M.D. Allocatur Dkt.
835 - 2013

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836 - 2013

Filed in Supreme Court
OCT 30 2013
Middle

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA : M.D. ALLOCATUR DOCKET 2013
RESPONDENT

v. : NO. _____

GERALD A. SANDUSKY : ATTY ID # 14223
PETITIONER

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the adverse published opinion of the Superior Court as of Nos. 338 and 343 MDA 2013 dated October 2, 2013 which affirmed the January 30, 2013 Denial of Post Sentencing Motions that made Appellant's 30 to 60- year Sentence Final, Said Sentence Having Been Imposed by the Honorable John M. Cleland on October 9, 2012 as of Nos. CP - 14 - CR - 2421 - 2011 and CP - 14 - CR - 2422 - 2011 of the Court of Common Pleas of Centre County

NORRIS E. GELMAN, ESQUIRE
MARGEAUX CIGAINERO, ESQUIRE
ATTORNEYS FOR PETITIONER SANDUSKY
2000 MARKET STREET
SUITE 2940
PHILA., PA. 19103
215 - 574 - 0513
ATTY ID # 14223

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STATEMENT OF JURISDICTION

This Allocatur Petition is properly before the Court because it has statutory jurisdiction. See 42 Pa.C.S.A. Section 724 (a), July 9, P.L. 586, No. 142, Section 2, effective June 27, 1978, as amended October 5, P.L. 693, No. 142 Section 402 (a), effective December 5, 1980.

THE ORDER IN QUESTION

The Order in question accompanied the Superior Court's published opinion dated October 2, 2013 as of Nos. 338 and 343 MDA 2013 which on direct appeal affirmed the sentences imposed by The Honorable John M. Cleland of the Centre County Court of Common Pleas as of Nos. CP-14-CR-0002421-2011 and CP-14-CR-0002422-2011 being a sentence of 30 to 60 years on Appellant's convictions for several instances of child molestation. A copy of the Superior Court's opinion is attached as Exhibit "A" [1] and a copy of the Court's Opinion filed on January 30, 2013 is attached to this Brief as Exhibit "B" hereto.

RULE OF APPELLATE PROCEDURE 2111(d) STATEMENT

Counsel timely filed a 1925(b) Statement which is attached as Exhibit "C".

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[1] Judge Panella authored the opinion with Judges Mundy and Platt joining.

SCOPE AND STANDARD OF REVIEW

As stated in Morrison v. Commonwealth, Department of Public Welfare, 538 Pa. 122, 646 A2d 565 (1994):

> Scope of Review' refers to 'the confines within which an appellate court must conduct its examination.' In other words, it refers to the *matters* (or 'what') the appellate court is permitted to examine. *Id* at 131, 646 A2d at 570 (citation omitted, emphasis in original) *quoting Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 450, 625 A2d 1181, 1186 (1993).

The scope of review is limited to the record certified to this Court.

The "Standard of Review" refers to the degree of scrutiny to be applied to the decision appealed. Morrison v. Commonwealth, Department of Public Welfare, 538 Pa. 122, 646 A2d 565 (1994).

All of Petitioner's claims are preserved.

Review is plenary as to whether or not the court erred in refusing to give a failure to make a prompt report instruction to the jury. Review is plenary as to whether such failure to instruct was harmless.

Review is plenary as to whether or not the denial of three requested continuances impaired Petitioner's right to counsel and as to whether or not prejudice need be shown.

Review is plenary as to whether or not the court erred in not charging that

character evidence is not to be weighed against the other evidence in the case and if such error was harmless.

Review is plenary as to whether or not the prosecutor adversely commented on the Petitioner's silence at trial, whether or not such comment was harmless and whether or not the Superior Court was correct in finding this claim waived.

STATEMENT OF THE CASE

PROCEDURAL HISTORY OF THE CASE

Petitioner was convicted by a jury of 45 counts of sexual abuse. The Honorable John M. Cleland presided. The Attorney General's Office prosecuted. Joseph Amendola and Carl Rominger defended. Petitioner was sentenced to 30 to 60 years on October 9, 2012. His post sentencing motions were denied on January 30, 2013. A copy of Judge Cleland's Opinion denying such motions is attached hereto as Exhibit "B".

Prior to the denial of post sentencing motions a hearing was held where Joseph Amendola testified as to the vast amount of material provided to him through Court ordered discovery and the service of those subpoenas duces tecum allowed by the court within six weeks of trial. Petitioner's other claims were also argued.

A copy of the relevant notes of testimony from that hearing - held on January 10, 2013 will be found in Petitioner's Appendix at pgs. 431-439.

WHY THIS COURT SHOULD GRANT THIS PETITION FOR ALLOWANCE OF APPEAL

This is a notorious case. It is a case that tests the limits of our ability to live up to the promise our constitution makes that even in the worst of cases, a fair trial will be afforded.

The Superior Court below provided a published opinion that is exemplary but chose not to follow this Court's decisions which held general credibility instructions cannot substitute for specific instructions designed to call the jury's attention to specific credibility flaws of the Commonwealth's witness/witnesses. Commonwealth v. Bricker, 525 Pa. 362, 375, 581 A.2d 147, 153 (1990); See also Commonwealth v. Pounds, 490 Pa.621, 634, 417 A.2d 597, 603 (1980).

The Superior Court held general credibility instructions were held to be a sufficient replacement for the failure to make a prompt report instructions which were clearly applicable because the delay in reporting the alleged abuse in this case ranged from a few days (showering together) to 16, 14, 12, 12, 9, 5 and 2 years.

When the trial court refused the failure to make a prompt report instructions it cut the heart out of Petitioner's main defense. Just as the court could not deny Petitioner the right to forward such a defense, it had no right to dilute it so seriously by refusing the instructions.

The Superior Court's opinion also found no reversible error because of the trial court's refusal to grant a continuance of the trial following the Commonwealth's turning over approximately 12,000 pages of information within 6 weeks of trial. The panel found no structural constitutional error, no due process error and no abuse of discretion in the denial of that continuance. [2]

Finally, the Superior Court panel held Petitioner's claims as to prosecutorial misconduct in summation to have been waived. The Commonwealth never raised the waiver claim either before the trial court during post sentencing motions or in the Superior Court. The Superior Court raised it *sua sponte*, and then ruled on the claim it had raised. There was no briefing on either side, although Petitioner argued to the panel that the Commonwealth had waived its right to assert the waiver by not raising it at all.

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[2] This material was furnished the defense from January 28, 2012 to June 15, 2012. Jury selection began on June 5 and trial began on June 11. (Superior Court published opinion pg. 13).

FACTUAL STATEMENT OF THE CASE

The Commonwealth's case rested on the credibility of its several complainants There was no physical or forensic evidence presented.

The facts presented to the jury established such a prolonged delay in reporting any of the sexual abuse to any authority figure as to clearly warrant the Standard Suggested Criminal Jury Instruction on the failure to make a prompt report of sexual abuse to authorities, an instruction the court refused.

Summarizing the facts delineated below, the delay in reporting was:

BSH - 14 years

RR - 12 years

DS - 16 years

MK - 9 years

AF - at least 2 years

JS - 12 years

SP - 5 years

ZK - told his mother of showering with Petitioner the same day, and was interviewed by police the next day - where he reported there were no improper touchings. District Attorney Gricar declined prosecution.

BSH testified the molestations began in 1997 and he did not report them until mid or late 2011 (N.T. 6/11/12 pgs. 51, 164-170; ARR 90, 180.1-180.7). BSH testified he was 13-14 when the molestations started in 1997 when Petitioner inappropriately touched him when they showered together. Thereafter, when he was "about 14", he testified Petitioner made him perform oral sex (N.T. 6/11/12 pgs. 69; ARR 108).

Petitioner would take him to football games where he could move up and down the Penn State sideline and talk to the players. His picture appeared in Sports Illustrated with Petitioner. Because he enjoyed the attendance at football games, the contact with the players and the other benefits from Petitioner, he said nothing about being molested. (N.T. 6/11/12 pgs. 59-61; ARR 98-100).

He learned the defendant was under investigation in April of 2011. When police first interviewed him he said nothing about being molested. (Id. at 140; ARR 179). When his father retained an attorney for him, he told the lawyer nothing. (Id. at 166, 168; ARR 180.3, 180.5). He did not discuss or report the molestations until his grand jury testimony was imminent and even then he did not go into details before the grand jury. (Id. at 169-170; ARR 180.6-180.7).

RR became involved in the Second Mile program in 1997. When he was 11 or 12 he was wrestling with Petitioner in Petitioner's basement when the defendant

performed oral sex on him (N.T. 6/13/12 pg. 32, 43; ARR 185, 190.1). He told his foster mother he did not want to see the defendant again, but did not tell her why. He did not report the molestation under November 11, 2011 when Sandusky was arrested and he called a police hotline. (N.T. 6/13/12 pgs. 29, 32, 54-55; ARR 181, 185, 190.2-190.3).

DS testified his molestation began in 1995 when he began to shower with the defendant. Police came to him in 2011. He hired a lawyer after he testified before the grand jury. (N.T. 6/13/12 pgs. 95, 106, 118, 138; ARR 201, 212, 224, 239.1). He believed he was 10 when he was molested (N.T. 6/13/12 pgs. 87, 94-95; ARR 193, 200-201).

MK testified that the defendant exposed himself to him in a sauna when he was 13 in 2002. He first reported this event to his girlfriend in 2011. When investigating police came to him he told them and testified before the grand jury. (N.T. 6/13/12 pgs. 174, 181, 182; ARR 249, 256, 257). He testified he was 13 when molested (N.T. 174, 177; ARR 249, 252).

AF was 10 years of age when he attended the Second Mile camp in 2004. He testified he stayed at the defendant's house over 100 times between 2005 and 2008. The molestation began when he was 11 or 12 and included oral sex when he was 13 or 14 (N.T. 6/12/12 pgs. 20-28; ARR 279-287).

He told his guidance counselor of the molestations when he was in either the 9th

or 10 grade which probably was in 2008, and he spoke with Children and Youth Services on 11/20/08. He reported these incidents to police in June of 2009.

ZK testified he met Sandusky in 1998 through his involvement in the Second Mile (N.T. 6/14/12 pg. 6; ARR 309). In May of that year, after showing him wrestling moves, Sandusky forced ZK to shower with him where he gave him a bear hug, wrestled with him, and picked him up to hold his head closer to the showerhead to get the shampoo used to wash his hair out of it. (Id. at 7, 11, 14, **53, 73**; ARR 310, 314, 317, 327.1, 327.2). He was 11 years old at the time (Id at 25; ARR 327.1a). He told initial police investigators that Petitioner never touched him inappropriately (Id. at 73-75; ARR 327.2-327.4) nor did he ever ask ZK to touch him inappropriately (Id); He told his mother about showering with Petitioner, and was interviewed by the police shortly thereafter when he told them no inappropriate touchings occurred. (Id at 19-20, **55, 73-75** ; ARR 322-323, 327.1, 327.2-327.4).

JS found the Second Mile Camp through the Big Brothers Big Sisters organization and attended the summer of 1998 (Id at 85-86; ARR 332-333). From 1999 to 2001 JS slept at Sandusky's residence approximately 50 times (Id at 91, 106; ARR 338, 353). Petitioner would rub and kiss his shoulders and touch his penis when he slept over during this three year period (Id at 99, 97; ARR 346, 344) which began when JS was 12

years old in 1999. (Id at 103; ARR 350). Although he knew this was clearly wrong, he made no report until July of 2011 when JS spoke with the police for the first time, but maintained that nothing had happened until subsequent interviews were held. (Id at 114; ARR 358.1).

Eventually JS's mother sent him to two different group homes where JS remained for three years. (Id. at 107; ARR 354). JS related that he was "infuriated" and enraged with Petitioner because Petitioner just forgot about him when he was sent to the group homes. JS would pray he [Petitioner] would call me and maybe find a way to get me out of there, adopt me or something. That never happened." (Id at 109; ARR 356).

SP was born on July 29, 1993. He attended the Second Mile Camp for three or four summers and met Sandusky when he was 12 years old (N.T. 6/14/12 pgs. 206, 209; ARR 363, 366). He began sleeping at the Sandusky residence in 2005, and did so almost every weekend from 2005-2008 or 2009 when he was 13-15 years old (Id at 216, 218; ARR 373, 375). Sandusky began kissing him and making him perform fellatio during this time period (Id at 213-214; ARR 370-371). Sandusky also forced SP to receive anal sex from him when he was "[m]aybe 13 and 14, maybe 15, between them, a few years" and this occurred "a few times." (Id at 218; 221; ARR 375, 378). SP never told anyone about these sexual contacts (N.T. 6/14/12 pgs. 213, 214; ARR 370, 371).

SP's first contact with the police in this case was in November of 2011, but he didn't tell them about the abuse at that point (Id at **240**, 224; ARR 383.1, 381). The first time he "told everything to" was when Mr. Amendola cross-examined him during the 2012 trial (Id at 225; ARR 382;).

The Court distributed its written charge and the next day had a charging conference in chambers. The Court had decided to deliver its charge and then allow counsel to make their summations. As the court stated in its Opinion, pg. 7:

> The defense offered no particular wording for my consideration and, instead, relied on the Pennsylvania Standard Criminal Jury Instruction. (Opinion, Exhibit "A", pg. 7).
>
> The Court responded to this request as follows:
>
> The defense has requested a charge on failure to make prompt complaint in certain sexual offenses. That will be denied because in my view the research is such that in cases involving child sexual abuse delayed reporting is not unusual and, therefore, is not an accurate indicia of honesty and may be misleading (N.T. 6/21/12 pg. 4; ARR 387).
>
> After the Court concluded its charge, it stated:
>
> We'll remain seated while the jury is taken out
>
> (Whereupon, the jury was escorted out from the courtroom.)

> THE COURT: Counsel, we'll do this step by step - we'll be in session please.
>
> Counsel, we'll do this step-by-step. Any additions corrections, exceptions to the charge as provided that have not already been placed on the record before court?
>
> .....
>
> MR. ROMINGER: Everything we did in chambers is preserved for the record?
>
> THE COURT: Yes, all exceptions previously made are preserved for the record (N.T. 6/21/12 pg. 29; ARR 412)(Emphasis supplied).

Prior to trial, defense counsel moved for three continuances. Each was denied as shown by the Court's three orders found in Appendix at pages **ARR 500-508** These motions were triggered by the Attorney General turning over a vast amount of material within six (6) weeks of trial. Mr. Amendola estimated that the total number of pages received from the Attorney General's office through June 15th was 9,450 pages. Also received were 674 pages of Grand Jury transcripts and 2,140 pages from the subpoenas duces tecum. (N.T. 1/10/13 pg. 10; ARR 440). All of this discovery was documented by a cover letter furnished with each delivery from the Attorney General. (Id at 10; Id). The Attorney General did not challenge any of these figures during the hearing.

This totaled over 12,000 pages of discovery with over 9,000 being supplied by

the Attorney General's Office. (Id. at 22; ARR 452).

During the prosecutor's summation he stated:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close. Well, he had the chance to talk to Bob Costas and make his case. What were his answers?
>
> What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining -- he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He just enjoys young children. (N.T. 6/21/12 pgs. 140-142; ARR 428-430)(Emphasis supplied).

Trial counsel objected based on the prosecutor's "commenting on" post arrest

silence (N.T. 6/21/12 pg. 157; **ARR 430.1**):

> He commented on extensively that the client could have come forward and broken his post-arrest silence and added more to his statement. We didn't put this statement [the Costas statement] in of the defendant. We didn't put any testimony of the defendant in.
>
> The Commonwealth is now saying he should have put more things forward, could have identified people in the shower, and done something in his own defense.
>
> .....
>
> So, first of all, is the commenting on the silence.
>
> .....
>
> THE COURT: Okay. I think these arguments were fair rebuttal. I cautioned the jury again and again the defendant has no obligation to testify or present any evidence in his own defense. I will caution the jury again that the decision must be made on the evidence presented and we'll proceed. (N.T. 6/21/12 pgs. 134 - 136; **ARR 427.1-427.3**).

In its Opinion, the trial court recognized that the above objection afforded him the opportunity to make any correction he deemed necessary in regard to the above comments, and as preserving the instant claims, specifically pointing out that counsel objected to the "commenting on the silence." (Opinion, Exhibit "A", pg. 16).

Citing Commonwealth v. Manley, 985 A.2d 256, 267 n.8 (Pa. Super. 2009) and Commonwealth v. Jones, 501 Pa. 162, 166, 460 A.2d 739, 741 (1983) the Superior Court

sua sponte held the misconduct claims waived because although trial counsel objected, he did not seek cautionary instructions nor move for a mistrial in spite of the fact that the Commonwealth never argued waiver during post sentencing motions or in its brief to the Superior Court. Petitioner argued that the Commonwealth had waived its waiver argument to the Court during oral argument, but the Court never mentioned what is a clear Commonwealth waiver.

During the charging conference the defense asked the court to dispense with the statement that character evidence had to be weighed against the other evidence introduced at trial, and the Court refused. It happened as follows:

> MR. ROMINGER: Mr. Amendola had raised the idea that defendant's character or reputation evidence alone would be enough to raise a reasonable doubt and it didn't have to be waived [weighed] with all other evidence in the case. We would add that you propose good character made [may] by itself raises (sic) a reasonable doubt and require a verdict of not guilty in and of itself, and then you could weigh and consider the evidence of other character but still reach a verdict on character evidence alone.
>
> THE COURT: The motion is denied. The language will be given in the form of the standard jury instructions.(N.T. 6/21/12 pg. 6; ARR 389)

The court instructed the jury that:

Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.

So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. (N.T. 6/21/12 pg. 22; ARR 405).

STATEMENT OF THE QUESTIONS PRESENTED

I. SHOULD REVIEW BE GRANTED TO DETERMINE IF THE TRIAL COURT'S REFUSAL TO GIVE THE STANDARD SUGGESTED CRIMINAL JURY INSTRUCTION REQUESTED BY THE DEFENSE ON THE FAILURE OF THE COMPLAINANTS TO MAKE A PROMPT COMPLAINT TO AUTHORITIES WAS REVERSIBLE ERROR?

IS THE COMMONWEALTH ESTOPPED FROM ARGUING THE INSTRUCTION WAS NOT WARRANTED BY PRINCIPLES OF JUDICIAL ESTOPPEL?

WAS THE REFUSAL TO GIVE THE FAILURE TO MAKE A PROMPT REPORT JURY INSTRUCTION HARMLESS ERROR?

II. SHOULD THIS COURT REVIEW THE DENIAL OF THREE CONTINUANCES REQUESTED BECAUSE OF THE VAST AMOUNT OF MATERIAL TURNED OVER TO THE DEFENSE PURSUANT TO COURT ORDERED DISCOVERY AND SERVICE OF SUBPOENAS?

III. SHOULD REVIEW BE GRANTED TO DETERMINE WHETHER REVERSIBLE ERROR OCCURRED WHEN THE PROSECUTOR COMMENTED ADVERSELY ON THE DEFENDANT'S NOT TESTIFYING AT TRIAL AND ALSO WHETHER OR NOT THIS CLAIM WAS WAIVED BY TRIAL COUNSEL'S FAILURE TO MOVE FOR EITHER A MISTRIAL OR CURATIVE INSTRUCTION AS FOUND BY THE SUPERIOR COURT?

CAN THE PROSECUTOR'S ADVERSE COMMENTS AS TO PETITIONER NOT HAVING TESTIFIED BE SAID TO HAVE BEEN HARMLESS?

IV. SHOULD REVIEW BE GRANTED TO DETERMINE WHETHER REVERSIBLE ERROR OCCURRED WHEN THE COURT REQUIRED THE JURY TO WEIGH THE TESTIMONY OF PETITIONER'S CHARACTER EVIDENCE AGAINST ALL OF THE OTHER EVIDENCE IN THE CASE?

(All questions were answered in the negative by the court below with the exception of the waiver question - consequently, the court below never reached the questions of estoppel or harmless error.)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE IF THE TRIAL COURT'S REFUSAL TO GIVE THE STANDARD SUGGESTED CRIMINAL JURY INSTRUCTION REQUESTED BY THE DEFENSE ON THE FAILURE OF THE COMPLAINANTS TO MAKE A PROMPT COMPLAINT TO AUTHORITIES WAS REVERSIBLE ERROR?

THE PRESERVATION OF THE CLAIM

The Superior Court rejected the Commonwealth's waiver argument based on trial counsel not having objected at the conclusion of the charge to the omission of the charge because at the conclusion of the charge the court had asked counsel for "Any additions corrections, exceptions to the charge as provided that have not already been placed on the record before court? (Emphasis supplied). Defense counsel asked if "everything we did in chambers is preserved for the record?" The court responded that "all exceptions previously made are placed on the record" which the Superior Court found established the trial court was "well aware of the requested instruction and its decision not to give the instruction to the jury." (Superior Court's published opinion, pg. 2 note 1).

The trial court had likewise rejected this waiver argument. (Trial court opinion, pgs. 24-26).

The factual background that led to the Commonwealth's specious waiver based on Commonwealth v. Pressley, 584 Pa. 624, 887 A.2d 220 (2005) argument was:

The Commonwealth argued objections to the charge of the court had been waived because of what it conceived to be the defense failure to object after the charge was given and prior to the jury retiring to deliberate, relying on Commonwealth v. Pressley, 584 Pa. 624, 887 A.2d 220 (2005).

The procedure utilized instantly was somewhat novel. The Court decided it would first charge the jury, and thereafter, the defense and prosecution would deliver their summations.

The Court gave counsel its charge in writing the day before the charging conference. During the charging conference in chambers, the attorneys registered objections, and as the court states in its Opinion, pg. 7, the defense requested the Pennsylvania Standard Criminal Jury Instruction, 4.13A as to the failure to make a prompt complaint.

The Court responded:

> The defense has requested a charge on failure to make prompt complaint in certain sexual offenses. That will be denied because in my view the research is such that in cases involving child sexual abuse delayed reporting is not unusual and, therefore, is not an accurate indicia of honesty and may be misleading (N.T. 6/21/12 pg. 4; ARR 387).

After the Court concluded its charge, it stated:

We'll remain seated while the jury is taken out.

(Whereupon, the jury was escorted out from the courtroom.)

THE COURT: Counsel, we'll do this step by step - we'll be in session please.

Counsel, we'll do this step-by-step. Any additions corrections, exceptions to the charge as provided that have not already been placed on the record before court?

.....

MR. ROMINGER: Everything we did in chambers is preserved for the record?

THE COURT: Yes, all exceptions previously made are preserved for the record (N.T. 6/21/12 pg. 29; ARR 412)(Emphasis supplied).

As shown above, the Court had ruled on this objection in chambers.

Following the charge, the Court specifically limited any objections to matters "that have not already been placed on the record before court".

Out of an excess of caution, and heeding the Court's admonition not to raise matters that had already been covered in chambers, the defense inquired as to the preservation of such objections, and the Court stated that such objections "were preserved for the record."

When the Court limited objections following his charge to matters not placed on

record "before court", i.e. the charging conference, it made it clear that the court would not reconsider such matters.

Even so, the Court had every opportunity to correct its charge after it was delivered, if it thought it best to do so which is the basis of Commonwealth v. Pressley, 584 Pa. 624, 887 A.2d 220 (2005).

THE FACTUAL CONTEXT OF THE CLAIM

THE COURT'S REFUSAL TO CHARGE ON THE FAILURE TO MAKE A PROMPT REPORT IN THE CONTEXT OF THIS CASE

The delay in reporting the alleged abuse in this case just cannot be ignored. A fast review of the complainants and the delay as to each one reporting alleged abuse shows: BSH- 14 years; RR - 13 years; DS - 16 years; MK - 9-10 years; AF - at least 2 years; JS - 12 years; SP - 6 years; and ZK - who told his mother of showering the same day when she noted his wet hair.

The Superior Court found that the trial court's reason for refusing a failure to make a prompt report instruction was "not supported in the case law." (Superior Court's published opinion, pg. 5). The Superior Court also found that the trial court engaged in no analysis of "whether the minor victims would have appreciated the offensive nature of Sandusky's conduct" (Superior Court's published opinion, pg. 6) and made the outcome determinative question whether or "the error could not have contributed to the

verdict and therefore did not prejudice Petitioner. (Id at 6).[3]

Moreover, the Superior Court took refuge in other jury instructions that involved credibility such as demeanor evidence, whether the witness had been convicted of a crime, his reputation for truthfulness in the community, whether his testimony was contradicted, whether he had any interest in the outcome of the case, any prejudice, or any other motive that may affect his testimony, and the false in one false in all concept. (Opinion, pgs. 6-7). The Superior Court found that these instructions "provided the jury

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3 This is a preserved error. As such, the question is whether there is a "reasonable possibility" that an error "might have contributed to the conviction" and if so, the error is not harmless. See Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978). Additionally, "under the harmless error doctrine, the judgment of sentence will be affirmed in spite of the error only where the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207, 218 (2006).

Use of the correct standard is important. Prejudice is the ineffectiveness of counsel standard where the burden of showing prejudice is on the defendant. The standard of review for a preserved claim casts the burden of showing "beyond a reasonable doubt that the error did not contribute to the verdict." Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207, 218 (2006); Commonwealth v. Williams, 573 Pa. 536, 573 A.2d 536, 538 (1990); Commonwealth v. Bricker, 525 PA. 362, 375, 581 A.2d 147, 153 (1990).

Because the failure to give the requested instruction impacted on the credibility of all of the complainants and its absence deprived Petitioner of the very heart of his defense, a reviewing court cannot conclude - beyond a reasonable doubt - that its omission "did not contribute to the verdict." Bullock, supra.

with a sufficient framework to question the victims' credibility." (Id at 8).

Petitioner disagrees. The concept that general instructions about credibility can somehow replace the Standard Suggested Jury Instruction on the failure to make a prompt report makes the standard charge superfluous in every case and has been thoroughly rejected by this Court. See Commonwealth v. Bricker, 525 PA. 362, 375-376, 581 A.2d 147, 153, 154 (1990).

The Superior Court also held that trial counsel argued the failure to report to the jury and vigorously cross-examined the complainants, holding:

> The vigorous cross-examination of the victims and arguments by defense counsel, when combined with the trial court's instructions on credibility, clearly defined the issues for the jury. Therefore, we find that, under the facts of this case, the absence of the prompt complaint instruction did not prejudice Sandusky. (Superior Court's published opinion, pg. 8).

This Court has held that allowing general credibility instructions to substitute for a specific instruction and allowing the arguments of counsel to be considered the equivalent of an instruction from the court to be an invalid way of analyzing a case where a specific instruction has been refused in Commonwealth v. Bricker, 525 PA. 362, 375-376, 581 A.2d 147, 153, 154 (1990):

> The duty of instructing the jury as to the law which is to be applied during their deliberations cannot be delegated to or

> usurped by a litigant involved in the trial of the case. Regardless of how effective Petitioner's attorney may have been in representing his client, the judge carries the sole responsibility for instructing the jury. In this case the primary evidence against Petitioner was the testimony of Kellington. Therefore, "it cannot be assumed beyond a reasonable doubt"" that the failure of the trial court to give the corrupt source charge "did not contribute to the verdict." Story, supra, 476 Pa. at 409, 383 A.2d at 164. The Commonwealth has failed to meet its burden that the error was harmless.

The term used by the Bricker Court in rejecting the Commonwealth's argument there that cross-examination coupled with the defense closing argument was sufficient to "alert the jury to scrutinize Kellington's testimony carefully" and served as a substitute for the accomplice charge the court that was refused was "specious". Bricker, supra. at 153.

Moreover, the jury was told to rely exclusively on the court for the law to apply to the case. This excludes defense counsel as a source of law, and for good reason.

Jurors know that the parties are advocates for their respective positions. As advocates, they are not impartial. The only impartial figure in the courtroom is the presiding judge, and the jury must rely on this impartial judge to school them in the law.

The judge had the obligation to give 4.13A - the Standard Suggested Criminal Jury Instruction on the failure to make a prompt report which was:

> 4.13A (Crim) Failure to Make Prompt Complaint in Certain Sexual Offenses
>
> 1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without [name of victim]'s consent.
>
> 2. The evidence of [name of victim]'s [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent].
>
> 3. You must not consider [name of victim]'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent. [name of victim]'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in the case. (Emphasis supplied).

This doctrine retains its vitality today. In Commonwealth v. Dillon, 592 Pa. 351, 360 - 363, 925 A.2d 131, 137-138 (2007) this Court made it clear that the presence or absence of a prompt complaint, while not an element of the crime of a sexual assault, is a critical factor to be weighed by the jury.

Dillon was a Commonwealth appeal of a ruling on the complainant's failure to make a prompt report. The complainant in Dillon was 9 years old when her mother's live in boyfriend began abusing her in 1995 and 12 years old when the abuse stopped in 1998. She did not report the abuse until 2001 when she was 16. Dillon, supra. at 133.

Chief Justice Castille in Dillon, supra. referred to the doctrine as a "reality" especially when the sexual assault prosecution "depends predominately on the victim's credibility, which is obviously affected by any delay in reporting the abuse." (Emphasis supplied). The Chief Justice concluded by stating that "the delay [in making a prompt report], enables the factfinder to more accurately assess the victim's credibility."

Justice Nix made it clear that the failure to make a prompt report applies to minors in Commonwealth v. Lane, 521 Pa. 390, 398-399, 555 A.2d 1246, at 1250 (1989) which involved an eight year old, stating for this Court:

> Moreover, it is important to note that evidence of a prompt complaint should also be considered when the victim is a child. A number of Superior Court cases have language which would suggest a failure to make a prompt complaint should have little or no application in sexual assaults involving minor complainants. See, e.g., Commonwealth v. Nabried, 264 Pa.Super. 419, 399 A.2d 1121 (1979); Commonwealth v. Shade, 242 Pa.Super. 115, 363 A.2d 1187 (1976); Commonwealth v. Allabaugh, 162 Pa.Super. 490, 58 A.2d 184 (1948). Such a statement of law is misleading and is to be avoided. (Emphasis supplied).

Case law is mindful of "long established tests" of credibility, one of which is the failure to make a prompt report, and reversals ensue when the failure to make a prompt report jury instructions were not given. See Commonwealth v. Berklowitz, 133 Pa. Super. 190, 194, 2 A.2d 516, 517 (1938)(at 517 -"We are compelled to reverse the judgments by reason of the failure of the trial judge to charge the jury as to its duty to consider whether the alleged victim made prompt complaint of the rape charged." - Id.- "unless complaint is found to have been made by a prosecutrix in a given case, the want of it weighs heavily against the prosecution, and in favor of the accused, unless satisfactorily explained." - Id. at 518 - "The credibility of the evidence of the female in a trial for rape is vital and it is of great importance that the long established tests should be called to the attention of the jury."); Commonwealth v. Jordan, 156 Pa. Super. 109, 39 A.2d 527, 528 (1944) is to the same effect - reversing because "failure to make an outcry or prompt complaint was an important matter for the jury's consideration."

In Commonwealth v. Jones, 449 Pa. Super. 58, 65, 672 A.2d 1353, 1357 (1996) a conviction was reversed because an inadequate instruction on the failure to give a prompt complaint was given:

> The presumption follows that if a complaint is made promptly after the alleged offense, the victim has not had time to fabricate the story and the story is given more credibility. *See e.g., Commonwealth v. Krick, supra.*

> Conversely, if a complaint is delayed substantially without any reasonable explanation, an inference can be drawn regarding the credibility of that complaint and against whether the incident in fact occurred.

Bringing the doctrine up to date, our Supreme Court held in 2007 that it certainly was viable and gave a full explication of the reasons why the presence or absence of a prompt complaint was critically relevant to the credibility of the complainant in Commonwealth v. Dillon, 592 Pa. 351, 360 - 363, 925 A.2d 131, 138-139 (2007).

The delay in reporting the alleged abuse was aggravated as to 7 of the 8 complainants and it impacted strongly on their credibility. Petitioner's jury should have been schooled by the court in the law pertaining to the failure to make a prompt report. Without such an instruction, the jury could well have believed that the law had no expectation such a report would or should be filed. Absent such an instruction, the jury could well have believed the making or not making of any such report was immaterial and of no relevance.

In other words, the law placed the failure to make such a report in the perspective of Standard Suggested Criminal Jury Instruction 4.13A and the failure to give such an instruction left the jury at sea as to what comprised a large part of the victims' credibility which this Court held in Dillon, supra., 925 A.2d at 138-139 "is obviously affected by any delay in reporting the abuse."

JUDICIAL ESTOPPEL PRINCIPLES PRECLUDE THE COMMONWEALTH FROM ARGUING THE FAILURE TO GIVE A PROMPT REPORT INSTRUCTION WAS APPROPRIATE

Even if the admonitions of Commonwealth v. Lane, supra as to youthful complainants are somehow rejected, the Commonwealth still cannot argue the immaturity of their complainants was such as to require the court dispense with the failure to make a prompt complaint instructions under the doctrine of judicial estoppel.

Dillon was a Commonwealth appeal of a ruling on the complainant's failure to make a prompt report. The complainant in Dillon was 9 years old when her mother's live in boyfriend began abusing her in 1995 and 12 years old when the abuse stopped in 1998. She did not report the abuse until 2001 when she was 16. Dillon, supra. at 133.

Justice Castille, writing for the Supreme Court in Dillon, supra. at 135 stated - "The Commonwealth responds that L.P.'s lengthy and unexplained failure to report the alleged abuse ""inevitably"" raises a negative inference as to her credibility." The Commonwealth was comprised of a representative from the Philadelphia District Attorney's Office and two highly renowned appellate attorneys from the Office of the Attorney General - the agency prosecuting this case.

Having argued that the unexplained failure to make a prompt report by a young girl during the time she was 9-12 years of age and then up to her being 16 "inevitably"

raises a negative inference as to credibility in Dillon, the Attorney General is estopped from arguing otherwise here. Having argued that the doctrine applied to such a youthful victim whose maturity and understanding of the events may not have been attuned to law enforcement, in a case where consent is not an issue, such arguments are now unavailable to the Attorney General under the doctrine of judicial estoppel.

The Attorney General cannot now be heard to argue that the age, immaturity, or lack of understanding of the instant complainants were such as to eliminate the need for a failure to make a prompt report.

The doctrine of judicial estoppel was first articulated by the United States Court of Appeals for the Third Circuit in Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953), which stated ""a party may be precluded by a prior position taken in litigation from later adopting an inconsistent position in the course of a judicial proceeding."" See also Commonwealth v. Lam, 453 Pa.Super. 497, 684 A.2d 153 at 164-165 (1996)(accepting judicial estoppel in Pennsylvania).

Our Supreme Court has held that "[a]s a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." In re Adoption of S.A.J., 575 Pa. 624, 631, 632, 838 A.2d 616, 620, 621 (2003). The Attorney General argued that

the failure to give a prompt report instruction had to be given in Dillon, and did so successfully. It is therefore estopped from taking a different position in this case.

THE REFUSAL TO GIVE THE FAILURE TO MAKE A PROMPT REPORT JURY INSTRUCTION WAS NOT HARMLESS ERROR

Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978), held that "[w]henever there is a "reasonable possibility" that an error "might have contributed to the conviction,"the error is not harmless."

Additionally, "under the harmless error doctrine, the judgment of sentence will be affirmed in spite of the error only where the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207, 218 (2006); Commonwealth v. Williams, 573 Pa. 536, 573 A.2d 536, 538 (1990); Commonwealth v. Bricker, 525 PA. 362, 375, 581 A.2d 147, 153 (1990).

Here, the delay in reporting the alleged abuse is as aggravated as it can be. The failure to make a prompt report is such cases is recognized by statutory law, case law, and the Suggested Standard Criminal Jury Instruction.

It is conceivable that some or most of the jurors did take the failure to make a prompt report into consideration - but without jury instructions a reviewing court

cannot be sure.

There is no principled distinction between this case and Commonwealth v. Bricker, 525 PA. 362, 375-376, 581 A.2d 147, 153, 154 (1990) where our Supreme Court held:

> The duty of instructing the jury as to the law which is to be applied during their deliberations cannot be delegated to or usurped by a litigant involved in the trial of the case. Regardless of how effective Petitioner's attorney may have been in representing his client, the judge carries the sole responsibility for instructing the jury. In this case the primary evidence against Petitioner was the testimony of Kellington. Therefore, "it cannot be assumed beyond a reasonable doubt"" that the failure of the trial court to give the corrupt source charge "did not contribute to the verdict." Story, supra, 476 Pa. at 409, 383 A.2d at 164. The Commonwealth has failed to meet its burden that the error was harmless.

The Commonwealth cannot establish, beyond a reasonable doubt, that the absence of the Standard Suggested Criminal Jury Instructions on the failure to make a prompt report did not contribute to the verdicts. The Standard Instructions would have imparted knowledge to the jury that the law offered support for Appellant in this area - support which seriously questioned the sincerity of the complainants - support that made the jury aware of possible motives that could have arisen during the period of time no reports were forthcoming - support because the delay in reporting could remove "the

assurance of reliability" that must accompany such complaints.

By not giving the failure to make a prompt report jury instructions, the court allowed the testimony of seven of the eight complainants to go to the jury in such a manner as to carry more weight than it would have if placed in the context of the failure to make a prompt report instructions.

It is clear that the testimony of the complainants without the failure to make a prompt report instructions was far more favorable to the Commonwealth than it would have been if placed in the context of such instructions.

Removing the failure to make a prompt report jury instructions from this case served to bolster the testimony of all of the complainants.

When credibility is the most critical issue, it is simply wrong to strip the Commonwealth's testimony of the flaws the law says attach to it, and then claim such an unfair advantage was "not prejudicial."

II. THIS COURT SHOULD REVIEW THE DENIAL OF THREE CONTINUANCES REQUESTED BECAUSE OF THE VAST AMOUNT OF MATERIAL TURNED OVER TO THE DEFENSE PURSUANT TO COURT ORDERED DISCOVERY AND SERVICE OF SUBPOENAS WHICH ADVERSELY AFFECTED PETITIONER'S RIGHT TO COUNSEL, AND DENIED HIM DUE PROCESS OF LAW.

THE FACTUAL CONTEXT OF THE CLAIM

The Court denied defense motions for a continuance filed on or about March 22, 2012 (Omnibus Pre-Trial Motion), May 9, 2012 (Motion for Continuance) and May 25, 2012 (Motion for Continuance), and in so doing abused its discretion and/or violated due process of law as guaranteed by the Fifth Amendment.

The defendant's Omnibus Motion filed in late March also requested a continuance. The Court denied the requested continuance by Order dated April 5, 2012 with the provision that jury selection would begin on June 5, 2012.

These motions and their corresponding adverse rulings suffice to preserve the instant claim. The Orders denying the three continuances sought are found in Appellant's Reproduced Record, Volume II at pages **500-508**.

Thereafter, the Commonwealth provided a vast amount of discovery ordered by the Court on April 27, 2012, May 4, 2012, May 9, 2012, May 14, 2012, May 16, 2012, May 18, 2012, May 24, 2012, May 31, 2012, June 4, 2012, June 8, 2012 and June 15, 2012. The defense moved for continuances on May 9, 2012 and May 25, 2012 because of the

voluminous nature of this material. These motions were denied.

During the hearing on post sentencing motions (January 10, 2013 - Petitioner's Reproduced Record, Volume II pgs. 431-499), trial counsel Joseph Amendola testified without contradiction[4] that pursuant to discovery and his discovery motions that were granted, from January 28, 2012, the defense received from the Attorney General:

1. On January 28, 2012 the defense received 1,114 pages, nine disks which comprised 3 hours and 23 minutes of materials and 117 images which was discovery provided by the Attorney General.

2. On January 23, 2012 the defense received 836 pages of discovery.

3. On February 4, 2012 the defense received two pages of discovery and one disk.

4. On March 7, 2012 - 1,809 pages of discovery were received.

5. On March 12, 2012 - 1,938 pages of discovery were provided, plus four disks which ranged over an hour and three minutes plus a flash drive with 235 images.

6. On March 27, 2012 - 80 pages of discovery were provided.

7. April 27, 2012 - 427 pages of discovery were forwarded, but received on April 30, 2012.

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[4] The fact that there was no contradiction is especially important here because Mr. Amendola recited what the Attorney General provided him, and the same Attorney Generals who provided the discovery were conducting the hearing.

8. May 4, 2012 - 608 pages of discovery, 9 disks, 11 files, and 2,377 images.

9. May 9, 2012 - 3 pages of discovery.

10. May 14, 2012 - 1,812 pages of discovery, one portable hard drive which contained the information taken from Petitioner's three home computers that were seized pursuant to a search warrant on June 21, 2011, ten disks and 588 images.

11. May 16, 2012 - 60 pages of discovery.

12. May 18, 2012 - 44 pages of discovery.

13. May 24, 2012 - 569 pages of discovery, 6 disks which comprised one hour and 42 minutes and 38 images.

14. May 31, 2012 - 141 pages of discovery, 3 disks, and 93 images.

15. June 4, 2012 - 7 pages of discovery, one disk, 36 images.

16. June 8, 2012 - 1 page of discovery, 1 disk which was comprised of one minute and 40 seconds of material.

17. June 15, 2012 - during trial - 3 pages of discovery, 1 disk comprised on 29 minutes and four seconds.

Based on the information contained in the above discovery materials, Mr. Amendola had issued subpoenas duces tecum and when the court allowed such subponeas Mr. Amendola had another 6,400 pages of materials. (N.T. Post Sentencing

Motions Hearing, 1/10/13 pgs. 5-10; ARR pgs. 435-440).

Mr. Amendola estimated that the total number of pages received from the Attorney General's office through June 15th was 9,450. Also received were 674 of Grand Jury transcripts and 2,140 pages from the subpoenas duces tecum. (Id. pg. 10; ARR 440)

All of this discovery was documented by a cover letter furnished with each delivery from the Attorney General. (Id at 10; Id).

This totaled over 12,000 pages of discovery with over 9,000 being supplied by the Attorney General's Office. (Id. at 22; ARR 452)

The Superior Court quoted the trial court's explanation with approval as denoting careful consideration of the requested continuance and as showing it was not arbitrarily denied:

> The amount of material that I have ordered the Commonwealth to provide in discovery has been significant. No doubt sorting the wheat from the chaff has been time consuming. Again, however, the defense team is assuredly capable, even as the trial is ongoing, of sorting through the material to determine what is useful to the defense and what is not. (Superior Court published opinion, pg. 13)

When counsel is forced to go through discovery during an on going trial, the right to counsel suffers.

The ability to go through discovery during trial was coupled with counsel's

forthright answer made during the post sentencing motion hearing when he was cross-examined by the trial prosecutor, Joseph McGettigan, as follows:

> Q. What item have you discovered since the conclusion of the trial in your review of these voluminous documents that you have talked about, that would have altered your conduct at the trial?
>
> .....
>
> A. The answer is none.
>
> Q. None. So there is no item, document, or person that in your review of the documents that you received at any time that would have altered your conduct at trial during the course of the trial, isn't that correct?
>
> A. That's correct. (Id. pgs. 39, 40, 43; ARR 469, 470, 473)

At the conclusion of the presentation of evidence on this claim, the court asked counsel if his claim was defeated by the fact that Mr. Amendola testified "reviewed the material after the fact [after trial] and said it wouldn't have altered his approach to the trial." (Id at 46-47; ARR 476-477).

Counsel responded that Mr. Amendola could not say that prior to trial because he lacked the time to read most of the discovery turned over so late. (Id.)

The court inquired about prejudice - "What's the harm?" The following occurred:

> MR. GELMAN: The harm is that he was forced to go to trial where he really didn't know what was in that material.

THE COURT: True.

MR. GELMAN: Where he was operating –

THE COURT: Let's concede that.

MR. GELMAN: Blindly.

THE COURT: Let's concede that.

MR. GELMAN: That is so dangerous and it doesn't confirm to on [sic-our] concept of counsel under the Sixth Amendment.

THE COURT: I will concede that.

MR. GELMAN: You should not fly blind.

THE COURT: For purposes of argument, I'll concede that, but –

MR. GELMAN: And that kind of trial – when a trial is composed in that manner, it's a structural error affecting the framework of trial.

THE COURT: We presume – we presume it's a structural error.

MR. GELMAN: And we don't have to show prejudice. Even though there may not be prejudice, that's irrelevant. We don't have to show prejudice. We have to show the framework of the trial, the structure - structural error which deviated from the Sixth Amendment right to counsel.

THE COURT: So the structural error entitles the defendant to a new ... trial.

MR. GELMAN: A new trial.

THE COURT: – Even where post review of the documents indicates there's no prejudice?

MR. GELMAN: That's our position.

THE COURT: Okay. (Id at **47-48;** ARR 477-478)

Petitioner was rushed to trial. The Penn State administrators who were charged at the same time he was charged have not - to this day - October 25, 2013 - gone to trial.

Whether the denial of the continuance caused a structural error or denied Petitioner due process of law is really of no moment. What is critical is the fact that his attorney operated blindly when he should have at least had the confidence he had read everything that could be involved in the trial of the case. Lacking that confidence, he was forced to go forward.

A proper respect for the Sixth Amendment's right to counsel requires far more than what was afforded here. The prosecution which had years to put the case together, and a team of lawyers, investigators, para-legals, and secretaries that far exceeded the defense team had plenty of time to review those 12,000 pages. To know that one side has been thoroughly schooled in what was in those 12,000 pages and relegate the other side to "sorting through the material" as " the trial is ongoing" is to load the scales of justice.

III. REVIEW SHOULD BE GRANTED TO DETERMINE IF REVERSIBLE ERROR OCCURRED WHEN THE PROSECUTOR COMMENTED ADVERSELY ON THE DEFENDANT'S NOT TESTIFYING AT TRIAL AND ALSO TO DETERMINE IF THIS CLAIM WAS WAIVED BY TRIAL COUNSEL'S FAILURE TO MOVE FOR EITHER A MISTRIAL OR CURATIVE INSTRUCTION AS WAS FOUND BY THE SUPERIOR COURT?

The Superior Court found this claim waived because while trial counsel objected, he did not move for either curative instructions or a mistrial citing Commonwealth v. Manley, 985 A.2d 256, 267 n.8 (Pa. Super. 2009) and Commonwealth v. Jones, 501 Pa. 162, 166, 460 A.2d 739, 741 (1983)(Superior Court published opinion pg. 9-10).

The Commonwealth did not assert waiver during post sentencing motions and did not brief the issue to the Superior Court. When the Superior Court raised the waiver issue during oral argument, Petitioner's counsel argued that the Commonwealth had waived its right to assert the waiver, and that the Court should not raise it *sua sponte*.

The Superior Court rejected Petitioner's waiver argument and found he had waived his right to present the misconduct claims.

This Court should grant review so as to provide the bar with a discussion and analysis of waiver as against the prosecution. It is unfair to have such a doctrine that prevents review on the merits when leveled against a defendant, while insulating the prosecution from its consequences.

Assuming the Commonwealth did waive its right to assert waiver against

Petitioner, this Court should review it on its merits.

THE PRESERVATION OF THE CLAIM

At the conclusion of the prosecutor's summation, the defense objected to the adverse comments made therein as Petitioner not testifying at trial. This was pursuant to an agreement (approved by the Court) that counsel reserve "objections to each other's closing arguments unless they're patently egregious." (N.T. 6/21/12 pg.4; ARR 387).

At the conclusion of the prosecutor's closing address, the defense objected to the references to Petitioner's failure to testify during the trial:

> He commented on extensively that the client could have come forward and broken his post-arrest silence and added more to his statement. We didn't put this statement [the Costas statement] in of the defendant. We didn't put any testimony of the defendant in.
>
> The Commonwealth is now saying he should have put more things forward, could have identified people in the shower, and done something in his own defense.
>
> .....
>
> So, first of all, is the commenting on the silence.
>
> .....
>
> THE COURT: Okay. I think these arguments were fair rebuttal. I cautioned the jury again and again the defendant has no obligation to testify or present any evidence in his own defense. I will caution the jury again that the decision

must be made on the evidence presented and we'll proceed. (N.T. 6/21/12 pgs. 134 - 136; **ARR 427.1-427.3**).

In its Opinion, the trial court recognized the above objection as preserving the instant claims, specifically pointing out that counsel objected to the "commenting on the silence." (Opinion, Exhibit "A", pg. 16).

Thus, the trial court was afforded the opportunity of making any corrections it chose to make, and was cognizant of the basis of the objection.

REVERSIBLE ERROR OCCURRED WHEN THE PROSECUTOR COMMENTED ADVERSELY ON THE DEFENDANT'S NOT TESTIFYING AT TRIAL.

During his summation, the prosecutor stated:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close. Well, he had the chance to talk to Bob Costas and make his case. What were his answers?
>
> What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them.
>
> That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining -- he offered that his client has a tendency to repeat questions after they're asked. I would think that the

> automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question. I wouldn't know. I only heard him on TV. Only heard him on TV. So that's his explanation there. He just enjoys young children. (N.T. 6/21/12 pgs. 140-142; ARR 428-430)(Emphasis supplied).

Trial counsel objected based on the prosecutor's "commenting on" post arrest silence (N.T. 6/21/12 pg. 157; **ARR 430.1**).

The prosecutor's statement that the defendant had "wonderful opportunities to speak out and make his case" is broad enough to cover the trial. See Commonwealth v. Clark, 533 Pa. 579, 583-584, 626 A.2d 154 at 156 (1993) which in reversing for the prosecutor's improper question which referenced post arrest silence, held:

> Notwithstanding the intention of the questioner, the question was ambiguous regarding the specific time frame to which it was directed. The prosecutor's question was, "Did you ever think of telling the police what happened?" N.T. p. 2.165 (emphasis added). Webster's Dictionary defines "ever" as "through all time or at anytime." Thus it is reasonable to assume that the jury would have interpreted the prosecutor's question as embracing Petitioner's post-arrest silence.

Both Commonwealth v. Turner, 499 Pa. 579, 454 A.2d 537 (1982) and

Commonwealth v. Clark, 533 Pa. 579, 584, 626 A.2d 154 at156 (1993) hold that it is the perception of the jurors and how they could interpret the comment that governs:

> This Court has firmly exhibited its intention to insure that the post-arrest silence of the accused is not used to his detriment in legal proceedings. Turner, 499 Pa. 579, 454 A.2d 537. In Turner, we held that any reference to the post-arrest silence of the accused is potentially prejudicial to the accused. 499 Pa. at 585, 454 A.2d at 540. Such a reference may impermissibly contribute to the verdict and consequently warrants the granting of a new trial for the accused. Turner reflects this Court's concern that lay jurors may mistakenly interpret the exercise of the Fifth Amendment privilege not to incriminate oneself as an implicit admission of guilt.

Petitioner did not testify at trial, a fact the prosecutor reminded the jury of by stating:

> But that's Mr. Amendola's explanation that he automatically repeats question. I wouldn't know. I only heard him on TV.
> Only heard him on TV. So that's his explanation there.(N.T. 6/21/12 pgs. 140-142; ARR 428-430)(Emphasis supplied).

Where else but in the very courtroom where Petitioner was tried would the prosecutor be in a position to hear him speak - in person - about the case? The prosecutor heard Petitioner on TV - but not in court. This is a clear reference to Petitioner not having taken the stand and testified - so that the prosecutor could have heard him and could readily be interpreted by the jury as being such.

Our Supreme Court has held that most laymen view the assertion of the Fifth Amendment privilege, at trial or otherwise, as a badge of guilt. Commonwealth v. Humphrey, 473 Pa. 533 at 540, 375 A.2d 717 (1977); Commonwealth v. Turner, 499 Pa. 579 (1982); Walker v. United States, 414 F. 2d 900 at 903 (5th Cir. 1968); Commonwealth v. Kuder, Pa. Super. , 62 A.3d 1038 (2013).

Our Supreme Court has condemned references to the accused not having testified even when made by implication in Commonwealth v. Rodriguez, 533 Pa. 555, 560, 626 A.2d 141, 144 (1993):

> It is beyond question that a defendant has an absolute right to refrain from testifying. Commonwealth v. Lewis, 528 Pa. 440, 598 A.2d 975 (1991). It is also well settled that a prosecutor cannot comment on a defendant's failure to take the stand in his own defense. If a prosecutor does comment, even by implication, on the defendant's failure to testify, then the Commonwealth has the burden of proving that the error it made was harmless beyond a reasonable doubt. Commonwealth v. Davis, 452 Pa. 171, 305 A.2d 715 (1973).(Emphasis supplied)

Further, the prosecutor included what can only be deemed another remarkable statement in his closing:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close. Well, he had the chance to talk

to Bob Costas and make his case. What were his answers?

Whether or not the prosecutor was as good as Bob Costas in questioning persons is irrelevant. It found its way into the prosecutor's summation because it was designed to have the jurors bemoan the fact that the prosecutor did not have a chance to question Petitioner because Petitioner did not testify.

The prosecutor's comment was a clear reference to the fact that Petitioner subjected himself to questioning to Bob Costas, but refused to subject himself to the prosecutor's questioning at trial, highlighted by the prosecutor's proud declamation that he was "almost as good a questioner as Bob Costas."

The prosecutor's closing was rife with adverse references to Petitioner's not having testified in violation of long standing law - Griffin v. California, 380 U.S. 609 (1995) which held:

> The Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

The prosecutor's summation clearly violated the Fifth Amendment as applied to the states through the Fourteenth Amendment in Griffin, supra. but it also violated Article 1, Section 9 of the Pennsylvania Constitution and Pennsylvania's anti-comment statute, 42 Pa.C.S.A. Section 5941(a).

The comment, "I wouldn't know. I only heard him on TV. Only heard him on TV. (N.T. 6/21/12 pgs. 140-142)(Emphasis supplied) was designed to call attention to the fact Petitioner did not testify - "only heard him on TV" but we did not hear him here in the courtroom. As held in Commonwealth v. Henderson, 456 Pa. 234, at 239, 317 A.2d 288 (1974):

> Presently, the comment by the district attorney brought to the attention of the jury the Petitioner's failure to testify, and this clearly could have been considered as evidence indicating guilt. Thus, the Petitioner could have been "penalized" for asserting his constitutional right.

The Henderson Court rejected the Commonwealth's harmless error argument, and reversed his convictions and this Court should do likewise.

THE PROSECUTOR'S ADVERSE COMMENTS WERE NOT HARMLESS

As our Supreme Court has explicated in Commonwealth v. Overby, 570 Pa. 328, 347, 809 A.2d 295, 306 (2002):

> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. [citations omitted].

> It is well established that an error is harmless only if the appellate court is convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict. Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978); see also Commonwealth v. Ardestani, 558 Pa. 191, 736 A.2d 552, 556 (1999). This is a burden that the Commonwealth must carry. Commonwealth v. Young, 561 Pa. 34, 748 A.2d 166, 193 (1999)(citing Commonwealth v. Mayhue, 536 Pa. 271, 639 A.2d 421 (1994))(Emphasis supplied).

See also Chapman v. California, 386 U.S. 18 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.") In other words, as Chapman further held at 24, "There is little, if any, difference between our statement in Fahy v. State of Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978), held that "[w]henever there is a "reasonable possibility" that an error "might have contributed to the conviction,"the error is not harmless."

Additionally, "under the harmless error doctrine, the judgment of sentence will be affirmed in spite of the error only where the reviewing court concludes beyond a

reasonable doubt that the error did not contribute to the verdict." Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207, 218 (2006).

The Commonwealth cannot show that the above referenced adverse comments did not contribute to the verdict.

Adverse comment on the accused not testifying is a double edged sword. It fortifies the prosecution's case, and adverse comment on the silence of the accused at trial undermines the defense offered.

This is a great advantage - far too great an advantage to be gained by misconduct which violates our federal constitution. The "badge of guilt" unconstitutionally bolstered the Commonwealth's case and unconstitutionally impaired Appellant's reasonable doubt defense. Such a devastating blow cannot be deemed "harmless" as it is impossible to conclude, beyond a reasonable doubt, that it did not contribute to the verdict. See Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978); Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207, 218 (2006).

IV. SHOULD REVIEW BE GRANTED TO DETERMINE WHETHER REVERSIBLE ERROR OCCURRED WHEN THE COURT REQUIRED THE JURY TO WEIGH THE TESTIMONY OF PETITIONER'S CHARACTER EVIDENCE AGAINST ALL OF THE OTHER EVIDENCE IN THE CASE?

THE PRESERVATION OF THE CLAIM

During the charging conference, the following occurred:

> MR. ROMINGER: Mr. Amendola had raised the idea that defendant's character or reputation evidence alone would be enough to raise a reasonable doubt and it didn't have to be waived [weighed] with all other evidence in the case. We would add that you propose good character made [may] by itself raises (sic) a reasonable doubt and require a verdict of not guilty in and of itself, and then you could weigh and consider the evidence of other character but still reach a verdict on character evidence alone.
>
> THE COURT: The motion is denied. The language will be given in the form of the standard jury instructions.(N.T. 6/21/12 pg. 6; ARR 436)

The Court charged the jury as follows:

> Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being law abiding, peaceable, nonviolent individual.
>
> The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.

> So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find – that he is guilty, you should find him guilty. But in making that determination, you may consider evidence of good character which you believe to be true. (N.T. 6/21/12 pg. 22; ARR 452).

Trial counsel did not object at the conclusion of the court's charge. The defendant invokes his arguments made above as to this claim being preserved under Commonwealth v. Pressley, 584 Pa. 624, 887 A.2d 220 (2005) and by leave of court.

Following the charge, the court stated:

> We'll remain seated while the jury is taken out.
>
> (Whereupon, the jury was escorted out from the courtroom.)
>
> THE COURT: Counsel, we'll do this step by step - we'll be in session please.
>
> Counsel, we'll do this step-by-step. Any additions corrections, exceptions to the charge as provided that have not already been placed on the record before court?
>
> .....
>
> MR. ROMINGER: Everything we did in chambers is preserved for the record?
>
> THE COURT: Yes, all exceptions previously made are

> preserved for the record (N.T. 6/21/12 pg. 29; ARR 459)(Emphasis supplied).

The Court ruled on objections in chambers. Following the charge, the Court specifically limited any objections to matters "that have not already been placed on the record before court".

> MR. ROMINGER: Everything we did in chambers is preserved for the record?
>
> THE COURT: Yes, all exceptions previously made are preserved on the record (N.T. 6/21/12 pg. 34; ARR 464).

In Commonwealth v. Neely, 522 Pa. 236, 241, 561 A.2d 1, 3 (1989) our Supreme Court held:

> A criminal defendant must receive a jury charge that evidence of good character (reputation) may, in and of itself, (by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty.

The Court gave the "in and of itself" instruction required by Neeley. (N.T. 6/21/12 pg. 22; ARR 405) However, the Court immediately thereafter gave a contradictory charge, instructing the jury that it "must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty." (N.T. 6/21/12 pg. 22; ARR 452).

If character testimony must, as per the court's instructions, be weighed against the other evidence in the case, it is not being considered "in and of itself" as required by Neely.

Under such circumstances, it is impossible to know on which instruction the jury relied and reversal must ensue. As held in Francis v. Franklin, 471 U.S. 307, 322, 85 L.Ed.2d 344, 358, 105 S.Ct. 1965 (1985):

> Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Where the incorrect instruction on a critical legal point is not expressly withdrawn, reversible error occurs. Commonwealth v. Broeckey, 364 Pa. 368 at 374, 72 A. 2d 134, 136 (1950); Commonwealth v. Waller, 322 Pa. Super. 11, 15, 16, 468 A. 2d 1134 (1983); Commonwealth v. Wortham, 471 Pa. 243, 248, 369 A. 2d 1287 (1977).

As held in Broeckey, supra. at 374:

> Where an erroneous instruction consists of a palpable misstatement of the law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, unless the erroneous instruction is expressly withdrawn, for the jury, assuming as it is their duty, that the

> instructions are all correct, may as readily follow the incorrect as the correct.

Commonwealth v. Neely, 522 Pa. 236, 561 A. 2d 1 (1989), must be strictly adhered to by the trial courts. See Commonwealth v. Bannerman, 525 Pa.264, 579 A. 2d 1295 (1990)(death sentence reversed due to "trial court's failure to comply explicitly with the mandate of Commonwealth v. Neely, Pa. , 561 A.2d 1 (1989)" (emphasis supplied). [5]

Because character testimony alone can result in an acquittal, there was severe prejudice from the defendant not getting instructions required by Commonwealth v. Neely, 522 Pa. 236, 241, 561 A.2d 1, 3 (1989), and instead receiving instructions which undercut Neely.

Neely designed a two step inquiry for the jury. It first had to decide if the character evidence - in and of itself - raised a reasonable doubt, and then if not, it had to review the trial evidence. Justice Flaherty in his dissent in Neely stated:

> I agree with the Commonwealth that the ""of itself"" charge

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5 In Commonwealth v. Khamphouseane, 434 Pa. Super. 93, 642 A.2d 490 (1994), the Superior Court found no fault with the above charge. Appellant submits that Khamphouseane is in conflict with this Court's well reasoned decisions in the area of character testimony such as Commonwealth v. Neely, 522 Pa. 236, 561 A.2d 1 (1989) and Bannerman, and also permits the unconstitutional conversion of character evidence into an affirmative defense.

> is fundamentally misleading because it suggests that character evidence, unlike other types of evidence, creates a reasonable doubt in a manner different from all other evidence. Insofar as that misconception is, in fact, promoted, reputation evidence usurps the jury's function by suggesting what weight to give a particular type of evidence, thereby encouraging the jury to ignore all other evidence and to give reputation evidence what the English call ""pride of place."" Neely, supra. at 561 A.2d 4 (Emphasis supplied)

Justice Flaherty concluded:

> It simply makes no sense to instruct a jury, in effect, that its task is divided into two steps in which it first must consider whether the defendant's evidence of good reputation creates a reasonable doubt in the case, and then if it does not, consider the rest of the evidence, both of the defense and the prosecution. Instead, reputation evidence should be treated like any other evidence, one of many considerations in a one-step process of determining guilt or innocence. The trial court properly instructed the jury and should be affirmed. Neely, supra. at 561 A.2d 4-5.

The Court's instructions contained another due process deficiency. The Court told the jury that it "must weigh and consider the evidence of good character along with the other evidence in the case." By using the word "weigh" with the mandatory "must" the Court conveyed to the jury that the character evidence had to outweigh other evidence in the case, and if it did it would then "justify" a verdict of not guilty.

The jury never received instructions on how it was to weigh evidence of good character against the other evidence in the case. It was left to literally invent its own

standard of weighing in order to comply with the instructions of the Court and that too is a denial of due process of law. Giaccio v. Pennsylvania, 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966).

The jury was given no burden of proof or standard by which to weigh character evidence against the other evidence in the case. The jury could well have interpreted this instruction so that character testimony could only operate to raise a reasonable doubt if it outweighed the other evidence presented by the Commonwealth. If so then this standard instruction is a burden shifting instruction which has always been unconstitutional. See Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

And if the jury believed that character testimony had to outweigh the evidence of guilt before it could raise a reasonable doubt Neely was severely undermined.

By giving the standard instruction directing that the jury weigh the character testimony, the trial court not only diluted the force of character evidence, but foisted a burden of proof onto the accused of proving that his character testimony outweighed the other evidence in the case before it could raise a reasonable doubt.

Indeed, the jury may well have believed that character testimony when weighed against other testimony is a far weaker kind of testimony since it is comprised of the

collective hearsay of the community.

Put another way, the requirement that the jury "weigh" character testimony is totally inconsistent with Neely's mandate that the jury may use such testimony, "in and of itself" to acquit, for if the jury must weigh the character testimony it cannot then consider it "in and of itself." Character testimony is not to be weighed against any other evidence. Commonwealth v. Padden, 160 Pa. Super. 269, 275, 50 A.2d 722, 725 (1947). Padden, supra. 50 A.2d at 725 held:

> Evidence of good character is substantive and positive evidence, not a mere make-weight to be considered in a doubtful case, and, according to all our authorities, is an independent factor which may of itself engender a reasonable doubt or produce a conclusion of innocence. Hanney v. Com., 116 Pa. 322, 9 A. 339; Com. v. Cleary 135 Pa. 64, 19 A. 1017; Com. v. Chester, 77 Pa. Super. 388. To be sure, it is to be considered with all the other evidence in the case. Commonwealth v. Dingman, 26 Pa. Superior Ct. 615. But it is not to be measured with or by other evidence. Its probative value, its power of persuasion, does not depend upon, and is not to be measured by, or appraised according to, the might or the infirmity in the Commonwealth's case. Hanney v. Com., supra. Even though, under all the other evidence a jury could reach a conclusion of guilt, still if the character evidence creates a reasonable doubt or establishes innocence a verdict of acquittal must be rendered. Com. v. Cate, supra. [220 Pa. 138, 69 A. 322](Emphasis supplied).

See also Commonwealth v. Farrior, 312 Pa. Super. 408, 458 A.2d 1356 at 1364(1983); Commonwealth v. Wood, 432 Pa. Super.183, 637 A.2d 1335 at 1352 (1994).

CONCLUSION

For any, or indeed all, of the foregoing reasons, it is respectfully requested that this Honorable Court grant this Petition for Allowance of Appeal.

Respectfully submitted,

NORRIS E. GELMAN, ESQUIRE
MARGEAUX CIGAINERO, ESQUIRE
ATTORNEYS FOR PETITIONER SANDUSKY
2000 MARKET STREET
SUITE 2940
PHILA., PA. 19103
215 - 574 - 0513
ATTY ID # 14223

J-A24001-13

Exhibit "A"

2013 PA Super 264

COMMONWEALTH OF PENNSYLVANIA Appellee v. GERALD A. SANDUSKY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 338 MDA 2013 343 MDA 2013

Appeal from the Judgment of Sentence October 9, 2012
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0002421-2011
CP-14-CR-0002422-2011

BEFORE: PANELLA, J., MUNDY, J., and PLATT, J.*

OPINION BY PANELLA, J.: **FILED OCTOBER 02, 2013**

Appellant, Gerald A. Sandusky, appeals from the judgment of sentence entered October 9, 2012, in the Court of Common Pleas of Centre County. We affirm.

A jury convicted Sandusky of 45 counts relating to the sexual abuse of young boys. The eight victims, now all adults, testified in detail about the sexual depravity they suffered as young boys at Sandusky's hands. Combined, the abuse spanned a thirteen-year period, 1995 to 2008. Sandusky met all the victims through a non-profit he founded called The Second Mile, an organization with the declared purpose of serving Pennsylvania's underprivileged and at-risk youth.

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* Retired Senior Judge assigned to the Superior Court.

Immediately prior to sentencing, the trial court held a hearing at which time it determined that Sandusky was a sexually violent predator. The trial court then imposed an aggregate period of incarceration of thirty to ninety years. Sandusky filed post-sentence motions, which the trial court denied after a hearing. This timely appeal followed.

Sandusky first argues that the trial court erred in refusing to give the jury the prompt complaint instruction found at Section 4.13A of the Pennsylvania Suggested Standard Criminal Jury Instructions.[1] Sandusky argues that the instruction was necessary as all but one of the victims waited several years to report the sexual abuse; there were delays of sixteen years, fourteen years, thirteen years, twelve years, ten years, six years, and approximately two years.

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[1] The Commonwealth contends that Sandusky waived this issue as he did not object to the trial court's failure to give the charge before the jury retired to deliberate. ***See*** Commonwealth's Brief, at 34. At the charge conference held in chambers, Sandusky requested that the trial court instruct the jury on prompt complaint and the trial court refused. ***See*** N.T., 6/21/12, at 4. After the trial court instructed the jury, it asked counsel for "[a]ny additions, corrections, exceptions to the charge as provided *that have not already been placed on the record* before court?" ***Id.***, at 33 (emphasis added). Counsel for Sandusky, Karl Rominger, Esquire, specifically asked the trial court if "[e]verything we did in chambers is preserved for the record?" ***Id.***, at 34. The trial court responded, "[y]es, all exceptions previously made are placed on the record." ***Id***. Thus, the trial court was well aware of the requested instruction and its decision to not give the instruction to the jury. As per the trial court's explicit instructions to counsel, there was no reason to lodge any further objection. Therefore, this claim is not waived.

In relation to an issue such as this, our scope and standard of review is as follows:

> In reviewing a challenge to the trial court's refusal to give a specific jury instruction, it is the function of this Court to determine whether the record supports the trial court's decision. In examining the propriety of the instructions a trial court presents to a jury, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal.

Commonwealth v. Thomas, 904 A.2d 964, 970 (Pa. Super. 2006) (internal citations, quotation marks, and brackets omitted).

The premise for the prompt complaint instruction is that a victim of a sexual assault would reveal at the first available opportunity that an assault occurred. ***See id***. The instruction permits a jury to call into question a complainant's credibility when he or she did not complain at the first available opportunity. ***See Commonwealth v. Prince***, 719 A.2d 1086, 1091 (Pa. Super. 1998). However, there is no policy in our jurisprudence that the instruction be given in every case.

"The propriety of a prompt complaint instruction is determined on a case-by-case basis pursuant to a subjective standard based upon the age

and condition of the victim." ***Thomas***, 904 A.2d at 970. For instance, "[w]here an assault is of such a nature that the minor victim may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication." ***Commonwealth v. Jones***, 672 A.2d 1353, 1357 n.2 (Pa. Super. 1996).

At the charging conference the trial court denied the requested instruction, reasoning that in its view "the research is such that in cases involving sexual abuse[,] delayed reporting is not unusual and, therefore, is not an accurate indicia of honesty and may be misleading." N.T., Trial, 6/21/12, at 4. In its opinion addressing Sandusky's post-sentence motions, the trial court explains that its use of the word "'research' was not accurate." Trial Court Opinion, 1/30/13, at 7 n.4. The trial court notes that it did not conduct any research on this issue to prepare for the charge conference, but relied on its "experience in handling child sexual abuse cases in a variety of contexts...." ***Id***.

The trial court opted to give only the standard credibility charge without the addition of the prompt complaint charge as it reasoned that "the jury would be more appropriately guided" by that charge. ***Id***., at 10. The standard credibility charge, in the trial court's opinion, instructed the jury to consider "the specific credibility issues raised by the defense: memory, self-interest, motive, and bias." ***Id***. The trial court concluded its thoughts on the prompt complaint instruction as follows:

> The practical reality is that the standard prompt complaint charge does not take into account the complex and myriad factors that might cause a child victim to delay in reporting an assault, or in comprehending the long-term significance of the assault, or even a child's motivation to protect the person who assaulted them. No one who has had the slightest experience with child sexual abuse or given a whit of thought to the dynamics could conclude that failure to make a prompt complaint, standing alone, is an accurate indicia of fabrication.

Id., at 11.

Although well intentioned, the trial court's analysis of the prompt complaint instruction and its application to cases involving children is not supported in the case law. ***See, e.g., Commonwealth v. Lane***, 521 Pa. 390, 398, 555 A.2d 1246, 1251 (1989) ("[I]t is important to note that evidence of a prompt complaint *should also be considered* when the victim is a child.") (emphasis added). As noted, its application is not determined by a blanket standard, but rather on a case-by-case basis. ***See Thomas, supra.***; ***Commonwealth v. Ables***, 590 A.2d 334, 340 (Pa. Super. 1991).

The prompt complaint instruction provides, in pertinent part, that evidence of "delay in making a complaint does not necessarily make [the victim's] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make." Pennsylvania Suggested Standard Criminal Jury Instructions Section 4.13A(2). The instruction further states that the failure to promptly complain and the victim's explanation for the failure "are factors bearing on the believability of