

AND NOW THIS DATE

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

13 FEB 2011  
SERVICE IS HEREBY ACCEPTED  
AND COPY RECEIVED

*Edward M. Morsino, Jr.*  
DISTRICT ATTORNEY

COMMONWEALTH OF PENNSYLVANIA, :

v. :

No. CP-22-CR-5165-2011

TIMOTHY MARK CURLEY, :

RECEIVED

Defendant.

PETITION FOR WRIT OF HABEAS CORPUS  
AND MEMORANDUM OF LAW

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COURT ADMINISTRATION  
OFFICE  
DAUPHIN COUNTY

AND NOW, comes the defendant, Timothy Mark Curley, by and through

his attorney, Caroline M. Roberto, Esquire, and respectfully requests the following:

1. Mr. Timothy Mark Curley is charged in a two count criminal information with, at Count 1, Perjury in violation of 18 Pa.C.S.A. § 4902(a) a felony of the third degree and at Count 2, Persons Required to Report. Suspected Child Abuse in violation of 23 Pa.C.S.A. § 6319, a summary offense.

2. The Pennsylvania statute defines perjury as,

A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

18 Pa.C.S.A. § 4902(a).

3. Pennsylvania's perjury statute prohibits proof of the alleged perjurious statement from one witness only. The statute requires corroboration of the falsity of the statement and 18 Pa.C.S.A. § 4902(f) provides in pertinent part as follows:

(f) Corroboration.—In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness.

4. On December 16, 2010, a preliminary hearing was conducted in this matter. Magisterial District Judge William C. Wenner presided and heard testimony related to the perjury count.

5. The prosecution presented the testimony of Michael McQueary to establish that in March 2002, he told Mr. Curley that he witnessed Jerry Sandusky in Penn State University's Lasch Building showers with a boy. Specifically, McQueary testified that, "I would have said that Jerry was in there in very close proximity behind a young boy with his arms wrapped around him." Notes of Testimony, December 16, 2011, at 33-34 (hereinafter NT). McQueary denied telling Mr. Curley, or anyone else, "since day one", that he observed Sandusky engaged in anal sex, anal intercourse or anal sodomy, or rape. NT at 24, 72. But see, Presentment at 12 ("The Grand Jury finds that Tim Curley made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30<sup>th</sup> Statewide Investigating Grand Jury, relating to the 2002 incident, that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers.")

6. The prosecution alleges that McQueary's testimony is in contrast to the grand jury testimony of Mr. Curley and establishes, at least in part, the falsity of Mr. Curley's grand jury testimony.

7. Mr. McQueary also testified that he reported his observations, albeit in a truncated form, to former Penn State University head football coach, Joseph V. Paterno. NT at 24-25.

8. Also, at the preliminary hearing, by agreement of the parties for the purpose of that hearing only, the prosecution presented, as Commonwealth Exhibit No. 1, the Transcript of the January 12, 2011, Grand Jury Testimony of Joseph V. Paterno. NT at 3, 164, 174-179. When asked what McQueary told him about the shower incident, Mr. Paterno testified at the grand jury proceeding as follows:

A. Well, I don't know what you would call it. Obviously, he was doing something with the youngster. It was a sexual nature. I'm not sure exactly what it was. I didn't push Mike to describe exactly what it was because he was very upset. Obviously I was in a little bit of a dilemma since Mr. Sandusky was not working for me anymore. So I told – I didn't go any further than that except I knew Mike was upset and I knew some kind of inappropriate action being taken by Jerry Sandusky with a youngster.

NT at 175.

9. Mr. Paterno's grand jury testimony also provided that he reported the incident to Mr. Curley. NT at 178. At the grand jury proceeding, the following exchange took place between the prosecutor and Mr. Paterno:

Q. How did you contact Mr. Curley?

A. I believe I did it by phone. As I recall, I called him and I said, hey, we got a problem, and I explained the problem to him.

Q. Was the information that you passed along substantially the same information that Mr. McQueary had given you?

A. Yes.

10. The prosecution presented Mr. Paterno's grand jury testimony in an attempt to establish its prima facie case regarding the corroboration requirement under § 4902(f). NT 243 (By prosecution: "The idea that Mr. Paterno saying, yeah, I got a report from Mike McQueary that it was sexual contact and that I then passed that

information along to Tim Curley is not corroborative of Mike McQueary's story here today is just really nothing but pure fantasy"). No other evidence was presented against Mr. Curley to corroborate the falsity of his statements.

11. After testimony and argument, Judge Wenner bound over the case for court.

12. On Sunday, January 22, 2012, Mr. Paterno died from complications of lung cancer. Exhibit A. Without the availability of Mr. Paterno, the prosecution's prima facie proof as to perjury as charged against Mr. Curley fails as no other facts or witnesses were presented at the preliminary hearing to establish corroboration as required by law. Mr. Paterno's grand jury testimony is inadmissible hearsay at trial on the merits in the case against Mr. Curley. See, *Crawford v. Washington*, 541 U.S. 36 (2004); Pennsylvania Rules of Evidence 802, 804.

13. For the reasons stated, Count 1 of the criminal information must be dismissed as the evidence presented at the preliminary hearing is insufficient to establish a prima facie case of perjury.

#### Memorandum of Law

The proper procedure for challenging the magisterial district judge's decision to bind over a case for court is for the accused to file a Petition for Writ of Habeas Corpus in the Court of Common Pleas. *Commonwealth v. Hetherington*, 331 A.2d 205 (Pa. 1975). The accused may file a habeas petition if not incarcerated as conditions of bail satisfy the "custody" requirement of a habeas corpus petition. *Commonwealth v. ex rel. Panlinski v. Isaac*, 397 A.2d 760 (Pa. 1979),

*Commonwealth v. Orman*, 408 A.2d 518 (Pa.Super. 1979). The habeas court is limited in determining whether there is sufficient evidence to require the accused to stand trial. However, the habeas court is not limited to the evidence presented at the preliminary hearing and may consider additional evidence presented by the prosecution at a hearing. *Commonwealth v. Scott*, 578 A.2d 933 (Pa.Super. 1990).

In order for the prosecution to prove perjury, one witness must testify to the falsity of the defendant's statement. However, in addition, there must be other independent evidence that provides proof of the defendant's guilt. The additional independent proof must be corroborative proof of falsity of the defendant's perjurious statement. This rule, sometimes referred to as the "one-witness plus" rule, seeks to prevent a conviction in a situation "where oath has been pitted against oath." See, *Commonwealth v. Robinson*, 480 A.2d 1229, 1231 (Pa.Super. 1984) (citing *Commonwealth v. Katsafanas*, 464 A.2d 1270, 1270, 1283 (Pa.Super. 1983)). The rule has value in safeguarding witnesses in official proceedings from harassment by "a grudge witness who might, himself, be tempted to commit perjury." *Commonwealth v. Broughton*, 390 A.2d 1282, 1287 (Pa.Super. 1978).

The corroboration that is required by the rule is evidence in support of the fact that the defendant's statement under oath was false. *Commonwealth v. Gore*, 90 A.2d 405, 408 (Pa.Super. 1952). In other words, corroboration from an independent source must prove the falsity of defendant's statement. In this case, the Presentment provides that the grand jury found Mr. Curley committed perjury when he stated "he was not told by the graduate assistant [McQueary] that Sandusky was engaged in sexual

conduct or anal sex with a boy in the Lasch Building showers." Presentment at 12.<sup>1</sup>

The evidence necessary to corroborate the falsity of Mr. Curley's statement is relevant evidence tending to prove that Mr. Curley was told by McQueary that he saw Sandusky in the Lasch Building shower with a boy engaged in "sexual conduct or anal sex".

At the preliminary hearing, the prosecution presented Mr. Paterno's grand jury testimony in an effort to infer that if McQueary told Paterno that he believed that the shower incident was sexual in nature and Paterno spoke to Mr. Curley, then Paterno must have told Curley that McQueary believed the incident was sexual in nature. At the preliminary hearing, Mr. Curley argued that Paterno's answer "Yes" to the question, "Was the [information you passed along [to Curley] substantially the same information that Mr. McQueary had given you?", was insufficient to meet the prima facie corroboration necessary as it would have been just as reasonable to believe that Mr. Paterno did not recite the specific conclusion reached by McQueary since Paterno himself knew little about the facts. As argued, Mr. Paterno's grand jury testimony was insufficient to establish a prima facie case. But now, with the death of Mr. Paterno, the prosecution's prima facie case clearly fails to establish the independent corroborative evidence as required by § 4902(f).

The other substantive witnesses called at the preliminary hearing, Thomas Harmon and John McQueary, had nothing to say about relevant communication with Mr. Curley regarding this matter. Officer Harmon was called to establish that he and Mr. Schultz communicated regarding a 1998 investigation of Mr.

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<sup>1</sup>Mr. Curley has timely filed a Request and subsequent Motion for Bill of Particulars requesting to be advised of the exact alleged perjurious statements as the Information is silent on this issue.

Sandusky. But, when asked, Harmon stated he and Mr. Curley "never spoke about" the 1998 investigation. NT at 133. John McQueary, Michael's father, presented testimony that sometime subsequent to Michael's observations of Sandusky in the shower, John met with Gary Schultz about a business matter. After the business discussion ended he "briefly told him what Michael had seen" and asked if Schultz was going to follow up. NT 137-139. John McQueary offered no similar testimony or evidence of a conversation with Mr. Curley.

In summary, Paterno's grand jury testimony did not corroborate the alleged false statement but, without Mr. Paterno's testimony, the preliminary hearing record is absent the corroboration necessary to bind over the perjury charge against Mr. Curley. For the reasons stated, insufficient evidence exists to support a prima facie case of perjury against Mr. Curley and Count 1 of the criminal information must be dismissed.

Wherefore, defendant respectfully requests that the Honorable Court dismiss the perjury charge at Count 1.

Respectfully submitted,

By: 

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## Ex-Penn State Coach Joe Paterno Dead at 85

By COLLEEN CURRY and OLIVIA KATRANJIAN

Jan. 22, 2012—

go.com

Joe Paterno Jr., whose glittering career as Penn State's football coach was tainted by a child sex-abuse scandal, died today. He was 85.

"It is with great sadness that we announce that Joe Paterno passed away earlier today. His loss leaves a void in our lives that will never be filled," Paterno's family said in a statement.

[Click Here to Read Paterno Family's Statement](#)

Paterno coached the Nittany Lions for 46 years and in 2011 became the winningest coach in Division I football. But before the season was over, he was abruptly dismissed as the sex scandal involving former assistant Jerry Sandusky suggested that top school officials had ignored signs of Sandusky's alleged predatory behavior.

Shortly after his dismissal, Paterno was diagnosed with lung cancer and broke his hip. Chemotherapy and radiation treatments weakened him, robbing him of his hair and his once-booming voice.

In a recent interview with the Washington Post, he appeared frail, wearing a wig and speaking in a whisper. He canceled public appearances after the interview because of his failing health, according to family members.

For Paterno's legion of fans, who referred to the coach affectionately as "JoePa," the turbulent final months of Paterno's life were a tragic end to an outstanding coaching career that was built around his motto of "success with honor."

Saturday night, Paterno's wife, Suzanne Paterno, summoned close friends and longtime staff members Saturday afternoon to the State College hospital where Paterno has been undergoing treatments since last weekend, a source told the Citizen's Voice newspaper of Wilkes-Barre, Pa.

Paterno wanted to see them and say a final goodbye, the coach's wife told one of the staff members, the source said.

Hundreds of students gathered around the bronze statue of Paterno on the Penn State campus Saturday night, praying for Paterno's recovery, lighting candles and placing blue and white baseball hats at the foot of the statue.

Paterno's personal life included service in the Army, an English degree from Brown University, a marriage that lasted more than half a century, and a football team's worth of children and grandchildren.

"He died as he lived. He fought hard until the end, stayed positive, thought only of others and



constantly reminded everyone of how blessed his life had been. His ambitions were far reaching, but he never believed he had to leave this Happy Valley to achieve them. He was a man devoted to his family, his university, his players and his community," Paterno's family said in a statement.

While at Penn State's helm, Paterno, who was born in Brooklyn, N.Y., led the Nittany Lions to seven undefeated seasons and two NCAA championships, had only five losing seasons, was inducted into the College Football Hall of Fame in 2007, and was nominated for a Presidential Medal of Freedom. The nomination was revoked, however, after the scandal broke.

#### Penn State Great Joe Paterno Dead at 85

Paterno was known for his "Grand Experiment" at the university, stressing academic success as well as athletic achievement for his players.

"Just winning is a silly reason to be serious about a game," Paterno wrote in his 1997 book, "Paterno: By the Book." "The purpose of college football is to serve education."

During his tenure, the reputation of Penn State grew from that of a small land-grant university to a nationally ranked research university. The football program ballooned in prestige, with the school's Beaver Stadium expanding six times during his tenure.

Paterno's football program consistently ranked among the top in the NCAA for graduation rates, as well as the top grade point averages for student athletes in Division 1 sports. The achievements helped illustrate Paterno's philosophy on collegiate sports and on life, as he said in a 1973 commencement speech to Penn State graduates, that "Success without honor is an unseasoned dish; it will satisfy your hunger but it won't taste good."

And despite offers from other universities and NFL football teams, including an ownership stake in the New England Patriots, Paterno remained at Penn State, where his base pay was only a fraction of that of other top football coaches in the country. His base pay in 2011 was a little less than \$600,000. He and his wife, Sue, donated more than \$4 million to the university, which named a library and a campus spirituality center for them.

Paterno was also involved in politics, supporting conservative candidates in Pennsylvania and befriending presidents George H.W. Bush and Gerald R. Ford, who tried but failed to convince the coach to run for office. Paterno spoke at the 1988 Republican convention in support of Bush.

Bush's son, President George W. Bush, visited Penn State's campus in 2005, noting his respect for Paterno.

"I tell you one thing about Joe Paterno, there's no more decent fellow on the face of the Earth," Bush said. "What a man, who sets high standards, he loves his family, he loves this university, he loves his country, and my mother and dad love him."

#### Joe Paterno Leaves Football Legacy

Although he was the most well-known person on Penn State's campus in State College, Paterno was also seen as a picture of humility. Students at Penn State knew that Coach Paterno lived nearby in a modest ranch home he bought for \$9,000, and walked from his house to each home football game. He and his wife remained listed in the public phone book, and his children went to the town's public school.

At his direction, the team wore simple uniforms, donning blue jerseys without names and simple white helmets without logos, and plain high-top black shoes. The austere style reflected that of the coach, who wore to nearly every game the same thick-framed black glasses, rolled-up pant legs and white athletic socks.

But Paterno's reputation was called into question in November 2011 when allegations of child sex-abuse surfaced against former Penn State defensive coordinator Jerry Sandusky. A grand jury presentment detailed an incident that took place in 2002 in the Penn State football complex, in which an assistant coach allegedly saw Sandusky in a shower, naked, with a young boy, in a position that seemed sexual.

The assistant, Mike McQueary, testified to a Pennsylvania grand jury that he reported what he saw to Paterno, who in turn told his superiors. No one called the police.

Paterno was accused of doing too little to ensure the safety of children on campus, although he was not legally bound to call the police.

#### Penn State Mourns Joe Paterno's Death

In his last interview before his death, Paterno told the Washington Post that he wished he had done more when faced with the allegations against Sandusky.

"I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was," he said. "So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way."

Paterno was fired by the Penn State Board of Trustees during the week after the scandal broke, three games before the end of the 2011 season and six weeks before his head coaching contract expired. The board said Paterno's ability to lead had been "compromised."

In the wake of the scandal, Pennsylvania's senators withdrew their support for his nomination for a Presidential Medal of Freedom, and Paterno's name was removed from the Big Ten Conference championship trophy.

During his induction into the Hall of Fame in 2007, Paterno expressed joy at a career spent coaching football.

"How good has it been? What we share in football; there's never been a greater game. We've been involved in the greatest game, the greatest experience anybody could hope for. Great teammates. Guys you could trust. Guys you loved. Guys you would go to war with tomorrow. We're so lucky.

"We're so lucky," he said.

Paterno is survived by his wife, Suzanne Paterno, their children, Diana, Joseph Jr. "Jay", Mary Kay, David and Scott, all of whom are Penn State graduates, and 17 grandchildren.

In lieu of flowers or gifts, the family requests that donations be made to the Special Olympics of Pennsylvania or the Penn State-THON (The Penn State IFC/Panhellenic Dance Marathon).

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Defendant.

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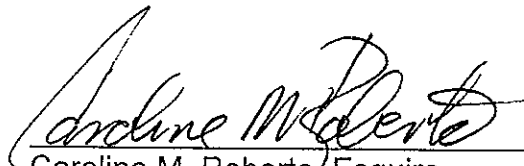
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Petition for Writ of Habeas Corpus, was e-mailed and mailed, First Class Mail, postage pre-paid, this 13<sup>th</sup> day of February, 2012, to the following:

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

I also certify that a true and correct copy of the within Petition for Writ of Habeas Corpus, was mailed, First Class Mail, postage pre-paid, this 13<sup>th</sup> day of February, 2012, to the following:

Thomas J. Farrell, Esquire  
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Caroline M. Roberto, Esquire  
Attorney for Defendant, Timothy Mark Curley