

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PA
: 217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD :
STATEWIDE INVESTIGATING : DAUPHIN COUNTY COMMON
GRAND JURY : PLEAS
: No. CP-22-CR-5164-2011
: No. CP-22-CR-5165-2011

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
: SUPREME COURT OF PA
v. : 217 M.D. MISC. DKT. 2010
: DAUPHIN COUNTY COMMON
: PLEAS
TIMOTHY M. CURLEY and : Complaint No. G07-1146135
GARY C. SCHULTZ, : REQUEST EXPEDITED REVIEW
: Defendants. :

JOINT MOTION TO QUASH PRESENTMENT AS DEFECTIVE
FOR RELYING ON ATTORNEY-CLIENT PRIVILEGED
COMMUNICATIONS AND WORK PRODUCT

AND NOW, come the defendants, Timothy Mark Curley, by and through his attorney, Caroline M. Roberto, Esquire, and Gary Charles Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully file the within Motion to Quash Presentment and state the following in support:

1. 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 over a period of years. *See* Exhibit A, November 1, 2012, Presentment at 1.
2. On January 12, 2011, defendants Timothy M. Curley and Gary C. Schultz testified before the grand jury investigating the allegations against Sandusky.

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3. As we described at length in our Omnibus Pretrial Motions, Exhibit G, then PSU General Counsel Attorney Cynthia A. Baldwin represented Messrs. Curley and Schultz as their counsel in connection with their grand jury appearances. She prepared Curley and Schultz for their grand jury testimonies, accompanied each defendant to interviews with the Office of the Attorney General on January 12, and attended their testimony in the grand jury hearing room, as only counsel for a witness may do, 42 Pa.C.S.A. § 4549(b) and Pa. R. Cr. P. 231(A). The Commonwealth, in its Answer to our Omnibus Pretrial Motions, agrees that Baldwin told everyone, including the Deputies and the grand jury supervising judge, that she represented Curley and Schultz. *See* Exhibit H, Answer at p.6, ¶17; p.8, ¶36; p.10 ¶13; p.23.

4. On November 4, 2011, Curley and Schultz were each charged with one count of Perjury based on their respective grand jury testimonies, a violation of 18 Pa.C.S. § 4902 and a felony of the third degree, and one count of Failure to Report in violation of 23 Pa.C.S. § 6319, a summary offense.

5. On November 1, 2012, Curley and Schultz were also charged with two counts of Endangering Welfare of Children in violation of 18 Pa.C.S. § 4304, a felony of the third degree, and Obstruction of Justice, a violation of 18 Pa.C.S. § 5101, a misdemeanor of the second degree.

6. On that same date, defendants and Graham B. Spanier were also charged with three counts of Conspiracy, in violation of 18 Pa.C.S. § 903, based on the underlying offenses of Obstruction of Justice, a misdemeanor of the second degree, Perjury, a felony of the third degree, and Endangering Welfare of Children, a felony of the third degree. A Presentment issued by the Third-Third Statewide Investigating Grand Jury was attached to the criminal complaint. *See* Exhibit A.

7. The Presentment indicates that the additional charges brought against Curley and Schultz are based, in large part, on Baldwin's testimony before the grand jury as to privileged communications with her clients Schultz, Curley and Spanier and attorney work-product performed for them. Testimony by Baldwin was specifically presented as evidence that certain acts committed by Curley and Schultz were part of alleged conspiracy to obstruct justice.

8. Baldwin's testimony was offered to substantiate the allegation that Curley, Schultz, and Spanier conspired to make false statements to the grand jury. *See* Presentment at 38. Baldwin's testimony about her privileged conversations with Schultz, Curley and Spanier is in fact the sole support for the existence of a conspiracy to commit perjury. She testified before the grand jury that based on her conversations with her clients, it was evident that Curley and Schultz "extensively discussed" their grand jury testimonies with Spanier. *See* Presentment at 25.

9. Baldwin's testimony about privileged attorney-client conversations also was presented to support the accusation that Curley and Schultz conspired to obstruct justice by deliberately preventing compliance with grand jury Subpoena 1179. *See* Presentment at 38.

According to the Presentment:

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, Schultz 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.

Presentment at 21. These assertions, which form a substantial part of the basis for the obstruction and conspiracy charges, come entirely from Baldwin's description of privileged communications with her clients.

10. It should be noted that Baldwin's assertions are inconsistent with Schultz' and Curley's grand jury testimony. Mr. Curley was not asked in the grand jury about any documents or his search for them. Exhibit G. At the time Mr. Schultz testified, he was retired from PSU and had been replaced as Senior Vice President for Finance and Business. When asked about notes, Mr. Schultz volunteered to the grand jury that he believed he did create notes. While he believed they had been destroyed when he retired, he suggested that they might still exist, but he did not know for certain:

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

A: I have none of those in my possession. I believe that there were probably notes taken at the time. Given my retirement in 2009, if I even had them at that time, something that old *would have probably* been destroyed. I had quite a number of files that I considered confidential matters that go back years that didn't any longer seem pertinent. I wouldn't be surprised. In fact, *I would guess* if there were any notes, they were destroyed on or before 2009.

Exhibit I, Schultz GJ Transcript at 16 (emphasis added).

11. Follow-up questions from the prosecutor showed that the prosecutor understood Mr. Schultz' answer to indicate that the notes might exist:

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

A: No.

Schultz GJ Transcript at 27-28 (emphasis added).

12. Thus to the extent that the obstruction of justice charge relies on an alleged misrepresentation by Mr. Curley or Mr. Schultz that they had no responsive documents, that misrepresentation, if indeed it was made, was made only to Ms. Baldwin, in a confidential communication, not to the grand jury.

13. Messrs. Curley and Schultz have not waived their privileges. To the contrary, on June 1, 2012, counsel for Mr. Schultz wrote Ms. Baldwin's counsel to inform him that Mr. Schultz did not waive the privilege and to instruct him that his client should "assert the attorney-client and work-product privileges in response to any and all requests from the OAG, the USAO in the Middle District of Pennsylvania, Louis Freeh and his investigative group and anyone else who may ask." Exhibit B. On June 11, 2012, counsel for Mr. Curley also sent a letter to Ms. Baldwin's attorney asserting the attorney-client privilege and requesting that, "you and Justice Baldwin assert the attorney-client work produce 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 all others seeking information or response related to Mr. Curley." Exhibit C.

14. On October 2, 2012, Attorney Michael M. Mustokoff, counsel for the Pennsylvania State University sent this Court a letter partially waiving the attorney-client privilege concerning certain communications and correspondence of its former General Counsel, Cynthia A. Baldwin. Counsel for Curley and Schultz were copied. Exhibit D.

15. On October 11, 2012, counsel for Curley and Schultz separately wrote to this Court asserting the attorney-client privilege concerning communication and correspondence with their counsel, Ms. Baldwin, "against production to the Grand Jury, the Office of Attorney General of Pennsylvania and any other party." Exhibits E and F, respectively.

16. On December 13, 2012, a preliminary hearing regarding the new charges against Curley and Schultz is scheduled before the Honorable Magisterial District Judge William C. Wenner. Defendants also intend to file before Judges Hoover and Wenner, a motion to preclude the testimony of Ms. Baldwin at the preliminary hearing.

17. 42 Pa.C.S.A. § 5916 requires this Honorable Court to exclude the testimony of Ms. Baldwin in the Grand Jury proceedings against her former clients, Curley and Schultz. In the absence of a waiver by the client, an attorney is barred from testifying, in a criminal matter, regarding statements that the client made to the attorney in confidence. 42 Pa.C.S.A. § 5916.

18. The presentment is defective as it relies upon communication in violation of the attorney-client privilege. 42 Pa.C.S.A. § 5916.

19. Quashal is the appropriate remedy for defects in the presentment. See, *In re: County Investigation Grand Jury VIII*, 2003, 2005 WL 480744 (Pa. Com. Pl.); *Commonwealth v. Schwartzman and Schwartz*, 1981 WL 207427 (Pa. Com. Pl.).

20. Title 42 Pa.C.S.A. §722(5) permits a direct appeal to the Pennsylvania Supreme Court “where the matter relates to the convening, supervising, administration, operation or discharge of an investigating grand jury or otherwise directly affects such a grand jury or any investigation conducted by it.” Rule 3331 of the Pennsylvania Rules of Appellate Procedure also authorizes a direct appeal to the Supreme Court under similar circumstances.

21. Moreover, the Pennsylvania Supreme Court has consistently held that “orders overruling claims of privilege and requiring disclosure are immediately appealable.” *Commonwealth v. Harris*, 32 A.2d 243, 251 (Pa. 2011) (PCRA court ruling that psychologist-patient privilege had been waived immediately appealable); *Commonwealth v. Kennedy*, 876

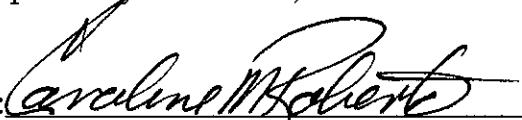
A.2d 939, 943-44 (Pa. 2005) (trial court order overruling assertion of attorney-client work product privilege immediately appealable.)

22. Thus, we request that the Court consider this issue expeditiously so that the parties may seek appellate review and a stay of the preliminary hearing if necessary.

WHEREFORE, for the reasons stated, defendants respectfully request this Honorable Court to Quash the Presentment as defective for including testimony of Cynthia A. Baldwin in violation of the attorney-client privilege.

Respectfully submitted,

By:



Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy Mark Curley
Pa. I.D. No. 41524
429 4th Avenue, Suite 500
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(412) 391-4071

By:



Thomas J. Farrell, Esquire
Attorney for Defendant, Gary Charles Schultz
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COMMONWEALTH OF
PENNSYLVANIA
COUNTY OF: DAUPHIN

Magisterial District Number: 12-3-03
MDJ: Hon. WILLIAM C. WENNER
Address: 5925 STEVENSON AVE., SUITE B
HARRISBURG, PA 17112
Telephone: (717)545-0261



POLICE CRIMINAL COMPLAINT
COMMONWEALTH OF PENNSYLVANIA
VS.

DEFENDANT:

(NAME and ADDRESS):

TIMOTHY

MARK

CURLEY

First Name

Middle Name

Last Name

Gen.

201 MEADOWLARK LANE, BOALSBURG, PA 16827

NCIC Extradition Code Type

- ☒ 1-Felony Full ☐ 4-Felony No Ext. ☐ B-Misdemeanor Limited ☐ E-Misdemeanor Pending
☐ 2-Felony Ltd. ☐ 5-Felony Pend. ☐ C-Misdemeanor Surrounding States ☐ Distance: _____
☐ 3-Felony Surrounding States ☐ A-Misdemeanor Full ☐ D-Misdemeanor No Extradition

DEFENDANT IDENTIFICATION INFORMATION

Docket Number _____ Date Filed ____/____/____ OTN/LiveScan Number _____ Complaint/Incident Number G07-1146135 SID 392-88-50-8 Request Lab Services? ☐ YES ☒ NO

GENDER ☒ Male ☐ Female DOB 04/28/1954 POB VIRGINIA Add'l DOB ____/____/____ Co-Defendant(s) ☒
First Name Middle Name Last Name Gen.
AKA TIM CURLEY

RACE ☒ White ☐ Asian ☐ Black ☐ Native American ☐ Unknown

ETHNICITY ☐ Hispanic ☒ Non-Hispanic ☐ Unknown

HAIR COLOR ☒ GRY (Gray) ☐ RED (Red/Auburn) ☐ SDY (Sandy) ☐ BLU (Blue) ☐ PLE (Purple) ☐ BRO (Brown)
☐ BLK (Black) ☐ ONG (Orange) ☐ WHI (White) ☐ XXX (Unk/Bald) ☐ GRN (Green) ☐ PNK (Pink)
☐ BLN (Blonde/Strawberry)

EYE COLOR ☐ BLK (Black) ☐ BLU (Blue) ☐ BRO (Brown) ☐ GRN (Green) ☐ GRY (Gray)
☒ HAZ (Hazel) ☐ MAR (Maroon) ☐ PNK (Pink) ☐ MUL (Multicolored) ☐ XXX (Unknown)

Driver License State PA License Number 15166572 Expires: 04/29/2016 WEIGHT (lbs.)

DNA ☐ YES ☒ NO DNA Location 195

FBI Number 44356ND6 MNU Number FL HEIGHT in

Defendant Fingerprinted ☐ YES ☒ NO 6 3

Fingerprint Classification

DEFENDANT VEHICLE INFORMATION

Plate # State Hazmat ☐ Registration Sticker (MM/YY) / Comm'l Veh. Ind. ☐ School Veh. ☐ Oth. NCIC Veh. Code Reg. same as Def. ☐

VIN Year Make Model Style Color

Office of the attorney for the Commonwealth ☐ Approved ☐ Disapproved because:

(The attorney for the Commonwealth may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing. See Pa.R.Crim.P. 507).

BRUCE R. BEEMER

(Name of the attorney for the Commonwealth)

(Signature of the attorney for the Commonwealth)

(Date)

I, TPR. JAMES P. ELLIS & AGT. A.L. SASSANO

(Name of the Affiant)

SP062084-7118 / AT504374-367

(PSP/MPOETC -Assigned Affiant ID Number & Badge #)

of PA STATE POLICE & PA ATTORNEY GENERAL

(Identify Department or Agency Represented and Political Subdivision)

PAPSP7400 / PA022240

(Police Agency ORI Number)

do hereby state: (check appropriate box)

1. ☒ I accuse the above named defendant who lives at the address set forth above
☐ I accuse the defendant whose name is unknown to me but who is described as _____

☐ I accuse the defendant whose name and popular designation or nickname are unknown to me and whom I have therefore designated as John Doe or Jane Doe with violating the penal laws of the Commonwealth of Pennsylvania at [301] HARRISBURG
(Subdivision Code) (Place/Political Subdivision)

in DAUPHIN County [22] on or about FEBRUARY 2001 TO PRESENT
(County Code)

**POLICE CRIMINAL COMPLAINT**

Docket Number:	Date Filed: 11/01/2012	OTN/LiveScan Number	Complaint/Incident Number G07-1146135
Defendant Name	First: TIMOTHY	Middle: MARK	Last: CURLEY

The acts committed by the accused are described below with each Act of Assembly or statute violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated. The age of the victim at the time of the offense may be included if known. In addition, social security numbers and financial information (e.g. PINs) should not be listed. If the identity of an account must be established, list only the last four digits. 204 PA.Code §§ 213.1 – 213.7.)

<input checked="" type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903					
<input checked="" type="checkbox"/> 1	4304	(A) (1)	of the TITLE 18	1	F3	200		
Lead?	Offense#	Section	Subsection	PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code
PennDOT Data (if applicable)	Accident Number			<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone			
Statute Description (include the name of statute or ordinance): ENDANGERING WELFARE OF CHILDREN								
Acts of the accused associated with this Offense: A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. To wit: as more fully described in the attached affidavit/presentment.								

<input type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903					
<input type="checkbox"/> 2	4304	(A)(2)	of the TITLE 18	1	F3	200		
Lead?	Offense#	Section	Subsection	PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code
PennDOT Data (if applicable)	Accident Number			<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone			
Statute Description (include the name of statute or ordinance): ENDANGERING WELFARE OF CHILDREN								
Acts of the accused associated with this Offense: A person commits an offense if the person, in an official capacity, prevents or interferes with the making of a report of suspected child abuse under 23 Pa. C.S. Ch. 63 (relating to child protective services). To wit: as more fully described in the attached affidavit/presentment.								

<input type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903					
<input type="checkbox"/> 3	5101		of the TITLE 18	1	M2	260		
Lead?	Offense#	Section	Subsection	PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code
PennDOT Data (if applicable)	Accident Number			<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone			
Statute Description (include the name of statute or ordinance): OBSTRUCTING ADMINISTRATION OF LAW OR OTHER GOVERNMENTAL FUNCTION								
Acts of the accused associated with this Offense: In that the defendant did intentionally obstruct, impair or pervert the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act. To wit: as more fully described in the attached affidavit/presentment.								



POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: 11/01/2012	OTN/LiveScan Number	Complaint/Incident Number G07-1146135
Defendant Name	First: TIMOTHY	Middle: MARK	Last: CURLEY

The acts committed by the accused are described below with each Act of Assembly or statute violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated. The age of the victim at the time of the offense may be included if known. In addition, social security numbers and financial information (e.g. PINs) should not be listed. If the identity of an account must be established, list only the last four digits. 204 PA.Code §§ 213.1 – 213.7.)

<input checked="" type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
<input type="checkbox"/> Lead?	Offense# 4	Section 5101	Subsection of the
	PA Statute (Title) TITLE 18	Counts 1	Grade M2
	NCIC Offense Code 260	UCR/NIBRS Code	
PennDOT Data (if applicable)	Accident Number	<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
Statute Description (include the name of statute or ordinance): CRIMINAL CONSPIRACY (TO COMMIT OBSTRUCTING ADMINISTRATION OF LAW OR OTHER GOVERNMENTAL FUNCTION)			
Acts of the accused associated with this Offense: In that the defendant did promote or facilitate its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit: as more fully described in the attached affidavit/presentment.			

<input checked="" type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
<input type="checkbox"/> Lead?	Offense# 5	Section 4902	Subsection A
	PA Statute (Title) TITLE 18	Counts 1	Grade F3
	NCIC Offense Code 260	UCR/NIBRS Code	
PennDOT Data (if applicable)	Accident Number	<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
Statute Description (include the name of statute or ordinance): CRIMINAL CONSPIRACY (TO COMMIT PERJURY)			
Acts of the accused associated with this Offense: In that the defendant did promote or facilitate its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit: as more fully described in the attached affidavit/presentment.			

<input checked="" type="checkbox"/> Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
<input type="checkbox"/> Lead?	Offense# 6	Section 4304	Subsection A,1,2
	PA Statute (Title) TITLE 18	Counts 1	Grade F3
	NCIC Offense Code 260	UCR/NIBRS Code	
PennDOT Data (if applicable)	Accident Number	<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
Statute Description (include the name of statute or ordinance): CRIMINAL CONSPIRACY (TO COMMIT ENDANGERING WELFARE OF CHILDREN)			
Acts of the accused associated with this Offense: In that the defendant did promote or facilitate its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit: as more fully described in the attached affidavit/presentment.			



POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: 11/01/2012	OTN/LiveScan Number	Complaint/Incident Number G07-1146135
Defendant Name	First: TIMOTHY	Middle: MARK	Last: Curley

2. I ask that a warrant of arrest or a summons be issued and that the defendant be required to answer the charges I have made.
3. I verify that the facts set forth in this complaint are true and correct to the best of my knowledge or information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904) relating to unsworn falsification to authorities.
4. This complaint consists of the preceding page(s) numbered 1 through 4.

The acts committed by the accused, as listed and hereafter, were against the peace and dignity of the Commonwealth of Pennsylvania and were contrary to the Act(s) of the Assembly, or in violation of the statutes cited.
(Before a warrant of arrest can be issued, an affidavit of probable cause must be completed, sworn to before the issuing authority, and attached.)

TPR JAMES ELLIS & AGT. A
SASSANO

NOVEMBER 01, 2012
(Date)

(Signature of Affiant)

AND NOW, on this date _____ I certify that the complaint has been properly completed and verified.

An affidavit of probable cause must be completed before a warrant can be issued.

(Magisterial District Court Number)

(Issuing Authority)

SEAL

Please provide the following information for each co-defendant.



Co-Defendant Data Sheet

Docket Number:	Date Filed: 11/01/2012	OTN/LiveScan Number	Complaint/Incident Number G07-1146135
Defendant Name	First: TIMOTHY	Middle: MARK	Last: CURLEY

Complaint/Incident Number G07-1146135	Co-Defendant # <u>1</u>
GARY CHARLES SCHULTZ (Name)	
636 ROSSLYN RD, PO BOX 363 (Home Street Address)	
BOALSBURG, PA 16827 (City, State, & ZIP Code)	814-466-7609 (Telephone #)

Complaint/Incident Number G07-1146135	Co-Defendant # <u>2</u>
GRAHAM B. SPANIER (Name)	
425 WINDMERE DR, 2A (Home Street Address)	
STATE COLLEGE, PA 16801 (City, State, & ZIP Code)	814-954-7577 (Telephone #)

Complaint/Incident Number	Co-Defendant # _____
(Name)	
(Home Street Address)	
(City, State, & ZIP Code)	(Telephone #)

Complaint/Incident Number	Co-Defendant # _____
(Name)	
(Home Street Address)	
(City, State, & ZIP Code)	(Telephone #)

**POLICE CRIMINAL COMPLAINT**

Docket Number:	Date Filed: 11/01/2012	OTN/LiveScan Number	Complaint/Incident Number G07-1146135
Defendant Name:	First: TIMOTHY	Middle: MARK	Last: CURLEY

AFFIDAVIT of PROBABLE CAUSE

SEE EXHIBIT "A" ATTACHED

I, TPR JAMES ELLIS & AGT. A.L. SASSANO, BEING DULY SWORN ACCORDING TO THE LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

(Signature of Affiant)

Sworn to me and subscribed before me this _____ day of _____

Date _____, Magisterial District Judge

My commission expires first Monday of January,

SEAL

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 CYS 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

in witness

11 1/2 yr old son

Nikky Gueles

Trinidad & Tobago

you picked up son & went
to FBI locker room

Behavior - at best inappropriate

Constant sexual propositions

Police interviewed

- typed.

- May be leaving at 11:00

- by themselves, undisturbed

- Give him other clothes -
even though he wears shorts

5/4/98
5:00pm

- 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 back hug - spinal towards squeeze gets out - alt.

- Keep clothes - soho JUP's hat

- took hand.

Mother concerned something more - Kel took another shower last night & this a.m.

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

- Friend Brandon, age 10,
also @ N. Hwy Center -
claims said thing went
on with him

- Mother also asked Brandon
- Children & Youth has been
notified & will come to
401 to Brandon - tonight

- 4 -

Mother over reacting - NO

Generally Concerning
Admin - Peer Judgment
Critical issue - conflict
w/ genitals?

Assuming same experience
w/ Breach? not assumed

Tom Harman 2/5

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 &

Go

- 2 -

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
- Other day - interviewed last night
- Similar case

courting
kissed on head

- 3 -

Hogging from behind
Shower

No allegation beyond that

Kids draw 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? v w,
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

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>>>>Tim Curley
>>>>Imc3@psu.edu

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>>>>Gary C. Schultz
>>>>Sr. V.P. for Finance and Business/Treasurer
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>>>>Phone: 865-6574
>>>>Fax: 863-8685

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>>>>Tim Curley
>>>>Imc3@psu.edu

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EXHIBIT 4

Working Attorney (s): Select 9

Matter I.D.	Description	Task/Activity	Hours
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 Khaliq		
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 Bohemendia; 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

PENNSTATE

Confidential



Date:

2/12/01

From:

Gary C. Schultz

To:

Taken w TMC

reviewed 1998 history

- agreed TMC will discuss w JUP + advise we think TMC should meet w JD 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.*

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: Cebile-Jean (JC)
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: <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>



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June 1, 2012

PRIVILEGED AND CONFIDENTIAL

By U.S. Mail & E-mail cdeemonaco@foxrothschild.com

Charles A. De Monaco
Fox Rothschild LLP
625 Liberty Avenue, 29th Floor
Pittsburgh, PA 15222

Re: Commonwealth v. Gary C. Schultz

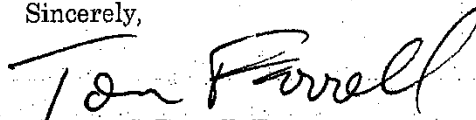
Dear Chuck:

I was pleased to learn that you are representing Cynthia Baldwin with respect to the Attorney General's investigation. The timing of your engagement, coming in the midst of renewed investigative activity by the OAG, causes me concern that the OAG may attempt to interview Judge Baldwin or to obtain notes, correspondence, emails or other documents from her.

Judge Baldwin, as she represented to Mr. Schultz, the grand jury supervising judge, the OAG, and the grand jury, was legal counsel to my client, Gary Schultz, during preparation for his appearance in the grand jury, during his interview and appearance before the grand jury on January 12, 2011, and through and until my retention on or about October 31, 2011. Therefore, we ask and expect that you and Judge Baldwin assert the attorney-client and work-product privileges in response to any and all requests from the OAG, the USAO in the Middle District of Pennsylvania, Louis Freeh and his investigative group and anyone else who may ask.

Please call me if you have any questions about this matter.

Sincerely,



Thomas J. Farrell, Esq.

Cc: Gary C. Schultz

EXHIBIT B

LAW OFFICE OF
CAROLINE M. ROBERTO
5TH FLOOR-LAW & FINANCE BUILDING
PITTSBURGH, PENNSYLVANIA 15219

(412) 391-4071
FAX (412) 391-1190

June 11, 2012

By U.S. Mail & E-mail – cdemonaco@foxrothschild.com

Charles A. De Monaco, Esquire
Fox Rothschild LLP
625 Liberty Avenue, 29th Floor
Pittsburgh, PA 15222

RE: Commonwealth v. Timothy Mark Curley

Dear Mr. De Monaco:

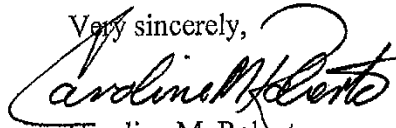
I represent Tim Curley, the former Athletic Director at Penn State, who is presently on administrative leave.

I recently learned from Attorney Thomas J. Farrell that you are representing Cynthia A. Baldwin with respect to the Pennsylvania Attorney General's investigation regarding Jerry Sandusky and related matters. I join in Mr. Farrell's concern that as the OAG continues the grand jury investigation, they may attempt to interview Justice Baldwin, or obtain notes, correspondence, e-mails or other documents from her related to Mr. Curley.

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 all others seeking information or response related to Mr. Curley.

If you have any questions, please do not hesitate to contact.

Very sincerely,



Caroline M. Roberto

CMR:geb
cc: Timothy Mark Curley

EXHIBIT C

FILE COPY

Duane Morris[®]

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MEXICO CITY
ALLIANCE WITH
MIRANDA & ESTAVILLO

October 2, 2012

Honorable Barry F. Feudale
Presiding Judge of the 33rd Statewide
Investigative Grand Jury
1400 Strawberry Square
Harrisburg, PA 17120

Re: In re: The Thirty-Third Statewide Investigating Grand Jury,
217 M.D. Misc. Dkt. 2010 (Pa. Sup. Ct.),
No. 1325 M.D. 2010 (Dauphin Cty. C.C.P.)

Dear Judge Feudale:

An issue has arisen that requires your attention. The Attorney General's office has requested that the University consider exercising its right to waive its privilege concerning certain communications and correspondence of its former General Counsel, Justice Cynthia Baldwin. Similarly, counsel to Messrs. Gary Schultz and Timothy Curley have subpoenaed those same items. The University is prepared to comply with both the Attorney General's request and defense counsels' subpoena consistent with the scope of the University's waiver.

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, as they relate to that office's efforts to comply with the Attorney General's Grand Jury investigation. The Attorney General's Office and the University have agreed that all communications with or concerning present counsel (including Reed Smith, Duane Morris, and Saul Ewing), are not included in this waiver and subject to review by the Court or the Attorney General's Office, and have agreed that this waiver is made with the clear understanding that the Attorney General's Office will continue to maintain and respect the distinction in the actions taken by the former General Counsel from those that are completely separate and apart from any consultation, direction or advice propounded or shared with, or concerning any outside law firm.

DUANE MORRIS LLP

30 SOUTH 17TH STREET PHILADELPHIA, PA 19103-4196
DM1\3542755.1

PHONE: +1 215 979 1000 FAX: +1 215 979 1020

EXHIBIT D-1

Honorable Barry F. Feudale
October 2, 2012
Page 2

Duane Morris

Deputy Attorney General Fina has asked that the release of the documents be presided over by Your Honor in your capacity as Supervising Grand Jury Judge. We agree with Mr. Fina's suggestion as the most prudent course.

Respectfully,


Michael M. Mustokoff

MMM/ks

cc: Bruce Beemer, Chief of Staff
Frank Fina, Deputy Attorney General
Frank T. Guadagnino, Esquire
Stephen S. Dunham, Esquire
Caroline M. Roberto, Esquire
Thomas J. Farrell, Esquire
Daniel R. Walworth, Esquire

LAW OFFICE OF
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(412) 391-4071
FAX (412) 391-1190

October 11, 2012

By Email and U.S. Mail

The Honorable Barry F. Feudale
Supervising Judge
1400 Strawberry Square
Verizon Tower, Eight Floor
Walnut Street
Harrisburg, PA 17120

RE: *Commonwealth of Pennsylvania v. Timothy Mark Curley*
CP-22-CR-5165-2011 (Dauphin Co. CCP)
In re: *The Thirty-Third Statewide Investigating Grand Jury*,
217 M.D. Misc. Dkt. 2010 (Pa. Sup. Ct.), No. 1325 M.D. 2010
(Dauphin Co. CCP)

Dear Judge Feudale:

I am writing to respond to the October 2, 2012, letter to you from Attorney Michael Mustokoff addressing the Attorney General's subpoena for Cynthia Baldwin's communications and correspondence.

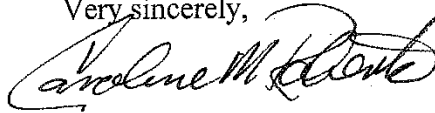
Attorney Baldwin represented my client, Timothy M. Curley, in preparation for, during and after his appearance before you and the Grand Jury on January 12, 2011. The notes or documentation Attorney Baldwin may have created as a result of her representation of Mr. Curley and her communications with Mr. Curley, fall within the attorney-client and work product privileges. On behalf of Mr. Curley, I assert both privileges against production to the Grand Jury, the Office of Attorney General of Pennsylvania, or any other party.

I have not seen the content of the documents at issue and, therefore, cannot specifically identify the documents to be produced. However, it is important that the documents be produced to Mr. Curley in preparation for his defense. I am open to

The Honorable Barry F. Feudale
Page Two (2)
October 11, 2012

discussion regarding a resolution perhaps in the nature of a limited waiver. I am also willing to discuss this matter with the Court and the parties at your earliest convenience.

Very sincerely,

A handwritten signature in cursive script, appearing to read "Caroline M. Roberto".

Caroline M. Roberto
Attorney for Timothy M. Curley

CMR:geb

cc: The Honorable Todd A. Hoover
Michael M. Mustokoff, Esquire
Daniel R. Walworth, Esquire
Frank T. Guadagnino, Esquire
Stephen S. Dunham, Esquire
Bruce Beemer, Chief of Staff, OAG
Frank Fina, Deputy Attorney General
Thomas J. Farrell, Esquire



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436 Seventh Avenue
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Telephone 412-894-1380
Facsimile 412-894-1381
www.farrellreisinger.com

October 11, 2012

By email and Federal Express

Honorable Barry F. Feudale
Supervising Judge
Strawberry Square
Verizon Tower, Eighth Floor
Walnut Street
Harrisburg, PA 17120

Re: *Commonwealth v. Schultz*, CP-22-MD-1375-2011 (Dauphin Co. CCP); In re: *The Thirty-Third Statewide Investigating Grand Jury*, 217 M.D. Misc. Dkt. 2010 (Pa. Sup. Ct.), No. 1325 M.D. 2010 (Dauphin Co. CCP)

Your Honor:

I write in response to attorney Michael Mustokoff's October 2, 2012, letter to you regarding the Attorney General's subpoena for Justice Cynthia Baldwin's communications and correspondence.

Ms. Baldwin represented my client, Gary C. Schultz in preparation for, during and after his appearance before you and the grand jury on January 12, 2011, as the transcripts of the colloquy before you and of Mr. Schultz' testimony make clear. Any of her notes or other documentation she may have created concerning that representation and her communications with Mr. Schultz fall within the attorney-client and work product privileges. I assert both privileges on his behalf against any production to the grand jury, OAG or any other party.

I cannot specify the documents at issue because apparently Ms. Baldwin produced those documents to PSU, and PSU asserted its privilege with Ms. Baldwin.

EXHIBIT F-1

I need these documents as soon as possible for preparation of Mr. Schultz' defense. I am open to discuss this issue with the OAG, PSU and the Court to reach a resolution, perhaps a limited waiver, that enables all of us to see the documents.

Sincerely,

Thomas J. Farrell / laa

Thomas J. Farrell, Esq.
Attorney for Gary Schultz

cc: Hon. Todd Hoover
Michael M. Mustokoff, Esq.
Bruce Beemer, Chief of Staff
Frank Fina, Deputy Attorney General
Frank T. Guadagnino, Esq.
Stephen S. Dunham, Esq.
Caroline M. Roberto, Esq.
Daniel R. Walworth, Esq.

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

COMMONWEALTH OF PENNSYLVANIA, :
 :
 v. : No. CP-22-CR-5165-2011
 :
 TIMOTHY MARK CURLEY, : **Evidentiary Hearing Requested**
 :
 Defendant. :

OMNIBUS PRE-TRIAL MOTION

AND NOW, comes the defendant, Timothy Mark Curley, by and through his attorney, Caroline M. Roberto, Esquire, and respectfully files his Omnibus Pre-Trial Motions as set forth below:

I. Motion to Dismiss, or Alternatively, to Suppress the Use of Grand Jury Testimony

1. 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 at 1.

2. In early 2010, the Office of Attorney General of Pennsylvania ("OAG") issued a grand jury subpoena to the Pennsylvania State University ("PSU") for employment files related to Sandusky. At the time, outside counsel for PSU was the law firm of McQuaide Blasko.

3. In 2010, Attorney Cynthia A. Baldwin ("Ms. Baldwin"), former PSU Trustee, was appointed by President Graham Spanier as General Counsel for PSU. The Board of Trustees approved the appointment by resolution effective February 15, 2010. <http://ogc.psu.edu/> (Last visited 10/24/12).

2012 NOV -1 AM 8:34
OFFICE OF
CLERK OF COURT
DAUPHIN COUNTY

4. The OAG began direct communication with Ms. Baldwin as PSU General Counsel regarding service of investigating grand jury subpoenas and production of documents.

5. In December 2010, based upon her communication with OAG, Ms. Baldwin anticipated service of subpoenas for Timothy M. Curley ("Mr. Curley"), Athletic Director, Joseph V. Paterno ("Paterno"), Head Football Coach, and Gary S. Schultz ("Schultz"), PSU Vice President of Finance.

6. On or about December 28, 2010, at the PSU Bowl Game in Tampa, Florida, Mr. Curley briefly met with Ms. Baldwin. She explained that a subpoena would be issued for his appearance in the context of the Sandusky investigation.

7. On or about January 3, 2011, Ms. Baldwin met with Mr. Curley in State College, Pennsylvania, to further discuss his grand jury appearance. The meeting lasted approximately 20 or so minutes. Ms. Baldwin told him that she could represent him before the grand jury. In subsequent discussions, Ms. Baldwin told Mr. Curley that she could represent Messrs. Curley, Schultz and Paterno as their recollections were consistent.

8. Ms. Baldwin strongly advised against speaking to Paterno, Schultz or anyone else to refresh his recollection. She did not review with Mr. Curley documents, emails, notes or files retained by others to aid in refreshing his recollection.

9. Based upon conversations with Ms. Baldwin, Mr. Curley believed that she, at all relevant times, was providing legal representation to him and that she was pursuing his best interests.

10. Title 42 Pa.C.S.A. § 4549(c)(1) provides that a witness subpoenaed to appear before the grand jury *shall be entitled* to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury. Emphasis added.

11. On January 12, 2011, Mr. Curley, believing that he was represented by counsel, Cynthia Baldwin, and accompanied by her, was interviewed by agents of OAG before his appearance, and then testified before the Thirtieth Statewide Investigating Grand Jury.

12. On November 4, 2011, a criminal information was filed charging Mr. Curley with perjury as a result of his grand jury testimony and failure to report, a summary offense. A Presentment issued by the Thirty-Third Statewide Investigating Grand Jury was attached to the criminal complaint.

13. On February 2, 2012, Lanny Davis, a lawyer and crisis manager hired to represent PSU, told reporter Sara Ganim of The Patriot News that Ms. Baldwin was in the grand jury room on January 12, 2011, strictly on behalf of the University and not as counsel for Mr. Curley and Schultz. Exhibit A.

14. On June 22, 2012, counsel for Ms. Baldwin, Charles DeMonaco of the law firm of Fox Rothschild, provided by letter in response to present counsel's inquiry regarding attorney-client privilege matters that, ". . . [Baldwin], as General Counsel for the University, could not and did not represent any agent of the University in an individual capacity." Exhibit B.

15. Ms. Baldwin never explained such a limited scope of legal representation to Mr. Curley prior to or during his grand jury appearance.

A. No Counsel - Constructive Denial of Counsel

16. According to Ms. Baldwin, she did not consider herself Mr. Curley's counsel and did not represent his personal interests in the grand jury.

17. Ms. Baldwin clearly represented to Mr. Curley both before and during the grand jury appearance, that she was his legal counsel. She never explained a limited scope representation or told Mr. Curley that PSU interests came first.

18. Although Ms. Baldwin's current position is that she did not represent Mr. Curley in his individual capacity, she did not notify the supervising judge of the limited role.

19. At the administration of the oath before the supervising judge, the following exchange took place:

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

Judge: Represented by?

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

Judge: Will you be providing representation for both of those identified witnesses?

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

Judge: Good morning . . .

Exhibit C.

20. When Mr. Curley was questioned by Eshbach at the outset of his grand jury testimony, the following exchange took place:

Q. Would you please introduce yourself to the Grand Jury?

A. Good morning, My name is Tim Curley.

Q. You have counsel with you?

A. Yes, I do.

Q. Would you introduce her, please?

A. My counsel is Cynthia Baldwin.

Exhibit D at 2.

21. Later during his testimony, Attorney Eshbach directed Mr. Curley "with [your] counsel" to step outside the grand jury room for a moment. Exhibit D at 7.

22. Ms. Baldwin allowed the judge and Mr. Curley to believe that she was Mr. Curley's unencumbered, conflict-free lawyer. The conflict now plainly apparent left Mr. Curley with no counsel during the grand jury proceeding in violation of Article 1, Section 9 of the Pennsylvania Constitution and the Sixth Amendment to the United States Constitution and 42 Pa.C.S.A. § 4549(c)(1).

23. At a hearing on this matter, Mr. Curley will present the testimony of Attorney Walter Cohen, partner-in-charge of the Harrisburg law firm of Obermayer Rebmann Maxwell & Hipple, LLP, and former Acting Attorney General of Pennsylvania from 1994-1996. Prior to the appointment, from 1989-1994, he was the First Deputy Attorney General.

24. Mr. Curley intends to present testimony of Attorney Cohen to demonstrate that upon his review of this matter, Mr. Curley reasonably believed that Ms. Baldwin was his counsel before the grand jury. He will also provide that Ms. Baldwin's presence in the grand jury room with Mr. Curley, and the grand jury transcript, demonstrate that she allowed everyone to believe she was Mr. Curley's counsel.

25. Mr. Curley will also present testimony from Lawrence J. Fox, partner in the Philadelphia law firm of Drinker Biddle and Reath, LLP; and the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility. He also is the Supervising Lawyer of the Ethics Bureau at Yale, a pro bono endeavor to provide ethics advice, counseling and support to those who cannot afford such services. Professor Fox has written and lectured extensively on legal ethics.

26. Professor Fox will provide that upon review of this matter, Ms. Baldwin was counsel for Mr. Curley and Schultz for all purposes before the grand jury. If the arrangement was otherwise, as she now claims, she had an absolute obligation to inform him of her limited scope of representation. The Pennsylvania Rules of Professional Conduct recognize only one class of clients. Ms. Baldwin's current position that she represented PSU and not Mr. Curley in an "individual capacity" demonstrates the conflict and failure to protect Mr. Curley's interest.

B. Failure to Provide Competent Representation

27. Ms. Baldwin did not protect the interests of Mr. Curley by assisting him in refreshing his recollection. She never attempted to share with Mr. Curley the information she had or could obtain from Messrs. Paterno, Spanier or Schultz. She prohibited him from speaking with Paterno, Schultz and Spanier regarding their recollections of the incident to refresh his recollection. Without a rudimentary effort to refresh his recollection of events occurring 10 to 13 years earlier, Mr. Curley was unprepared to answer questions before the grand jury.

28. Ms. Baldwin did not advise Mr. Curley that he may have exposure to the criminal charges even after Mr. Curley's pre-testimony interview with OAG.

29. Ms. Baldwin did not advise Mr. Curley that he could exercise his constitutional right to remain silent before the grand jury based upon potential criminal exposure.

30. During his testimony, Ms. Baldwin did nothing to protect Mr. Curley from abusive and confusing questioning.

31. Attorney Cohen will testify that Ms. Baldwin operated under a fatal conflict of interest which adversely affected her ability to act in the best interest of Mr. Curley and that she failed to represent him competently by failing to prepare him and advise him of his Fifth Amendment rights.

32. Professor Fox will also testify that upon review of this matter, Ms. Baldwin was laboring under multiple conflicts, first between PSU and Mr. Curley, and second, between Mr. Curley and Schultz. Professor Fox will also testify that Ms. Baldwin gave incompetent advice to Mr. Curley.

33. Ms. Baldwin's representation was ineffective and in violation of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

C. Prosecutorial Interference with Right to Counsel

34. In November 2010, law enforcement agents of the OAG interviewed PSU Assistant Coach Mike McQueary. On or about December 14, 2010, McQueary testified before the grand jury regarding an incident he observed in the Lasch Building Assistant Coaches' shower/locker room between Sandusky and a boy. Although McQueary's

grand jury testimony has not been disclosed, it is reasonable to conclude that consistent with police reports, see attached, and his preliminary hearing testimony in this case, McQueary testified that he described an incident to Mr. Curley and Schultz relating to Sandusky's inappropriate behavior with a boy. The exact description given by McQueary is in dispute.

35. On January 12, 2011, Mr. Curley and Schultz arrived at the grand jury conference room accompanied by Ms. Baldwin.

36. OAG knew that Ms. Baldwin was General Counsel for PSU and that she was providing legal representation to Mr. Curley and Schultz.

37. Ms. Baldwin accompanied Mr. Curley to the OAG interview which occurred at 9:20 a.m. on January 12, 2012. According to the police report regarding McQueary's description of his observations, Mr. Curley provided that there was no mention of sexual acts; that McQueary observed Sandusky horsing around in the shower; and that the incident was something that could be misconstrued. Exhibit E at 1.

38. Ms. Baldwin also accompanied Schultz to his pre-testimony interview at 9:35 a.m. on January 12, 2012. According to the police report, Schultz stated that based upon the information provided by McQueary, there was inappropriate sexual contact involving Sandusky and a minor. Exhibit E at 2.

39. OAG was aware before the sworn testimony of Mr. Curley that Mr. Curley and Schultz' statements were inconsistent.

40. Although OAG was keenly aware of Ms. Baldwin's multiple representation and conflict of interest, it failed to move to disqualify her as counsel or to raise the conflict issue before the supervising judge.

41. Prosecutors in the grand jury proceeding have the obligation and responsibility to raise a conflict of interest before the presiding judge to prevent a violation of the witness' right to counsel.

42. Title 42 Pa.C.S.A. § 4549(c)(4) provides that an attorney shall not continue multiple representation of client in a grand jury proceeding if the attorney's independent judgment on behalf of one of the clients will or is likely to be adversely affected by her representation of another client. It is for the supervising judge to determine if disqualification of the attorney is necessary.

43. At a hearing on this matter, Mr. Curley intends to call as a witness, Deputy Attorney General Frank Fina ("DAG"), to testify that he confronted Ms. Baldwin about her conflict. Although DAG spoke to Ms. Baldwin, Mr. Curley is unaware of any evidence which supports notice of the conflict to the supervising judge.

44. Raising the conflict of interest before the supervising judge would have resulted in, at least, a colloquy regarding the conflict or, most likely, a hearing concerning the multiple representation and, ultimately, disqualification of counsel.

45. The failure by the DAG deprived the supervising judge of the ability to enforce § 4549(c)(4) and deprived Mr. Curley of his right to counsel at the grand jury proceeding.

46. At a hearing on this matter, Attorney Cohen will testify that the Deputy Attorney General in this case had the obligation to ensure a fair proceeding in which witnesses had conflict free counsel; that even if he confronted Ms. Baldwin concerning the conflict, he had the duty to raise the issue before the supervising judge. The DAG's failure constituted denial of counsel to Mr. Curley and Schultz.

47. Professor Fox will testify that a prosecutor has the duty to bring to the attention of the courts conflicts of interest that would compromise the individual right to the assistance of counsel. Professor Fox will also testify that in this case, the DAG failed in its duty as it was aware of the conflict and did not raise the issue before the grand jury presiding judge.

D. Structural Defect in Grand Jury Proceeding

48. OAG's failure to raise the conflict of interest before the supervising judge resulted in Mr. Curley being denied counsel at the grand jury proceeding.

49. Ms. Baldwin's failure to clarify the scope of her legal representation to Mr. Curley, which led him to believe she was his counsel, and her representations to the supervising judge, which led him to believe she was Mr. Curley's counsel, obfuscated her conflict and resulted in Mr. Curley being denied counsel at the grand jury proceeding.

50. Failures by OAG and Ms. Baldwin deprived the presiding judge of notice concerning the serious problems related to Ms. Baldwin's representation and the opportunity to disqualify her as Mr. Curley's counsel and, at the very least, resulted in a deficient colloquy where Mr. Curley was not given the opportunity to become aware of counsel's debilitating conflict and knowingly, intelligently and voluntarily waive his right to representation by a non-conflicted attorney, if he chose to do so.

51. Failures by OAG and Ms. Baldwin resulted in a violation of grand jury secrecy. It is now apparent that Ms. Baldwin's presence in the grand jury room as PSU counsel during the testimony of Mr. Curley and Schultz violated grand jury secrecy. Rule 231 of the Pennsylvania Rules of Criminal Procedure.

52. The failure at all levels caused a structural defect in the grand jury mechanism which resulted in the total deprivation of the right to counsel.

E. Remedy

53. The conduct described above violated the defendant's right to counsel as guaranteed by the Sixth Amendment to the United States Constitution, Article I, Section 9 of the Pennsylvania Constitution and 42 Pa.C.S.A. § 4549(c)(1). Prejudice is presumed.

54. Dismissal of the charges and suppression of defendant's grand jury testimony are appropriate remedies for the deprivation of the right to counsel.

F. Memorandum of Law

The process, procedure and fair administration of the investigating grand jury is supervised by the Pennsylvania Supreme Court. Rules 120, 220-244 of Pa.R.Crim.P. The Court retains original jurisdiction over the appeal of questions regarding grand jury issues. 42 Pa.C.S.A. § 722(5); Rule 3331(a)(2) and (3) of Pa.R.A.P. Generally, issues that arise during the grand jury proceeding may be, and often are, directly appealed to the Supreme Court. There are numerous examples of cases where grand jury matters, particularly issues related to disqualification of counsel, are raised before the supervising judge and then directly appealed to the Supreme Court. Only a few are cited here. See, *In re: Bucks County Investigating Grand Jury*, 861 A.2d 876 (Pa. 2004); *Pirillo v. Takiff*, 341 A.2d 896 (Pa. 1975). The statute and rule regulate a practice of expedited review. Issues related to counsels' conduct or disqualification are not normally delayed but, instead, addressed expeditiously.

Here, a breakdown in the grand jury proceeding prevented contemporaneous adjudication and review of the disqualification of counsel, first by the supervising judge and, ultimately, by the Supreme Court. As is contemplated by the expedited practice, questions regarding the conduct of prosecutors and counsel for witnesses/defendants must be addressed pretrial if, as here, it is claimed that the challenged conduct and representation prevented judicial review in the first instance. Motions to suppress evidence and motions to quash the information or dismiss charges are properly brought by pretrial motion. Pa.R.Crim.P. 578.

The Investigating Grand Jury Act guarantees a witness the right to counsel. Title 42 Pa.C.S.A. § 4549(c) provides:

(1) A witness subpoenaed to appear and testify before an investigating grand jury or to produce documents, records or other evidence before an investigating grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury. In the event counsel of the witness' choice is not available, he shall be required to obtain other counsel within a reasonable time in order that the work of the grand jury may proceed.

The right to counsel necessarily includes the right to effective assistance of counsel. *Commonwealth v. Lieber*, 825 A.2d 630, 633-34 (Pa. 2003) citing *Commonwealth v. Daniels*, 420 A.2d 1323 (Pa. 1980), concluding that Rule 122 right to counsel for discretionary appeal includes right to effective assistance of counsel. *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1999) (finding rule based right to counsel at PCRA proceeding included the right to effective assistance of counsel). The case law suggests an even stronger correlation between a statutory right to counsel and the concomitant right to the effective assistance of counsel. See also, *Pirillo v. Takiff*, 341 A.2d 896, 900 (Pa. 1975) where our Supreme Court employs a constitutional Sixth Amendment analysis regarding a grand jury witness' right to conflict free counsel.

The investigating Grand Jury Act prohibits multiple representation of witnesses if the attorney has a conflict of interest. Title 42 Pa.C.S.A. § 4549(c) provides:

(4) An attorney, or attorneys who are associated in practice, shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client. If the supervising judge determines that the interest of an individual will or is likely to be adversely affected, he may

order separate representation of witnesses, giving appropriate weight to the right of an individual to counsel of his own choosing.

All that must be shown before an attorney is disqualified before the grand jury is multiple representation which is likely to adversely affect her representation of one of the clients. The test for determining whether there is an impairing conflict is probability, not certainty. *Pirillo*, 340 A.2d at 905 citing *Middleburg v. Middleburg*, 233 A.2d 889, 890 (Pa. 1967). This is so because in conflict cases, prejudice is presumed. *Cuyler v. Sullivan*, 100 S.Ct. 1708 (1980); *Commonwealth v. Lopez*, 51 A.3d 195, 200 (Pa. 2012) (Castille concurring) citing *Commonwealth v. Tedford*, 960 A.2d 1, 54 (Pa. 2008) and *Commonwealth v. Collins*, 957 A.2d 237, 251 (Pa. 2008). Under Pennsylvania jurisprudence, prejudice is presumed "where there is an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest." *Commonwealth v. Reaves*, 592 Pa. 134, 923 A.2d 1119, 1128 (Pa. 2007). "The defining features of all of these cases is that the acts or omission of counsel [are] of the type that are virtually certain to undermine confidence that the defendant received a fair trial or that the outcome of the proceeding is reliable, primarily because they remove any pretension that the accused had counsel's reasonable assistance during the critical time frame." *Id.* at 1128 (citing *Commonwealth v. Cousin*, 585 Pa. 287, 888 A.2d 710, 718 (Pa. 2005)). Clients' interests actually conflict when "during the course of representation" they "diverge with respect to a material factual or legal issue or to a course of action". *Commonwealth v. Padden*, 783 A.2d 299, 31 (Pa.Super. 2001).

Prejudice is also presumed where, as here, counsel's inaction results in complete denial of counsel. See, *United States v. Cronin*, 104 S.Ct. 2039 (1984) (prejudice presumed where "surrounding circumstances" result in complete denial of counsel). Here, the OAG's inaction and Ms. Baldwin's failures converged to preclude the supervising judge from exploring the conflict with Ms. Baldwin and Mr. Curley through a colloquy. Lawyers have an obligation to bring to the Court's attention any actual or potential ethical violation – including conflicts – involving any of the parties, witnesses, or attorneys in the case. *In the matter of the Grand Jury Empaneled on April 24, 2008*, 601 F.Supp.2d 600, 604-605 (D. New Jersey, 2008). The cluster of errors in this case resulted in a constructive denial of counsel.

Where the witness "shall be entitled" to counsel, 42 § 4549(c), the deprivation of counsel can be redressed only by returning the defendant to his status before the structural error in the proceeding occurred. See, *Gideon v. Wainwright*, 83 S.Ct. 792 (1963); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (deprivation of counsel is structural error not subject to harmless error review; where government interfered with defendants' pretrial right to counsel indictment was dismissed). *In the Interest of Saladin*, 518 A.2d 1258, 1262 (Pa.Super. 1986) (reversing a delinquency adjudication where counsel represented the defendant and victim). In the context of a violation of the Fifth Amendment right against self incrimination at the grand jury, quashal of the grand jury indictment has been deemed the proper remedy. *Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. 1971); *Commonwealth v. Cohen*, 289 A.2d 96 (Pa.Super. 1972). The defendants in this case suffered as much, if not more, harm than

those in *McCloskey* and *Cohen*. A deprivation of the right to counsel under the circumstances presented here requires at least the same remedy.

Wherefore, defendant respectfully requests dismissal of the charges, or alternatively, suppression of his grand jury testimony.

II. Motion Regarding Pretrial Publicity

55. The charges in this case and every event related to it – every court appearance, the death of Coach Paterno, the trial and sentence of Mr. Sandusky, every motion filed, the lawsuit by Michael McQueary, the release of the Freeh Report, and the announcement of NCAA sanctions against PSU – have generated hundreds if not thousands of media reports in the newspapers, on television and radio, and on the Internet.

56. The charges in this case and against Mr. Sandusky, who was charged in the same Presentment, led Penn State University to commission and announce an independent investigation by the firm of Freeh Sporkin & Sullivan, LLP (“FSS”).

57. FSS released its findings, contained in the Freeh Report, on July 12, 2012. That report runs several hundred pages and is available at www.thefreehreportonpsu.com (last visited 10/28/12). The release of the Freeh Report and avalanche of news stories related to it further inflamed the public. In the most public of ways, the Freeh Report concluded unequivocally that Mr. Schultz and Mr. Curley were guilty not only of the crimes charged, but of a conspiracy to conceal the conduct of Sandusky.

58. The Freeh Report's negative impact creating a biased jury pool cannot be understated: in it one former federal judge and the ex-head of the FBI pronounced the defendants guilty.

59. The negative, outrageous and pervasive publicity continues to this day virtually unabated in every media form. Most recently, a surge of negative publicity attended the sentencing of Jerry Sandusky, where victims testified. National and local news saturated the public with detailed stories of the victims' abuse by Sandusky. Mr. Curley expects the negative pretrial publicity to grow even more intense and widespread as the trial date approaches and the time for jury selection nears.

60. The poisoned atmosphere created by the onslaught of negative media publicity has unfortunately already predetermined defendants' guilt.

61. Defendants commissioned a public opinion survey. The results, as described in the attached report from Arthur Patterson, are discouraging. Exhibit F. Eighty-five percent of respondents in Dauphin County knew of the charges, and 65% of those believed the defendants definitely or probably guilty. Perhaps even worse, nearly 50% believed that even if the defendants did nothing illegal, they should be punished.

62. Exploring a change of venue or venire remedy, defendants surveyed three counties similar in size, Erie, Luzerne and Chester. The results were as bad or worse.

63. Given the pervasive, inflammatory, and negative publicity surrounding this case and the defendants, unprecedented in amount and duration, which includes the absolute condemnation of the defendants by a former federal judge and the ex-head of the FBI, the defendants seek the following remedial measures in the hopes of getting the fairest trial possible under these extraordinary circumstances:

- a. A trial continuance to allow a reasonable "cooling off" period so as to avoid a jury pool tainted by the overwhelmingly negative press coverage;
- b. Lawyer participation in *voir dire*, including a questionnaire and personal questioning of prospective jurors;
- c. Individual *voir dire* which is conducted outside the presence of other potential jurors;
- d. More extensive *voir dire* examination of the jurors to allow the possibility of more for cause challenges; and,
- e. Additional peremptory challenges for each defendant.

Wherefore, defendant respectfully requests remedial measures as suggested, *supra*, be implemented including a trial continuance, expanded juror questionnaire, increased peremptory challenges, and more extensive individual voir dire.

III. Motion for Discovery

64. The following discovery requests are still outstanding:

- a. Recorded conversations of investigative interviews including victims and Joseph V. Paterno; and,
- b. Material pursuant to Pa.R.E. 404(b).

65. Additionally, defendant requests production of the following:

- a. Identification of expert witnesses the Commonwealth intends to call at trial and reports of experts. See Pa.R.Crim.P. 573(B)(2)(b); and,
- b. All follow-up and supplemental reports by Pennsylvania State Police. Pa.R.Crim.P. 573(D).

Wherefore, defendant respectfully requests this Honorable Court to order production of the material listed above on or before November 15, 2012.

IV. Evidentiary Hearing Requested

66. An evidentiary hearing is requested. Counsel certifies that she intends to call as witnesses the following persons to support the averments contained in this motion:

- State Trooper Scott Rossman
- Agent Anthony Sassano
- Cynthia A. Baldwin, Esquire
- Lanny Davis, Esquire
- Charles DeMonaco, Esquire
- Walter Cohen, Esquire
- Lawrence J. Fox, Esquire
- Frank Fina, Esquire
- Jonelle Esbach, Esquire
- Timothy M. Curley
- Arthur Patterson

Respectfully submitted,

By: Caroline M. Roberto by Bu
Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy Mark Curley
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Special Report: Penn State counsel Cynthia Baldwin's role before grand jury could affect Tim Curley and Gary Schultz's perjury case, experts say

Published: Thursday, February 02, 2012, 1:00 AM Updated: Thursday, February 02, 2012, 5:31 PM



By **SARA GANIM, The Patriot-News**

When top Penn State officials **Tim Curley and Gary Schultz testified before a grand jury** in the **Jerry Sandusky child sex abuse investigation**, both men apparently thought they had an attorney.

She was Cynthia Baldwin, in-house legal counsel for Penn State University.

It is reflected in the transcript of their testimonies:

"Good morning, my name is Tim Curley."

"Do you have counsel with you?"

"Yes I do. ... My counsel is Cynthia Baldwin."

Schultz was asked: "You are accompanied today by counsel, Cynthia Baldwin. Is that correct?"

"That is correct."

But Baldwin says she was not representing either man, according to Lanny Davis, the high-profile Washington lawyer **hired to represent Penn State in the wake of the Sandusky scandal**.

Instead, Davis said, Baldwin was in the grand jury room Jan. 12, 2011, strictly on behalf of the university, and not as legal counsel for Schultz and Curley.



[View full size](#)

CHRIS KNIGHT, The Patriot-News

Penn State counsel Cynthia Baldwin during the Penn State University board of trustees meeting at the Nittany Lion Inn in State College on Jan. 20.

http://blog.pennlive.com/midstate_image/print.html?entry=/2012/02/penn_state_legal_co_10/25/2012

EXHIBIT A-1

EXHIBIT G-20

Legal experts say Baldwin's role before the grand jury could affect the case or Baldwin personally.

And the questions remain: How could confusion reign about something so fundamental to the judicial system?

Why was Baldwin allowed in the grand jury room if she was only representing Penn State?



Enlarge

JOE HERMITT, The Patriot-News

Former Penn State athletic director Tim Curley, center, and Gary Schultz, interim senior vice president for finance and business at Penn State University, left, enter District Judge Wenner's court room for their arraignment on perjury charges stemming from the Grand Jury investigation of former Penn State assistant coach Jerry Sandusky. JOE HERMITT, The Patriot-News

Penn State's Tim Curley and Gary Schultz arraigned on charges related to Jerry Sandusky case gallery (8 photos)

Baldwin says it was all a big misunderstanding — that Schultz and Curley were simply mistaken, according to Davis.

"I believe, having looked into the overall situation, this can be explained by the innocent reality of misunderstanding, stress and incomplete information," Davis said Wednesday.

Davis agreed "It is unusual for a lawyer to be present at a grand jury." But, he said: "At a state grand jury in Pennsylvania, it is up to the discretion of the judge to permit a lawyer to be present. The judge asked Cynthia, 'Who are you representing?' She said, the university. And he said, 'You may listen if you wish.' She said, 'Thank you.' "

David added, "As general counsel, she felt a responsibility to represent and

understand — for the university's interests — their testimony."

Then-head coach **Joe Paterno** appeared before the grand jury the same day with Joshua Locke as his counsel. Baldwin was not there.

If she felt responsible to understand the testimony from Curley and Schultz on behalf of the university, why didn't Baldwin feel the same about Paterno?

"Curley and Schultz were senior officers, they were members of the administration," Davis said. "She felt it was her responsibility because she represented the university as general counsel." By contrast, Paterno "was not a member of the administration."

Davis said she also noted that Paterno was with two attorneys — his son Scott Paterno and Locke.

'HER OBLIGATION'

One year later, Penn State is working to recover from the scandal that led to the ouster of Paterno and **former President Graham Spanier.**

Sandusky awaits trial on charges of sexually abusing 10 young boys, including two allegedly assaulted in the football building on campus. Curley and Schultz stand charged with failure to report Sandusky to the proper authorities and lying to the grand jury. All three men maintain their innocence.

Baldwin, a former Pennsylvania Supreme Court justice, would not comment for this story, but authorized Davis to speak for her.

The confusion over her role began in December 2010 when Baldwin received the grand jury subpoenas for Curley, Schultz, Spanier and Paterno. Davis said Baldwin accepted them "as a common courtesy" and agreed to deliver them to the four men.

Curley and Schultz came to her office separately to pick up their subpoenas. According to Davis, Baldwin said she then told each man: "You know, I represent the university. You can get your own lawyer."

With that, Davis said, Baldwin believed she had fulfilled "what she believed her obligation is."

After Baldwin informed Paterno of his subpoena, according to Davis, she gave his son Scott the same message — that she represented the university and the coach could get his own lawyer.

"We have a different understanding of the process by which Coach Paterno engaged legal counsel," said Wick Sollers, the Paterno family's lawyer. Sollers said the family did not want to elaborate further while grieving the loss of Paterno, **who died of complications from lung cancer on Jan. 22.**

Curley and Schultz did not get an outside lawyer for their grand jury testimony.

Weeks after handing them their subpoenas, Baldwin drove Curley and Schultz to Harrisburg for their grand jury appearance — again "as a courtesy," Davis said, since she was attending on behalf of the university.

The three arrived together: Baldwin, Schultz, who was Penn State's vice president for finance and business, and Curley, who was Penn State's athletic director.

They went in together.

Curley and Schultz met with no other attorneys at the offices of the attorney general in Strawberry Square

where the grand jury met.

When Baldwin signed in, Davis said, she signed in as representing Penn State.

Before the grand jury began, the witnesses and attorneys went into Judge Barry Feudale's chambers. (A judge does not preside at a grand jury, but swears in witnesses beforehand.)

In chambers, Davis said, Feudale asked Baldwin whom she represented.

"The Penn State University," Davis said she replied.

Then, Davis said, Baldwin walked into the grand jury room. She did not seek special permission as an outside observer for an interested party — in this case, Penn State — Davis said. She simply received the judge's okay and walked in, according to Davis.

As Curley and Schultz each began, they stated on the record that they were accompanied by "counsel" or "my counsel" Cynthia Baldwin, who sat with each as they testified.

Davis said Baldwin "does not remember hearing" those answers.

Even if she had, Davis said, "at that moment in time, she would not feel it appropriate to speak up and correct it with witnesses being questioned." Davis said she would have remained silent in the moment out of deference to the grand jury process.

Did Baldwin talk to the two men later — for example, during their 90-minute ride together back to Happy Valley — to clarify her role?

"She said no," Davis said.

In other words, the series of events, as described by Baldwin through Davis, played out like this:

- December 2010: Baldwin tells Curley and Schultz she "represents the university" and they can get their own attorneys.
- January 2011: Baldwin drives them to the grand jury. On the trip, the three apparently do not discuss the investigation or who will represent the two men.
- In the judge's chambers: After Baldwin announces she is representing Penn State, she is simply allowed to walk into the grand jury room to listen to the testimony of Curley and Schultz even though she has not said she represents them.

- In the grand jury room: Baldwin doesn't remember hearing Curley and Schultz identify her as counsel. Baldwin skips Paterno's testimony.
- On the drive home: The subject of representation doesn't come up.

'A DUTY TO CLARIFY'

Questions about Baldwin's role were first raised in a Patriot-News story on Nov. 19, two weeks after Sandusky, Curley and Schultz were indicted. The story referred to Baldwin's apparent "dual representation" of the men and the university.

At the time, the university raised no public concerns about the story.

Last month, after Baldwin announced **she would soon be stepping down as Penn State counsel**, the university first disputed the idea that she represented Schultz and Curley at the grand jury.

Several prominent attorneys asked by The Patriot-News about the secret grand jury process said lawyers would not normally be allowed in the room to hear testimony unless they were representing the client on the stand.

It would be exceptional, these experts said.

Think of it this way: Could Jerry Sandusky's lawyer, Joe Amendola, or a lawyer for Sandusky's Second Mile charity have walked in to listen to the testimony of the alleged victims?

Baldwin had an obligation to correct Curley and Schultz when they identified her as counsel, Geoffrey Hazard said. The law professor at the University of California is recognized for his knowledge of legal ethics and is not involved in the grand jury investigation.

"One of the fundamentals is, 'Who is your client?' " Hazard said. "She had every right, and indeed a duty to clarify that. ... She and the university might be [subject to claims] somewhere down the line."

Attorneys for Schultz and Curley, retained in late October, declined comment for this story. However, Walter Cohen, a former Pennsylvania attorney general closely following the Sandusky case, said he thinks that if there was confusion over Baldwin's role — whomever is to blame — it could be a fatal blow to the prosecution.

Schultz and Curley could have invoked the Fifth Amendment if they believed they were at risk for prosecution based on their testimony, several attorneys said.

"If she was not representing them, they shouldn't have let her into the room," Cohen said.

"You have a right to have counsel of your choice in the room with you if you are testifying before the grand jury," Cohen said. "It's serious."

When called for comment, the attorney general's office said it could not discuss an ongoing grand jury investigation.

Hazard and Jules Epstein, an associate professor of law at Widener Law School, aren't sure that the testimony from Curley and Schultz about their legal representation will have an effect on the case.

The right to effective counsel only applies after someone is charged, Epstein said, not during an investigation. And Hazard added, there is no indication that Baldwin told them not to tell the truth.

However, Hazard said Baldwin could face consequences from the bar association if she is found to have acted inappropriately.

"This could be a real mess," he said. "They might well have [pleaded the Fifth]. I don't think it prejudices prosecution, but it might cause her problems."

IMPACT DOWNPLAYED

Immediately after Curley and Schultz were arrested on Nov. 7, the university pledged not only the school's moral support but support for their legal defense.

"With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support," Spanier said in a statement. "I have known and worked 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."

University spokeswoman Lisa Powers emphasized that, since the allegations concerned how Schultz and Curley fulfilled their responsibilities as top Penn State officials, the university would pay for their defense.

Spanier, who was forced to resign by the trustees after the scandal broke, testified before the grand jury in April. As before, Davis said Baldwin traveled with Spanier to Harrisburg and sat in on his grand jury testimony as a representative of the university.

An assistant to Spanier's attorneys said they were unavailable to comment on this story.

Less than a week before the charges against Sandusky became public, Joe Paterno, Spanier and Curley were standing inside the Penn State football press room, surrounded by hundreds of reporters celebrating the coach's 409th victory — an all-time record in major college football.

http://blog.southcoastonline.com/midstate_impact/print.html?entry=/2012/02/penn-state-legal-cc 10/25/2012

EXHIBIT A-6

EXHIBIT G-25

Spanier leaned in to Paterno and told him they needed to talk soon about the Sandusky investigation, sources close to the football program said.

The coach apparently didn't hear him. Paterno was promptly whisked away by his handlers.

The next day — six days before charges would be announced — Spanier and Baldwin were first made aware that Schultz and Curley would be charged with lying to investigators and failing to report child abuse, sources said.

That same night, Spanier called Paterno and canceled their meeting, sources said.

Up to that point, Spanier had downplayed any possible impact of the Sandusky investigation on Penn State. In a May briefing, Spanier reportedly gave trustees the impression that the investigation was little to be concerned about and mainly involved Sandusky's activities in connection with Second Mile, not Penn State.

Which leads back to Baldwin's presence in the grand jury room.

"If it had nothing to do with Penn State, why was she even there?" Walter Cohen asked.

Davis said Baldwin was bound by grand jury secrecy rules to keep quiet about the testimony she heard.

"She was between a rock and a hard place as an attorney allowed to sit in on the grand jury and had to follow Pennsylvania law not to reveal to the board of trustees the content of the testimony," Davis said.

Davis said that Baldwin specifically cited the March article in The Patriot-News during her May briefing to the trustees. The article detailed the alleged 1998 assault in the Penn State football locker room showers that was part of the investigation.

Several board members said they had never read the story, which reported that Paterno, Curley and Schultz had all testified.

Spanier was not bound by any secrecy rule regarding his own testimony.

"The grand jury secrecy does not apply to witnesses — or their counsel if the witness doesn't want to invoke secrecy," Cohen said. "They can go out and hold a press conference as to what they say."

Davis' response?

"He could have, and chose not to."

This story has been updated from an earlier version.

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EXHIBIT A-8

EXHIBIT G-27



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June 22, 2012

Caroline M. Roberto, Esquire
Law Office of Caroline M. Roberto
Law and Finance Building, Fifth Floor
Pittsburgh, PA 15219

Re: Commonwealth v. Timothy Mark Curley

Dear Ms. Roberto:

Please be advised that I am in receipt of your letter dated June 11, 2012. As you know and in accordance with existing Office of General Counsel, University, and National Association of College and University Attorneys policy, 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.

Please be further advised that I sent your letter to Frank Guadagnino of Reed Smith, Michael Mustokoff and Daniel Walworth of Duane Morris, Joseph O'Dea of Saul Ewing and Greg Paw of the Freeh Group, who all serve as outside counsel to the University. Those counsel are responsible for providing responsive documents to the federal and state grand juries and interacting with federal and state prosecutors.

Sincerely,

Charles A. De Monaco

CAD:md

PT1 591467v2 06/22/12

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EXHIBIT B

EXHIBIT G-28

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
THIRTIETH STATEWIDE INVESTIGATING GRAND JURY

IN RE: NOTICE NO. 29

TRANSCRIPT OF PROCEEDINGS
OF GRAND JURY

BEFORE: BARRY FEUDALE, SUPERVISING JUDGE

DATE: JANUARY 12, 2011, 9:04 A.M.

PLACE: STRAWBERRY SQUARE
VERIZON TOWER, EIGHTH FLOOR
WALNUT STREET
HARRISBURG, PA 17120

STEPHANIE MCCARROLL, FOREPERSON
RENEE HARTMAN, SECRETARY

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL
BY: JAMES BARKER, ESQUIRE
FRANK FINA, ESQUIRE
JONELLE ESHBACH, ESQUIRE
FOR - COMMONWEALTH

PENNSYLVANIA STATE UNIVERSITY
BY: CYNTHIA BALDWIN, ESQUIRE
FOR - TIM CURLEY AND GARY SCHULTZ

SHANNON MANDERBACH
REPORTER-NOTARY PUBLIC



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EXHIBIT C-1

EXHIBIT G-29

23 MR. BARKER: Judge, we're here on
24 Notice 29. We have some witnesses to be sworn,
25 Mr. curley and Mr. schultz.

EXHIBIT C-2

EXHIBIT G-30

1 JUDGE FEUDALE: Represented by?

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

5 JUDGE FEUDALE: Will you be providing
6 representation for both of those identified
7 witnesses?

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

11 JUDGE FEUDALE: Good morning. I'm
12 Barry Feudale. I'm a Senior Judge from
13 Northumberland County. I've been assigned by
14 Chief Justice Ronald Castille to supervise the
15 30th Statewide Investigative Grand Jury which has
16 subpoenaed both of you to appear as witnesses
17 before it.

18 As witnesses before the Grand Jury,
19 you're entitled to certain rights and subject to
20 certain duties which I am now going to explain to
21 you. All of these rights and duties are equally
22 important and it's important that you fully
23 understand each of them.

24 First, you have the right to the
25 advice and assistance of a lawyer. This means you

EXHIBIT C-3

EXHIBIT G-31

1 have the right to the services of a lawyer with
2 whom you may consult concerning all matters
3 pertaining to your appearance before the Grand
4 Jury.

5 You may confer with your lawyer at
6 any time before, during and after your testimony.
7 You may consult with your lawyer throughout your
8 entire contact with the Grand Jury. Your lawyer
9 may be present with you in the Grand Jury room
10 during the time you're actually testifying and you
11 may confer with her at that time.

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

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

23 Should you refuse to answer any
24 question, you may offer a reason for your refusal,
25 but you're not obliged to do so. If you answer.

EXHIBIT C-4

EXHIBIT G-32

1 some questions or begin to answer any particular
2 question, that does not necessarily mean you must
3 continue to answer your questions or even complete
4 the answers you have started.

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

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

17 MR. CURLEY: Yes.

18 MR. SCHULTZ: Yes, sir.

19 JUDGE FEUDALE: Next, a witness
20 before the Grand Jury has the duty to give full,
21 truthful, complete and honest answers to all
22 questions asked except where the witness
23 appropriately refuses to answer on a proper legal
24 ground.

25 I'm hereby directing both of you to

EXHIBIT C-5

EXHIBIT G-33

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

7 So I ask you, do you have any
8 questions regarding your rights and obligations
9 before this Grand Jury?

10 MR. CURLEY: NO.

11 MR. SCHULTZ: NO.

12 JUDGE FEUDALE: Noting no questions,
13 please raise your right hand. You do solemnly
14 swear or affirm that the testimony you will give
15 before the 30th Statewide Investigative Grand Jury
16 in the matters being inquired into by it will be
17 the truth, the whole truth and nothing but the
18 truth. If so, say I do.

19 MR. CURLEY: I do.

20 MR. SCHULTZ: I do.

21 JUDGE FEUDALE: Any motions?

22 MS. ESHBACH: We are requesting that
23 both our agent as well as the State Trooper be
24 permitted to be present in the room.

25 JUDGE FEUDALE: That motion is

EXHIBIT C-6

EXHIBIT G-34

1

granted.

EXHIBIT C-7

EXHIBIT G-35

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	<p>COMMONWEALTH OF PENNSYLVANIA THIRTIETH STATEWIDE INVESTIGATING GRAND JURY</p> <p>IN RE: NOTICE NO. 29</p> <p>TRANSCRIPT OF PROCEEDINGS OF GRAND JURY</p> <p>WITNESS: TIM CURLEY</p> <p>DATE: JANUARY 12, 2011, 11:20 A.M.</p> <p>PLACE: STRAWBERRY SQUARE VERIZON TOWER, EIGHTH FLOOR WALNUT STREET HARRISBURG, PA 17120</p> <p>STEPHANIE MCCARROLL, FOREPERSON RENEE HARTMAN, SECRETARY</p> <p>COUNSEL PRESENT:</p> <p>OFFICE OF THE ATTORNEY GENERAL BY: JONELLE ESHBACH, ESQUIRE FRANK FINA, ESQUIRE</p> <p>FOR - COMMONWEALTH</p> <p>PENNSYLVANIA STATE UNIVERSITY BY: CYNTHIA BALDWIN, ESQUIRE</p> <p>FOR - TIM CURLEY</p> <p>SHANNON MANDERBACH REPORTER-NOTARY PUBLIC</p>	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	<p>TIM CURLEY, called as a witness, being previously sworn, testified as follows:</p> <p>EXAMINATION</p> <p>BY MS. ESHBACH:</p> <p>Q Would you please introduce yourself to the Grand Jury?</p> <p>A Good morning. My name is Tim Curley.</p> <p>Q You have counsel with you?</p> <p>A Yes, I do.</p> <p>Q Would you introduce her, please?</p> <p>A My counsel is Cynthia Baldwin.</p> <p>Q Mr. Curley, how are you employed?</p> <p>A I'm employed as the director of athletics at Penn State University.</p> <p>Q How long have you been employed in that capacity?</p> <p>A As the athletic director since 1993.</p> <p>Q Were you with the university before that?</p> <p>A Yes, I'm am.</p> <p>Q How long?</p> <p>A Since 1979 full-time.</p> <p>Q As the athletic director, does every</p>
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	<p>INDEX</p> <p>EXAMINATION</p> <p>WITNESS</p> <p>Tim Curley</p> <p>PAGE</p> <p>3</p>	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	<p>athletic program in the University fall under your control?</p> <p>A Yes, I have an administrative responsibility for varsity athletics, intramurals, and club sports in a variety of other areas.</p> <p>Q I'd like to direct your attention first to an incident which was brought to your attention sometime around spring break of 2002. Did you receive information from Coach Joseph Paterno about an incident that was alleged to have occurred on university property involving Jerry Sandusky and a minor sale?</p> <p>A Yes.</p> <p>Q Please tell us how that information came to your attention the best that you can recall and what you did as a result of it.</p> <p>A My recollection -- and I don't know if it was 2002, but my recollection was that Coach Paterno called myself and Gary Schultz, who is the senior vice president, and said he needed to meet with us, that he wanted to report something to us. So we went over, the two of us together, not with him, and he -- do you want me to --</p> <p>Q Yes, please.</p> <p>A Coach Paterno indicated that he had</p>

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<p>5</p> <p>1 had a football coach, an assistant football coach, 2 that came to him with information that he 3 encountered in the locker room on campus in the 4 football building, that he went into the locker 5 room -- it was, I think, sometime in the evening 6 -- went in the locker room and was going to get a 7 workout in and the individual heard and saw; I 8 guess, two people in the shower, in the shower 9 area. And my recollection was that he could see 10 that through a mirror, that there was a mirror 11 that he could see that through, and that the 12 individual was uncomfortable with the activity in 13 the shower area and -- as I supposed to go through 14 the whole thing? 15 Q Go ahead. Tell us what you know. 16 A Okay. So he was uncomfortable with 17 that and at that point he felt it was something he 18 should report to Coach Paterno. Coach Paterno 19 relayed that information to Gary and I. 20 We then took that information and met 21 with Mike McQueary, who was the football coach, 22 and met with Mike, got the information from Mike 23 about the activity, what he saw. And then from 24 there, Gary and I reported that information to the 25 president of the university, Dr. Graham Spanier.</p>	<p>7</p> <p>1 specific as you can recall -- what exactly did he 2 tell you he had seen Jerry Sandusky doing in that 3 shower with that young man? 4 A I can't recall the specific 5 conversation with Mike and exactly how he said it. 6 My recollection was that Mike could hear there 7 were people in -- they were in the shower area, 8 that they were horsing around, that they were 9 playful, and that it just did not feel 10 appropriate. 11 Q Are you saying that Mike McQueary did 12 not tell you specifically that there was anal 13 intercourse occurring between Jerry Sandusky and 14 this child? 15 A Absolutely not, that he did not tell 16 me that. 17 Q Did he tell you that it was, in fact, 18 in his estimation definitely a child and nothing 19 other than that, no one older than a small child? 20 A I can't recall how he described the 21 person in there. My recollection was it was a 22 young adult or it was young child. It was a 23 child, not a young child, a child. 24 Q Not a man? 25 A Not a man.</p>
<p>6</p> <p>1 And then following that, I made a 2 suggestion, recommendation that we needed to take 3 this information and report it to the Second Mile, 4 which is the organization at that time that Jerry 5 was working either with or for. He was not an 6 employee at Penn State at that time. So by myself 7 I met with Dr. Jack Raykovitz, who is the 8 executive director of the Second Mile. I shared 9 the information that we had with him. 10 Additionally, I then met with -- 11 actually, it was probably the other way around. I 12 met with Jerry Sandusky first, told him about the 13 information that we received, that we were 14 uncomfortable with the information and that I was 15 going to take the information and report it to the 16 executive director of the Second Mile and that I 17 did not want him in the future to be in our 18 athletic facilities with any young people. 19 Then, to the best of my recollection, 20 I circled back around and informed the president 21 of my actions and then Coach Paterno, Mr. 22 McQueary. I guess that's the people. 23 Q Now, specifically with regard to the 24 information that you got from Mike McQueary in 25 your meeting -- and I'm going to ask you to be as</p>	<p>8</p> <p>1 Q Was there any indication to you of 2 what type of conduct was occurring? How would you 3 characterize what McQueary told you about what the 4 conduct was? 5 A Again, I can't remember specifically 6 how Mike described it. My recollection was that 7 they were kind of wrestling, there was body 8 contact, and they were horsing around. 9 Q Did he indicate to you that they were 10 naked? 11 A No. I assume they were, but no. 12 Q Did he indicate to you that there was 13 sexual conduct? 14 A No. 15 Q Of any kind? 16 A No. 17 Q But he was clearly uncomfortable with 18 what he had seen? 19 A Correct. 20 Q As a result of this, you thought it 21 appropriate to inform the university, the 22 president of the university? 23 A That's correct. 24 Q Graham Spanier? 25 A Yes.</p>

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<p>1 Q Inform the executive director of the 2 Second Mile which is a charity which helps young 3 boys? 4 A That's correct. 5 Q And women, young girls -- 6 A Yes, young children. 7 Q It started out helping boys? 8 A I don't know that, but yes. 9 Q It was founded by Mr. Sandusky.</p>	<p>11 1 bringing any young people with him. He was not to 2 use our facilities with young people. 3 Q In addition, you reported this to the 4 executive director of the Second Mile, correct? 5 A That's correct. 6 Q Was that an in-person meeting or a 7 telephone meeting? 8 A That was an in-person meeting. Well, 9 first I contacted to say I wanted to meet and then</p>
<p>10 correct? 11 A That's correct. 12 Q You indicated that you met with Jerry 13 Sandusky. What specifically did you tell Jerry 14 Sandusky that you believe had occurred in the 15 showers? 16 A I cannot recall my specific 17 conversation with Jerry in terms of the details of 18 it. My recollection was that I shared with him 19 that we had an employee that had come to us with 20 this information, that the employee was 21 uncomfortable with what the activity was taking 22 place in the shower, and that that was the 23 information we had received. 24 Q Did Sandusky admit to being in the 25 shower with the boy?</p>	<p>10 we met in person. 11 Q I take it that what you informed the 12 executive director -- well, I don't want to put 13 words in your mouth, 'tell me what you told the 14 executive director. 15 A I informed the executive director of 16 the same information that Mike relayed to us and 17 that was the information. 18 Q Did you discuss this matter with Tim 19 Schultz, the senior vice president for the 20 university, at the time that it was reported? 21 A Gary Schultz. 22 Q I'm sorry. 23 A Yes. Gary Schultz is the senior vice 24 president. Gary was the other individual that was 25 with me when Coach Paterno initially reported it</p>
<p>10 1 A Not initially. 2 Q Did he ultimately come around to 3 admitting that he had been there with the boy? 4 A He admitted that he was there that 5 evening. I can't recall if he said he was there 6 with a young man, but he did indicate -- initially 7 his memory said he didn't think he was there on 8 that date, I do recall that, but I don't recall 9 whether or not he said he was with an individual.</p>	<p>12 1 To us. 2 Q Did you have discussions with him 3 about how this would be handled or did you make 4 these recommendations yourself? 5 A I don't recall the specifics on what 6 conversations I had with Gary. I do know that I 7 was the one that came forward to say I think that 8 this is the appropriate action, that we need to 9 report it to the Second Mile, and that I wanted to</p>
<p>10 Q Subsequently, did he come back to you 11 and in some way, either by phone or in person, 12 admit to you that he had been there? 13 A That's my recollection. 14 Q Was it in person by or by phone? 15 A I believe it was in person. 16 Q Did you take specific action with 17 regard to Jerry Sandusky? At this point he's not 18 an employee you indicated. What did you tell him 19 with regard to his being on university property? 20 A Yes. When I met with Jerry, because 21 I was uncomfortable with the information we 22 received, I indicated to him that in addition to 23 reporting it to the executive director of the 24 Second Mile, that I did not want him using our 25 athletic facilities for workout purposes and</p>	<p>10 meet with Jerry. 11 Q Did you, yourself, ever report this 12 incident to the university police? 13 A No, ma'am. 14 Q Were you aware that the report that 15 Mike McQueary made could be considered a crime by 16 Jerry Sandusky? 17 A I didn't think that it was a crime at 18 the time. 19 Q So you didn't make a report to the 20 university police? 21 A No, ma'am. 22 Q But you brought it to the attention 23 of the university president? 24 A That's correct. 25 Q Did he have any input on how this</p>

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<p>1 matter was handled?</p> <p>2 A Well, the input was that we provided</p> <p>3 the information to him and then made the</p> <p>4 recommendation of the follow-up action that we</p> <p>5 wanted to take or that I wanted to take.</p> <p>6 Q So the decision not to report it to</p> <p>7 the police was your decision?</p> <p>8 A Yes. I didn't see any reason because</p> <p>9 I didn't, at that time, think it was a crime.</p>	<p>15</p> <p>1 A I would think, but I don't know.</p> <p>2 Q But the 1998 incident was never</p> <p>3 brought to your attention?</p> <p>4 A No, na'an, not that I recall.</p> <p>5 Q Have you ever heard -- anything other</p> <p>6 than what you heard from Mike McQueary, have you</p> <p>7 ever heard anything at all regarding inappropriate</p> <p>8 conduct between Jerry Sandusky and young men</p> <p>9 either on or off campus?</p>
<p>10 Q Do you recall whether you ever</p> <p>11 consulted with university counsel regarding</p> <p>12 potential liability to the university for this</p> <p>13 incident?</p> <p>14 A I personally did not, that I recall.</p> <p>15 Q As far as you know then, the matter</p> <p>16 was handled strictly by the referral to the Second</p> <p>17 Mile and by barring Mr. Sandusky from bringing any</p> <p>18 young persons on university property?</p> <p>19 A That's correct.</p> <p>20 Q At the time of the incident in 2002,</p> <p>21 were you aware of any other incidents involving</p> <p>22 alleged sexually inappropriate misconduct by Mr.</p> <p>23 Sandusky anywhere, on university property or</p> <p>24 otherwise?</p> <p>25 A No, na'an.</p>	<p>10 A No.</p> <p>11 Q What was Sandusky's status in 2002</p> <p>12 that allowed him to come and go on university</p> <p>13 property?</p> <p>14 A Jerry had what the university calls</p> <p>15 emeritus status. His status at that time, he was</p> <p>16 not employed at the university in 2002, but he had</p> <p>17 what they call emeritus status, which I'm not sure</p> <p>18 if I know all of the benefits of that. But I know</p> <p>19 one of the benefits is that he can have office</p> <p>20 space and utilize campus resources.</p> <p>21 Q Do you know if he had office space in</p> <p>22 2002?</p> <p>23 A 2002, yes, he had office space in the</p> <p>24 east area locker room.</p> <p>25 Q Is that in the Lash building?</p>
<p>14</p> <p>1 Q Since this has come to light, have</p> <p>2 you become aware of other allegations of</p> <p>3 inappropriate sexual conduct by Jerry Sandusky on</p> <p>4 university property or elsewhere?</p> <p>5 A Other than what was mentioned this</p> <p>6 morning.</p> <p>7 Q Specifically a 1998 report, did you</p> <p>8 know anything about that in 2002?</p> <p>9 A No, na'an.</p>	<p>16</p> <p>1 A No, it's right across the street.</p> <p>2 Q Does Sandusky still enjoy that</p> <p>3 emeritus status at this point?</p> <p>4 A Yes, na'an.</p> <p>5 Q There was no practical way to enforce</p> <p>6 him not bringing children onto the campus,</p> <p>7 however, after he was warned not to, is that</p> <p>8 correct?</p> <p>9 A That's correct.</p>
<p>10 Q If an incident occurs involving an</p> <p>11 athlete on campus and the university police are</p> <p>12 involved with an athlete, would that be brought to</p> <p>13 your attention as the athletic director?</p> <p>14 A Could you rephrase that? I didn't</p> <p>15 understand it.</p> <p>16 Q If a criminal incident occurred or</p> <p>17 any kind of incident involving an athlete and the</p> <p>18 university police are involved in the</p> <p>19 investigation, would that be brought to your</p> <p>20 attention?</p> <p>21 A I would say in most cases.</p> <p>22 Q If there was an incident involving a</p> <p>23 coach and an allegation of criminal conduct on</p> <p>24 campus, would that be brought to your attention,</p> <p>25 would you think, as the athletic director?</p>	<p>10 Q Does he still have an office on</p> <p>11 campus?</p> <p>12 A My understanding is -- and I don't</p> <p>13 know this for fact. But my understanding is we</p> <p>14 needed his office to accommodate some people. So</p> <p>15 I don't think he has one currently. And that was</p> <p>16 probably about a year or two ago where he had some</p> <p>17 space issues and he wasn't using the office that</p> <p>18 much. So I believe he no longer uses the office,</p> <p>19 but I don't know that 100 percent.</p> <p>20 Q The office that you knew him to have</p> <p>21 in the east area across from the Lash building,</p> <p>22 who else would have had offices in that area</p> <p>23 besides Sandusky?</p> <p>24 A The area that the office is located</p> <p>25 is in our academic support area. And I don't</p>

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<p>17</p> <p>1 I know. I think there's one other office there and 2 I don't know who it's assigned to. 3 Q When you say the academic support 4 area, can you explain what that is and what kind 5 of a building it is and would only have two 6 offices in it? 7 A Yes. It's called the east area 8 locker room. This is our old football building. 9 the football office moved over to a new facility 10 called the Lash Building. And so now the east 11 area locker room currently has field hockey, men's 12 lacrosse, women's lacrosse housed there and then 13 it has an academic study hall area on the second 14 floor. 15 Q To assist the athletes? 16 A That's correct. 17 Q And then you're indicating -- 18 A And there's a strength room there as 19 well and a training room and locker rooms. 20 Q And that's where Sandusky's office 21 was? 22 A That's correct. 23 Q You say there was one other 24 individual at that time in 2002 who would have had 25 an office there, but you don't know who that is?</p>	<p>18</p> <p>1 I don't know for sure. 2 Q When you met with Mike McQueary -- 3 A If I could just back up, that's not 4 my office. My office is in another part of 5 campus. So I just don't know whether it's a key 6 or a swipe system. I just don't know. 7 Q When you met with Mike McQueary to 8 let him know the result of what he had reported to 9 you, do you recall telling him that Sandusky's 10 keys would be taken away from him? 11 A I don't recall saying that because 12 that wasn't the action that I had taken. He may 13 have understood it that way when I indicated that 14 they were not supposed to use the facilities with 15 young people. 16 Q Was the incident, the 2002 incident, 17 reported to the university police? I think you've 18 indicated it was not reported by you, correct? 19 A That's correct. 20 Q Did you report the incident to the 21 State College Borough Police or the Centre County 22 children and youth program? 23 A I did not. 24 Q Do you know if anyone did? 25 A I do not.</p>
<p>19</p> <p>1 A I don't know who was -- there's I 2 think two offices there, but I don't know who was 3 there in 2002. And I don't know who is there 4 right now. 5 Q Did he have a secretary attached to 6 that office? 7 A No, no sir. 8 Q Strictly a desk and a room? 9 A An office, yes. 10 Q Was that a building that was 11 typically locked, that east locker room building? 12 A After building hours it would be 13 locked, yes. 14 Q He would've had to have a key to 15 enter? 16 A Correct. 17 Q Was it a key literally, an old 18 fashioned key, or was it a key card in 2002? What 19 was the system at that time? 20 A The system for the east area locker 21 room I believe was a key and it still is today, I 22 believe. 23 Q How about the Lash building? How 24 would one get into the Lash building? 25 A It's still a key system I believe. I</p>	<p>20</p> <p>1 Q Other than yourself and Santor Vice 2 President Schultz and President Graham Spanier and 3 Mike McQueary, do you know of anyone else who had 4 knowledge of the 2002 incident? 5 A Just Coach Paterno and Jack 6 Raykovitz, the person I went to at the Second 7 Mile. 8 Q Was there ever any investigation that 9 you know of conducted by you or anyone at the 10 University into the incident in 2002? 11 A Not by me and I'm not aware of any. 12 Q This was an incident that obviously 13 had Mike McQueary so concerned that he reported it 14 to Paterno and Paterno so concerned that he 15 reported it to you and yet there was no 16 investigation; is that correct? This was an 17 incident of concern, but there was no effort to 18 investigate it? 19 A Other than the follow-up meeting that 20 I had with Mike. 21 Q And you met with Sandusky? 22 A And Jerry and Dr. Raykovitz. 23 Q Did you ask Jerry Sandusky who the 24 boy was that was with him in the shower? 25 A I did not.</p>

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<p>21</p> <p>1 Q Did you attempt to find out who that 2 young man was?</p> <p>3 A I did not.</p> <p>4 Q Obviously, you're a person of more 5 than reasonable intelligence who's running a 6 Division I football program, not only the football 7 program, but the entire athletic program. Did it 8 not occur to you that there was something sexual 9 going on in this incident based on what was 10 referred to you by Mike McQueary?</p> <p>11 A I was not aware of anything sexual. 12 So I didn't feel that it warranted that and I felt 13 my actions were appropriate. But I was not aware 14 that there was sexual activity.</p> <p>15 Q If you didn't think this was sexual 16 in nature or criminal in nature, then why did you 17 take the action of barring Sandusky from bringing 18 youths on to the university property?</p> <p>19 A Because I didn't think it was 20 appropriate that he would be using our facilities, 21 having young people in there in the evening, and 22 that you're in a shower area horsing around with a 23 young person.</p> <p>24 Q Did that concern extend to what he 25 might be doing to those youths off university</p>	<p>23</p> <p>1 A Yes.</p> <p>2 Q So, in fact, the ultimate decision 3 was not yours. You made the decision on 4 proposals, but the ultimate decision to take this 5 action instead of any other would have been by 6 your supervisors?</p> <p>7 A I reported it to my direct employer, 8 which is President Spanier, and made the 9 recommendation and proceeded.</p> <p>10 Q Was there a specific conversation 11 about whether or not to go to law enforcement 12 authorities about this?</p> <p>13 A At the time I don't recall that 14 because, again, I didn't feel -- at least I didn't 15 feel personally that any criminal activity had 16 occurred. So my thought was that because a young 17 person was there, that I needed to take it to the 18 Second Mile.</p> <p>19 Q But you made this determination 20 without talking to the young person who was there 21 or any other investigative measures. There were 22 no other investigative steps made to determine 23 whether or not there was anything sexual about 24 this conduct?</p> <p>25 A Again, I don't remember any report to</p>
<p>22</p> <p>1 property if you didn't report this to somebody?</p> <p>2 A No, not at the time, it didn't.</p> <p>3 Q I think you have answered this, but I 4 want to be clear. The decision to limit 5 Sandusky's access with children to university 6 property was made by who?</p> <p>7 A I'm sorry. It was made --</p> <p>8 Q It was you?</p> <p>9 A Yes, ma'am.</p> <p>10 Q The decision not to report this to 11 police was made by you?</p> <p>12 A Yes.</p> <p>13 Q The decision to report this to the 14 Second Mile, the individuals in charge there, was 15 made by you?</p> <p>16 A Yes.</p> <p>17 Q All of these decisions were made 18 known to the president of the university and he 19 concurred in your decisions?</p> <p>20 A That's correct.</p> <p>21 BY MR. FINA:</p> <p>22 Q Just to be clear, sir, you didn't do 23 these things in a vacuum. You proposed these as 24 the resolution to this and you were affirmed in 25 that by your supervisors?</p>	<p>24</p> <p>1 me that it was sexual in nature. It was 2 inappropriate behavior. So I didn't feel that 3 that was necessary and felt that it was important. 4 Whether I knew it at the time or not, I don't 5 know, but I thought it was probably a Second Mile 6 person. You know, it was a young person. So I 7 thought it was appropriate to give the information 8 to the Second Mile or to the executive director of 9 the Second Mile.</p> <p>10 Q If it was your understanding it was 11 not sexual and you had no information that would 12 lead you to believe it was sexual or even that it 13 involved a Second Mile minor, why would you take 14 the rather extraordinary step of going to the 15 executive director of a nonprofit that is not part 16 of the university and informing them of this 17 incident?</p> <p>18 A Because I think that Mike felt he was 19 uncomfortable with the behavior. And based on 20 what I heard that was reported to me, I just 21 didn't feel it was appropriate that Jerry would be 22 in a shower area with a young person. Whether it 23 was horsing around or however you want to describe 24 it, I just didn't think that would be appropriate 25 and shouldn't occur.</p>

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<p>25</p> <p>1 Q Mr. McQueary was uncomfortable 2 because there was a child who was not a student 3 and not an employee of the university on 4 university property. Is that what you're saying? 5 A My recollection was that he was 6 uncomfortable they were in the shower and it was 7 just the two of them and that they were horsing 8 around and inappropriate conduct. It was 9 inappropriate conduct. I think he felt that this 10 just didn't feel right. 11 Q Well, sir, listening to the words you 12 just used, I think a reasonable person would 13 immediately jump to, there could be a sexual 14 nature to this. You have a grown male with a 15 child naked in the shower horsing around. What is 16 it that specifically alarmed Mr. McQueary? What 17 did you take away from that meeting? 18 A I took away that he didn't feel 19 comfortable with the activity that was happening 20 and it wasn't appropriate that we had an adult and 21 a young child or a person in the shower area and 22 that it was a situation that -- and that's what 23 alarmed him. 24 MS. ESHBACH: Do you want to step 25 outside, please, with your counsel and we will?</p>	<p>27</p> <p>1 Q Did your meeting with Coach Paterno 2 and Gary Schultz take place on Sunday as well or 3 was that during the week? 4 A No. When he contacted us, he said 5 come over to the house. He didn't tell us what it 6 was. 7 Q So the two of you went to Coach 8 Paterno's house? 9 A Yes. 10 Q On a Sunday? 11 A I'm not sure of the exact date. 12 Q As best you can recall? 13 A Yeah. 14 Q How much later approximately did you 15 meet with Mike McQueary and get the information 16 directly from McQueary? 17 A I don't recall how many days it was, 18 but it was soon after that. 19 Q Would you say it was within a week? 20 A Yes. 21 Q Was Gary Schultz also present for 22 that meeting with McQueary? 23 A It's my recollection. 24 Q How quickly after that did you make 25 the decisions to do the various things that you</p>
<p>26</p> <p>1 Find out if the Grand Jury has any additional 2 questions for you. 3 (Witness and counsel leave the room.) 4 (Proceedings before the Grand Jury 5 contained in the Master Transcript.) 6 (Witness and counsel enter the room.) 7 BY MS. ESHBACH: 8 Q With regard to your meetings with 9 Sandusky, I just want to make sure I understand 10 this. Mike McQueary tells Coach Paterno about the 11 incident and Coach Paterno contacts you within a 12 matter of days of the incident in the shower in 13 2002, correct? 14 A That's correct. 15 Q Do you remember what day of the week 16 Coach Paterno contacted you? 17 A I believe it was a Sunday. 18 Q And you met with him and with Gary 19 Schultz when? 20 A That day. 21 Q Sunday as well? 22 A Could you back up? When you said -- 23 Q You were contacted by Coach Paterno 24 to report the incident to you on a Sunday? 25 A I believe.</p>	<p>28</p> <p>1 did, talk to Sandusky, go to Second Mile, advise 2 the president? How quickly did that happen? 3 A I don't remember the number of days, 4 but it was soon after that. I would say within 5 two weeks. 6 Q Specifically with regard to your 7 meeting with Sandusky, the very first meeting that 8 you had with him in which you told him of the 9 allegations of the incident that had occurred in 10 the shower and he said to you at that time I don't 11 think I was there, how long did that meeting take 12 place after this incident was reported to you by 13 Coach Paterno? 14 A It would have been within that two 15 weeks right after talking to Mike or right after 16 that. Now, I just don't know how many days it 17 was, but it was a week to two weeks. 18 Q How long after that initial meeting 19 with Sandusky did Sandusky come back and tell you, 20 yeah, I was in the shower? 21 A I believe it was soon after that. It 22 was a day or two after that. 23 MS. ESHBACH: No further questions. 24 (cluded at 11:59 a.m.)</p>

D7

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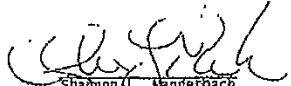
1	I hereby certify that the proceedings	29
2	and evidence are contained fully and accurately in	
3	the notes taken by me on the within proceedings	
4	and that this is a correct transcript of the same.	
5		
6		
7		
8	Shannon L. Manderbach Notary Public	
9		
10		
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12		
13	COMMONWEALTH OF PENNSYLVANIA	
14	NOTORIAL SEAL	
15	Shannon L. Manderbach, Notary Public	
16	Town of Enola, Cumberland County	
17	My Commission Expires June 19, 2013	
18		
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EXHIBIT D-8

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wrestling [1] 8:7

- Y -

year [1] 16:16
young [22] 5:18; 7:3, 22,
23; 9:2, 5, 6; 10:6; 11:1;
13:18; 15:8; 19:15; 21:2,
24, 23; 23:16, 20; 24:6, 22;
25:21

yours [1] 23:3

youth [1] 19:22

youths [2] 21:18, 25

EXHIBIT D-13

EXHIBIT G-48

PENNSYLVANIA STATE POLICE		<input checked="" type="checkbox"/> INCIDENT <input type="checkbox"/> OTHER		001/1100-11/20/11		001/1100-11/20/11	
CONTINUATION SHEET <input type="checkbox"/> SUPPLEMENTAL INVESTIGATION REPORT <input checked="" type="checkbox"/>		THREAT OF INCIDENT 0100-2400		JUVENILE <input type="checkbox"/>		DOMESTIC VIOLENCE <input type="checkbox"/>	
ATTACHMENTS:		<input type="checkbox"/> MISSING PERSON CHECKLIST		DISP: <input type="checkbox"/> CLEARED BY ARREST <input type="checkbox"/> UNFOUNDED <input type="checkbox"/> EXCEPTIONALLY CLEARED - DATE			
<input type="checkbox"/> FELONY CRIMES AGAINST THE PERSON		<input type="checkbox"/> STATEMENT FORM(S)		A <input type="checkbox"/> DEATH OF FACTOR		D <input type="checkbox"/> VICTIM REFUSED TO COOPERATE	
<input type="checkbox"/> VICTIM WITNESS ASSISTANCE COUNCIL RECEIPT		<input type="checkbox"/> RIGHTS WARNING AND WAIVER		B <input type="checkbox"/> PROSECUTION DECLINED		E <input type="checkbox"/> JUVENILE IN CUSTODY	
<input type="checkbox"/> PROPERTY RECORD <input type="checkbox"/> OTHER				C <input type="checkbox"/> EXTRADITION DENIED		F <input type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> MULTIPLE CLEARANCE	
1. ORIGINATOR		PAPSP7400/Rockview		2. DATE OF REPORT		01/20/11	
3. OFFENSE		Indecent Assault		4. VICTIM		Aaron Scott FISHER	
5. NARRATIVE							
<p>INTERVIEW: Joseph Vincent PATERNO:</p> <p>On 01/12/11 at 0840 hrs at the Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed PennState Head football coach Joseph Vincent PATERNO, W/M/M-84, DOB: 12/21/26 of [REDACTED]. Deputy Attorney Generals Frank FINA and Jonelle ESHBACH were present as well as PATERNO's attorney Joshua LOCKE and PATERNO'S son Scott PATERNO. PATERNO related he remembered of Mike MCQUEARY coming to him a year or two after SANDUSKY retired and telling him that he saw SANDUSKY in the locker room doing something inappropriate with a young boy. PATERNO related he believed MCQUEARY was a graduate assistant at the time. PATERNO related that MCQUEARY did not give him any specific details about the incident however he remembered MCQUEARY being upset about what he saw. PATERNO related he thought MCQUEARY contacted him on a Saturday but was not sure. PATERNO related he passed the information on to Tim CURLEY, The PennState Athletic Director via phone a day or two later. PATERNO related he did not have any meetings about the incident and he did not know what happened after he advised CURLEY. PATERNO related he informed CURLEY because he thought he was the proper authority due to the fact that he was The Athletic Director for PennState. PATERNO related he did not hear any rumors about SANDUSKY and inappropriate acts. PATERNO related he did not ever witness SANDUSKY do anything inappropriate with kids. PATERNO related he participated in a few Second Mile fundraisers that SANDUSKY was present however he did not witness anything inappropriate. PATERNO related SANDUSKY maintained an office in the Lasch building on PennState until a year or two ago. PATERNO related he believed that SANDUSKY no longer had an office anywhere on PennState Campus. I asked PATERNO if he knew why SANDUSKY retired and PATERNO said SANDUSKY told him that it was time for SANDUSKY to move on to other things.</p> <p>INTERVIEW: TIMOTHY Mark CURLEY:</p> <p>On 01/12/11 at 0920 hrs at Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed PennState Athletic Director Timothy Mark CURLEY, W/M/M-58, DOB: 04/28/54 of [REDACTED]. In the presence of PennState General Counsel Cynthia BALDWIN. CURLEY related he became the Athletic Director for the Pennsylvania State University in 1993 and has remained in that position ever since. CURLEY related he remembered being notified in early 2000 by Joseph PATERNO of an incident. CURLEY related PATERNO requested a meeting with him and Gary SCHULTZ to discuss the incident. CURLEY related the incident involved something inappropriate with SANDUSKY. CURLEY related he passed the information onto the president of the university Graham SPANIER. CURLEY related he and SCHULTZ met with Michael MCQUEARY and discussed what MCQUEARY witnessed. CURLEY related MCQUEARY informed them that he observed SANDUSKY horsing around in the shower with a young boy. CURLEY related there was no mention of sexual acts. CURLEY related it seemed to be something that could have been misconstrued and was inappropriate behavior at best. CURLEY related he and SCHULTZ met with SPANIER a short time later to discuss the incident. CURLEY related he came up with a recommendation plan to address the issue and SPANIER approved it. CURLEY related the first part of the plan was for him to meet with SANDUSKY and advise him that he was no longer allowed to bring kids onto the PennState and use the facilities. The second part of the plan was for him to meet with Dr Jack RAYKOVITZ, the director of the Second Mile program and advise him of the incident. CURLEY related he did both of these things and took care of the incident. CURLEY related when he spoke to SANDUSKY he first related he was not even sure if he was even there then a day or two later SANDUSKY came back and related he was there. CURLEY related that these meetings all took place within a few weeks after MCQUEARY told them of the incident. I asked CURLEY to describe the meeting with MCQUEARY in more detail. CURLEY related MCQUEARY told him that he was in the coach's locker room and he heard people in the shower. CURLEY related MCQUEARY said he looked through the mirror and saw SANDUSKY in the shower with a young boy wrestling around, horse playing. CURLEY related he did not report it to the police department because he informed SPANIER. CURLEY related that he advised PATERNO, SCHULTZ, SPANIER and MCQUEARY of the recommendation plan and action. CURLEY related that this was the only incident he knew about involving SANDUSKY and inappropriate behavior with kids. CURLEY related they did not seek legal counsel at the time they addressed the issue. CURLEY related he first heard about this investigation in the fall of 2010. CURLEY related they did not have any meetings on the issue after the issue was addressed back in 2000 or since then. CURLEY related he did not take any keys from SANDUSKY to restrict his access and they did not inform anyone else of the restriction on SANDUSKY.</p>							
OFFICER'S NAME(S) SIGNATURE		BADGE NO.		7. INVEST. REGION		8. JUV. DIV. OR AGING	
Trooper Scott F. C. ROSSMAN		6481		9. CONT. <input type="checkbox"/> TERM. <input type="checkbox"/>		10. CONCUR <input type="checkbox"/> NONCONCUR <input type="checkbox"/>	
		STATION		OK 3115		49	

TMC 000051

EXHIBIT E-1

EXHIBIT G-49

SP 7.0051 (3-98)		REPORT TYPE <input checked="" type="checkbox"/> INCIDENT <input type="checkbox"/> OTHER		DATE/TIME OF INCIDENT 08/01/08 1120/08		INCIDENT NO. 607-118185	
PENNSYLVANIA STATE POLICE SUPPLEMENTAL INVESTIGATION REPORT				SUBJECT IDENTIFICATION 100-2400		JUVENILE <input type="checkbox"/>	
ATTACHMENTS: <input type="checkbox"/> FELONY CRIMES AGAINST THE PERSON <input type="checkbox"/> WITNESS ASSISTANCE GUARANTEE <input type="checkbox"/> PROPERTY RECORD <input type="checkbox"/> OTHER		<input type="checkbox"/> MISSING PERSON CHECKLIST <input type="checkbox"/> STATEMENT FORM(S) <input type="checkbox"/> RIGHT TO WALKING AND WALKER		DISP.: <input type="checkbox"/> CLEARED BY ARREST <input type="checkbox"/> UNFOUNDED <input type="checkbox"/> EXCEPTIONALLY CLEARED - DATE			
				A. <input type="checkbox"/> DEATH OF ACTOR B. <input type="checkbox"/> DEATH OF VICTIM C. <input type="checkbox"/> DEATH OF WITNESS D. <input type="checkbox"/> DEATH OF OTHER			
1. ORIGINATOR PAPSR400/Rockview		2. DATE OF REPORT 01/20/11					
3. OFFENSE Indecent Assault		4. VICTIM Aaron Scott FISHER					
6. NARRATIVE							
<p>INTERVIEW: Timothy Mark CURLEY CONTINUED:</p> <p>CURLEY further related he believed that SANDUSKY retired because his time was torn between coaching and the Second Mile program. CURLEY related SANDUSKY decided to go in the direction of the Second Mile that SANDUSKY founded many years ago.</p> <p>INTERVIEW: Gary Charles SCHULTZ:</p> <p>On 01/12/11 at 0935 hrs at Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed the former Executive Senior Vice President of Finance Gary Charles SCHULTZ, WINM-61, DOB: 09/13/49 of [REDACTED] in the presence of PennState General Counsel Cynthia BALDWIN. SCHULTZ related he retired from PennState in 2009. SCHULTZ related he was in charge of operations for PennState that included things like food services, health and safety and police services. SCHULTZ related he remembered that he was contacted by Tim CURLEY the Athletic Director back in 2002 and informed of an incident involving SANDUSKY. SCHULTZ related he was informed that a graduate assistant was in a locker room on campus and observed something disturbing involving SANDUSKY and a boy in the shower. SCHULTZ related a meeting was arranged and he, CURLEY, MCQUEARY and PATERNO met and discussed the incident. SCHULTZ related he did not remember all of the details however there was not any mention of any sexual acts. SCHULTZ related that MCQUEARY was very vague and spoke in general terms when he described what he witnessed. SCHULTZ related however that it was his impression based on the information he was provided that there was inappropriate sexual contact involving SANDUSKY and a minor. I asked him to explain that in more detail and he related that he had the feeling that there was inappropriate behavior, possibly messing around and maybe SANDUSKY might have grabbed genitals. SCHULTZ related he later met with CURLEY and SPANIER and discussed the incident. SCHULTZ related CURLEY came up with a recommendation to address the issue. SCHULTZ related the recommendation was for CURLEY to meet with SANDUSKY and inform him that he was no longer allowed to bring Second Mile kids on PennState campus facilities. I asked him if any other things were recommended and he said he did not believe. I asked him if the second mile was notified and he said he did not contact them and he did not believe that they had been. SCHULTZ related that he did not believe that that was part of the plan. SCHULTZ related that he thought the proper authorities were notified but he was not able to provide any information about who made the notification or who was notified. SCHULTZ related he thought Children and Youth Services was notified but did not know for sure or who might have notified them. SCHULTZ related he was not sure if the police were involved in this incident or not. SCHULTZ related that since SANDUSKY was no longer employed by PennState that is why the recommendation was to restrict him from bringing Second Mile kids onto PennState property. SCHULTZ related that he assumed that it was a second mile kid because that was the organization that SANDUSKY founded and still was involved in. SCHULTZ related the incident was discussed with attorney Wendel COURTNEY who was representing PennState at the time. SCHULTZ related he did not discuss the incident with anyone else since then. SCHULTZ related that the President of the University Graham SPANIER would have been notified of the outcome by CURLEY. I asked SCHULTZ if he was aware of any other incidents involving SANDUSKY and kids and he related that there was an incident back in 1998 in which a mother made a complaint to the PennState Police about inappropriate contact between SANDUSKY and her son while they were in the shower. SCHULTZ related he did not remember the details but it was investigated and Children and Youth Services were involved. SCHULTZ related he was later informed that the Centre County District attorney was also involved and that there were not any charges brought against SANDUSKY. I asked SCHULTZ if SPANIER was aware of the 1998 incident and he related yes. SCHULTZ related he was sure that SPANIER knew of the 1998 incident. SCHULTZ related he believed the only reason SANDUSKY retired was because of the financial benefits of the State Employees Retirement system. SCHULTZ related that he did not believe that anyone took away SANDUSKY'S keys nor was he restricted from using PennState facilities other than not being allowed to bring Second Mile kids on campus. SCHULTZ related he later met with CURLEY and MCQUEARY and advised MCQUEARY of how the incident was handled. SCHULTZ related he did not hear anything else about these incidents or any other incident involving SANDUSKY.</p>							
8. OFFICER'S NAME/SIGNATURE Trooper Scott F.C. ROSSMAN		9. INVEST. RECD. 8481		10. SUPV. DEF. RCD. NO. 12-30		11. CONCUR 19 PAGE 45	

TMC 000052

STATION

EXHIBIT E-2

EXHIBIT G-50

COMMONWEALTH OF
PENNSYLVANIA

V.

Timothy M. Curley and Gary C. Schultz

Defendants

EXHIBIT F-1

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

QUALIFICATIONS

2. In my current position, I both consult and supervise the consulting activities of consultants at DecisionQuest, a firm whose business (among many services) is to study the social and psychological processes that are involved in jury trials. DecisionQuest assists litigators in understanding the attitudes, perceptions, and decision-making processes of jurors, including any biases and prejudices those jurors may bring to the courtroom.
3. I have a B.A. degree (with Honors in Psychology) from Clark University in Worcester, Massachusetts. My M.A. and Ph.D. are in Social Psychology from Northwestern University in Chicago, Illinois. I was previously a tenured Associate Professor of Administration of Justice at the Pennsylvania State University.
4. I have provided jury consulting services to counsel for both plaintiffs and defendants in civil trials, criminal defense counsel, public defenders, and federal and state prosecutors in federal and state court cases throughout the United States.

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

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

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

7. DecisionQuest has offices in Atlanta, Boston, Chicago, Los Angeles, Minneapolis, New York, Philadelphia, State College, Pennsylvania, and Washington, DC.
8. DecisionQuest is a firm engaged in the business of understanding the social and psychological processes involved in juror behavior. DecisionQuest maintains a full-time staff of Ph.D. specialists in psychology, social psychology, sociology, communication sciences, statistics, computer analysis, and research design. DecisionQuest assists attorneys in understanding the perceptions that jurors bring with them into the courtroom. These may include certain biases and prejudices.
9. The principals of DecisionQuest have conducted research in more than 14,000 civil and criminal cases throughout the United States and abroad. Over the last 25 years, we have frequently been asked to analyze venue questions, particularly to determine a party's ability to obtain a fair trial in a given venue.
10. At the request of counsel for Gary C. Schultz and Timothy M. Curley, a venue study was commissioned to investigate the extent and impact of pretrial publicity in the above-styled case.

SURVEY METHODOLOGY

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

12. Between September 6 and 27, 2012, jury-eligible residents of the jurisdictions of Dauphin, Erie, Chester, and Luzerne Counties, Pennsylvania were contacted using random digit dialing with replicate sampling. Replicate sampling is a standard technique used for academic and legal research that maximizes the representativeness of the sample.
13. The sample was built in replicates of 400 telephone numbers each for the Dauphin study and 300 each for the Erie, Chester and Luzerne study. The replicates were randomized. This gives each household with a telephone an equal opportunity to participate in the survey.
14. Bennett Research completed 710 interviews, 410 in Dauphin County and 100 each in Erie, Chester, and Luzerne Counties. Each phone number was dialed four times for the Dauphin study and six times for the Erie, Chester and Luzerne study, or until the number was resolved (whichever came first). A resolved number is a number where the respondent completed the survey, a number was found to be a disconnected phone, or some other final resolution. Calls were made on both weekdays and weekend days and at different times during the day beginning at or after 11:00 AM and ending at or before 9:00 PM respondent time.
15. The sample size was determined to obtain a margin of error of approximately 5% for Dauphin County.
16. In conjunction with another venue study, Dr. Robert F. Bettler, Jr., Ph.D. of DecisionQuest visited Bennett Research's call center in Pocatello, Idaho, on October 7 and 8, 2004, and observed their operation.

- a. As part of his observations, he reviewed their training and operation manuals used to train the interviewers and guide their interviewing procedures.
- b. In this visit he confirmed that nothing in the training revealed to the interviewers the purpose of this research. In that study, as in the present one, he ascertained that all Bennett personnel at all levels were blind as to the purpose and sponsorship of the research.
- c. He randomly monitored several hours of live calls.
- d. He randomly monitored call supervisors and quality controllers. Bennett managers inform us that they randomly monitor 10% of all completed interviews for quality control purposes and another 15% of randomly selected respondents are called back to check the validity of the interviewing records. Both of these operations were observed by Dr. Bettler.
- e. To the best of his knowledge, it was his observation that managers, supervisors, programmers, and interviewers at all levels of the organization followed appropriate methodological procedures. Bennett assures us that in the interim nothing has changed about their methodology.

17. Respondent suitability.

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

18. Instrument design.

- a. DecisionQuest created the survey instrument in accordance with established guidelines.
- b. A complete copy of the survey instrument is included as Exhibit 2 to this affidavit.

19. Supplemental analyses, readability.

- a. To ensure respondents understood the questions posed to them, the survey text was analyzed using Microsoft Word's built-in readability statistics.
- b. By this measure, the text had a Flesch-Kincaid Grade Level of 5.6, meaning that an elementary school student in the latter half of the 5th grade should be able understand the survey.

20. Supplemental analyses, interview break-offs.

- a. At various points in the interview a small number of respondents terminated the survey. Out of 765 who began the interview, 55 broke off, or 7% of the total.
- b. This is an unusually low number, as compared to other venue studies DecisionQuest has conducted, and could be an indirect indicator of the strength of the feelings Pennsylvanians have about this case.

21. Supplemental analyses, order effect.

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

- b. To check whether the order of these options had any impact on the presumption of guilt, a statistical analysis was conducted on this order effect.
- c. No difference in the guilty versus not guilty or "don't know" responses was observed as a function of this response option order.

22. Supplemental analyses, gender and age.

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

- i. Gender:

- a. Men were more likely to recall one of the defendants' names or titles freely, but on the second prompt, when respondents were reminded of the names and charges, men and women were equally likely to recall the cases. Since any prospective jurors called for the case will also be reminded of the defendants' names and the charges against them, the difference observed in free recall in this study is inconsequential.
 - b. There was no gender difference in presumptions of guilt or innocence: With both men and women, over 60% of the respondents felt the defendants were guilty.

ii. Age:

- a. Older respondents were slightly more likely to be familiar with the case than were younger ones, both in a free recall question and in a prompted recall question. Small age differences are often observed in research of this sort because older respondents tend to be more informed about events in the news. This is not expected to pose a threat to the validity of the findings reported below.
- b. There was no correlation between guilt ratings and age.

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

- a. The published literature on the subject, as well as DecisionQuest's experience, suggest that there are generally minimal attitudinal or opinion differences between survey respondents reached by cell phone and those reached by landlines.
- b. Nevertheless, approximately 50 Dauphin County respondents were reached by cell phone, and an analysis was conducted to determine whether this sampling difference was associated with differences in responses to key items on the survey.
 - i. Although landline respondents were more likely to recall one of the defendant's names or titles without a prompt, no difference was observed in prompted recall by sample source (cell or landline). This probably reflects the age difference noted above in free recall of the defendants' names or titles since respondents reached by cell

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

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

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

PRINCIPAL FINDINGS

25. The focus of this venue evaluation was a comparison of the responses of potential
jurors in four Pennsylvania counties to questions in five general categories:

- a. Familiarity with the case,
- b. Presumptions about the guilt of the defendants,
- c. The extent of exposure to pretrial publicity and impressions of the
evidence against the defendants,
- d. Familiarity with and reactions to the Freeh report, and
- e. Beliefs and opinions related to the case.

26. Familiarity with the case.

- a. Familiarity with the case was gauged in two ways. First, respondents were
asked whether they could freely recall the names or titles of the
defendants. Then, respondents were prompted with the names and titles of
the defendants and asked whether they were familiar with the defendants'
cases.

	Dauphin	Luzerne	Chester	Erie
Familiarity* (unprompted recall)	32.3%	21.2%	23.6%	11.5
Familiarity (prompted recall)	85.8%	80.6%	85.3%	68.3%

*NOTE: In this and the following tables the wording of the survey questions has been abbreviated. See Exhibit 2 for full wording.

- b. Only a minority in each county was able to recall the defendants' names or titles without a prompt. On the other hand, given a minimal prompt, large majorities in all four counties reported they were familiar with the cases of defendants Curley and Schultz.
- c. Note that if respondents denied any familiarity with the case after this prompt, they exited the interview.

27. Presumptions about guilt.

	Dauphin	Luzerne	Chester	Erie
Curley: Definitely or probably guilty*	65.0%	72.3%	68.9%	75.7%
Schultz: Definitely or probably guilty	65.6%	78.0%	70.5%	81.4%

*NOTE: As described above in the methodology section, a small number of respondents broke off the interview at various points. The percentages given in this and the following tables are for respondents remaining at this point in the survey.

- a. Large majorities in all four counties reported feeling that the defendants are definitely or probably guilty.
- b. Respondents were also asked whether they thought "...most people in your county would feel that Curley and Schultz are guilty of these

crimes.” By large margins in all four counties people reported that this would indeed be the case.

	Dauphin	Luzerne	Chester	Erie
Definitely or probably yes	73.2%	74.4%	70.5%	78.6%
Definitely or probably no, Don't know, not sure	26.8%	25.6%	29.5%	21.5%

28. Exposure to pretrial publicity and impressions of the evidence against the defendants.

- a. Exposure to pretrial publicity was assessed in a series of questions, asking respondents whether they had read or heard about the Curley and Schultz cases from any of six different media sources.

	Dauphin	Luzerne	Chester	Erie
TV reports	75.7%	82.5%	71.4%	58.8%
Newspaper reports	66.0%	81.2%	71.4%	64.7%
Radio reports	37.3%	33.7%	40.0%	26.5%
Internet reports or 'blogs	21.5%	15.0%	28.6%	2.9%
Word of mouth, conversations	62.9%	63.7%	63.1%	41.2%
Emails	7.6%	3.7%	15.5%	1.5%

- b. Over 90% of the respondents reported having heard or read about the charges against defendants Curley and Schultz from at least one source.

Only 49 people, or 8.6%, denied exposure to all six sources of pretrial publicity.

- c. Given this level of exposure, many have formed the impression that there is substantial evidence against defendants Curley and Schultz.

Respondents were also asked, "Based on what you know about this case, how much evidence would you say there is against Curley and Schultz?"

	Dauphin	Luzerne	Chester	Erie
Some or a lot of evidence	67.3%	74.4%	73.6%	65.7%
A little, none, not sure	32.4%*	25.6%	26.4%	34.3%

*NOTE: One Dauphin respondent said there was a lot or some evidence against Mr. Schultz, but was not sure about Mr. Curley.

- d. In all four counties, about two-thirds, or more, of the respondents had formed the impression that the evidence against the defendants was substantial.

29. Familiarity with and reactions to the Freeh report.

- a. Respondents were prompted with a brief reminder about the Freeh report and its conclusions and asked several questions to gauge their familiarity with that report and their thoughts about its implications.

	Dauphin	Luzerne	Chester	Erie
Familiar with Freeh report	73.8%	72.8%	73.3%	52.9%
Does Freeh report conclude Curley and Schultz covered up Sandusky abuse?*	75.8%	67.8%	81.0%	75.0%
If Freeh concluded cover-up, then are Curley and Schultz guilty of a crime?*	68.1%	72.4%	69.8%	75.0%

*NOTE: These questions were only administered to those who were familiar with the Freeh report.

- b. Large majorities in three of the four counties reported being familiar with the Freeh report and in all four, large majorities of those familiar with the report agreed that it concludes the defendants covered up Mr. Sandusky's abuse of young boys.
- c. Similarly, large majorities of those familiar with the Freeh report felt its conclusions would mean the defendants are guilty of the charges against them.

30. Beliefs and opinions related to the case.

- a. The last few items in the survey asked respondents whether they agreed or disagreed with various opinions about Penn State and how an alleged "culture" at the university might have "tolerated" Mr. Sandusky's behavior.
- b. Note that many opinions of this sort have appeared, not only in the Freeh report, but in the media coverage of this matter as well.

	Dauphin	Luzerne	Chester	Erie
Even if Penn State officials like Curley and Schultz did nothing illegal, they still should be punished.	46.9%	55.0%	50.0%	64.2%
From very early on, officials like Curley and Schultz knew exactly what was going on with Sandusky.	70.0%	71.3%	73.8%	77.6%
The culture at Penn State and in the Penn State athletic department tolerated Sandusky's behavior.	64.9%	72.6%	72.6%	68.6%
Curley and Schultz helped to create the culture at Penn State that tolerated Sandusky's behavior.	62.6%	65.0%	59.5%	65.7%

- c. About half or more of the respondents in every county agreed that the defendants in this case should be punished, even if they did nothing illegal.
- d. Beyond that, large majorities in all four counties agreed that the defendants knew about Mr. Sandusky's actions and that they helped to create the culture at Penn State that tolerated his behavior.

31. To sum up:

- a. In all four of the counties examined in this study two-thirds to almost three-quarters of jury-eligible Pennsylvanians were familiar with this case.
- b. Of those familiar with the Curley and Schultz cases—in all four counties—two-thirds or more felt the defendants are probably or definitely guilty of the crimes of which they are accused.
- c. Very few of the respondents in this study have not heard or read news reports about these accusations.
- d. About two-thirds or more have gotten the impression from these news reports (and from other sources) that there is substantial evidence against these defendants.
- e. In all four counties examined in this study, majorities report being familiar with the Freeh report and its conclusions regarding the defendants, Mr. Curley and Mr. Schultz. And in all four counties, two-thirds to three-quarters of those familiar with the Freeh report feel the report's

conclusions mean the defendants are guilty of the crimes of which they are accused.

i. That these conclusions come from an investigation and report by a former head of the Federal Bureau of Investigation and a former Federal judge make them unusually influential over jurors' thinking—as clearly indicated by the results summarized above.

f. Finally, by large margins, jury-eligible respondents in these four counties hold beliefs and opinions about a culture at Penn State that at least tolerated Mr. Sandusky's behavior and, further, that defendants Curley and Schultz helped to create that culture.

32. These results are consistent with what has been observed in the literature on cases of this sort. For example, Vidmar and Hans (2007, *American Juries, The Verdict*) write:

"A phenomenon known as *generic prejudice* may also come into play in high-profile cases. Public attention to the issues of child abuse, including child pornography, sexual violations, and physical harm, gained widespread attention in the 1980s that continues to this day. At a 1990 symposium, Judge Abner Mikva coined the term *generic prejudice* and explained: 'I do not think that you can get a fair child abuse trial before a jury anywhere in the county...when they hear that a child has been abused, a piece of their mind closes up...' (p. 113, internal citations omitted).

DISCUSSION

33. In the entire social scientific literature on jury decision-making, spanning many decades, the effect of pretrial publicity (PTP) on a defendant's right to a fair trial is one of the most thoroughly studied subjects. As a result of this extensive research literature, there is a strong consensus of opinion among leading researchers in the field that such publicity seriously undermines the ability of a defendant to receive a fair trial and is poorly remedied by mitigation measures typically employed by our courts.

- a. For example, one recent reference work, summarizing decades of research into the effects of and remedies for pretrial publicity concluded, "In sum, it appears that the effects of PTP can find their way into the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and can persevere not only through deliberation, but may also actually intensify." (Studebaker & Penrod, 2005, Pretrial publicity and its influence on juror decision making, in Brewer & Williams, Editors, *Psychology and Law*, pp. 265-266).
- b. Other recognized authorities in this realm strongly concur, for example, Posey and Wrightsman in *Trial Consulting* (2005) write, "...the belief that voir dire is an effective remedy for the effects of pretrial publicity assumes that prospective jurors are capable of assessing their own biases and that they are willing to admit to such biases during the jury selection process. It also requires that judges and attorneys be able to identify those who

should appropriately be challenged for cause. Research suggests that none of these is a safe assumption" (p. 58).

- c. Thus, the conclusions of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.

- 34. Instructions from the Court are unlikely to alleviate the problem. Admonitions from the bench to "set aside one's biases" have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity.
- 35. One cannot expect the deliberation process to reduce the effect of pretrial publicity either. As noted by Studebaker and Penrod (2005), and in line with research on small group dynamics, discussions among jurors can actually intensify the biases caused by pretrial publicity.
- 36. Ordinarily, a change of venue or venire might offer the best opportunity for reducing the threat to the defendants' rights to a fair trial, but the findings summarized above, from counties all around Pennsylvania, suggest these options would do little to reduce that threat. Given the feelings expressed in this survey by potential jurors from one end of the Pennsylvania to the other, neither changing venue nor using an imported venire would be effective. Indeed, these results make it difficult to imagine how the defendants could get a fair jury trial anywhere in the Commonwealth.

37. In short, few subjects in the history of jury research have been studied as much as pretrial publicity and that research does not offer much hope for seating a truly impartial jury in this case.

38. Although the prospects are not particularly promising, it is possible that with an especially thorough and extensive voir-dire process, some of the threats to the defendants' rights could be at least partially reduced.

39. To this end, some of the measures the Court could consider include:

- a. A written juror questionnaire constructed in accordance with proven social scientific methods for the assessment of knowledge, beliefs and attitudes relevant to the issues in this case.
- b. A relatively intensive sequestered voir dire interview with each individual juror. It must be emphasized, however, that to be maximally effective, this voir dire will probably need to employ interviewing techniques patterned after the structured interview protocols utilized in the highest quality social scientific research.
- c. Expanded criteria for excusing prospective jurors for cause.
- d. An increase in the routine number of peremptory strikes.

40. In conclusion then, to a reasonable degree of scientific certainty, it is my opinion that:

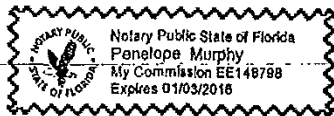
- a. The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania.

- b. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury.
- c. The survey results outlined above show that the Freeh report has probably magnified the generic biases inherent in a child sexual abuse case to what, in my experience, is an unprecedented degree. The wide-spread publicity about the Freeh report, wherein a highly authoritative former FBI Director and Federal judge is understood to have pronounced the defendants guilty of criminal acts, is a unique situation in my experience.
- d. Given the extent of that publicity and the intensity of the negative opinions about anyone connected with the Sandusky matter, even a change of venue—normally one of the best remedies for pretrial publicity—holds little promise of helping the Court to seat an impartial jury. The same would be true for a change of venire.
- e. In my opinion, although extremely difficult, it may be possible to move, at least incrementally, in the direction of seating an impartial jury by designing and implementing a comprehensive juror assessment program along the lines described above. Most importantly, whatever their ultimate forms, the questionnaire administered to prospective jurors and the interview protocol for individual voir dire must conform to the best available social scientific assessment methodologies. It is very unlikely that any mere variation on a "routine" voir dire will meet those standards or have the desired result.

I declare under penalty of perjury that the foregoing is true and correct. Executed on,

October 24, 2012.

Arthur H. Patterson



As to Arthur H. Patterson
on this Date Oct, 24, 2012
Sarasota, Florida

Penelope Murphy

REFERENCES

Studebaker, C. A., & Penrod, S. D. (2005). Pretrial publicity and its influence on juror decision making, in Brewer & Williams, Editors, *Psychology and Law, an Empirical Perspective*, pp. 265-266. New York: Guilford Press.

Posey, A. J., & Wrightsman, L. S. (2005). *Trial Consulting*. New York: Oxford University Press.

Vidmar, N., & Hans, V. P. (2007). *American Juries, The Verdict*. New York: Prometheus Books.

**VERIFICATION PURSUANT TO
TITLE 18 Pa.C.S.A. § 4904**

If called as a witness to support the averments of the within Omnibus Pre-Trial Motion to Dismiss, Timothy M. Curley will provide testimony consistent with the following Verification by counsel:

On or about December 28, 2010, at the Penn State Bowl Game in Tampa, Florida, Mr. Curley met with Attorney Cynthia Baldwin, former Penn State General Counsel. She explained that he would be subpoenaed to appear before the Grand Jury and that she would give him more details when they returned to State College. Ms. Baldwin made Mr. Curley aware that he would be called to testify in the context of the Gerald Sandusky investigation and that he was being called as a witness only.

Upon returning to State College, Mr. Curley met with Ms. Baldwin on January 3, 2011. Ms. Baldwin advised him that he was free to hire his own lawyer, however, she assured Mr. Curley that she could represent him before the Grand Jury. Sometime later, Ms. Baldwin told Mr. Curley that Gary Schultz and Joe Paterno would also be called before the grand jury and that she could represent all three because their recollections were consistent. Mr. Curley agreed to allow Ms. Baldwin to provide legal representation regarding the Grand Jury matter. Ms. Baldwin did not explain a limited scope of representation at the January 3, 2011, meeting or at any other time.

Mr. Curley fully believed that Ms. Baldwin was representing him and that she was looking out for his best interests and, based upon her representations, that she was his lawyer.

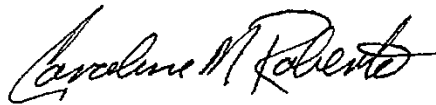
Ms. Baldwin advised Mr. Curley not to talk to Joe Paterno, Gary Schultz or Graham Spanier to refresh his recollection of events before testifying at the Grand Jury even though his memory was lacking. Ms. Baldwin did not attempt to refresh his recollection through files, emails or documents from Schultz, Spanier or Paterno. The January 3, 2011, meeting lasted only 20 minutes and no further meetings were scheduled to prepare Mr. Curley for his testimony or to help refresh his recollection.

Ms. Baldwin never told Mr. Curley that he had the option not to testify before the Grand Jury and assert his Fifth Amendment right. She never told Mr. Curley that he or Penn State administrators were the focus of the investigation.

When Mr. Curley arrived at the Grand Jury on January 12, 2011, Ms. Baldwin accompanied him to the interview by members of Attorney General staff before he testified. OAG challenged his recollection of events. During this time, Mr. Curley fully believed that Ms. Baldwin was his attorney and representing his best interests. After the interview, Mr. Curley expressed his concerns to Ms. Baldwin regarding the unanticipated tenor of the interview. Ms. Baldwin did not advise Mr. Curley that he may have exposure to criminal charges, or to exercise his Fifth Amendment right or to retain private counsel.

After the interview, Mr. Curley was called before the Grand Jury and again Ms. Baldwin accompanied him into the Grand Jury room. When asked if he had legal representation, he stated that Cynthia Baldwin, who was sitting beside him, was his lawyer. Mr. Curley fully believed before and during his Grand Jury appearance that Ms.

Baldwin was his legal counsel. He relied on Ms. Baldwin to provide guidance and advice during the testimony and to protect his interest throughout the grand jury proceeding.

A handwritten signature in black ink, reading "Caroline M. Roberto". The signature is fluid and cursive, with the first name "Caroline" and last name "Roberto" clearly legible.

Caroline M. Roberto, Esquire
Attorney for Timothy Mark Curley

Date: 10/31/12

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

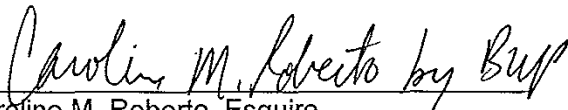
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. CP-22-CR-5165-2011
	:	
TIMOTHY MARK CURLEY,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Omnibus Pre-Trial Motion, was e-mailed and mailed, First Class Mail, postage pre-paid, this 1st day of November, 2012, to the following:

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Deputy Attorney General
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Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy Mark Curley

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

COMMONWEALTH OF PENNSYLVANIA, :
v. : No. CP-22-CR-5164-2011
GARY CHARLES SCHULTZ, : Charges: Perjury; Penalties for
Defendant. : Failure to Report or to Refer

OMNIBUS PRE-TRIAL MOTION

AND NOW, comes the defendant, Gary Charles Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and respectfully files his Omnibus Pre-Trial Motions as set forth below:

I. Motion to Dismiss, Or, In The Alternative, To Suppress Grand Jury Testimony.

A. Background

1. 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 over a period of years. See Presentment at 1.

2. In early 2010, the Office of Attorney General of Pennsylvania ("OAG") issued a grand jury subpoena to the Pennsylvania State University ("PSU") for employment files related to Sandusky. At the time, outside counsel for PSU was the law firm of McQuaide Blasko.

3. In 2010, Attorney Cynthia A. Baldwin, a former PSU Trustee, was appointed by President Graham Spanier as General Counsel for PSU. The Board of

Trustees approved the appointment by resolution effective February 15, 2010.

<http://ogc.psu.edu/> (Last checked 10/24/12).

4. The OAG began direct communication with Ms. Baldwin as PSU General Counsel regarding service of investigating grand jury subpoenas and production of documents.

5. In November 2010, law enforcement agents of the OAG interviewed PSU Assistant Coach Mike McQueary. On or about December 14, 2010, Mr. McQueary testified before the grand jury regarding an incident he observed in the Lasch Building Assistant Coaches' shower/locker room between Sandusky and a boy. Although Mr. McQueary's grand jury testimony has not been disclosed, it is reasonable to conclude that consistent with his preliminary hearing testimony in this case, McQueary testified that he described an incident to Mr. Curley and Mr. Schultz relating to Sandusky's sexually inappropriate behavior with a boy. The exact description given by Mr. McQueary is in dispute.

6. In December 2010, based upon her communication with OAG, Mr. Baldwin anticipated service of subpoenas for Athletic Director Timothy M. Curley, Head Football Coach Joseph V. Paterno; and Gary S. Schultz, former PSU Senior Vice President for Finance and Business.

7. In late December 2010, Ms. Baldwin called Mr. Schultz and informed him that she had been contacted by the OAG about a grand jury subpoena for his testimony in connection with the Sandusky investigation. Mr. Schultz had retired from PSU in June 2009. She asked if he would authorize her to accept service of a

subpoena from the OAG, and he agreed. Ms. Baldwin scheduled a meeting with Mr. Schultz in her office to discuss the matter. See Exhibit A (Schultz Affidavit).

8. On or about January 5, 2011, Schultz met with Ms. Baldwin in State College, Pennsylvania, to discuss his grand jury appearance. On or before this date, Ms. Baldwin had met separately with Mr. Curley and Coach Paterno as their counsel and interviewed them concerning their knowledge of Mr. McQueary's report about the Sandusky shower incident. Ms. Baldwin told Mr. Schultz that she would represent him before the grand jury and that she also did or intended to represent PSU, Curley and Paterno. Ms. Baldwin did not inform Schultz of any potential for a conflict of interest.

9. From at least at this point forward, based upon his conversations with Ms. Baldwin and her words and actions, Schultz believed, quite reasonably, that Ms. Baldwin was providing legal representation to him and that she was pursuing his best interests.

10. Mr. Schultz informed Ms. Baldwin that reviewing documents or notes relating to the Sandusky matter or discussing the matter with other participants, such as Mr. Curley and PSU President Spanier, would refresh his memory and would enable him to testify more accurately. He informed her that he may have had a file relating to Sandusky and that if he did, it might be in the office of the senior vice president, his former office to which he no longer had access.

11. Ms. Baldwin advised him that in her legal opinion, he should not review or look for any documents and should not seek to refresh his memory by discussing the matter with anyone else.

12. On January 12, 2011, Curley and Schultz arrived at the grand jury accompanied by Ms. Baldwin.

13. OAG knew that Ms. Baldwin was General Counsel for PSU and that she was providing legal representation to Curley and Schultz.

14. Ms. Baldwin accompanied Mr. Curley to the OAG interview which occurred at 9:20 a.m. on January 12, 2012. According to the police report regarding Mr. McQueary's description of his observations, Mr. Curley stated that there was no mention of sexual acts; that Mr. McQueary observed Sandusky horsing around in the shower; and that the incident was something that could be misconstrued. See Exhibit B attached (interview report).

15. Ms. Baldwin also accompanied Mr. Schultz to his pre-testimony interview at 9:35 a.m. on January 12, 2012. According to the police report, Mr. Schultz stated that Mr. McQueary reported inappropriate contact that could be considered sexual involving Sandusky and a minor. See Exhibit B.

16. The prosecutors and agents were hostile to Curley and Schultz in both interviews and challenged their recollection of the events, specifically what Mr. McQueary had told them, and indicated that they had evidence that Jerry Sandusky had anally raped a boy in the Lasch Building showers and that the witness had been told of it. See Exhibit A.

17. OAG and Ms. Baldwin were aware before the sworn testimony of Mr. Curley and Mr. Schultz that their statements were inconsistent with each other in that Mr. Schultz admitted that the horseplay or wrestling of which he was told was inappropriate and could be considered sexual in some way, whereas Mr. Curley denied that the conduct was in any way sexual. Further, Mr. Schultz recalled the 1998 incident and investigation involving Sandusky, whereas Mr. Curley did not.

18. At a hearing on this matter, Mr. Schultz intends to call as a witness Deputy Attorney General Frank Fina ("DAG"), to testify that he confronted Ms. Baldwin about her conflict on January 12 before either Schultz or Curley testified and advised her that he believed that she was operating under a conflict of interest. Mr. Fina has told this to numerous attorneys.

19. Although OAG was keenly aware of Ms. Baldwin's multiple representation and conflict of interest, it failed to move to disqualify her as counsel or to raise the conflict issue with the grand jury judge.

20. At the administration of the oath before the grand jury presiding judge on January 12, the following exchange took place:

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

Judge: Represented by?

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

Judge: Will you be providing representation for both of those identified witnesses?

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

Judge: Good morning . . .

See Exhibit C (Grand Jury Colloquy.)

21. DAG Jonelle Eshbach further confirmed Ms. Baldwin's representation at the start of testimony. Before questioning Mr. Schultz she asked: "You are accompanied today by counsel, Cynthia Baldwin; is that correct?" Mr. Schultz answered: "That is correct." Ms. Baldwin remained silent. Transcript of Mr. Schultz's Grand Jury Testimony dated January 12, 2012, at 3. See Exhibit D. (Grand jury excerpts).

22. Ms. Baldwin sat next to Mr. Schultz in the grand jury courtroom and did not attempt to limit the scope of her representation or otherwise clarify her role. Instead, she allowed Mr. Schultz to believe that she was his unencumbered, conflict-free lawyer. She did not offer him any advice during his grand jury testimony.

23. On November 4, 2011, a criminal information was filed charging Mr. Schultz with perjury as a result of his grand jury testimony and failure to report, a summary offense. A Presentment issued by the Thirty-Third Statewide Investigating Grand Jury was attached to the criminal complaint.

24. On February 2, 2012, Lanny Davis, a lawyer and crisis manager hired to represent PSU, told reporter, Sara Ganim of The Patriot News that Ms. Baldwin was in the grand jury room on January 12, 2011, strictly on behalf of the University

and not as counsel for Curley and Schultz. See Exhibit E (Patriot-News 2/12/12 article).

25. On June 22, 2012, counsel for Ms. Baldwin, Charles DeMonaco of the law firm of Fox Rothschild, provided by letter in response to present counsel's inquiry regarding attorney-client privilege matters that, "... [Baldwin], as General Counsel for the University, could not and did not represent any agent of the University in an individual capacity." See Exhibit F (DeMonaco letter).

26. Ms. Baldwin never explained such a limited scope of legal representation to Mr. Curley prior to or during his grand jury appearance.

B. No Counsel.

27. According to Ms. Baldwin, she did not consider herself Mr. Schultz' counsel and did not represent his personal interests in the grand jury. However, she did not inform Mr. Schultz (nor the judge supervising the grand jury) of this limitation on her representation.

28. Title 42 Pa.C.S.A. § 4549(c)(1) provides that a witness subpoenaed to appear before the grand jury shall be entitled to the assistance of counsel. The witness' counsel – not counsel for third parties – has a right to be present and advise the witness during his testimony. See 42 Pa.C.S.A. § 4549(b), (c); Pa. R. Cr. P. 231(A).

29. At a hearing on this matter, Mr. Schultz will present the testimony of Attorney Walter Cohen, partner-in-charge of the Harrisburg law firm of

Obermayer Rebmann Maxwell & Hipple, LLP, and former Acting Attorney General of Pennsylvania from 1994-1996. Prior to the appointment, from 1989-1994, he was the First Deputy Attorney General. He has practiced extensively before State grand juries. Mr. Cohen will testify that under the circumstances, Mr. Schultz reasonably believed that Ms. Baldwin represented him as a grand jury witness. Since the law permits only attorneys representing a witness to be present in the grand jury room during his testimony, Ms. Baldwin's presence in the grand jury itself demonstrates that she led everyone to believe that she represented Mr. Schultz and Mr. Curley as her clients. The transcripts of the grand jury proceedings confirm that the prosecutor, the supervising judge, and Mr. Schultz and Mr. Curley believed that Ms. Baldwin was acting as personal counsel for the individuals.

30. Mr. Schultz will also present testimony from Lawrence J. Fox, partner in the Philadelphia law firm of Drinker Biddle and Reath, LLP; and the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility. He also is the Supervising Lawyer of the Ethics Bureau at Yale, a pro bono endeavor to provide ethics advice, counseling and support to those who cannot afford such services.. Professor Fox has written and lectured extensively on legal ethics.

31. Professor Fox will testify that Ms. Baldwin was Mr. Schultz' counsel for all purposes before the grand jury. Her conduct unequivocally demonstrated that she represented Mr. Schultz. He had a reasonable basis for concluding that he was

her client, and she had an absolute obligation to disabuse him of that notion, or be deemed his attorney.

32. Further, according to Professor Fox, the idea set forth in Mr. DeMonaco's letter that a lawyer can represent the officers or employees of an organizational client under some kind of a watered down, second-class version of clienthood finds no support in the Pennsylvania Rules of Professional Conduct. Those rules recognize one form of client, and that client is entitled to the benefit of all the lawyer duties under the rules, as well as the same fiduciary duties lawyers owe every client. Once Ms. Baldwin admits she represented Mr. Schultz in some capacity, her conduct must be judged by the same standards that apply to every lawyer.

33. Ms. Baldwin's assertion that she was representing Mr. Schultz as a representative of her real client, PSU, not only advances a defense that finds no support in our ethical standards, but also confirms her conflict of interest and indicates that she did not make any effort to protect Mr. Schultz' individual interests, for as her counsel plainly states: "She, however, as General Counsel for the University, could not and did not represent any agent of the University in an individual capacity." Exhibit E. (De Monaco June 22, 2012, letter).

34. As the accompanying Memorandum of Law explains, where counsel fails to exercise any professional judgment on the client's behalf, it is as if the

witness had no counsel, and no specific showing of prejudice is required. Prejudice is presumed.

C. Ineffective Assistance of Counsel – Actual Conflict of Interest.

35. Because Ms. Baldwin was laboring under a conflict of interest, first, between Mr. Schultz and PSU and, second, among Mr. Curley, Coach Paterno and Mr. Schultz, she did not and could not provide the effective assistance of counsel.

36. In their conversations prior to Mr. Schultz' grand jury appearance, Ms. Baldwin clearly represented to Mr. Schultz that she was his legal counsel. Although Baldwin's current position is that she never represented Mr. Schultz in his individual capacity, she never notified the grand jury presiding judge, and never informed Mr. Schultz of the limited scope of her representation before his appearance, or during his testimony. She never explained a limited scope representation or told Mr. Schultz that PSU interests came first. The conflict of interest, now plainly apparent on this record, left Mr. Schultz with no counsel at all, conflicted counsel, and ineffective counsel during his appearance before the grand jury.

D. General Ineffective Assistance of Counsel.

37. Ms. Baldwin never advised Mr. Schultz that he could exercise his constitutional right to remain silent before the grand jury.

38. Ms. Baldwin never advised Mr. Schultz that he may have exposure to the criminal charge of failure to report, even after Mr. Schultz' pre-testimony interview with OAG.

39. Ms. Baldwin did not protect the interests of Mr. Schultz by assisting him in refreshing his recollection by review of documents and notes. There was a file in his office that would have refreshed his recollection about these events and led to other refreshing emails. Exhibit G. She prohibited him from speaking with Paterno, Curley and Spanier regarding their recollections of the incident to refresh his recollection. Without a rudimentary effort to refresh his recollection of events occurring 10 to 13 years earlier, Mr. Schultz was unprepared to answer questions before the grand jury.

40. Many of the questions put to both Mr. Schultz and Mr. Curley were argumentative, compound, rhetorical and confusing. For example, the exchange that led to the "not that serious" and "no indication a crime had occurred" answers identified in the Presentment and Bill of Particulars as allegations of perjury against Mr. Schultz reflect a rhetorical comment eliciting a nonresponsive answer:

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

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

Preliminary Hearing Transcript at 229: 7-16.

41. Ms. Baldwin did nothing to protect Mr. Schultz from such improper questioning.

42. Mr. Schultz will present testimony of Attorney Cohen to demonstrate that upon review of this matter, Ms. Baldwin was counsel for Mr. Curley and Mr. Schultz as they reasonably believed; Ms. Baldwin operated under a fatal conflict of interest which adversely affected her ability to perform on Mr. Schultz' behalf, and she failed to represent her clients competently by failing to prepare him and failing to advise him about his Fifth Amendment rights.

43. Mr. Cohen also will testify that a grand jury witness' attorney has an obligation to advise her client and protect him from improper and misleading questioning, by conferring with the client to make sure he understand a confusing question or that he ask for clarification. In addition, in his experience, attorneys for witnesses can and do notify the prosecutor that the questioning is improper or confusing, and prosecutors either will re-phrase their questions or the matter will be brought before the grand jury judge to stop the abuse or obtain clarification. Even though both witnesses, by their own statements to the prosecutor, found the questioning confusing, Ms. Baldwin did nothing to protect her clients.

44. Mr. Schultz will also present the testimony of Professor Fox who will provide that upon review of this matter, Ms. Baldwin was counsel for Mr. Curley and Mr. Schultz for all purposes before the grand jury; that she was laboring under multiple conflicts of interest, first between PSU and Mr. Schultz, and second, between Mr. Curley and Mr. Schultz. Professor Fox will also testify that Ms. Baldwin gave incompetent advice to Mr. Schultz and Mr. Curley.

45. OAG's failure to raise the conflict of interest before the grand jury presiding judge resulted in Mr. Schultz being denied of counsel at the grand jury proceeding.

46. Failures by OAG and Ms. Baldwin deprived the presiding judge of notice concerning the serious problems related to Ms. Baldwin's representation and resulted in a deficient colloquy where Mr. Schultz was not given the opportunity to become aware of counsel's debilitating conflict and knowingly, intelligently and voluntarily waive his right to representation by a non-conflicted attorney, if he chose to do so.

E. Prosecutorial Interference with the Right to Counsel.

47. Prosecutors in the grand jury proceeding have the obligation and responsibility to raise the conflict of interest before the presiding judge to prevent a violation of the witness' right to counsel.

48. Raising the conflict of interest before the presiding judge would have resulted in, at least, a colloquy regarding the conflict or, most likely, a hearing concerning the multiple representation.

49. The failure by the DAG deprived Mr. Schultz of his right to counsel at the grand jury proceeding.

50. Mr. Cohen will testify that the Deputy Attorney General in this case had the obligation to ensure a fair proceeding in which witnesses had conflict free counsel; that even if he confronted Baldwin concerning the conflict, he had the duty to raise the issue before the presiding judge. The DAG's failure constituted denial of counsel to Mr. Curley and Mr. Schultz.

51. Professor Fox will testify that a prosecutor has the duty to bring to the attention of the courts conflicts of interest that would compromise the individual right to the assistance of counsel.

52. Professor Fox will also testify that in this case, the DAG failed in its duty as it was aware of the conflict and did not raise the issue before the grand jury presiding judge.

F. Remedy

53. For the reasons stated above, Mr. Schultz was denied counsel and his due process rights violated through the misconduct of the prosecutors and by the complete deprivation of the assistance of counsel. The remedy is to dismiss the charges or to suppress his grand jury testimony.

54. Mr. Schultz need not prove prejudice because he effectively had no counsel or actively conflicted counsel. In the alternative, the failure to prepare Mr. Schultz, to advise him after the hostile pre-testimony interview that he was at risk of incrimination and prosecution and that he should invoke his privilege against self-incrimination caused Mr. Schultz actual prejudice.

II. Motion Regarding Pretrial Publicity.

55. As the Court well knows, the charges in this case and every event related to it – every court appearance, the death of Coach Paterno, the trial and sentence of Mr. Sandusky, every motion filed, the lawsuit by Michael McQueary, the release of the Freeh Report, and the announcement of NCAA sanctions against PSU – have generated hundreds if not thousands of media reports in the newspapers, on television and radio, and on the Internet.

56. The charges in this case and against Mr. Sandusky, who was charged in the same Presentment, led Penn State University to commission an independent investigation by the firm of Freeh Sporkin & Sullivan, LLP (“FSS”).

57. FSS released its findings, contained in the Freeh Report, on July 12, 2012. That report runs several hundred pages and is available at www.thefreehreportonpsu.com (last visited 10/28/12). The release of the Freeh Report and avalanche of news stories related to it further inflamed the public. In the most public of ways, the Freeh Report concluded unequivocally that Mr. Schultz and Mr. Curley were guilty of the crimes as charged.

58. The weight and effect of the Freeh Report cannot be understated: a former federal judge and the ex-head of the FBI pronounced the defendants guilty.

59. The negative, outrageous and pervasive publicity continues to this day virtually unabated in every media form. Most recently, a surge of negative publicity attended the sentencing of Jerry Sandusky, where victims testified. National and local news saturated the public with detailed stories of the victims' abuse by Jerry Sandusky. Defendant expects the negative pretrial publicity to grow even more intense and widespread as the trial date approaches and the time for jury selection nears.

60. The poisoned atmosphere created by the onslaught of negative media publicity unfortunately has already predetermined defendants' guilt.

61. To explore the effects of this publicity, defendants commissioned a public opinion survey. The results, as described in the attached report from Arthur Patterson, are discouraging. Exhibit G. Eighty-five percent of respondents in Dauphin County knew of the charges, and 65% of those believed the defendants definitely or probably guilty. Perhaps even worse, nearly 50% believed that even if the defendants did nothing illegal, they should be punished.

62. Wondering whether a change of venue or venire would help, defendants surveyed three counties similar in size, Erie, Luzerne and Chester. The results were as bad or worse. Exhibit H.

63. Given the pervasive, inflammatory, and negative publicity surrounding this case and the defendants, unprecedented in amount and duration, which includes the condemnation of the defendants by a former federal judge and the ex-head of the FBI, the defendants seek the following remedial measures in the hopes of getting the fairest trial possible under these extraordinary circumstances:

- a. A continuance to allow a reasonable "cooling off" period so as to avoid a jury pool tainted by the overwhelmingly negative press coverage, which continues virtually unabated;
- b. Lawyer participation in *voir dire*, including a questionnaire and personal questioning of prospective jurors;
- c. Individual *voir dire* which is conducted outside the presence of other potential jurors;
- d. More extensive *voir dire* examination of the jurors to allow the possibility of more for cause challenges;
- e. Additional peremptory challenges for each defendant.

III. Motion for Discovery

64. By motion dated June 15, 2012, and numerous emails and letters, defendants have requested discovery from the Commonwealth of, *inter alia*, all statements of witnesses. The Commonwealth has provided voluminous discovery, but has not produced the following despite repeated requests:

- a. The audio-recordings of victim interviews.

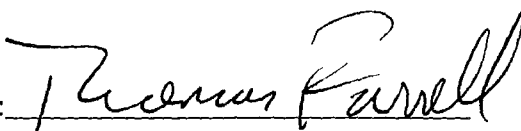
- b. The audio-recording of the October 24, 2011, interview of Joseph Paterno.
- c. Any "other wrongs" evidence the prosecution intends to offer. See PA R.Evid. 404(b)(4); June 15 Discovery Motion at para. 7.
- d. Written or recorded statements of witnesses interviewed by the Commonwealth. Pa. R. Cr. P. 573(B)(2)(a)(ii). The OAG has produced many, but has withheld more recent interview reports on the grounds that they relate to the ongoing grand jury investigation. That is not a grounds for withholding witness statements other than the transcripts of grand jury testimony or physical evidence actually presented to the grand jury. Rule 573 governs discovery "except as otherwise provided in Rule 230." Rule 573(B)(2)(a). Rule 230 addresses only "testimony before an investigating grand jury" or "physical evidence before the investigating grand jury." The Grand Jury Act's secrecy provisions likewise address only "matters occurring before the grand jury." 42 Pa.C.S.A § 4549(b). Reports of witness interviews occurring outside the grand jury are neither. Other than the grand jury provisions which do not apply here, there is no exception to the discovery rules for an "ongoing investigation"; therefore, the reports should be produced.

IV. Request for an Evidentiary Hearing.

We respectfully request an evidentiary hearing to present testimony and other evidence on the counsel and venue issues from at least the following witnesses:

- Gary Schultz
- Timothy Curley
- Cynthia Baldwin
- Lanny Davis
- Charles De Monaco
- Frank Fina
- Jonelle Eshbach
- Anthony Sassano
- Scott Rossman
- Lawrence Fox
- Walter Cohen
- Arthur Patterson

Respectfully submitted,

By: 

Thomas J. Farrell, Esquire
Farrell & Reisinger, LLC
Attorney for Gary C. Schultz
200 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219-1827

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

COMMONWEALTH OF PENNSYLVANIA, :
: No. CP-22-CR-5164-2011
v. :
: Charges: Perjury; Penalties for
GARY CHARLES SCHULTZ, : Failure to Report or to Refer
: Defendant. :
:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Omnibus
Pre-Trial Motion, was e-mailed and mailed, First Class Mail, postage pre-paid, this
1st day of November, 2012, to the following:

Bruce Beemer
Deputy Attorney General
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120
(bbeemer@attorneygeneral.gov)

Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy Mark Curley
Pa. I.D. No. 41524
429 4th Avenue, Suite 500
Pittsburgh, PA 15219
(412) 391-4071

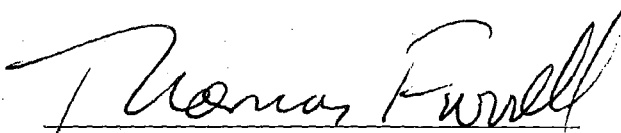

Thomas J. Farrell, Esquire
Attorney for Defendant, Gary C. Schultz

EXHIBIT A

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CP-22-CR-5164-2011
v.	:	
	:	Charges: Perjury; Penalties for
GARY CHARLES SCHULTZ,	:	Failure to Report or to Refer
	:	
Defendant.	:	

AFFIDAVIT OF GARY C. SCHULTZ

1. I, Gary C. Schultz, am the defendant in this case.
2. In December 2010, Cynthia A. Baldwin, General Counsel for the Pennsylvania State University ("PSU") called me and informed me that she had been contacted by the Office of the Pennsylvania Attorney General ("OAG") about a grand jury subpoena for my testimony. At the time, I was retired from PSU, having retired in June 2009. She asked if I would authorize her to accept service of a subpoena from the OAG, and I agreed to so authorize her.
3. The date for my grand jury testimony was January 12, 2011, and Ms. Baldwin suggested we meet before then.
4. Ms. Baldwin never told me that an option might be submitting to an interview rather than testifying before the grand jury.
5. I met with Ms. Baldwin at her office in Old Main on January 5, 2011. Only she and I were in attendance. Ms. Baldwin informed me that the grand jury investigation focused on Jerry Sandusky, not on me or PSU, and that I was being called purely as a witness. She told me that this was the second or third grand jury to

look into Jerry Sandusky's actions. She informed me that I would be asked about an event that happened in the early 2000s.

6. Ms. Baldwin told me that neither I nor PSU were under investigation. Ms. Baldwin told me that she had interviewed Tim Curley and Joe Paterno, and their memories were consistent with mine. She explained that I was entitled to have legal counsel in the grand jury. She said that I could consult with my attorney during the testimony, but the attorney could not address the grand jury. She said that I could have outside counsel, if I wished, but at that point, seeing that all the stories were consistent, she could represent me, Tim Curley and Joe Paterno as well. I responded that I would not know who to call and that if Ms. Baldwin was fine with it, so was I.

7. I told her what I remembered and expressed frustration over my lack of memory. I suggested that I talk to Tim Curley, Joe Paterno or Graham Spanier to refresh my memory, but Ms. Baldwin told me that I should not talk to anyone about this. She said that any reasonable person would understand my failure to recall.

8. I also told her that I might have had a file on Sandusky, that it might still be in my former office, and that it might help refresh my memory. Ms. Baldwin told me that she did not want me to look for or review any materials.

9. Ms. Baldwin also told me that PSU and I were not targets of the investigation and that I would be treated as a witness. There never was any discussion of the Fifth Amendment privilege or the risk of self-incrimination.

10. I believed that Ms. Baldwin was representing me during and in connection with the grand jury proceedings and that she was looking out for my best interests. Based on her representations, I did not believe I needed a separate lawyer.

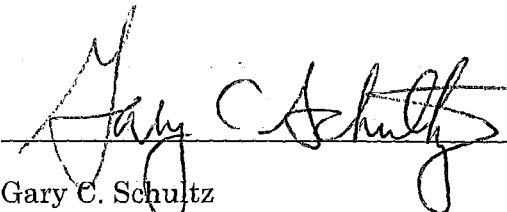
11. When I arrived at the grand jury on January 12, 2011, Ms. Baldwin accompanied me to the interview by prosecutors before I testified. Prosecutors were

hostile and challenged my recollection of events, indicating that they had evidence that Jerry Sandusky had anally raped the boy in the shower. During this time, I fully believed that Attorney Baldwin was my attorney and representing my best interests. After the interview, she did not advise me to exercise my Fifth Amendment right or to retain separate counsel.

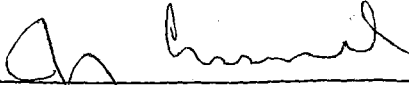
12. Ms. Baldwin first told me that I should retain separate counsel approximately one week before charges were filed against me.

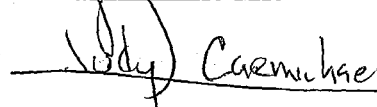
13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on, October 25, 2010



Gary C. Schultz





Judy Carmichael

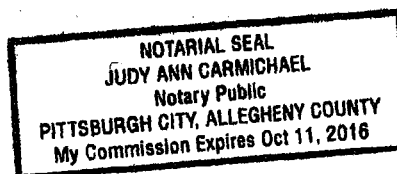


EXHIBIT B

PENNSYLVANIA STATE POLICE CONTINUATION SHEET SUPPLEMENTAL INVESTIGATION REPORT		<input checked="" type="checkbox"/> INCIDENT <input type="checkbox"/> OTHER		08/07/00-11/20/08		007-1140100	
ATTACHMENTS:		<input type="checkbox"/> MISSING PERSON CHECKLIST <input type="checkbox"/> FELONY CRIMES AGAINST THE PERSON <input type="checkbox"/> STATEMENT FORM(S) <input type="checkbox"/> VICTIM WITNESS ASSISTANCE GUIDE RECEIPT <input type="checkbox"/> RIGHTS WARNING AND WAIVER <input type="checkbox"/> PROPERTY RECORD <input type="checkbox"/> OTHER		DISP: <input type="checkbox"/> CLEARED BY ARREST <input type="checkbox"/> UNFOUNDED <input type="checkbox"/> EXCEPTIONALLY CLEARED - DATE A <input type="checkbox"/> DEATH OF ACTOR D <input type="checkbox"/> VICTIM REFUSED TO COOPERATE B <input type="checkbox"/> PROSECUTION DECLINED E <input type="checkbox"/> JUVENILE IN CUSTODY C <input type="checkbox"/> EXTRADITION DENIED F <input type="checkbox"/> NOT APPLICABLE G <input type="checkbox"/> MULTIPLE CLEAR-UP		TIME(S) OF INCIDENT: 0100-2400 JUVENILE <input type="checkbox"/> DOMESTIC VIOLENCE <input type="checkbox"/>	
1. ORIGINATING AGENCY: PAPSP7400/Rockview				2. DATE OF REPORT: 01/20/11			
3. OFFENSE: Indecent Assault				4. VICTIM: Aaron Scott FISHER			
5. NARRATIVE INTERVIEW: Joseph Vincent PATERNO: On 01/12/11 at 0840 hrs at the Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed PennState Head football coach Joseph Vincent PATERNO, W/N/M-84, DOB: 12/21/26 of [REDACTED]. Deputy Attorney Generals Frank FINA and Jonelle ESHBACH were present as well as PATERNO's attorney Joshua LOCKE and PATERNO's son Scott PATERNO. PATERNO related he remembered of Mike MCQUEARY coming to him a year or two after SANDUSKY retired and telling him that he saw SANDUSKY in the locker room doing something inappropriate with a young boy. PATERNO related he believed MCQUEARY was a graduate assistant at the time. PATERNO related that MCQUEARY did not give him any specific details about the incident however he remembered MCQUEARY being upset about what he saw. PATERNO related he thought MCQUEARY contacted him on a Saturday but was not sure. PATERNO related he passed the information on to Tim CURLEY, The PennState Athletic Director via phone a day or two later. PATERNO related he did not have any meetings about the incident and he did not know what happened after he advised CURLEY. PATERNO related he informed CURLEY because he thought he was the proper authority due to the fact that he was The Athletic Director for PennState. PATERNO related he did not hear any rumors about SANDUSKY and inappropriate acts. PATERNO related he did not ever witness SANDUSKY do anything inappropriate with kids. PATERNO related he participated in a few Second Mile fundraisers that SANDUSKY was present however he did not witness anything inappropriate. PATERNO related SANDUSKY maintained an office in the Lasch building on PennState until a year or two ago. PATERNO related he believed that SANDUSKY no longer had an office anywhere on PennState Campus. I asked PATERNO if he knew why SANDUSKY retired and PATERNO said SANDUSKY told him that it was time for SANDUSKY to move onto other things. INTERVIEW: TIMOTHY Mark CURLEY: On 01/12/11 at 0920 hrs at Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed PennState Athletic Director Timothy Mark CURLEY, W/N/M-56, DOB: 04/28/54 of [REDACTED] in the presence of PennState General Counsel Cynthia BALDWIN. CURLEY related he became the Athletic Director for the Pennsylvania State University in 1993 and has remained in that position ever since. CURLEY related he remembered being notified in early 2000 by Joseph PATERNO of an incident. CURLEY related PATERNO requested a meeting with him and Gary SHULTZ to discuss the incident. CURLEY related the incident involved something inappropriate with SANDUSKY. CURLEY related he passed the information onto the president of the university Graham SPANIER. CURLEY related he and SCHULTZ met with Michael MCQUEARY and discussed what MCQUEARY witnessed. CURLEY related MCQUEARY informed them that he observed SANDUSKY horsing around in the shower with a young boy. CURLEY related there was no mention of sexual acts. CURLEY related it seemed to be something that could have been misconstrued and was inappropriate behavior at best. CURLEY related he and SCHULTZ met with SPANIER a short time later to discuss the incident. CURLEY related he came up with a recommendation plan to address the issue and SPANIER approved it. CURLEY related the first part of the plan was for him to meet with SANDUSKY and advise him that he was no longer allowed to bring kids onto the PennState and use the facilities. The second part of the plan was for him to meet with Dr Jack RAYKOVITZ, the director of the Second Mile program and advise him of the incident. CURLEY related he did both of these things and took care of the incident. CURLEY related when he spoke to SANDUSKY he first related he was not even sure if he was even there then a day or two later SANDUSKY came back and related he was there. CURLEY related that these meetings all took place within a few weeks after MCQUEARY told them of the incident. I asked CURLEY to describe the meeting with MCQUEARY in more detail. CURLEY related MCQUEARY told him that he was in the coach's locker room and he heard people in the shower. CURLEY related MCQUEARY said he looked through the mirror and saw SANDUSKY in the shower with a young boy wrestling around, horse playing. CURLEY related he did not report it to the police department because he informed SPANIER. CURLEY related that he advised PATERNO, SCHULTZ, SPANIER and MCQUEARY of the recommendation plan and action. CURLEY related that this was the only incident he knew about involving SANDUSKY and inappropriate behavior with kids. CURLEY related they did not seek legal counsel at the time they addressed the issue. CURLEY related he first heard about this investigation in the fall of 2010. CURLEY related they did not have any meetings on the issue after the issue was addressed back in 2000 or since then. CURLEY related he did not take any keys from SANDUSKY to restrict his access and they did not inform anyone else of the restriction on SANDUSKY.							
OFFICER'S NAME/SIGNATURE: Trooper Scott F.C. ROSSMAN		BADGE NO.: 0491		7. INVEST. RECM. <input checked="" type="checkbox"/> CONT. <input type="checkbox"/> TERM.		8. SUPV. INIT. BADGE NO. [REDACTED]	
				9. <input checked="" type="checkbox"/> CONCUR <input type="checkbox"/> NONCONCUR		10. PAGE 44	

EXHIBIT G-102

SP 7-0051 (3-98)		REPORT TYPE <input checked="" type="checkbox"/> INCIDENT <input type="checkbox"/> OTHER		DATE(S) OF INCIDENT 08/01/08-11/20/08		INCIDENT NO. GDT-146185	
PENNSYLVANIA STATE POLICE CONTINUATION SHEET <input type="checkbox"/> SUPPLEMENTAL INVESTIGATION REPORT <input checked="" type="checkbox"/>				TIME(S) OF INCIDENT 0100-2400		JUVENILE <input type="checkbox"/> DOMESTIC VIOLENCE <input type="checkbox"/>	
ATTACHMENTS: <input type="checkbox"/> FELONY CRIMES AGAINST THE PERSON <input type="checkbox"/> VICTIM/WITNESS ASSISTANCE GUIDE RECEIPT <input type="checkbox"/> PROPERTY RECORD <input type="checkbox"/> OTHER		<input type="checkbox"/> MISSING PERSON CHECKLIST <input type="checkbox"/> STATEMENT FORM(S) <input type="checkbox"/> RIGHTS WARNING AND WAIVER		DISP.: <input type="checkbox"/> CLEARED BY ARREST <input type="checkbox"/> UNFOUNDED <input type="checkbox"/> EXCEPTIONALLY CLEARED-DATE <input type="checkbox"/> DEATH OF AGTOR <input type="checkbox"/> VICTIM REFUSED TO COOPERATE <input type="checkbox"/> PROSECUTION DECLINED <input type="checkbox"/> JUVENILE IN CUSTODY <input type="checkbox"/> EXTRADITION DENIED <input type="checkbox"/> NOT AFFORDABLE <input type="checkbox"/> MULTIPLE CLEAR UP			
1. ORIGINATOR PAPSP/400/Rockview		2. DATE OF REPORT 01/20/11					
3. OFFENSE Indecent Assault		4. VICTIM Aaron Scott FISHER					
5. NARRATIVE							
<p>INTERVIEW: Timothy Mark CURLEY CONTINUED:</p> <p>CURLEY further related he believed that SANDUSKY retired because his time was torn between coaching and the Second Mile program. CURLEY related SANDUSKY decided to go in the direction of the Second Mile that SANDUSKY founded many years ago.</p> <p>INTERVIEW: Gary Charles SCHULTZ:</p> <p>On 01/12/11 at 0935 hrs at Grand Jury located at Strawberry Square Harrisburg, PA Agent SASSANO and I interviewed the former Executive Senior Vice President of Finance Gary Charles SCHULTZ, W/M-61, DOB: 09/13/49 of [REDACTED] in the presence of PennState General Counsel Cynthia BALDWIN. SCHULTZ related he retired from PennState in 2009. SCHULTZ related he was in charge of operations for PennState that included things like food services, health and safety and police services. SCHULTZ related he remembered that he was contacted by Tim CURLEY the Athletic Director back in 2002 and informed of an incident involving SANDUSKY. SCHULTZ related he was informed that a graduate assistant was in a locker room on campus and observed something disturbing involving SANDUSKY and a boy in the shower. SCHULTZ related a meeting was arranged and he, CURLEY, MCQUEARY and PATERNO met and discussed the incident. SCHULTZ related he did not remember all of the details however there was not any mention of any sexual acts. SCHULTZ related that MCQUEARY was very vague and spoke in general terms when he described what he witnessed. SCHULTZ related however that it was his impression based on the information he was provided that there was inappropriate sexual contact involving SANDUSKY and a minor. I asked him to explain that in more detail and he related that he had the feeling that there was inappropriate behavior, possibly messing around and maybe SANDUSKY might have grabbed genitals. SCHULTZ related he later met with CURLEY and SPANIER and discussed the incident. SCHULTZ related CURLEY came up with a recommendation to address the issue. SCHULTZ related the recommendation was for CURLEY to meet with SANDUSKY and inform him that he was no longer allowed to bring Second Mile kids on PennState campus facilities. I asked him if any other things were recommended and he said he did not believe. I asked him if the second mile was notified and he said he did not contact them and he did not believe that they had been. SCHULTZ related that he did not believe that that was part of the plan. SCHULTZ related that he thought the proper authorities were notified but he was not able to provide any information about who made the notification or who was notified. SCHULTZ related he thought Children and Youth Services was notified but did not know for sure or who might have notified them. SCHULTZ related he was not sure if the police were involved in this incident or not. SCHULTZ related that since SANDUSKY was no longer employed by PennState that is why the recommendation was to restrict him from bringing Second Mile kids onto PennState property. SCHULTZ related that he assumed that it was a second mile kid because that was the organization that SANDUSKY founded and still was involved in. SCHULTZ related the incident was discussed with attorney Wendel COURTNEY who was representing PennState at the time. SCHULTZ related he did not discuss the incident with anyone else since then. SCHULTZ related that the President of the University Graham SPANIER would have been notified of the outcome by CURLEY. I asked SCHULTZ if he was aware of any other incidents involving SANDUSKY and kids and he related that there was an incident back in 1998 in which a mother made a complaint to the PennState Police about inappropriate contact between SANDUSKY and her son while they were in the shower. SCHULTZ related he did not remember the details but it was investigated and Children and Youth Services were involved. SCHULTZ related he was later informed that the Centre County District attorney was also involved and that there were not any charges brought against SANDUSKY. I asked SCHULTZ if SPANIER was aware of the 1998 incident and he related yes. SCHULTZ related he was sure that SPANIER knew of the 1998 incident. SCHULTZ related he believed the only reason SANDUSKY retired was because of the financial benefits of the State Employees Retirement system. SCHULTZ related that he did not believe that anyone took away SANDUSKY'S keys nor was he restricted from using PennState facilities other than not being allowed to bring Second Mile kids on campus. SCHULTZ related he later met with CURLEY and MCQUEARY and advised MCQUEARY of how the incident was handled. SCHULTZ related he did not hear anything else about these incidents or any other incident involving SANDUSKY.</p>							
6. OFFICER'S NAME/SIGNATURE Trooper Scott F.C. ROSSMAN <i>[Signature]</i>		7. INVEST. RECM. <input checked="" type="checkbox"/> CONT. <input type="checkbox"/> TERM.		8. RPTV. INIT./BADGE NO. <i>[Signature]</i> 8491		9. <input type="checkbox"/> CONCUR <input type="checkbox"/> NONCONCUR	
STATION						10. PAGE 45	

EXHIBIT G-103

EXHIBIT C

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
THIRTIETH STATEWIDE INVESTIGATING GRAND JURY

IN RE: NOTICE NO. 29

TRANSCRIPT OF PROCEEDINGS
OF GRAND JURY

BEFORE: BARRY FEUDALE, SUPERVISING JUDGE

DATE: JANUARY 12, 2011, 9:04 A.M.

PLACE: STRAWBERRY SQUARE
VERIZON TOWER, EIGHTH FLOOR
WALNUT STREET
HARRISBURG, PA 17120

STEPHANIE MCCARROLL, FOREPERSON
RENEE HARTMAN, SECRETARY

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL
BY: JAMES BARKER, ESQUIRE
FRANK FINA, ESQUIRE
JONELLE ESHBACH, ESQUIRE
FOR - COMMONWEALTH

PENNSYLVANIA STATE UNIVERSITY
BY: CYNTHIA BALDWIN, ESQUIRE
FOR - TIM CURLEY AND GARY SCHULTZ

SHANNON MANDERBACH
REPORTER-NOTARY PUBLIC



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(717) 234-5922
FAX (717) 234-6190

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

1 JUDGE FEUDALE: Represented by?

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

5 JUDGE FEUDALE: Will you be providing
6 representation for both of those identified
7 witnesses?

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

11 JUDGE FEUDALE: Good morning. I'm
12 Barry Feudale. I'm a Senior Judge from
13 Northumberland County. I've been assigned by
14 Chief Justice Ronald Castille to supervise the
15 30th Statewide Investigative Grand Jury which has
16 subpoenaed both of you to appear as witnesses
17 before it.

18 As witnesses before the Grand Jury,
19 you're entitled to certain rights and subject to
20 certain duties which I am now going to explain to
21 you. All of these rights and duties are equally
22 important and it's important that you fully
23 understand each of them.

24 First, you have the right to the
25 advice and assistance of a lawyer. This means you

1 have the right to the services of a lawyer with
2 whom you may consult concerning all matters
3 pertaining to your appearance before the Grand
4 Jury.

5 You may confer with your lawyer at
6 any time before, during and after your testimony.
7 You may consult with your lawyer throughout your
8 entire contact with the Grand Jury. Your lawyer
9 may be present with you in the Grand Jury room
10 during the time you're actually testifying and you
11 may confer with her at that time.

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

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

23 Should you refuse to answer any
24 question, you may offer a reason for your refusal,
25 but you're not obliged to do so. If you answer

1 some questions or begin to answer any particular
2 question, that does not necessarily mean you must
3 continue to answer your questions or even complete
4 the answers you have started.

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

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

17 MR. CURLEY: Yes.

18 MR. SCHULTZ: Yes, sir.

19 JUDGE FEUDALE: Next, a witness
20 before the Grand Jury has the duty to give full,
21 truthful, complete and honest answers to all
22 questions asked except where the witness
23 appropriately refuses to answer on a proper legal
24 ground.

25 I'm hereby directing both of you to

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

7 So I ask you, do you have any
8 questions regarding your rights and obligations
9 before this Grand Jury?

10 MR. CURLEY: No.

11 MR. SCHULTZ: No.

12 JUDGE FEUDALE: Noting no questions,
13 please raise your right hand. You do solemnly
14 swear or affirm that the testimony you will give
15 before the 30th Statewide Investigative Grand Jury
16 in the matters being inquired into by it will be
17 the truth, the whole truth and nothing but the
18 truth. If so, say I do.

19 MR. CURLEY: I do.

20 MR. SCHULTZ: I do.

21 JUDGE FEUDALE: Any motions?

22 MS. ESHBACH: We are requesting that
23 both our agent as well as the State Trooper be
24 permitted to be present in the room.

25 JUDGE FEUDALE: That motion is

1

granted.

EXHIBIT D

<p>1 COMMONWEALTH OF PENNSYLVANIA 2 THIRTIETH STATEWIDE INVESTIGATING GRAND JURY 3 IN RE: NOTICE NO. 29 4 5 TRANSCRIPT OF PROCEEDINGS 6 OF GRAND JURY 7 8 WITNESS: GARY SCHULTZ 9 DATE: JANUARY 12, 2011, 12:02 P.M. 10 PLACE: STRAWBERRY SQUARE VERIZON TOWER, EIGHTH FLOOR WALNUT STREET HARRISBURG, PA. 17120 11 STEPHANIE MCCARROLL, FOREPERSON 12 RENEE HARTMAN, SECRETARY 13 14 COUNSEL PRESENT: 15 OFFICE OF THE ATTORNEY GENERAL 16 BY: JONELLE ESHBACH, ESQUIRE FRANK FINA, ESQUIRE 17 FOR - COMMONWEALTH 18 PENNSYLVANIA STATE UNIVERSITY 19 BY: CYNTHIA BALDWIN, ESQUIRE 20 FOR - GARY SCHULTZ 21 22 SHANNON MANDERBACH 23 REPORTER-NOTARY PUBLIC 24 25</p>	<p>1 GARY SCHULTZ, called as a witness, 2 being previously sworn, testified as follows: 3 4 EXAMINATION 5 6 BY MS. ESHBACH: 7 Q Would you please introduce yourself 8 to the Grand Jury and spell your last name for the 9 court reporter's benefit? 10 A Sure. My name is Gary Schultz; 11 S-c-h-u-l-t-z. I am a retired senior vice 12 president for finance and business at Penn State 13 University. 14 Q You are accompanied today by counsel, 15 Cynthia Baldwin; is that correct? 16 A That is correct. 17 Q When did you retire from the 18 university? 19 A In June of 2009. 20 Q In June of 2002, did you occupy that 21 position as senior vice president? 22 A Yes, I did. 23 Q Could you please explain to the Grand 24 Jury in that capacity what operations of the 25 university were under your authority?</p>
<p>1 2 INDEX 3 EXAMINATION 4 5 WITNESS 6 Gary Schultz 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 A Yes. Within an academic institution, 2 we have the chief academic officer. That's 3 commonly referred to as the provost. That's not 4 me. I really run the operations of the 5 university, the physical plant, all the facilities 6 and services of those facilities, all the housing 7 and food services; if you have ever been on Penn 8 State campus, the Nittany Lion Inn, the airport, 9 all kinds of printing and fleet, human resources, 10 university police, and all the finance elements of 11 the university which would include the controller, 12 the budget office and the investment office. 13 Q With regard to Penn State's athletic 14 program, the Grand Jury has already met the 15 athletic director. Could you explain your 16 position vis-a-vis Mr. Curley as the athletic 17 director? 18 A Yes. Mr. Curley directly reports to 19 the president of the university, but kind of a 20 day-to-day working arrangement is that he would 21 often behave like he reported to me as well. 22 Q I'd like to direct your attention to 23 a time around spring break of 2002 as it's been 24 reported to us. Do you recall being called and 25 requested to attend a meeting with Coach Paterno</p>

1	COMMONWEALTH OF PENNSYLVANIA	1	1	TIM CURLEY, called as a witness,	3
2	THIRTIETH STATEWIDE INVESTIGATING GRAND JURY		2	being previously sworn, testified as follows:	
3	IN RE: NOTICE NO. 29		3		
4			4	EXAMINATION	
5	TRANSCRIPT OF PROCEEDINGS		5		
6	OF GRAND JURY		6	BY MS. ESHBACH:	
7	WITNESS: TIM CURLEY		7	Q Would you please introduce yourself	
8	DATE: JANUARY 12, 2011, 11:20 A.M.		8	to the Grand Jury?	
9	PLACE: STRAWBERRY SQUARE		9	A Good morning, My name is Tim Curley.	
10	VERIZON TOWER, EIGHTH FLOOR		10	Q You have counsel with you?	
11	WALNUT STREET		11	A Yes, I do.	
12	HARRISBURG, PA 17120		12	Q Would you introduce her, please?	
13	STEPHANIE MCCARROLL, FOREPERSON		13	A My counsel is Cynthia Baldwin.	
14	RENEE HARTMAN, SECRETARY		14	Q Mr. Curley, how are you employed?	
15	COUNSEL PRESENT:		15	A I'm employed as the director of	
16	OFFICE OF THE ATTORNEY GENERAL		16	athletics at Penn State University.	
17	BY: JONELLE ESHBACH, ESQUIRE		17	Q How long have you been employed in	
18	FRANK FINA, ESQUIRE		18	that capacity?	
19	FOR - COMMONWEALTH		19	A As the athletic director since 1993.	
20	PENNSYLVANIA STATE UNIVERSITY		20	Q Were you with the university before	
21	BY: CYNTHIA BALDWIN, ESQUIRE		21	that?	
22	FOR - TIM CURLEY		22	A Yes, ma'am.	
23	SHANNON MANDERBACH		23	Q How long?	
24	REPORTER-NOTARY PUBLIC		24	A Since 1979 full-time.	
25			25	Q As the athletic director, does every	
1		2	1	athletic program in the university fall under your	4
2	INDEX		2	control?	
3	EXAMINATION		3	A Yes, I have an administrative	
4	WITNESS	PAGE	4	responsibility for varsity athletics, intramurals,	
5	Tim Curley	3.	5	and club sports in a variety of other areas.	
6			6	Q I'd like to direct your attention	
7			7	first to an incident which was brought to your	
8			8	attention sometime around spring break of 2002.	
9			9	Did you receive information from Coach Joseph	
10			10	Paterno about an incident that was alleged to have	
11			11	occurred on university property involving Jerry	
12			12	Sandusky and a minor male?	
13			13	A Yes.	
14			14	Q Please tell us how that information	
15			15	came to your attention the best that you can	
16			16	recall and what you did as a result of it.	
17			17	A My recollection -- and I don't know	
18			18	if it was 2002, but my recollection was that Coach	
19			19	Paterno called myself and Gary Schultz, who is the	
20			20	senior vice president, and said he needed to meet	
21			21	with us, that he wanted to report something to us,	
22			22	so we went over, the two of us together, met with	
23			23	him, and he -- do you want me to --	
24			24	Q Yes, please.	
25			25	A Coach Paterno indicated that he had	

EXHIBIT E



Special Report: Penn State counsel Cynthia Baldwin's role before grand jury could affect Tim Curley and Gary Schultz's perjury case, experts say

Published: Thursday, February 02, 2012, 1:00 AM Updated: Thursday, February 02, 2012, 5:31 PM



SARA GANIM, The Patriot-News

By

When top Penn State officials **Tim Curley and Gary Schultz testified before a grand jury** in the **Jerry Sandusky child sex abuse investigation**, both men apparently thought they had an attorney.

She was Cynthia Baldwin, in-house legal counsel for Penn State University.

It is reflected in the transcript of their testimonies:

"Good morning, my name is Tim Curley."

"Do you have counsel with you?"

"Yes I do. ... My counsel is Cynthia Baldwin."

Schultz was asked: "You are accompanied today by counsel, Cynthia Baldwin. Is that correct?"

"That is correct."

But Baldwin says she was not representing either man, according to Lanny Davis, the high-profile Washington lawyer **hired to represent Penn State in the wake of the Sandusky scandal**.

Instead, Davis said, Baldwin was in the grand jury room Jan. 12, 2011, strictly on behalf of the university, and not as legal counsel for Schultz and Curley.

Legal experts say Baldwin's role before the grand jury could affect the case or Baldwin personally.



[View full size](#)

CHRIS KNIGHT, The Patriot-News

Penn State counsel Cynthia Baldwin during the Penn State University board of trustees meeting at the Nittany Lion Inn in State College on Jan. 20.

EXHIBIT F



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ATTORNEYS AT LAW

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Email Address: cdeмоноco@foxrothschild.com

June 22, 2012

Thomas J. Farrell, Esquire
Farrell & Reisinger, LLC
200 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219-1827

Re: Commonwealth v. Gary C. Schultz

Dear Mr. Farrell:

Please be advised that I am in receipt of your letter dated June 1, 2012. As you know and in accordance with existing Office of General Counsel, University, and National Association of College and University Attorneys policy, 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.

Please be further advised that I sent your letter to Frank Guadagnino of Reed Smith, Michael Mustokoff and Daniel Walworth of Duane Morris, Joseph O'Dea of Saul Ewing and Greg Paw of the Freeh Group, who all serve as outside counsel to the University. Those counsel are responsible for providing responsive documents to the federal and state grand juries and interacting with federal and state prosecutors.

Sincerely,

Charles A. De Monaco

CAD:md

PT1 591466v2 06/22/12

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EXHIBIT G-118

EXHIBIT G

PENN STATE

Confidential



Date:

2/12/01

From:

Gary C. Schultz

To:

Talked w TMC

reviewed 1998 history

- agreed TMC will discuss w JUP & advise we think TMC should meet w JS on Friday.*
- unless he expresses to having a problem TMC will indicate we need to have PPW 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 G-120

- 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 ??

Tim Curley, Re: Fwd: Confidential

To: Tim Curley <tmc3@psu.edu>
From: Joan Coble <jlc9@psu.edu>
Subject: Re: Fwd: Confidential
Cc:
Bcc:
Attached:

Thx. Tim. Joan

At 10:48 AM 3/7/01 -0500, you wrote:

I just gave him the update.

At 08:54 AM 3/7/01 -0500, Joan Coble wrote:

Tim - Have you updated Gary lately? Before he left for FL, he asked me to ck. w/you re this.

Pls. know that he is doing e-mail, but will not be reading until Sun., 3/11. He is spending a few days with Dave Schuckers and you may either phone him on his cell phone at 777-7393 or @ Schuckers at 941/388-3034. Pls. know that the Schuckers live in a Condominium & you may have to go through some referrals to get to speak w/them, so be patient if you go that route.

Thx. Joan

X-Sender: gcs2@imap.cac.psu.edu
X-Mailer: QUALCOMM Windows Eudora Version 4.3.2
Date: Mon, 26 Feb 2001 08:57:16 -0500
X-PH: V4.1@f04n01
To: TMC3@psu.edu
From: "Gary C. Schultz" <gcs2@psu.edu>
Subject: Confidential
Cc: jlc9@psu.edu

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.

Gary C. Schultz
Senior Vice President for
Finance & Business/Treasurer
Penn State University
208 Old Main
University Park, PA 16802
814/865-6574
814/863-8685 (fax)

Tim Curley, Re: Fwd: Confidential

<http://www.psu.edu/dept/fab>

Joan L. Coble
Administrative Assistant
Office of the Senior Vice President for
Finance & Business/Treasurer
208 Old Main
University Park, PA 16802
814/865-6574 (phone)
814/863-8685 (fax)
<http://www.psu.edu/dept/fab>

If TMC hasn't updated GCS by next wk. (3/6), JLC to ask TMC to send GCS
an e-mail to update re status of enclosed.

CONFIDENTIAL

Gary C. Schultz, 01:57 PM 2/26/2001 -0500, Confidential

To: TMC3@psu.edu
From: "Gary C. Schultz" <gcs2@psu.edu>
Subject: Confidential
Cc: Coble-Joan(JLC)
Bcc:
X-Eudora-Signature: <Standard>
Date: Mon, 26 Feb 2001 13:57:16 -0500

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.

THE SECOND MILE

HOME TOUR VOLUNTEER CONTRIBUTE SIGN-UP CALENDAR CONTACT US

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- Matt Millen - Fox Sports NFL Commentator
- Michael Murphy - Chairman, Cable Management Ireland Ltd.
- Arnold D. Palmer - President, Arnold Palmer Enterprises
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- Dr. John Reidell - President, The Second Mile (Retired), General Surgeon
- William Schreyer - Chairman of the Board, Merrill Lynch (Retired)
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- Richard Verneil - St. Louis Rams Head Coach
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General inquiries to office@thesecondmile.org
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2/12/2001 11:10 AM

EXHIBIT G-127

And the questions remain: How could confusion reign about something so fundamental to the judicial system?

Why was Baldwin allowed in the grand jury room if she was only representing Penn State?



Enlarge

JOE HERMITT, The Patriot-News

Former Penn State athletic director Tim Curley, center, and Gary Schultz, interim senior vice president for finance and business at Penn State University, left, enter District Judge Wenner's court room for their arraignment on perjury charges stemming from the Grand Jury investigation of former Penn State assistant coach Jerry Sandusky. JOE HERMITT, The Patriot-News

Penn State's Tim Curley and Gary Schultz arraigned on charges related to Jerry Sandusky case gallery (8 photos)

Baldwin says it was all a big misunderstanding — that Schultz and Curley were simply mistaken, according to Davis.

"I believe, having looked into the overall situation, this can be explained by the innocent reality of misunderstanding, stress and incomplete information," Davis said Wednesday.

Davis agreed "it is unusual for a lawyer to be present at a grand jury." But, he said: "At a state grand jury in Pennsylvania, it is up to the discretion of the judge to permit a lawyer to be present. The judge asked Cynthia, 'Who are you representing?' She said, the university. And he said, 'You may listen if you wish.' She said, 'Thank you.' "

David added, "As general counsel, she felt a responsibility to represent and

understand — for the university's interests — their testimony."

Then-head coach **Joe Paterno** appeared before the grand jury the same day with Joshua Locke as his counsel. Baldwin was not there.

If she felt responsible to understand the testimony from Curley and Schultz on behalf of the university, why didn't Baldwin feel the same about Paterno?

"Curley and Schultz were senior officers, they were members of the administration," Davis said. "She felt it was her responsibility because she represented the university as general counsel." By contrast, Paterno "was not a member of the administration."

Davis said she also noted that Paterno was with two attorneys — his son Scott Paterno and Locke.

'HER OBLIGATION'

One year later, Penn State is working to recover from the scandal that led to the ouster of Paterno and **former President Graham Spanier**.

Sandusky awaits trial on charges of sexually abusing 10 young boys, including two allegedly assaulted in the football building on campus. Curley and Schultz stand charged with failure to report Sandusky to the proper authorities and lying to the grand jury. All three men maintain their innocence.

Baldwin, a former Pennsylvania Supreme Court justice, would not comment for this story, but authorized Davis to speak for her.

The confusion over her role began in December 2010 when Baldwin received the grand jury subpoenas for Curley, Schultz, Spanier and Paterno. Davis said Baldwin accepted them "as a common courtesy" and agreed to deliver them to the four men.

Curley and Schultz came to her office separately to pick up their subpoenas. According to Davis, Baldwin said she then told each man: "You know, I represent the university. You can get your own lawyer."

With that, Davis said, Baldwin believed she had fulfilled "what she believed her obligation is."

After Baldwin informed Paterno of his subpoena, according to Davis, she gave his son Scott the same message — that she represented the university and the coach could get his own lawyer.

"We have a different understanding of the process by which Coach Paterno engaged legal counsel," said Wick Sollers, the Paterno family's lawyer. Sollers said the family did not want to elaborate further while grieving the loss of Paterno, **who died of complications from lung cancer on Jan. 22**.

Curley and Schultz did not get an outside lawyer for their grand jury testimony.

Weeks after handing them their subpoenas, Baldwin drove Curley and Schultz to Harrisburg for their grand jury appearance — again "as a courtesy," Davis said, since she was attending on behalf of the university.

The three arrived together: Baldwin, Schultz, who was Penn State's vice president for finance and business, and Curley, who was Penn State's athletic director.

They went in together.

Curley and Schultz met with no other attorneys at the offices of the attorney general in Strawberry Square where the grand jury met.

When Baldwin signed in, Davis said, she signed in as representing Penn State.

Before the grand jury began, the witnesses and attorneys went into Judge Barry Feudale's chambers. (A judge does not preside at a grand jury, but swears in witnesses beforehand.)

In chambers, Davis said, Feudale asked Baldwin whom she represented.

"The Penn State University," Davis said she replied.

Then, Davis said, Baldwin walked into the grand jury room. She did not seek special permission as an outside observer for an interested party — in this case, Penn State — Davis said. She simply received the judge's okay and walked in, according to Davis.

As Curley and Schultz each began, they stated on the record that they were accompanied by "counsel" or "my counsel" Cynthia Baldwin, who sat with each as they testified.

Davis said Baldwin "does not remember hearing" those answers.

Even if she had, Davis said, "at that moment in time, she would not feel it appropriate to speak up and correct it with witnesses being questioned." Davis said she would have remained silent in the moment out of deference to the grand jury process.

Did Baldwin talk to the two men later — for example, during their 90-minute ride together back to Happy Valley — to clarify her role?

"She said no," Davis said.

In other words, the series of events, as described by Baldwin through Davis, played out like this:

- December 2010: Baldwin tells Curley and Schultz she "represents the university" and they can get their own attorneys.
- January 2011: Baldwin drives them to the grand jury. On the trip, the three apparently do not discuss the investigation or who will represent the two men.
- In the judge's chambers: After Baldwin announces she is representing Penn State, she is simply allowed to walk into the grand jury room to listen to the testimony of Curley and Schultz even though she has not said she represents them.
- In the grand jury room: Baldwin doesn't remember hearing Curley and Schultz identify her as counsel.

Baldwin skips Paterno's testimony.

- On the drive home: The subject of representation doesn't come up.

'A DUTY TO CLARIFY'

Questions about Baldwin's role **were first raised in a Patriot-News story on Nov. 19**, two weeks after Sandusky, Curley and Schultz were indicted. The story referred to Baldwin's apparent "dual representation" of the men and the university.

At the time, the university raised no public concerns about the story.

Last month, after Baldwin announced **she would soon be stepping down as Penn State counsel**, the university first disputed the idea that she represented Schultz and Curley at the grand jury.

Several prominent attorneys asked by The Patriot-News about the secret grand jury process said lawyers would not normally be allowed in the room to hear testimony unless they were representing the client on the stand.

It would be exceptional, these experts said.

Think of it this way: Could Jerry Sandusky's lawyer, Joe Amendola, or a lawyer for Sandusky's Second Mile charity have walked in to listen to the testimony of the alleged victims?

Baldwin had an obligation to correct Curley and Schultz when they identified her as counsel, Geoffrey Hazard said. The law professor at the University of California is recognized for his knowledge of legal ethics and is not involved in the grand jury investigation.

"One of the fundamentals is, 'Who is your client?' " Hazard said. "She had every right, and indeed a duty to clarify that. ... She and the university might be [subject to claims] somewhere down the line."

Attorneys for Schultz and Curley, retained in late October, declined comment for this story. However, Walter Cohen, a former Pennsylvania attorney general closely following the Sandusky case, said he thinks that if there was confusion over Baldwin's role — whomever is to blame — it could be a fatal blow to the prosecution.

Schultz and Curley could have invoked the Fifth Amendment if they believed they were at risk for prosecution based on their testimony, several attorneys said.

"If she was not representing them, they shouldn't have let her into the room," Cohen said.

"You have a right to have counsel of your choice in the room with you if you are testifying before the grand jury," Cohen said. "It's serious."

When called for comment, the attorney general's office said it could not discuss an ongoing grand jury investigation.

Hazard and Jules Epstein, an associate professor of law at Widener Law School, aren't sure that the testimony from Curley and Schultz about their legal representation will have an effect on the case.

The right to effective counsel only applies after someone is charged, Epstein said, not during an investigation. And Hazard added, there is no indication that Baldwin told them not to tell the truth.

However, Hazard said Baldwin could face consequences from the bar association if she is found to have acted inappropriately.

"This could be a real mess," he said. "They might well have [pleaded the Fifth]. I don't think it prejudices prosecution, but it might cause her problems."

IMPACT DOWNPLAYED

Immediately after Curley and Schultz were arrested on Nov. 7, the university pledged not only the school's moral support but support for their legal defense.

"With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support," Spanier said in a statement. "I have known and worked 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."

University spokeswoman Lisa Powers emphasized that, since the allegations concerned how Schultz and Curley fulfilled their responsibilities as top Penn State officials, the university would pay for their defense.

Spanier, who was forced to resign by the trustees after the scandal broke, testified before the grand jury in April. As before, Davis said Baldwin traveled with Spanier to Harrisburg and sat in on his grand jury testimony as a representative of the university.

An assistant to Spanier's attorneys said they were unavailable to comment on this story.

Less than a week before the charges against Sandusky became public, Joe Paterno, Spanier and Curley were standing inside the Penn State football press room, surrounded by hundreds of reporters **celebrating the coach's 409th victory** — an all-time record in major college football.

Spanier leaned in to Paterno and told him they needed to talk soon about the Sandusky investigation, sources close to the football program said.

The coach apparently didn't hear him. Paterno was promptly whisked away by his handlers.

The next day — six days before charges would be announced — Spanier and Baldwin were first made aware that Schultz and Curley would be charged with lying to investigators and failing to report child abuse, sources said.

That same night, Spanier called Paterno and canceled their meeting, sources said.

Up to that point, Spanier had downplayed any possible impact of the Sandusky investigation on Penn State. In a May briefing, Spanier reportedly gave trustees the impression that the investigation was little to be concerned about and mainly involved Sandusky's activities in connection with Second Mile, not Penn State.

Which leads back to Baldwin's presence in the grand jury room.

"If it had nothing to do with Penn State, why was she even there?" Walter Cohen asked.

Davis said Baldwin was bound by grand jury secrecy rules to keep quiet about the testimony she heard.

"She was between a rock and a hard place as an attorney allowed to sit in on the grand jury and had to follow Pennsylvania law not to reveal to the board of trustees the content of the testimony," Davis said.

Davis said that Baldwin specifically cited the March article in The Patriot-News during her May briefing to the trustees. The article detailed the alleged 1998 assault in the Penn State football locker room showers that was part of the investigation.

Several board members said they had never read the story, which reported that Paterno, Curley and Schultz had all testified.

Spanier was not bound by any secrecy rule regarding his own testimony.

"The grand jury secrecy does not apply to witnesses — or their counsel if the witness doesn't want to invoke secrecy," Cohen said. "They can go out and hold a press conference as to what they say."

Davis' response?

"He could have, and chose not to."

This story has been updated from an earlier version.

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EXHIBIT H

Timothy M. Curley and Gary C. Schultz
Defendants

**IN THE COURT OF COMMON PLEAS,
DAUPHIN COUNTY, PENNSYLVANIA**

**AFFIDAVIT OF ARTHUR H.
PATTERSON, PH.D. IN SUPPORT OF
DEFENDANTS' MOTION TO REQUEST
SUPPLEMENTAL VOIR DIRE
MEASURES**

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

QUALIFICATIONS

2. In my current position, I both consult and supervise the consulting activities of consultants at DecisionQuest, a firm whose business (among many services) is to study the social and psychological processes that are involved in jury trials. DecisionQuest assists litigators in understanding the attitudes, perceptions, and decision-making processes of jurors, including any biases and prejudices those jurors may bring to the courtroom.
3. I have a B.A. degree (with Honors in Psychology) from Clark University in Worcester, Massachusetts. My M.A. and Ph.D. are in Social Psychology from Northwestern University in Chicago, Illinois. I was previously a tenured Associate Professor of Administration of Justice at the Pennsylvania State University.
4. I have provided jury consulting services to counsel for both plaintiffs and defendants in civil trials, criminal defense counsel, public defenders, and federal and state prosecutors in federal and state court cases throughout the United States.

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

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

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

7. DecisionQuest has offices in Atlanta, Boston, Chicago, Los Angeles, Minneapolis, New York, Philadelphia, State College, Pennsylvania, and Washington, DC.
8. DecisionQuest is a firm engaged in the business of understanding the social and psychological processes involved in juror behavior. DecisionQuest maintains a full-time staff of Ph.D. specialists in psychology, social psychology, sociology, communication sciences, statistics, computer analysis, and research design. DecisionQuest assists attorneys in understanding the perceptions that jurors bring with them into the courtroom. These may include certain biases and prejudices.
9. The principals of DecisionQuest have conducted research in more than 14,000 civil and criminal cases throughout the United States and abroad. Over the last 25 years, we have frequently been asked to analyze venue questions, particularly to determine a party's ability to obtain a fair trial in a given venue.
10. At the request of counsel for Gary C. Schultz and Timothy M. Curley, a venue study was commissioned to investigate the extent and impact of pretrial publicity in the above-styled case.

SURVEY METHODOLOGY

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

12. Between September 6 and 27, 2012, jury-eligible residents of the jurisdictions of Dauphin, Erie, Chester, and Luzerne Counties, Pennsylvania were contacted using random digit dialing with replicate sampling. Replicate sampling is a standard technique used for academic and legal research that maximizes the representativeness of the sample.
13. The sample was built in replicates of 400 telephone numbers each for the Dauphin study and 300 each for the Erie, Chester and Luzerne study. The replicates were randomized. This gives each household with a telephone an equal opportunity to participate in the survey.
14. Bennett Research completed 710 interviews, 410 in Dauphin County and 100 each in Erie, Chester, and Luzerne Counties. Each phone number was dialed four times for the Dauphin study and six times for the Erie, Chester and Luzerne study, or until the number was resolved (whichever came first). A resolved number is a number where the respondent completed the survey, a number was found to be a disconnected phone, or some other final resolution. Calls were made on both weekdays and weekend days and at different times during the day beginning at or after 11:00 AM and ending at or before 9:00 PM respondent time.
15. The sample size was determined to obtain a margin of error of approximately 5% for Dauphin County.
16. In conjunction with another venue study, Dr. Robert F. Bettler, Jr., Ph.D. of DecisionQuest visited Bennett Research's call center in Pocatello, Idaho, on October 7 and 8, 2004, and observed their operation.

- a. As part of his observations, he reviewed their training and operation manuals used to train the interviewers and guide their interviewing procedures.
- b. In this visit he confirmed that nothing in the training revealed to the interviewers the purpose of this research. In that study, as in the present one, he ascertained that all Bennett personnel at all levels were blind as to the purpose and sponsorship of the research.
- c. He randomly monitored several hours of live calls.
- d. He randomly monitored call supervisors and quality controllers. Bennett managers inform us that they randomly monitor 10% of all completed interviews for quality control purposes and another 15% of randomly selected respondents are called back to check the validity of the interviewing records. Both of these operations were observed by Dr. Bettler.
- e. To the best of his knowledge, it was his observation that managers, supervisors, programmers, and interviewers at all levels of the organization followed appropriate methodological procedures. Bennett assures us that in the interim nothing has changed about their methodology.

17. Respondent suitability.

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

18. Instrument design.

- a. DecisionQuest created the survey instrument in accordance with established guidelines.
- b. A complete copy of the survey instrument is included as Exhibit 2 to this affidavit.

19. Supplemental analyses, readability.

- a. To ensure respondents understood the questions posed to them, the survey text was analyzed using Microsoft Word's built-in readability statistics.
- b. By this measure, the text had a Flesch-Kincaid Grade Level of 5.6, meaning that an elementary school student in the latter half of the 5th grade should be able understand the survey.

20. Supplemental analyses, interview break-offs.

- a. At various points in the interview a small number of respondents terminated the survey. Out of 765 who began the interview, 55 broke off, or 7% of the total.
- b. This is an unusually low number, as compared to other venue studies DecisionQuest has conducted, and could be an indirect indicator of the strength of the feelings Pennsylvanians have about this case.

21. Supplemental analyses, order effect.

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

- b. To check whether the order of these options had any impact on the presumption of guilt, a statistical analysis was conducted on this order effect.
- c. No difference in the guilty versus not guilty or "don't know" responses was observed as a function of this response option order.

22. Supplemental analyses, gender and age.

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

- i. Gender:

- a. Men were more likely to recall one of the defendants' names or titles freely, but on the second prompt, when respondents were reminded of the names and charges, men and women were equally likely to recall the cases. Since any prospective jurors called for the case will also be reminded of the defendants' names and the charges against them, the difference observed in free recall in this study is inconsequential.
- b. There was no gender difference in presumptions of guilt or innocence: With both men and women, over 60% of the respondents felt the defendants were guilty.

ii. Age:

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

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

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

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

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

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

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

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

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

PRINCIPAL FINDINGS

25. The focus of this venue evaluation was a comparison of the responses of potential jurors in four Pennsylvania counties to questions in five general categories:

- a. Familiarity with the case,
- b. Presumptions about the guilt of the defendants,
- c. The extent of exposure to pretrial publicity and impressions of the evidence against the defendants,
- d. Familiarity with and reactions to the Freeh report, and
- e. Beliefs and opinions related to the case.

26. Familiarity with the case.

- a. Familiarity with the case was gauged in two ways. First, respondents were asked whether they could freely recall the names or titles of the defendants. Then, respondents were prompted with the names and titles of the defendants and asked whether they were familiar with the defendants' cases.

	Dauphin	Luzerne	Chester	Erie
Familiarity* (unprompted recall)	32.3%	21.2%	23.6%	11.5
Familiarity (prompted recall)	85.8%	80.6%	85.3%	68.3%

*NOTE: In this and the following tables the wording of the survey questions has been abbreviated. See Exhibit 2 for full wording.

- b. Only a minority in each county was able to recall the defendants' names or titles without a prompt. On the other hand, given a minimal prompt, large majorities in all four counties reported they were familiar with the cases of defendants Curley and Schultz.
- c. Note that if respondents denied any familiarity with the case after this prompt, they exited the interview.

27. Presumptions about guilt.

	Dauphin	Luzerne	Chester	Erie
Curley: Definitely or probably guilty*	65.0%	72.3%	68.9%	75.7%
Schultz: Definitely or probably guilty	65.6%	78.0%	70.5%	81.4%

*NOTE: As described above in the methodology section, a small number of respondents broke off the interview at various points. The percentages given in this and the following tables are for respondents remaining at this point in the survey.

- a. Large majorities in all four counties reported feeling that the defendants are definitely or probably guilty.
- b. Respondents were also asked whether they thought "...most people in your county would feel that Curley and Schultz are guilty of these

crimes.” By large margins in all four counties people reported that this would indeed be the case.

	Dauphin	Luzerne	Chester	Erie
Definitely or probably yes	73.2%	74.4%	70.5%	78.6%
Definitely or probably no, Don't know, not sure	26.8%	25.6%	29.5%	21.5%

28. Exposure to pretrial publicity and impressions of the evidence against the defendants.

- a. Exposure to pretrial publicity was assessed in a series of questions, asking respondents whether they had read or heard about the Curley and Schultz cases from any of six different media sources.

	Dauphin	Luzerne	Chester	Erie
TV reports	75.7%	82.5%	71.4%	58.8%
Newspaper reports	66.0%	81.2%	71.4%	64.7%
Radio reports	37.3%	33.7%	40.0%	26.5%
Internet reports or 'blogs	21.5%	15.0%	28.6%	2.9%
Word of mouth, conversations	62.9%	63.7%	63.1%	41.2%
Emails	7.6%	3.7%	15.5%	1.5%

- b. Over 90% of the respondents reported having heard or read about the charges against defendants Curley and Schultz from at least one source.

Only 49 people, or 8.6%, denied exposure to all six sources of pretrial publicity.

- c. Given this level of exposure, many have formed the impression that there is substantial evidence against defendants Curley and Schultz.

Respondents were also asked, "Based on what you know about this case, how much evidence would you say there is against Curley and Schultz?"

	Dauphin	Luzerne	Chester	Erie
Some or a lot of evidence	67.3%	74.4%	73.6%	65.7%
A little, none, not sure	32.4%*	25.6%	26.4%	34.3%

*NOTE: One Dauphin respondent said there was a lot or some evidence against Mr. Schultz, but was not sure about Mr. Curley.

- d. In all four counties, about two-thirds, or more, of the respondents had formed the impression that the evidence against the defendants was substantial.

29. Familiarity with and reactions to the Freeh report.

- a. Respondents were prompted with a brief reminder about the Freeh report and its conclusions and asked several questions to gauge their familiarity with that report and their thoughts about its implications.

	Dauphin	Luzerne	Chester	Erie
Familiar with Freeh report	73.8%	72.8%	73.3%	52.9%
Does Freeh report conclude Curley and Schultz covered up Sandusky abuse?*	75.8%	67.8%	81.0%	75.0%
If Freeh concluded cover-up, then are Curley and Schultz guilty of a crime?*	68.1%	72.4%	69.8%	75.0%

*NOTE: These questions were only administered to those who were familiar with the Freeh report.

- b. Large majorities in three of the four counties reported being familiar with the Freeh report and in all four, large majorities of those familiar with the report agreed that it concludes the defendants covered up Mr. Sandusky's abuse of young boys.
- c. Similarly, large majorities of those familiar with the Freeh report felt its conclusions would mean the defendants are guilty of the charges against them.

30. Beliefs and opinions related to the case.

- a. The last few items in the survey asked respondents whether they agreed or disagreed with various opinions about Penn State and how an alleged "culture" at the university might have "tolerated" Mr. Sandusky's behavior.
- b. Note that many opinions of this sort have appeared, not only in the Freeh report, but in the media coverage of this matter as well.

	Dauphin	Luzerne	Chester	Erie
Even if Penn State officials like Curley and Schultz did nothing illegal, they still should be punished.	46.9%	55.0%	50.0%	64.2%
From very early on, officials like Curley and Schultz knew exactly what was going on with Sandusky.	70.0%	71.3%	73.8%	77.6%
The culture at Penn State and in the Penn State athletic department tolerated Sandusky's behavior.	64.9%	72.6%	72.6%	68.6%
Curley and Schultz helped to create the culture at Penn State that tolerated Sandusky's behavior.	62.6%	65.0%	59.5%	65.7%

- c. About half or more of the respondents in every county agreed that the defendants in this case should be punished, even if they did nothing illegal.
- d. Beyond that, large majorities in all four counties agreed that the defendants knew about Mr. Sandusky's actions and that they helped to create the culture at Penn State that tolerated his behavior.

31. To sum up:

- a. In all four of the counties examined in this study two-thirds to almost three-quarters of jury-eligible Pennsylvanians were familiar with this case.
- b. Of those familiar with the Curley and Schultz cases—in all four counties—two-thirds or more felt the defendants are probably or definitely guilty of the crimes of which they are accused.
- c. Very few of the respondents in this study have not heard or read news reports about these accusations.
- d. About two-thirds or more have gotten the impression from these news reports (and from other sources) that there is substantial evidence against these defendants.
- e. In all four counties examined in this study, majorities report being familiar with the Freeh report and its conclusions regarding the defendants, Mr. Curley and Mr. Schultz. And in all four counties, two-thirds to three-quarters of those familiar with the Freeh report feel the report's

conclusions mean the defendants are guilty of the crimes of which they are accused.

i. That these conclusions come from an investigation and report by a former head of the Federal Bureau of Investigation and a former Federal judge make them unusually influential over jurors' thinking—as clearly indicated by the results summarized above.

f. Finally, by large margins, jury-eligible respondents in these four counties hold beliefs and opinions about a culture at Penn State that at least tolerated Mr. Sandusky's behavior and, further, that defendants Curley and Schultz helped to create that culture.

32. These results are consistent with what has been observed in the literature on cases of this sort. For example, Vidmar and Hans (2007, *American Juries, The Verdict*) write:

“A phenomenon known as *generic prejudice* may also come into play in high-profile cases. Public attention to the issues of child abuse, including child pornography, sexual violations, and physical harm, gained widespread attention in the 1980s that continues to this day. At a 1990 symposium, Judge Abner Mikva coined the term *generic prejudice* and explained: ‘I do not think that you can get a fair child abuse trial before a jury anywhere in the county...when they hear that a child has been abused, a piece of their mind closes up...’” (p. 113, internal citations omitted).

DISCUSSION

33. In the entire social scientific literature on jury decision-making, spanning many decades, the effect of pretrial publicity (PTP) on a defendant's right to a fair trial is one of the most thoroughly studied subjects. As a result of this extensive research literature, there is a strong consensus of opinion among leading researchers in the field that such publicity seriously undermines the ability of a defendant to receive a fair trial and is poorly remedied by mitigation measures typically employed by our courts.

- a. For example, one recent reference work, summarizing decades of research into the effects of and remedies for pretrial publicity concluded, "In sum, it appears that the effects of PTP can find their way into the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and can persevere not only through deliberation, but may also actually intensify." (Studebaker & Penrod, 2005, Pretrial publicity and its influence on juror decision making, in Brewer & Williams, Editors, *Psychology and Law*, pp. 265-266).
- b. Other recognized authorities in this realm strongly concur, for example, Posey and Wrightsman in *Trial Consulting* (2005) write, "...the belief that voir dire is an effective remedy for the effects of pretrial publicity assumes that prospective jurors are capable of assessing their own biases and that they are willing to admit to such biases during the jury selection process. It also requires that judges and attorneys be able to identify those who

should appropriately be challenged for cause. Research suggests that none of these is a safe assumption" (p. 58).

c. Thus, the conclusions of these, among the most authoritative experts on jury decision making, summarizing decades of research, are uniformly pessimistic about the effectiveness of the remedies American courts typically employ to reduce the pernicious impact of pretrial publicity.

34. Instructions from the Court are unlikely to alleviate the problem. Admonitions from the bench to "set aside one's biases" have been shown in some studies to have the paradoxical effect of actually increasing the adverse impact of pre-trial publicity.

35. One cannot expect the deliberation process to reduce the effect of pretrial publicity either. As noted by Studebaker and Penrod (2005), and in line with research on small group dynamics, discussions among jurors can actually intensify the biases caused by pretrial publicity.

36. Ordinarily, a change of venue or venire might offer the best opportunity for reducing the threat to the defendants' rights to a fair trial, but the findings summarized above, from counties all around Pennsylvania, suggest these options would do little to reduce that threat. Given the feelings expressed in this survey by potential jurors from one end of the Pennsylvania to the other, neither changing venue nor using an imported venire would be effective. Indeed, these results make it difficult to imagine how the defendants could get a fair jury trial anywhere in the Commonwealth.

37. In short, few subjects in the history of jury research have b
pretrial publicity and that research does not offer much hope
impartial jury in this case.

38. Although the prospects are not particularly promising, it is
especially thorough and extensive voir dire process, some
defendants' rights could be at least partially reduced.

39. To this end, some of the measures the Court could consider

a. A written juror questionnaire constructed in accordance
scientific methods for the assessment of knowledge
relevant to the issues in this case.

b. A relatively intensive sequestered voir dire interview
juror. It must be emphasized, however, that to be
this voir dire will probably need to employ interview
patterned after the structured interview protocols used
quality social scientific research.

c. Expanded criteria for excusing prospective jurors if

d. An increase in the routine number of peremptory strikes

40. In conclusion then, to a reasonable degree of scientific certainty
that:

a. The pretrial publicity surrounding the Sandusky murder
far-reaching and intense in the Commonwealth of Pennsylvania

37. In short, few subjects in the history of jury research have been studied as much as pretrial publicity and that research does not offer much hope for seating a truly impartial jury in this case.

38. Although the prospects are not particularly promising, it is possible that with an especially thorough and extensive voir dire process, some of the threats to the defendants' rights could be at least partially reduced.

39. To this end, some of the measures the Court could consider include:

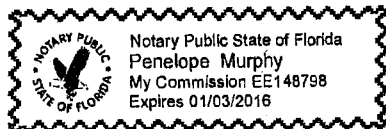
- a. A written juror questionnaire constructed in accordance with proven social scientific methods for the assessment of knowledge, beliefs and attitudes relevant to the issues in this case.
- b. A relatively intensive sequestered voir dire interview with each individual juror. It must be emphasized, however, that to be maximally effective, this voir dire will probably need to employ interviewing techniques patterned after the structured interview protocols utilized in the highest quality social scientific research.
- c. Expanded criteria for excusing prospective jurors for cause.
- d. An increase in the routine number of peremptory strikes.

40. In conclusion then, to a reasonable degree of scientific certainty, it is my opinion that:

- a. The pretrial publicity surrounding the Sandusky matter has been unusually far-reaching and intense in the Commonwealth of Pennsylvania.

- b. In line with decades of research into the effects of pretrial publicity, the notoriety of this case has led to strong and pervasive biases that seriously undermine these defendants' rights to an impartial jury.
- c. The survey results outlined above show that the Freeh report has probably magnified the generic biases inherent in a child sexual abuse case to what, in my experience, is an unprecedented degree. The wide-spread publicity about the Freeh report, wherein a highly authoritative former FBI Director and Federal judge is understood to have pronounced the defendants guilty of criminal acts, is a unique situation in my experience.
- d. Given the extent of that publicity and the intensity of the negative opinions about anyone connected with the Sandusky matter, even a change of venue—normally one of the best remedies for pretrial publicity—holds little promise of helping the Court to seat an impartial jury. The same would be true for a change of venire.
- e. In my opinion, although extremely difficult, it may be possible to move, at least incrementally, in the direction of seating an impartial jury by designing and implementing a comprehensive juror assessment program along the lines described above. Most importantly, whatever their ultimate forms, the questionnaire administered to prospective jurors and the interview protocol for individual voir dire must conform to the best available social scientific assessment methodologies. It is very unlikely that any mere variation on a "routine" voir dire will meet those standards or have the desired result.

I declare under penalty of perjury that the foregoing is true and correct. Executed on,
October 24, 2012. Arthur H. Patterson



AS to ARTHUR H. PATTERSON
on this DATE Oct 24, 2012
Sarasota, Florida

[Handwritten signature]

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EXHIBIT 1 – CURRICULUM VITAE

CURRICULUM VITAE

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EDUCATION

- 1970 - 1972 Ph.D., Social Psychology
Northwestern University.
- 1968 - 1970 M.A., Psychology
Northwestern University.
- 1966 - 1968 B.A., Psychology, Clark University.

PROFESSIONAL EXPERIENCE

- 1998 - Senior Vice President, DecisionQuest.
- 1992 - 1998 Senior Vice President, Director of Jury Analysts Group, FTI.
- 1984 - 1992 President, Jury Analysts, Inc.
- 1983 - 1988 Associate Professor of Administration of Justice, The Pennsylvania State University.
- 1978 - 1982 Associate Professor of Environment and Behavior, The Pennsylvania State University.
- 1972 - 1978 Assistant Professor of Man-Environment Relations, The Pennsylvania State University.

PAPERS AND PRESENTATIONS

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What do jurors think of Defense Counsel? Presentation to Philadelphia Area Defense Counsel, Philadelphia, PA, January 2000.

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How juries do what they do. Invited address to the First Circuit Judicial Conference, 55th Annual Meeting, Providence, RI, September 1997.

Jury attitudes and behavior. Presentation to the North American Securities Administrators, Annual Litigation Seminar, Quebec City, Canada, September 1997.

Juror attitudes in sexual harassment cases. Presentation to the Pennsylvania Bar Institute Program on Sexual Harassment Cases, Philadelphia, PA, July 1997.

Jury consulting and the psychology of jurors. Continuing Legal Education Presentation to the U.S. Attorney's Office for the Eastern District of Pennsylvania, Lancaster, PA, June 1997.

Jury selection and voir dire. Presentation to the National Employment Lawyers' Association (NELA), Philadelphia, PA, April 1997.

Jury issues in sexual discrimination cases. Presentation to the William B. Bryant Inns of Court, Washington, DC, April 1997.

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The use of jury consultants. Presentation to the U.S. Attorney's Office, Civil Division, Washington, DC, June 1996.

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The psychology of jury selection. Presentation to the Pennsylvania Bar Institute, Personal Injury Institute, Philadelphia, PA, April 1996.

Stranger than fiction: Three real-life terrors and how to avoid them. Panel discussion presented to American Bar Association, Section of Litigation, Annual Meeting, Miami, FL, January 1996.

Learning without losing. Presentation to the Philadelphia Bar Association, 37th Annual Conference, Baltimore, MD, September 1995.

The O.J. Simpson trial: The impact on jurors' attitudes. Presentation to the Western Pennsylvania Trial Lawyers Association, Pittsburgh, PA, September 1995.

Jury psychology and the impact of computer animations. Presentation to the Philadelphia Federal Bench-Bar Conference, Philadelphia, PA, June 1995.

The psychology of jury verdicts in construction cases. Presentation to the American Institute of Architects, 34th Annual Meeting of Invited Attorneys, Newport Beach, CA, May 1995.

The psychology of jurors in punitive damages cases. Presentation to the American Conference Institute on Litigating Punitive Damages, New York, NY, May 1995.

Jury selection techniques. Presentation to the Pennsylvania Bar Institute, Personal Injury Institute, Philadelphia, PA, May 1995.

Mock juror focus groups: Understanding jury verdicts. Presentation to the Academy of Trial Lawyers of Allegheny County, Pittsburgh, PA, March 1995.

How jurors think. Presentation to Philadelphia Association of Defense Counsel, Philadelphia, PA, January 1995.

Trial theme selection. Presentation to ALI-ABA Course, Litigating Medical Malpractice Claims, Philadelphia, PA, October 1994.

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The use of shadow and mock juries in litigation. Presentation to the Florida Bar Association, Labor and Employment Law Section, Orlando, FL, September 1993.

The myths and misconceptions of a jury. Presentation to the American Bar Association Annual Meeting, Section of Litigation, New York, NY, August 1993.

The psychology of the jury: Science or fiction. Presentation to the Delaware Bar Association, Hershey, PA, August 1993.

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How to persuade the jury. Presentation to the American Bar Association, section on Litigation, National Institute Program: "How to Persuade the Jury," Orlando, FL, February 1993.

How to pick and keep the perfect jury. Presentation to the Trial Lawyers Association of Washington, DC, February 1993.

Jurors and corporations: Getting juror support. Presentation to the National Institute of Trial Advocacy (NITA) Program: "The Corporate Counsel's Guide to the Effective Use of Trial Counsel," Washington, DC, November 1992.

The CPA as an expert witness: What jurors think. Presentation to the Illinois CPA Foundation Annual Litigation Services Conference, Chicago, IL, November 1992.

The mechanics of jury research. Presentation to the National Institute of Trial Advocacy (NITA), Advanced Trial Advocacy Program, Washington, DC, October 1992.

The psychology of the jury. Presentation to Washington, D.C. Bar, Section on Labor Relations and Injury to Persons and Property, Washington, DC, April 1992.

Applications of jury psychology. Presentation to the New York District Attorneys, Manhattan Division, New York, April 1992.

Jury selection in the defense of sex crimes. Presentation to the Pennsylvania Association of Criminal Defense Lawyers, State College, PA, April 1992.

How to persuade the jury. Presentation to the American Bar Association, Section on Litigation, National Institute Program: "How to Persuade the Jury," Washington, DC, March 1992.

Voir dire in a business jury trial. Presentation to the American Bar Association, Section of Litigation, National Institute Program: "How to Win a Business Jury Trial," Boston, MA, November 1991.

What is jury research? Presented to the National Institute for Trial Advocacy (NITA), Master Advocate's Program, Washington, DC, October 1991.

How to persuade the jury. Presentation to the American Bar Association Annual Meeting, Section of Litigation, Atlanta, GA, August 1991.

Jurors' perceptions of corporate litigation over the sale of a business. Presentation to Price Waterhouse symposium on Acquisitions, Divestitures and Lawsuits, Chicago, IL, April 1991.

The use, misuse and abuse of expert witnesses: Dealing with experts from discovery through summation. Continuing Legal Education Satellite Network (CLESN) seminar faculty member, Washington, DC, February 1991.

Trial simulations and jury psychology. Presentation to the Columbus Bar Association, Program on Trial Simulations, Columbus, OH, December 1990.

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Jury consultants: Use and abuse. Presentation to the National Institute for Trial Advocacy (NITA), Advanced Trial Advocacy Program, Washington, DC, October 1989.

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What jurors think of lawyers? Presentation to the Luzerne County Bar Association Annual Meeting, Wilkes-Barre, PA, January 1989.

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Psychological strategies of jury selection and persuasion. Panel member, Pennsylvania Bar Association Annual Convention, Hershey, PA, May 1988.

Voir dire: Jury selection and jury psychology. Presentation to Pennsylvania Defense Institute Seminar, May 1988.

Scientific jury work in civil and criminal cases. Invited address, Pennsylvania Trial Lawyers Group, Williamsport, PA, February 1988.

The use of shadow juries and other jury research techniques. Invited address to the Philadelphia Association of Defense Counsel, Philadelphia, PA, November 1987.

Juror preconceptions and case strategy. Panel member, American Bar Association, Toxic and Environmental Torts Litigation Committee, Program on Jury Practice in Toxic Tort Cases, Houston, TX, October 1987.

Jury selection techniques. Invited address, Annual Seminar for Georgia Prosecuting Attorneys, Atlanta, GA, October 1987.

Strategic and psychological aspects of jury selection. Invited address, Association of Government Attorneys in Capital Litigation, Denver, CO, August 1987.

Prosecution of a death-penalty case in Pennsylvania: Jury psychology. Invited address, Pennsylvania District Attorneys Association, State College, PA, July 1987.

How to use jury research in trial practice. Invited address, Association of Delaware Valley Criminal Defense Lawyers, Media, PA, May 1987.

Voir Dire or Not to Voir Dire? Panel member, Pennsylvania Bar Association, Bench Bar Conference, Scranton, PA, April 1987.

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The anatomy of a closing speech to a jury. Panel member, Philadelphia Bar Association, Bench Bar Conference, Atlantic City, NJ, September 1985.

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The examination of expert witnesses: The juror's perspective. Invited address, Program on Examination of Expert Witnesses, Dickinson School of Law, Carlisle, PA, April 1985.

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The legal concept of privacy: An environmental psychological perspective. Paper presented to American Psychology Law Society, Chicago, IL, March 1984.

Fear-of-Crime, environmental control, and use of public transportation by the elderly. Paper presented to the Eastern Psychological Association, Philadelphia, PA, April 1983 (with P. Ralston).

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Patterson, A.H., Training the Elderly in Mastery of Environment. In, A. Goldstein and W.J. Hoyer (eds.), Crime and the Elderly Citizens, Oxford: Pergamon, 1979.

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Godbey, G., A.H. Patterson, and L. Brown, The relationship of crime and fear of crime among the aged to leisure behavior and use of public leisure services. Washington, DC: Andrus Foundation, 1979.

From 1968 through 1978, 23 publications on a variety of social psychological issues. Full citations available upon request.

SYMPOSIA ORGANIZED AND SESSIONS CHAIRED

Trial consultants and mental health concerns. Session chaired at the Annual Meeting of the American Society of Trial Consultants, Portland, Oregon, October 1986.

Courts and Corrections. Discussant, Academy of Criminal Justice Sciences, Chicago, March 1984.

Perceived control and the effect of the environment on the elderly. Symposium organized at the American Psychological Association, Los Angeles, August 1981.

Spatial Representation and Behavior Across the Life Span: Theory and Application. Conference organized with L. Liben and N. Newcombe, The Pennsylvania State University, May 1979.

Social Aggression. Session chaired at the Eastern Psychological Association, Washington, DC, April 1978.

Community and Residential Environments. Session co-chaired at the Gerontological Society Annual Meeting, San Francisco, August 1977.

Crime prevention through environmental design. Discussant, American Psychological Association, San Francisco, August 1977.

Normative and cross-cultural influences on behavior. Session chaired at the American Psychological Association, Washington, DC, September 1976.

Housing and livability of tall buildings: Research needs. Session chaired at the American Institute of Architects Conference on Human Response to Tall Buildings, Chicago, July 1975.

Social control and social change. Symposium organized and chaired at the Environmental Design Research Association, Meeting (EDRA), Lawrence, April 1975.

Research on environment and behavior. Meeting organized and chaired at the Midwestern Psychological Association, Chicago, May 1975.

The prevention of crime through architectural design. Symposium organized and chaired at the American Psychological Association, New Orleans, August 1974.

REVIEWING AND EDITING

Federal Judicial Center (Reference Manual on Scientific Evidence)

Judicature

Journal of Personality and Social Psychology

Journal of Abnormal Psychology

Contemporary Sociology

Science

Journal of Sports Psychology

Environment and Behavior: Editorial Board

Society for the Psychology Study of Social Issues (SPSSI)

Harper and Row

Brooks/Cole

Ronald Press

W.B. Saunders, Publishing

CONSULTING

Research and strategic consulting on litigation from a social psychological perspective for over 200 law firm, governmental, and corporate clients, 1982-present.

Expert testimony and affidavits on venue and other jury issues in various State and Federal Courts, 1982-present.

Media Magic Marketing, 1981-1983. Environmental issues in marketing.

The Rand Corporation, 1978-1979. Crime prevention through environmental design.

Westinghouse Electric Corporation (National Issues Center), 1977-1978. Crime prevention through environmental design.

U.S. House Select Committee on Aging, Subcommittee on Housing, 1977-1978. Crime and the elderly.

City of Harrisburg, Department of Community Development (Planning Bureau), 1976-1977. Elderly housing.

RTKL Associates, Architects and Planners, 1975-1976. Urban pedestrian behavior.

United States Department of Labor, 1974-1975. Leisure time activities.

UNIVERSITY COURSES TAUGHT

Administration of Justice
Crime and the Elderly
The American Jury
Social Psychology
Introductory Psychology
Environmental Psychology
Introduction to Man-Environment Relations
Research Methods
Environments for the Elderly

HONORS, AWARDS, AND GRANTS

Commissioner, Pennsylvania Futures Commission on Justice in the 21st Century, Sponsored by the Supreme Court of Pennsylvania, 1995-1998.

Invited address, United States Chamber of Commerce, National Chamber Center for Litigation, Washington, DC, May 1985.

Andrus Foundation Grant: Barriers to Use of Public Transportation by the Elderly, 1982-1983.

U.S. Department of Transportation, University Research Office Grant: Fear of Crime and Use of Public Transportation by the Elderly, 1981-1982.

National Endowment of the Arts Graduate Internship Sponsor, 1979.

Andrus Foundation Grant: The Relationship of Crime and Fear of Crime among the Aged to Leisure Behavior and Use of Public Leisure Services (with G. Godbey), 1978-1979.

E. Marlin Butts, Guestship, Oberlin College, 1978.

Administration on Aging (HEW) Training Grant: Design, Planning, and Managing of Living Arrangements for the Elderly, 1978-1979.

Gerontological Society Summer Institute Fellowship, 1976.

Administration on Aging (HEW) Grant: Dissemination of the Results and Implications of A.O.A. funded research on the fear of crime and the environment of the elderly, 1977-1978.

N.I.M.H. Training Grant: Environmental Design and Mental Health, Acting Director, 1976-1977.

U.S. Department of Labor Contract: Work, Non-work Linkages, 1974-1975.

Environmental Policy Center Grant: Decreasing Fuel Oil Consumption Through Positive Feedback, 1973-1974.

Dissertation Year Fellow, Northwestern University, 1971-1972.

N.S.F. Trainee in Social Psychology, 1968-1971.

Honors B.A., Clark University, 1968.

Travelli Foundation Award, 1967-1968.

MAJOR MEDIA APPEARANCES

National media presentations:

The Today Show, National Broadcasting Company (NBC);
Cable Network News (CNN);
National Education Television (WPSX);
National Educational Radio (Morning Edition);
Larry King Show, Mutual Broadcasting (National Radio);
Sunday Today, National Broadcasting Company (NBC).
MSNBC (Debra Norville Show)
CNNFN

[Revised October, 2012]

EXHIBIT 2 – TELEPHONE SURVEY INSTRU

PA VENUE STUDY

Hello, this is _____ calling from Bernett Research. We are conducting a brief study about recent events in your area and would like to include your opinions. I am not trying to sell anything and your answers will be kept strictly confidential. There are no right or wrong answers, if at any point you don't know, please just say so.

Q1INT. These first few questions are for classification purposes only

Q1. Which of the following age groups best describes you? (READ LIST UNTIL VALID RESPONSE IS GIVEN) [CLASSIFY INTO CENSUS BUREAU CATEGORIES]

Under 18	1 [TERMINATE]
18 to 24	2
25 to 34	3
35 to 44	4
45 to 54	5
55 to 64	6
65 to 74	7
75 or older	8
(DO NOT READ) Don't Know/Refused	9 [TERMINATE]

Q24. INTERVIEWER: RECORD GENDER BY OBSERVATION

Male	1
Female	2
(DO NOT READ) Don't Know/Refused	3

Q2. Are you a U.S. citizen?

Yes	1
No	2 [TERMINATE]
(DO NOT READ) Don't Know/Refused	3 [TERMINATE]

Q3. Do you currently live in Dauphin (daw-fin) County, Pennsylvania?
[INTERVIEWER: READ LIST IF NECESSARY]

Yes	1
No	2 [TERMINATE]
(DO NOT READ) Don't Know/Refused	3 [TERMINATE]

Q3A. In which Pennsylvania County do you live? (READ LIST IF NECESSARY)

1. Luzerne (loo-ZERN)

2. Chester
3. Erie (eer-ee)
4. or, some other county [TERMINATE]
5. (DO NOT READ) Don't Know/Refused [TERMINATE]

Q4. Do you have a valid Pennsylvania driver's license?

- | | |
|----------------------------------|---|
| Yes | 1 |
| No | 2 |
| (DO NOT READ) Don't Know/Refused | 3 |

[IF LUZERNE COUNTY IN Q3A AND NO/DK/REF TERMINATE, ELSE CONTINUE]

[IF CHESTER COUNTY IN Q3A CONTINUE]

[IF ERIE COUNT IN Q3A CONTINUE]

Q4A. Are you registered to vote in [INSERT COUNTY FROM Q3A]?

- | | |
|----------------------------------|---|
| Yes | 1 |
| No | 2 |
| (DO NOT READ) Don't Know/Refused | 3 |

[IF LUZERNE COUNTY IN Q3A CONTINUE]

[IF CHESTER COUNTY IN Q3A AND NO/DK/REF TERMINATE, ELSE CONTINUE]

[IF ERIE COUNTY IN Q3A AND NO/DK/REF IN Q3A AND Q4A TERMINATE, IF YES TO AT LEAST 1 CONTINUE.

Q5. Have you heard about the trial and conviction of Jerry Sandusky, the former Penn State coach, for the sexual abuse of young boys?

- | | |
|-----------------------------------------------------|---|
| Yes | 1 |
| No | 2 |
| (DO NOT READ) Don't know/Refused/Not Sure/Can't Say | 3 |

Q6. There have been other officials at Penn State who have been charged with crimes in connection with the Sandusky scandal. Do you recall the names or the titles or the positions of any Penn State officials who have been charged in connection with this incident?

- | | |
|----------------------------------|---------------------|
| Yes | 1 [CONTINUE TO Q6A] |
| No | 2 [SKIP TO Q7] |
| (DO NOT READ) Don't Know/Refused | 3 [SKIP TO Q7] |

Q6A. What are the specific names, titles or positions, that you recall, of any Penn State officials who have been charged in connection with the incident? (DO NOT READ LIST, CODE ACCORDINGLY)

Timothy M. Curley, Athletic Director, last name or title mentioned	1
Gary C. Schultz, University Vice President, last name or title mentioned	2
Both mentioned	3
Neither/Don't Know/Not Sure	4

Q7. Criminal charges have been filed against the university's Athletic Director, Timothy M. Curley, and against a Senior Vice President, Gary C. Schultz for failing to report Sandusky's abuse to law enforcement and for lying to a grand jury. Have you heard about these charges?

Yes	1 [GO TO Q8A]
No	2 [GO TO VNAME]
(DO NOT READ) Don't Know/Refused/Not Sure/Can't Say	3 [GO TO VNAME]

Q8A. Mr. Curley was the Athletic Director at Penn State while Mr. Sandusky worked there. He is accused of covering up Sandusky's behavior and lying to a grand jury about it. Given what you know about these accusations, would you say that Mr. Curley is... (READ LIST)? [PROGRAMMER: REVERSE LIST RANDOMLY FOR APPROXIMATELY 50% OF RESPONDENTS]

Definitely guilty	1
Probably guilty	2
Probably not guilty	3
Definitely not guilty	4
(DO NOT READ) Don't know/refused/not sure	5

Q8B. Mr. Schultz was a Senior Vice President at Penn State while Mr. Sandusky worked there. He is also accused of covering up Sandusky's behavior and lying to a grand jury about it. Given what you know about these accusations, would you say that Mr. Schultz is... (READ LIST)? [PROGRAMMER: REVERSE LIST RANDOMLY FOR APPROXIMATELY 50% OF RESPONDENTS]

Definitely guilty	1
Probably guilty	2
Probably not guilty	3
Definitely not guilty	4
(DO NOT READ) Don't know/refused/not sure	5

Q8C. [PROGRAMMER: RECORD ORDER OF Q8A & Q8B PRESENTATION, ROTATE BOTH QUESTIONS IN SAME ORDER]

Definitely guilty to definitely not guilty (1 to 4)	1
Definitely not guilty to definitely guilty (4 to 1)	2

Q9. Regardless of how you personally feel, do you think most people in [INSERT COUNTY FROM Q3A] County would feel that Curley and Schultz committed crimes? (READ LIST)

Definitely yes	1
Probably yes	2
Probably no	3
Definitely no	4
(DO NOT READ) Don't know/refused/not sure	5
(DO NOT READ) Curley yes, Schultz no	6
(DO NOT READ) Schultz yes, Curley no	7

Q10. Based on what you know about this case, how much evidence is against Curley and Schultz? (READ LIST)

A lot
Some
A little
None
(DO NOT READ) Don't know/refused/not sure
(DO NOT READ) Curley a lot/some, Schultz a little/none
(DO NOT READ) Schultz a lot/some, Curley a little/none

Q11. In November of 2011, Penn State hired Louis (LOO-iss) Freeh (Freeh) as a B-I director and Federal judge, to conduct an investigation into the sexual abuse of young boys. In July of 2012, Mr. Freeh (Freeh) submitted his report. Have you read the Freeh (Freeh) report? (READ LIST)

Yes
No
(DO NOT READ) Don't know/refused/not sure

Q12. From what you know of it, does the Freeh (Freeh) report conclude that Schultz tried to cover up Sandusky's abuse of young boys?

Yes
No
(DO NOT READ) Don't know/refused/not sure

Q13. If the Freeh (Freeh) report concludes that Curley and Schultz committed crimes, do you think that for most people in [INSERT COUNTY] County this would automatically mean that Curley and Schultz are guilty? (READ LIST)

Definitely yes	1
----------------	---

Probably yes	2
Probably no	3
Definitely no	4
(DO NOT READ) Don't know/refused/not sure	5

Q14. Setting aside the Sandusky case and focusing only on the case of Curley and Schultz, have you seen TV reports about their case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q15. Again, with respect to the charges against Curley and Schultz, have you seen newspaper reports about their case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q16. Have you listened to radio reports or radio talk shows about the case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q17. Have you read reports, discussions or blogs on the Internet about Schultz's case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q18. Have you had conversations with other people, like family, friends or neighbors, about the Curley and Schultz case? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3

No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q19. Have you sent or received emails where the cases of Curley and Schultz were mentioned? (READ LIST)

Yes, a lot	1
Yes, some	2
Yes, one or two	3
No, none at all	4
(DO NOT READ) Don't know/refused/not sure	5

Q20. Even if Penn State officials like Curley and Schultz did nothing illegal, they still should be punished. Do you... (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q21. From very early on, officials like Curley and Schultz knew exactly what was going on with Sandusky. Do you... (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q22. The culture at Penn State and in the Penn State athletic department tolerated Sandusky's behavior. Do you... (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4
(DO NOT READ) Don't know/refused/not sure	5

Q23. Curley and Schultz helped to create the culture at Penn State that tolerated Sandusky's behavior. Do you... (READ LIST)

Strongly agree	1
Somewhat agree	2
Somewhat disagree	3
Strongly disagree	4

(DO NOT READ) Don't know/refused/not sure 5

Q25. [PROGRAMMER: RECORD SAMPLE SOURCE]

Landline	1
Cell	2

FOLLOW-UP FOR QUALITY CONTROL PURPOSES (MAY VARY BY VENDOR)

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

COMMONWEALTH OF PENNSYLVANIA, :

v. :

GARY C. SCHULTZ,

Defendant. :

No. CP-22-CR-5164-2011

DAUPHIN COUNTY
PENNA

2012 OCT 31 PM 4:08

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CLERK OF COURTS

**DEFENDANT SCHULTZ MEMORANDUM OF LAW IN SUPPORT OF
OMNIBUS PRETRIAL MOTION**

AND NOW, comes the defendant, Gary C. Schultz, by and through his attorney, Thomas J. Farrell, Esquire, and the law firm of Farrell & Reisinger, LLC, and respectfully submits the following Memorandum of Law in Support of his Omnibus Pretrial Motion:

I. Motion to Dismiss, or in the Alternative, to Suppress Grand Jury Testimony

A. Introduction

Because Cynthia Baldwin, Penn State University's General Counsel, provided either no counsel or the ineffective assistance of counsel to Mr.. Schultz during his Grand Jury appearance and testimony on January 12, 2012, the Commonwealth's charges against him should be dismissed or his testimony suppressed. Despite her statements to her clients, the Deputy Attorney General, and the grand jury supervising judge, and her conduct and presence before the

grand jury itself, Ms. Baldwin disavows any personal representation of Mr. Schultz and Curley before the grand jury. Thus they were unrepresented at the Grand Jury in contravention of the Grand Jury Act.

Ms. Baldwin represented the defendants while suffering from an impairing conflict of interest which prevented her from effectively representing them. Even if Ms. Baldwin was not suffering from a disabling conflict, her assistance was nevertheless ineffective for the following reasons:

- She failed to prepare either of the defendants for their grand jury appearances.
- She failed to conduct any investigation or to look for documents, files, notes or emails relating to Jerry Sandusky, all of which easily would have been found in Mr. Schultz' former office.
- She specifically told Mr. Schultz not to prepare for his testimony and to testify exclusive from memory because anyone would understand a lapse in memory after so many years.
- She told the defendants that the Commonwealth would treat them as friendly witnesses, even after a pre-testimony interview made clear that they were at great risk of prosecution.
- She failed to provide them with any advice about exercising their Fifth Amendment rights to refuse to answer questions.

B. Despite What Everyone Else Thought, Ms. Baldwin Did Not Believe She was Acting as Defendants' Counsel at Their Grand Jury Appearance, Thus Depriving Them of Any Counsel.

Pursuant to the Grand Jury Act, a grand jury witness in Pennsylvania has a right to counsel in the grand jury to assist and advise him. *See* 42 Pa. C.S.A. § 4549(c)(1), (3). The statutory right to counsel "includes the concomitant right to

effective assistance of counsel.” *Commonwealth v. Albrecht*, 554 Pa. 31, 44, 720 A.2d 693, 700 (1998)(Right to appointed counsel created by the Post Conviction Relief Act is a right to effective counsel). *See also Commonwealth v. Masker*, 2011 PA Super 271, 34 A.3d 841, 845-46 (Pa. Super. 2011) (Bowes, J., concurring in part and dissenting in part)(“where there is a rule –based right to counsel, [there is] a corresponding statutory right to effective assistance of counsel,” right to effective assistance applies to civil sexually violent predator hearings).

To demonstrate ineffective assistance of counsel a claimant generally must show: (1) that the issue(s) underlying his ineffectiveness of counsel claim is arguably meritorious; (2) that the course chosen by counsel was unreasonable; and (3) that the claimant was prejudiced by counsel’s actions or inactions. *Commonwealth v. Pierce*, 515 Pa. 153, 161, 527 A.2d 973 (1987). Prejudice is presumed, however, “where there is an actual or constructive denial of counsel, the state interfered with counsel’s assistance, or counsel had an actual conflict of interest.” *Commonwealth v. Reaves*, 592 Pa. 134, 923 A.2d 1119, 1128 (Pa. 2007). “Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” *Strickland v. Washington*, 466 U.S. 688, 692 (1984). *See United States v. Cronin*, 466 U.S. at 648, 654, n.11 (1984) (“In some cases, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided”).

Here, because Ms. Baldwin provided no counsel to the defendants when they testified before the Grand Jury, the defendants were effectively denied their legal right to assistance of counsel at the Grand Jury. Such complete deprivation of the right to counsel is *per se* prejudicial.

Ms. Baldwin believed that she was not representing Mr. Schultz and Mr. Curley, despite her statements to them, the prosecutors and the grand jury judge. In a letter to the undersigned counsel dated June 22, 2012, Ms. Baldwin, through her attorney Charles A. De Monaco, Esquire, stated that she that “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.***” Exhibit E. (Emphasis added).

Under the Pennsylvania Rules of Professional Responsibility, a lawyer either represents a client fully and completely or not at all. Partial representation does not exist. *In re Fifth Pennsylvania Statewide Investigating Grand Jury [No. 2]*, 50 Pa. D&C.3d 617, 622 (Comm.Pl.Ct. Dauphin County 1987) (“Adequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest.”); *see* Rules of Professional Conduct, Rule 1.2, Comment 7 (any agreement limiting scope of representation “does not exempt a lawyer from the duty to provide

competent representation"). By Ms. Baldwin's own admission, she provided no legal representation to the defendants in their personal capacity (the only capacity that the criminal law recognizes) before or during their Grand Jury appearances.

If counsel abandons her duty to exercise professional judgment on behalf of a client's individual interests, or makes no attempt to protect her client, she effectively leaves the client unrepresented, and no showing of prejudice is required. Thus, In *Commonwealth v. Jones*, 2005 Pa. Super. 115, 871 A.2d 1258 (Pa. Super. 2005), the Superior Court concluded that an attorney blindly following another attorney's lead in waiving a motion for a mistrial warranted a new trial because "was a blind guess tantamount to providing [the defendant] no counsel at all." *Jones*, 871 A.2d at 1261.

Pennsylvania courts have also presumed prejudice where counsel did not file a statement of matters complained of on appeal, thereby waiving all claims, and where counsel failed to file direct appeal. See *Commonwealth v. Halley*, 582 Pa. 164, 870 A.2d 795, 801 (Pa. 2005) and *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 564, 572 (Pa. 1999). See also *Childress v. Johnson*, 103 F.3d 1221, 1228-30 (5th Cir. 1997)(surveying cases). The Supreme Court has extended this rule of presumed prejudice to such failures by statutorily-required PCRA counsel, presuming prejudice where PCRA counsel failed to file any brief on appeal. *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007).

Ms. Baldwin's admitted abandonment is the legal equivalent to no representation. In fact, it is worse, because, as described in our motion, she led the defendants, Judge Feudale, the Commonwealth and the grand jury to believe she represented the defendants, even though she did not intend to assist the defendants before the Grand Jury. Unbeknownst to all, she was there only to protect her organizational client, PSU. Her actions deprived the defendants of their right to counsel at a Grand Jury proceeding, and left the defendants to testify as targets of an investigation believing that she was protecting their interests. In such a situation, no showing of prejudice is needed, and the result of the effectively-uncounseled appearance – the testimony and the charges – must be suppressed.

C. Ms. Baldwin Provided Ineffective Assistance of Counsel to Defendants Because She Represented the Defendants While Suffering from an Actual and Impairing Conflict of Interest.

As the proceedings and surrounding circumstances of the defendants' grand jury appearance make clear, Ms. Baldwin provided ineffective assistance of counsel because she was suffering from an impairing actual conflict of interest while she represented the defendants before and during their Grand Jury appearances. Ms. Baldwin's conflict arose because (i) the interests of her clients did not align, (ii) she favored Penn State above her clients, and (iii) she possessed confidential information from all clients.

"Inherent in the right to effective assistance of counsel is the correlative right to be represented by counsel unburdened by any conflict of interest."

Commonwealth v. Breaker, 456 Pa. 341, 342, 318 A.2d 354 (1974);. The courts “presume prejudice when the [defendant] shows that trial counsel was burdened by an actual--rather than mere potential--conflict of interest. To show an actual conflict of interest, the [defendant] must demonstrate that: (1) counsel actively represented conflicting interests; and (2) those conflicting interests adversely affected his lawyer's performance.” *Commonwealth v. Collins*, 598 Pa. 397, 957 A.2d 237, 251 (Pa. 2008) (citations and internal quotation marks omitted). See also *Cuyler v. Sullivan*, 446 U.S. 335, 344, 345-50 (1980). The Grand Jury Act also requires conflict free counsel: Section 4594(c)(4) states: “[a]n attorney . . . **shall not** continue multiple representations of clients in a grand jury proceeding if the exercise of the independent profession judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client.” In fact, “[i]f the supervising judge determines that the interest of an individual will or is likely to be adversely affected, he may order separate representation of witnesses, giving appropriate weight to the right of an individual to counsel of his own choosing.” Section 4549(C)(4).

Interests actually conflict if, during the course of the representation, they “diverge with respect to a material factual or legal issue or to a course of action,” *Commonwealth v. Padden*, 2001 Pa. Super. 246, 783 A.2d 299, 310 (Pa. Super. 2001), or if counsel favors one client over another client, *Commonwealth v. Breaker*, 456 Pa. 341, 318 A.2d 354, 355-56 (Pa. 1974)(conflict where counsel induces guilty

plea of defendant as part of strategy for codefendant was represented by the same counsel who represented his co-defendant); *Commonwealth v. Lantzy*, 284 Pa. Super. 192, 425 A.2d 768, 773 (Pa. Super. 1981)(impairing conflict existed where the defendant's attorney refused to call his co-defendant as an exonerating witnesses at trial for defendant and defendant enters guilty instead of going to trial based on attorneys proffer); *Commonwealth v. Rodrigues*, 285 Pa. Super. 579, 428 A.2d 197, 200 (Pa. Super. 1981) (dual representation created conflict of interest where attorney provided a more spirited defense to his co-defendant, by, for example, cross-examining the investigating police officer but only as to co-defendant without obtaining a waiver); *In Re: County Investigating Grand Jury of May 15, 1986*, 15 Phila. 1 (Comm. Pl. Ct. 1986)(effective representation is impossible where different testimony is likely, cross-accusations probable, and "conflicting, inconsistent and divergent interests are patently clear."). Prejudice will be presumed "where . . . counsel had an actual conflict of interest." *Reaves*, 592 Pa. 134, 923 A.2d at 1128.

In *In re Fifth Pennsylvania Statewide Investigating Grand Jury [No. 2]*, 50 Pa.D&C3d 617 (Dauphin Co CCP 1987), the court disqualified an attorney because "[a]dequate representation of a client requires full representation, not such representation as is convenient as it relates to another client with whom there is a conflict of interest." *Id.* at 622. In that case, counsel who already represented the mayor, who was a target of the investigation, also sought to represent the Chief of

Police, but only in a very narrow capacity. To the court, counsel confirmed that "he will not be a party to any matters that come up between him [the chief] and the attorney general, and will not go into the grand jury room with [the chief]. *Id.* at 622. The Chief of Police agreed and sought to waive any conflict of interest. The Court rejected the waiver, holding that under the circumstances "counsel's multiple representation has already resulted in counsel's inability to fully protect the rights of his client as envisioned by the right to representation set forth in the Grand Jury Act." *Id.* at 623.

Ms. Baldwin suffered from a similar debilitating conflict of interest which rendered her representation of Messrs. Schultz and Curley *per se* prejudicial. As Penn State's General Counsel, Ms. Baldwin was obligated to keep PSU out of trouble, including both civil and criminal liability, regarding the Commonwealth's investigation into Jerry Sandusky. Her counsel's letter plainly states that she favored one client, PSU, over the others: "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.**" De Monaco June 22, 2012, letter.

Even if Ms. Baldwin believed Messrs.' Curley's and Schultz' stories were originally consistent and in line with the University's, her belief was unreasonable after the defendants' pre-testimony interviews on January 12, 2011. See Exhibits

A, B. The tone, tenor and questioning of both defendants indicated that not only did the defendants' stories differ over critical facts, but also the defendants were targets of the investigation, at least with respect to their alleged failure to report. Once the defendants emerged as targets, the University had to distance itself from the defendants, since civil and potentially criminal liability lay in the balance. At that point, Ms. Baldwin could not simultaneously advocate for both the University and the defendants, and they were entitled to separate counsel.

Whenever the interests of Mr. Schultz and PSU conflicted, Ms. Baldwin took the course that hurt Mr. Schultz:

- She never informed them that she represented them and the University, that a conflict could develop, and that if it did, (assuming arguendo that one did not exist) she could not represent them.
- She never asked them to waive any conflict of interest.
- She never attempted to share with Mr. Schultz the information she did or could obtain from other PSU witnesses, such as Messrs. Curley, Paterno, or Spanier, or from the files in the office of the Senior Vice President of Finance and Business.
- She never informed the defendants that they should consider invoking their Fifth Amendment privilege to refuse to answer incriminating questions.

While Penn State's interests were best served by appearing to be fully cooperative with the OAG's office by having its executives testify, Schultz' and Curley's interests would have been better served by invoking their Fifth Amendment rights, even if this strategy put the University at risk civilly (and potentially criminally). As the Superior Court wrote in a case involving a grand

jury witness who was an attorney, "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. Determining what is an incriminating statement is not always clear to a layman." *Commonwealth v. Cohen*, 221 Pa. Super. 244, 249-50, 289 A.2d 96, 98-99 (1972). Given the tenor of the police interviews of the defendants prior to their testimony, Ms. Baldwin had an absolute duty, by that point, if not before, to inform the defendants that they had a right not to testify before the Grand Jury. Her failure to do so has no reasonable basis which could benefit the defendants. They relied on Ms. Baldwin to give them this advice, and her conflict caused her to fail them.

Ms. Baldwin's advocacy was also irreparably impaired because she possessed confidential information from each client - PSU, Curley, Schultz and Paterno - which she could not use to assist the other clients. *See In the Interest of Saladin*, 359 Pa. Super. 326, 333-34, 518 A.2d 1258, 1262 (1986)(finding actual conflict and reversing adjudication of delinquency where counsel for defendant also represented a witness) who was his associate's client). Her joint representation undermined her ability to represent Curley and Schultz as well as the policy of grand jury secrecy. "If one witness reveals his testimony to his attorney, as he has every right to do, certainly the attorney will feel obliged, perhaps subconsciously, to reveal to his other clients the testimony of the first witness. With the attorney in such a position, either the attorney-client relationship or the grand jury secrecy must

suffer." *Investigating Grand Jury of Philadelphia*, 527 Pa. 432, 593 A.2d 402, 409 (1991).

Ms. Baldwin made no effort to inform Mr. Schultz and Mr. Curley of even the potential for a conflict. Where a conflict is foreseeable, an attorney must ensure that "each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." See Explanatory Comment [18] to Rule 1.7, Rules of Professional Conduct. At best it appears that Ms. Baldwin told Mr. Schultz and Mr. Curley, without context or explanation, only that they could have their own counsel. See Schultz Affidavit, at ¶ 5. She then assured them that they did not need separate counsel. Ms. Baldwin's statement falls woefully short of her professional obligations and the clients never legally consented to her joint representation or waived any conflict of interest.

D. Even Under the *Pierce* Standard, Ms. Baldwin's Performance was Ineffective and the Defendants Were Prejudiced by It.

Even if prejudice is not presumed (although it should be), Ms. Baldwin was ineffective and the defendants were prejudiced thereby. As stated, under *Pierce*, a defendant must prove that counsel's performance was deficient and that the defendant was prejudiced because of counsel's deficient performance. *Pierce*, 527 A.2d at 975. To demonstrate prejudice, the defendant must show that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

In this case, there is no question that Ms. Baldwin's performance was deficient. In addition to the reasons delineated above, Ms. Baldwin also failed to properly assist the defendants in preparing for their Grand Jury testimony. As the testimony of Mr. Cohen and Prof. Fox will establish, competent counsel must investigate the facts, find and review the relevant documents, and use those documents and facts learned in that investigation to prepare the client to testify. Ms. Baldwin did none of that. Rather than do so, Ms. Baldwin made no effort to refresh Mr. Schultz' memory with what others said about the incident. She also instructed him not to review or search for any documents, and she, too, failed to do so, even when he expressed frustration over his poor memory, and informed her that he might have left a file behind that he could look over.

Instructing Mr. Schultz not to refresh his recollection and to testify before a Grand Jury under oath was folly and served no reasonable legal strategy. As the Freeh Report explained, an employee personnel file on Jerry Sandusky sat in Mr. Schultz' former office. It contained notes about the 1998 and 2001 incidents as well as print-outs of some of the 2001 emails. Review of those notes and emails, and surrounding emails to which the file would have led, would have enabled Mr. Schultz to recall that the 2001 incident ultimately was not reported to DPW and that he had communicated with Chief Harmon in 2001 about the 1998 incident and

report. The unprepared Mr. Schultz testified that he believed the shower incident had been reported to the Department of Welfare and he expressed complete ignorance about the existence of the 1998 police report, and the OAG has identified those statements as instances of perjury. See Commonwealth Response to Defendants' Motion for a Bill of Particulars, Exhibit B.

E. State Interference with Right to Counsel.

The defendants were denied assistance of counsel because the Commonwealth failed to inform the grand jury judge that Ms. Baldwin was operating under an impairing conflict. At the time of the defendants' respective appearances before the grand jury, the Commonwealth already knew that Mike McQueary had testified that he witnessed Jerry Sandusky sexually assaulting a boy in the Lasch Building on Penn State's campus and that he reported the incident to the defendants and Coach Paterno. The Commonwealth also knew that the defendants denied McQueary's accusations about telling them of Sandusky's sexual assault of a young boy. The Commonwealth also knew that the defendants did not report the incident to the Department of Welfare or Child Youth Services, which meant that the defendants were already targets prior to their Grand Jury appearances, at least regarding the failure to report charge. The Commonwealth also knew that, after the defendants' police interviews, it did not believe them and thought they were untruthful.

Yet, despite knowing all of this information and knowing that Ms. Baldwin

was representing the defendants and Penn State under an impairing conflict of interest, the Commonwealth remained silent rather than bring the conflict to the attention of the grand jury judge, who, under Section 4549(c)(4), would have been obligated to address the conflict with Curley and Schultz and perhaps prevented this fiasco.

F. Remedy

In both *Commonwealth v. Cohen* and *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (1971), the appellate courts addressed the proper remedy for violations of the right to counsel and the privilege against self-incrimination in the grand jury. The violations in those cases were failures to advise witnesses of their rights to remain silent and to consult with counsel. In each case, the court “conclude[d] that . . . testimony received in violation of [the witness] constitutional rights . . . could not serve, as the record reveals it did, as the basis in whole or part, of any of the indictments entered against him.” *Cohen*, 221 Pa. Super. At 253, 289 A.2d at 100. See also *McCloskey*, 443 Pa. at 147, 277 A.2d at 779. This comports with the Sixth Amendment right to counsel rule that the remedy for violation of that right should restore the defendant to the circumstances that existed had there been no violation of the right to counsel. See *United States v. Stein*, 541 F.3d 130, 144 (2nd Cir. 2008).

The defendants here suffered a much more egregious violation: they were misled into believing skilled counsel was protecting their rights, when in fact, they

had no counsel. However, the defendants here are charged by Information, not Indictment. The appropriate remedy therefore may be suppression of the testimony rather than dismissal of the charges (This may leave Count Two, while Count One, the perjury count, cannot proceed without the testimony.). *See also United States v. Daprano*, 505 F.Supp. 2d 1009, 1018 (D. N.M. 2007) (“In most ineffective assistance of counsel cases, suppression of the evidence, rather than dismissal of the indictment, is the appropriate remedy.”)

II. Procedures to Address Pretrial Publicity

A “defendant has a right to an impartial jury pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution.” *Commonwealth v. Chmiel*, 585 Pa. 547, 889 A.2d 501, 578 (Pa. 2005) (citations omitted). Pennsylvania courts have recognized that “in certain cases, pre-trial publicity can be so pervasive and inflammatory” that juror prejudice is presumed. *Commonwealth v. Carter*, 537 Pa. 233, 643 A.2d 61, 69 (Pa. 1994). In fact, Pennsylvania law presumes prejudice where, as here, “the publicity is sensational, inflammatory, and slanted towards conviction rather than actual and objective.” *Carter*, 643 A.2d at 69. “The accepted procedure, wherein an accused claims to have been prejudiced by an inordinate dissemination of pre-trial publicity pertaining to the crime charged, is either by a motion to request a change of venue or in the alternative, a request for a continuance.” *Commonwealth v. Douglas*, 461 Pa. 749, 337 A.2d 860, 862 (Pa. 1075).

Additional mitigating remedies can include "severance, change of venue, *voir dire*, peremptory challenges, sequestration, and admonition of the jury." *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, 335 (Pa. 1980) (closure context); *see also Commonwealth v. Reeves*, 255 Pa. Super. 409, 387 A.2d 877, 888 (Pa. Super. 1978) (the "preferred procedure when highly prejudicial material is disseminated throughout the community where the trial is being held is either to sequester the jury or question the jurors outside the presence of the other jurors.").

The impaneling of a jury is governed by Rules 631-634 of the Pennsylvania Rules of Criminal Procedure. Pertinent here, Rule 631(D) provides that the "judge *may* require the parties to submit in writing a list of proposed questions to be asked of the jurors regarding their qualifications." (Emphasis added.) It further provides that the judge *may* permit the parties to "conduct the examination of prospective jurors." (Emphasis added.) Last, Rule 631(E)(1)(a) allows the *voir dire* of prospective jurors to "be conducted beyond the hearing and presence of other jurors."

Based on this law, the defendant requests that this Honorable Court administer certain prophylactic measures to curb of much as possible the pervasive negative pretrial publicity. First, a continuance is warranted. It is among the primary ways, short of changing venue or venire, to curb pretrial publicity. In *Commonwealth v. Cohen*, 489 Pa. 167, 413 A.2d 1066, 1076 (Pa. 1980), the Pennsylvania Supreme Court ordered a new trial because "in the months between

arrest and trial Berks County residents became increasingly aware of this case.”¹

Id. Briefly stated, the cooling-off period was insufficient. *Id.* at 1075-76.

Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 373, 293 (Pa. 1978) (cooling off period important consideration in determining prejudicial effect of pretrial publicity). In this case to date there has never been a sufficient cooling off period. Therefore, a continuance is required to prevent the defendants from being tried by a jury pool tainted by the inflammatory pretrial publicity.

In addition to a continuance, a more sweeping voir dire is necessary to prevent jurors who already have fixed in their minds defendants' guilt. See *Commonwealth v. Rovisinki*, 1997 Pa. Super. LEXIS 3705, 704 A.2d 1068, 1074 (Pa. Super. 1997) (single goal in permitting questioning of prospective jurors is to provide the accused with a competent, fair, impartial and unprejudicial jury.)

Defendants also requests that individual *voir dire* be conducted out of the presence of other potential jurors.

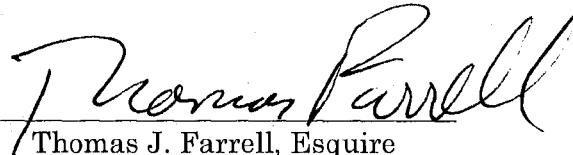
Last, Defendant requests that he and his codefendant each be given additional peremptory challenges each.

Given the unprecedented pretrial publicity in this case, defendants' requests are modes, reasonable, and easily accommodated.

¹ The court analyzed two public opinion polls showing that public awareness grew, not waned over time. *Cohen*, 413 A.2d at 1076. The four polls conducted here show that the public fever about this case has not eased.

Respectfully submitted,

By:



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(412) 894-1380

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

COMMONWEALTH OF PENNSYLVANIA, :

v. :

No. CP-22-CR-5164-2011

GARY C. SCHULTZ, :

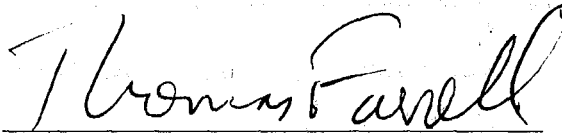
Defendant. :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Memorandum of
Law, was emailed and mailed, First Class Mail, this 16th day of November, 2012,
to the following

Bruce Beemer
Deputy Attorney General
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120
(bbeemer@attorneygeneral.gov)

Caroline M. Roberto, Esquire
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Thomas J. Farrell, Esquire
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DAUPHIN COUNTY
PENNA

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF DAUPHIN COUNTY
v.	:	
	:	No. CP-22-CR-5165-2011
TIMOTHY M. CURLEY,	:	
Defendant	:	CHARGES: PERJURY; PENALTIES
	:	FOR FAILURE TO REPORT

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF DAUPHIN COUNTY
v.	:	
	:	No. CP-22-CR-5164-2011
GARY CHARLES SCHULTZ,	:	
Defendant	:	CHARGES: PERJURY; PENALTIES
	:	FOR FAILURE TO REPORT

COMMONWEALTH'S ANSWER TO DEFENDANTS' OMNIBUS PRETRIAL MOTIONS

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Linda L. Kelly, Attorney General, Bruce R. Beemer, Chief of Staff, and James P. Barker, Chief Deputy Attorney General, who file this Commonwealth's Answer to Defendants' Omnibus Pretrial Motions, and in support thereof aver as follows:

I. BACKGROUND

On November 7, 2011, following a Grand Jury investigation and return of a presentment, a criminal complaint was filed charging the Defendants, Timothy M. Curley and Gary Charles Schultz, with Perjury¹ and Penalties for Failure to Report.² Each Defendant has entered a plea of not guilty. Following a preliminary hearing on December 16, 2011, the charges were held for court. The Defendants waived their appearance at formal arraignment and the Commonwealth filed a Criminal Information on January 19, 2012.

On November 1, 2012, a second criminal complaint was filed with respect to each Defendant, charging them with Endangering the Welfare of Children³ (two counts), Obstructing the Administration of Law or Other Governmental Function,⁴ and Criminal Conspiracy (three counts).⁵ Also, a third Defendant, Graham B. Spanier, was charged with the same offenses as Defendants.

Currently pending before the Court are Omnibus Pretrial Motions filed by the Defendants. Both Defendants seek dismissal of the charges or, in the alternative, suppression of their Grand Jury testimony based on an alleged conflict of interest on the part of counsel who represented them at the time they appeared before the Grand Jury. Also, Defendant Schultz seeks relief relating to pretrial publicity, to compel discovery, and an evidentiary hearing.

¹ 18 Pa.C.S. § 4902(a).

² 23 Pa.C.S. § 6319.

³ 18 Pa.C.S. § 4304(a).

⁴ 18 Pa.C.S. § 5101.

⁵ 18 Pa.C.S. § 903(a).

II. DEFENDANT CURLEY'S OMNIBUS PRETRIAL MOTION

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

7. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

8. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

9. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

10. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

11. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, it is admitted that the Defendant was interviewed by Special Agents of the Office of Attorney General while accompanied by Attorney Baldwin and that he testified before the Grand Jury; otherwise, the allegation is denied and proof thereof is demanded.

12. Admitted, with correction. The initial criminal complaint was filed on November 7, 2011.

13. Neither admitted nor denied. A hearsay, after-the-fact statement by an attorney representing the Pennsylvania State University is not relevant to any matter in issue before the Court. To the extent that a response is required, it is admitted that the *Harrisburg Patriot-News* so reported. It is denied that the opinion of another attorney would have any legal effect on the status of counsel as representing or not representing the Defendant.

14. Neither admitted nor denied. To the extent a response is required, the allegations of this paragraph are denied. See ¶ 13, above.

15. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

16. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

17. Admitted in part and denied in part. It is admitted that Attorney Baldwin stated that she represented the Defendant. The remainder of this paragraph is neither admitted nor denied. The Commonwealth does not have sufficient information to respond to the remainder of this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

18. Admitted in part and denied in part. It is admitted that Attorney Baldwin did not inform the Supervising Judge of any dual representation involving the Defendant and the Pennsylvania State University at the time of the Defendant's testimony before the Grand Jury. Attorney Baldwin's "current position" with regard to her status at the time of the Defendant's testimony is not relevant to any matter before the Court.

19. Admitted that the transcript so provides.

20. Admitted that the transcript so provides.⁶

21. Admitted that the transcript so provides.

22. Denied.

23. Admitted in part and denied in part. It is admitted that the Defendant might attempt to introduce such evidence. It is denied that such evidence is admissible. The Court is the expert on the law. See *Waters v. State Employees' Retirement Bd.*, 955 A.2d 466, 471 n.7 (Pa. Commw. 2008) ("It is well-settled that an expert is not permitted to give an opinion on a question of law... The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning."; citations omitted); *41 Valley Associates v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 14 n.12 (Pa. Commw. 2005) (citing *Browne v. Commonwealth*, 843 A.2d 429, 433 n.1

⁶ This answer presumes that "Eshbach" refers to former Senior Deputy Attorney General Jonelle Eshbach.

(Pa. Commw. 2004)). See also *Bessemer Stores Inc. v. Reed Shaw Stenhouse, Inc.*, 344 Pa. Super. 218, 223, 496 A.2d 762, 765 (1985) (legal conclusions are inadmissible).

24. Admitted in part and denied in part. See ¶ 23, above.

25. Admitted in part and denied in part. See ¶ 23, above.

26. Admitted in part and denied in part. See ¶ 23, above.

27. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon. Any fact recited in this paragraph is denied and proof thereof is demanded.

28. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

29. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. Further, the Supervising Judge advised Defendant Schultz of his constitutional right to remain silent before the Grand Jury. Exhibit C at 8-9.

30. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. It is specifically denied that any "abusive and confusing questioning" took place.

31. Admitted in part and denied in part. See ¶ 23, above.
32. Admitted in part and denied in part. See ¶ 23, above.
33. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, it is denied that the Defendant is entitled to relief.
34. Admitted.
35. Admitted.
36. Admitted that representatives of the Office of Attorney General knew Attorney Baldwin's title and that she appeared and stated that she was representing the Defendants for purposes of the Grand Jury.
37. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.
38. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.
39. Admitted in part and denied in part. It is admitted that each Defendant recalled the report by McQueary in a different way. It is denied that inconsistent recall would necessarily lead members of the Office of Attorney General to "know" that witnesses will lie under oath or that their testimony would be inconsistent.
40. Denied. The Office of Attorney General was not be aware of any actual conflict of interest on the part of Attorney Baldwin and therefore had no basis for raising the conflict before the Supervising Judge.
41. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph

is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

42. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

43. Neither admitted nor denied. This paragraph is a statement of intent as to which the Commonwealth has no information. It is admitted that the Office of Attorney General did not provide notice to the Supervising Judge of any conflict of interest because it had no basis for doing so.

44. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that this paragraph recites appropriate actions when the Supervising Judge is notified of an actual conflict of interest. It is denied that such actions are the only actions that the Supervising Judge might take. Further, it is denied that notice to the Supervising Judge was required in this case.

45. Denied.

46. Admitted in part and denied in part. See ¶ 23, above.

47. Admitted in part and denied in part. See ¶ 23, above.

48. Denied. It is specifically denied that any conflict on the part of counsel gave the Defendant the right to commit Perjury or excused the commission of Perjury.

49. Denied.

50. Denied.
51. Denied.
52. Denied.
53. Denied.
54. Denied.

III. DEFENDANT SCHULTZ'S OMNIBUS PRETRIAL MOTION

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.

6. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

7. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

8. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

9. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

10. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

11. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

12. Admitted.

13. Admitted that representatives of the Office of Attorney General were so informed by Attorney Baldwin.

14. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

15. Neither admitted nor denied. The documents speak for themselves and any attempt to characterize the contents of the documents is denied.

16. Denied.

17. Admitted in part and denied in part. It is admitted that each Defendant recalled the report by McQueary in a different way. It is denied that inconsistent recall would necessarily lead members of the Office of Attorney General to be "aware" that witnesses will lie under oath or that their testimony would be inconsistent. It is further denied that Defendant Schultz's recall of the 1998 incident would be "inconsistent" with Defendant Curley's lack of recall of that incident.

18. Neither admitted nor denied. This paragraph is a statement of intent as to which the Commonwealth has no information. It is admitted that the Office of Attorney General did not provide notice to the Supervising Judge of any conflict of interest because it had no basis for doing so.

19. Admitted in part and denied in part. It is admitted that the Office of Attorney General did not move to disqualify counsel. It is denied that the Office of Attorney General was "keenly aware" of any conflict of interest.

20. Admitted that the transcript so provides.

21. Admitted that the transcript so provides.

22. Denied.

23. Admitted.

24. Neither admitted nor denied. A hearsay, after-the-fact statement by an attorney representing the Pennsylvania State University is not relevant to any matter in issue before the Court. To the extent that a response is required, it is admitted that the *Harrisburg Patriot-News* so reported. It is denied that the opinion of another attorney would have any legal effect on the status of counsel as representing or not representing the Defendant.

25. Neither admitted nor denied. To the extent a response is required, the allegations of this paragraph are denied. See ¶ 24, above.

26. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

27. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

28. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

29. Admitted in part and denied in part. It is admitted that the Defendant might attempt to introduce such evidence. It is denied that such evidence is admissible. The Court is the expert on the law. See *Waters v. State Employees' Retirement Bd.*, 955 A.2d 466, 471 n.7 (Pa. Commw. 2008) ("It is well-settled that an expert is not permitted to give an opinion on a question of law... The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning."; citations omitted); *41 Valley Associates v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 14 n.12 (Pa. Commw. 2005) (citing *Browne v. Commonwealth*, 843 A.2d 429, 433 n.1 (Pa. Commw. 2004)). See also *Bessemer Stores Inc. v. Reed Shaw Stenhouse, Inc.*, 344 Pa. Super. 218, 223, 496 A.2d 762, 765 (1985) (legal conclusions are inadmissible).

30. Admitted in part and denied in part. See ¶ 29, above.

31. Admitted in part and denied in part. See ¶ 29, above.

32. Admitted in part and denied in part. See ¶ 29, above.

33. Admitted in part and denied in part. See ¶ 29, above.

34. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

35. Denied.

36. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is denied.

37. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded. Further, the Supervising Judge advised Defendant Schultz of his constitutional right to remain silent before the Grand Jury. Exhibit C at 8-9.

38. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

39. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

40. Denied.

41. Denied. The questioning was not improper.

42. Admitted in part and denied in part. See ¶ 29, above.

43. Admitted in part and denied in part. See ¶ 29, above.

44. Admitted in part and denied in part. See ¶ 29, above.

45. Denied.

46. Denied.

47. Neither admitted nor denied. This paragraph is a statement of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that the paragraph is an accurate statement of the law. It is denied that the Defendant is entitled to relief based thereon.

48. Neither admitted nor denied. This paragraph is a conclusion of law to which no response is required. To the extent that a response is required, the paragraph is admitted in part and denied in part. It is admitted that this paragraph recites appropriate actions when the Supervising Judge is notified of an actual conflict of interest. It is denied that such actions are the only actions that the Supervising Judge might take. Further, it is denied that notice to the Supervising Judge was required in this case.

49. Denied.

50. Admitted in part and denied in part. See ¶ 29, above.

51. Admitted in part and denied in part. See ¶ 29, above.

52. Admitted in part and denied in part. See ¶ 29, above.

53. Denied.

54. Denied.

55. Admitted.

56. Admitted, with correction. A presentment is not a charging document but a vehicle by which a grand jury recommends that charges be filed via a criminal

complaint. Sandusky was not "charged in the same Presentment," although the Presentment recommended charges against these Defendants and Sandusky.

57. Admitted in part. It is admitted that the "Freeh Report" generated substantial publicity, both favorable and unfavorable to Defendants. The remainder of this paragraph is neither admitted nor denied as the document speaks for itself, although any characterization of the "Freeh Report" is specifically denied.

58. Denied.

59. Admitted in part and denied in part. It is admitted that substantial publicity attended the trial of Sandusky. The remainder of the paragraph is denied as hyperbole.

60. Denied.

61. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

62. Neither admitted nor denied. The Commonwealth does not have sufficient information to respond to this paragraph of the Motion. To the extent a response is required, the allegation is denied and proof thereof is demanded.

63. Admitted in part and denied in part. Defendant's characterizations of the reasons for seeking relief are denied. That Defendant seeks such relief is admitted.

64. Admitted in part and denied in part. It is admitted that discovery has been provided and is ongoing. As to the specific items demanded:

(a) Only one victim interview was recorded and that interview is unrelated to the instant charges.

(b) The recorded interview of Joseph V. Paterno has been provided.

(c) The only evidence that might potentially fall within the ambit of Rule 404(b) is evidence of the 1998 incident. Defendants have been provided with notice of that evidence.

(d) Any further written statements or reports will be provided.

IV. MEMORANDUM OF LAW

I. A PRETRIAL MOTION TO DISMISS CHARGES THAT IS BASED ON EVENTS ALLEGED TO HAVE OCCURRED BEFORE A GRAND JURY MUST BE ADDRESSED BY THE SUPERVISING JUDGE.

Defendants contend that the charges against them should be dismissed or their Grand Jury testimony suppressed because prior counsel, Cynthia Baldwin, Esquire, had conflicts of interest based on her representation of other witnesses during the Grand Jury investigation as well as the Pennsylvania State University (Penn State). The first problem with Defendants' Motions is that they are directed to the wrong judge. In the Order granting the application of the Office of Attorney General to convene the Thirty-Third Statewide Investigating Grand Jury, the Honorable Ronald D. Castille, Chief Justice of the Supreme Court of Pennsylvania, ordered as follows:

The Honorable Barry F. Feudale, Senior Judge of the Court of Common Pleas, Eighth Judicial District, Northumberland County, Pennsylvania, is hereby designated as Supervising Judge of the Thirty-Third Statewide Investigating Grand Jury. All applications and motions relating to the work of the Thirty-Third Statewide Investigating Grand Jury – including motions for disclosure of grand jury transcripts and evidence – shall be presented to said Supervising Judge. ...

In re: Application of Thomas W. Corbett Jr., Attorney General of the Commonwealth of Pennsylvania, Requesting an Order Directing that an Additional Multicounty Investigating Grand Jury Having Statewide Jurisdiction Be Convened, No. 217 M.D. 2010, at 1 ¶ 2 (Pa. December 27, 2010).

The plain language of the Order of Court dated December 27, 2010, makes it clear that the Omnibus Pretrial Motion is properly directed to Judge Feudale, the Supervising Judge of the Grand Jury that heard the evidence against Defendants and recommended that charges be filed. The crux of Defendants' Omnibus Pretrial Motions is that the attorney who represented them during the Grand Jury investigation labored under a conflict of interest. As such, the Motion should be heard by Judge Feudale, consistent with the Order of Court, which is consistent with statutory authority relating to the claims raised by Defendants. See 42 Pa.C.S. 4549(c)(4) (when counsel representing multiple witnesses before grand jury will or is likely to be adversely affected by representation of another client, supervising judge may order separate representation of witnesses). Based on both sources of authority, the Motion should be denied.

II. A DEFENDANT IS NOT ENTITLED TO DISMISSAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT PRIOR TO TRIAL WHEN JEOPARDY HAS NOT ATTACHED, WHEN THE CONDUCT OF WHICH THE DEFENDANT COMPLAINS IS ATTRIBUTABLE ONLY TO DEFENSE COUNSEL, THE PROSECUTORS HAD NO AUTHORITY TO ACT TO ADDRESS PURPORTED CONSTITUTIONAL VIOLATIONS, THERE IS NO EVIDENCE OF THOSE VIOLATIONS, AND THE EXISTENCE OF A VIOLATION DOES NOT PERMIT A DEFENDANT TO COMMIT A CRIME.

Defendants seek dismissal based on a claim of prosecutorial misconduct. Because most such claims are raised in the context of trial, the standard of review generally is expressed in terms relating to trial:

The phrase "prosecutorial misconduct" has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. See *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L.Ed.2d 618 (1987) ("To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.") (internal quotation marks omitted); *Donnelly v. DeChristoforo*, 416

U.S. 637, 643, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."). However, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511, 104 S. Ct. 2543, 81 L.Ed.2d 437 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982).

Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (2008).

Similarly, claims of prosecutorial misconduct so egregious as to warrant the extreme remedy of barring retrial are expressed in terms of conduct during trial:

Under both the federal and state constitutions, double jeopardy bars retrial where the prosecutor's misconduct was intended to provoke the defendant into moving for a mistrial. See *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L.Ed.2d 416 (1982); *Commonwealth v. Simons*, 514 Pa. 10, 522 A.2d 537 (1987). In *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), our Supreme Court recognized that the standard set forth in *Oregon v. Kennedy*, *supra*, was inadequate to protect a defendant's rights under the Pennsylvania Constitution. The Court stated:

We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

Smith, at 186, 615 A.2d at 325 (quoted in *Commonwealth v. Martorano*, 559 Pa. 533, 537-38, 741 A.2d 1221, 1223 (1999), *rearg. denied* 1999 Pa.LEXIS 3828 (Pa.12/27/99)).

Prosecutorial misconduct includes actions intentionally designed to provoke the defendant into moving for a mistrial or conduct by the prosecution intentionally undertaken to prejudice the defendant to the point where he has been denied a fair trial. *Smith*, at 186, 615 A.2d at 325. The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant subjected to the kind of prosecutorial misconduct intended to subvert a defendant's constitutional rights. *Id.* at 186, 615 A.2d at 325. However, *Smith* did not create a *per se* bar to retrial in all cases of intentional prosecutorial overreaching. See *Commonwealth v. Simone*, 712 A.2d 770 (Pa.Super.1998), *appeal denied*, 557 Pa. 628, 732 A.2d 614 (1998). "Rather, the *Smith* Court primarily was concerned with prosecution tactics, which actually were designed to demean or subvert the truth seeking process." *Id.* at 774-75. The *Smith* standard precludes retrial

where the prosecutor's conduct evidences intent to so prejudice the defendant as to deny him a fair trial. A fair trial, of course is not a perfect trial. Errors can and do occur. That is why our judicial system provides for appellate review to rectify such errors. However, where the prosecutor's conduct changes from mere error to intentionally subverting the court process, then a fair trial is denied. See *Commonwealth v. Martorano & Daidone*, 453 Pa. Super. 550, 684 A.2d 179, 184 (1996), *affirmed Martorano*, 559 Pa. 533, 741 A.2d 1221 (1999). "A fair trial is not simply a lofty goal, it is a constitutional mandate, ... [and] [w]here that constitutional mandate is ignored by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." *Martorano*, 559 Pa. at 539, 741 A.2d at 1223 (*quoting Martorano & Daidone*, 684 A.2d at 184). We must first determine if Chmiel's claims of prosecutorial misconduct are meritorious, and then, we must determine if such claims bar retrial on double jeopardy grounds.

Our standard for a claim of prosecutorial misconduct is as follows:

The primary guide in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict. *Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974); *Commonwealth v. VanCliff*, 483 Pa. 576, 397 A.2d 1173 (1979). In making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding, Code of Professional Responsibility, Canon 7, E.D. 7-19-7-39, and the prosecution, like the defense, must be accorded reasonable latitude in fairly presenting its version of the case to the jury. *Commonwealth v. Cronin*, 464 Pa. 138, 346 A.2d 59 (1975).

Commonwealth v. Rainey, 540 Pa. 220, 235, 656 A.2d 1326, 1334 (1995) (*quoting Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991)).

Commonwealth v. Chmiel, 777 A.2d 459, 463-464 (Pa. Super. 2001).

Defendants point to no specific authority that would permit dismissal based on purported prosecutorial misconduct and, in fact, the only basis would be principle of double jeopardy.

The first problem with Defendants' argument is that they fail to present circumstances implicating double jeopardy concerns.- According to Defendants,⁷ after learning of the Grand Jury investigation, they met with Cynthia Baldwin, Esquire, regarding their appearance before the Grand Jury. Attorney Baldwin also was General Counsel for Penn State. There have been public statements indicating that Attorney Baldwin was representing Penn State and not the Defendants in their individual capacities. The Notes of Testimony of the Defendants' colloquy and oath before the Supervising Judge and their appearance before the Grand Jury indicate that Attorney Baldwin was identified as Defendants' counsel.

Based on Defendants' own factual recitation, their argument fails. Plainly, jeopardy has not attached:

In Pennsylvania, jeopardy does not attach and the constitutional prohibition against double jeopardy has no application until a defendant stands before a tribunal where guilt or innocence will be determined. In a criminal jury trial, jeopardy attaches when the jury is sworn. In a bench trial, however, jeopardy attaches when the trial court begins to hear the evidence.

Commonwealth v. Ortega, 995 A.2d 879, 887 (Pa. Super. 2010) (quoting *Commonwealth v. Vargas*, 947 A.2d 777, 780-781 (Pa. Super. 2008)) (quotation marks, citations omitted), *alloc. denied*, 20 A.3d 1211 (Pa. 2011). The jury in this case has not been selected, much less sworn, and no defendant has waived the right to a jury trial. Jeopardy plainly has not attached and so there can be no double jeopardy violation.

Additionally, there cannot have been an instance of prosecutorial misconduct. Nothing alleged by the Defendants remotely touches upon the fairness of the (yet to be

⁷ For purpose of this Memorandum of Law, the facts alleged by Defendants will be presumed to be true. As reflected in the Commonwealth's Answer, many of those facts are denied. However, even assuming the veracity and accuracy of Defendants' recitation, they are not entitled to relief, as demonstrated in this Memorandum of Law. The Commonwealth continues to deny the facts challenged in the Answer except for purposes of its argument herein.

conducted) trial. At best, the Defendants allege that counsel during the Grand Jury investigation had a conflict of interest⁸ and that the Commonwealth should have taken action to remove the conflict. They cite no authority for the proposition that criminal charges are subject to dismissal under these circumstances. To the contrary, the law is clear that the Double Jeopardy Clause does not apply.

Also, at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest. Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate in the investigation. Such an action would not conflict with the interests of the other witnesses represented by Attorney Baldwin, who also were cooperating. That the Defendants actually intended to mislead the Grand Jury and the Commonwealth would not alter the fact that, at the time they were represented by Attorney Baldwin, there was no conflict of interest.

The purported notice to the Commonwealth of the "actual" conflict of interest was that Defendant Schultz remembered the 1998 incident while Curley said that he did not remember it. That one witness does not remember an incident that the other remembers does not make their testimony "inconsistent," as the Defendants contend. The matter would have been different if Defendant Curley had testified that the 1998 incident never occurred, but that was not his statement and not his testimony. This information simply did not reveal a conflict of interest.

Moreover, the Defendants' statements would not impact on any purported duty on the part of the Commonwealth to act with respect to the representation of multiple witnesses. The Commonwealth had no reason to question Attorney Baldwin's conduct

⁸ Defendants ignore the fact that they benefitted from the multiple representation in that he learned about the testimony of other Penn State witnesses.

when all of her clients had the same interest. In fact, the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541-4553, provides that an attorney "shall not continue in multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client." 42 Pa.C.S. § 4549(c)(4). The supervising judge makes the final determination "that the interest of an individual will or is likely to be adversely affected." *Id.* Noticeably absent from this provision is any authority or duty on the part of the attorney for the Commonwealth to usurp the role of defense counsel and inquire whether counsel has an actual conflict of interest even when there is no apparent conflict of interest and no basis for believing that a conflict exists. A failure to commit such a flagrant violation of the attorney-client relationship does not constitute prosecutorial misconduct.

Simply stated, multiple representation does not necessarily amount to a conflict of interest, and so multiple representation is permitted except as limited by § 4549(c)(4). And it is defense counsel and the supervising judge who are primarily charged with recognizing a conflict of interest and remedying the situation.⁹ Significantly, defense counsel does so in "the exercise of ... independent professional judgment." A prosecutor is not familiar with discussions between counsel and the client, does not know the goal of the representation, and does not know the substance of any anticipated defense. The prosecutor therefore has a limited ability to "exercise ...

⁹ This is not to say that the Commonwealth has no interest in ensuring that a defendant has adequate representation and that the judicial process is protected. See, e.g., *In re Paradyne Corp.*, 803 F.2d 604, 608 n.7 (11th Cir. 1986) (government had standing to move for disqualification of defense counsel based on its interest in preventing reversals and its duty to report ethical violations to the court).

independent professional judgment" and must rely on information available through the record and, to some extent, from defense counsel.

In this case, the Commonwealth knew that defense counsel was experienced and aware of the possibility of a conflict. The information available to the Commonwealth also included the fact that the Defendants apparently intended to cooperate, as evidenced by their statements. There would be no reason under these circumstances for the Commonwealth to jump to the conclusion that an actual conflict of interest existed. The Commonwealth could not know that the Defendants intended to provide inaccurate testimony.

Given that there was no conflict of interest, actual or apparent, the fact that the Commonwealth had no basis for moving to disqualify defense counsel also leads to the conclusion that there was no prosecutorial misconduct. There certainly was no prosecutorial misconduct so egregious as to implicate double jeopardy principles, presuming that those principles apply to Grand Jury proceedings.

The Defendants also claim that the purported conflict of interest violated their right to counsel. Succinctly stated, the Fifth Amendment right to counsel applies to custodial interrogation and means simply that if the person in custody affirmatively asks for counsel, questioning must cease. *Commonwealth v. Briggs*, 12 A.3d 291, 319-320 and n. 30 (Pa. 2011), *cert. denied*, 132 S. Ct. 267 (2011). See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

In addition to the fact that there was no conflict, as discussed above, the Defendants were not in custody at the time of their testimony. *Commonwealth v. Columbia Investment Corp.*, 457 Pa. 353, 361-362, 325 A.2d 289, 293-294 (1974)

(subject of a grand jury subpoena is not "in custody" for purposes of *Miranda*). See also *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality; defendant need not have been provided with *Miranda* warnings before grand jury testimony that formed the basis for perjury prosecution).¹⁰

----- The other constitutional source of the right to counsel is the Sixth Amendment.

The right to counsel attaches at a particular point in time which reflects its "criminal prosecution" roots: "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Commonwealth v. McCoy*, 601 Pa. 540, 975 A.2d 586, 590 (2009) (quoting *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, [213], 128 S. Ct. 2578, 2592, 171 L.Ed.2d 366 (2008)).

Commonwealth v. Colavita, 606 Pa. 1, 28, 993 A.2d 874, 890-891 (2010). In this case, apart from the absence of an actual conflict of interest as discussed above, the Defendants had not been charged at the time that the purported conflict of interest existed, i.e. during the Grand Jury proceedings. By the time of their preliminary arraignment, when the right attached, the Defendants had retained new counsel. There was no deprivation of the constitutional right to counsel.¹¹

The Defendants also claims to be entitled to relief based on a purported violation of 42 Pa.C.S. § 4549(c)(4). Again, there was no actual conflict of interest, and so that statutory provision was not violated. Moreover, § 4549(c)(4) confers on the Commonwealth no duty to affirmatively investigate every multiple representation based on the possibility of a conflict of interest. The onus is placed on defense counsel to

¹⁰ Any argument under Article I, § 9 of the Pennsylvania Constitution also fails, as the rights protected under that provision are no broader than those protected by the Fifth Amendment. *Commonwealth v. Arroyo*, 555 Pa. 125, 134-135, 723 A.2d 162, 166-167 (1999).

¹¹ The right to counsel under Article I, § 9 also attaches at the formal initiation of adversarial judicial proceedings, as the provision is coterminous with the Sixth Amendment. *Arroyo* at 136, 723 A.2d at 167; *McCoy* at 546-547, 975 A.2d at 590.

make an independent professional judgment regarding any conflict and the supervising judge then exercises discretion to allow counsel to continue or to substitute counsel. It should be added that § 4549(c) provides for no relief in the form of dismissal or disqualification of the Office of Attorney General, as the Defendants seek. It allows only for the substitution of counsel.

The only other potential source of authority relating to the relief sought by the Defendants is the Pennsylvania Rules of Professional Conduct, specifically 1.7 (relating to current conflicts of interest generally), 1.8 (relating to specific conflicts of interest), 1.16 (relating to declining or terminating representation), 8.3 (relating to reporting professional misconduct), and 8.4 (defining professional misconduct). However, any purported violation of those Rules is, at best, a basis for disciplinary proceedings and not a basis for relief in this Court because “[t]he rules that govern the ethical obligations of the legal profession (presently, the Rules of Professional Conduct) do not constitute substantive law.” *Commonwealth v. Chmiel*, 558 Pa. 478, 495, 738 A.2d 406, 415 (1999) (citations omitted).

In short, apart from failing to raise an actual conflict of interest of which the Commonwealth should have been aware, the Defendants cite no authority for the proposition that an alleged conflict of interest on the part of counsel at the time of a Grand Jury investigation warrants dismissal of charges, particularly Perjury. Effectively, the Defendants’ argument amounts to a contention that appearing before a Grand Jury with conflicted counsel allows a witness to lie to the Grand Jury. No legal authority is cited for such a proposition because no such authority exists.

* * *

Defendant Schultz also complains of the pretrial publicity associated with this case but does not request a change of venue or venire. Rather, Defendant Schultz requests relief relating to the manner in which *voir dire* will be conducted. The Commonwealth takes no position on that issue and leaves the conduct of *voir dire* to the discretion of the Court.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying the Defendants' Omnibus Pretrial Motions.

Respectfully submitted,
LINDA L. KELLY
Attorney General

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(717) 787-3391
Date: November 14, 2012

VERIFICATION

The facts recited in the foregoing Commonwealth's Answer to Defendants' Omnibus Pretrial Motions are true and correct to the best of my knowledge and belief.

This statement is made with knowledge that a false statement is punishable by law under 18 Pa.C.S. § 4904(b).

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Date: November 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Answer to Defendants' Motions for Severance of Counts and Defendants with Memorandum of Law upon the persons and in the manner indicated below:

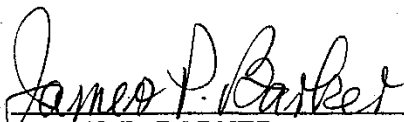
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Date: November 14, 2012

<p>1 COMMONWEALTH OF PENNSYLVANIA 2 THIRTIETH STATEWIDE INVESTIGATING GRAND JURY 3 IN RE: NOTICE NO. 29 4 5 TRANSCRIPT OF PROCEEDINGS 6 OF GRAND JURY 7 WITNESS: GARY SCHULTZ 8 DATE: JANUARY 12, 2011, 12:02 P.M. 9 PLACE: STRAWBERRY SQUARE 10 VERIZON TOWER, EIGHTH FLOOR 11 WALNUT STREET HARRISBURG, PA 17120 12 STEPHANIE MCCARROLL, FOREPERSON RENEE HARTMAN, SECRETARY 13 14 COUNSEL PRESENT: 15 OFFICE OF THE ATTORNEY GENERAL BY: JONELLE ESHBACH, ESQUIRE 16 FRANK FINA, ESQUIRE 17 FOR - COMMONWEALTH 18 PENNSYLVANIA STATE UNIVERSITY BY: CYNTHIA BALDWIN, ESQUIRE 19 20 FOR - GARY SCHULTZ 21 22 SHANNON MANDERBACH REPORTER-NOTARY PUBLIC 23 24 25</p>	<p>1 GARY SCHULTZ, called as a witness, 2 being previously sworn, testified as follows: 3 4 EXAMINATION 5 6 BY MS. ESHBACH: 7 Q Would you please introduce yourself 8 to the Grand Jury and spell your last name for the 9 court reporter's benefit? 10 A Sure. My name is Gary Schultz, 11 S-c-h-u-l-t-z, I am a retired senior vice 12 president for finance and business at Penn State 13 University. 14 Q You are accompanied today by counsel, 15 Cynthia Baldwin; is that correct? 16 A That is correct. 17 Q When did you retire from the 18 university? 19 A In June of 2009. 20 Q In June of 2002, did you occupy that 21 position as senior vice president? 22 A Yes, I did. 23 Q Could you please explain to the Grand 24 Jury in that capacity what operations of the 25 university were under your authority?</p>
<p>1 INDEX 2 EXAMINATION 3 WITNESS PAGE 4 Gary Schultz 3 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 A Yes. Within an academic institution, 2 we have the chief academic officer. That's 3 commonly referred to as the provost. That's not 4 me. I really run the operations of the 5 university, the physical plant, all the facilities 6 and services of those facilities, all the housing 7 and food services; if you have ever been on Penn 8 State campus, the Nittany Lion Inn, the airport, 9 all kinds of printing and fleet, human resources, 10 university police, and all the finance elements of 11 the university which would include the controller, 12 the budget office and the investment office. 13 Q With regard to Penn State's athletic 14 program, the Grand Jury has already met the 15 athletic director. Could you explain your 16 position vis-a-vis Mr. Curley as the athletic 17 director? 18 A Yes. Mr. Curley directly reports to 19 the president of the university, but kind of a 20 day-to-day working arrangement is that he would 21 often behave like he reported to me as well. 22 Q I'd like to direct your attention to 23 a time around spring break of 2002 as it's been 24 reported to us. Do you recall being called and 25 requested to attend a meeting with Coach Paterno</p>


<p>13</p> <p>1 there was a police investigation in 1998?</p> <p>2 A Well, I know the police were</p> <p>3 involved, but my recollection is that it was</p> <p>4 decided that this child protection agency would be</p> <p>5 the better entity to do the investigation.</p> <p>6 Q Were you, yourself, ever questioned</p> <p>7 with regard to that '98 incident?</p> <p>8 A I don't recall I was, no.</p> <p>9 Q Do you know if any criminal charges</p> <p>10 arose from the 1998 report?</p> <p>11 A To the best of my knowledge, there</p>	<p>15</p> <p>1 Q Knowing that there was an incident in</p> <p>2 1998 involving a boy or boys and the incident in</p> <p>3 2002, did you not feel it was appropriate to</p> <p>4 further investigate the incident to determine if</p> <p>5 something truly sexually inappropriate had</p> <p>6 occurred on campus?</p> <p>7 A Yes. Again, '98 was investigated.</p> <p>8 There was an allegation. I have no idea what the</p> <p>9 conclusion of that investigation was, whether</p> <p>10 there was any merit to the allegation or not. I</p> <p>11 did have the impression that it concluded without</p>
<p>12 were none.</p> <p>13 Q What did you understand the 1998</p> <p>14 incident, in a general way, to allege?</p> <p>15 A Again, I thought that it had some</p> <p>16 basis of inappropriate behavior, but without any</p> <p>17 specifics at all.</p> <p>18 Q At the time of finding out in 2002</p> <p>19 about the allegations of the inappropriate conduct</p> <p>20 in the shower by Sandusky, you were aware of the</p> <p>21 1998 allegations --</p> <p>22 A That's correct.</p> <p>23 Q -- of the same nature involving</p> <p>24 Sandusky?</p> <p>25 A An allegation, yes.</p>	<p>12 any charges being filed. The incident in 2002,</p> <p>13 again, I recall that it was also turned over to</p> <p>14 that same agency for investigation and it's</p> <p>15 appropriate for them to do that, not for me to</p> <p>16 determine the name of the boy. I wasn't doing an</p> <p>17 investigation.</p> <p>18 Q Do you remember whether the District</p> <p>19 Attorney was consulted at all in the 1998</p> <p>20 investigation?</p> <p>21 A I believe the District Attorney was</p> <p>22 in 1998. I think, again, my recollection -- this</p> <p>23 is a long time ago. But my recollection was that</p> <p>24 between the university police chief and the</p> <p>25 District Attorney and perhaps university legal</p>
<p>14</p> <p>1 Q It's your testimony that you believed</p> <p>2 the 2002 incident was reported to the same agency,</p> <p>3 that child protective services agency, for an</p> <p>4 investigation as the '98 one had been?</p> <p>5 A That's my recollection, yes.</p> <p>6 Q You did not meet with Jerry Sandusky</p> <p>7 about any of these incidents whatsoever?</p> <p>8 A No, I did not.</p> <p>9 Q Did Tim Curley report back to you</p> <p>10 about his contact with Jerry Sandusky regarding</p> <p>11 the incident in 2002?</p> <p>12 A I can't say for sure. I had the</p> <p>13 impression that Tim did follow through and make</p> <p>14 sure Jerry understood that he was no longer</p> <p>15 permitted to bring Second Mile children into the</p> <p>16 football facility.</p> <p>17 Q Did you, yourself, ever attempt to</p> <p>18 determine the identity or age of the boy in the</p> <p>19 shower in the 2002 incident?</p> <p>20 A No.</p> <p>21 Q Do you know if anyone in the</p> <p>22 university under your auspices then when you were</p> <p>23 senior vice president attempted to learn that</p> <p>24 information?</p> <p>25 A No.</p>	<p>16</p> <p>1 counsel and myself, the decision was made to use</p> <p>2 the child protection agency as the appropriate</p> <p>3 investigative agency.</p> <p>4 Q Who was the university legal counsel</p> <p>5 when that decision was made?</p> <p>6 A His name was Wendell Courtney.</p> <p>7 Q He was with the firm of McQuaide</p> <p>8 Blasko?</p> <p>9 A That's correct.</p> <p>10 Q Do you believe that you may be in</p> <p>11 possession of any notes regarding the 2002</p> <p>12 incident that you may have written memorializing</p> <p>13 what occurred?</p> <p>14 A I have none of those in my</p> <p>15 possession. I believe that there were probably</p> <p>16 notes taken at the time. Given my retirement in</p> <p>17 2009, if I even had them at that time, something</p> <p>18 that old would have probably been destroyed. I</p> <p>19 had quite a number of files that I considered</p> <p>20 confidential matters that go back years that</p> <p>21 didn't any longer seem pertinent. I wouldn't be</p> <p>22 surprised. In fact, I would guess if there were</p> <p>23 any notes, they were destroyed on or before 2009.</p> <p>24 Q You indicated that you consulted with</p> <p>25 Tim Curley. Did you agree with his</p>

<p>17</p> <p>1 recommendations as to how this should be handled?</p> <p>2 A I don't know if it was a</p> <p>3 recommendation but, yes, we reached agreement. I</p> <p>4 can't remember if I recommended, he recommended or</p> <p>5 who recommended, but at the conclusion of</p> <p>6 discussion, there was agreement. There was no</p> <p>7 disagreement.</p> <p>8 Q Did you, yourself, directly consult</p> <p>9 with Graham Spanier, the president of the</p> <p>10 university, concerning the 2002 incident?</p> <p>11 A I believe so. It was a routine way</p>	<p>19</p> <p>1 A I probably would have been able to,</p> <p>2 but it was my practice that I didn't ask the</p> <p>3 police for police reports.</p> <p>4 Q In 2002 when you became aware of this</p> <p>5 allegation in the shower, did you then seek out</p> <p>6 the 1998 report to find out what it was that</p> <p>7 Sandusky specifically was alleged to have done?</p> <p>8 A No, I did not. Honestly, I don't</p> <p>9 know what the procedures are. I assume that that</p> <p>10 report was with the child protection agency and</p> <p>11 not Penn State University Police. I thought the</p>
<p>12 of kind of handling business, that I would've had</p> <p>13 a conversation with the president about such a</p> <p>14 matter, yes.</p> <p>15 Q Did the president of the university</p> <p>16 express concern about this incident at the time it</p> <p>17 was reported to him?</p> <p>18 A Very similar to mine and Tim's, yes.</p> <p>19 We took it seriously.</p> <p>20 Q Did President Spanier appear to</p> <p>21 approve of the way in which you and Athletic</p> <p>22 Director Curley handled this?</p> <p>23 A Yes. Again, my recollection was that</p> <p>24 there was agreement.</p> <p>25 Q Do you know if President Spanier was</p>	<p>12 police turned it over and that investigation was</p> <p>13 then handled independently.</p> <p>14 Q You thought that the university</p> <p>15 police would not have kept any kind of record of</p> <p>16 that investigation?</p> <p>17 A That there was a -- yeah, I think</p> <p>18 they would have a record that a complaint was</p> <p>19 received and that it was turned over. But I</p> <p>20 wouldn't have assumed that they would have the</p> <p>21 report from the other agency.</p> <p>22 Q You wouldn't assume that the police</p> <p>23 would keep reports of all their investigations</p> <p>24 that they have conducted?</p> <p>25 A They didn't conduct it. The other</p>
<p>18</p> <p>1 aware of the 1998 incident at the time of the 2002</p> <p>2 incident?</p> <p>3 A I believe so, yes.</p> <p>4 Q Why do you believe so? Did you tell</p> <p>5 him or was it discussed?</p> <p>6 A Again, I don't remember the specifics</p> <p>7 of the conversation I had with him, but it would</p> <p>8 have been a routine kind of way of handling</p> <p>9 things, that I would have kept him informed about</p> <p>10 the '98 as well as the 2002 reports.</p> <p>11 Q You knew, of course, that the</p> <p>12 incident in 1998 was alleged to have taken place</p> <p>13 very similarly in the Lash Building in the shower</p> <p>14 with a young boy or more than one young boy?</p> <p>15 A I honestly don't recall that '98 I</p> <p>16 knew anything about the details of what the</p> <p>17 allegation was from the mother. I do recall there</p> <p>18 was a mother with a young boy who reported some</p> <p>19 inappropriate behavior of Jerry Sandusky. But I</p> <p>20 don't recall it being reported in the Lash</p> <p>21 Building or anything of that sort.</p> <p>22 Q The reports on that were something</p> <p>23 that you could have had access to as the director,</p> <p>24 the police being under your purview of the</p> <p>25 university; is that correct?</p>	<p>20</p> <p>1 agency did was my understanding. So, yeah, I</p> <p>2 believe they have reports of investigations that</p> <p>3 they have done, but this I thought was turned over</p> <p>4 to another agency.</p> <p>5 Q You knew the university police were</p> <p>6 involved in the 1998 investigation, right?</p> <p>7 A Yes.</p> <p>8 Q But you didn't attempt to find out</p> <p>9 whether they had anything that would substantiate</p> <p>10 or cause you to come to some conclusions regarding</p> <p>11 the 2002 incident and whether or not it might have</p> <p>12 actually occurred? That didn't occur to you, to</p> <p>13 check into the 1998 incident more firmer?</p> <p>14 A No.</p> <p>15 Q And you didn't attempt to find out</p> <p>16 anything about the identity of the youth that was</p> <p>17 in the shower in 2002?</p> <p>18 A No.</p> <p>19 Q You've referenced and Mr. Curley also</p> <p>20 referenced reporting this incident to the Second</p> <p>21 Mile. You've indicated that you thought this was</p> <p>22 a child from the Second Mile in the 2002 incident</p> <p>23 and we know that in the 1998 incident it was a</p> <p>24 Second Mile child. Why did you think that a</p> <p>25 Second Mile child was involved in the 2002</p>

<p>21</p> <p>1 incident when you didn't investigate to make sure?</p> <p>2 A Well, I'm not sure that I knew for</p> <p>3 sure it was a Second Mile child in 2002. I think</p> <p>4 I knew that it was a younger boy. I'm not sure I</p> <p>5 knew definitively it was a Second Mile child.</p> <p>6 Q Did you have occasion to see Sandusky</p> <p>7 in the company of young boys who were affiliated</p> <p>8 with the Second Mile program?</p> <p>9 A I would see Jerry from time to time</p> <p>10 at Second Mile events in the presence of lots of</p> <p>11 children, sure.</p>	<p>23</p> <p>1 something like that was going on in the locker</p> <p>2 room and perhaps in the course of that, that</p> <p>3 somebody might have grabbed the genitals, that</p> <p>4 Jerry might have grabbed the genitals of the boy.</p> <p>5 I had no impression that it was anything more</p> <p>6 serious than that. That was my impression at the</p> <p>7 time.</p> <p>8 Q Didn't you previously tell us in our</p> <p>9 interview that you had the impression -- I have it</p> <p>10 written down -- that this was inappropriate sexual</p> <p>11 conduct?</p>
<p>12 Q Did you ever see him on university</p> <p>13 property at any time with boys who were of that</p> <p>14 age, Second Mile age?</p> <p>15 A Well, technically, yes. I mean, some</p> <p>16 of the Second Mile fundraising events and so forth</p> <p>17 would be held on university property in either the</p> <p>18 Nittany Lion Inn or the Penn Stater. So, yes, I</p> <p>19 would see him at those events.</p> <p>20 Q Did you ever see him around at any</p> <p>21 football games or football practices with kids?</p> <p>22 A No.</p> <p>23 Q It that because you didn't go or</p> <p>24 because you didn't see him?</p> <p>25 A I don't go to the practices. I do go</p>	<p>12 A Again, depending on what you call --</p> <p>13 I mean, grabbing the genitals of the boy is what I</p> <p>14 had in mind. Now, is that sexual? Yes.</p> <p>15 Q We can all agree that an adult male</p> <p>16 under no circumstances other than a doctor should</p> <p>17 be grabbing the genitals of a young boy?</p> <p>18 A I agree completely with that.</p> <p>19 Q And that it doesn't happen</p> <p>20 accidentally?</p> <p>21 A Rather than just agreeing to I</p> <p>22 thought it was sexual conduct or misconduct, I'm</p> <p>23 explaining what I really thought might have gone</p> <p>24 on. You know, you can define that as you want.</p> <p>25 I'm telling you what I thought was going on.</p>
<p>22</p> <p>1 to the games. There's a hundred some thousand</p> <p>2 people. I don't know if I saw Jerry there.</p> <p>3 Q So you're indicating that as far as</p> <p>4 you know, no one from the university investigated</p> <p>5 the 2002 incident at all?</p> <p>6 A Yeah. As far as I know, the</p> <p>7 university asked the other agency to follow up as</p> <p>8 it did in '98.</p> <p>9 Q One more thing I just want to be</p> <p>10 clear on. When you met with Mike McQueary, was it</p> <p>11 or was it not your impression that he was</p> <p>12 reporting inappropriate sexual conduct, your</p> <p>13 impression --</p> <p>14 A Yes.</p> <p>15 Q Inappropriate sexual conduct by Jerry</p> <p>16 Sandusky?</p> <p>17 A You know, I don't know what sexual</p> <p>18 conduct's definition to be, but I told you that my</p> <p>19 impression was -- you know, Jerry was the kind of</p> <p>20 guy that he regularly kind of like physically</p> <p>21 wrestled people. He would punch you in the arm.</p> <p>22 He would slap you on the back. He would grab you</p> <p>23 and get you in a headlock, etc. That was a fairly</p> <p>24 common clowning around thing.</p> <p>25 I had the impression that maybe</p>	<p>24</p> <p>1 Q Would you agree with me that if it</p> <p>2 had been sodomy, that is, anal sex, that would</p> <p>3 clearly be inappropriate sexual conduct?</p> <p>4 A No doubt.</p> <p>5 BY MR. FINA:</p> <p>6 Q Sir, I just want to be real clear on</p> <p>7 this. It was your impression after you talked to</p> <p>8 McQueary that this was about some physical</p> <p>9 conduct, some horsing around, some wrestling that</p> <p>10 resulted in contact with a boy's genitals in the</p> <p>11 context of wrestling. That was your impression of</p> <p>12 what McQueary was reporting to you?</p> <p>13 A I don't recall what McQueary</p> <p>14 specifically reported, but I can tell you that I,</p> <p>15 after going through whatever we went through in</p> <p>16 2003, had that impression that that was probably</p> <p>17 the kind of thing that had taken place.</p> <p>18 Q Nothing else? No further sexual</p> <p>19 conduct?</p> <p>20 A No, I had no basis --</p> <p>21 Q No intercourse?</p> <p>22 A I had no basis of anything else, and</p> <p>23 I only formed the impression that I had based on</p> <p>24 kind of what I observed of Jerry and the kind of</p> <p>25 horsing around that he does.</p>

<p>25</p> <p>1 Q No, no. Please follow my 2 questioning. I'm not asking you what impression 3 you had of your observations of Mr. Sandusky over 4 the years. I'm asking you of your impression, 5 what you learned from Mr. McQueary, what he 6 observed in the shower. 7 A I don't recall himself telling us 8 what he observed specifically. 9 Q What generally did he report? 10 A I believe that he said that he saw 11 something that he felt was inappropriate between</p>	<p>27</p> <p>1 A Well, the child protection agency, 2 the same one that I think handled the '98 3 investigation. 4 Q Sir, it might surprise you to know 5 that the '98 investigation was handled by your 6 police department and there's a -- 7 A In its entirety? 8 Q There's a 95-page police report on 9 that incident. 10 A In its entirety? 11 Q Correct.</p>
<p>12 Jerry and a boy. 13 Q And from his saying along the line of 14 something inappropriate, you took, oh, they must 15 have been wrestling and maybe he touched the kid's 16 groin? 17 A I could imagine that might have taken 18 place, yes. 19 Q Was McQueary upset? Was he emotional 20 about this? 21 A No, I don't recall him being upset. 22 Q He was calm; he was collected? 23 A Yes. 24 Q Nobody, not you, nor Curley, nor 25 anybody else went back to McQueary and asked for</p>	<p>12 A Wow. I thought that it was turned 13 over to the child protection agency for 14 investigation. 15 Q Did it ever occur to anybody that the 16 police might need to be contacted, either campus 17 police or this entity known as the Pennsylvania 18 State Police? 19 A I don't recall that we talked about 20 it being turned over to the police. 21 Q That was never part of the 22 discussions between you and Curley or you and 23 Spanier or you and anybody else? 24 A No. 25 Q Are you aware of any memorandums or</p>
<p>26</p> <p>1 specifics or at the time asked for specifics? 2 A No. Again, I recalled that we asked 3 this agency to do the investigation and I would 4 let them follow up. 5 Q The agency that you were never 6 interviewed by, correct? 7 A That's correct. 8 Q Are you aware of anybody at the 9 university who was interviewed by any agency about 10 this incident? 11 A About 2002, I don't. 12 Q How is it that this agency, this 13 whatever it was, would even know who to talk to, 14 to talk to McQueary or to talk to you or to talk 15 to whoever? Who was supposed to relay this 16 information? 17 A I don't recall. I don't recall who 18 contacted the agency. I'm telling you, to the 19 best of my recollection, I believe that the agency 20 was asked to follow up on the investigation. 21 Q At no time did you contact any law 22 enforcement entity or individuals? 23 A I had the impression that that agency 24 had some law enforcement authority. 25 Q The agency that you can't identify?</p>	<p>28</p> <p>1 any written documents other than your own notes 2 that existed either at the time of this incident 3 or after this incident about the 2002 events? 4 A No. 5 Q Would that be standard? Would that 6 be the way the university operates when an 7 allegation is made against a current employee or a 8 very famous prior employee, that nothing be put in 9 writing? 10 A The allegations came across as not 11 that serious. It didn't appear at that time, 12 based on what was reported, to be that serious, 13 that a crime had occurred. We had no indication a 14 crime had occurred. 15 Q Do you recollect going to Joe 16 Paterno's house on a Sunday to be informed of 17 this? 18 A No. 19 Q No, that you don't recollect? No, 20 that it did not happen? 21 A No, I don't recollect it. Again, I 22 thought I was informed in a meeting that Joe and 23 Tim and I had at my office. Now, could it have 24 happened at Joe's house? Possibly. 25 Q Would that be unusual, to be called</p>

<p>29</p> <p>1 to Joe Paterno's house on a Sunday to discuss 2 something that wasn't even criminal or sexual? 3 A Well, it wasn't an everyday thing, 4 but Tim and I and others would meet with Joe 5 weekends, Sundays and so on. But, yeah, it would 6 be an important matter if we were meeting with Joe 7 on a Sunday. 8 BY MS. ESHBACH: 9 Q In terms of university policy at the 10 time that you were the senior vice president, how 11 would a matter of inappropriate conduct by an</p>	<p>31</p> <p>1 contained in the Master Transcript.) 2 (Witness and counsel enter the room.) 3 BY MS. ESHBACH: 4 Q Can you give me an example of what 5 you would consider to be inappropriate conduct 6 that wasn't criminal? We did a lot of talking 7 about what's inappropriate, what's criminal, not 8 criminal. Give me an example of conduct -- for 9 example, a university professor does something to 10 a student and a student reports it. I assume that 11 would go to the university police, right?</p>
<p>12 employee be handled, something along the lines of 13 perhaps a theft, criminal conduct? 14 A If there was an allegation of a 15 criminal act, it would be turned over to the 16 university police for handling. On occasion, 17 depending on the nature of it, university internal 18 audit might get involved initially to do some 19 background work just to confirm an allegation. 20 Q If there had been inappropriate or 21 criminal conduct by a student, would that go to 22 the provost side of things or would that come to 23 your side of things? 24 A Well, if it was a criminal act, it 25 would be investigated by the police, yes.</p>	<p>12 A No, not necessarily. You asked for 13 an example. Not all inappropriate conduct is 14 criminal. Cursing at a student in class, if 15 you're a faculty member losing your temper, 16 perhaps might not be criminal, but it's not 17 appropriate for a faculty member to do such a 18 thing. 19 Q How about an adult individual being 20 naked in the shower with a young boy and touching 21 that young boy? Clearly inappropriate, right? 22 A Yeah, I would say. 23 Q But not criminal in your mind, not 24 potentially criminal? 25 A I didn't get the impression that</p>
<p>30</p> <p>1 Q How about an incident of criminal 2 conduct involving a student athlete? How would 3 that be handled? 4 A If it was criminal, it would be the 5 police. If it's not, there's an office of student 6 conduct. 7 Q How about, again, inappropriate 8 conduct of an employee of the university? 9 A If there was an allegation of some 10 criminal conduct, it would be handled by the 11 police. 12 Q And, finally, a person in the status 13 of Mr. Sandusky who had access to the university 14 even though he was no longer an employee? 15 A Same. 16 Q You're saying that this incident 17 wasn't referred to the university police for 18 investigation because you didn't think it was 19 criminal? 20 A There was no indication that it was. 21 MS. ESHBACH: You can step out with 22 counsel and we will see if the Grand Jury has any 23 more questions. 24 (Witness and counsel leave the room.) 25 (Proceedings before the Grand Jury</p>	<p>32</p> <p>1 there was something like that going on. 2 Q I thought you said that you thought 3 perhaps he had grabbed his genitals? 4 A Well, you know, whether he -- I don't 5 know. I mean, I wasn't told what was really going 6 on. But if he did, if that was what it was, he 7 shouldn't do that. That's inappropriate. I don't 8 know if that's criminal. If it's in the context 9 of wrestling or something like that, I don't know. 10 Q The Grand Jurors would like to know 11 your age. 12 A Sixty-one. 13 Q You retired in May of 2009? 14 A June. 15 Q June of 2009? 16 A Yes. 17 Q When you retired, were you aware of 18 any other allegations of sexual conduct by Jerry 19 Sandusky against any other young boys not in 1998 20 and not in 2002, but any subsequent to that? 21 A No. 22 Q You knew of nothing? 23 A Nothing. 24 Q You look young for your age. 25 A Thank you.</p>

<p>33</p> <p>1 (Witness consults with counsel.)</p> <p>2 BY MS. ESHBACH:</p> <p>3 Q Since this incident came to light in</p> <p>4 2002 involving Sandusky and this boy in the</p> <p>5 shower, did the university do anything in terms of</p> <p>6 adopting a policy with regard to nonstudent youth</p> <p>7 being on university facilities in the</p> <p>8 circumstances that this young boy was?</p> <p>9 A No, I don't believe so.</p> <p>10 Q Did anybody do anything to prevent</p> <p>11 something like this from happening again other</p> <p>12 than telling Jerry Sandusky he's not supposed to</p> <p>13 bring a kid on campus?</p> <p>14 A Well, we did that.</p> <p>15 Q But that was on the honor system,</p> <p>16 right?</p> <p>17 A Well, I don't know. I think Tim</p> <p>18 handled it and I'm not quite sure what the</p> <p>19 enforcement mechanism of that was. It may have</p> <p>20 been an honor system. I think Tim trusted Jerry</p> <p>21 and if Jerry said he understood and wouldn't do</p> <p>22 it, that's what he believed.</p> <p>23 Q As far as you know, the university</p> <p>24 took no steps to prevent something like this from</p> <p>25 happening again?</p>	<p>35</p> <p>1 characterize it as a place that's only used like</p> <p>2 on a limited basis. It's used regularly.</p> <p>3 Q Would you agree with me that on a</p> <p>4 Friday night before the start of spring break,</p> <p>5 there probably wouldn't be very many people in</p> <p>6 that building?</p> <p>7 A Probably, yes.</p> <p>8 Q And a former staff member would</p> <p>9 understand that, would know that kids would be</p> <p>10 gone?</p> <p>11 A Probably, yes. Sure.</p> <p>12 MS. ESHBACH: That's it.</p> <p>13 (Testimony concluded at 12:52 p.m.)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>34</p> <p>1 A Well, with regard to Jerry, I think</p> <p>2 we did, yeah.</p> <p>3 Q How about other individuals?</p> <p>4 A I don't know exactly how to answer</p> <p>5 that. I can imagine instances where adult men</p> <p>6 would perhaps be in the shower with young boys.</p> <p>7 Q In a group?</p> <p>8 A Perhaps.</p> <p>9 Q But not alone?</p> <p>10 A Perhaps or maybe not. I don't know.</p> <p>11 I mean, our recreation buildings, for example,</p> <p>12 separate from the football building, which has</p> <p>13 some restrictions, are pretty much open.</p> <p>14 Q Again, that would be a circumstance</p> <p>15 where there would be likely a number of persons</p> <p>16 present?</p> <p>17 A Could be, yeah.</p> <p>18 Q But the Lash Building was not a</p> <p>19 public building?</p> <p>20 A No. But, you know, it's a building</p> <p>21 that generally is active. It's used with all the</p> <p>22 individuals on the team, the coaches, all the</p> <p>23 support staff and so on. Football is a 12 month a</p> <p>24 year program. It's less open than a public</p> <p>25 recreation facility would be, but I don't want to</p>	<p>36</p> <p>1 I hereby certify that the proceedings</p> <p>2 and evidence are contained fully and accurately in</p> <p>3 the notes taken by me on the within proceedings</p> <p>4 and that this is a correct transcript of the same.</p> <p>5</p> <p>6 </p> <p>7</p> <p>8 Shannon L. Manderbach</p> <p>9 Notary Public</p> <p>10</p> <p>11 COMMONWEALTH OF PENNSYLVANIA</p> <p>12 NOTORIAL SEAL</p> <p>13 Shannon L. Manderbach, Notary Public</p> <p>14 Town of Enola, Cumberland County</p> <p>15 My Commission Expires June 19, 2013</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PA
: 217 M.D. MISC. DKT. 2010
THE THIRTY-THIRD :
STATEWIDE INVESTIGATING : DAUPHIN COUNTY COMMON
GRAND JURY : PLEAS
: No. CP-22-CR-5164-2011
: No. CP-22-CR-5165-2011

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
: SUPREME COURT OF PA
v. : 217 M.D. MISC. DKT. 2010
:
: DAUPHIN COUNTY COMMON
: PLEAS
: Complaint No. G07-1146135
TIMOTHY M. CURLEY and :
GARY C. SCHULTZ, : REQUEST EXPEDITED REVIEW
:
Defendants. :

ORDER

AND NOW, to-wit, this _____ day of _____, 2012, upon due
consideration of the Joint Motion to Quash Presentment as Defective for Relying on Attorney-
Client Privileged Communication and Work Product, it is hereby ORDERED and DECREED
that the presentment is hereby quashed.

BY THE COURT:

_____, J.

**IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA**

IN RE:	: SUPREME COURT OF PA
	: 217 M.D. MISC. DKT. 2010
	:
THE THIRTY-THIRD	: DAUPHIN COUNTY COMMON
STATEWIDE INVESTIGATING	: PLEAS
GRAND JURY	: No. CP-22-CR-5164-2011
	: No. CP-22-CR-5165-2011

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COMMONWEALTH OF PENNSYLVANIA,	:
	: SUPREME COURT OF PA
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	:
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	: Complaint No. G07-1146135
TIMOTHY M. CURLEY and	:
GARY C. SCHULTZ,	: <u>REQUEST EXPEDITED REVIEW</u>
	:
Defendants.	:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Joint Motion to Quash Presentment as Defective for Relying on Attorney-Client Privileged Communication and Work Product, was sent by email and First Class Mail, this ~~19th~~ day of November, 2012, to the following:

The Honorable Judge Todd A. Hoover
President Judge
Court of Common Pleas of Dauphin County
Dauphin County Courthouse
101 Market Street
Harrisburg, PA 17101
thoover@dauphinc.org

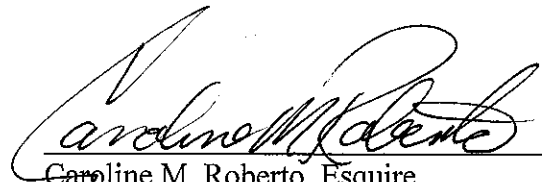
The Honorable Judge William C. Wenner
Magisterial District Judge
Court of Common Pleas of Dauphin County
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A handwritten signature in cursive script, appearing to read "Caroline M. Roberto", written over a horizontal line.

Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy M. Curley