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

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Nos. CP-14-CR-2421-2011 &
	)	CP-14-CR-2422-2011
GERALD A. SANDUSKY	)	

Commonwealth Attorneys:	*Frank Fina, Esquire*
Defense Attorney:	*Joseph L. Amendola, Esquire*
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DEFENDANT'S BRIEF IN SUPPORT OF HIS POST SENTENCE MOTIONS

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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 the due process of law as guaranteed by the Fifth Amendment.

The defendant's Omnibus Motion filed in late March requested a continuance.

The Court denied the requested continuance by Order dated April 5, 2012 with the provision that the commencement of jury selection would begin on June 5, 2012.

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 May and June 2012 alone, in addition to the aforementioned volumes of

materials received from third party entities, the Defendant and counsel received the following pre-trial discovery materials from the Commonwealth: a) May 4, 2012 – 200 pages of discovery materials and (8) discs which included hundreds of Second Mile photographs, a thumb drive containing voluminous amounts of Second Mile database camp information and a portable hard drive containing all of the materials found in 3 computers which were seized from the Defendant's residence as a result of the execution of a search warrant on June 21, 2011; b) May 9 and May 14, 2012 – over 2,000 pages of additional discovery materials plus 12 discs; May 16, 2012 – 60 pages of discovery materials; May 18, 2012 - 50 pages of discovery materials; May 24, 2012 – over 2,200 pages of discovery materials, approximately 700 pages of which were non-Grand Jury materials, and 3 discs; May 31, 2012 – 50 pages of additional discovery materials plus 3 discs; June 4, 2012 – 10 pages of additional discovery materials and 1 disc; June 8, 2012 – 1 disc; and June 15, 2012 – 4 pages and 1 disc.

The Defendant is moving for a hearing where testimony can be presented to document the vast amount of material turned over within a month of trial.

ARGUMENT AS TO CLAIM I

Because the defense had no time to digest and integrate this material into its defenses, and no time to prepare for its introduction, the denial of its May 9 and May 22 motions for a continuance was an abuse or discretion and a violation of due process.

Time was needed for counsel to review the discovery, investigate, and incorporate the material into a theory or theories of defense, consider the material in light of the selection of the jury and in the light of the presentation of witnesses, and to consider the style of witness examination and jury argument. See United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2010).

In Commonwealth v. Wesley, 562 Pa. 7, 752 A.2d 204, 215-216 (2000) our Supreme Court held:

> It has long been our view that a decision to grant or deny a continuance to secure a witness is a matter within the sound discretion of the trial court and will not be reversed by an appellate court absent prejudice or an abuse of discretion. Commonwealth v. Thomas, 552 Pa. 621, 717 A.2d 468, 475-76 (1998), *cert. denied*, 528 U.S. 827, 120 S.Ct. 78, 145 L.Ed.2d 66 (1999); Commonwealth v. Gibson, 547 Pa. 71, 688 A.2d 1152, 1162, *cert. denied,* 522 U.S. 948, 118 S.Ct. 364, 139 L.Ed.2d 284 (1997); Commonwealth v. Williams, 537 Pa. 1, 640 A.2d 1251, 1260 (1994); Commonwealth v. Sullivan, 484 Pa. 130, 398 A.2d 978, 980 (1979). In reviewing a denial of a continuance, the appellate court must have regard for the orderly administration of justice, as well as the right of the defendant to have adequate time to prepare a

> defense. Commonwealth v. Small, 559 Pa. 423, 741 A.2d 666, 683-84 (1999); Crews, 640 A.2d at 403. In the instant matter, we find that the trial court abused its discretion by not granting defense counsel's motion for a continuance. If we were to affirm the holding of the trial court, we would be giving our imprimatur to careless prosecutions by the Commonwealth and we would force defendants to make strategic decisions based on speculation. See Abdul-Salaam, 678 A.2d at 353-54. Such a result would not serve the administration of criminal justice. (Emphasis supplied).

See also Commonwealth v. Crews, 536 Pa. 508, 640 A.2d 395 at 403 (1994).

In Commonwealth v. McAleer, 561 Pa. 129, 136, 137, 748 A.2d 670 at 674 (2000) our Supreme Court made it clear that far more than "expeditiousness" in adhering to a trial schedule is required before a continuance can be constitutionally denied, citing and quoting the United States Supreme Court decision in Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)) stating:

> " 'a myopic insistence upon expeditiousness [in proceeding to trial] in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " Robinson, 468 Pa. at 593-94, 364 A.2d at 675 (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).

The American Bar Association Standards for Criminal Justice in effect at the time of this trial provided:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues

> leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–4.1 (3d ed.1993).

Our Supreme Court has made it clear that counsel "has a duty to undertake reasonable investigations or to make reasonable decisions that render particular investigations unnecessary." Commonwealth v. Basemore, 560 Pa. 258m 744 A.2d 717 at 735 (2000).

Given the vast amount of material the prosecution turned over at the eleventh hour, it is clear counsel could not come close to fulfilling this obligation.

Counsel had no time to review the aforesaid material in search of persons who could testify to the poor reputation for truthfulness on the part of any of the complainants, any alibi, or any connection between the complainants that would impair their credibility.

A. THE ERROR IN DENYING THE REQUESTED CONTINUANCES INTERFERED WITH THE DEFENDANT'S RIGHT TO COUNSEL, PREVENTING TIME TO PREPARE WHICH IS A CONSTRUCTIVE DENIAL OF THE RIGHT, AND AS A RESULT, THE DEFENDANT IS NOT REQUIRED TO SHOW PREJUDICE.

Since Powell v. Alabama, 287 U.S. 45, 53 (1932) the right to assistance of counsel has necessarily included the right to "effective and substantial aid."

The United States Supreme Court has distinguished between two types of constitutional error that occur at both trial and sentencing: "trial errors," which are subject to constitutional harmless error analysis, and "structural defects," which require automatic reversal or vacatur. United States v. Stevens, 223 F.3d 239, 244 (3d Cir.2000) (citing cases); see also United States v. Vazquez, 271 F.3d 93, 103 (3d Cir.2001). Certain types of constitutional errors are considered structural, and subject to automatic reversal, not only because they have the potential to "infect the entire trial process," Brecht v. Abrahamson, 507 U.S. 619 at 630 (1993) but because of "the difficulty of assessing the effect of the error." Gonzalez-Lopez, 548 U.S. at 148-49 & n. 4 (citing cases). That is, whereas an error of the trial type occurs "during the presentation of the case to the jury" and "may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt," Arizona v. Fulminante, 499 U.S. 279 at 307-08 (1991) the effects of a structural defect "are

frequently intangible, difficult to prove ... [or] cannot be ascertained." Gonzalez-Lopez, 548 U.S. at 149 n. 4 (citations omitted). The list of errors that constitute structural defects is "very limited," Johnson v. United States, 520 U.S. 461, 468 (1997), and "includes complete denial of counsel, biased judges, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and [a] seriously defective reasonable doubt instruction." Stevens, 223 F.3d at 244 (citing Neder v. United States, 527 U.S. 1 at 7-8 (1999).

Here the error in not allowing anywhere close to sufficient time to prepare significantly interfered with the defendant's right to counsel, was certainly a constructive denial of the right to counsel who was prepared as contemplated by the Sixth Amendment, and it "infect[ed] the entire trial process."

As Chief Justice Rehnquist wrote for the Court in Neder v. United States, 527 U.S. 1 at 8-9 (1999):

> When the error creates a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," the error is structural and is prejudicial per se. See Fulminante, supra, at 310, 111 S.Ct. 1246. Such errors ""infect the entire trial process,"" Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and ""necessarily render a trial fundamentally unfair,"" Rose, 478 U.S., at 577, 106 S.Ct. 3101. Put another way, these errors deprive defendants of ""basic protections"" without which ""a criminal trial cannot reliably serve its

> function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair."" Id., at 577-578, 106 S.Ct. 3101.

The denial of the requested continuances triggered such an error. Counsel could not conceivably prepare properly for trial. Counsel who is unable to prepare because he was not provided with the time to prepare by the denial of his requested continuances cannot function as the counsel envisioned by the Sixth Amendment.

As Justice Scalia held for the Court in Sullivan v. Louisiana, 508 U.S. 275 at 281-282 (1993):

> The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ""structural error.""

II. REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL COURT REFUSED THE DEFENSE REQUEST TO GIVE JURY INSTRUCTIONS ON THE FAILURE OF ANY OF THE ALLEGED VICTIMS TO MAKE A PROMPT COMPLAINT TO AUTHORITIES BASED ON ITS VIEW OF "THE RESEARCH" WHICH LED THE COURT TO BELIEVE THAT IN THE AREA OF CHILD SEXUAL ABUSE SUCH AN INSTRUCTION WAS NOT "AN ACCURATE INDICIA OF HONESTY AND MAY BE MISLEADING."

THE DENIAL OF THE REQUEST AND THE PRESERVATION OF THE CLAIM

None of the alleged victims ever made a prompt complaint to authorities as to the crimes each accused Sandusky of perpetrating on them.

Prior to the court's charge, the defense made a request for instructions pertaining to the lack of 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).

Although the defense did not object at the conclusion of the charge to the absence of the failure to make a prompt complaint instructions, this was not a waiver of the defense objection.

First, after the main body of the charge was delivered to the jury, the defense specifically asked if its submission in chambers was preserved:

> 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).

Second, the plurality opinion in Commonwealth v. Pressley, 584 Pa. 624, 887 A.2d 220 (2005) will not suffice to arm the Commonwealth with a waiver argument.

This is because Justice Saylor's opinion in Pressley did not command a majority of the Court.

To be precedential, an opinion of the Pennsylvania Supreme Court must be supported by the "joinder of a majority of participating justices" Commonwealth v. Miller, A. 3d 2012 WL 5420456 (11/7/12).

The plurality opinion in Pressley purports to "hold" that the mere submission of a point for charge and its denial does not preserve the claim for error unless the defense objects at the conclusion of the charge - on the same grounds the judge rejected when he rejected the submitted point for charge.

Pressley came before a Pennsylvania Supreme Court which was then comprised of six (6) Justices.

Justice Saylor wrote the plurality opinion in which Justices Cappy and Eakin joined.

Justice Castille filed a concurring opinion and Justices Baer and Nigro joined in a concurring and dissenting opinion.

Since a majority of the six justices did not join in the Pressley opinion written by

Justice Saylor it is a plurality opinion.

Plurality opinions, by definition, establish no binding precedent for future cases. E.g., Commonwealth v. Bethea, 574 Pa. 100, 828 A.2d 1066, 1073 (2003); Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 750 (1998); see also Interest of O.A., 552 Pa. 666, 717 A.2d 490, 496 n. 4 (1998) (Opinion Announcing Judgment of Court by Cappy, J.) ("While the ultimate order of a plurality opinion, *i.e.* an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority."). See also Commonwealth v. Price , 543 Pa. 403, 407-09, 672 A.2d 280, 282 (1996).

See also Commonwealth v. Perez, 760 A.2d 873, 2000 PA Super 283, Pa.Super., September 26, 2000 holding – that a plurality decision is non-precedential - citing Commonwealth v. Price , 543 Pa. 403, 407-09, 672 A.2d 280, 282 (1996) (plurality decision is non-precedential).

It is clear that Pressley cannot be used to find a waiver of this claim.

If Pressley is properly considered for what it is - a non-precedential plurality opinion - then the division of authority cited in remains See Pressley, supra. at , 584 Pa. 624, 629, 887 A.2d 220 at 223 (2005).

The line of authority cited by Pressley which favors the defendant is:

Commonwealth v. Williams, 463 Pa. 370, 373 n. 1, 344 A.2d 877, 879 n. 1 (1975); see also Commonwealth v. Miller, 490 Pa. 457, 470 n. 9, 417 A.2d 128, 135 (1980); Commonwealth v. Ernst, 476 Pa. 102, 108 n. 9, 381 A.2d 1245, 1247 n. 9 (1977) (opinion in support of affirmance); Commonwealth v. Palmer, 467 Pa. 476, 481 n. 3, 359 A.2d 375, 378 n. 3 (1976); Commonwealth v. Sisak, 436 Pa. 262, 269-70, 259 A.2d 428, 432 (1969)(treating issues respecting jury instructions as preserved, in the absence of a specific objection following the charge, where, as here, points for charge were timely offered and rejected by the trial court).

The line of authority Pressley cited which would result in a waiver of the claim is: Commonwealth v. Galloway, 495 Pa. 535, 538, 434 A.2d 1220, 1221 (1981) (citing Pa.R.Crim.P. 1119(B) (re-numbered as Pa.R.Crim.P. 647(B)); Commonwealth v. Brown, 490 Pa. 560, 570, 417 A.2d 181, 187 (1980)); Commonwealth v. Martinez, 475 Pa. 331, 337, 380 A.2d 747, 750 (1977) (plurality); Commonwealth v. Hilton, 461 Pa. 93, 96, 334 A.2d 648, 650 (1975) (plurality)(a specific objection following the jury charge is necessary to preserve an issue concerning the instructions, even where points for charge were submitted by a defendant and denied by the trial court).

As such, the Pressley resolution of the question must apply here. Pressley held at 887 A.2d 225:

> Presently, although counsel did not take an exception or lodge an objection at the time of the rulings on his proposed instructions or following the charge, there was existing authority under which Appellant's jury instruction issues would have been treated as adequately preserved. See Williams, 463 Pa. at 373 n. 1, 344 A.2d at 879 n. 1 while such authority is disavowed to THE EXTENT THAT IT IS CONTRARY to the language of Rules 603 and 647(B), Appellant cannot be faulted for relying upon it. Consequently, the clarification of the procedure for preserving an issue involving a jury instruction is prospective.

THE FACTUAL CONTEXT OF THE LACK OF A PROMPT COMPLAINT BY THE COMPLAINANTS

The failure to make a prompt report was striking insofar as each complainant was concerned:

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). As best as can be determined the molestation occurred when he was 13 or 14 (N.T. 51).

RR went to Second Mile Camp in 1998-1999 and said he was molested at that time. He did not make a report until November 11, 2011 - after the defendant was arrested when he called a police hotline. (N.T. 6/13/12 pgs. 29, 32, 54-55). He testified the molestation occurred when he was 11 or 12 (N.T. 43).

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). He believed he was 10 when he was molested (N.T. 87, 94-95).

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). He testified he was 13 when molested (N.T. 174, 177).

BSH testified he was 13-14 when the molestations started in 1997 and "about" when the defendant made him perform oral sex (N.T. 6/12/12 pgs. 51, 69). 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). When his father retained an attorney for him, he told the lawyer nothing. (Id. at 166, 168). 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). He testified he was "about 14" when molested (N.T. 69).

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).

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.

RR became involved in the Second Mile program in 1997. When he was 11 or 12 he was wrestling with the defendant in the defendant's house (in the basement) when the defendant performed oral sex on him (N.T. 6/13/12 pg. 32). 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 of 2011 when Sandusky was arrested and he called a police hotline.

ZK testified he met Sandusky in 1998 through his involvement in the Second Mile (N.T. 6/14/12 pg. 6). In May of that year, after showing him wrestling moves, Sandusky forced ZK to shower with him (Id. at 7, 11, 14). He was 11 years old at the time (Id at 25). He told his mother bits and pieces of what happened and was interviewed by the police that same year (Id at 19-20).

JS found the Second Mile Camp through the Big Brothers Big Sisters organization and attended the summer of 1998 (Id at 85-86). From 1999 to 2001 JS slept at Sandusky's residence approximately 50 times (Id at 106, 91). Sandusky would rub and kiss his shoulders and touch his penis when he slept over during this three year period (Id at 99,

97). JS was 12 years old in 1999 when this began (Id at 103). In July of 2011, JS spoke with the police for the first time, but maintained that nothing had happened until subsequent interviews (Id at 114).

SP attended the Second Mile Camp for three or four summers and met Sandusky when he was 12 years old (Id at 206, 209). 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). Sandusky began kissing him and making him perform fellatio during this time period (Id at 213-214). 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" (Id at 218). 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). The first time he "told everything to" was when Mr. Amendola cross-examined him during the 2012 trial (Id at 225).

THE LAW PERTAINING TO THE FAILURE TO MAKE A PROMPT COMPLAINT

The overriding issue in the case was the credibility of the complainants.

The failure to make a prompt complaint goes to the credibility of the accuser.

The lack of a prompt complaint given the significant delay in this case by each of the alleged victims "should cause the jury to look more critically upon the credibility of the victim." Commonwealth v. Snoke, 525 Pa. 295, 580 A.2d 295, 297 (1990); Commonwealth v. Berklowitz, 133 Pa. Super. 190, 193-94, 2 A.2d 516 (1938); Commonwealth v. Jones, 449 Pa. Super. 58, 68, 672 A.2d 1353, 1358 (1996).

Additionally, "the lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred...." Commonwealth v. Snoke, 525 Pa. 295, 580 A.2d 295, 298 (1990).

The Suggested Standard Criminal Jury Instructions - 4.13 A - is quoted below. The Commonwealth may well point to its Comment which seemingly limits the instruction to cases in which consent is at issue. That would be incorrect as Chief Justice Nix, writing for the Court, in Commonwealth v. Lane, 521 Pa. 390, 555 A.2d 1246 (1989) applied the instruction to a case where the victim was eight (8) years old and could not consent. ("Edward Lane was tried and convicted of rape, statutory rape, indecent assault, terroristic

threats and corruption of a minor, arising from an incident with an eight-year-old girl." Id at 1248).

The requested instruction in its form in the Suggested Standard Criminal Jury Instructions - 4.13 A - can be devastating to the credibility of one or more complainants. It reads:

> 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.

As Justice Nix wrote in Commonwealth v. Snoke, 580 Pa. 295, 302, 580 A.2d 295, 298, 299 (1990):

> Questions of credibility must always be put before the jury as the fact finder and the judge must instruct the jury as to credibility considerations applicable to the case. Commonwealth v. Smith, 502 Pa. 600, 467 A.2d 1120 (1983); Commonwealth v. Holmes, 486 Pa. 415, 406 A.2d 510 (1979); Commonwealth v. Hampton, 462 Pa. 322, 341 A.2d 101 (1975); Commonwealth v. Murray, 460 Pa. 605, 334 A.2d 255 (1975). As this Court stated in Lane:
>
> > The validity of our system of justice is dependent upon the integrity of our fact-finding process. The hallmark of that system is trial by jury. To achieve this goal, we are committed to provide a jury of one's peers and require that they be willing to decide the cause on the evidence presented following the instructions as to the law as provided by the court. Lane, supra, 521 Pa. at 396, 555 A.2d 1248.
>
> Specifically, where the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the relevance of a delay in disclosure and the significance of a prompt complaint. In such an assessment the witness' understanding of the nature of the conduct is critical. Where the victim did not comprehend the offensiveness of the contact at the time of its occurrence, the absence of an immediate complaint may not legitimately be used to question whether the conduct did in fact occur. Commonwealth v. Lane, supra; see, e.g., Commonwealth v. Romanoff, 258 Pa.Super. 452, 392 A.2d 881 (1978); Commonwealth v. Hornberger, 199 Pa.Super. 174, 184 A.2d 276 (1962).

Chief Justice Nix relied on Commonwealth v. Lane, 521 Pa. 390, 555 A.2d 1246 (1989) in reaching his conclusions in Snoke. Lane reversed convictions for Rape, Statutory

Rape, Indecent Assault and Corrupting the Morals of a Minor because the trial court allowed the Commonwealth to challenge a juror for cause who stated he would be unable to disregard the time delay between the sexual assault and the complaint. The Pennsylvania Supreme Court in Lane, per Chief Justice Nix, in reversing held that the delay issue as a "legitimate factor be considered in the trial of the case," and there was no basis for disqualifying the juror. The victim in Lane was eight (8) years old, and had been violently assaulted. In reversing, the Lane Court recognized that consideration must be given to factors inherent in cases with minor victims which could explain the delay without reflecting unfavorably on the minor witness' credibility. Amongst those factors the Lane Court deemed highly relevant was the possibility that "the immaturity of the victim would cause the child not to appreciate the offensiveness of the encounter and the need for its prompt disclosure." Lane, supra. at 398, 555 A.2d at 1250.

Justice Nix did not reverse the convictions in Snoke because the victim was 5 years of age. The complainants in this case are significantly older - and all were older than the 8 year old victim in Lane, supra.

Whether or not any of these complainants could or could not "appreciate the offensiveness of the encounter and the need for its prompt disclosure" was a jury question and was not to be resolved by the court against the accused.

As our Supreme Court has previously stated, "[t]he lack of a prompt complaint by a victim of crime, although not dispositive of the merits of the case, *may justifiably produce a doubt as to whether the offense indeed occurred,* or whether it was a recent fabrication by the complaining witness" Commonwealth v. Snoke, 525 Pa. 295, 300, 580 A.2d 295, 298 (1990) quoting Commonwealth v. Lane, 521 Pa. 390 at 398, 555 A. 2d 1246 at 1250 (1989).

When a trial court fails to give jury instructions that would detract from the credibility of a principal witness, reversible error is committed. See Commonwealth v. Sisak, 436 Pa. 262, 268, 259 A.2d 428, 432 (1969)(failure to give accomplice charge foreclosed the possibility of the jury deliberating based on such instructions, resulting in reversible error).

Depriving the defendant of these critical credibility instructions was reversible error. The defendant's jury was unable to deliberate properly as to the credibility of the Commonwealth's complainants without these instructions.

The reason given by the court for not giving the failure to make a prompt complaint instructions was:

> 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.

was thoroughly repudiated by the Pennsylvania Supreme Court in Commonwealth v. Balodis, 560 Pa. 567, 747 A.2d 341 (2000) and deemed junk science by Commonwealth v. Dunkle, 529 Pa. 168, 602 A.2d 830, 834-835 (1992).

III. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REQUIRED THE JURY TO WEIGH THE TESTIMONY OF THE DEFENDANT'S CHARACTER WITNESSES AGAINST ALL OF THE OTHER EVIDENCE IN THE CASE.

THE REQUEST FOR A CHARACTER CHARGE THAT DID NOT REQUIRE THE JURY TO WEIGHT CHARACTER EVIDENCE AGAINST THE OTHER EVIDENCE IN THE CASE.

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 by itself raises 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)

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).

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:

> 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).

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 above instruction (N.T. 7/27/07 pg. 119). 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).

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 is required by Neely, supra.

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). [1]

Because character testimony alone can result in an acquittal, there was severe prejudice from the defendant not getting instructions required by Commonwealth v.

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1 In Commonwealth v. Khamphouseane, 434 Pa. Super. 93, 642 A.2d 490 (1994), the Superior Court found no fault with the above charge. The defendant submits that Khamphouseane is in conflict with the Supreme 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.

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 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."

IV. THE COMBINED EFFECT OF THE COURT'S REFUSAL TO GIVE THE FAILURE TO MAKE A PROMPT REPORT INSTRUCTION COUPLED WITH THE COURT'S DIRECTING THE JURY TO WEIGH CHARACTER EVIDENCE AGAINST THE OTHER EVIDENCE IN THE CASE IMPAIRED THE DEFENDANT'S CREDIBILITY DEFENSE AND HIS GOOD CHARACTER DEFENSE.

The defendant offered a credibility defense against the Commonwealth's complainants and also offered a good character defense.

The entire case against Defendant rested on the credibility of the Commonwealth witnesses. The failure to make a prompt complaint went to the credibility of each complainant. Not only did the failure to make a prompt report impact adversely on the credibility of each complainant, but as held in *Commonwealth v. Snoke*, 525 Pa. 295, 580 a.2d 295, 298 (1990), such failure may "justifiably produce a doubt as to whether the offense indeed occurred...".

The Defendant was deprived of instructions which impacted on the credibility of the alleged victims. His defense that these complainants were lacking in credibility was severely undermined and without the failure to give a prompt report instruction, their credibility was bolstered.

As to the mandating that character evidence be weighed with the other evidence in the case, it is clear that this undermined both the Neely and Bannerman holdings that such evidence, in and of itself, can raise a reasonable doubt as to guilt. Good character

testimony offers the accused an opportunity win the case. By forcing it to be weighed against the other evidence in the case, that chance was effectively removed. Due to the Court's conflicting charge to the jury on character testimony, the Defendant submits it is now impossible to ascertain which instruction the jury relied on in reaching its verdicts.

Moreover, the instruction that the jury must "weigh" the character evidence against the other evidence converted the defense of good character to an affirmative defense. The defense of good character is not an affirmative defense. The defendant need not prove that his good character outweighs the Commonwealth's evidence of guilt, nor must a defendant show that his character evidence justifies an acquittal.

By requiring a weighing process, the trial court prohibited jury consideration of the character evidence "in and of itself" as mandated by Commonwealth v. Neely, 522 Pa. 236, 561 A.2d 1 (1989).

Alibi evidence is not to be weighed against the Commonwealth's case. Rather it is to be considered with all the other evidence in the case. See Commonwealth v. Bonomo, 396 Pa. 222, 151 A.2d 441 (1959).

The jury never received instructions on just how it is to weigh evidence of good character against the other evidence in the case.

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].

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).

The trial court's jury instruction foisted onto Defendant's jury a standardless weighing process which carried with it a risk of error far too high to tolerate in the wake of Neely.

Finally, the Pennsylvania Suggested Standard Criminal Jury Instructions provides the following standard charge at § 3.06(3), and § 3.06(4):

(3) The law recognizes that a person of good character is not likely to commit a crime which is contrary to his nature. Evidence of good character may by itself raise a reasonable doubt of guilty and justify a verdict of not guilty.

(4) You must weigh and consider the evidence of good character along with the other evidence in the case. If on all the evidence you are satisfied you have a reasonable doubt of the defendant's guilt you must find him not guilty. However, if on all the evidence, you are satisfied beyond a reasonable doubt that the defendant is guilty you should find him guilty.

These instructions seem to have their genesis in Commonwealth v. Stoner, 265 Pa. 140 (1919) and are sometimes repeated as in Commonwealth v. Gaines, Pa. Super. , 75 A.2d 617, 620 (1950). This line of cases was quite obviously overruled by Neely.

V. 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)

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

The prosecutor's statement that the defendant had "wonderful opportunities to speak out and make his case" is broad enough to cover the trial. The defendant did not testify at trial. The prosecutor's statement is an adverse comment on his not having testified. Griffin v. California, 380 U.S. 609 (1995).

VI. THE COURT ERRED WHEN IT PERMITTED THE COMMONWEALTH TO INTRODUCE THE HEARSAY TESTIMONY OF RONALD PETROSKY CONCERNING THE STATEMENT PURPORTEDLY MADE BY JAMES CALHOUN TO HIM, AND OTHERS, CONCERNING CALHOUN'S OBSERVATIONS IN THE SHOWER RELATING TO ALLEGED VICTIM 8.

At trial, the Court permitted the Commonwealth to present the hearsay testimony of Ronald Petrosky concerning the statement purportedly made by James Calhoun to him and other custodians at the Pennsylvania State University concerning Mr. Calhoun's observations in the shower of November 2000 relating to purported Victim 8. (N.T. 6/13/12 pgs. 220-221). The Court ruled as follows:

> THE COURT: Okay. As a general rule hearsay evidence is not admissible. There are some obvious exceptions. One of them is the excited utterance which is a spontaneous declaration made when the opportunity for reflection and precipitated by some exciting event. That is a well-grounded exception to the hearsay rule, and I believe that the foundation has been laid to get that admitted in this case.
>
> The next question becomes, even if it's admitted, is the evidence sufficient to support the Commonwealth's case? There I think that the jury would be permitted to look at the entirety of the evidence in the case as a whole in determining whether or not any particular crime had or had not been committed. In that sense I believe Barnes would not apply. I will overrule the defense objections and permit the Commonwealth to present its evidence. Id.

Ronald Petrosky testified to having seen the legs two persons in a shower while he was cleaning, and one whom had skinny legs. When he saw the legs in the shower, he left

the area since he did not believe the shower would take too long. He was two feet from the shower (N.T. 6/13/12 pg. 226-227).

He saw no one go into the shower while he waited, but did see the defendant and a "small boy" leave the shower and walk down the hall. He watched as the two walked down a long hallway which led to the coaches offices. About three quarters of the way down this long hallway, the defendant took the hand of the small boy. (Id at 228-229)

Both had wet hair, and both carried gym bags.[2]

Petrosky testified to the excited utterance as follows:

> Q.[by the prosecutor] Okay. Now, after that, did you see Jim Calhoun?
>
> A. Yes, shortly after. I finished the chemicals and I grabbed my bottle and I started in the door and Jim was coming out. There's double doors there before you go in to the locker and I met Jim in between the two doors, between the hall and where you entered the locker area. And I could see he was upset. His face was white. His hands was trembling. I thought it was a medical condition. I said, "Jim, what's wrong?" And this is how he said it to me. He said, "Buck," -- that's my nickname. He said. "Buck, I just witnessed something in there I'll never forget the rest of my life." I said, "What are you talking about, Jim." He said that man that just left, he had this -- the boy up against the shower wall licking

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[2] Because the time lapse from the viewing of the event to the excited utterance is important, the Defendant notes that the showers had to be finished, both had to dry off, dress, and exit.

> on his privates. I said, "Are you sure that man that just left?" He said, "I'm sure." I said, "You know who that is?" I said, "That's Jerry Sandusky." He didn't know who he was but he knows what he seen that night.

A critical factor in determining the admissibility of an excited utterance is the length of time that passed from the event to the utterance. The time passage is important because the excited utterance must be spontaneous and being spontaneous, it does not involve or implicate memory. It is a reaction to an event.

The excited utterance must be made in reference to some phase of an occurrence which was perceived, and made so near the occurrence in both time and place as to exclude the likelihood of its having emanated in whole or in part from reflective faculties. Commonwealth v. Penn, 497 Pa. 232, 241, 439 A.2d 1154, 1159, *cert. denied,* 456 U.S. 980, 102 S.Ct. 2251, 72 L.Ed.2d 857 (1982), quoting Commonwealth v. Pronkoskie, 477 Pa. 132 at 137-38, 383 A.2d 858 at 860 and Allen v. Mack, 345 Pa. 407, 410, 28 A.2d 783, 784 (1942). See also: Commonwealth v. Little, 469 Pa. 83, 87, 364 A.2d 915, 916-17 (1976); Commonwealth v. Robinson, 273 Pa.Super. 337, 341, 417 A.2d 677, 679 (1979); Commonwealth v. Hess, 270 Pa.Super. 501, 507, 411 A.2d 830, 833 (1979); Commonwealth v. Summers, 269 Pa.Super. 437, 442, 410 A.2d 336, 338 (1979).

Here, there is the passage of time of unknown duration.

Petrosky saw two people in a shower and he left and waited for them to finish their

shower. He stood outside until both are dry, both are dressed, both have packed their gym bags, and both leave and walk down a long hallway (Id at 228-229).

Shortly after this, after Petrosky had finished mixing his chemicals. He began to enter the lockers where he met Jim Calhoun who informed him that the "man that just left, he had this -- the boy up against the shower wall licking on his privates" (Id at 227).

Based on the lapse of time alone, the excited utterance was not admissible, and the Defendant's conviction as to victim 8 must be vacated.

There is another, perhaps more persuasive reason, why the excited utterance fails. There is no independent proof that the event in the shower occurred. Had the small boy testified to what occurred, then the excited utterance related by Petrosky probably would have been admissible, assuming the time lapse was not fatal to it.

The small boy did not testify. There was no independent proof of the event, and the event cannot be proven through the excited utterance alone.

Commonwealth v. Barnes, 310 Pa Super. 480, 485, 456 A.2d 1037, 1040 (1983)held:

> We are thus presented with the troublesome situation in which the excited utterance itself is being used to prove that an exciting event did, in fact, occur. This circuitous reasoning is unacceptable. Where there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule.

The Barnes Court went on to reiterate the above principle at 456 A.2d 1037, 1040:

> The requirement of independent proof of the exciting occurrence has been noted approvingly by most legal scholars and writers. See: McCormick on Evidence, §§ 297 (2nd ed.1972); Binder, The Hearsay Handbook, Exception 2 p. 43; 29 Am.Jur.2d, Evidence §§ 711 (""the principal act must first be established before res gestae statements can be admitted""); 31A C.J.S. Evidence §§ 404 (""[i]t is proceeding in a circle to use the declarations as proof of facts necessary to constitute the declarations part of the res gestae"").
>
> In the case sub judice, there was no independent evidence of a startling event to demonstrate that excitement and stress which were necessary to make Rock's extra-judicial statement admissible as a spontaneous reaction thereto. Consequently, the decedent's extra-judicial statement that he had been robbed and that appellant was the robber should not have been received.

The Commonwealth's argument that the shower incident had "context" from other crimes, only allowed the jury to guess at what transpired in the shower. Even though the Court did charge that the excited utterance was "not sufficient standing alone to sustain a conviction"[3] (Id at 31-32), any finding of criminal contact in the shower without using the excited utterance would be nothing but a guess.

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[3] The Court did not instruct the jury that in determining whether or not a crime occurred in the shower, the jury was prohibited from using the excited utterance - the kind of instruction that is used for the corpus delicti when it is in question, but there is a statement from the accused. See Commonwealth v. Fried, 382 Pa. Super. 156, 555 A.2d 119 (1989); Commonwealth v. Fried, 327 Pa. Super. 234, 475 A.2d 773 (1984); Commonwealth v. Frazier, 411 Pa. 195, 203, 191 A.2d 369, 373 (1963); Gray v. Commonwealth, 101 Pa. 380, 386 (1882); Commonwealth v. Turza, 340 Pa. 128, 135, 16 A.2d 401, 405 (1940).

Calhoun's declaration as related by Petrosky was pure hearsay.

Calhoun was not under oath when he allegedly made his declaration.

The jury was deprived of seeing Calhoun and observing his demeanor.

Calhoun could not be cross-examined.

VII. THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS TO DISMISS CHARGES DELINEATED IN CRIMINAL INFORMATION NOS. CP - 14 - CR - 2421 - 2011 AND CP - 14 - CR - 2422 - 2011.

The Defendant submits the Court erred in denying the Defendant's motions to dismiss Counts 1 through 12 inclusive in Criminal Information No. CP-14-CR-2421-2011 and Counts 1 through 6 inclusive, Counts 12 through 15 inclusive, Counts 16 through 23 inclusive, Counts 24 through 27 inclusive, and Counts 32 through 35 inclusive of Criminal Information No. CP-14-CR-2422-2011 on the basis that the charges set forth in those counts of the aforementioned Criminal Informations were so general and nonspecific that the Defendant could not adequately prepare a defense to them and was irreparably prejudiced at trial in presenting a defense to them, especially in light of the brief period of time the Defendant had to prepare defenses to those charges.

The Defendant submits the allegations set forth by the Commonwealth in Criminal Information No. CP-14-CR-2421-2011 relating to Counts 1 through 12 inclusive and dealing with Defendant's alleged illegal contact with alleged Victims 9 and 10 were so general and non-specific that the Defendant could not adequately prepare a defense to those charges.

The Defendant also submits the allegations set forth in Criminal Information No. CP-14-CR-2422-2011 relating to Counts 1 through 6 inclusive dealing with Defendant's

alleged illegal contact with alleged Victim 1, Counts 12 through 15 dealing with Defendant's alleged illegal contact with alleged Victim 3, Counts 16 through 23 dealing with Defendant's alleged illegal contact with alleged Victim 4, Counts 24 through 27 dealing with Defendant's alleged illegal contact with alleged Victim 5, and Counts 32 through 35 dealing with Defendant's alleged illegal contact with alleged Victim 7 were so general and non-specific that the Defendant could not adequately prepare a defense to those charges.

The Commonwealth failed to provide the Defendant with dates of the commission of the aforementioned alleged offenses with reasonable certainty and with sufficient particularity in order for the Defendant to adequately prepare his defense, thus violating the notion of fundamental fairness embedded in our legal process. See Commonwealth v. Devlin, 460 Pa. 508, 333 A.2d 888 (1975).

The Pennsylvania Supreme Court in Devlin, supra. found a due process violation when the Commonwealth charged Devlin with sodomy as to a severely retarded twenty-two year old who had the mental ability of a first or second grade child and the emotional stability of an even younger child.

The Devlin Court held:

> We believe that Commonwealth v. Levy, 146 Pa.Super. 564, 23 A.2d 97 (1941), states the applicable rule of law. Levy also

involved an appeal from a sodomy conviction. In that case, the victim, an eleven-year-old boy, was unable to fix the date of the offense except to state that it occurred some time in August or September of 1939. Other Commonwealth witnesses provided no assistance in fixing a more particular date. In those circumstances, the Court reversed the conviction, stating:

"It may be conceded that in the prosecution of crimes of the kind here involved the Commonwealth is not required to prove their commission on the date laid in the indictment, but, failing in that, we think it has the burden, in order to sustain a conviction, of proving their commission upon some other date, fixed with reasonable certainty and being within the prescribed statutory period . . ..

In other words, where a particular date or day of the week is not of the essence of the offense, the date laid in the indictment is not controlling, but some other reasonably definite date must be established with sufficient particularity to advise the jury and the defendant of the time the Commonwealth alleges the offense was actually committed, and to enable the defendant to know what dates and period of time he must cover if his defense is an alibi. . . .'

"We do not understand the rule of the cases to be that the Commonwealth need not prove any date at all, but can sustain a conviction merely by proving that *513 the offense must have been committed upon some unshown date within the statutory period. Our attention has not been called to any case so holding." 146 Pa.Super. at 569-70, 23 A.2d at 99.

Accord Commonwealth v. Morrison, 180 Pa.Super. 121, 118 A.2d 258 (1955); Commonwealth v. Mourar, 167 Pa.Super. 279, 74 A.2d 734 (1950).

[1] [2] Certainly, the Commonwealth has shown that the crime was committed, if at all, within the statutory period of

> limitations. As a general proposition of law, the evidence is sufficient to support a conviction if it tends to prove that the offense was committed prior to the commencement of the prosecution and that it was not committed at a time so remote that its prosecution is barred by the prescribed statutory period of limitations. Commonwealth v. Weiss, 284 Pa. 105, 130 A. 403 (1925); Commonwealth v. Ryhal, 274 Pa. 401, 118 A. 358 (1922); Commonwealth v. Kuhn, 200 Pa.Super. 649, 190 A.2d 337 (1963); 23 C.J.S. Criminal Law s 915 (1961). If the statute of limitations was our only consideration this conviction could be upheld. However, the rule announced in Levy contains another requirement: the date of the commission of the offense must be "fixed with reasonable certainty." We do not feel that the Commonwealth's proof to the effect that the crime was committed on any single day within a fourteen-month period meets the "sufficient particularity" standard of Levy. To hold otherwise **891 would violate the notions of fundamental fairness embedded in our legal process.
>
> Our holding is required by the Fourteenth Amendment Due Process Clause of the United States Constitution and by Article I, Section 9, of the Pennsylvania Constitution.

The Defendant submits his due process rights under the Fourteenth Amendment to the U.S. Constitution as well as his due process rights under the due process clause of the Constitution of the Commonwealth of Pennsylvania were violated and he was forced to proceed to trial on the aforementioned charges without having the ability to adequately prepare and present a defense to those charges due to the lack of specificity contained therein.

In most, if not virtually all, of those cases in which the courts have given the

Commonwealth greater latitude in establishing timeframes when crimes were allegedly committed, involved crimes allegedly committed against young children. In the instant cases, the alleged Victims were no younger than nine (9) or ten (10) years old and in several instances were teenagers at the time the Defendant allegedly had inappropriate contact with them. The Defendant submits the fact that his Accusers were considerably older than the very young children who were allegedly victimized in those cases involving wide latitude as to timeframes placed the prosecution against the Defendant in these matters in a very different perspective and required more specific timeframes so the Defendant had the opportunity to adequately prepare a defense to the charges filed against him.

Moreover, none of the complainants in this case had the handicaps the complainant in Devlin endured.

For all the aforementioned reasons, the Defendant submits Counts 1 through 12 inclusive in Information No. CP-14-CR-2421-2011 and Counts 1 through 6, 12 through 27 and 32 through 35 in Information No. CP-14-CR-2422-2011 lacked specificity and were so generalized that they failed to adequately provide the Defendant with sufficient notice to prepare his defense to those charges and violated his right to due process of law under the Sixth Amendment to the U.S. Constitution as applied to the Commonwealth through the Fourteenth Amendment as well as under the due process clause of the Constitution of

the Commonwealth of Pennsylvania, and the Court erred in denying Defendant's motions to dismiss those charges.

WAIVER

All claims raised in post sentence motions but not raised in this Brief are waived.

CONCLUSION

For any, or indeed all, of the foregoing reasons, it is respectfully submitted that this Honorable Court grant Defendant Jerry Sandusky a new trial.

Respectfully submitted,

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

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Nos. CP-14-CR-2421-2011 &
	)	CP-14-CR-2422-2011
GERALD A. SANDUSKY	)	
Commonwealth Attorneys:		*Frank Fina, Esquire* *Joseph McGettigan, Esquire* *Jonelle H. Eshbach, Esquire*
Defense Attorneys:		*Joseph L. Amendola, Esquire* *Karl Rominger, Esquire*

CERTIFICATE OF SERVICE

AND NOW, this 13th day of December, 2012, I, Joseph L. Amendola, hereby certify that I have, this date, served a copy of the foregoing document, by:

Hand Delivery

Hon. John M. Cleland, Senior Judge
c/o Ms. Maxine Ishler, Court Administrator
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Bellefonte, PA 16823

Mr. Thomas J. Young, Director
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