on removal that begins to run at the time of a filing of a writ of summons, which, under Pennsylvania law, properly commences an action. *Pa.R.Civ.P. 1007*. However, in removing the case, they failed to comply with § 1446(b)(1).

The Third Circuit has determined that the 30-day period under § 1446(b)(1) begins to run *only* when a complaint, and not merely a writ of summons, has been filed. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 223 (3d Cir.2005) (relying on *Murphy Bros., Inc., v. Michetti Pipe Stringing, Inc.*, 526 U.S. 317 (1999)). In other words, while a writ of summons commences an action under Pennsylvania law, it “can no longer be the ‘initial pleading’ that triggers the 30-day period for removal” under § 1446. *Id.*

Here, there is no dispute that no complaint has been filed in this case. Without such a complaint, the removal is premature. “[P]arties are forbidden from filing notice of removal prematurely, prior to the time when grounds for removal are apparent.” *Stephens v. State Farm Fire & Cas. Co.*, 2014 WL 1784686, at* 2 (Mar. 24, 2014)

M.D. Pa.2014). A writ of summons under Pennsylvania law “merely contains the plaintiff’s name, the defendant’s name, and notice that an action has been commenced, with the county, the date, the name of the prothonotary or clerk, and the deputy.” *Sikirica*, 416 F.3d, at 222. Such information is not sufficient to give a defendant notice “what the action is about.” *Id.*, at 223. The writ of summons in this case is just such a bare-bones document as described in *Sikirica*. The court appreciates that complete diversity may exist in this case and that federal jurisdiction may possibly be proper. However, in addition to diversity the court must determine that the amount in controversy exceed \$75,000.00. No such information can be gleaned from the summons. Because “the complaint is the operative document for removal,” and there is none in this case, see *In re Avandia Marketing, Sales Practices and Products Liability Litig.*, 941 F.Supp.2d 568, 571 (E.D.Pa.2013), the motion to remand must be **GRANTED** as a proper determination of removal is premature.

*4 The court recognizes that the unusual circumstances of this case have put defendants in a difficult position as to their ultimate ability to remove the case to federal court, because once a complaint is filed and the defendants are able to remove it, it is possible that a federal court could rule that the year time limit for removal of § 1446(c)(1) has elapsed. The court also recognizes that defendants have acted, both in their actions in state court and here, to protect their ability to remove the case. Nevertheless, the court must remand the case as it is guided by several principles.

First, it is well-settled that the removal rules are to be read strictly, and to favor remand. *A.S. ex rel. Miller*, 769 F.3d, at 208. Here, it is clear and undisputed that the removal was premature. Second, because the removal is premature, whether the case will be removable at a later date is not something that the court can determine now. There is no document from which the court can determine the removability of this action, and defendant does not dispute that fact in asking the court to rule that the one-year limit does not apply. But defendant’s desire for a ruling on the effect of § 1446(c) effectively asks the court to make a determination that it will have jurisdiction in the future, and, as “a ruling on the court’s jurisdiction in the future would ‘constitute nothing more than an advisory opinion based on a hypothetical scenario,’ “ the court cannot make that determination at this time. *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 307 (3d Cir.2000) (citing *Moore’s Fed. Practice* § 101.75 (3d ed.1999)). While it is conceivable that

the case will be removable in the future, it is also conceivable that it will not be so. As noted by counsel at the oral argument, plaintiff is evaluating whether to add additional parties and claims that might have the effect of destroying diversity jurisdiction.

Third, the law on the applicability of the one-year limitation is not firmly settled in this Circuit, and it is far from clear whether or not defendants would be barred from removing the case in the future. On one hand, some district courts have ruled that the one-year limit on removal is an absolute bar that runs from the date of the commencement of an action by filing a writ of summons. See *Donato–Cook v. State Farm Fire & Cas. Co.*, 2009 WL 2169168 (M.D.Pa. Jul.20, 2009); *Penn Patio Sunrooms, Inc. v. Ohio Cas. Ins. Co.*, 2008 WL 919543 (M.D.Pa. Mar.31, 2008); *Namey v. Malcolm*, 534 F.Supp.2d 494 (M.D.Pa.2008); *Kowalski v. PBM Logistics, LLC* 2012 WL 3890249 (M.D.Pa. Aug.6, 2012); *Samii v. Allstate Ins. Co.*, 2010 WL 3221924 (E.D.Pa. Aug.12, 2010).

However, there are arguments supporting defendants’ position as well. In the majority of the above cases, the defendants had taken no action to force plaintiffs to file complaints in a timely fashion, thus leading the courts to find that defendants were at least partially responsible for their own untimeliness in removing the cases. This case is in stark contrast, as defendants have acted diligently to protect their rights both in this court and in state court. Further, at least one district court in Pennsylvania has held that a stay in state court tolls the running of the one-year limitation in § 1446. See *Cabibbo v. Einstein/Noah Bagel Partners, L.P.*, 181 F.Supp.2d 428, 430 (E.D.Pa.2002).

*5 What is more, several courts have disagreed with the above cases as to whether the one-year limit serves as an absolute bar and runs from the filing of a writ of summons. See *Parker Hannifin Corp. v. Federal Ins. Co.*, 2014 WL 2457408 (W.D.Pa. May 29, 2014) (citing *Sikirica*, 416 F.3d at 220 in holding that the plain language of the statute shows the one-year removal limit “applies only if the initial pleading does not set forth the grounds for removal”); *Heffran v. State Auto Property & Cas. Ins. Co.*, 2013 WL 4041171, at *4, n. 3 (M.D.Pa. Aug.7, 2013) (noting that the one-year limitation only applies when “the case stated by the initial pleading is not removable”); *Sheller, Ludwig & Sheller, P.C. v. Catalano & Plache, PLLC*, 2006 WL 3097837 (E.D.Pa. Oct.27, 2006) (same). Thus, while the state of the law as to the one-year removal period is presently unclear, these conflicts may be resolved by the Circuit Court by the time this case becomes

ripe for removal pursuant to 1446(b). As such, it is far from clear whether this court's decision will preclude defendants from seeking and potentially obtaining a federal forum for this case in the future.

Finally, having determined that there is no operative document from which it is able to determine whether subject matter jurisdiction exists, the court will not address the issues raised by plaintiff as to whether there is complete diversity in this case.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion to remand, (Doc. 7), is **GRANTED**. The case is remanded to the Centre County Court of Common Pleas. A separate order shall issue.

All Citations

Slip Copy, 2014 WL 6687323

EXHIBIT 2

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, May 06, 1998 2:06 PM
To: Tim Curley
Cc: Spanier-Graham (GBS)
Subject: Re: Joe Paterno

Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday.

At 05:24 PM 5/5/98 -0400, Tim Curley wrote:

>I have touched base with the coach. Keep us posted. Thanks.

>

>Tim Curley

>Tmc3@psu.edu

>

>

>

EXHIBIT 3

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:09 AM
To: Curley-Tim (TMC)
Cc: Spanier-Graham (GBS); Harmon-Thomas (TRH)
Subject: Re: Jerry

They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriately investigated and I hope it is now behind us.

>Date: Mon, 08 Jun 1998 21:59:42 -0400
>To: Tim Curley <tmc3@psu.edu>
>From: "Gary C. Schultz" <gcs2@psu.edu>
>Subject: Re: Jerry

>
>Tim, I don't have an update at this point. Just before I left for vac, Tom told me that the DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you.

>
>At 10:27 AM 5/30/98 -0400, Tim Curley wrote:
>>Any further update?

>>
>>
>>
>>

>>At 09:46 AM 5/19/98 -0400, you wrote:
>>>No, but I don't expect we'll hear anything prior to the end of this week.

>>>
>>>At 09:37 PM 5/18/98 -0400, Tim Curley wrote:
>>>>Any update?

>>>>
>>>>

>>>>At 04:11 AM 5/14/98 -0400, you wrote:
>>>>>Tim, I understand that a DPW person was here last week; don't know
>>>>>for sure if they talked with Jerry. They decided to have a child
>>>>>psychologist talk to the boys sometime over the next week. We won't know anything before then.

>>>>>
>>>>>At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>>>>>>Anything new in this department? Coach is anxious to know where it stands.

>>>>>>
>>>>>>_____

>>>>>>>Tim Curley
>>>>>>>Tmc3@psu.edu

>>>>>>>
>>>>>>>
>>>>>>>
>>>>>>>Gary C. Schultz
>>>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>>>208 Old Main
>>>>>>>Phone: 865-6574

EXHIBIT 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
OF
: DAUPHIN COUNTY, PENNSYLVANIA
V.
:
TIMOTHY MARK CURLEY : No. CP-22-MD-1374-2011

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
OF
: DAUPHIN COUNTY, PENNSYLVANIA
V.
:
GARY CHARLES SCHULTZ : No. CP-22-MD-1375-2011

TRANSCRIPT OF PROCEEDINGS
PRELIMINARY HEARING

BEFORE: MAGISTERIAL DISTRICT JUDGE
WILLIAM C. WENNER
DATE: FRIDAY, DECEMBER 16, 2011
PLACE: COURTROOM NO. 1
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

APPEARANCES:
BRUCE R. BEEMER, ESQUIRE
OFFICE OF ATTORNEY GENERAL
For - Commonwealth
CAROLINE ROBERTO, ESQUIRE
For - Defendant Curley
THOMAS FARRELL, ESQUIRE
For - Defendant Schultz

INDEX TO WITNESSES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR THE COMMONWEALTH DIRECT CROSS REDIRECT RECROSS

Michael McQuery

By Mr. Beemer: 5 113
By Ms. Roberto: 42
By Mr. Farrell: 86

Thomas Harmon

By Mr. Beemer: 115 130
By Mr. Farrell: 124
By Ms. Roberto: 131

John McQueary

By Mr. Beemer: 133
By Ms. Roberto: 140
By Mr. Farrell: 148

Shannon Manderbach

By Mr. Beemer: 158

Anthony Sassano

By Mr. Beemer: 164
By Ms. Roberto: 166
By Mr. Farrell: 169

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

<u>FOR THE COMMONWEALTH</u>	<u>IDENTIFIED</u>	<u>ADMITTED</u>
Exhibit No. 1 (Transcript of Paterno Grand Jury Testimony.)	161	164
Exhibit No. 2 (Transcript of Curley Grand Jury Testimony.)	161	164
Exhibit No. 3 (Transcript of Schultz Grand Jury Testimony.)	161	164

1 it was a week to two weeks.

2 Q How long after that initial meeting with
3 Sandusky did Sandusky come back and tell you,
4 yeah, I was in the shower?

5 A I believe it was soon after that. It was
6 a day or two after that.

7 Q No further questions. Testimony
8 concluded at 11:59 a.m.

9 Date, January 12th, 2011, 12:02 p.m.

10 Witness, Gary Schultz, S-C-H-U-L-T-Z.

11 Questioning for the Office of Attorney General,
12 Jonelle Eshbach, Frank Fina.

13 Would you please introduce yourself to
14 the Grand Jury and spell your last name for the
15 court reporter's benefit?

16 A Sure. My name is Gary Schultz,
17 S-C-H-U-L-T-Z. I am a retired senior vice
18 president for finance and business at Penn State
19 University.

20 Q You are accompanied today by counsel,
21 Cynthia Baldwin; is that correct?

22 A That is correct.

23 Q When did you retire from the university?

24 A In June of 2009.

25 Q In June of 2002, did you occupy that

1 position as senior vice president?

2 A Yes, I did.

3 Q Could you please explain to the Grand
4 Jury in that capacity what operations of the
5 university were under your authority?

6 A Yes. Within an academic institution, we
7 have the chief academic officer. That's commonly
8 referred to as the provost. That's not me.

9 I really run the operations of the
10 university, the physical plant, all the
11 facilities and services of those facilities, all
12 the housing and food services; if you have ever
13 been on Penn State campus, the Nittany Lion Inn,
14 the airport, all kinds of printing and fleet,
15 human resources, university police, and all the
16 finance elements of the university which would
17 include the controller, the budget office and the
18 investment office.

19 Q With regard to Penn State's athletic
20 program, the Grand Jury has already met the
21 athletic director. Could you explain your
22 position vis-à-vis Mr. Curley as the athletic
23 director?

24 A Yes. Mr. Curley directly reports to the
25 president of the university, but kind of a

1 day-to-day working arrangement is that he would
2 often behave like he reported to me as well.

3 Q I'd like to direct your attention to a
4 time around spring break of 2002 as it's been
5 reported to us. Do you recall being called and
6 requested to attend a meeting with Coach Paterno
7 to report an unusual incident?

8 A I do recall such a meeting.

9 Q Would you please tell the Grand Jurors
10 what you remember, everything that you can
11 remember about that incident and the time that it
12 occurred?

13 A Yes. I believe the meeting occurred in
14 my office. It included the athletic director,
15 Tim Curley, and Coach Paterno. Coach Paterno
16 wanted the meeting. It was essentially called at
17 his request.

18 He indicated that someone observed some
19 behavior in the football locker room that was
20 disturbing. I believe the impression I got was
21 it was inappropriate and he wanted to bring that
22 to Tim Curley and my attention.

23 Q Specifically, did Coach Paterno tell you
24 who had observed this inappropriate disturbing
25 behavior?

1 A No, I don't believe he did. I recall
2 having the impression that it was a student or a
3 grad student that observed the purported
4 incident.

5 Q Did you know who it was that had
6 allegedly engaged in this inappropriate conduct?

7 A Well, yes.

8 Q Who was it?

9 A He told me that it was Jerry Sandusky and
10 some unnamed boy.

11 Q Who was Jerry Sandusky? Who did you know
12 Jerry Sandusky to be at that time?

13 A Was this in 2002?

14 Q Yes, please.

15 A Well, in 2002, Jerry Sandusky was retired
16 from coaching at Penn State and, you know,
17 continued to have involvement with the Second
18 Mile.

19 Q What's the Second Mile?

20 A Well, I mean, the Second Mile is a
21 program that I think Jerry founded that provides
22 opportunities for children who might have had
23 some difficulty in their early life and giving
24 them life skills and mentoring to try to improve
25 their future.

1 Q It's a not-for-profit that helps
2 children?

3 A It's my understanding, yes, it's not for
4 profit.

5 Q The incident that was reported to you by
6 Coach Paterno, were the words disturbing and
7 inappropriate -- were those Paterno's words?

8 A I don't remember his precise words. I'm
9 using words now, when I tell you, that was the
10 impression that I had. I don't recall his exact
11 words.

12 Q Again, where was this incident supposed
13 to have occurred?

14 A I believe it was in the Lasch Building.

15 Q What kind of a facility is that?

16 A Well, the Lasch Building is the football
17 building. The coaches have their offices there
18 and it's the team's locker room.

19 Q That would be a building that would be
20 expected that Jerry Sandusky would have access to
21 as a former coach?

22 A Yes. With all the years of service that
23 Jerry had, I believe that when he decided to
24 retire, that he continued to have relationships
25 with the football program and access to the

1 building.

2 Q While you're on the subject of his
3 retirement, what were the circumstances of his
4 retirement? Was there anything unusual about his
5 retirement that you can recall?

6 A No. I candidly have recollections that
7 Coach Paterno and Jerry had reached a point where
8 I think Coach Paterno felt it would be best to
9 make a coaching change. I had that underlying
10 feeling or understanding. Jerry was enrolled in
11 the Commonwealth State Employee Retirement
12 System, which employees at Penn State have the
13 option to elect into.

14 It turns out at the time that he was
15 contemplating retirement, there was a retirement
16 incentive. I think they called it a retirement
17 window or something that was referred to as such.
18 But in other words, if you retired by a certain
19 date, a window of time, your retirement was
20 enhanced.

21 So Jerry had that as kind of a factor or
22 a key factor in deciding the timing of his
23 retirement, which I believe the window would
24 close at the end of June in that particular year.
25 So if he didn't make the decision to retire by

1 the end of June, he would have lost the benefit
2 of that early retirement window.

3 Q Do you recall knowing of any other reason
4 that might have motivated him to retire at that
5 time?

6 A No.

7 Q Did you know him to be spending a lot of
8 time with the Second Mile program at that time?

9 A I wasn't that close to how he spent his
10 time. He certainly was visible as an identity of
11 the Second Mile. They used to refer to them as
12 Jerry's kids. So his name was clearly a brand
13 associated with the Second Mile, but I had no
14 idea how much time he physically spent.

15 Q You said that you did not have -- did you
16 ever meet directly with Mike McQueary?

17 A Yes.

18 Q When?

19 A I don't recall the exact circumstances.
20 In fact, it was this morning when you asked me a
21 question that I first recalled that there was
22 such a meeting.

23 Q You don't recall where it took place?

24 A I think it occurred in my office, I
25 believe.

1 Q At that time, did McQueary relate to you
2 what he had observed in the locker room?

3 A No. My recollection was McQueary and Joe
4 both only described what was observed in a very
5 general way. There was no details.

6 Q Did you, nevertheless, form an impression
7 about what type of conduct this might have been
8 that occurred in the locker room?

9 A Well, I had the impression that it was
10 inappropriate. Telling you what kind of thing I
11 had in my mind without being clear, without him
12 telling me, but, you know, I had the feeling that
13 there was perhaps some kind of wrestling around
14 activity and maybe Jerry might have grabbed the
15 young boy's genitals or something of that sort is
16 kind of the impression that I had.

17 Q Would you consider that to be
18 inappropriate sexual conduct?

19 A Oh, absolutely. Well, I don't know the
20 definition of sexual, but that's certainly
21 inappropriate for somebody to do.

22 Q It would give you pause or concern if an
23 adult male and an underage male were in a shower
24 and that adult male grabbed the genitals of the
25 younger male?

1 A Yes.

2 Q Do you not recall anything more specific
3 than that that Mike McQueary reported to you?

4 A I do not recall, no.

5 Q Did you consult with Tim Curley as to
6 what would be done as a result of this 2002
7 report?

8 A I believe Tim and I had -- yes, we had
9 conversation at that time.

10 Q Whose recommendations -- what was done,
11 first of all?

12 A Well, my recollection was -- and I'm not
13 so sure it's -- I'm not as confident, but I think
14 we decided it would be appropriate to just say to
15 Jerry that you shouldn't be bringing the Second
16 Mile kids onto campus in the football building.

17 So I believe Tim communicated to Jerry
18 that that type of thing should not be occurring
19 in the future. I also have a recollection that
20 we asked the child protective agency to look into
21 the matter.

22 Q When you say child protective agency, was
23 that a university department or something off
24 university?

25 A Yeah. My understanding is it's somehow

1 affiliated with the Commonwealth of Pennsylvania.

2 Q Who specifically asked that that
3 investigation be done?

4 A I don't recall.

5 Q Was it you?

6 A It may have been. I don't recall.

7 Q Do you remember to whom you would have or
8 anyone would have made such a request, an
9 individual, the name of the agency, where it was
10 located?

11 A I don't recall the details, but I can
12 tell you that there was an investigation earlier
13 that the child protection agency -- and I may
14 have that technically incorrect, but it was this
15 agency that I'm referring to that conducted an
16 earlier investigation. So my recollection would
17 be in 2002 that they were asked to look into this
18 allegation.

19 Q Now, I don't want to necessarily get away
20 from 2002, but you're referring now to an
21 incident that was reported in 1998 involving
22 Mr. Sandusky and one or two young boys on the
23 campus at the university; is that correct?

24 A I believe it was in '98, yes.

25 Q And that incident was reported to the

1 university police, correct?

2 A My recollection is that the mother
3 contacted university police with regard to her
4 son and that that started a police investigation.

5 Q Are you practically certain that there
6 was a police investigation in 1998?

7 A Well, I know the police were involved,
8 but my recollection is that it was decided that
9 this child protection agency would be the better
10 entity to do the investigation.

11 Q Were you, yourself, ever questioned with
12 regard to that '98 incident?

13 A I don't recall I was, no.

14 Q Do you know if any criminal charges arose
15 from the 1998 report?

16 A To the best of my knowledge, there were
17 none.

18 Q What did you understand the 1998
19 incident, in a general way, to allege?

20 A Again, I thought that it had some basis
21 of inappropriate behavior, but without any
22 specifics at all.

23 Q At the time of finding out in 2002 about
24 the allegations of the inappropriate conduct in
25 the shower by Sandusky, you were aware of the

1 1998 allegations --

2 A That's correct.

3 Q -- of the same nature involving Sandusky?

4 A An allegation, yes.

5 Q It's your testimony that you believed the
6 2002 incident was reported to the same agency,
7 that child protective services agency, for an
8 investigation as the '98 one had been?

9 A That's my recollection, yes.

10 Q You did not meet with Jerry Sandusky
11 about any of these incidents whatsoever?

12 A No, I did not.

13 Q Did Tim Curley report back to you about
14 his contact with Jerry Sandusky regarding the
15 incident in 2002?

16 A I can't say for sure. I had the
17 impression that Tim did follow through and make
18 sure Jerry understood that he was no longer
19 permitted to bring Second Mile children into the
20 football facility.

21 Q Did you, yourself, ever attempt to
22 determine the identity or age of the boy in the
23 shower in the 2002 incident?

24 A No.

25 Q Do you know if anyone in the university

1 under your auspices then when you were senior
2 vice president attempted to learn that
3 information?

4 A No.

5 Q Knowing that there was an incident in
6 1998 involving a boy or boys and the incident in
7 2002, did you not feel it was appropriate to
8 further investigate the incident to determine if
9 something truly sexually inappropriate had
10 occurred on campus?

11 A Yes. Again, '98 was investigated. There
12 was an allegation. I have no idea what the
13 conclusion of that investigation was, whether
14 there was any merit to the allegation or not. I
15 did have the impression that it concluded without
16 any charges being filed.

17 The incident in 2002, again, I recall
18 that it was also turned over to that same agency
19 for investigation and it's appropriate for them
20 to do that, not for me to determine the name of
21 the boy. I wasn't doing an investigation.

22 Q Do you remember whether the District
23 Attorney was consulted at all in the 1998
24 investigation?

25 A I believe the District Attorney was in

1 1998. I think, again, my recollection -- this is
2 a long time ago. But my recollection was that
3 between the university police chief and the
4 District Attorney and perhaps university legal
5 counsel and myself, the decision was made to use
6 the child protection agency as the appropriate
7 investigative agency.

8 Q Who was the university legal counsel when
9 that decision was made?

10 A His name was Wendell Courtney.

11 Q He was with the firm of McQuaide Blasko?

12 A That's correct.

13 Q Do you believe that you may be in
14 possession of any notes regarding the 2002
15 incident that you may have written memorializing
16 what occurred?

17 A I have none of those in my possession. I
18 believe that there were probably notes taken at
19 the time. Given my retirement in 2009, if I even
20 had them at that time, something that old would
21 have probably been destroyed.

22 I had quite a number of files that I
23 considered confidential matters that go back
24 years that didn't any longer seem pertinent. I
25 wouldn't be surprised. In fact, I would guess if

1 there were any notes, they were destroyed on or
2 before 2009.

3 Q You indicated that you consulted with Tim
4 Curley. Did you agree with his recommendations
5 as to how this should be handled?

6 A I don't know if it was a recommendation
7 but, yes, we reached agreement. I can't remember
8 if I recommended, he recommended or who
9 recommended, but at the conclusion of discussion,
10 there was agreement. There was no disagreement.

11 Q Did you, yourself, directly consult with
12 Graham Spanier, the president of the university,
13 concerning the 2002 incident?

14 A I believe so. It was a routine way of
15 kind of handling business, that I would have had
16 a conversation with the president about such a
17 matter, yes.

18 Q Did the president of the university
19 express concern about this incident at the time
20 it was reported to him?

21 A Very similar to mine and Tim's, yes. We
22 took it seriously.

23 Q Did President Spanier appear to approve
24 of the way in which you and Athletic Director
25 Curley handled this?

1 A Yes. Again, my recollection was that
2 there was agreement.

3 Q Do you know if President Spanier was
4 aware of the 1998 incident at the time of the
5 2002 incident?

6 A I believe so, yes.

7 Q Why do you believe so? Did you tell him
8 or was it discussed?

9 A Again, I don't remember the specifics of
10 the conversation I had with him, but it would
11 have been a routine kind of way of handling
12 things, that I would have kept him informed about
13 the '98 as well as the 2002 reports.

14 Q You knew, of course, that the incident in
15 1998 was alleged to have taken place very
16 similarly in the Lasch Building in the shower
17 with a young boy or more than one young boy?

18 A I honestly don't recall that '98 I knew
19 anything about the details of what the allegation
20 was from the mother. I do recall there was a
21 mother with a young boy who reported some
22 inappropriate behavior of Jerry Sandusky. But I
23 don't recall it being reported in the Lasch
24 Building or anything of that sort.

25 Q The reports on that were something that

1 you could have had access to as the director, the
2 police being under your purview of the
3 university; is that correct?

4 A I probably would have been able to, but
5 it was my practice that I didn't ask the police
6 for police reports.

7 Q In 2002, when you became aware of this
8 allegation in the shower, did you then seek out
9 the 1998 report to find out what it was that
10 Sandusky specifically was alleged to have done?

11 A No, I did not. Honestly, I don't know
12 what the procedures are. I assume that that
13 report was with the child protection agency and
14 not Penn State University Police. I thought the
15 police turned it over and that investigation was
16 then handled independently.

17 Q You thought that the university police
18 would not have kept any kind of record of that
19 investigation?

20 A That there was a -- yeah, I think they
21 would have a record that a complaint was received
22 and that it was turned over. But I wouldn't have
23 assumed that they would have the report from the
24 other agency.

25 Q You wouldn't assume that the police would

1 keep reports of all their investigations that
2 they have conducted?

3 A They didn't conduct it. The other agency
4 did was my understanding. So, yeah, I believe
5 they have reports of investigations that they
6 have done, but this I thought was turned over to
7 another agency.

8 Q You knew the university police were
9 involved in the 1998 investigation, right?

10 A Yes.

11 Q But you didn't attempt to find out
12 whether they had anything that would substantiate
13 or cause you to come to some conclusions
14 regarding the 2002 incident and whether or not it
15 might have actually occurred? That didn't occur
16 to you, to check into the 1998 incident more
17 firmer?

18 A No.

19 Q And you didn't attempt to find out
20 anything about the identity of the youth that was
21 in the shower in 2002?

22 A No.

23 Q You've referenced and Mr. Curley also
24 referenced reporting this incident to the Second
25 Mile. You've indicated that you thought this was

1 a child from the Second Mile in the 2002 incident
2 and we know that in the 1998 incident it was a
3 Second Mile child.

4 Why did you think that a Second Mile
5 child was involved in the 2002 incident when you
6 didn't investigate to make sure?

7 A Well, I'm not sure that I knew for sure
8 it was a Second Mile child in 2002. I think I
9 knew that it was a younger boy. I'm not sure I
10 knew definitively it was a Second Mile child.

11 Q Did you have occasion to see Sandusky in
12 the company of young boys who were affiliated
13 with the Second Mile program?

14 A I would see Jerry from time to time at
15 Second Mile events in the presence of lots of
16 children, sure.

17 Q Did you ever see him on university
18 property at any time with boys who were of that
19 age, Second Mile age?

20 A Well, technically, yes. I mean, some of
21 the Second Mile fundraising events and so forth
22 would be held on university property in either
23 the Nittany Lion Inn or the Penn Stater. So,
24 yes, I would see him at those events.

25 Q Did you ever see him around at any

1 football games or football practices with kids?

2 A No.

3 Q Is that because you didn't go or because
4 you didn't see him?

5 A I don't go to the practices. I do go to
6 the games. There's a hundred some thousand
7 people. I don't know if I saw Jerry there.

8 Q So you're indicating that as far as you
9 know, no one from the university investigated the
10 2002 incident at all?

11 A Yeah. As far as I know, the university
12 asked the other agency to follow-up as it did in
13 '98.

14 Q One more thing I just want to be clear
15 on. When you met with Mike McQueary, was it or
16 was it not your impression that he was reporting
17 inappropriate sexual conduct, your impression --

18 A Yes.

19 Q Inappropriate sexual conduct by Jerry
20 Sandusky?

21 A You know, I don't know what sexual
22 conduct's definition to be, but I told you that
23 my impression was -- you know, Jerry was the kind
24 of guy that he regularly kind of like physically
25 wrestled people. He would punch you in the arm.

1 He would slap you on the back. He would grab you
2 and get you in a headlock, etc. That was a
3 fairly common clowning around thing.

4 I had the impression that maybe something
5 like that was going on in the locker room and
6 perhaps in the course of that, that somebody
7 might have grabbed the genitals, that Jerry might
8 have grabbed the genitals of the young boy. I
9 had no impression that it was anything more
10 serious than that. That was my impression at the
11 time.

12 Q Didn't you previously tell us in our
13 interview that you had the impression -- I have
14 it written down -- that this was inappropriate
15 sexual conduct?

16 A Again, depending on what you call -- I
17 mean, grabbing the genitals of the boy is what I
18 had in mind. Now, is that sexual? Yes.

19 Q We can all agree that an adult male under
20 no circumstances other than a doctor should be
21 grabbing the genitals of a young boy?

22 A I agree completely with that.

23 Q And that it doesn't happen accidentally?

24 A Rather than just agreeing to I thought it
25 was sexual conduct or misconduct, I'm explaining

1 what I really thought might have gone on. You
2 know, you can define that as you want. I'm
3 telling you what I thought was going on.

4 Q Would you agree with me that if it had
5 have been sodomy, that is, anal sex, that would
6 clearly be inappropriate sexual conduct?

7 A No doubt.

8 Q By Mr. Fina.

9 Sir, I just want to be real clear on
10 this. It was your impression after you talked to
11 McQueary that this was about some physical
12 conduct, some horsing around, some wrestling that
13 resulted in contact with a boy's genitals in the
14 context of wrestling. That was your impression
15 of what McQueary was reporting to you?

16 A I don't recall what McQueary specifically
17 reported, but I can tell you that I, after going
18 through whatever we went through in 2003, had
19 that impression that that was probably the kind
20 of thing that had taken place.

21 Q Nothing else? No further sexual conduct?

22 A No, I had no basis --

23 Q No intercourse?

24 A I had no basis of anything else, and I
25 only formed the impression that I had based on

1 kind of what I observed of Jerry and the kind of
2 horsing around that he does.

3 Q No, no. Please follow my questioning.
4 I'm not asking you what impression you had of
5 your observations of Mr. Sandusky over the years.
6 I'm asking you of your impression, what you
7 learned from Mr. McQueary, what he observed in
8 the shower.

9 A I don't recall himself telling us what he
10 observed specifically.

11 Q What generally did he report?

12 A I believe that he said that he saw
13 something that he felt was inappropriate between
14 Jerry and a boy.

15 Q And from his saying along the line of
16 something inappropriate, you took, oh, they must
17 have been wrestling and maybe he touched the
18 kid's groin?

19 A I could imagine that might have taken
20 place, yes.

21 Q Was McQueary upset? Was he emotional
22 about this?

23 A No, I don't recall him being upset.

24 Q He was calm; he was collected?

25 A Yes.

1 Q Nobody, not you, nor Curley, nor anybody
2 else went back to McQueary and asked for
3 specifics or at the time asked for specifics?

4 A No. Again, I recalled that we asked this
5 agency to do the investigation and I would let
6 them follow-up.

7 Q The agency that you were never
8 interviewed by, correct?

9 A That's correct.

10 Q Are you aware of anybody at the
11 university who was interviewed by any agency
12 about this incident?

13 A About 2002, I don't.

14 Q How is it that this agency, this whatever
15 it was, would even know who to talk to, to talk
16 to McQueary or to talk to you or to talk to
17 whoever? Who was supposed to relay this
18 information?

19 A I don't recall. I don't recall who
20 contacted the agency. I'm telling you, to the
21 best of my recollection, I believe that the
22 agency was asked to follow-up on the
23 investigation.

24 Q At no time did you contact any law
25 enforcement entity or individuals?

1 A I had the impression that that agency had
2 some law enforcement authority.

3 Q The agency that you can't identify?

4 A Well, the child protection agency, the
5 same one that I think handled the '98
6 investigation.

7 Q Sir, it might surprise you to know that
8 the '98 investigation was handled by your police
9 department and there's a --

10 A In its entirety?

11 Q There's a 95-page police report on that
12 incident.

13 A In its entirety?

14 Q Correct.

15 A Wow. I thought that it was turned over
16 to the child protection agency for investigation.

17 Q Did it ever occur to anybody that the
18 police might need to be contacted, either campus
19 police or this entity known as the Pennsylvania
20 State Police?

21 A I don't recall that we talked about it
22 being turned over to the police.

23 Q That was never part of the discussions
24 between you and Curley or you and Spanier or you
25 and anybody else?

1 A No.

2 Q Are you aware of any memorandums or any
3 written documents, other than your own notes,
4 that existed either at the time of this incident
5 or after this incident about the 2002 events?

6 A No.

7 Q Would that be standard? Would that be
8 the way the university operates when an
9 allegation is made against a current employee or
10 a very famous prior employee, that nothing be put
11 in writing?

12 A The allegations came across as not that
13 serious. It didn't appear at that time, based on
14 what was reported, to be that serious, that a
15 crime had occurred. We had no indication a crime
16 had occurred.

17 Q Do you recollect going to Joe Paterno's
18 house on a Sunday to be informed of this?

19 A No.

20 Q No, that you don't recollect? No, that
21 it did not happen?

22 A No, I don't recollect it. Again, I
23 thought I was informed in a meeting that Joe and
24 Tim and I had at my office. Now, could it have
25 happened at Joe's house? Possibly.

1 Q Would that be unusual, to be called to
2 Joe Paterno's house on a Sunday to discuss
3 something that wasn't even criminal or sexual?

4 A Well, it wasn't an everyday thing, but
5 Tim and I and others would meet with Joe
6 weekends, Sundays and so on. But, yeah, it would
7 be an important matter if we were meeting with
8 Joe on a Sunday.

9 Q By Ms. Eshbach.

10 In terms of university policy at the time
11 that you were the senior vice president, how
12 would a matter of inappropriate conduct by an
13 employee be handled, something along the lines of
14 perhaps a theft, criminal conduct?

15 A If there was an allegation of a criminal
16 act, it would be turned over to the university
17 police for handling. On occasion, depending on
18 the nature of it, university internal audit might
19 get involved initially to do some background work
20 just to confirm an allegation.

21 Q If there had been inappropriate or
22 criminal conduct by a student, would that go to
23 the provost side of things or would that come to
24 your side of things?

25 A Well, if it was a criminal act, it would

1 be investigated by the police, yes.

2 Q How about an incident of criminal conduct
3 involving a student athlete? How would that be
4 handled?

5 A If it was criminal, it would be the
6 police. If it's not, there's an office of
7 student conduct.

8 Q How about, again, inappropriate conduct
9 of an employee of the university?

10 A If there was an allegation of some
11 criminal conduct, it would be handled by the
12 police.

13 Q And, finally, a person in the status of
14 Mr. Sandusky who had access to the university
15 even though he was no longer an employee?

16 A Same.

17 Q You're saying that this incident wasn't
18 referred to the university police for
19 investigation because you didn't think it was
20 criminal?

21 A There was no indication that it was.

22 Q Can you give me an example of what you
23 would consider to be inappropriate conduct that
24 wasn't criminal? We did a lot of talking about
25 what's inappropriate, what's criminal, not

1 criminal.

2 Give me an example of conduct -- for
3 example, a university professor does something to
4 a student and a student reports it. I assume
5 that would go to the university police, right?

6 A No, not necessarily. You asked for an
7 example. Not all inappropriate conduct is
8 criminal. Cursing at a student in class, if
9 you're a faculty member losing your temper,
10 perhaps might not be criminal, but it's not
11 appropriate for a faculty member to do such a
12 thing.

13 Q How about an adult individual being naked
14 in the shower with a young boy and touching that
15 young boy? Clearly inappropriate, right?

16 A Yeah, I would say.

17 Q But not criminal in your mind, not
18 potentially criminal?

19 A I didn't get the impression that there
20 was something like that going on.

21 Q I thought you said that you thought
22 perhaps he had grabbed his genitals?

23 A Well, you know, whether he -- I don't
24 know. I mean, I wasn't told what was really
25 going on. But if he did, if that was what it

1 was, he shouldn't do that. That's inappropriate.
2 I don't know if it's criminal. If it's in the
3 context of wrestling or something like that, I
4 don't know.

5 Q The Grand Jurors would like to know your
6 age.

7 A Sixty-one.

8 Q You retired in May of 2009?

9 A June.

10 Q June of 2009?

11 A Yes.

12 Q When you retired, were you aware of any
13 other allegations of sexual conduct by Jerry
14 Sandusky against any other young boys not in 1998
15 and not in 2002, but any subsequent to that?

16 A No.

17 Q You knew of nothing?

18 A Nothing.

19 Q You look young for your age.

20 A Thank you.

21 Q Since this incident came to light in 2002
22 involving Sandusky and this boy in the shower,
23 did the university do anything in terms of
24 adopting a policy with regard to nonstudent youth
25 being on university facilities in the

1 circumstances that this young boy was?

2 A No, I don't believe so.

3 Q Did anybody do anything to prevent
4 something like this from happening again other
5 than telling Jerry Sandusky he's not supposed to
6 bring a kid on campus?

7 A Well, we did that.

8 Q But that was on the honor system, right?

9 A Well, I don't know. I think Tim handled
10 it and I'm not quite sure what the enforcement
11 mechanism of that was. It may have been an honor
12 system. I think Tim trusted Jerry and if Jerry
13 said he understood and wouldn't do it, that's
14 what he believed.

15 Q As far as you know, the university took
16 no steps to prevent something like this from
17 happening again?

18 A Well, with regard to Jerry, I think we
19 did, yeah.

20 Q How about other individuals?

21 A I don't know exactly how to answer that.
22 I can imagine instances where adult men would
23 perhaps be in the shower with young boys.

24 Q In a group?

25 A Perhaps.

1 Q But not alone?

2 A Perhaps or maybe not. I don't know. I
3 mean, our recreation buildings, for example,
4 separate from the football building, which has
5 some restrictions, are pretty much open.

6 Q Again, that would be a circumstance where
7 there would be likely a number of persons
8 present?

9 A Could be, yeah.

10 Q But the Lasch building was not a public
11 building?

12 A No. But, you know, it's a building that
13 generally is active. It's used with all the
14 individuals on the team, the coaches, all the
15 support staff and so on. Football is a
16 12-month-a-year program. It's less open than a
17 public recreation facility would be, but I don't
18 want to characterize it as a place that's only
19 used like on a limited basis. It's used
20 regularly.

21 Q Would you agree with me that on a Friday
22 night before the start of spring break, there
23 probably wouldn't be very many people in that
24 building?

25 A Probably, yes.

1 Q And a former staff member would
2 understand that, would know that kids would be
3 gone?

4 A Probably, yes, sure.

5 Q That's it.

6 Testimony concluded at 12:52 p.m.

7 THE COURT: Thank you.

8 (Witness excused.)

9 THE COURT: Mr. Beemer, any other
10 witnesses for the Commonwealth?

11 MR. BEEMER: No, Your Honor. For
12 purposes of this preliminary hearing, the
13 Commonwealth rests.

14 THE COURT: Ms. Roberto, would you like
15 to start with argument?

16 MS. ROBERTO: Yes, Your Honor.

17 Your Honor, today we were here for a
18 preliminary hearing on the crime of perjury at
19 Title 18, Section 4902.

20 And I think in order to understand what
21 the Pennsylvania Legislature has required for the
22 Commonwealth to prove, even at a prima facie
23 level before a Magistrate Judge, you have to
24 understand the background and the history of
25 perjury in Pennsylvania.

EXHIBIT 5

- 2/25/01
- ③. Tell Chair^{*} of Board of Second Mile.
 - ②. Report to Dept of Welfare.
 - ①. Tell J.S. to avoid bringing children
alone into Lash Bldg

* who's the chair??

EXHIBIT 6

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
v.	:	
	:	
TIMOTHY M. CURLEY	:	NO. 3614 CR 2013
	:	NO. 5165 CR 2011
GARY CHARLES SCHULTZ	:	NO. 3616 CR 2013
	:	NO. 5164 CR 2011
GRAHAM BASIL SPANIER	:	NO. 3615 CR 2013

MEMORANDUM OPINION AND ORDER

Before the court are numerous motions filed by each of the Defendants, Timothy M. Curley, Gary C. Schultz and Graham B. Spanier, which seek relief based upon claims of violations of Defendants' rights relating to representation in connection with grand jury proceedings, out of which arose charges at the above dockets.

With the exception of the requests for an evidentiary hearing which we have granted in part, for the reasons set forth herein, the requests for relief are **DENIED** in accordance with the within **ORDER**.

I. PROCEDURAL BACKGROUND

For ease of reference, we provide this brief chronology of events relevant to the issues before the court:

December 28, 2010 -January 3, 2011-Contact by the Pennsylvania Office of Attorney General with Cynthia A. Baldwin, Esquire regarding investigation related to Gerald Sandusky and service of subpoenas for testimony of Timothy Curley, Gary Schultz and Joseph Paterno before

the investigating grand jury and subpoena No. 1179 for production of documents directed to Pennsylvania State University

January 12, 2011-Testimony of Timothy Curley and Gary Schultz before the investigating grand jury

April 13, 2011-Conference before the supervising grand jury judge, the Honorable Barry F. Feudale regarding subpoena No. 1179 for production of documents directed to Pennsylvania State University

April 13, 2011-Testimony of Graham B. Spanier before the investigating grand jury

November 7, 2011-Charges filed against Timothy M. Curley and Gary C. Schultz

October 2-19, 2012-Communications among counsel and to the Honorable Barry F. Feudale regarding assertion of the attorney-client privilege and waiver of the attorney-client privilege by the Pennsylvania State University

October 26, 2012-Testimony of Cynthia A. Baldwin before the investigating grand jury

November 1, 2012-Charges filed in a second criminal complaint against Defendants Curley and Schultz containing additional charges, and charges against Graham B. Spanier

Pursuant to Notice of Submission of Investigation No. 1, a statewide investigating grand jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky ("Sandusky") over a period of years. (See, Presentment). On December 14, 2010, Pennsylvania State University Assistant Coach Michael McQueary testified before the grand jury as to his observation of an incident in the Lasch Building shower involving Sandusky and a boy. Defendant Timothy Mark Curley ("Mr. Curley"), Defendant Gary Charles Schultz, ("Mr. Schultz") and Defendant Graham Basil Spanier, ("Mr. Spanier") or collectively, ("Defendants") appeared before the

grand jury for testimony, as well as Cynthia A. Baldwin, then General Counsel to the Pennsylvania State University. Cynthia A. Baldwin is a former Justice of the Supreme Court of Pennsylvania and is properly addressed as the Honorable Cynthia A. Baldwin. For the sake of brevity, in this Opinion, we refer to her as Ms. Baldwin.

Following issuance of the grand jury presentment, Defendants filed motions to quash the presentment before the Honorable Barry F. Feudale, Supervising Judge of the Thirtieth and Thirty-Third Statewide Investigating Grand Juries (“Judge Feudale”). Judge Feudale denied Defendants’ motions by Memorandum Opinion and Order filed April 9, 2013, finding that the grand jury judge lacked jurisdiction to consider such claims. Defendants Curley and Schultz appealed. The Pennsylvania Supreme Court denied the petitions for review without prejudice to raise the issues in the underlying criminal prosecution. (See, *Thirty-Third Statewide Investigating Grand Jury*, Nos. 61, 62 MM 2013 (Pa. June 7, 2013)).

Charges

On November 7, 2011, the Commonwealth charged Timothy M. Curley and Gary C. Schultz each with one count of Perjury in violation of 18 Pa.C.S. § 4902(a), a felony in the third degree and one count of Failure to Report Suspected Child Abuse in violation of 23 Pa.C.S. § 6319, a summary offense.

On December 16, 2011, Magisterial District Judge William C. Wenner conducted a preliminary hearing. After testimony and argument, Judge Wenner bound the cases over to the Court of Common Pleas. Defendants waived their appearance at formal arraignment. The Commonwealth filed a criminal information on January 19, 2012.

Approximately one year later, on November 1, 2012, the Commonwealth filed a second criminal complaint against Defendants Curley and Schultz which contained additional charges, and filed a criminal complaint against Graham

B. Spanier. The second criminal complaint charged as follows:

Timothy Curley: Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, 18 Pa.C.S. § 903

Gary C. Schultz: Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, 18 Pa.C.S. § 903

Graham Spanier: Perjury, 18 Pa.C.S. § 4902; Endangering the Welfare of Children, 18 Pa.C.S. § 4304; Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101; Criminal Conspiracy, (to Commit Obstructing Administration of Law or Other Governmental Function), 18 Pa.C.S. § 903; Penalties for Failure to Report or Refer, 23 Pa.C.S. § 6319; Criminal Conspiracy (to Commit Perjury), 18 Pa.C.S. § 903; Criminal Conspiracy (to Commit Endangering Welfare of Children), 18 Pa.C.S. § 903

After testimony and argument on July 29, 2013 and July 30, 2013, Magisterial District Judge William C. Wenner bound the November 1, 2012 cases against all Defendants over to the Court of Common Pleas. Defendants waived their appearance at formal arraignment.

Ms. Baldwin did not testify at the preliminary hearings on either set of charges against Defendants.

Motions Seeking Relief

Throughout the pendency of these cases, Defendants have filed numerous motions which seek relief based upon assertions that Defendants were denied the right to counsel, including the right to effective and conflict free counsel, that charges arose from violation of the attorney-client privilege, that prosecutorial misconduct interfered with the right to counsel, and that defects occurred in the grand jury proceedings, all of which denied the right to due process under the United States and Pennsylvania Constitutions. Based upon these alleged violations, Defendants seek relief in the form of quashal of the grand jury presentment, dismissal of charges, suppression of Defendants' grand jury testimony and suppression of Ms. Baldwin's grand jury testimony.

On December 17, 2013, we conducted a hearing in order to establish an evidentiary record necessary for disposition of the numerous motions. Defendants issued subpoenas to, and sought to introduce the testimony of, among others, Ms. Baldwin and former Deputy Attorney Generals Frank Fina ("Mr. Fina") and Jonelle Eshbach ("Ms. Eshbach"). The court granted motions to quash subpoenas filed on behalf of Ms. Baldwin, Mr. Fina and Ms. Eshbach, finding that we required no evidence related to those witnesses beyond that contained in transcripts available to the court and the parties. We also denied

Defendants' requests to call expert witnesses in support of claims related to Defendants' representation by counsel.

Based upon those rulings, we established the evidentiary record which we deemed necessary for disposition of the pending motions. We granted the parties' requests to include in the record transcripts of the colloquies of witnesses in advance of their grand jury testimonies, transcripts of conferences with counsel and Judge Feudale, and transcripts of the grand jury testimonies of Defendants Curley, Schultz and Spanier, and of Ms. Baldwin. (See generally, Transcript of Proceedings, December 17, 2013). The then Supervising Grand Jury Judge, the Honorable Norman Krumenaker III, granted the parties and this court permission to disclose those transcripts.

In addition, at the Defendants' request, we admitted a series of letters from Defendant Curley's counsel, Caroline Roberto, Esquire, Defendant Schultz' counsel, Thomas Farrell, Esquire, Ms. Baldwin's counsel, Robert DeMonaco, Esquire and the Pennsylvania State University's ("the University") counsel, Michael Mustokoff. At the request of the Commonwealth, we admitted a July 23, 2012 letter to the members of the Pennsylvania State University Board of Trustees and the transcript of an interview of Spanier by ABC News reporter Josh Elliot in the summer of 2012. For the reasons explained below, we deem it unnecessary to reach the issue for which the Commonwealth submitted such evidence.

Following the December 17, 2013 proceedings, we ordered counsel to submit Post Hearing Memoranda which identified pleadings before the court

which sought relief related to claims based upon representation of Defendants as grand jury witnesses, and to provide proposed findings of fact, conclusions of law, and legal discussion as to bases for the relief sought. (See, Orders of Court, January 17, 2014 and February 4, 2014). All parties timely filed Post Hearing Memoranda on February 18, 2014.

Upon consideration of the parties' Post Hearing Memoranda, we deemed central to disposition of Defendants' claims for relief the issue of the scope of the attorney-client relationship with Ms. Baldwin. However, the record, as established at the December 17, 2013 proceeding, lacked testimony from the Defendants on that central issue. The record included only averments and affidavits not subject to cross examination. Defense counsel had not offered the testimony of Defendants as to the asserted attorney-client relationship. We therefore scheduled a hearing to allow Defendants to supplement the record with testimony on the single issue of the scope of the asserted attorney-client relationship between Defendants and Ms. Baldwin.

We conducted closed hearings on November 20 and 21, 2014. In advance of and during the hearings, we limited testimony and cross examination to facts relevant to determination of the scope of the attorney-client relationship, and disallowed questioning or testimony which might disclose allegedly privileged substantive communications.

We recognize the sensitivity which surrounds the issue of the attorney-client privilege. We also recognize that Defendants may exercise a right of appeal of this decision as to that issue. Therefore, out of an abundance of

caution, in support of our conclusions set forth in this Opinion, we refer only to evidence contained in the open record established in the December 17, 2013 hearing. Although we rely upon evidence presented at the November 20 and 21, 2014 hearings in reaching those conclusions, we do not cite to that evidence in this Opinion.

By the within Order, we rule upon all motions identified in the parties' Post Hearing Memoranda, as well as all earlier filed motions, which seek relief based upon the existence of an alleged attorney-client or work product privilege, an alleged violation thereof, denial of the right to counsel, defects in the grand jury proceedings related to representation or alleged prosecutorial misconduct.

II. FACTUAL BACKGROUND

We set forth testimony provided to the grand jury for purpose of factual background necessary to discussion of the claims at issue. We make no substantive factual or credibility findings as to the testimony with respect to the charges.

On December 28, 2010, in her capacity as general counsel of the University, Ms. Baldwin received a telephone call from the Office of the Attorney General ("OAG") pertaining to four grand jury subpoenas. Three subpoenas required the appearance of individuals, Timothy Curley, Gary Schultz and Joseph Paterno, and one required production of documents pursuant to a subpoena *duces tecum*. (Transcript of Proceedings, December 17, 2013, Exhibit Q, Notes of Testimony Grand Jury Proceedings, Cynthia A. Baldwin, October 26, 2012,

pp. 11-12)(hereinafter, "N.T.G.J. 10/26/12, Baldwin"). The subpoena *duces tecum*, Subpoena 1179, requested any information regarding Sandusky and allegations of misconduct, as follows: "Any and all records pertaining to Jerry Sandusky and incidents reported to have occurred on or about March 2002, and any other information concerning Jerry Sandusky and inappropriate contact with underage males both on and off University property. Response shall include any and all correspondence directed to or pertaining to Jerry Sandusky". (N.T.G.J. 10/26/12, Baldwin, p. 12).

As to the subpoenas directed to individuals, Ms. Baldwin spoke to the University's president, Graham Spanier, and advised that it would be necessary to contact Messrs. Curley, Schultz and Paterno regarding the subpoenas. (N.T.G.J. 10/26/12, Baldwin, p. 13).

The University was not in session. Mr. Curley and Mr. Paterno were attending a bowl game. Mr. Spanier stated that he would contact all three individuals. Mr. Spanier reached Mr. Curley and Mr. Schultz, but neither Mr. Spanier nor Ms. Baldwin reached Mr. Paterno until his return from the bowl game. (*Id.*).

Ms. Baldwin testified that she discussed representation of those individuals after their return. Ms. Baldwin met with Mr. Curley and Mr. Spanier in Spanier's office and explained the grand jury process. (N.T.G.J. 10/26/12, Baldwin, p. 14). In that meeting, she explained that Curley, Schultz and Paterno could be accompanied by an attorney to the grand jury. (*Id.*) Ms.

Baldwin testified that Spanier told Baldwin that she would represent Curley and Schultz before the grand jury. (*Id.*). Ms. Baldwin testified that in another conversation with Mr. Spanier, he stated that Ms. Baldwin would accompany him to the grand jury. (*Id.*).

Ms. Baldwin testified that she had no doubt that she represented the University and that as high ranking officials of the University, she would represent Curley and Schultz as agents. (*Id.*). Ms. Baldwin stated that Mr. Spanier consistently maintained that she would represent them. (*Id.*). Ms. Baldwin testified that she learned that Paterno would be represented by separate counsel, and informed Spanier of the same. (N.T.G.J. 10/26/12, Baldwin, p. 15).

As to compliance with Subpoena 1179, Ms. Baldwin testified that she sent a notice to all affected by the subpoena that they must preserve everything, because it would have to be turned over to the OAG. (N.T.G.J. 10/26/12, Baldwin, p. 16). Ms. Baldwin testified that she told Curley, Schultz and Spanier that they would have to “turn all of the information over” to the Office of the Attorney General. (*Id.*). Ms. Baldwin testified that she instructed Curley, Schultz and Spanier to notify anyone who worked under them to preserve everything and find out if there existed any Sandusky-related materials, so that such materials could be turned over to the Office of the Attorney General. (N.T.G.J. 10/26/12, Baldwin, p. 17). Ms. Baldwin testified that the request for information included emails, paper files or any documents, whether electronic

or non-electronic. (N.T.G.J. 10/26/12, Baldwin, p. 18). Ms. Baldwin testified that Messrs. Curley, Schultz and Spanier told her that they would check and get back to her. (*Id.*).

Ms. Baldwin testified that Mr. Curley reported back to her that “there is nothing.”(*Id.*). She testified that Mr. Schultz stated that he would “look for anything he had and especially, he was going to look for documents that would help his recollection.” (N.T.G.J. 10/26/12, Baldwin, p. 19). Mr. Schultz reported back to her and stated that he did not have anything. (*Id.*).

Ms. Baldwin testified that Mr. Spanier told her that he had a great many emails, that he never deleted them, and that it would be necessary for IT people to retrieve them. (N.T.G.J. 10/26/12, Baldwin, pp. 17-18). She testified that Mr. Spanier stated to her that “all of his emails were there, but that he did not have anything else.” (N.T.G.J. 10/26/12, Baldwin, p. 19).

Mr. Fina represented, in questioning Ms. Baldwin, “as you know and the grand jury knows, since this case was charged against Mr. Sandusky and Mr. Curley and Mr. Schultz, a fair number of emails from 1998 and 2001 have been discovered”. (N.T.G.J. 10/26/12, Baldwin, p. 20). Ms. Baldwin responded, “I know that now”. (*Id.*).

January 12, 2011-Appearances of Timothy Curley and Gary Schultz Before the Grand Jury.

On January 12, 2011, Timothy M. Curley and Gary C. Schultz both appeared before the Thirtieth Statewide Investigating Grand Jury. (Transcript of

Proceedings, December 17, 2013, Exhibit L, Notes of Testimony Grand Jury Proceedings, January 12, 2011)(hereinafter, "N.T.G.J. 1/12/11"). At the commencement of the proceeding, Judge Feudale inquired as to representation of Messrs. Curley and Schultz as follows:

MR. BARKER: Judge, we're here on Notice 29. We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.

JUDGE FEUDALE: Represented by?

MS. BALDWIN: My name is Cynthia Baldwin, general counsel for Pennsylvania State University.

JUDGE FEUDALE: Will you be providing representation for both those identified witnesses?

MS. BALDWIN: Gary is retired but was employed by the university and Tim is still an employee.

(N.T.G.J. 1/12/11, p. 8).

Colloquy of Timothy Curley and Gary Schultz

Before they testified, Judge Feudale apprised Messrs. Curley and Schultz, together, of their rights as witnesses before the grand jury as follows:

As a witness before the grand jury you're entitled to certain rights and subject to certain duties which I am now going to explain to you. All of these rights and duties are equally important and it's important that you fully understand each of them.

First, you have the right to the advice and assistance of a lawyer. This means you have the right to the services of a lawyer with whom you may consult concerning all matters pertaining to your appearance before the grand jury.

You may confer with your lawyer at any time before, during and after your testimony. You may consult with your lawyer throughout your entire contact with the grand jury. Your lawyer will be present with you

in the grand jury room during the time you're actually testifying and you may confer with her at that time.

You may also at any time discuss your testimony with your lawyer and except for cause shown before this court, you may disclose your testimony to whomever you choose, if you choose.

You also have the right to refuse to answer any question pending a ruling by the court directing you to respond if you honestly believe there are proper legal grounds for your refusal. In particular, you have the right to refuse to answer any question which you honestly believe may tend to incriminate you.

Should you refuse to answer any question, you may offer a reason for your refusal, but you're not obligated to do so. If you answer some questions or begin to answer any particular question, that does not necessarily mean you must continue to answer your question or even complete the answers you have started.

Now, any answers you give to any question can and may be used against you either for the purpose of a Grand Jury Presentment, Grand Jury Report, or a Criminal Information.

In other words, if you're uncertain as to whether you may lawfully refuse to answer any questions or if any other problem arises during the course of your appearance before the Grand Jury, you may stop the questioning and appear before me either alone or in this case with your counsel, and I will rule on that matter whatever it may be. Now do you understand your rights?

MR CURLEY: Yes.

MR. SCHULTZ: Yes, sir.

JUDGE FEUDALE:

Next, a witness before the Grand Jury has the duty to give full, truthful, complete and honest answers to all questions asked except where the witness appropriately refuses to answer on a proper legal ground.

I'm hereby directing both of you to observe and obey this duty. In this regard, I must caution you that if a witness answers untruthfully, he may be subjected to prosecution for perjury which is punishable under the Crimes Code of Pennsylvania. It's a very serious offense. It's a felony.

(N.T.G.J. 1/12/11, pp. 8-11).

Neither Mr. Curley nor Mr. Schultz asked any questions of nor sought clarification by Judge Feudale or Ms. Baldwin regarding the instructions.

Grand Jury Testimony of Timothy Curley.

Mr. Curley testified as to his recollection of information and conversations surrounding a 2002 report by Michael McQueary of an incident involving Sandusky and a child in the shower of a campus locker room. (Transcript of Proceedings, December 17, 2013, Exhibit M, Notes of Testimony Grand Jury Proceedings, Timothy M Curley, January 12, 2011)(hereinafter, “N.T.G.J. 1/12/11, Curley”). The incident which occurred in the Lasch Building locker room, as described in the testimony of Michael McQueary was initially referred to as having occurred in 2002, but later determined to have occurred in 2001. For purposes of this Opinion, we utilize the date as stated in the record, without correction. Mr. Curley provided a characterization of what McQueary reported as to his observation of the incident involving Sandusky and the child. (N.T.G.J. 1/12/11, Curley, p. 7).

Mr. Curley testified regarding a meeting with Joseph Paterno and University Senior Vice President Gary Schultz. *Id.* Curley also testified as to his report of information regarding the incident to the University President, Graham Spanier, and to the executive director of the Second Mile, a charity organization with which Sandusky was associated. (*Id.*). Curley testified that at no time, neither at the time of the 2002 incident, nor the time of his testimony, was he aware of any other incidents of alleged sexually inappropriate conduct by

Sandusky, on University property or elsewhere. Specifically, Curley testified that in 2002, he did not know anything about a 1998 report of an incident. (N.T.G.J. 1/12/11, Curley, pp. 13-15).

At no time during his testimony did Mr. Curley consult with Ms. Baldwin, refuse to answer a question, ask a question of, or seek a ruling by, Judge Feudale.

Grand Jury Testimony of Gary Schultz

Having received the explanation of rights by Judge Feudale set forth above, Gary Schultz testified before the grand jury. (Transcript of Proceedings, December 17, 2013, Exhibit N, Notes of Testimony Grand Jury Proceedings, Gary C. Schultz, January 12, 2011)(hereinafter, "N.T.G.J. 1/12/11, Schultz"). Mr. Schultz acknowledged that he was accompanied by counsel, Cynthia Baldwin. (N.T.G.J. 1/12/11, Schultz, p. 2). Mr. Schultz testified that in June 2009, he retired as Senior Vice President for Finance and Business of the University. (*Id.*).

Mr. Schultz testified regarding his recollection of information related to a report of an incident in 2002 involving Sandusky in the locker room of the Lasch Building. (N.T.G.J. 1/12/11, Schultz, pp. 5-6; p.7). Schultz testified that in a meeting held in Schultz's office, McQueary and Joseph Paterno described the incident in a very general way, with no details. (N.T.G.J. 1/12/11, Schultz, p. 9). Mr. Schultz testified that he formed an impression that the type of conduct was inappropriate sexual conduct. (N.T.G.J. 1/12/11, Schultz, p. 10).

Mr. Schultz testified that, after consulting with Mr. Curley, a child protective agency was contacted to look into the matter. (N.T.G.J. 1/12/11, Schultz, p.11). Schultz recalled that after consulting with Mr. Curley, they determined that it would be communicated to Sandusky that he should not bring children associated with the Second Mile onto campus in the football building. (N.T.G.J. 1/12/11, Schultz, p.11).

Mr. Schultz testified that a child protective agency investigated an incident reported in 1998 involving Sandusky and a boy or boys on the campus. (N.T.G.J. 1/12/11, Schultz, p.12). He testified that he recalled that he, the University police chief, the District Attorney and perhaps University legal counsel, decided to use the child protective agency as the appropriate investigative agency. (N.T.G.J. 1/12/11, Schultz, pp. 15-16). Schultz testified that he did not recall the 1998 matter being turned over to police and believed that it was turned over to the child protective agency for investigation. (N.T.G.J. 1/12/11, Schultz, p. 27). He testified that he did not know of the conclusion of the investigation of the 1998 allegation. (N.T.G.J. 1/12/11, Schultz, p. 15).

Mr. Schultz testified that he was unaware of any memoranda or written documents, other than his own notes, which may have existed at the time of the 1998 incident, after the incident, or regarding the 2002 events. (N.T.G.J. 1/12/11, Schultz, pp. 27-28). Mr. Schultz testified that he was not then in possession of any notes regarding the 2002 incident which he may have written. (N.T.G.J. 1/12/11, Schultz, p. 16). He testified that he believed notes

were probably taken at the time of the 2002 incident. Mr. Schultz testified that he would guess that any notes that old would have been destroyed on or before his retirement in 2009. (*Id.*)

Mr. Schultz testified that he believed he would have consulted with University President Graham Spanier regarding the 2002 incident. (N.T.G.J. 1/12/11 Schultz, p. 17). Schultz testified that he believed that Mr. Spanier was aware of the 1998 incident at the time of the 2002 incident. (N.T. Gary Schultz, pp. 17-18). He testified that he did not attempt to find out the identity of the youth in the shower in the 2002 incident. (N.T.G.J. 1/12/11, Schultz, p. 20). He testified that at the time he retired, he was not aware of any other allegations of sexual conduct involving Sandusky subsequent to the 1998 and 2002 incidents. (N.T.G.J. 1/12/11, Schultz, p. 32).

Mr. Schultz testified that since the 2002 incident involving Sandusky came to light, to his knowledge, the University did not adopt a policy with regard to non-student youth being on University facilities under circumstances such as the 2002 incident. (N.T.G.J. 1/12/11, Schultz, p. 33).

At no time during the testimony did Mr. Schultz consult with Ms. Baldwin, refuse to answer a question, or ask a question of, or seek ruling by, Judge Feudale

April 13, 2011- Conference before the Grand Jury Judge, the Honorable Barry F. Feudale regarding Subpoena No. 1179 for Production of Documents

On April 13, 2011, Judge Feudale conducted an in-chambers conference with Ms. Baldwin and Mr. Fina regarding the document subpoena issued to the University related to the Sandusky investigation. (Transcript of Proceedings, December 17, 2013, Exhibit O, Transcript of Proceedings of Grand Jury, April 13, 2011)(hereinafter, "N.T.G.J. 4/13/11, Conference"). Ms. Baldwin represented to Judge Feudale that the subpoena, which sought emails dating back to 1997, was overly broad, difficult to comply with and, potentially, included sensitive matters on unrelated subjects. (N.T.G.J. 4/13/11, Conference, pp. 2-4).

Judge Feudale requested that Ms. Baldwin leave the room. He then entertained an *in-camera* response on behalf of the Commonwealth regarding the foundation for the request for documents. (N.T.G.J. 4/13/11, Conference, pp. 6-7). Mr. Fina stated that the Commonwealth "really want[s] to find out whether there were emails about the cases we know about, the 1998 incident, the 2002 incident and the alleged 1984-85 incident, but what other incidents there may have been". (N.T.G.J. 4/13/11, Conference, p. 14). Mr. Fina asserted the Commonwealth's view of alleged inconsistencies in the testimony of Curley and Schultz. (N.T.G.J. 4/13/11, Conference, p. 10). The representations by Mr. Fina to Judge Feudale occurred outside the presence of, and based upon the record before us, were not communicated to Ms. Baldwin.

Following that exchange, Ms. Baldwin joined the conference. Mr. Fina indicated that he would not ask Mr. Spanier questions about anything related to the document subpoena. (N.T.G.J. 4/13/11, Conference, p. 24). Ms. Baldwin and Mr. Fina discussed a proposed resolution for the University's response to the document subpoena. Mr. Fina stated, "...[t]hen what we would ask that—we can work on the language in this regard—essentially that any of those emails, any subset of those emails that relate in any fashion, whether they're illusions or direct statements to Mr. Sandusky, that those would be culled out by the University and provided directly to the Office of Attorney General." (N.T.G.J. 4/13/11, Conference, p. 26).

Following the discussion regarding the compliance with the document subpoenas, before commencement of questioning of Mr. Spanier, Judge Feudale inquired:

Cindy, just for the record, who do you represent?

MS. BALDWIN: The university.

JUDGE FEUDALE: The university solely?

MS. BALDWIN: Yes, I represent the university solely.

(N.T.G.J. 4/13/11, Conference, p. 28).

April 13, 2011- Grand Jury Testimony of Graham B. Spanier

Judge Feudale provided instructions to Mr. Spanier essentially identical to those provided to Curley and Schultz, namely, the right to advice and assistance of a lawyer, the right to the services of a lawyer with whom the

witness could consult at any time before, during or after testimony or contact with the grand jury; the right to confer at any time during the testimony, the right to refuse to answer any questions and seek a ruling on the refusal to answer, a right to stop the questioning and appear either alone or with counsel to seek a ruling on any matter which may arise. (Transcript of Proceedings, December 17, 2013, Exhibit O, Notes of Testimony Grand Jury Proceedings, Graham Spanier, April 13, 2011, pp. 29-31)(hereinafter, "N.T.G.J. 4/13/11, Spanier").

Judge Feudale instructed Mr. Spanier as to the duty to give truthful answers and cautioned that if a witness answers untruthfully, he may be subject to prosecution for perjury, a felony punishable under the Crimes Code. (N.T.G.J. 4/13/11, Spanier, p. 31). Mr. Spanier asked no questions regarding the explanation of rights or duties.

At the commencement of the questioning, Mr. Fina inquired of Spanier as follows:

BY MR. FINA:

Q. Sir, you're represented by counsel today?

A. Yes.

Q. Could you just identify counsel?

A. Cynthia Baldwin sitting behind me.

(N.T.G.J. 4/13/11, Spanier, p. 3).

Mr. Spanier testified that Timothy Curley was Director of Athletics and reported directly to him in the chain of command, and that Curley would also

work closely with other senior members of the University administration. (N.T.G.J. 4/13/11, Spanier, p. 6). Mr. Spanier testified that from 1993 or 1994 until approximately 2008, Gary Schultz served as Vice President for Finance, the chief financial and business officer of the University. Duties of that position included oversight of financial expenditures and operational areas of the University such as housing, food services, environmental health and safety, physical plant, transportation, internal audit, the controller's office, the University budgeting and other areas. (N.T.G.J. 4/13/11, Spanier, p. 7). Included in those areas of oversight were University police services and public safety operations. (N.T.G.J. 4/13/11, Spanier, p. 8). Mr. Spanier testified that it would be a rare event that criminal allegations or activities would be brought to his attention (N.T.G.J. 4/13/11, Spanier, p. 10; pp. 12-13). Mr. Spanier testified that if he were to be informed of something, it would come from the senior vice president of finance. (N.T.G.J. 4/13/11, Spanier, p. 12). Spanier testified that during his tenure as president, there was never an occasion on which University police came to him with information regarding Sandusky. (N.T.G.J. 4/13/11, Spanier, p. 13).

Mr. Spanier testified that there was one occasion on which Mr. Schultz and Mr. Curley came to him to seek advice on a matter related to Sandusky. (*Id.*) Spanier testified that in 2002, or approximately that time frame, Curley asked if he could see Spanier because Curley had been approached by a member of his staff "saying that he was somewhat uncomfortable because Jerry Sandusky [sic] in the football building locker room area in the shower was with a younger

child and that they were horsing around in the shower. I believe that was the language that was used.” (N.T.G.J. 4/13/11 Spanier, p. 14). Spanier testified that he did not know who witnessed Sandusky in the shower with the child. (N.T.G.J. 4/13/11 Spanier, p. 15).

Mr. Spanier testified that he advised that Curley and Schultz should inform Sandusky that “[i]t was not a good practice to bring people under 18 into [the University’s locker room] and we’d like to ask him not to do that going forward; secondly we thought since he was no longer employed by the University and we really didn’t have any responsibility for him at that point in time that we should also, as a matter of prudence, contact the chair of the board of the Second Mile to simply inform that individual that we were concerned about Second Mile children being brought into Penn State locker facilities and that we were going to ask that that not occur.” (N.T.G.J. 4/13/11, Spanier, p. 17).

Mr. Spanier testified that in his discussions with Curley and Schultz, there was no indication that the conduct described could have been sexual in nature. (N.T.G.J. 4/13/11, Spanier, pp. 22-25). Spanier testified that in reference to the recommendations, Spanier did not make any suggestion that Curley should identify who the child was. (N.T.G.J. 4/13/11, Spanier, p. 21). Mr. Spanier testified that he had no impression that that was done by either Mr. Schultz or Mr. Curley. (*Id.*).

Mr. Spanier testified that there was no discussion with or information provided to him about any prior allegations against Sandusky involving

children. (N.T.G.J. 4/13/11, Spanier, p. 22). Spanier testified that he was never informed before 2011 of an allegation in 1998 that Sandusky was in a University shower with two young men and that contact had occurred. (N.T.G.J. 4/13/11, Spanier, p. 22; pp. 34-35). Mr. Spanier testified that he was never informed before 2011 that the Penn State University Police had investigated allegations of potential sexual misconduct by Sandusky. (*Id.*). He testified that he was not aware of any occurrences where Sandusky had brought children into University locker rooms or showers. (N.T.G.J. 4/13/11, Spanier, p. 26).

Mr. Spanier testified that he believed that no writing resulted from the meeting with Curley and Schultz or that anyone prepared a memo, email or handwritten note. (N.T.G.J. 4/13/11, Spanier, p. 30).

Mr. Spanier testified that in 2002, when the matter was reported to him by Curley and Schultz, they did not indicate in any way that they had disclosed the matter to either law enforcement authorities or other public entities. (N.T. Graham Spanier, 36). Mr. Spanier testified that he believed that no writing resulted from the meeting with Curley and Schultz or that anyone prepared a memo, email or handwritten note. (N.T.G.J. 4/13/11, Spanier, p. 30).

At no time during his testimony before the grand jury did Mr. Spanier ask to consult with Ms. Baldwin, refuse to answer a question on any grounds, express uncertainty as to whether he could lawfully refuse to answer a question, ask a question or request to stop the questioning for any reason.

October 2012- Assertion of Attorney-Client Privilege Before the Grand Jury Judge and Waiver of Privilege by Pennsylvania State University

The record includes a series of letters from the period of June 1, 2012 through October 19, 2012, in which counsel for Defendants Curley and Schultz asserted the attorney-client privilege to which the University's counsel, and counsel for Ms. Baldwin responded. The details of these communications are set forth at length, below.

October 26, 2012- Grand Jury Testimony of Cynthia Baldwin

On October 26, 2012, Ms. Baldwin appeared before the grand jury for questioning.

Mr. Fina represented in his questioning of Ms. Baldwin that, since the time that charges were filed against Sandusky, Curley and Schultz, a number of emails from 1998 and 2001 were discovered which directly related to the 1998 investigation and 2001 crime regarding Sandusky. (N.T.G.J. 10/26/12, Baldwin, p. 20). Ms. Baldwin testified that at no time, in response to her request for materials, did Curley, Schultz or Spanier in any way disclose to her the existence of any emails regarding the events of 1998 or 2001. (*Id.*).

Mr. Fina also represented in his questioning that Mr. Schultz had a file in his office regarding Sandusky which contained documents related to his employment and retirement agreement as well as notes and emails pertaining to the 1998 and 2001 crimes of Sandusky. (*Id.*) Ms. Baldwin testified that

Schultz never revealed the existence of a Sandusky file or its contents, and stated that he did not have anything. (*Id.*).

Testimony Related to Graham Spanier

Ms. Baldwin testified that in January 2011, she became aware and received a copy of a report of the 2008 incident. (N.T.G.J. 10/26/12, Baldwin, p.23). She testified that she did not provide a copy of the report to Spanier, but believed that Spanier was aware that she had received the report. (N.T.G.J. 10/26/12, Baldwin, p. 24). Ms. Baldwin testified that Spanier told her that he did not know anything about the 1998 investigation. (*Id.*).

Ms. Baldwin testified that Spanier was interviewed by the Office of the Attorney General on March 22, 2011, and was asked direct questions regarding any knowledge of or involvement in the incidents of 1998 and 2001. She accompanied Spanier to that interview.(N.T.G.J. 10/26/12, Baldwin, p. 25). A few days after the interview, the Office of the Attorney General notified her that it intended to subpoena Spanier to appear before the grand jury. (N.T.G.J. 10/26/12, Baldwin, p. 27).

Ms. Baldwin testified that she apprised Spanier that he would be required to testify, and that he responded that he would do so. (*Id.*). She testified that she kept Spanier, as University President, apprised of everything of which she was aware regarding the investigation, including the fact that interviews with persons in the Athletics Department occurred. (N.T.G.J. 10/26/12, Baldwin, p. 28). Ms. Baldwin testified that she advised Spanier that if he had questions, he

should feel free to ask her, which he did. (*Id.*) Ms. Baldwin testified that she viewed it as her duty as general counsel to keep Spanier, as University President and Board of Trustees member, aware of the status of the ongoing investigation and believed Spanier expected her to do so. (N.T.G.J. 10/26/12, Baldwin, pp. 28- 29).

Ms. Baldwin testified that communications with the grand jury and the OAG continued from April 2011 through November 2011, during which time she kept Mr. Spanier apprised of those communications. (*Id.*) Ms. Baldwin testified that throughout that period of time, Spanier told her that he did not know anything about the 1998 incident involving Sandusky. (N.T.G.J. 10/26/12, Baldwin, pp. 39-40).

As to the 2001 incident, Ms. Baldwin testified that Spanier stated that Schultz and Curley apprised him of the situation, if it could be so described, and that they had discussions. As University President, Spanier expected that Curley and Schultz would take care of it. (N.T.G.J. 10/26/12, Baldwin, p. 40). She testified that Spanier articulated that he was told that the observation of the incident in the shower of the Lasch Building was horsing around and horseplay. (*Id.*).

Ms. Baldwin testified that in early November 2011, the OAG alerted her that the presentment of the grand jury would include charges against Curley and Schultz related to a failure to report. (N.T.G.J. 10/26/12, Baldwin, p. 41).

III. DISCUSSION

Central to disposition of Defendants' claims and theories for relief is determination of the scope of the attorney-client privilege asserted by each Defendant. We must determine whether the record demonstrates the existence of an individual attorney-client privilege between each Defendant personally and Ms. Baldwin.

We find that, in all matters related to their appearances before the grand jury, including preparation for such appearances, Ms. Baldwin represented each Defendant in his capacity as an agent of the University conducting University business, not in an individual, personal capacity. Thus, in their roles as agents of the University, the Defendants received representation and no denial of counsel occurred.

We also find that the record does not support a divergence of interests of the Defendants as agents from those of the privilege holder, the University, of which Ms. Baldwin was aware, nor a conflict among the Defendants. No apparent conflict of interest precluded her representation of them in their capacities as agents of the University conducting University business.

We further find that the University, as the holder of the privilege, waived its attorney-client privilege, and that any disclosure of information related to the ongoing investigation of Sandusky fell within the terms of the waiver. Therefore, no violations of the attorney-client privilege occurred.

Finally, we find no prosecutorial misconduct based upon a claim that the Commonwealth interfered with the Defendants' constitutional rights, or that

defects existed in the grand jury proceedings with respect to Ms. Baldwin's representation of Defendants before the grand jury.

A. Background of the Attorney-Client Privilege

In their filings, Defendants rely heavily upon standards which govern the establishment of an attorney-client relationship between an individual and counsel, that is,

- 1) The asserted holder of the privilege is or sought to become the client;
- 2) The person to whom the communication was made is a member of the bar or a court, or his subordinate.
- 3) The communication relates to an act of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- 4) The privilege has been claimed and is not waived by the client.

Commonwealth v. Mrozek, 441 Pa.Super. 425, 428, 657 A.2d 997, 998 (1995).

The attorney-client privilege is "deeply rooted in the common law," and in both criminal and civil proceedings, the General Assembly has provided that "counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215, 216-17 (2014) citing 42 Pa.C.S. § 5916 (criminal matters) and 5928 (civil matters); *Commonwealth v. Chmiel*, 558 Pa. 478, 738 A.2d 406, 414 (1999). "The attorney-client privilege is "the most revered of our common law

privileges, and, as it relates to criminal proceedings, it has been codified at 43 PA.C.S.A. §5916....[I]n criminal proceedings, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” *Commonwealth v. Maguigan*, 511 Pa. 112, 124, 511 A.2d 1327, 1333 (Pa. 1986). Nevertheless, the Pennsylvania Supreme Court has acknowledged the “ongoing tension between the two strong, competing interests of justice in play- namely -the encouragement of trust and candid communication between lawyers and their clients... and the accessibility of material evidence to further the truth-determining process”. *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d at 217 (2014); See also, *Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d 361(2013)(attorney-client privilege is often in tension with truth-determining process).

The attorney-client privilege applies to corporations as well as individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981). However, “[a]s the [United States] Supreme Court has recognized... [t]he administration of the privilege in the case of corporations... presents special problems. As an inanimate entity, a corporation must act through its agents.” *In the Matter of Bevill, Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986) citing *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed. 2d 373 (1985).

Further, although “[t]he attorney-client privilege is intended to facilitate full and frank communication between the attorneys and their clients and thereby promote broader public interests in observance of the law and administration of justice’ tension exists between waiver of a corporation’s attorney-client privilege and the assertion of an individual privilege.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *Bevill*, at 125.

The instant case presents the particularly challenging issue of the scope of representation by corporate or organizational counsel and its employees or agents. No parties dispute that Ms. Baldwin represented the University as general counsel and that all three Defendants were high ranking University officials. Defendants assert, however, that Ms. Baldwin represented each Defendant individually and, because of alleged failures of or conflicts in representation, they were deprived of the right to counsel throughout the proceedings, which failures or conflicts entitle them to relief.

Representation of the individual is distinct from representation of the corporate agent in the official capacity. “[T]he party asserting the privilege bears the burden of proving the existence of each element of the privilege.” *United States v. Fisher*, 692 F. Supp. 488, 490-91 (E.D. Pa. 1988) See also, *United States v. Costanzo*, 625 F.2d 465, 468 (3d Cir. 1980) (“While establishment of an attorney-client relationship is not dependent upon execution of a formal contract, the burden of demonstrating that a privileged

relationship exists nonetheless rests on the party who seeks to assert it.”). In this instance, that burden of proof rests upon the Defendants.

Pennsylvania cases, and federal cases relying upon Pennsylvania law, have addressed the standard applicable to determination of the scope of corporate counsel’s representation. Whether there is a valid claim of privilege exists is decided on a case-by-case basis, and applicability of the privilege based upon the attorney-client relationship is a factual question, the scope of which is a question of law. *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1988) citing *Upjohn Co., v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed 2d 584. Pennsylvania has adopted the five-part test set forth in *Bevill* which governs the issue of whether an attorney-client privilege exists between corporate counsel and corporate officers. See, *Maleski by Chronsiter v. Corporate Life Ins. Co.*, 163 Pa.Cmwlt. 36, 641 A. 2d 1 (1994).

In *Bevill*, the United States Court of Appeals of the Third Circuit affirmed the District Court’s order which required disclosure of communications related to corporate matters by corporate officers to corporate counsel where the corporation waived the attorney-client privilege. The Court explained that, in order to assert an individual attorney-client privilege as to communications with corporate counsel, corporate officers must demonstrate that:

First, they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual

capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Bevill, 805 F. 2d at 123 (citing *In re Grand Jury Investigation*, 575 F.Supp. 777, 780 (N.D. Ga. 1983)).

The *Bevill* Court reminded that any privilege which exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer, and that, "[b]ecause a corporation can act only through its agents, a corporation's privilege consists of communications by corporate officials about corporate matters and their actions in the corporation. A corporate official thus may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters. *Bevill*, at 125 (internal citations omitted). See also, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 349, 105 S.Ct. 1986, 85 L.Ed. 2d 372 (1985)(any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer).

These standards apply equally in civil and criminal settings. For example, in *United States v. Norris*, 722 F.Supp.2d 632 (2010), the United States District Court for the Eastern District of Pennsylvania relied upon the five-part *Bevill* test, adopted as Pennsylvania law, and found that no individual attorney-client relationship between corporate counsel and a chief executive officer of the corporation charged with fabricating information. In *Norris*, as in the instant matter, corporate counsel accompanied the corporate officer to an interview in

advance of the officer's grand jury testimony. The corporation later waived its attorney-client privilege as to communications with corporate counsel regarding representation in connection with the grand jury investigation. In denying the corporate officer's motion to suppress testimony of corporate counsel, the Court concluded that, 1) at no time did the corporate officer ask corporate counsel to represent him personally, 2) the corporate officer provided no evidence of a conversation which did not involve the business affairs of the corporation, 3) the corporate counsel did not believe he represented the corporate officer individually. *Norris*, at 639. The United States Court of Appeals affirmed the District Court's reliance upon *Bevill* and its holding that no attorney-client relationship existed. *United States v. Norris*, 419 Fed. Appx. 190 (March 23, 2011)(3d Cir. Pa.).

B. Application of Law and Conclusions: Scope of the Attorney-Client Relationship

Applying these standards in the instant matter, the evidence fails to establish that Ms. Baldwin represented Defendants in their individual capacities, but instead, demonstrates that Ms. Baldwin represented each Defendant in his role as an official of the University conducting University business. In reaching this conclusion, we rely in part upon evidence presented at the November 20 and 21, 2014 hearings, but for the reason set forth above, we do not cite to that testimony in this Opinion.

First, Defendants each approached Ms. Baldwin for legal advice related to receipt of subpoenas for appearance before the grand jury. In consultation with

the University President Spanier, Ms. Baldwin arranged for contact with Curley and Schultz regarding the subpoenas. The OAG served the subpoenas upon Messrs. Curley and Schultz through Ms. Baldwin as general counsel, rather than upon them personally at their homes or elsewhere. Mr. Spanier instructed Ms. Baldwin that she would represent each before the grand jury. Each met with Ms. Baldwin, at the instruction of the University President, to receive counsel related to their appearances before the grand jury.

Second, Defendants presented no evidence that they sought representation in their individual rather than their organizational capacities. Defendants rely instead upon assertions as to their beliefs regarding representation, which we do not find satisfies their burden of proof. In contrast, Ms. Baldwin presented testimony as to her discussion with Defendants as to their rights related to representation and the nature of their communications with her. Defendants chose to proceed with Ms. Baldwin as their counsel, aware of her role as University counsel and made no request that she represent them individually.

Third, there exists no evidence that Ms. Baldwin communicated with the officials in their individual capacities, knowing that a conflict could arise. We cannot conclude that Ms. Baldwin was aware of facts which raised a conflict between the interests of the University and the Defendants personally; that is, potential personal exposure to criminal charges. In response to Ms. Baldwin's request to gather information required by the subpoena *duces tecum* directed to the University, Defendants responded that they had none. If Defendants

possessed personal knowledge which created either personal criminal exposure or a conflict of interest, we have no evidence upon which we could conclude that Ms. Baldwin was or should have been aware of such information and communicated with them in their individual capacities in spite of such knowledge.

As to the fourth factor, we find that Ms. Baldwin maintained confidentiality of communications with the Defendants in their roles as agents, until such time as the University waived the privilege it held.

Finally, Defendants have not alleged that conversations occurred with Ms. Baldwin which related to private individual matters outside of their roles as University officials.

IV. Defendants' Theories in Support of Claims for Relief

Having reached this conclusion as to the scope of Ms. Baldwin's representation, we turn to Defendants' claims for relief.

A. Right to counsel

No violation of the right to counsel occurred where Ms. Baldwin consistently and properly identified her role as counsel to the University in consultation with the Defendants and in the grand jury proceedings. Defendants chose to proceed with the University's counsel and therefore suffered no denial of the right to counsel.

In support of the claim of denial of the right to counsel, Defendants rely heavily upon Ms. Baldwin's identification of herself as counsel to the University. Indeed, Ms. Baldwin made clear on the record at each proceeding that she appeared as general counsel to the University. Such identification neither concealed nor misrepresented her role.

Ms. Baldwin further correctly noted her representation of the witnesses as University agents. On behalf of Messrs. Curley and Schultz, Ms. Baldwin articulated her representation by reference to their respective roles at the University. (MS. BALDWIN: *My name is Cynthia Baldwin, general counsel for Pennsylvania State University.* JUDGE FEUDALE: Will you be providing representation for both those identified witnesses? MS. BALDWIN: *Gary is retired but was employed by the university and Tim is still an employee.*)(N.T.G.J. 1/12/11, p. 8). Mr. Spanier correctly identified Ms. Baldwin as his counsel in his appearance before the grand jury in the capacity as University president.(MR. FINA: Could you just identify counsel? A. *Cynthia Baldwin sitting beside me.*)(N.T.G.J. 4/13/11, Spanier, p. 3). No reason existed for Ms. Baldwin to correct Mr. Spanier's statement. Ms. Baldwin's identification as their counsel as University officials was consistent with her role as general counsel to the University.

It follows, therefore, that we find meritless Defendants' claims that they appeared before the grand jury without the benefit of counsel. In asserting that argument, Defendants rely upon cases which address the remedies available for failure of a grand jury judge to apprise a witness of his rights, including the

right to counsel. (See e.g., Defendant Curley's Reply to The Commonwealth's Answer to Defendant's Omnibus Pre-Trial Motion, p. 14; Schultz Memorandum of Law in Support of Omnibus Pre-Trial Motion, p. 15, citing *Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. Super. 1972) and *Commonwealth v. Cohen*, 289 A.2d 96 (Pa. Super 1972)).

We find misplaced Defendants' reliance upon *McCloskey* and *Cohen*, which address the denial of counsel before a grand jury. In *McCloskey*, the Supreme Court quashed the indictment of a defendant based upon grand jury testimony provided following denial of the defendant's request to have counsel with him in the grand jury room, or in the alternative, that he be allowed to consult with counsel at will outside the door. The Supreme Court stated,

In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness's right to exercise his privilege against self incrimination knowingly and intelligently, we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should state the answer.

Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury. He has been summoned to testify, and he is subject to contempt proceedings if he should refuse to testify without justification. The question of when a witness has 'reasonable cause to apprehend danger' and hence can exercise his right against self incrimination is not always clear.

McCloskey, at 776.

Thus, the Court concluded, “a subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self-incrimination.” *Id.*

In *Cohen*, the Superior Court applied the requirement of *McCloskey* instructions to the appearance of an attorney as a witness before the grand jury, and quashed the indictment where the supervising grand jury judge failed to advise the attorney-witness of the Fifth Amendment right to remain silent and the Sixth Amendment right to seek the advice of counsel.

No such violations occurred in the instant case. As set forth above, Judge Feudale’s instructions fully apprised the witnesses of their right to counsel and all of its related privileges, including the right to the advice and assistance of a lawyer, and the right to confer and consult with a lawyer at any time before, during or after testifying before the grand jury. (N.T.G.J. 1/12/11, pp. 8-11; N.T.G.J. 5/13/11, pp. 29-31). Judge Feudale’s instructions complied in every respect to the requirements set forth in *McCloskey* and *Cohen*.

Accordingly, neither Ms. Baldwin’s identification of herself as counsel to the University representing the witnesses in their agency capacities nor Judge Feudale’s instructions to the witnesses deprived Defendants of the right to counsel. Defendants were represented by counsel in the role in which they appeared, agents of the University.

B. Right to Conflict Free Counsel

We reject Defendants’ assertions that they received conflicted representation in derogation of their Sixth Amendment right to counsel based

upon an alleged conflicts of interest. Ms. Baldwin did not jointly represent the individuals personally or in conflict with the University.

We find that the interests of the University and the individuals appeared aligned at the time the Defendants met with Ms. Baldwin and testified before the grand jury, that is, the interests in providing truthful information within their knowledge, as agents of the University, regarding the apparent target of the investigation, Sandusky.

We disagree with the assertion that Ms. Baldwin knew or should have known that the interests of the individual Defendants would diverge from the interests of the University, such that an inevitable conflict existed, which denied Defendants of representation. If, as the Commonwealth alleges, Defendants provided false testimony as to their knowledge of information or documents which created individual exposure to criminal liability, that exposure arose at such time as the Commonwealth viewed their testimony as chargeable conduct. Defendants testified after receiving proper instruction from the grand jury judge regarding their duties. If, in fact, they gave chargeable testimony, we decline to find that the information of which Ms. Baldwin was aware in advance raised an issue of a divergence of interests.

We also decline to find that Ms. Baldwin should have been aware of an alleged conflict by virtue of Mr. Paterno's separate representation. No evidence exists upon which we may make assumptions regarding his choice of representation, and we do not infer that such choice proved the existence of a conflict.

We note that, even after their grand jury testimony, based upon the information of which Ms. Baldwin was aware, the Defendants' testimony appeared consistent. If, as Defendants argue, the Commonwealth shifted the focus from investigation of Sandusky to the University or individual Defendants, the record does not support that the Commonwealth communicated that focus to Ms. Baldwin. Discussions regarding the view of alleged inconsistencies in the testimony of Messrs. Curley and Schultz took place outside of Ms. Baldwin's presence in an *ex parte* discussion regarding the scope of a document subpoena. (See, N.T.G.J. 5/13/11, Conference).

Further, Ms. Baldwin could not have been aware of any alleged inconsistencies between the Defendants' testimony and that of Michael McQueary, who testified in secret grand jury proceedings.

B. Violation of Grand Jury Secrecy

Because they were represented by counsel in the capacity in which they appeared before the grand jury, agents of the University, Ms. Baldwin's appearance in the grand jury room with Messrs. Curley, Shultz and Spanier was proper and did not violate secrecy. As counsel, Ms. Baldwin was entitled to accompany her client, the University, by its agents.

C. Breach of Attorney-Client and Work Product Privileges

We find that no violation of the attorney-client privilege occurred where Ms. Baldwin testified before the grand jury on October 26, 2012 within the scope of the waiver of privilege of the University, as the holder of the privilege.

Following issuance of the presentment, Messrs. Curley and Schultz obtained individual counsel. On behalf of Mr. Schultz, on June 1, 2012, Thomas J. Farrell, Esq., wrote to Charles DeMonaco, Esq., counsel to Ms. Baldwin. Ms. Baldwin concluded her position as general counsel in January 20, 2012. Attorney Farrell asserted that Ms. Baldwin represented Mr. Schultz during preparation for his appearance before the grand jury, during his interview and appearance before the grand jury on January 12, 2011, and through and until Mr. Farrell's retention on or about October 2011. Attorney Farrell requested that "[Mr. DeMonaco] and Judge Baldwin assert the attorney-client and work product privileges in response to any and all requests from the OAG, USAO in the Middle District of Pennsylvania, Louis Freeh and his investigation group and anyone else who may ask." (Transcript of Proceedings, December 17, 2013, Exhibit C).

Similarly, on behalf of Mr. Curley, on June 11, 2012, Caroline Roberto, Esq., wrote to Attorney DeMonaco and asserted that "Justice Baldwin was previous counsel to Mr. Curley and represented such to him and to others on several occasions. Therefore, I ask that you and Justice Baldwin assert the attorney-client work product privileges in response to all requests from the Attorney General, the United States Attorney's Office in the Middle District, the Louis Freeh investigation and those associated with it, and others seeking information or response related to Mr. Curley." (Transcript of Proceedings, December 17, 2013, Exhibit D).

On June 22, 2012, Attorney DeMonaco responded to Attorney Farrell and Attorney Roberto that:

.... Cynthia Baldwin, as General Counsel was counsel for and represented The Pennsylvania State University and represented the interests of administrators of the University in their capacity as agents conducting University business, so long as their interests were aligned with the University. She however, as General Counsel for the University, could not and did not represent any agent of the University in an individual capacity. Nevertheless, Cynthia Baldwin considered communications with the University and those agents whose interests were aligned with the University to be confidential.

(Transcript of Proceedings, December 17, 2013, Exhibit F).

On October 2, 2012, Michael Mustokoff, Esq., then counsel for the University, wrote to Judge Feudale advising that the University waived its attorney-client privilege. On behalf of the University, Mr. Mustokoff stated,

The University has agreed to waive privilege as to the Office of General Counsel's efforts to comply with the Commonwealth's grand jury investigation related to Gerald Sandusky, specifically excluding privileged communications with or concerning outside counsel, and has further agreed to waive the University's assertion of privilege regarding certain actions taken by the Office of General Counsel subsequent to November 4, 2011.

(Transcript of Proceedings, December 17, 2013, Exhibit G)(emphasis added).

October 11, 2012, Attorney Roberto wrote to Judge Feudale and asserted that attorney-client and work product privileges existed regarding Ms. Baldwin's representation of Curley during the grand jury proceedings.

(Transcript of Proceedings, December 17, 2013, Exhibit I). On the same date, Mr. Farrell wrote to Judge Feudale and asserted that those privileges applied to Ms. Baldwin's preparation for the grand jury, as well as representation during

and after Mr. Schultz's appearance before the grand jury. (Transcript of Proceedings, December 17, 2013, Exhibit H).

On October 19, 2012, Mr. Mustokoff wrote to Mr. Fina regarding the scope of the waiver of the University's attorney-client privilege. Mr. Mustokoff stated exceptions to the University's waiver as follows:

(2) *any communications between Justice Baldwin and Messrs. Schultz and Curley.* We have previously shared our concerns about the Schultz/Curley communications with you and memorialized them in our October 2, 2012 letter to Judge Feudale.

(Transcript of Proceedings, December 17, 2013, Exhibit K).

On October 22, 2012, in anticipation of upcoming grand jury testimony of Ms. Baldwin, Judge Feudale conducted a conference with Mr. Fina, Mr. Mustokoff and Mr. DeMonaco during which counsel and the court discussed the claims of privilege asserted on behalf of Curley and Schultz. (Transcript of Proceedings, December 17, 2013, Exhibit P, Transcript of Grand Jury Proceedings, October 22, 2013)(hereinafter, "N.T.G.J. 10/22/12, Conference").

At that conference, Mr. Mustokoff stated that with all aspects of Ms. Baldwin's representation of the University, the attorney-client privilege belonged to the University. (N.T.G.J. 10/22/12, Conference p. 6). Mustokoff asserted that the issue of the scope of an asserted privilege between Ms. Baldwin and Messrs. Curley and Schultz was a matter for the court. (*Id.*). Mr. DeMonaco, as counsel for Ms. Baldwin, asserted that "[Ms.] Baldwin was counsel for and represented the interest of Penn State University and

represented the interest of administrators of Penn State University in capacity as agents conducting University business so long as their interests were aligned with the University.” (N.T.G.J. 10/22/12, Conference, p. 8).

Before Judge Feudale, Fina, Mustokoff and DeMonaco agreed that, in view of the assertion of a privilege on behalf of Curley and Schultz, Mr. Fina would not ask questions of Ms. Baldwin as to the “testimony of Mr. Schultz and Mr. Curley before the grand jury, and any preparation for or follow-up they had with Counsel Baldwin, University Counsel Baldwin” (N.T.G.P. Conference, 10/22/12, pp. 10-11). Mr. Fina stated, “ I don’t believe [counsel for Curley and Schultz] attempt to extend the privilege to any actions that Baldwin took as University counsel in fulfilling subpoenas and the contacts that may have occurred between those two gentlemen in the fulfillment of subpoenas that were issued to the University.” (N.T.G.J. 10/22/12, Conference 10/22/12, p. 5).

Our analysis of whether Ms. Baldwin’s grand jury testimony breached the attorney-client privilege is controlled by identification of the privilege holder, and the scope of any waiver thereof. Attorneys Roberto and Farrell’s assertions of the privilege, and the lack of an assertion on behalf of Mr. Spanier, against whom the Commonwealth had not yet filed charges, do not control our analysis. No evidentiary record existed upon which Judge Feudale could decide the issue, asserted only by way of letter. In his April 9, 2013, Opinion, Judge Feudale found that he lacked jurisdiction to do so.

We have determined that Ms. Baldwin represented the University and Defendants as agents conducting University business. Therefore, the University held the attorney-client privilege, which it agreed to waive. Ms. Baldwin testified within the scope of the waiver and the parameters set forth in advance of her grand jury testimony.

As to Messrs. Curley and Schultz, Ms. Baldwin testified regarding their knowledge of documents requested by subpoena directed to the University, to which the University had an obligation to respond. Ms. Baldwin's testimony regarding Mr. Spanier's communication of lack of awareness of the 1998 incident and handling of the 2001 incident was within the scope of the University's waiver. Regardless of whether or not private counsel had asserted a privilege on his behalf, as we have stated, "a corporate official may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters." *Bevill*, at 125.

The University having waived its privilege, Ms. Baldwin's testimony did not breach an attorney-client privilege.

D. Prosecutorial Interference With the Right to Counsel and Structural Defects in the Grand Jury Proceedings

We reject Defendants' arguments that the OAG engaged in prosecutorial misconduct or that apparent conflicts existed which required disqualification of Ms. Baldwin by Judge Feudale.

First, Defendants assert that the OAG engaged in prosecutorial misconduct which amounted to denial of the right to counsel because it perceived inconsistencies between the Defendants' testimonies, did not address allegedly resulting conflicts of interest and therefore compromised the grand jury proceedings.

The Commonwealth was not obligated to disclose in advance of Defendants' grand jury appearances, whether or not they viewed them as targets. In *Commonwealth v. Williams*, 388 Pa. Super. 153, 565 A.2d 160 (1989), the Pennsylvania Superior Court considered whether the Commonwealth engaged in misconduct consisting of "setting a perjury trap" for an uncounseled target of a grand jury. Williams sought reversal of convictions for perjury and false swearing and asserted that the Commonwealth engaged in misconduct by bringing Defendant before the grand jury with the primary purpose of extracting perjured testimony from him. *Id.* at 163. In *Williams*, although the Commonwealth recognized the possibility that the witness might perjure himself, truthful answers could have disclosed information useful to the investigation; therefore, the Court declined to say that he was subpoenaed for the sole purpose of extricating perjured testimony. *Williams*, at 164. The Court held that it was not improper for the Commonwealth to allow the witness to testify uncounseled and non-immunized where he was a "target" and not merely a witness and "strenuously disagreed" with Williams' argument that the Commonwealth had a duty to warn him that he was a target, and entitled to counsel and a grant of immunity. *Id.*, at 166.

In so deciding, the Superior Court looked to the adequacy of the instructions to the witness provided by the grand jury judge regarding the duty to testify truthfully. The Court reminded that the witness was given the opportunity to obtain counsel and to refuse to answer questions which might incriminate him. The Court explained,

...we do not understand what constitutional disadvantage a failure to give potential warnings could possibly inflict on a grand jury witness, whether or not he has received other warnings. It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Williams, at 166, citing *United States v. Washington*, 431 U.S. 181, 189 97 S.Ct. 1814, 1820, 52 L.Ed. 2d 238, 246 (1977).

In the instant case, the Commonwealth sought information from Curley, Schultz and Spanier in connection with the Sandusky investigation. Judge Feudale provided each one virtually identical instruction to those provided in *Williams*. Pursuant to *Williams*, Defendants' rights as witnesses before the grand jury were the same regardless of the Commonwealth's perception of their status.

Second, Defendants assert that defects existed in the grand jury proceedings because alleged conflicts of interest required that Judge Feudale disqualify Ms. Baldwin.

No structural defect existed in the proceedings by virtue of Ms. Baldwin's appearance with each Defendant as an agent of the University. Her appropriate identification of her role as counsel raised no apparent conflict of interest which required intervention by Judge Feudale.

Defendants' reliance upon *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975), to argue a duty on the part of Judge Feudale to disqualify Ms. Baldwin from representation is misplaced. In *Pirillo*, the Pennsylvania Supreme Court upheld the disqualification of an attorney, engaged by the Fraternal Order of Police, from representing twelve police officers before an investigating grand jury. The Supreme Court agreed that an impairing conflict existed where the Fraternal Order of Police had "avowed [a] public policy of strenuous opposition to any form of cooperation by individual policemen with the Special Prosecutor's office and with the investigating grand jury, and [took] the position that the interest of any single member in cooperating to obtain leniency must be sacrificed to the interest of the membership as a whole in obstructing any inquiry into police corruption" *Id.*, at 518; 528.

In this case, the Commonwealth's theory or belief that inconsistencies existed in testimonies of Defendants did not rise to a level of impairing conflict which required Judge Feudale's intervention into the issue of representation.

No apparent conflicts of interest existed at that time Defendants testified which either denied their right to counsel or compromised the grand jury proceedings.

F. Effective Assistance of Counsel

We decline to consider Defendants' claims that Ms. Baldwin provided ineffective or inadequate representation which warrant relief. (See, e.g. Omnibus Pre-Trial Motion of Timothy Mark Curley, p. 6, Sec. B, Failure to Provide Competent Representation). Claims of ineffectiveness may be brought only after the conclusion of direct appeal following conviction under the Post Conviction Relief Act, 42 Pa. C.S. §§ 9541-9546. See also, *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002).

F. Crime-Fraud Exception and Waiver

As to Ms. Baldwin's grand jury testimony related to Mr. Spanier, the Commonwealth and Defense Counsel dispute the applicability of the crime-fraud exception to the attorney-client privilege. Pursuant to the crime-fraud exception, "[p]rotection under attorney-client privilege is subject to limits, exceptions, and waiver...[t]he crime-fraud exception results in loss of the privilege's protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity." *In re Investigating Grand Jury of Philadelphia County*, No. 88-00-3503, 527 Pa. 432, 441-42, 593 A.2d 402, 406-07(1991). Because we find that Mr. Spanier failed to meet the burden of proving an individual attorney-client relationship with Ms. Baldwin, and the

University, as the privilege holder waived its privilege as to Ms. Baldwin's grand jury testimony, we need not consider the applicability of the crime-fraud exception.

For the same reason, we need not address whether Mr. Spanier waived the attorney-client privilege by his July 23, 2012 letters to the University Board of Trustees or the ABC News interview in the summer of 2012. (Transcript of Proceedings, December 17, 2013, Commonwealth Exhibit).

V. CONCLUSION

For all of the forgoing reasons, we enter the following:

ORDER

AND NOW, this 14th day of January, 2015, it is hereby

ORDERED that:

As to Defendant Timothy M. Curley, the following Motions are **DENIED**:

1. Omnibus Pre-Trial Motion, filed November 1, 2012 at Docket No. 5165 CR 2011
2. Motion to Preclude Testimony of Attorney Cynthia Baldwin filed November 20, 2012 at Docket No. 1385 MD 2012
3. Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product, filed November 28, 2012

4. Motion to Suppress Grand Jury Testimony, to Dismiss Prior Charges and Incorporate Prior Motions, filed November 21, 2013
5. Joint Motion (with Graham B. Spanier) to Quash Criminal Complaint and Presentment, filed June 20, 2013

As to Defendant Gary C. Schultz, the following Motions are **DENIED**:

1. Omnibus Pre-Trial Motion, filed October 31, 2012 at Docket No. 5164 CR 2011
2. Motion to Preclude Testimony of Cynthia Baldwin filed November 20, 2012 at Docket No. 1386 CR 2012
3. Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communications and Work Product, filed November 27, 2012 at Docket Nos. 217 MD Misc. Docket 2010 and 5165 CR 2011
4. Motion to Join Co-Defendant Spanier's Motion and Memorandum of Law in Support of Motion to Quash Criminal Complaint and Presentment filed June 20, 2103 at 1386 MD 2012
5. Motion to Suppress Grand Jury Testimony, to Dismiss and Incorporate Prior Motions filed October 18, 2013 at 5164 CR 2011 and 3616 CR 2013

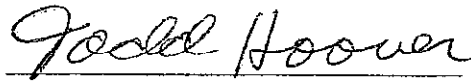
As to Defendant Graham B. Spanier, Docket No. 3615 CR 2013, the following Motions are **DENIED**:

1. Motion to Preclude Testimony of Attorney Cynthia Baldwin filed November 20, 2012
2. Motion to Quash Criminal Complaint filed May 16, 2013 seeking quashal of the Perjury, Obstruction and Conspiracy to Commit Perjury and Obstruction charges based upon claims of violation of the attorney-client privilege, deprivation of the right to counsel, alleged improper presence in the grand jury session, violation of the right to effective assistance of counsel, violation of Due Process

Note: The court **RESERVES** ruling upon requests for quashal of charges of Child Endangerment, Failure to Report, Conspiracy to Commit Child Endangerment presented on grounds other than those addressed in this Opinion. Ruling upon these claims shall be made by separate Order.

3. As submitted to Grand Jury Judge:
 - a. Motion to Quash Presentment, November 26, 2012
 - b. Supplemental Motion to Quash Presentment or in the Alternative to Strike Defendant Grand Jury Testimony filed January 18, 2013

BY THE COURT:



TODD A. HOOVER, JUDGE

Distribution:

Bruce R. Beemer, Esquire, First Deputy Attorney General
James P. Barker, Esquire, Chief Deputy Attorney General
Karen Ditka, Esquire, Chief Deputy Attorney General
Office of PA Attorney General, Criminal Prosecutions Section, 16th Floor-Strawberry Square,
Harrisburg, PA 17120
(Attorneys for the Commonwealth)

Caroline Roberto, Esquire
Law & Finance Building, 5th Floor, 429 Fourth Avenue,
Pittsburgh, PA 15219
(Attorney for Defendant Curley)

Brian Perry, Esquire
2411 N. Front Street
Harrisburg, PA 17110
(Attorney for Defendant Curley)

Thomas J. Farrell, Esquire
Farrell & Reisinger, 436 7th Avenue, Suite 200
Pittsburgh, PA 15219
(Attorney for Defendant Schultz)

George H. Matangos, Esquire
P.O. Box 222, 831 Market Street
Lemoyne, PA 17043-0222
(Attorney for Defendant Schultz)

Timothy K. Lewis, Esquire
Elizabeth K. Ainslie, Esquire
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(Attorneys for Defendant Graham B. Spanier)

EXHIBIT 7

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>

Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

 At 10:18 PM 2/27/01 - 0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.

 At 08:10 PM 2/27/01 - 0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
 President
 The Pennsylvania State University
 201 Old Main
 University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

EXHIBIT 8

INTRODUCTION

We, the members of the Thirty-Third Statewide Investigating Grand Jury, having received and reviewed evidence regarding violations of the Crimes Code occurring in Centre County, Pennsylvania, and elsewhere pursuant to Notice of Submission of Investigation No. 1, do hereby make the following findings of fact and recommendation of charges.

FINDINGS OF FACT

The Grand Jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky (“Sandusky”) over a period of years, both while Sandusky was a football coach for the Pennsylvania State University (“Penn State”) football team and after he retired from coaching. Widely known as Jerry Sandusky, the subject of this investigation founded The Second Mile, a charity initially devoted to helping troubled young boys. It was within The Second Mile program that Sandusky found his victims.

Sandusky was employed by Penn State for 23 years as the defensive coordinator of its Division I collegiate football program. Sandusky played football for four years at Penn State and coached a total of 32 years. While coaching, Sandusky started “The Second Mile” in State College, Pennsylvania, in 1977. It began as a group foster home dedicated to helping troubled boys. It grew into a charity dedicated to helping children with absent or dysfunctional families. It is now a statewide, three region charity and Sandusky has been its primary fundraiser.¹ The Second Mile raises millions of dollars through fundraising appeals and special events. The mission of the program is to “help children who need additional support and would benefit from positive human interaction.” Through The Second Mile, Sandusky had access to hundreds of boys, many of whom were vulnerable due to their social situations.

¹ Sandusky retired from The Second Mile in September 2010.

VICTIM 1

The Grand Jury conducted an investigation into the reported sexual assault of a minor child, Victim 1, by Sandusky, when Victim 1, a Second Mile participant, was a houseguest at Sandusky's residence in College Township, Centre County, Pennsylvania. During the course of the multi-year investigation, the Grand Jury heard evidence that Sandusky indecently fondled Victim 1 on a number of occasions, performed oral sex on Victim 1 on a number of occasions and had Victim 1 perform oral sex on him on at least one occasion.

Victim 1 testified that he was 11 or 12 years old when he met Sandusky through The Second Mile program in 2005 or 2006. As with the remaining victims, Victim 1 only came to Sandusky's attention during his second year in the program, when the boy attended The Second Mile's camp on the Penn State University Park campus. During the 2007 track season, Sandusky began spending time with Victim 1 weekly, having the boy stay overnight at his residence in State College, Pennsylvania. Sandusky took Victim 1 to professional and college sporting events, such as Philadelphia Eagles games, or pre-season practices at Penn State. When Victim 1 slept at the Sandusky residence, he would sleep in a finished bedroom in the basement. Occasionally, other boys would also stay overnight at Sandusky's home but usually it was only Victim 1. Sandusky also encouraged Victim 1 to participate in The Second Mile as a volunteer. Sandusky gave Victim 1 a number of gifts, including golf clubs, a computer, gym clothes, dress clothes and cash. Sandusky took the boy to restaurants, swimming at a hotel near Sandusky's home, and to church.

Victim 1 testified that Sandusky had a practice of coming into the basement room after he told Victim 1 that it was time to go to bed. Victim 1 testified that Sandusky would "crack his back." He described this as Sandusky getting onto the bed on which Victim 1 was already lying

and rolling under the boy. With Victim 1 lying on top of him, face to face, Sandusky would run his arms up and down the boy's back and "crack" it. The back-cracking became a ritual at bedtime. Victim 1 said that after Sandusky had cracked his back a number of times, he progressed to rubbing Victim 1's backside while they lay face-to-face on the bed. Victim 1 testified that this began to occur during the summer of 2005 or 2006, before he entered sixth or seventh grade. Sandusky then began to blow on Victim 1's bare stomach. Eventually, Sandusky began to kiss Victim 1 on the mouth. Victim 1 was uncomfortable with the contact and would sometimes try to hide in the basement to avoid Sandusky. Victim 1 testified that ultimately Sandusky performed oral sex on him more than 20 times through 2007 and early 2008. Sandusky also had Victim 1 perform oral sex on him one time and also touched Victim 1's penis with his hands during the 2007-2008 time period. Victim 1 did not want to engage in sexual conduct with Sandusky and knew it was wrong. Victim 1 stopped taking Sandusky's phone calls and had his mother tell Sandusky he was not home when Sandusky called. This termination of contact with Sandusky occurred in the spring of 2008, when Victim 1 was a freshman in high school.

Before Victim 1 ceased contact with Sandusky, Sandusky routinely had contact with him at a Clinton County high school where the administration would call Victim 1 out of activity period/study hall in the late afternoon to meet with Sandusky in a conference room. No one monitored these visits. Sandusky assisted the school with coaching varsity football and had unfettered access to the school.

Victim 1 testified about an incident that occurred one evening at the high school when he and Sandusky were alone in the weight room where there was a rock climbing wall. After Victim 1 fell off the wall a few times, Sandusky lay down on top of him, face to face, and was

rolling around the floor with the boy. No one was able to see Victim 1 and Sandusky because of the configuration of the room. Sandusky was lying under Victim 1 with his eyes closed. Suddenly a wrestling coach, Joe Miller, unexpectedly entered the room and Sandusky jumped up very quickly and explained that they had just been wrestling.

Joseph Miller testified that he was head wrestling coach for the elementary wrestling program for that school district. He knew Victim 1, who had wrestled for him. Miller corroborated that one evening in 2006 or 2007, he returned to the high school to retrieve something he had forgotten. He saw a light on in the weight room which should have been turned off and when he went in, he discovered Victim 1 and Sandusky, lying on their sides, in physical contact, face to face on a mat. He said both Victim 1 and Sandusky were surprised to see him enter the room. He recalls that Sandusky jumped up and said, "Hey Coach, we're just working on wrestling moves." Sandusky was not a wrestling coach. Miller found the use of that secluded room odd for wrestling because the bigger wrestling room right outside the weight room had more room to wrestle and more mats. He had seen Victim 1 with Sandusky frequently before the weight room incident. He saw them together after school and before athletic practice time.

Steven Turchetta testified that he was an assistant principal and the head football coach at the high school attended by Victim 1. He testified that Sandusky was a volunteer assistant football coach. Sandusky also worked with children in the Second Mile program in that school district. Turchetta described the Second Mile as a very large charitable organization that helped children who are from economically underprivileged backgrounds and who may be living in single parent households. Turchetta first met Sandusky in 2002 when Sandusky attempted to assist some Second Mile members who were on Turchetta's football team. Sandusky's

involvement grew from there. In the 2008 season, Sandusky was a full-time volunteer coach. Turchetta said it was not unusual for him, as assistant principal, to call a Second Mile student out of activity period at the end of the day, at Sandusky's request, to see Sandusky. He knew of several students who were left alone with Sandusky, including Victim 1. Turchetta characterized Sandusky as very controlling within the mentoring relationships he established with Second Mile students. Sandusky would often want a greater time commitment than the teenagers were willing to give and Sandusky would have "shouting matches" with various youths, in which Turchetta would sometimes be the mediator. Turchetta would also end up being Sandusky's point of contact for a youth whom he had been unable to reach by phone the previous evening. Turchetta testified that Sandusky would be "clingy" and even "needy" when a young man broke off the relationship he had established with him and called the behavior "suspicious." Turchetta became aware of Victim 1's allegations regarding sexual assault by Sandusky when the boy's mother called the school to report it. Sandusky was barred from the school district attended by Victim 1 from that day forward and the matter was reported to authorities as mandated by law.

Office of Attorney General Narcotics Agent Anthony Sassano testified concerning phone records that establish 61 phone calls from Sandusky's home phone to Victim 1's home phone between January 2008 and July 2009. In that same time, there were 57 calls from Sandusky's cell phone to Victim 1's home phone. There were four calls made from Victim 1's home phone to Sandusky's cell phone and one call from Victim 1's mother's cell phone to Sandusky's cell phone. There were no calls made to Sandusky's home phone by Victim 1 during that time period.

Another youth, F.A., age fifteen, testified that Sandusky had taken him and Victim 1 to a Philadelphia Eagles football game and that Sandusky had driven. He witnessed Sandusky place

his right hand on Victim 1's knee; Sandusky had also done this to F.A. on more than one occasion when they were in Sandusky's car. F.A. was uncomfortable when Sandusky did this and moved his leg to try to avoid the contact. Sandusky would keep his hand on F.A.'s knee even after F.A. tried to move it. F.A. also testified that Sandusky would reach over, while driving, and lift his shirt and tickle his bare stomach. F.A. did not like this contact. F.A. also witnessed Sandusky tickling Victim 1 in similar fashion. Sandusky invited F.A. to stay over at his house but F.A. only stayed one time when he knew Victim 1 was also staying over, after returning from the Philadelphia Eagles game. F.A. confirmed that Victim 1 slept in Sandusky's basement room when F.A. stayed there. F.A. testified that he stayed away from Sandusky because he felt he didn't want to be alone with him for a long period of time, based on the tickling, knee touching and other physical contact. Victim 1 confirmed that Sandusky would drive with his hand on Victim 1's leg.

VICTIM 2

On March 1, 2002, a Penn State graduate assistant ("graduate assistant") who was then 28 years old, entered the locker room at the Lasch Football Building on the University Park Campus on a Friday night before the beginning of Spring Break. The graduate assistant, who was familiar with Sandusky, was going to put some newly purchased sneakers in his locker and get some recruiting tapes to watch. It was about 9:30 p.m. As the graduate assistant entered the locker room doors, he was surprised to find the lights and showers on. He then heard rhythmic, slapping sounds. He believed the sounds to be those of sexual activity. As the graduate assistant 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.

The graduate assistant went to his office and called his father, reporting to him what he had seen. His father told the graduate assistant to leave the building and come to his home. The graduate assistant and his father decided that the graduate assistant had to promptly report what he had seen to Coach Joe Paterno ("Paterno"), head football coach of Penn State. The next morning, a Saturday, the graduate assistant telephoned Paterno and went to Paterno's home, where he reported what he had seen.

Joseph V. Paterno testified to receiving the graduate assistant's report at his home on a Saturday morning. Paterno testified that the graduate assistant was very upset. Paterno called Tim Curley ("Curley"), Penn State Athletic Director and Paterno's immediate superior, to his home the very next day, a Sunday, and reported to him that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.

Approximately one and a half weeks later, the graduate assistant was called to a meeting with Penn State Athletic Director Curley and Senior Vice President for Finance and Business Gary Schultz ("Schultz"). The graduate assistant reported to Curley and Schultz that he had witnessed what he believed to be Sandusky having anal sex with a boy in the Lasch Building showers. Curley and Schultz assured the graduate assistant that they would look into it and determine what further action they would take. Paterno was not present for this meeting.

The graduate assistant heard back from Curley a couple of weeks later. He was told that Sandusky's keys to the locker room were taken away and that the incident had been reported to The Second Mile. The graduate assistant was never questioned by University Police and no other

entity conducted an investigation until he testified in Grand Jury in December, 2010. The Grand Jury finds the graduate assistant's testimony to be extremely credible.

Curley testified that the graduate assistant reported to them that "inappropriate conduct" or activity that made him "uncomfortable" occurred in the Lasch Building shower in March 2002. Curley specifically denied that the graduate assistant reported anal sex or anything of a sexual nature whatsoever and termed the conduct as merely "horsing around". When asked whether the graduate assistant had reported "sexual conduct" "of any kind" by Sandusky, Curley answered, "No" twice. When asked if the graduate assistant had reported "anal sex between Jerry Sandusky and this child." Curley testified, "Absolutely not."

Curley testified that he informed Dr. Jack Raykovitz, Executive Director of the Second Mile of the conduct reported to him and met with Sandusky to advise Sandusky that he was prohibited from bringing youth onto the Penn State campus from that point forward. Curley testified that he met again with the graduate assistant and advised him that Sandusky had been directed not to use Penn State's athletic facilities with young people and "the information" had been given to director of The Second Mile. Curley testified that he also advised Penn State University President Graham Spanier of the information he had received from the graduate assistant and the steps he had taken as a result. Curley was not specific about the language he used in reporting the 2002 incident to Spanier. Spanier testified to his approval of the approach taken by Curley. Curley did not report the incident to the University Police, the police agency for the University Park campus or any other police agency.

Schultz testified that he was called to a meeting with Joe Paterno and Tim Curley, in which Paterno reported "disturbing" and "inappropriate" conduct in the shower by Sandusky upon a young boy, as reported to him by a student or graduate student. Schultz was present in a

subsequent meeting with Curley when the graduate assistant reported the incident in the shower involving Sandusky and a boy. Schultz was very unsure about what he remembered the graduate assistant telling him and Curley about the shower incident. He testified that he had the impression that Sandusky might have inappropriately grabbed the young boy's genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy. While equivocating on the definition of "sexual" in the context of Sandusky wrestling with and grabbing the genitals of the boy, Schultz conceded that the report the graduate assistant made was of inappropriate sexual conduct by Sandusky. However, Schultz testified that the allegations were "not that serious" and that he and Curley "had no indication that a crime had occurred." Schultz agreed that sodomy between Sandusky and a child would clearly be inappropriate sexual conduct. He denied having such conduct reported to him either by Paterno or the graduate assistant.

Schultz testified that he and Curley agreed that Sandusky was to be told not to bring any Second Mile children into the football building and he believed that he and Curley asked "the child protection agency" to look into the matter. Schultz testified that he knew about an investigation of Sandusky that occurred in 1998, that the "child protection agency" had done, and he testified that he believed this same agency was investigating the 2002 report by the graduate assistant. Schultz acknowledged that there were similarities between the 1998 and 2002 allegations, both of which involved minor boys in the football showers with Sandusky behaving in a sexually inappropriate manner. Schultz testified that the 1998 incident was reviewed by the University Police and "the child protection agency" with the blessing of then-University counsel Wendell Courtney. Courtney was then and remains counsel for The Second Mile. Schultz confirmed that University President Graham Spanier was apprised in 2002 that a report of an

incident involving Sandusky and a child in the showers on campus had been reported by an employee. Schultz testified that Spanier approved the decision to ban Sandusky from bringing children into the football locker room and the decision to advise The Second Mile of the 2002 incident.

Although Schultz oversaw the University Police as part of his position, he never reported the 2002 incident to the University Police or other police agency, never sought or reviewed a police report on the 1998 incident and never attempted to learn the identity of the child in the shower in 2002. No one from the University did so. Schultz did not ask the graduate assistant for specifics. No one ever did. Schultz expressed surprise upon learning that the 1998 investigation by University Police produced a lengthy police report. Schultz said there was never any discussion between himself and Curley about turning the 2002 incident over to any police agency. Schultz retired in June 2009 but currently holds the same position as a senior vice president with Penn State, on an interim basis.

Graham Spanier testified about his extensive responsibilities as President of Penn State and his educational background in sociology and marriage and family counseling. He confirmed Curley and Schultz's respective positions of authority with the University. He testified that Curley and Schultz came to him in 2002 to report an incident with Jerry Sandusky that made a member of Curley's staff "uncomfortable." Spanier described it as "Jerry Sandusky in the football building locker area in the shower [] with a younger child and that they were horsing around in the shower." Spanier testified that even in April, 2011, he did not know the identity of the staff member who had reported the behavior. Spanier denied that it was reported to him as an incident that was sexual in nature and acknowledged that Curley and Schultz had not indicated any plan to report the matter to any law enforcement authority, the Commonwealth of

Pennsylvania Department of Public Welfare or any appropriate county child protective services agency. Spanier also denied being aware of a 1998 University Police investigation of Sandusky for incidents with children in football building showers.

Department of Public Welfare and Children and Youth Services local and state records were subpoenaed by the Grand Jury; University Police records were also subpoenaed. The records reveal that the 2002 incident was never reported to any officials, in contravention of Pennsylvania law.

Sandusky holds emeritus status with Penn State. In addition to the regular privileges of a professor emeritus, he had an office and a telephone in the Lasch Building. The status allowed him access to all recreational facilities, a parking pass for a vehicle, access to a Penn State account for the internet, listing in the faculty directory, faculty discounts at the bookstore and educational privileges for himself and eligible dependents. These and other privileges were negotiated when Sandusky retired in 1999. Sandusky continued to use University facilities as per his retirement agreement. As a retired coach, Sandusky had unlimited access to the football facilities, including the locker rooms. Schultz testified that Sandusky retired when Paterno felt it was time to make a coaching change and also to take advantage of an enhanced retirement benefit under Sandusky's state pension.

Both the graduate assistant and Curley testified that Sandusky himself was not banned from any Penn State buildings and Curley admitted that the ban on bringing children to the campus was unenforceable.

The Grand Jury finds that portions of the testimony of Tim Curley and Gary Schultz are not credible.

The Grand Jury concludes that the sexual assault of a minor male in 2002 should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency such as the University Police or the Pennsylvania State Police. The University, by its senior staff, Gary Schultz, Senior Vice President for Finance and Business and Tim Curley, Athletic Director, was notified by two different Penn State employees of the alleged sexual exploitation of that youth. Pennsylvania's mandatory reporting statute for suspected child abuse is located at 23 Pa.C.S. §6311 (Child Protective Services Law) and provides that when a staff member reports abuse, pursuant to statute, the person in charge of the school or institution has the responsibility and legal obligation to report or cause such a report to be made by telephone and in writing within 48 hours to the Department of Public Welfare of the Commonwealth of Pennsylvania. An oral report should have been made to Centre County Children and Youth Services but none was made. Nor was there any attempt to investigate, to identify Victim 2 or to protect that child or any others from similar conduct, except as related to preventing its re-occurrence on University property. The failure to report is a violation of the law which was graded a summary offense in 2002, pursuant to 23 Pa.C.S. §6319.²

The Grand Jury finds that Tim Curley made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30th Statewide Investigating Grand Jury, relating to the 2002 incident, that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers.

Furthermore, the Grand jury finds that Gary Schultz made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30rd Statewide Investigating Grand Jury, relating to the 2002 incident that the allegations made by the

² The grading of the failure to report offense was upgraded from a summary offense to a misdemeanor of the third degree in 2006, effective May 29, 2007.

graduate assistant were "not that serious" and that he and Curley "had no indication that a crime had occurred."

VICTIM 3

Victim 3, now age 24, met Sandusky through The Second Mile in the summer of 2000, when he was between seventh and eighth grade. The boy met Sandusky during his second year in the program. Sandusky began to invite Victim 3 to go places with him. Victim 3 was invited to Sandusky's home for dinner, to hang out, walk the family dogs and to go to Penn State football games and to Holuba Hall and the gym. When Victim 3 went to the gym with Sandusky, they would exercise and then shower. He recalls feeling uncomfortable and choosing a shower at a distance from Sandusky. Sandusky then made him feel bad about showering at a distance from him, so Victim 3 moved closer. Sandusky initiated physical contact in the shower with Victim 3 by patting him, rubbing his shoulders, washing his hair and giving him bear hugs. These hugs would be both face to face and with Sandusky's chest to Victim 3's back. Victim 3 said that on at least one occasion, Sandusky had an erection when he bear hugged Victim 3 from behind. He also recalled that when he slept over at Sandusky's residence, he slept in the basement bedroom. He testified that Sandusky would come into the bedroom where he was lying down. He sometimes said he was going to give Victim 3 a shoulder rub; sometimes he would blow on Victim 3's stomach; other times he tickled Victim 3. Sandusky would rub the inside of Victim 3's thigh when he tickled him. On two occasions Victim 3 recalls that Sandusky touched Victim 3's genitals through the athletic shorts Victim 3 wore to bed. Victim 3 would roll over on his stomach to prevent Sandusky from touching his genitals.

Victim 3 knew Victim 4 to spend a great deal of time with Sandusky.

VICTIM 4

The investigation revealed the existence of Victim 4, a boy who was repeatedly subjected to Involuntary Deviate Sexual Intercourse and Indecent Assault at the hands of Sandusky. The assaults took place on the Penn State University Park campus, in the football buildings, at Toftrees Golf Resort and Conference Center ("Toftrees") in Centre County, where the football team and staff stayed prior to home football games and at bowl games to which he traveled with Sandusky. Victim 4, now age 27, was a Second Mile participant who was singled out by Sandusky at the age of 12 or 13, while he was in his second year with The Second Mile program in 1996 or 1997. He was invited to a Sandusky family picnic at which there were several other non-family members and Sandusky's adopted children. Victim 4 described that on that first outing, Sandusky had physical contact with him while swimming, which Victim 4 described as testing "how [Victim 4] would respond to even the smallest physical contact." Sandusky engaged Victim 4 in workouts or sports and then showered with him at the old East locker rooms across from Holuba Hall, the football practice building. Sandusky initiated physical contact with Victim 4 by starting a "soap battle"--throwing a handful of soap at the boy and from there, the fight turned into wrestling in the shower. Victim 4 remembers indecent contact occurring many times, both in the shower and in hotel rooms at Toftrees.

Victim 4 became a fixture in the Sandusky household, sleeping overnight and accompanying Sandusky to charity functions and Penn State football games. Victim 4 was listed, along with Sandusky's wife, as a member of Sandusky's family party for the 1998 Outback Bowl and the 1999 Alamo Bowl. He traveled to and from both bowl games with the football team and other Penn State staff, coaches and their families, sharing the same accommodations. Victim 4 would frequently stay overnight at Toftrees with Sandusky and the football team prior to home

games; Sandusky's wife was never present at Toftrees when Victim 4 stayed with Sandusky. This was where the first indecent assaults of Victim 4 occurred. Victim 4 would attend the pre-game banquet and sit with Sandusky at the coaches' table. Victim 4 also accompanied Sandusky to various charity golf outings and would share a hotel room with him on those occasions.

Victim 4 stated that Sandusky would wrestle with him and maneuver him into a position in which Sandusky's head was at Victim 4's genitals and Victim 4's head was at Sandusky's genitals. Sandusky would kiss Victim 4's inner thighs and genitals. Victim 4 described Sandusky rubbing his genitals on Victim 4's face and inserting his erect penis in Victim 4's mouth. There were occasions when this would result in Sandusky ejaculating. He testified that Sandusky also attempted to penetrate Victim 4's anus with both a finger and his penis. There was slight penetration and Victim 4 resisted these attempts. Sandusky never asked to do these things but would simply see what Victim 4 would permit him to do. Sandusky did threaten to send him home from the Alamo Bowl in Texas when Victim 4 resisted his advances. Usually the persuasion Sandusky employed was accompanied by gifts and opportunities to attend sporting and charity events. He gave Victim 4 dozens of gifts, some purchased and some obtained from various sporting goods vendors such as Nike and Airwalk. Victim 4 received clothes, a snowboard, Nike shoes, golf clubs, ice hockey equipment and lessons, passes for various sporting events, football jerseys, and registration for soccer camp. Sandusky even guaranteed Victim 4 he could be a walk-on player at Penn State. Victim 4 was in a video made about linebackers that featured Sandusky, and he appeared with him in a photo accompanying an article about Sandusky in Sports Illustrated.

The Penn State football program relocated to the Lasch Football Building in 1999 and that facility had a sauna. Victim 4 reported that after the move, most of the sexual conduct that did not occur in a hotel room occurred in the sauna, as the area is more secluded.

Victim 4 remembers Sandusky being emotionally upset after having a meeting with Joe Paterno in which Paterno told Sandusky he would not be the next head coach at Penn State and which preceded Sandusky's retirement. Sandusky told Victim 4 not to tell anyone about the meeting. That meeting occurred in May, 1999.

Eventually, Victim 4 began to intentionally distance himself from Sandusky, not taking his phone calls and at times even hiding in closets when Sandusky showed up at Victim 4's home. Victim 4 had a girlfriend, of whom Sandusky did not approve. Sandusky tried to use guilt and bribery to regain time with Victim 4. Victim 4 had begun to smoke cigarettes and had Sandusky buy them for him. Victim 4 also said that Sandusky once gave him \$50 to buy marijuana at a location known to Victim 4. Sandusky drove there at Victim 4's direction and Victim 4 smoked the marijuana in Sandusky's car on the ride home. This was when Victim 4 was trying to distance himself from Sandusky because he wanted no more sexual contact with him.

VICTIM 5

Victim 5, now age 22, met Sandusky through The Second Mile in 1995 or 1996, when he was a 7 or 8 year old boy, in second or third grade. Sometime after their initial meeting at a Second Mile camp at Penn State, Sandusky called to invite the boy to a Penn State football game. Victim 5 was thrilled to attend. Sandusky picked him up at home and then Sandusky drove to pick up Victim 6. There were a couple of other kids in the car. The boys were left at Holuba Hall by Sandusky. They attended the Sandusky family tailgate and the football game. This

became a pattern for Victim 5, who attended perhaps as many as 15 football games as Sandusky's guest. Victim 5 also traveled with Sandusky to watch other college football games. Victim 5 remembers that Sandusky would often put his hand on Victim 5's left leg when they were driving in Sandusky's car, any time Victim 5 was in the front seat.

Victim 5 was taken to the Penn State football locker rooms one time by Sandusky. Sandusky put his hand on Victim 5's leg during the ride to the locker room. To the best of his recollection, this occurred when he was 8 to 10 years old, sometime during 1996-1998. The locker room was the East Area Locker rooms, next to Holuba Hall. No one was present in the locker rooms. Victim 5 was sweaty from a brief period of exercise and then Sandusky took him in the sauna and "pushed" Victim 5 "around a little bit". Looking back on it as an adult, Victim 5 says it was inappropriate. Sandusky would press his chest and body up against Victim 5's back and then push him away. All the contact was initiated by Sandusky. Then Sandusky said they needed to shower. Victim 5 was uncomfortable because he had never been naked in front of anyone who wasn't a family member. So he turned his back to Sandusky and chose a shower that was a distance away from where Sandusky was showering. Victim 5 looked back over his shoulder and saw that Sandusky was looking at him and that Sandusky had an erection. Victim 5 did not understand the significance of this at the time but still averted his gaze because he was uncomfortable. The next thing he knew, Sandusky's body touched Victim 5 from behind and Sandusky was rubbing Victim 5's arms and shoulders. Victim 5 crept forward and so did Sandusky. Victim 5 then took another step, this time to the right, and Sandusky pinned Victim 5 up against a wall in the corner. Sandusky then took Victim 5's hand and placed it on his erect penis. Victim 5 was extremely uncomfortable and pulled his hand away and slid by Sandusky.

Victim 5 walked out of the shower and dried himself off and got dressed. Sandusky never touched him again. Victim 5 thinks that he did not get invited to any football games after that.

VICTIM 6

Victim 6, who is now 24 years old, was acquainted with Victim 5 and another young boy in The Second Mile program, B.K.; their interaction with Sandusky overlapped. Victim 6 was referred to the Second Mile program by a school counselor. He met Sandusky at a Second mile picnic at Spring Creek Park when he was seven or eight years old, in 1994 or 1995. After Sandusky interacted with Victim 6 after a skit at the picnic, Sandusky telephoned to invite Victim 6 to tailgate and attend a football game with some other boys. He was picked up by Sandusky. Victim 5, B.K., and other boys were present. They went to Holuba Hall, a football practice building on the Penn State campus, and were left there by Sandusky. They threw footballs around until it was time for them to walk to the tailgate hosted by Sandusky's family and then attended the football game. Victim 6 recalls this pattern repeating many times.

Victim 6 recalls being taken into the locker room next to Holuba Hall at Penn State by Sandusky when he was 11 years old, in 1998. Sandusky picked him up at his home, telling him he was going to be working out. As they were driving to the University, Sandusky put his right hand upon Victim 6's left thigh several times. When they arrived, Sandusky showed Victim 6 the locker rooms and gave him shorts to put on, even though he was already dressed in shorts. They then lifted weights for about 15 or 20 minutes. They played "Polish bowling" or "Polish soccer", a game Sandusky had invented, using a ball made out of tape and rolling it into cups. Then Sandusky began wrestling with Victim 6, who was much smaller than Sandusky. Then Sandusky said they needed to shower, even though Victim 6 was not sweaty. Victim 6 felt awkward and tried to go to a shower some distance away from Sandusky but Sandusky called him over, saying

he had already warmed up a shower for the boy. While in the shower, Sandusky approached the boy, grabbed him around the waist and said, "I'm going to squeeze your guts out." Sandusky lathered up the boy, soaping his back because, he said, the boy would not be able to reach it. Sandusky bear-hugged the boy from behind, holding the boy's back against his chest. Then he picked him up and put him under the showerhead to rinse soap out of his hair. Victim 6 testified that the entire shower episode felt very awkward. No one else was around when this occurred. Looking back on it as an adult, Victim 6 says Sandusky's behavior towards him as an 11 year old boy was very inappropriate.

When Victim 6 was dropped off at home, his hair was wet and his mother immediately questioned him about this and was upset to learn the boy had showered with Sandusky. She reported the incident to University Police who investigated. After a lengthy investigation by University Police Detective Ronald Shreffler, the investigation was closed after then-Centre County District Attorney Ray Gricar decided there would be no criminal charges. Shreffler testified that he was told to close the investigation by the director of the campus police, Thomas Harmon. That investigation included a second child, B.K., also 11, who was subjected to nearly identical treatment in the shower as Victim 6, according to Detective Schreffler.

Detective Schreffler testified that he and State College Police Department Detective Ralph Ralston, with the consent of the mother of Victim 6, eavesdropped on two conversations the mother of Victim 6 had with Sandusky on May 13, 1998, and May 19, 1998. The mother of Victim 6 confronted Sandusky about showering with her son, the effect it had on her son, whether Sandusky had sexual feelings when he hugged her naked son in the shower and where Victim 6's buttocks were when Sandusky hugged him. Sandusky said he had showered with other boys and Victim 6's mother tried to make Sandusky promise never to shower with a boy

again but he would not. She asked him if his “private parts” touched Victim 6 when he bear-hugged him. Sandusky replied, “I don’t think so...maybe.” At the conclusion of the second conversation, after Sandusky was told he could not see Victim 6 anymore, Sandusky said, “I understand. I was wrong. I wish I could get forgiveness. I know I won’t get it from you. I wish I were dead.” Detective Ralston and the mother of Victim 6 confirm these conversations.

Jerry Lauro, an investigator with the Pennsylvania Department of Public Welfare, testified that during the 1998 investigation, Sandusky was interviewed on June 1, 1998, by Lauro and Detective Schreffler. Sandusky admitted showering naked with Victim 6, admitted to hugging Victim 6 while in the shower and admitted that it was wrong. Detective Schreffler advised Sandusky not to shower with any child again and Sandusky said that he would not.

The Grand Jury was unable to subpoena B.K. because he is in the military and is stationed outside the United States.

VICTIM 7

Victim 7, now 26 years old, met Sandusky through the Second Mile program, to which he was referred by a school counselor at about the age of 10, in 1994. When Victim 7 had been in the program for a couple of years, Sandusky contacted Victim 7’s mother and invited Victim 7 to a Penn State football game. He would also attend Sandusky’s son’s State College High School football games with Sandusky. Victim 7 enjoyed going on the field at Penn State games, interacting with players and eating in the dining hall with the athletes. Victim 7 would stay overnight at Sandusky’s home on Friday nights before the home games and then go to the games with him. Sometimes they would go out for breakfast and would attend coaches meetings. Victim 6 was also a part of this group of boys. He knew B.K. and several other boys that were in Sandusky’s circle.

Victim 7 testified that Sandusky made him uncomfortable when he was a young boy. He described Sandusky putting his hand on Victim 7's left thigh when they were driving in the car or when they would pull into his garage. Victim 7 eventually reacted to this by sitting as far away from Sandusky as he could in the front seat.

He also described more than one occasion on which Sandusky put his hands down the waistband of Victim 7's pants. Sandusky never touched any private parts of Victim 7. Victim 7 would always slide away because he was very uncomfortable with Sandusky's behavior. Victim 7 described Sandusky cuddling him when he stayed at his home, lying behind him with his arm around the boy. Sandusky also bear-hugged Victim 7 and cracked his back. He also took Victim 7 to Holuba Hall to work out and then to the East Area Locker rooms to shower. Victim 7 was very uncomfortable with this shared showering. Sandusky would tell Victim 7 to shower next to him even though there were multiple other showerheads in the locker room. Victim 7 testified that he has a "blurry memory" of some contact with Sandusky in the shower but is unable to recall it clearly. Victim 7 had not had contact with Sandusky for nearly two years but was contacted by Sandusky and separately by Sandusky's wife and another Sandusky friend in the weeks prior to Victim 7's appearance before the Grand Jury. The callers left messages saying the matter was very important. Victim 7 did not return these phone calls.

VICTIM 8

In the fall of 2000, a janitor named James "Jim" Calhoun ("Jim") observed Sandusky in the showers of the Lasch Building with a young boy pinned up against the wall, performing oral sex on the boy. He immediately made known to other janitorial staff what he had just witnessed.

Fellow Office of Physical Plant employee Ronald Petrosky was also working that evening and recalls that it was football season of 2000 and it was a Thursday or Friday evening,

because the football team was away for its game. Petrosky, whose job it was to clean the showers, first heard water running in the assistant coaches' shower room. He then saw that two people were in the assistant coaches' shower room. He could only see two pairs of feet; the upper bodies were blocked. Petrosky waited for the two persons to exit the shower so he could clean it. He later saw Jerry Sandusky exit the locker room with a boy, who he described as being between the ages of 11 and 13. They were carrying gym bags and their hair was wet. Petrosky said good evening and was acknowledged by Sandusky and the boy. He noted that the hallway in the Lasch building at that point is long and that Sandusky took the boy's hand and the two of them walked out hand in hand. Petrosky began to clean the shower that Sandusky and the boy had vacated. As he worked, Jim approached him. Petrosky described Jim as being upset and crying. Jim reported that he had seen Sandusky, whose name was not known to him, holding the boy up against the wall and licking on him. Jim said he had "fought in the [Korean] war....seen people with their guts blowed out, arms dismembered...I just witnessed something in there I'll never forget." And he described Sandusky performing oral sex on the boy. Petrosky testified that Jim was shaking and he and his fellow employees feared Jim might have a heart attack. Petrosky testified that all the employees working that night except Witherite were relatively new employees. In discussions held later that shift, the employees expressed concern that if they reported what Jim had seen, they might lose their jobs. Jim's fellow employees had him tell Jay Witherite what he had seen.

Jay Witherite was Jim's immediate supervisor. Witherite testified that Jim was "very emotionally upset", "very distraught", to the point that Witherite "was afraid the man was going to have a heart attack or something the way he was acting." Jim reported to Witherite that he had observed Sandusky performing oral sex on the boy in the showers. Witherite tried to calm Jim,

who was cursing and remained upset throughout the shift. Witherite told him to whom he should report the incident, if he chose to report it.

Witherite testified that later that same evening, Jim found him and told him that the man he had seen in the shower with the young boy was sitting in the Lasch building parking lot, in a car. Witherite confirmed visually that it was Sandusky who was sitting in his car in the parking lot. Witherite says that this was between 10:00 p.m. and 12:30 a.m. Petrosky also saw Sandusky drive very slowly through the parking lot about 2 to 3 hours after the incident was reported to him by Jim, at approximately 11:30 p.m. to 12:00 a.m. Petrosky recognized Sandusky in his vehicle. Petrosky testified that Sandusky drove by another time, about two hours later, again driving by very slowly but not stopping. The second drive-by was between 2:00 and 3:00 a.m. Petrosky testified that Sandusky did not enter the building either time. The area is well lit and the coaches' cars were known to Petrosky.

Jim was a temporary employee at the Lasch Building, working there for approximately 8 months. No report was ever made by Jim Calhoun. Jim presently suffers from dementia, resides in a nursing home and is incompetent to testify. Victim 8's identity is unknown.

EXHIBIT 9

FINDINGS OF FACT

This investigation commenced as a result of allegations of sexual assaults of minor male children by Gerald R. Sandusky ("Sandusky") over a period of years while Sandusky was a football coach with the Pennsylvania State University ("Penn State") football team and after he retired from coaching. The Thirty-Third Statewide Investigating Grand Jury issues this Presentment in furtherance of its ongoing investigation of this matter and hereby incorporates all of its previous findings from Presentments No. 12 and 13 herein as if fully set forth.

1998 Incident Involving Victim 6

In the spring of 1998, Sandusky was a very prominent defensive coordinator/assistant football coach at Penn State. Sandusky had garnered national acclaim for the quality of his coaching and was widely looked upon as the mastermind of defenses that led to two national championships in the 1980's. He was revered in much of the State College area not only for his coaching success, but also his work with youth through a non-profit organization he founded known as the Second Mile.

Sandusky started the Second Mile in the 1970's, principally as a foster home that would focus on assisting troubled boys. Over time, the Second Mile developed into a much broader-based regional charity that focused its efforts primarily on young boys between the ages of eight and sixteen. By 1998, Sandusky was clearly the established "name" behind the charity, utilizing his broad array of contacts both at Penn State and around the region to raise money and create highly recognized events for the charity.

On May 3, 1998, Sandusky contacted Victim 6, then eleven years old, about going to work out with him at Penn State facilities. Victim 6 met Sandusky about four weeks prior at a Second Mile youth activity. Sandusky picked the boy up around 7:00 p.m., and they went to the East Area Locker Room on campus. At the time, it contained workout facilities, showers, and football team locker room.

The "workout" session consisted of a brief wrestling episode in which Sandusky tried to pin Victim 6, followed by a short period of using exercise machines. Afterwards, Sandusky kissed Victim 6 on the head and told him he loved him. Sandusky then took the boy to a coach's locker room and suggested they shower together. Victim 6 testified that he found this odd because the workout was brief and he had not even begun sweating, and therefore he felt he did not need a shower. Despite feelings of embarrassment and discomfort, Victim 6 did enter the shower room with Sandusky.

Upon entering the showers, Victim 6 immediately went to the side of the room opposite where Sandusky was showering. Sandusky coaxed Victim 6 over to the shower next to him. Sandusky placed his hands around the boy and told him he was going to "squeeze his guts out." Victim 6 testified that this made him very uncomfortable. He then lifted Victim 6 up to "get soap out of his hair" and at that point the boy's face was right in Sandusky's chest.

Sandusky took the boy home at around 9:00 p.m. and left the area. Victim 6's mother noticed that his hair was wet and she inquired why. He informed her of the shower activity and she became quite concerned and upset. The next morning, she made a report to the University Park Police. Detective Ronald Schreffler was assigned

to the case and almost immediately began an investigation into Sandusky's contact with the boy.

Initially, Centre County Children and Youth Services (CYS) were also notified of the complaint made by Victim 6's mother. Centre County CYC referred the case, however, to the Pennsylvania Department of Public Welfare (DPW), citing a conflict of interest due to their heavy involvement in placement and foster care activities with Sandusky's Second Mile charity. Normally, the case would have been referred to a neighboring county child welfare agency but, due to Sandusky's high-profile status in the community, the case was sent directly to the state DPW in Harrisburg.

Detective Schreffler conducted the investigation over a four-week period in May and early June 1998. It included not only interviews of Victim 6 and his mother, but also of a second child, B.K., also 11, who described very similar contact with Sandusky in a shower on a different occasion. Schreffler testified that, twice in mid-May, he and University Police Detective Ralston listened in on two conversations Victim 6's mother had with Sandusky at her home. She confronted Sandusky about his conduct with her son in the shower and he admitted his private parts may have touched her son when he bear-hugged the boy. When informed that he was not to contact Victim 6 anymore, Sandusky responded, "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead." Schreffler, Ralston, and Victim 6's mother all confirmed these conversations before the Grand Jury.

Sandusky was never interrogated about the incident or the statements made to Victim 6's mother. Then Centre County District Attorney Ray Gricar decided there would be no criminal charges. It was only after this decision was made that Schreffler

and Jerry Lauro, an investigator with DPW, interviewed Sandusky on June 1, 1998. Lauro testified that Sandusky admitted to showering with and hugging Victim 6. He acknowledged that it was wrong. Schreffler told him not to shower with children anymore and Sandusky assured Schreffler that he would not.

Tom Harmon was the Chief of Police of the University Police Department in 1998 and a thirty-year veteran of the University Police Department. Chief Harmon testified that he was concerned when the initial report regarding Sandusky came to his Department on May 4, 1998. Chief Harmon received a rather extensive briefing from Detective Schreffler regarding his interview with Victim 6. Chief Harmon then called Gary Schultz, the Senior Vice President for Business and Finance at Penn State. Schultz oversaw the University Police Department as a part of his position. Chief Harmon testified that it was not unusual for him to keep Schultz informed of the status of investigations that could prove embarrassing to, or generate public scrutiny of, Penn State. Chief Harmon spoke in detail with Schultz on the evenings of May 4 and May 5 about specifics of the investigation.

Schultz took notes during his conversations with Harmon.¹ Schultz not only wrote down very detailed information about Sandusky's contact with Victim 6, but he also made several observations about the import of Sandusky's conduct. At one point Schultz noted that Sandusky's behavior toward Victim 6 was "at best inappropriate @ worst sexual improprieties." He further noted that during the bear hug between Sandusky and Victim 6 there "had to be genital contact because of size difference." He also clearly understood that Victim 6 had a friend (B.K.) and "claim[ed] same thing went

¹ 4 pages of notes kept by Schultz on 5/4 and 5/5/98 are Attached as Exhibit 1. It will be discussed later in this Presentment why these notes were not discovered by authorities until April of 2012.

on with him.” Schultz appeared to analyze what could ultimately be important areas for police and prosecutors when he observed “critical issue – contact w genitals?” Finally, at the conclusion of his notes, he pondered two chilling questions when he wrote, “is this opening of pandoras box? Other children?”

The investigation by police and child welfare authorities into this incident was clearly a matter of considerable interest among high-ranking Penn State administrators. Sandusky was in many ways at the pinnacle of his career, enjoying tremendous stature both for his coaching ability and his work within the Second Mile. The filing of criminal charges or other legal action against Sandusky for having sexual contact with a young boy could have proven troublesome and embarrassing for Penn State, particularly in light of the fact that the incident occurred on campus. The Grand Jury reviewed a number of electronic communications from May and June of 1998 that reflect the concern that several University officials shared over the course and direction of the investigation.² Schultz very quickly updated Athletic Director Tim Curley and University President Graham Spanier following his conversations with Chief Harmon. Curley in fact sent an e-mail on May 5, 1998 and alerted Schultz, “I have touched base with the coach. Keep us posted. Thanks.” Schultz responded to Curley on May 6 and copied the e-mail to Spanier, indicating the following: “Will do. Since we talked tonight I’ve learned that the Public Welfare people will interview the individual Thursday.”³ In the first thirty-six hours after Victim 6’s mother alerted the police, Schultz obtained detailed information from the Chief of Police about virtually every aspect of police contact with

² These electronic communications (e-mails) were not obtained by this Grand Jury until many months after the original Presentment on this matter in November of 2011, and therefore could not be considered or utilized in our evaluation at that time.

³ E-mail attached as Exhibit 2

the boy, and he was in both phone and e-mail contact with the Athletic Director (while alerting the school President by, at a minimum, copying him on communications).

As the police and child welfare investigation progressed through the month of May, there were a number of documented communications by Penn State officials regarding this matter. Curley anxiously asked Schultz for status updates on at least three occasions with phrases like "anything new in this department?" and "any further update?"⁴ The Grand Jury notes that these electronic communications clearly establish that Curley made a materially false statement under oath before the 30th Statewide Investigating Grand Jury when he testified he had no knowledge of this investigation or any recollection of his involvement.⁵ Schultz responded several times to Curley, informing him of investigatory decisions to have a child psychologist meet with Victim 6 and that police and DPW caseworkers planned to meet with Sandusky to discuss his behavior. Finally, on June 9, 1998, Schultz sent Curley an e-mail on which he copied Spanier and Chief Harmon. Schultz informed Curley and Spanier of the decision not to pursue charges and to close the investigation and, at the conclusion, he noted, "I think the matter has been appropriately investigated and I hope it is now behind us."⁶

Chief Harmon testified he was personally relieved by the decision of the Centre County District Attorney not to pursue criminal charges against Sandusky. He also understood Gary Schultz to be relieved by this decision. Chief Harmon also indicated he kept Schultz very informed of the investigation throughout May and spoke with him by telephone on about five occasions. Chief Harmon expected, as would be consistent

⁴ E-mail attached as Exhibit 3 and includes communication from Curley on 5/13, 5/18 and 5/30/98.

⁵ The Grand Jury notes these false statements are the subject of a criminal trial in the Dauphin County Court of Common Pleas in *Commonwealth v. Timothy Curley*, docketed at No. CP-22-CR-5165-2011.

⁶ See attached Exhibit 3

with his experience when there was an investigation of significant importance to both the Athletic Department and the University as a whole, that Schultz would inform both Spanier and Curley of what was happening. Numerous witnesses who were employed at Penn State testified that Schultz was a detailed, organized individual who adhered faithfully to the chain of command and the "no surprises" rule for his immediate boss, Graham Spanier.

Detective Schreffler testified that the ninety-eight page police report was not filed under a typical criminal investigation, but was instead assigned an Administrative number. This would make the report very difficult to locate unless someone specifically knew identifiers of the case. Detective Schreffler indicated that, in his experience, it was very unusual for a criminal investigation to be labeled in this manner within the University Police department. Chief Harmon agreed this was an unusual thing to do, and testified that it was done at his direction because there was a concern the media might make inquiries if the incident were placed on their regular police log.

Victim 6 testified along with Detective Schreffler at the criminal trial of Sandusky in Centre County. Victim 6 and Schreffler testified consistently with their appearance before this Grand Jury. As a result, Sandusky was convicted of Unlawful Contact with a Minor, Corrupting the Morals of a Minor, and Endangering the Welfare of a Child.⁷

⁷ The verdict was returned on June 22, 2012, and included forty-five total convictions spanning ten separate victims. Sandusky was sentenced on October 9, 2012 and received an aggregate sentence of thirty to sixty years in prison.

February 9, 2001 Incident

In December of 2010, Michael McQueary testified before the Grand jury about events he observed in the Lasch Building, on a Friday evening, on the Penn State campus. McQueary detailed how he observed Sandusky sexually assault a young boy in the shower at that facility.⁸

In February of 2001, McQueary was a graduate assistant football coach. He was working for head football coach Joseph V. Paterno, for whom McQueary had played the position of quarterback from 1993 to 1997. McQueary testified that he was sitting at home on a Friday night watching a football movie, "Rudy."⁹ He decided to go to the Lasch Building and do some work around nine o'clock in the evening. Earlier in the day, he had purchased a pair of sneakers and decided to bring them to place in his locker.

Upon entering the locker room, McQueary heard showers running and skin-on-skin smacking sounds. He became concerned about what he might be walking in on, and he proceeded quickly over to his locker. His initial view was through a mirror into the shower. He observed Jerry Sandusky, who had been an assistant football coach when McQueary played at Penn State, standing behind a pre-pubescent boy who was propped up against the shower. The boy's hands were up against the wall and he was naked, as was Sandusky. McQueary then stepped to the right and looked directly into the showers. Sandusky had his arms wrapped around the boy's midsection and

⁸ Sandusky was tried and convicted for this incident of four (4) criminal counts of Indecent Assault, Unlawful Contact with a Minor, Endangering the Welfare of Children, and Corruption of Minors as a result of a jury trial and verdict on June 22, 2012. McQueary was the sole witness utilized to establish these crimes beyond a reasonable doubt.

⁹ The original date of this incident was believed to have been in early March 2002. McQueary testified the incident happened in either 2001 or 2002. Subsequent evidence has confirmed the actual date of the incident as February 9, 2001.

was right up against the boy. There was no doubt in McQueary's mind that a sexual assault was taking place.

McQueary slammed his locker door shut and observed Sandusky and the boy separate from their original position. He was extremely shocked and alarmed. McQueary left the locker room area and went up to his office. He called his father, John McQueary, and provided him a brief description of what he had seen. His father asked him to drive over to his house, which McQueary did.

John McQueary testified that he had never seen his son as shaken and upset as he was that night. John McQueary also called a family friend, Dr. Jonathan Dranov, to come over to the house. Michael McQueary relayed some of what he had observed to his father and Dr. Dranov. They advised him to contact Coach Paterno early the next morning and report what he had seen.

Early on Saturday morning, February 10, 2001, Mike McQueary called his boss, Coach Paterno. McQueary made the phone call at approximately 7:00 a.m., and asked if he could come to meet with the coach. McQueary immediately went to Paterno's house, where he reported to Paterno what he witnessed between Sandusky and the boy the night before.

Joseph Paterno testified before a prior Grand Jury that he did in fact receive McQueary's information at his home on a Saturday morning.¹⁰ Paterno recognized that McQueary was very upset and assured him he did the right thing by coming to Paterno. Paterno informed the Grand Jury that McQueary described Sandusky fondling or doing something of a sexual nature to a young boy in the Lasch Building showers. He told

¹⁰ Joe Paterno unfortunately passed away on January 22, 2012.

McQueary he would pass the information along to his superiors. Paterno decided to provide the information to Tim Curley the very next day, Sunday, February 11, 2001.

February 11, 2001, was less than three years after the 1998 police investigation. Curley and Schultz both testified before the Thirtieth Statewide Investigating Grand Jury they met with Paterno on a Sunday. It would be at least another week before they decide to speak with McQueary about what he actually witnessed in the Lasch Building showers.¹¹ It is clear that the meeting with Paterno generated a flurry of activity. Paterno testified he relayed substantially the same information McQueary told to him to Curley and Schultz. Following their meeting with Paterno, Schultz almost immediately made contact with Wendell Courtney, an attorney with the law firm of McQuaide Blasko. McQuaide Blasko provided most of the outside counsel work to Penn State in 2001, with Courtney acting as one of the primary attorneys for the firm in their relationship with the University. Testimony from a number of sources before the Grand Jury suggested Schultz and Courtney had, and to this day have, a close personal friendship.

Schultz contacted Courtney that very Sunday regarding the information that Paterno provided. There was no delay or hesitation in seeking out Courtney. In fact, billing records from McQuaide Blasko show that Schultz and Courtney discussed the issue that Sunday, February 11. Courtney billed out 2.9 hours of time for what he described at the time as "Conference with G Schultz re reporting of suspected child abuse; Legal research re same; Conference with G Schultz."¹² Despite efforts by this Grand Jury, no Sandusky file containing information relevant to this inquiry was ever obtained from McQuaide Blasko.

¹¹ The exact date of the meeting between McQueary, Schultz and Curley is unknown. Based on known electronic communications, it was not any later than February 25, 2001.

¹² Billing record is attached as Exhibit 4.

The similarities between the 1998 and 2001 incidents are rather striking. Both involve Sandusky showering naked alone with pre-pubescent boys and having close physical contact with the children (although the nature of the 2001 contact is more severe and extreme with regard to the sexual contact). Both incidents occurred in the showers at Penn State. Chief Harmon testified that he received a call from Gary Schultz on February 12, 2001, inquiring into the status of the paperwork from the 1998 investigation and whether it was available as a record. Chief Harmon responded by e-mail during the late afternoon of Monday, February 12, and stated, "Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged archives."¹³ At no point did Schultz inform Harmon, the Chief of Police at the University and a subordinate of Schultz, that there had been another report of shockingly similar behavior by Sandusky on campus. Schultz merely appeared to be concerned about the current existence of the 1998 investigatory files.

By the afternoon of Monday, February 12, 2001, Schultz and Curley formulate a plan (that was also communicated that afternoon to Graham Spanier) reflected in the handwritten notes of Gary Schultz.¹⁴ Schultz dated the note 2/12/01 with the header "Confidential." He indicated that he had "talked with TMC [Curley]" and that the following steps were to take place or have taken place, "reviewed 1998 history—agreed TMC will discuss with JVP [Paterno] and advise we think TMC should meet w JS [Sandusky] on Friday—unless he "confesses" to having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned w Child Welfare – TMC will keep me posted." The plan, formulated many days before Curley

¹³ E-mail attached as Exhibit 5.

¹⁴ The handwritten note is attached as Exhibit 6.

and Schultz would even speak to the actual eyewitness, involved using their legal requirement to report this information as a bargaining chip with Sandusky to get him to "confess" his problem. Thus, if Sandusky agreed to a particular course of action, they would not notify the proper authorities, including apparently the police department Schultz himself supervised.

Schultz and Curley scheduled a meeting with McQueary at the Bryce Jordan Center, approximately seven to ten days after receiving the report from Paterno. McQueary indicated that the meeting lasted approximately fifteen minutes. Schultz and Curley asked no questions. McQueary described the extremely sexual nature of the incident and they told him they would get back to him.

After speaking to McQueary directly about the incident, Schultz sent an email to Curley on Monday, February 26, 2001. There appears to have been a change from the February 12th plan regarding contacting an outside child welfare agency. The email reads as follows: "Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know."¹⁵ Schultz asked for confirmation from Curley about contacting DPW.

Curley responded on February 27, 2001, just after 8:00 p.m. Curley included Spanier on this communication.¹⁶ It reads as follows:

I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more

¹⁵ Email attached as Exhibit 7.

¹⁶ Email attached as Exhibit 8.

thought and talking it over with Joe yesterday—I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

I need some help on this one. What do you think about this approach?

Curley used coded words to try to mask the true nature of this topic. He referred to Sandusky as the "individual" or "person". He referred to the Second Mile as the "organization". In addition, he referred to the 1998 investigation as the "first situation". He then discussed a similar type of deal that had been discussed on February 12. This deal would keep Sandusky from being reported to outside authorities if he was "cooperative" and followed the suggestions Curley put forth. Curley also indicated that he would inform Sandusky that his "guests" are not permitted to use Penn State facilities. These "guests" were actually the young boys that Sandusky would routinely bring onto the Penn State campus, often at odd hours when very few people were around to witness his actions with the children. Curley was undoubtedly seeking the blessing of his boss, Spanier, when he indicated, "I need some help on this one."

Spanier responded a couple of hours later as follows:

Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message

isn't 'heard' and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.

Spanier did not question the existence of the "first situation" or inquire as to what Curley was referring to. He instead endorsed the plan of action that involved circumventing any outside agency. He did recognize the potential consequences for their failure to report by suggesting they will be "vulnerable" if "the message isn't 'heard' and acted upon."

Schultz also endorsed this plan by responding the following day:

Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

The Grand Jury would note that evidence was presented showing that no report of what Michael McQueary witnessed was ever made to a children and youth agency, DPW, or any police agency. The Grand Jury notes that the above electronic communications and other evidence clearly establish that Schultz made a materially false statement under oath before the Thirtieth Statewide Investigating Grand Jury when he testified numerous times that the McQueary incident had been turned over to DPW or other child welfare entities.¹⁷

Curley did in fact implement part of the plan that he, Spanier, and Schultz agreed to follow. Curley met with Sandusky in early March and instructed him not to bring children on campus. This ban was completely unenforceable. In fact, since only Schultz and Spanier also knew of this plan, no other individuals at Penn State or entities

¹⁷ The Grand Jury notes these false statements are the subject of a criminal trial in the Dauphin County Court of Common Pleas in *Commonwealth v. Gary Schultz*, docketed at CP-22-CR-5164-2011.

such as the police department would even be aware of the ban to try and enforce it. He also met with Dr. Jack Raykovitz, the Executive Director of the Second Mile, to advise him that Sandusky was prohibited from bringing youth onto the Penn State campus. Raykovitz testified before the Grand Jury he did not ask who the boy was in the shower or whether he was a Second Mile kid. He said Curley described the incident as mere horseplay that made someone uncomfortable.

There is no evidence that Curley, Spanier, or Schultz ever sought to get Sandusky the "professional help" to which Curley referred in the email. The only thing asked of Sandusky was that he not bring children on the campus anymore. This, of course, not only did not happen but evidence presented before this grand jury indicates Sandusky continued to have kids on campus with him with some regularity.

Curley did talk with McQueary several weeks after their initial meeting. McQueary was told that Sandusky's keys to the locker room had been taken away and the incident was reported to the Second Mile. No law enforcement investigators were notified to speak with McQueary about his observations until November of 2010.

John McQueary confronted Gary Schultz about what was being done regarding his son Mike's report. This took place several weeks later at the office building where McQueary worked. Dr. Dranov was also present during this meeting. Schultz assured McQueary he would look into the matter and that it was being investigated. McQueary, like his son Mike, was well aware of the fact that Schultz oversaw the police department. John McQueary never heard anything further from Gary Schultz about the matter.

Grand Jury Investigation and Attempts to Gather Evidence 2010-2012

After the disclosures by Michael McQueary to the Grand Jury, the investigation sought to: identify and encourage victims of abuse at the hands of Sandusky to reveal their ordeal to the Grand Jury; find events that supported and corroborated the testimony of Michael McQueary; reexamine the actions of Sandusky in May of 1998, and the investigation thereof, in light of the new evidence of Sandusky's criminal activities; search for evidence of Sandusky's known activities, and those potentially yet unknown, that may be in the possession of Penn State; and, determine whether or not any employees or officials at Penn State assisted Sandusky in his activities or sought to conceal or obscure these activities from the authorities and the public. Unfortunately, the Investigative Grand Jury's efforts to acquire pertinent and valuable evidence from Penn State were significantly thwarted and frustrated from 2010 to 2012.

Typical of this experience was Grand Jury Subpoena 1179. Subpoena 1179 was issued in December of 2010 yet would remain unfulfilled until April of 2012. This subpoena, authorized and signed by the Supervising Judge of the Investigating Grand Jury, required Penn State University to acquire and disclose to the Grand Jury: "Any and all records pertaining to Jerry Sandusky and incidents reported to have occurred on or about March 2002 and any other information concerning Jerry Sandusky in inappropriate contact with underage males on and off University property. Response shall include any and all correspondence directed to or regarding Jerry Sandusky." The University's response to this subpoena was due on January 10, 2011.

Upon service of this subpoena in December of 2010, Penn State's Legal Counsel, Cynthia Baldwin, immediately informed Spanier of the subpoena and the University's obligation to respond. At the same time, Curley, Schultz and Paterno had also been subpoenaed to appear before the Grand Jury scheduled in January of 2011. She informed Spanier about those subpoenas as well. Spanier told her that he would notify Curley and Schultz and that she was to contact Paterno. Soon thereafter, Legal Counsel Baldwin met with Spanier and with Athletic Director Tim Curley. At this meeting, Spanier directed, without discussion, that Baldwin would go with Curley and Shultz to their grand jury appearances. During this meeting, and at a number of other meetings, Baldwin sought to determine if any of the information required by Subpoena 1179 was known to Athletic Director Curley, Vice President Schultz, and President Spanier. Each personally and directly assured her that they knew of no information or documents involving alleged misconduct or inappropriate contact by Jerry Sandusky. They also assured her that they would look and see if they could find any such information or documentation. In the several weeks after the receipt of Subpoena 1179, all three individuals—Spanier, Shultz and Curley—assured Baldwin that they had investigated and determined that they possessed no information or documents that would be responsive to Subpoena 1179. She was specifically assured that they had searched through their emails and physical documents for any Sandusky-related materials. In addition, Athletic Director Curley informed Baldwin that the Athletic Department did not possess any applicable responsive materials.

The investigation also found that, contrary to what Schultz had told legal counsel Baldwin, Schultz had a file kept in his Penn State office containing notes and

documents directly related to the 1998 and 2001 sexual assault by Sandusky. These documents included hand-written notes prepared by Schultz from conversations he had with Penn State University Police Chief Thomas Harmon in 1998. Chief Harmon testified that, during the investigation of Sandusky from May and through part of June 1998, he provided frequent and detailed updates to Schultz. As part of this investigation, Chief Harmon reviewed the notes prepared by Schultz and identified them as reflective of their conversations at the time. Chief Harmon also detailed that the 1998 investigation of Sandusky was a "big deal" and clearly recognized as such. It was clear to Chief Harmon, from his extensive conversations with Schultz, that the University's hierarchy was extremely interested and concerned about this investigation. There was no question that it was recognized that this investigation had the potential to significantly damage and embarrass Penn State.

Also included in the notes kept in Schultz's office were notes that Schultz wrote regarding at least one conversation he had with Athletic Director Tim Curley about the McQueary observations in February of 2001. One note, recited above, written by Schultz and dated February 12, 2001, clearly stated that Schultz and Curley had "reviewed 1998 history" before discussing how to handle the latest allegations about Sandusky. In an email on that same date, February 12, 2001, Schultz was told by Chief Harmon that the 1998 investigative file still exists and "is documented in our imaged archives." Chief Harmon testified before the Grand Jury that he provided this response as a result of Schultz questioning him about whether the 1998 investigative file still existed. Chief Harmon stated that at no time during his contact with Schultz on this matter did Schultz reveal anything about a new allegation against Sandusky. Schultz,

despite being informed of McQueary's allegations within 48 hours of their occurrence on the night of February 9, 2001, and despite his having contact with the University Chief of Police about the 1998 investigation, never reported then, or at any other time, the new allegations of Sandusky assaults on a minor boy in a Penn State shower.

In January of 2011, only a handful of documents were provided in response to the subpoena. None of the documents provided were material or pertinent to the misconduct and crimes of Sandusky. Subsequent investigation into whether the University fully complied with the subpoena determined that no effort was made to search the Athletic Department, where Sandusky had been employed for over 30 years, or to search any of the electronically stored data at the University or emails or other documents pertinent to their responses to this subpoena.

It is also noteworthy that Penn State had in place a well-defined historical practice and procedure for responding to subpoenas. Subpoenas that might encompass electronically stored data (such as emails and documents stored on a computer or network drive) would routinely be sent to the specialized unit called the "SOS." These information technology professionals were trained and dedicated to assembling responsive electronically stored data in response to litigation needs or other legal process. None of the SOS professionals were ever shown subpoena 1179, nor were they directed to seek any of the information requested by subpoena 1179 before the arrests of Sandusky, Schultz and Curley. Likewise, investigators contacted the information technology employees of Penn State, who were not members of the SOS unit but had access to the electronically stored data likely to be searched to fulfill the requirements of subpoena 1179. These information technology employees likewise

stated that they were never requested to fulfill any requests for Sandusky related information. In addition, no independent efforts were made to search the paper files of the Athletic Director, Tim Curley, the Vice President of Finance and Business, Gary Schultz, or the President of the University, Graham Spanier.

The notes and documents concerning Sandusky's 1998 and 2001 crimes were in Schultz's Penn State office on November 5, 2011. The administrative assistant at the time, Kimberly Belcher, upon learning that Schultz was to be arrested and would not be returning to the office, removed these documents from a file drawer in Schultz's office and delivered them to his home.¹⁸ Joan Coble, who served as Schultz's administrative assistant until her retirement in 2005, testified that she was instructed by Schultz to never "look in" the "Sandusky" file he kept in his bookcase file drawer. She said it was a very unusual request and was made in a "tone of voice" she had never heard him use before.

It should be noted that, throughout the Grand Jury's investigation, Spanier continuously wanted to know about the actions of the Grand Jury and law enforcement investigators. He required specific updates and regularly checked with Baldwin for any new information about the investigation. Legal Counsel Baldwin relayed all known information directly to Spanier. She fully informed him of all Grand Jury subpoenas and investigative requests.¹⁹ Spanier also pressed Baldwin for information about Paterno's contacts with investigators and the Grand Jury. When she informed Spanier that

¹⁸ Before giving the original documents to Schultz, Belcher made a copy for herself. Belcher then lied about the existence and whereabouts of these documents whenever she was subsequently questioned by University representatives.

¹⁹ Legal Counsel Baldwin testified that it was not only her duty to inform the University President of such things, but that Spanier also specifically requested that she keep him informed of everything regarding this investigation. Spanier has repeatedly misrepresented the level of his knowledge about the investigation. He told Board members and others that he was ignorant of the investigation into the 1998 and 2001 crimes. Even after his termination as President, he sent a letter to the Board on July 23, 2012, reiterating these false claims.

Paterno had acquired his own lawyer, who was not affiliated with the University, Spanier seemed disturbed and questioned aloud why Paterno would not use the University's legal counsel. He also questioned Baldwin, on a number of occasions, about what she knew or could discover regarding the information Paterno was providing to authorities.

Legal counsel Baldwin testified before the Grand Jury that, by January of 2011, Spanier was well aware that the Grand Jury was investigating the May 1998 allegations against Sandusky and the McQueary allegations against Sandusky. In March of 2011, law enforcement investigators requested an interview with Spanier. Spanier agreed and directed Baldwin to accompany him to the interview. Baldwin testified that, before this interview, Spanier was well versed and prepared for questions about the May 1998 allegations, the McQueary allegations, and the allegations of a high school student in Clinton County. Baldwin specifically discussed all of these matters with Spanier before that interview. Baldwin also testified that it was absolutely clear from her discussion with Spanier that he had extensively discussed the substance of Curley and Schultz's grand jury testimonies from January 2011 with each of those individuals. Spanier was also knowledgeable on likely investigative topics due to the fact that Legal Counsel had been keeping him informed of all the information subpoenaed by the Grand Jury from the University.

On March 22, 2011, Spanier was interviewed by law enforcement authorities. Spanier was questioned extensively about his knowledge of, and involvement with, the May 1998 investigation of Sandusky and about his knowledge of the Michael McQueary allegations from early in the 2000's. Spanier stated that he was not aware of the 1998 incident involving Sandusky and allegations of inappropriate behavior, nor was he

aware of any police report involving that matter. Spanier repeatedly detailed that he was rarely informed of any Penn State University Police involvements or investigations. Spanier stated that sexual assault allegations would not be reported to him and that he only reviewed statistical summaries of the Penn State Police Department that did not contain case details. Spanier did say that, sometime between 2000 and 2002, although he was unsure of the date, he was informed that a staff member saw an incident involving Sandusky with a child in a Penn State shower. He stated that he was informed of this by Gary Shultz and Tim Curley, and then he was told that the staff member observed Sandusky "horse playing around" with a child in a Penn State locker room shower. He further explained that he was told the staff member only observed this from a distance and was not sure of what he saw and that the staff member may have misconstrued or misinterpreted what he observed. Spanier stated that he had never been told the name of the staff member and only learned it was McQueary a few weeks before Spanier's interview by law enforcement authorities. Spanier further stated that he told Curley that, if there were no other details of what was observed in the shower, then Curley should contact Sandusky and inform him that he should no longer bring children into the Penn State facilities. Spanier further stated that he, Schultz, and Curley also decided that the Second Mile should be contacted and told about the incident and Penn State's restriction. Spanier specifically stated that his only meeting with Curley and Schultz lasted five to fifteen minutes. Spanier also specifically stated that he never heard anything further about the matter or any other allegations of misconduct against Sandusky. Later in the interview, Spanier stated that he believed

Curley did inform him that he had successfully spoken with Sandusky and the Second Mile about the University's restrictions.

The Board of Trustees was never informed in 1998 or 2001 about the conduct of Jerry Sandusky. Likewise, Spanier failed to inform anyone on the Board of Trustees about: the Grand Jury investigation; the Grand Jury subpoenas issued to the University; or, the testimony before the Grand Jury of Curley, Schultz, Paterno, and other Penn State employees, until April of 2011. At that time, he was forced to address the matter when several members of the Board of Trustees contacted Spanier and the then-Chairman of the Board of Trustees, Steve Garban, in response to a news story about the Grand Jury investigation. When Garban and other members of the Board attempted to discuss the matter with Spanier, Spanier told them he could reveal very little because of the Grand Jury secrecy rules. Spanier would employ this excuse repeatedly to mask details of the investigation and the extent of his past involvement from the Board of Trustees. Legal counsel Baldwin testified that she repeatedly instructed Spanier that he was free to discuss the investigation and the substance of his testimony before the Grand Jury. Baldwin specifically related this to Spanier in April of 2011, in writing, when the Board requested information about the investigation.²⁰ Chairman of the Board Garban advised Spanier that he would need to advise the Board of Trustees, at least in executive session, about the newspaper story revealing a Grand Jury investigation of Sandusky. The next board meeting scheduled was in May 2011. Spanier directed Baldwin to speak to the Board in executive session about the structure, work, and

²⁰ When Spanier testified before the Investigating Grand Jury on April 13th of 2011, he was never instructed by the Grand Jury Judge that his testimony was secret or that he was prohibited from publically disclosing that testimony. In fact, he was specifically advised by the Supervising Judge of the Grand Jury that he was free to disclose his testimony.

procedures of an investigating grand jury. She believed, from her discussions with Spanier leading up to the May board meeting, that Spanier would inform the Board that the Grand Jury investigation not only involved allegations of sexual assault of a minor in Clinton County but also included the 1998 and 2001 incidents that had occurred in Penn State's facilities. Baldwin also believed that Spanier would inform the Board about the various Grand Jury subpoenas that had been issued to the University seeking testimony and evidence regarding Sandusky's acts of misconduct. Baldwin testified that Spanier was absolutely obligated to inform the Board of these matters and that he clearly understood this obligation.

At the executive session of the Board in May 2011, Legal Counsel Baldwin provided her report about Grand Jury practice and process to members of the Board. After she finished her presentation, she was stunned when Spanier immediately directed her to leave the room. In fact, she was so taken aback that, in gathering her papers and possessions to leave, she left her purse in the board room. She later had to ask someone to retrieve her personal possessions from the Board meeting. It was her understanding that Spanier was to address the Board members regarding the substance, known at that time, of the criminal investigation into Sandusky's activities. Members of the Board of Trustees who were in attendance at the executive session have all stated that Spanier never informed them of any connection between the Grand Jury investigation of Sandusky and Penn State. Quite to the contrary, Spanier specifically informed the Board that the investigation had nothing to do with Penn State and that the investigation was regarding a child in Clinton County without affiliation with Penn State. Spanier also told the Board that he could say little more about the matter

because of secrecy that had been imposed upon him by the Grand Jury. After the May 2011 executive session with the Board, Spanier provided no other information regarding the investigation, his involvement with 1998 and 2001 incidents, or Penn State's duties and responses to Grand Jury process. Spanier made no further mention of the matter to the Board until forced to address the issue when Sandusky, Curley, and Schultz were arrested in November 2011.

Numerous Board members testified that, when informed of the arrests, they were completely surprised and stunned. At a series of hastily called board meetings on Saturday and Sunday, November 5th & 6th, 2011, Spanier was still attempting to hide behind claims of grand jury secrecy when questioned about his knowledge of the investigation and his failure to disclose that knowledge to the Board.

The press release issued by Spanier on Saturday, November 5, 2011, read as follows:

STATEMENT FROM PRESIDENT SPANIER:

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and work daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former university employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity, and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.
GRAHAM SPANIER

Penn State has heard from the attorneys representing both Tim Curley and Gary Schultz, they have released the following statements:

ATTORNEY TOM FARRELL:

"Gary Schultz is innocent of all charges. We believe in the legal system, and we believe that it will vindicate him. We will fight these charges in court, and Gary Schultz will be proven innocent of all of them."

ATTORNEY CAROLINE ROBERTO:

"Tim Curley is innocent of all charges against him. We will vigorously challenge the charges in court and we are confident he will be exonerated."

By Sunday, most members of the Board had copies of the Grand Jury Presentment. Members were completely stunned by the extent of Sandusky's crimes and the extent to which these crimes involved Penn State and its facilities. Many Board members were completely dismayed at Spanier's attempt to downplay the charges and vouch for the innocence of Gary Schultz and Tim Curley. On Sunday, in what was described as often contentious and angry exchanges, Spanier was directed—without qualification—to issue a press release on behalf of the University that specifically did not comment on the nature or veracity of the charges and that focused on concern for the victims and provided assurances that the University would fully cooperate and take whatever measures necessary to prevent this from ever happening again. The Secretary of the Board of Trustees, Paula Ammerman, also corroborated the Board members regarding the explicit directions related to Spanier about the press release.

On Sunday evening, November 6, 2011, Spanier called together Penn State press officers and other senior members of his staff. They met in his office, whereupon he provided them with a draft press release that he had prepared. The primary focus of this press release was upon the proclaimed innocence of Tim Curley and Gary Schultz and the University's pledge to support them through this process. There was no mention of the victims or the criminal activities of Sandusky. When it was suggested that he put in at least one line about the victims, Spanier acquiesced and added a

sentence. Some of those staff members present, including Paula Ammerman, knew what the Board had directed Spanier to do in this press release. They were surprised by Spanier's vehemence in supporting Curley and Schultz and his willingness to directly ignore the directives of the Board of Trustees. However, there were no protests or attempts to remind Spanier of his duty and obligation to the Board of Trustees.²¹

In the early hours of November 7, 2011, Spanier released a statement that again reiterated his support for Curley and Schultz. The statement largely ignored the nature of the charges and the harm to the victims.

Reaction from members of the Board of Trustees began almost immediately after publication of this press release. Members were astonished and infuriated. The contents of this press release not only largely contradicted the Board's instruction to Spanier, but it continued to demonstrate an affiliation by Spanier and the University, not only with Schultz and Curley, but with their criminal defense.

Several more meetings would occur between Spanier and Board members over the next two days. Again, Spanier never disclosed to the Board, or of any of its members, despite continuous conversations about the crimes charged, that he was knowledgeable about and had been involved in both the 1998 and 2001 episodes. Legal counsel Baldwin testified that Spanier repeatedly informed her and others that he knew nothing about the 1998 activities of Sandusky or the University police investigation of Sandusky. However, as time went on, she observed that Spanier's discussions about the 1998 episode seemed increasingly detailed and knowledgeable. She

²¹ When asked why they remained silent, these senior staff members and Penn State officials all provided similar responses. They said that Graham Spanier was a controlling President who did not easily brook contrary advice or anything he might view as disloyalty.

eventually came to believe that Spanier not only had known of the 1998 episode but clearly recollected he had been involved with that matter.

On November 9, 2011, the Board of Trustees of Penn State terminated Graham Spanier as the President of the University. The Board of Trustees also directed that University personnel were to cooperate with the law enforcement investigation of Jerry Sandusky and Penn State. Almost immediately following those two events, actual compliance with the Grand Jury subpoenas (past and present) and cooperation with the investigation began to be realized. Law enforcement investigators, working in conjunction with Penn State IT staff, were able to access massive amounts of electronically stored data and began a lengthy process of review and analysis. For the first four months of 2012, large amounts of evidence and data—much of which had been sought and subpoenaed for more than a year prior—was uncovered and provided to investigators. This evidence included significant emails from 1998 reflecting knowledge of, and involvement with, the investigation into Sandusky's showering with two young boys in May of 1998. In addition, significant emails were discovered, reflecting direct evidence of involvement by Graham Spanier, Gary Schultz, and Tim Curley in the failure of Penn State to report to child welfare or law enforcement authorities the crimes reported by Michael McQueary in February of 2001. Additionally, searches conducted—*for the first time*—of the athletic facilities where Sandusky had had offices, revealed approximately 22 boxes of Sandusky documents, photographs, and other materials. Much of the evidence found in these stored boxes proved to be highly valuable and were utilized in the subsequent criminal trial of Sandusky. This evidence included copies of letters that Sandusky sent to a number of his victims, lists

of the children who attended the Second Mile camps with Sandusky's notations next to their names, and photographs of a number of Sandusky's victims.

Endangering the Welfare of Children

Graham Spanier, Tim Curley, and Gary Schultz engaged in a repeated pattern of behavior that evidenced a willful disregard for the safety and well-being of minor children on the Penn State campus. Jerry Sandusky utilized his unfettered access to Penn State facilities, both before his retirement in 1999 and after, to sexually abuse young boys. Spanier, Curley, and Schultz were all well aware of the extent to which Sandusky would use the campus in his connection with the Second Mile. This included Second Mile camps and other activities, as well as Sandusky's use of Penn State for his workout and shower sessions with young boys. The police investigation involving Victim 6 certainly provided an indication of the issues involved with Sandusky bringing children onto campus to use the facilities. When McQueary reported the assault in February of 2001, the first response should have been an immediate report to law enforcement and a child protective services agency. Instead, there was a frightening lack of concern for the yet to be identified child (Victim 2), and an interest in shielding a man who Curley recognized needed "professional help"²² and who Schultz indicated should "confess to having a problem".²³ The plan of action undertaken by these three administrators, who formed the very apex of decision making and power at Penn State,

²² See February 27, 2001 email marked as Exhibit 8.

²³ See handwritten notes of Schultz marked as Exhibit 6.

was created out of a desire to shield Sandusky from the criminal process and, perhaps most importantly, to spare the University tremendous negative publicity and embarrassment.

Chief Harmon testified that all Gary Schultz (or, for that matter, Tim Curley or Graham Spanier) need have done was to let him know an eyewitness observed Sandusky and a young boy in a shower together on campus and that there was observed physical contact (let alone the actual sexual assault McQueary described to them during the meeting). Chief Harmon pointed out in his testimony that the need to report should have been readily apparent given this was now the second episode, and he observed that it would have likely led to a reexamination of the 1998 incident.²⁴ Tragically, this did not happen. The conduct of the three administrators focused on only two things: not reporting this to any outside agency and taking steps (unenforceable as they may be) to limit Sandusky from bringing children onto the Penn State campus.

The Grand Jury concludes that Graham Spanier, Tim Curley and Gary Schultz endangered the welfare of children by failing to report the incident witnessed by Michael McQueary to any law enforcement or child welfare agency. There was never any effort made to locate, identify, or otherwise protect Victim 2 from foreseeable future harm. In fact, by notifying Sandusky they were aware of the incident and not informing the police or a child welfare agency, Spanier, Curley and Schultz placed Victim 2 in even greater danger. Sandusky was placed on notice that others had been informed of his abuse of Victim 2.

²⁴ This is in fact precisely what happened a decade later. Sandusky was convicted as a result of a fresh examination of the evidence in this case.

The continued cover up of this incident and the ongoing failure to report placed every minor male child who would come into contact with Sandusky in the future in grave jeopardy of being abused. The actual harm realized by this wanton failure is staggering. For example, a jury has convicted Sandusky of various sexual offenses for the following victims:

- Victim 1, between the years 2005 and 2008.
- Victim 2, for the 2001 assault witnessed by McQueary.
- Victim 3, who was abused between 1999 and December of 2001 (during the same time frame as the Victim 2 assault).
- Victim 5, who was abused in the Lasch Building in August of 2001, several months after Curley had supposedly "banned" Sandusky from bringing children on campus.
- Victim 9, between the years 2005 and 2008.

The depth of abuse and number of victims may never be fully realized. The Grand Jury witnessed firsthand the devastating effects of Sandusky's abuse on his victims. We find that Spanier, Curley, and Schultz had an ongoing duty to report this behavior and the overall supervisory responsibility for minor children they knew to frequent the campus with Sandusky. Their failure to report Sandusky to authorities from 2001 through 2011 directly endangered Victims 1, 2, 3, 5 and 9 and allowed Sandusky to abuse them between 2001 and 2008.

Spanier Perjury

Graham Spanier testified before this Grand Jury regarding his oversight of one of the largest and most complex universities in the United States. He testified that Curley and Schultz came to him around 2002 to report an incident in which a staff member of Curley's had witnessed Sandusky horsing around in the shower with a younger child. He stated the staff member was apparently a little uncomfortable with the activity, so he brought it to Curley's attention. Spanier stated Schultz and Curley never identified who made the report and Spanier still did not know who it was as of the date of his testimony. He testified that he told Schultz and Curley that, since that kind of behavior could be misconstrued, his advice would be they tell Sandusky not to bring kids into Penn State facilities and that they notify the Second Mile of the incident. Spanier testified this all occurred in a ten- to fifteen-minute meeting.

Spanier acknowledged there was no discussion about trying to locate the child. He also told the Grand Jury there was no discussion about reporting the matter to police or a child welfare agency. He also said he had no knowledge of the 1998 incident involving Victim 6 prior to 2011. He claimed the 1998 matter was never discussed between himself, Curley, and Schultz in deciding how to handle the incident reported by McQueary. Spanier denied he was ever given any indication the 2001 incident could have been sexual in nature.

The Grand Jury finds that Graham Spanier made materially false statements under oath in an official proceeding on April 13, 2011. Spanier claimed on multiple

occasions that he had no knowledge of the 1998 incident when it occurred, during the decision making process in 2001, or at any point up until 2011. We find this claim was made to mislead the Grand Jury. This claim conflicts with all of the evidence we received regarding how important matters were dealt with at Penn State. Gary Schultz would routinely keep Spanier apprised of significant police matters, particularly ones that involved the football team and generated media scrutiny. Spanier was obviously kept in the loop on this matter as Schultz copied him on emails that discussed the status and conclusion of the investigation. One need only look to the 2001 incident to see how Schultz would immediately seek out Spanier on an issue of importance. In 1998, Sandusky was arguably the most high profile individual on campus other than Joe Paterno. Sandusky was also a current employee being investigated by the police department for unlawful sexual contact with a minor in the football building. Schultz would have been negligent in his duties to not notify the Athletic Department and the President.

Spanier made a materially false statement when he denied that he, Curley, and Schultz ever discussed turning the 2001 incident over to a child protection agency. This was the course of action that was considered, at one point even suggested by Schultz, and ultimately rejected in an email exchange where Spanier extols the "humane" nature of an approach that did not include reporting Sandusky to outside authorities.

Spanier made a materially false statement when he described that he was only told by Curley and Schultz that the 2001 incident was horseplay and made someone uncomfortable. The previously discussed electronic communications between the three make clear they are discussing an event that involves the abuse of a child.

Obstruction of Justice and Criminal Conspiracy

Graham Spanier, Tim Curley, and Gary Schultz conspired among each other and did in fact engage in many acts to obstruct justice between 2001 and the present. The acts of obstruction and conspiracy include, but are not limited to the following:

- The actions taken by Spanier, Curley, and Schultz after the initial report is made by Joe Paterno on February 11, 2001, including plans to not tell DPW if Sandusky "confesses" to having a problem.
- The review and knowledge of the 1998 allegations.
- Schultz contacted Chief Harmon to determine the availability of the 1998 police report but never disclosed the information received by Paterno.
- The failure to report McQueary's eyewitness account of a sexual assault.
- Schultz informing John McQueary the matter was being investigated and looked into when it was not.
- The willful failure to alert anyone about Sandusky from February of 2001 through the course of this investigation.
- The numerous lies told by Spanier, Schultz, and Curley to this grand jury.
- The total lack of compliance with the Grand Jury's requests for information, such as Subpoena 1179.
- Schultz hid the existence of pertinent files and notes.

- Curley failed to conduct a search for pertinent documents and materials involving Sandusky.
- Spanier hid the existence of emails and other forms of communication.
- Spanier failed to disclose his role in the 2001 incident to the Board of Trustees.
- Spanier withheld key information from his senior staff charged with managing the Sandusky situation throughout 2011.²⁵

Spanier's Failure to Report

The sexual assault of Victim 2 should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency. Graham Spanier, by virtue of his position within the University, had a legal obligation and responsibility to report or to cause a report to be made within forty-eight hours to a child services agency.

²⁵ It should be noted that Spanier continues to mislead with numerous public statements that contain demonstrably false statements.

EXHIBIT 1

Wilson

5/4/98
5:00 PM

11 1/2 yr old son

N. Hwy Garden

Trapped w Dad Wife

They picked up son & wanted

to FBI back room

Behavior - at best inappropriate

cannot separate w parents

Police interviewed

- typed

- may be living at home

- by themselves, washed

Give him other clothes

even though he was in shorts

- worked out on Treadmill etc
- Jerry - to take a shower -
undressed - ? no other
shower? 4 in here.

Shampoo

Jerry came up behind &
gave him a bear hug -
squeezed towards squeeze
got out - etc.

- keep clothes - socks JUP's
hat

- took hand.

At the concerned something
more - Val took another
shower last night & this a.m.

-3-
Mother - asked how dad
to give him
had to be a gentle contact
because of age difference
but when asked of boy
he quietly said NO.

- Friend Brandon, age 10,
also @ Nathan Conder -
davis said thing went
on with him

- Mother also on local bus
- Children & Youth has been
noticed & will come to
talk to Brandon - tonight

- 4 -

Walter over meeting - 110

generally concerning

Admin - Peer Judgment

Critical issue - content
w/ genitals?

Assuming some exploring
w/ Braden? not around

Tom Harman

5/5

Last evening

- re interview 11 1/2 yr old
- only change: added what happened in shower demonstrated on chair how Jerry hugged from back

hands around abdomen
& down to thighs - picked
him up & held him at
shower head - rinse

soap out of ears

observed by BU FB +

- psychologist
- Probably emotional problems but articulate & believable
- Mother to psychologist & said she would call child abuse hot line & will generate an incident no - with Dept of Public Welfare
- Officer - interviewed last night
- Similar case

wrestling
kissed on head

-3-

Hugging from behind
Shower

No allegation beyond that

Kids drew diagrams of
shower rooms.

He initially went down to
shower 3 yds stuck
away & Gary told
him to come down
to shower next to his.

- Local child abuse people
Met at FOC today to
decide what to do.

-4-

Either way, case worker
felt they would interview

Jerry

box? " " " "
Other children?

EXHIBIT 2

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, May 06, 1998 2:06 PM
To: Tim Curley
Cc: Spanier-Graham (GBS)
Subject: Re: Joe Paterno

Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday.

At 05:24 PM 5/5/98 -0400, Tim Curley wrote:
>I have touched base with the coach. Keep us posted. Thanks.

>

>Tim Curley
>Tmc3@psu.edu

>

>

>

EXHIBIT 3

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:09 AM
To: Curley-Tim (TMC)
Cc: Spanier-Graham (GBS); Harmon-Thomas (TRH)
Subject: Re: Jerry

They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriately investigated and I hope it is now behind us.

>Date: Mon, 08 Jun 1998 21:59:42 -0400
>To: Tim Curley <tmc3@psu.edu>
>From: "Gary C. Schultz" <gcs2@psu.edu>
>Subject: Re: Jerry

>
>Tim, I don't have an update at this point. Just before I left for vac, Tom told me that the DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you.

>
>At 10:27 AM 5/30/98 -0400, Tim Curley wrote:
>>Any further update?

>>>
>>>
>>>
>>>

>>>At 09:46 AM 5/19/98 -0400, you wrote:
>>>>No, but I don't expect we'll hear anything prior to the end of this week.

>>>>
>>>>At 09:37 PM 5/18/98 -0400, Tim Curley wrote:
>>>>>Any update?

>>>>>
>>>>>

>>>>>At 04:11 AM 5/14/98 -0400, you wrote:
>>>>>>Tim, I understand that a DPW person was here last week; don't know
>>>>>>for sure if they talked with Jerry. They decided to have a child
>>>>>>psychologist talk to the boys sometime over the next week. We won't know anything before then.

>>>>>>
>>>>>>At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>>>>>>>Anything new in this department? Coach is anxious to know where it stands.

>>>>>>>
>>>>>>>Tim Curley
>>>>>>>Tmc3@psu.edu

>>>>>>>>
>>>>>>>>
>>>>>>>>

>>>>>>>>Gary C. Schultz
>>>>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>>>>208 Old Main
>>>>>>>>Phone: 865-6574
>>>>>>>>Fax: 863-8685

>>>>>>>>>
>>>>>>>>>
>>>>>>>>>

>>>>

>>>>Tim Curley

>>>>Tmc3@psu.edu

>>>>

>>>>

>>>>

>>>Gary C. Schultz

>>>Sr. V.P. for Finance and Business/Treasurer

>>>208 Old Main

>>>Phone: 865-6574

>>>Fax: 863-8685

>>>

>>>

>>>

>>

>>Tim Curley

>>Tmc3@psu.edu

>>

>>

>>

>

EXHIBIT 4

Working Attorney(s): Select 9

<i>Matter ID</i>	<i>Description</i>	<i>Task/Activity</i>	<i>Hours</i>	
02-08-01				
4000-465063	PSU - Labor - Human Resources PS010		0.60	
	Conference with J Purdum re holiday pay issue; Conference with R Maney re same			
4000-490106	PSU - Personnel - Continuing & Distance Educat		0.50	
	Conference with J Elliott re J Marshall; Conference with G Schultz			
4000-490143	PSU - Personnel - Mont Alto Campus		2.20	
	Conference with J Leathers re D Goldenberg; Preparation of correspondence to G Spanier; Review of files; Preparation of correspondence to G Spanier et al; Conference with J Leathers			
4000-481582	PSU - Students - Student Affairs		2.90	
	Interoffice conference re camping policy; Legal research re same			
4000-481582	PSU - Students - Student Affairs		1.70	
	Study/analyze documents re LGB tenant; Interoffice conference re same; Legal research; Preparation of correspondence to G Spanier et al re same			
4000-490163	PSU - Personnel - Human Resources		0.30	
	Conference with R Maney re R Kballiq			
4000-465026	PSU - Labor - COM - General		1.50	
	Preparation of documents re HMC parking			
** Total for 2/8/2001 **			9.70	0.00
02-09-01				
4000-490143	PSU - Personnel - Mont Alto Campus		1.60	
	Review of documents re D Goldenberg; Preparation of correspondence to G Spanier; Preparation of correspondence to J Leathers; Legal research			
4000-451558	PSU - Gifts & Grants - Develop and Alumni Rela		0.20	
	Review of files re Hagan estate			
4000-490117	PSU - Personnel - College of Liberal Arts		1.10	
	Conference with J Battista re R Echemendia; Interoffice conference			
4000-425562	PSU - Contracts - Hershey Medical Center		0.80	
	Review of documents re Purchase of Services Agreement; Interoffice conference re same			
4000-465026	PSU - Labor - COM - General		2.60	
	Conference with L Kushner re HMC parking fees; Preparation of correspondence to L Kushner re same; Preparation of documents; Legal research			
4000-465063	PSU - Labor - Human Resources PS010		0.70	
	Review Schaeffer brief			
** Total for 2/9/2001 **			7.00	0.00
02-11-01				
4000-450061	PSU - General - Finance/Business - Central		2.90	
	Conference with G Schultz re reporting of suspected child abuse; Legal research re same;			
	Conference with G Schultz			
02-12-01				

EXHIBIT 5

OAG

From: Thomas R. Harmon <HARMON@SAFETY-1.SAFETY.PSU.EDU>
Sent: Monday, February 12, 2001 4:57 PM
To: gcs2@psu.edu
Subject: Incident in 1998

Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged archives.

Thomas R. Harmon
Director, University Police
The Pennsylvania State University
30-B Eisenhower Parking Deck
University Park, PA 16802
(814) 865-1864
harmon@police.psu.edu

EXHIBIT 6

PENNSSTATE

Confidential



Date: 2/12/01.

From: Gary C. Schultz

To:

Talked w TMC

reviewed FRO history

- agreed TMC will discuss w JVP +
advise we think TMC should meet
w JVP on Friday.

- unless he confirms to having a problem,
TMC will indicate we need to
have DPW review the matter
as an independent agency concerned
w. Child Welfare.

- TMC will keep me posted.

Senior Vice President for Finance and Business/Treasurer

The Pennsylvania State University
208 Old Main
University Park, PA 16802-1503
(814) 865-6574
Fax: (814) 863-7188

EXHIBIT 7

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Monday, February 26, 2001 1:57 PM
To: TMC3@psu.edu
Cc: Coble-Joan (JLC)
Subject: Confidential

Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know.

EXHIBIT 8

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>

Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization. At 10:18 PM 2/27/01 - 0500, Graham Spanier wrote:
Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't heard and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed. At 08:10 PM 2/27/01 - 0500, Tim Curley wrote:
I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. I need some help on this one. What do you think about this approach? -----

Graham B. Spanier

President

The Pennsylvania State University

201 Old Main

University Park, Pennsylvania 16802 Phone: 814-865-7611 email:

gspanier@psu.edu

EXHIBIT 10

283. Freeh and FSS made false and defamatory statements of fact in the Freeh Report when they stated:

- Dr. Spanier exhibited “total and consistent disregard ... for the safety and welfare of Sandusky’s child victims.”
- Dr. Spanier “failed to protect against a child sexual predator harming children for over a decade.”
- Dr. Spanier “concealed Sandusky’s activities from the Board of Trustees, the University community and authorities.”
- Dr. Spanier “exhibited a striking lack of empathy for Sandusky’s victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001.”
- Dr. Spanier “empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University’s facilities and affiliation with the University’s prominent football program.”
- “[I]n order to avoid the consequences of bad publicity, the most powerful leaders at the University — Spanier, Schultz, Paterno, and Curley — repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State

community, and the public at large. The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities.”

- Dr. Spanier “fail[ed] ... to adequately report and respond to the actions of a serial sexual predator.”
- “The investigation also revealed: [] A striking lack of empathy for child abuse victims by the most senior leaders at the University.”
- Dr. Spanier made “[a] decision ... to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy ... essentially granting him license to bring boys to campus facilities for ‘grooming’ as targets for his assaults.”
- “Despite their knowledge of the criminal investigation of Sandusky [in 1998], Spanier, Schultz, Paterno and Curley took no action to limit Sandusky’s access to Penn State facilities or took any measures to protect children on their campuses.”
- “The investigation also revealed: ... [a] president who discouraged discussion and dissent.”
- “After the February 2001 incident, Sandusky engaged in improper conduct with at least two children in the Lasch Building. Those assaults may well have been prevented if Spanier, Schultz, Paterno and Curley had taken