

**Review of the Freeh Report Concerning Joseph Paterno**

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## **I. Introduction and Executive Summary**

I was asked by the family of former Pennsylvania State University (“Penn State” or the “University”) head football coach Joseph V. Paterno to perform an independent and objective review of the Freeh, Sporkin and Sullivan LLP (“FSS”) report (the “Freeh Report” or the “Report”). FSS was appointed Special Investigative Counsel (“SIC”) to a Task Force of the Board of Trustees of the University to conduct an investigation of the University’s response to the child abuse charges against former Penn State assistant football coach Jerry Sandusky. The Report was released on July 12, 2012.

At the outset, I believe that the conduct of Mr. Sandusky was reprehensible, and he has been dealt with appropriately by our justice system. The lives of the victims of Mr. Sandusky will never be the same, and I feel for them and their families. My review did not consider the conduct of Mr. Sandusky, but rather was focused solely on the findings of the Freeh Report concerning Mr. Paterno. I evaluated the Report to determine whether statements made by the SIC were accurate, fair and supported by the record. The Paterno family did not ask me to reach any particular conclusion, and I offer no opinion with respect to the findings in the Freeh Report related to any other person. In conducting my review, I drew upon my experience as a former prosecutor and Attorney General of the United States, as well as my expertise in conducting independent internal investigations. I was assisted in my review by my colleagues at K&L Gates LLP.

Perhaps the most significant finding of the Freeh Report was that Mr. Paterno knew about critical facts relating to the child abuse by Mr. Sandusky in 1998 and 2001, but repeatedly

concealed those facts.<sup>1</sup> Although the Freeh Report makes separate findings against Mr. Paterno and former Penn State President Dr. Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz, and Athletic Director Timothy M. Curley, it combines these findings to make collective conclusions that the four of them conspired together to cover up Mr. Sandusky's crimes.

In my opinion, the Freeh Report is seriously flawed, both with respect to the process of the SIC's investigation and its findings related to Mr. Paterno. The most significant failures of the Freeh Report are as follows:

- The Freeh Report claims that Mr. Paterno knew about the 1998 incident involving Mr. Sandusky at or about the time that it occurred.<sup>2</sup> However, there is no credible support provided in the Freeh Report for what, if anything, Mr. Paterno was aware of concerning the 1998 incident prior to 2011. Indeed, the Freeh Report ignored contrary evidence that Mr. Paterno did not have such knowledge. Instead, the Report relies upon a vague 1998 e-mail chain that does not directly reference Mr. Paterno.<sup>3</sup> The Report also claims that, since unnamed “[w]itnesses consistently told the [SIC] that Paterno was in control of the football facilities and knew ‘everything that was going on,’” he must have known about the 1998 incident.<sup>4</sup> Mr. Paterno testified to the grand jury that he did not recall the incident.<sup>5</sup> In press interviews, he also stated that he did not recall learning about the allegation.<sup>6</sup> I am aware of no witness who has challenged the veracity of Mr. Paterno's statements.
- The Freeh Report concludes that Mr. Paterno must have conspired with Messrs. Curley and Schultz and Dr. Spanier to conceal the 2001 incident because: (1) Mr. Paterno wielded “excessive influence” at the University;<sup>7</sup> (2) two documents, neither of which was sent or received by Mr. Paterno, refer to a meeting between

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<sup>1</sup> Freeh, Sporkin & Sullivan LLP, *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, 16 (July 12, 2012) [hereinafter Freeh Report], [http://progress.psu.edu/assets/content/REPORT\\_FINAL\\_071212.pdf](http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf).

<sup>2</sup> *Id.* at 20.

<sup>3</sup> *Id.* at Ex. 2A; *see also id.* at Ex. 2B.

<sup>4</sup> *Id.* at 51.

<sup>5</sup> *Pennsylvania v. Curley*, Preliminary Hearing Transcript of Proceedings, Dec. 16, 2011, at 177-78 [hereinafter Preliminary Hearing Transcript].

<sup>6</sup> Sally Jenkins, *Joe Paterno's Last Interview*, WASHINGTON POST, Jan. 14, 2012.

<sup>7</sup> Freeh Report at 65 n.w.

Mr. Curley and Mr. Paterno concerning the incident;<sup>8</sup> and (3) Mr. Curley, whom “several” unidentified people interviewed during the SIC’s investigation described as Mr. Paterno’s “errand boy,” decided not to report the incident to the Pennsylvania Department of Public Welfare.<sup>9</sup> This does not provide proper or sufficient evidence for such a bold claim.

- Numerous sworn witness statements and other accounts, some of which were referenced in the Freeh Report, describe the extent to which persons beyond Messrs. Curley, Schultz and Paterno and Dr. Spanier were aware of the 1998 and 2001 incidents.<sup>10</sup> This is strong evidence that there was no cover-up.
- Mr. Freeh’s mischaracterization of an e-mail critical to his Report at his July 12, 2012 press conference announcing his findings is emblematic of the SIC’s unjustified inferences and the flaws in the Report. Mr. Freeh stated that an e-mail showed that it was Mr. Paterno who decided not to report to authorities the 2001 shower incident involving Mr. Sandusky and a young boy.<sup>11</sup> However, this is not what the e-mail states. The e-mail suggests that it was Mr. Curley’s decision not to report the 2001 incident to authorities and does not state that Mr. Paterno was involved in such a decision or that he was even aware of it.<sup>12</sup> Mr. Freeh did not supply any other evidence at the press conference to support the proposition that Mr. Paterno was involved in or aware of the decision.<sup>13</sup> Indeed, the Report acknowledges that it was Mr. Curley’s decision and not Mr. Paterno’s in its “key findings” about the 2001 incident.<sup>14</sup>
- The Freeh Report claims that it conducted a “complete” investigation.<sup>15</sup> This is not accurate because, despite the fact that it supposedly conducted 430 interviews,<sup>16</sup> the SIC did not speak to virtually any of the persons who had the most important and relevant information. Three of the most crucial individuals—Messrs. Paterno, Schultz and Curley—were never interviewed.<sup>17</sup> Michael McQueary, the sole witness to the 2001 incident, was also not interviewed.<sup>18</sup>

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<sup>8</sup> *Id.* at Exs. 5C, 5G.

<sup>9</sup> *Id.* at 75.

<sup>10</sup> *See, e.g., id.* at 67 n.x, 69, 78.

<sup>11</sup> Remarks of Louis Freeh in Conjunction with Announcement of Publication of Report Regarding the Pennsylvania State University (July 12, 2012), at 4 [hereinafter Freeh Remarks], [http://progress.psu.edu/assets/content/Press\\_Release\\_07\\_12\\_12.pdf](http://progress.psu.edu/assets/content/Press_Release_07_12_12.pdf); *see also* Freeh Report at Ex. 5G.

<sup>12</sup> Freeh Report at Ex. 5G.

<sup>13</sup> Freeh Remarks at 4.

<sup>14</sup> Freeh Report at 63.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.*

Another important individual, Dr. Spanier, was interviewed, but just days before the Freeh Report was issued.<sup>19</sup> The usefulness of the Report is also restricted because many of the interviewees cited are not identified, limiting the reader's ability to weigh the witnesses' credibility and reliability.<sup>20</sup>

- The failure to conduct key interviews is all the more consequential because of the lack of relevant documents. Although the SIC purported to review over 3.5 million documents, the Freeh Report references and relies upon only approximately 30 documents, including 17 e-mails. Significantly, the Freeh Report cites only four documents that purportedly reference Mr. Paterno, none of which were sent to him, and only three documents containing notes authored by him.<sup>21</sup> Although not mentioned in the Report, Penn State reportedly did not retain most e-mails dated prior to 2004 because of a technology changeover, making it impossible to search and review the vast majority of e-mails that must have existed during the critical time periods of 1998 and 2001.<sup>22</sup> Indeed, the only e-mails apparently available to the SIC prior to 2004 were those that were saved personally by Mr. Schultz.<sup>23</sup> Particularly in matters in which the relevant events took place more than ten years ago, contemporaneous e-mails are important sources of information. Mr. Freeh should have disclosed this serious shortcoming in his analysis.

In an interview with the media before his death, Mr. Paterno conceded that he wished he had done more with respect to the 2001 incident, particularly when viewed through the powerful lens of hindsight.<sup>24</sup> However, as discussed in more detail below, failing to do more does not translate into a conspiracy to cover up Mr. Sandusky's actions. The findings in the Freeh Report related to Mr. Paterno do not support such a conclusion. The lack of factual support for the SIC's inaccurate and unfounded findings related to Mr. Paterno and its numerous process-

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<sup>19</sup> Dr. Spanier was interviewed by the SIC on July 6, 2012. *Id.* at 145 n.4. The Freeh Report was published on July 12, 2012. *See generally id.*

<sup>20</sup> *See generally id.*

<sup>21</sup> *See id.* at Exs. 3D, 3E, and 3F.

<sup>22</sup> Paula Reed Ward, *Spanier Drops Lawsuit Against Penn State*, PITTSBURGH POST-GAZETTE, July 19, 2012 (quoting Dr. Spanier's attorney, who stated that e-mails for Dr. Spanier and other administrators dated prior to 2004 were not retained when the University's computer system was overhauled).

<sup>23</sup> Freeh Report at 72-74.

<sup>24</sup> Jenkins, *supra* note 6.

oriented deficiencies was a rush to injustice and calls into question the credibility of the entire Report.

## **II. Background**

### **A. Sandusky Conviction and Charges Against Messrs. Curley, Schultz and Dr. Spanier**

On November 4, 2011, following a two-year grand jury investigation, the Pennsylvania State Attorney General (“Attorney General”) filed criminal charges in Dauphin County Court against Mr. Sandusky, a retired assistant Penn State football coach, for numerous counts of child sexual abuse between 1994 and 2009.<sup>25</sup> The Attorney General’s office issued a grand jury presentment concerning Mr. Sandusky’s actions the following day, which described the grand jury testimony of various witnesses, including Mr. Paterno, and summarized in detail the grand jury’s findings of fact and recommendations of charges concerning Mr. Sandusky.<sup>26</sup> Also on November 4, 2011, the Attorney General filed criminal charges against Messrs. Curley and Schultz for failing to report allegations of child abuse by Mr. Sandusky and for committing perjury during grand jury testimony.<sup>27</sup>

Although the Attorney General stated publicly on November 7, 2011 that Mr. Paterno was not the target of any investigation,<sup>28</sup> pressure was building at the University and among the public to assess responsibility for Mr. Sandusky’s actions at Penn State.<sup>29</sup> The Board of Trustees released a statement on November 8, 2011 that said: “We cannot begin to express the

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<sup>25</sup> Criminal Docket, *Pennsylvania v. Gerald A. Sandusky*, Docket No. MJ-49201-CR-0000636-2011 (Nov. 4, 2011).

<sup>26</sup> Grand Jury Presentment (Nov. 4, 2011) [hereinafter Grand Jury Presentment], available at <http://www.attorneygeneral.gov/uploadedfiles/press/sandusky-grand-jury-presentment.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> Pa. Attorney General Press Release (Nov. 7, 2011), available at <http://www.attorneygeneral.gov/press.aspx?id=6277>.

<sup>29</sup> See, e.g., Dan Le Batard, *How could Paterno not have done more to stop Penn State Scandal?*, MIAMI HERALD, November 8, 2011; Scott Ostler, *Paterno Should be Fired by Penn State*, SAN FRANCISCO CHRONICLE, November 8, 2011.

combination of sorrow and anger that we feel about the allegations surrounding Jerry Sandusky. We hear those of you who feel betrayed and we want to assure all of you that the Board will take swift, decisive action.”<sup>30</sup> As a result of this mounting pressure, Mr. Paterno was fired by Penn State on November 9, 2011.<sup>31</sup> Then, on November 11, 2011, the University’s Board of Trustees formed the Task Force and appointed Board of Trustees members, Kenneth Frazier, who is the Chief Executive Officer and President of Merck & Co., Inc., and Ronald J. Tomalis, the Secretary of the Pennsylvania Department of Education, to lead the Task Force.<sup>32</sup> On November 21, 2011, the Task Force engaged FSS as the SIC to conduct an “independent, full and complete” investigation of the “alleged failure of [Penn State] personnel to respond to and report to the appropriate authorities” sexual abuse of children by former Penn State assistant football coach Gerald A. Sandusky and the “circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.”<sup>33</sup> Mr. Paterno died on January 22, 2012 before having the opportunity to participate in the SIC’s investigation.<sup>34</sup>

After a jury trial beginning on June 11, 2012, Mr. Sandusky was found guilty of child sexual abuse charges on June 22, 2012, and later sentenced to 30 to 60 years in prison on October 9, 2012.<sup>35</sup> On July 12, 2012, the SIC released the Freeh Report.<sup>36</sup>

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<sup>30</sup> Statement by The Pennsylvania State University Board of Trustees, *Penn State Live*, <http://live.psu.edu/story/56285> (Nov. 8, 2011).

<sup>31</sup> Report of the Board of Trustees Concerning Nov. 9 Decisions, *Penn State Live*, <http://live.psu.edu/story/58341> (Nov. 9, 2011).

<sup>32</sup> Freeh Report at 13-14.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 53; Ron Musselman, *Penn State legendary coach Joe Paterno has died*, PITTSBURGH POST-GAZETTE, Jan. 22, 2012.

<sup>35</sup> *Pennsylvania v. Sandusky*, No. CP-14-CR-2421-2011, No. CP-14-CR-2422-2011, Verdict Slips (June 22, 2012); *id.*, Sentencing Order (Oct. 9, 2012).

<sup>36</sup> See Freeh Remarks at 1.



Messrs. Curley and Schultz were scheduled to stand trial in January 2013,<sup>37</sup> but, on November 1, 2012, additional child endangerment charges were filed against them.<sup>38</sup> The Attorney General also filed charges on November 1, 2012 against Dr. Spanier for perjury, obstruction, endangering the welfare of children, failure to properly report suspected abuse and conspiracy for his actions in response to complaints about Mr. Sandusky.<sup>39</sup> At the same time, a new grand jury presentment was released summarizing new findings of fact and the grand jury's recommendations of charges against the three men.<sup>40</sup> In light of the new charges against Messrs. Curley and Schultz and a pending motion to dismiss the charges, their January 2013 trial date was postponed.<sup>41</sup>

## **B. Freeh Report Process**

To execute its mandate to perform an independent, full, and complete investigation, the SIC purported to conduct “over 430 interviews” of a “cross-section of individuals including current and former University faculty and staff members, Trustees, and student-athletes” and to review “over 3.5 million pieces of pertinent electronic data and documents.”<sup>42</sup> The SIC established a toll-free hotline and dedicated e-mail address to receive any relevant information.<sup>43</sup> The SIC also reviewed applicable University policies, guidelines, practices and procedures and compared them to other large universities.<sup>44</sup>

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<sup>37</sup> *Pennsylvania v. Curley*, No. CP-22-CR-5165-2011, *Pennsylvania v. Schultz*, CP-22-CR-5164-2011, Scheduling Order (Aug. 17, 2012).

<sup>38</sup> *Id.*, Criminal Docket (Nov. 1, 2012).

<sup>39</sup> *Pennsylvania v. Spanier*, No. MJ-12303-CR-0419-2012, Criminal Docket (Nov. 1, 2012).

<sup>40</sup> Grand Jury Presentment (Nov. 1, 2012) [hereinafter 2012 Grand Jury Presentment], available at [http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley\\_presentment-11-1-12.pdf](http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley_presentment-11-1-12.pdf).

<sup>41</sup> See *Pennsylvania v. Curley*, No. CP-22-CR-5165-2011, *Pennsylvania v. Schultz*, CP-22-CR-5164-2011, Order Postponing Trial Date, Dec. 5, 2012.

<sup>42</sup> Freeh Report at 9, 12.

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *Id.*

### **III. Process of My Review**

I conducted my review of the Freeh Report in a completely independent manner. Mr. Paterno's family did not influence the scope of the review or my findings in any way.

In conducting my review, I analyzed thoroughly the Freeh Report and the evidence cited in support of it. However, because the Freeh Report did not identify specifically all of the documents it reviewed or witnesses it interviewed in support of its findings, I also reviewed various other documents and information to evaluate the Report's findings and to discover other potentially relevant information. These documents and information included:

- Various court filings and transcripts, including the grand jury presentment concerning Mr. Sandusky; Mr. Paterno's grand jury testimony; the grand jury presentments with respect to Messrs. Schultz and Curley and Dr. Spanier; witness testimony from the preliminary hearing with regard to the case filed against Messrs. Schultz and Curley; filings and exhibits from the case against Messrs. Schultz and Curley; and trial testimony and documents from the trial of Mr. Sandusky;
- Public statements by and on behalf of Mr. Paterno and members of his family;
- Public statements by Mr. Freeh;
- Public statements by counsel for Messrs. Schultz and Curley and Dr. Spanier;
- Public statements and news reports concerning Penn State and the Board of Trustees;
- News reports, internet postings, and other statements about Mr. Paterno;
- Various statements and news reports analyzing the Freeh Report;
- Documents and correspondence provided to the U.S. Department of Justice by counsel for Mr. Paterno and his family, which included notes by Mr. Paterno and several of his files; and
- A summary of an interview of Mr. Paterno by the Attorney General's office.

I also spoke to counsel for Messrs. Curley and Schultz to gather information relevant to my review.

#### **IV. The Freeh Report's Findings with Respect to Mr. Paterno Are Flawed**

##### **A. The Goals of a Proper Internal Investigation**

As Mr. Freeh stated at his press conference releasing the Report, a proper internal investigation and its findings must be accurate, thorough, fair, and credible.<sup>45</sup> An accurate report of an investigation is one in which the conclusions are supported with sufficient and specific facts and investigators consider all of the relevant information. An accurate report should also avoid mistakes, typographical errors and mischaracterizations, as they are the characteristics of a negligent investigative report.<sup>46</sup>

A meaningful internal investigation must be thorough. The investigators should interview all significant witnesses, conduct an extensive review of all pertinent documents, and pursue all possible theories or potential conclusions. In *Mott v. Anheuser-Busch, Inc.*, the court determined that the internal investigation at issue was conducted in a thorough and responsible manner because “the investigation included interviews with *all* relevant parties,” including the target of the investigation.<sup>47</sup> Omitting an important witness or failing to follow a meaningful lead can raise serious questions as to the thoroughness of the investigation. Indeed, as Mr. Freeh himself stated recently during his “keynote address” to the Annual Pharmaceutical Regulatory and Compliance Congress:

The basic skills and tools for conducting credible investigations require more than data review, more than numbers crunching, more than comparative data analysis. It really requires going out, speaking to people,

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<sup>45</sup> See Freeh Remarks at 2.

<sup>46</sup> See, e.g., *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987) (noting that characteristics of a negligent investigative report include “errors in note-taking and quotation of sources” as well as “mechanical or typographical errors”).

<sup>47</sup> 910 F. Supp. 868, 876 (N.D.N.Y. 1995) (emphasis added).

interviewing them, and using all the lawful techniques that we use and companies are allowed to use to conduct business.<sup>48</sup>

As Mr. Freeh stated, interviewing witnesses “will make the critical difference between a competent and fulsome investigation or not.”<sup>49</sup>

Such an investigation must be fair to all parties involved. This is not to say that liability and determinations should not be assessed, but rather that the investigators have a duty to consider both incriminating and exculpatory evidence. When drafting a report, key facts can often be ambiguous and/or conflicting. Fairness requires that an investigation identify such situations and evaluate them when an objective reader could reasonably reach different conclusions. Leaving out any possible exculpatory evidence and ignoring other reasonable alternatives presents the reader with a biased and unfair version of the facts.<sup>50</sup>

Finally, an investigative report must be credible. Inadequate evidence, unreasonable reliance on sources, and the unjustified formulation of conclusions and inferences are all signs of a report that lacks credibility.<sup>51</sup> All potential conflicts of interest or appearances of a lack of independence that could compromise an investigation or its findings’ integrity must be identified and vetted in the report.

## **B. Deficiencies in the Freeh Report**

When considered in the context of investigation “best practices,” it is evident that the Freeh Report and many of its findings as they relate to Mr. Paterno are not accurate, thorough, fair or credible. Moreover, Mr. Paterno never had the opportunity to speak to the SIC and

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<sup>48</sup> Louis Freeh, Keynote Address at the 13th Annual Pharmaceutical Regulatory and Compliance Congress 20 (Nov. 7, 2012).

<sup>49</sup> *Id.* at 19.

<sup>50</sup> *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 489-92 (2d Cir. 1982) (holding that an internal investigation that excludes crucial information could be perceived as biased and possibly creating a misleading report).

<sup>51</sup> *See Pearce*, 664 F. Supp. at 1510-17.

explain his involvement before his death. The process of the SIC's investigation was deficient in numerous ways, including the failure to interview virtually all of the key witnesses and the reliance upon limited, ambiguous documents. Perhaps most significantly, the findings in the Freeh Report about Mr. Paterno concerning his alleged knowledge of the 1998 incident and purported concealment of the 2001 incident were not properly supported. Instead, the SIC attempted to construct an unsubstantiated "collective guilt" among Messrs. Paterno, Curley and Schultz and Dr. Spanier to maintain its conclusions.

**1. Defects in the Process of the SIC's Investigation**

**a. *Failure to Identify Witnesses Interviewed or to Interview Key Witnesses***

The SIC described in the Freeh Report that it investigated the events in question by "conducting over 430 interviews of key University personnel and other knowledgeable individuals" including current and former Trustees; current and former administrators, faculty and staff, including coaches and student-athletes; law enforcement officials; and members of the State College community.<sup>52</sup> The SIC stated that it had "unfettered access" in conducting interviews and that it covered in the interviews a "wide range of academic, administrative and athletic topics relating to Sandusky's crimes and the allegations against Schultz and Curley, as well as the governance and oversight function of the University's administrators and Board of Trustees."<sup>53</sup> Although the Freeh Report's description of its interview process sounds impressive, the SIC did not interview the most significant witnesses.

First, other than offering generalizations in the summary of its process, and occasionally specifically identifying witnesses within the text or footnotes, the Freeh Report fails to provide identifying information for the vast majority of the witnesses it interviewed. As a result,

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<sup>52</sup> Freeh Report at 9.

<sup>53</sup> *Id.* at 11, 12.

anonymous sources are often set forth as evidence for critical conclusions in the Report. Without an understanding of who actually made the statements set forth in the Freeh Report, there is no way for the reader to weigh the credibility or reliability of witnesses or the consistency of statements among witnesses. There also is no description in the Report of any such credibility or consistency analysis performed by the SIC. Further, the Freeh Report also does not describe how many witnesses the SIC interviewed during the investigation, and instead discusses the number of interviews it conducted. As a result, it is unclear whether some witnesses were interviewed once or many times.

In at least one instance, the anonymous source for some of the Freeh Report's assertions has been revealed through subsequent press interviews. During those interviews, information was revealed that raises questions as to the source's credibility. Specifically, the Freeh Report describes an incident involving Mr. Sandusky that was witnessed by a temporary Penn State janitor and his decision not to inform Penn State officials about it because he feared retaliation.<sup>54</sup> A footnote in support of the assertion that the janitor was justified in fearing retaliation cites to an anonymous source's account of an April 2007 disciplinary action involving several Penn State football players in which Mr. Paterno intervened in the discipline.<sup>55</sup> Subsequent press interviews revealed that the anonymous source cited in the footnote was Dr. Vicky Triponey, former Penn State Vice President of Student Affairs.<sup>56</sup> Several subsequent commentators and news articles have raised questions as to Dr. Triponey's biased agenda or possible misrepresentation of the

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<sup>54</sup> *Id.* at 65.

<sup>55</sup> *Id.* at 65 n.w.

<sup>56</sup> Mike Jensen, *Vicky Triponey, the Woman Who Took on JoePa*, PHILADELPHIA INQUIRER, July 22, 2012.

facts.<sup>57</sup> Without knowing Dr. Triponey's identity, it would have been impossible to evaluate properly the credibility and reliability of any statements made by her.

Second, in addition to failing to identify whom the SIC *did* interview, the Freeh Report also provides virtually no information about whom the SIC *did not*, or *could not*, speak to and why. The Freeh Report acknowledges that some witnesses declined to be interviewed on the advice of counsel and identifies as examples Messrs. Sandusky, Schultz, and Curley and former University outside legal counsel, Wendell Courtney.<sup>58</sup> Although the Freeh Report states that the Attorney General requested that the SIC not interview former University Director of Public Safety Thomas Harmon and former assistant coach Michael McQueary, it alludes to the fact that the Attorney General asked the SIC not to talk to others, without identifying them.<sup>59</sup> The Freeh Report also describes that, generally, witnesses were cooperative and forthright, but also states, without specifically naming them, that there were a "few exceptions" who were not.<sup>60</sup>

Third, the Freeh Report fails to acknowledge that, as a result of the above-described limitations, it lacked access to the most *critical* witnesses, which severely limits the reliability and usefulness of the Report. Indeed, the SIC interviewed only one witness (Dr. Spanier) who had direct knowledge about the most important incidents discussed in the Freeh Report. Despite this fact, the Freeh Report states that, while the information unavailable witnesses "could have provided would have been pertinent to the investigation, the findings contained in this report

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<sup>57</sup> See, e.g., Anne Danahy, *Penn State Athletics Study Counters Triponey Claims*, CENTRE DAILY TIMES, Sept. 2, 2012 (questioning the claims made by Dr. Triponey regarding the PSU athletic program); Joe Posnanski, *Paterno 312-15* (2012) (discussing the controversy surrounding Vicky Triponey during her time at Penn State and the incident that eventually led to her resignation); The Vicky Triponey Timeline of Terror, Safeguard Old State, <http://safeguardoldstate.org/the-vicky-triponey-timeline-of-terror> (last visited Dec. 4, 2012) (Safeguard Old State is a student run advocacy group that posted this timeline back in 2007, documenting the supposed wrongdoings of Dr. Triponey while at PSU).

<sup>58</sup> Freeh Report at 12.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

represent a fair, objective and comprehensive analysis of the facts.”<sup>61</sup> Incredibly, considering the findings in the Freeh Report are supported substantially by less than 30 contemporaneous documents, the Report goes further, stating that “the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed.”<sup>62</sup> In light of the broad and damning conclusions in the Freeh Report, such statements by the SIC are irresponsible and self-serving. It is virtually impossible to provide a full account of incidents, and more importantly to make judgments related to them, without the benefit of talking to the individuals who were involved at the time they occurred. Perhaps most critically, it is unfair to make findings about credibility and intent without interviewing witnesses necessary to make those conclusions.

Fourth, the SIC apparently gave short shrift to the information important witnesses provided that was contrary to the Freeh Report’s findings. As discussed above (and in greater detail below), Dr. Spanier was the only witness interviewed by the SIC with direct knowledge about the alleged cover-up involving the 2001 incident. However, as has been widely reported, the SIC did not interview Dr. Spanier until just six days prior to the Freeh Report’s publication on July 12, 2012.<sup>63</sup> According to his counsel, Dr. Spanier vehemently denied the SIC’s findings, including the Freeh Report’s allegations of a cover-up relating to the 2001 incident to prevent bad publicity for the University.<sup>64</sup> As anyone who has drafted a long report knows, the Freeh Report was likely in near final draft at the time of Dr. Spanier’s interview. For the SIC to consider properly Dr. Spanier’s statements, and to perform any necessary follow-up, it should

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See supra* note 19.

<sup>64</sup> Elizabeth K. Ainslie, *Two Investigations: A News Release From Attorneys For Dr. Graham Spanier* (July 16, 2012).



have conducted his interview well in advance of the date the Freeh Report was released. Even more critically, the Freeh Report should have considered and addressed what Dr. Spanier stated in his interview.<sup>65</sup>

The SIC's lack of access to these most significant witnesses, and the Report's other weaknesses about witnesses described above, calls into question the fairness, completeness, thoroughness, and credibility of the findings in the Freeh Report as they relate to Mr. Paterno.

**b. *Failure to Adequately Address Documentation Issues***

The Freeh Report touts the fact that the SIC analyzed “over 3.5 million pieces of pertinent electronic data and documents”<sup>66</sup> and states that “extensive contemporaneous documentation . . . provided important insights . . .”<sup>67</sup> The Freeh Report's description of the documentary evidence supposedly supporting its findings is of concern.

First, despite the SIC purporting to review millions of documents, the Freeh Report specifically identifies only 30 exhibits as relevant to support its findings.<sup>68</sup> Some of these exhibits subsume portions of other attached exhibits, which gives the appearance of more documented support for the Report's findings than actually exists.<sup>69</sup>

Second, the Freeh Report fails to acknowledge the crucial fact that, due to a University-wide computer system change in 2004, the vast majority of Penn State e-mails dated prior to that

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<sup>65</sup> It has also been widely reported that Dr. Spanier told the SIC that federal investigators reviewed his involvement in the 1998 and 2001 incidents as part of a federal clearance procedure and still determined him to be cleared. *See, e.g., Critique of the Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* at 16, available at [http://espn.go.com/photo/preview!/pdfs/120822/espn\\_pennst\\_critique\\_of\\_report.pdf](http://espn.go.com/photo/preview!/pdfs/120822/espn_pennst_critique_of_report.pdf); Timothy K. Lewis, *Press Conference Remarks on Behalf of Dr. Graham B. Spanier*, at 4 (Aug. 22, 2012). The Freeh Report fails to mention this fact, nor does it describe that it made any effort to collect this information.

<sup>66</sup> Freeh Report at 9.

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *See generally id.*

<sup>69</sup> *See, e.g., id.* at Exs. 2B, 2C, 2E.

year are no longer available.<sup>70</sup> As a result, most of the potentially relevant documents created prior to 2004, including those concerning the 1998 and 2001 incidents that serve as the primary bases for the Report, could not be reviewed. Although the Freeh Report does not discuss it, I understand that the only relevant pre-2004 e-mails discovered and reviewed by FSS were e-mails retained voluntarily by Mr. Schultz, who directed the University's information technology personnel to migrate the historic messages he had saved at the time of the change to Penn State's new e-mail system. Because deleted messages or messages sent or received prior to 2004 by University personnel other than Mr. Schultz apparently were not available for review, it is impossible to know what other e-mails may have provided insight into these matters. The Freeh Report also does not disclose the total number of documents it reviewed from the 1998 and 2001 time period, instead providing only a total number of documents reviewed without reference to the e-mail system change.

**c. *Inappropriate Reliance upon Grand Jury Testimony and Presentment***

Throughout the Freeh Report, the SIC references the grand jury proceeding, including the grand jury presentment of November 4, 2011 and testimony thereof from the Centre County investigation of Mr. Sandusky.<sup>71</sup> The Freeh Report's reliance on the grand jury presentment and proceedings is misplaced and overstated.

Grand jury proceedings and any related presentments are used to determine whether there is sufficient evidence to pursue criminal charges against a suspect.<sup>72</sup> The burden of proof on the prosecution in grand jury proceedings is not the higher burden of "beyond a reasonable doubt" used during criminal trials, but rather whether the person "appears to have committed" an

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<sup>70</sup> See *supra* note 22.

<sup>71</sup> See, e.g., Freeh Report at 14, 66-69.

<sup>72</sup> See 42 Pa. Code § 4548.

offense.<sup>73</sup> The Freeh Report fails to address this important issue regarding burden and instead treats the November 4, 2011 grand jury presentment as fact. A grand jury presentment, however, is neither evidence nor is it a transcription of testimony. Rather, it is a document drafted by a prosecutor to obtain majority approval by the grand jury.<sup>74</sup> Further, a presentment is not typically admissible in judicial proceedings as it constitutes inadmissible hearsay.<sup>75</sup> The Freeh Report fails to address these important evidentiary issues in relying upon the November 4, 2011 grand jury presentment.

The Freeh Report, in citing to the grand jury testimony of witnesses (*e.g.*, Messrs. McQueary, Paterno, Schultz, and Curley, and Dr. Spanier), fails to discuss the two main evidentiary problems with grand jury testimony generally. First, although a grand jury witness may be represented by counsel, his counsel is not permitted to object to improper or misleading questions, which has the potential to create a one-sided record.<sup>76</sup> Second, there is no cross-examination of witnesses permitted in grand jury proceedings.<sup>77</sup> A thorough cross-examination is always of paramount importance in eliciting accurate and balanced testimony and in evaluating whether certain testimony may be inaccurate. By failing to address these fundamental issues with grand jury testimony, the Freeh Report allows readers to make unfounded inferences about the accuracy of certain statements it relies upon to render its conclusions.

Further, the Freeh Report fails to address substantive discrepancies between the November 4, 2011 grand jury presentment and other witness statements. The grand jury

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* § 4551(a).

<sup>75</sup> *See, e.g., Jack Martinez, Surviving Partner t/a M & S Tool & Mach. Co. & M & S Tool Mach. Co., Inc. v. Redevelopment Auth. of the City of Philadelphia*, No. 6608, 1992 WL 1071394 (Pa. Com. Pl. Apr. 1, 1992).

<sup>76</sup> 42 Pa. Code § 4549(c).

<sup>77</sup> *Id.*

presentment asserts through Mr. McQueary's testimony that the 2001 incident in the Lasch Building shower with Victim 2 actually occurred in March 2002.<sup>78</sup> Although the Freeh Report briefly acknowledges this fact,<sup>79</sup> it fails to address the fact that such a discrepancy could raise credibility issues regarding Mr. McQueary's testimony. In addition, the grand jury presentment describes the testimony of Mr. McQueary relating to the 2001 incident as Mr. Sandusky subjecting Victim 2 to "anal intercourse."<sup>80</sup> However, at the December 16, 2011 preliminary hearing concerning Messrs. Curley and Schultz ("Preliminary Hearing"), Mr. McQueary testified, "I have never used the word anal or rape in this – since day one."<sup>81</sup> The November 4, 2011 grand jury presentment also states that Mr. McQueary went to Mr. Paterno's home "where he reported what he had seen."<sup>82</sup> Again, at the Preliminary Hearing, Mr. McQueary repeatedly testified that he never told Mr. Paterno any of the specifics of what he saw.<sup>83</sup> For these reasons, the Freeh Report's heavy reliance on the November 4, 2011 grand jury presentment and proceedings is misplaced. This problem is further compounded given Mr. McQueary was not interviewed as a part of the SIC's investigation.

2. **There Is No Credible Evidence to Support the Finding That Mr. Paterno Conspired with Others to Cover Up Mr. Sandusky's Actions**

The Freeh Report claims that Mr. Paterno conspired with Messrs. Schultz and Curley and Dr. Spanier to cover up the incidents involving Mr. Sandusky in order to avoid bad publicity.<sup>84</sup> The Report, however, fails to offer any credible evidence to support such an assertion.

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<sup>78</sup> Grand Jury Presentment at 6.

<sup>79</sup> Freeh Report at 66.

<sup>80</sup> Grand Jury Presentment at 6-7.

<sup>81</sup> Preliminary Hearing Transcript at 72.

<sup>82</sup> Grand Jury Presentment at 7.

<sup>83</sup> See, e.g., Preliminary Hearing Transcript at 24, 74, 102.

<sup>84</sup> Freeh Report at 16.

First, as discussed in greater detail below, the Report fails to acknowledge that there is no credible evidence of what, if anything, Mr. Paterno knew of the 1998 incident or about Mr. Paterno's involvement in the 2001 incident after he learned of it from Mr. McQueary and reported it to Messrs. Curley and/or Schultz.

Second, the SIC's conclusion that a conspiracy existed to "conceal" the actions of Mr. Sandusky in order to avoid bad publicity is also undermined by the very facts the Report describes. "Concealment" is "[t]he act of refraining from disclosure; especially, an act by which one prevents or hinders the discovery of something; a cover-up."<sup>85</sup> A fair and credible report by the SIC should have addressed why the SIC believed the record supported the finding of a cover-up, despite the fact that so many people were told of the incidents. Had Mr. Paterno wanted to conceal the facts from authorities for the betterment of his football program, it is difficult to understand why he would have disclosed the accusations to Messrs. Curley and/or Schultz. Moreover, Mr. McQueary confirmed that no one, including Mr. Paterno, Mr. Curley, or Mr. Schultz, ever asked him to refrain from disclosing the 2001 incident.<sup>86</sup>

Mr. Paterno was not the only alleged "co-conspirator" to act in ways inconsistent with a purported attempt to "conceal" the actions of Mr. Sandusky. In his grand jury testimony, Mr. Curley testified repeatedly that he spoke in person with Dr. Jack Raykovitz, Director of The Second Mile, about Mr. Sandusky's actions relating to the 2001 incident.<sup>87</sup> Mr. Freeh acknowledges this in the Report, and states further that Dr. Raykovitz told two people affiliated with The Second Mile.<sup>88</sup> Also, during the Preliminary Hearing, John McQueary, Michael

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<sup>85</sup> *Black's Law Dictionary* 306 (8th ed. 2004).

<sup>86</sup> Preliminary Hearing Transcript at 38.

<sup>87</sup> *Id.* at 182, 195-96.

<sup>88</sup> Freeh Report at 78.

McQueary's father, testified that he, along with Dr. Jonathan Dranov, a McQueary family friend and the elder McQueary's boss, spoke with Mr. Schultz about the 2001 incident after a business meeting in John McQueary's office sometime after Michael McQueary initially came to him.<sup>89</sup> In addition, John McQueary testified that Mr. Schultz indicated that there had been other allegations against Mr. Sandusky and that they had "never been able to really unearth anything or sink our teeth into something that we had that was substantial."<sup>90</sup> This is most likely a reference to the 1998 incident. Although the Freeh Report cites to the testimony by John McQueary during the Preliminary Hearing about his conversation with Mr. Schultz,<sup>91</sup> the Report completely ignores the fact that his description of this encounter weighs against the Report's conclusion of an alleged conspiracy to conceal Mr. Sandusky's actions. Moreover, Mr. Schultz reached out to Wendell Courtney, outside counsel for Penn State, about the situation.<sup>92</sup> This is further evidence that there was no intent to limit the number of people who knew of this matter, much less engage in a cover-up. Without any evidence and without speaking to any of the key parties involved with the initial reporting, the Report falls glaringly short of suggesting, let alone proving, any concealment by Mr. Paterno.<sup>93</sup>

Third, the Freeh Report asserts:

Taking into account the available witness statements and evidence, the [SIC] finds that it is more reasonable to conclude that, *in order to avoid the consequences of bad publicity*, the most powerful leaders at the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the

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<sup>89</sup> Preliminary Hearing Transcript at 135-39.

<sup>90</sup> *Id.* at 139.

<sup>91</sup> Freeh Report at 67 n.x.

<sup>92</sup> *Id.* at 69.

<sup>93</sup> In addition, and significantly, the Freeh Report notes that there is no evidence of interference by Mr. Paterno or any University administrator with the 1998 investigation. *Id.* at 52. That does not prevent the Freeh Report, however, from drawing the conclusion of a cover-up of Mr. Sandusky's actions. *Id.* at 16.

University's Board of Trustees, the Penn State community, and the public at large.<sup>94</sup> (emphasis added).

However, the Freeh Report fails to support this broad finding about motive with any actual evidence, including identifying any specific witness statement or document. Without any evidence, it is wrong to make the overarching conclusion that Mr. Paterno chose not to report the 2001 incident for fear of bad publicity.

Moreover, there is contrary evidence that Mr. Paterno in fact did *not* fear bad publicity for his football program. Not even a year prior to the 2001 incident, Mr. Paterno was criticized by the media for keeping star quarterback Rashard Casey on the Penn State football team after he was charged with aggravated assault of an off-duty police officer.<sup>95</sup> Those charges were later dropped, and Mr. Casey eventually settled his lawsuit against the police department for malicious prosecution.<sup>96</sup> Throughout this tumultuous period, Mr. Paterno stood by Mr. Casey, whom he believed had been falsely charged with a serious crime despite receiving harsh criticism from the media. These facts raise the question of why Mr. Paterno would be willing to withstand bad publicity for a current player, yet supposedly be unwilling to endure bad publicity for the actions of a former coach, whom he reportedly did not like much.<sup>97</sup> When taken in context with what was occurring at the University in 2001 with a current football player, the Freeh Report's conclusion of an alleged cover-up to avoid the consequences of bad publicity becomes even more tenuous.

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<sup>94</sup> *Id.* at 16.

<sup>95</sup> Ray Fittipaldo, *Testy Paterno Backs Casey*, PITTSBURGH POST-GAZETTE, July 27, 2000.

<sup>96</sup> David Porter, *Rashard Casey Settles Suit With Hoboken Police Department*, ASSOCIATED PRESS, Aug. 13, 2003.

<sup>97</sup> *See, e.g.*, Posnanski, *supra* note 57, at 213.

3. **The Freeh Report's Conclusions About Mr. Paterno Are Not Appropriately Supported**

a. *The Report's Findings Concerning Mr. Paterno's Knowledge of the 1998 Incident Are Unfounded*

In the Freeh Report, the SIC describes that, on May 3, 1998, an incident occurred between Mr. Sandusky and a young boy that included physical contact in the showers of the Lasch Building on the campus of the University.<sup>98</sup> The following day, after noticing her son was upset, the boy's mother contacted a psychologist who encouraged her to contact the local authorities, who then began an investigation into the matter in coordination with child protective services organizations.<sup>99</sup> As the Freeh Report describes in great detail, the 1998 incident was investigated exhaustively by the full spectrum of Pennsylvania authorities, the officials of which were all educated, trained and experienced in dealing with child sexual abuse. These authorities included: (1) the University Police Department; (2) the Centre County Children and Youth Services ("CYS"); (3) the State College Borough Police Department; (4) the Centre County District Attorney; and (5) the Pennsylvania Department of Public Welfare ("DPW").<sup>100</sup> After the investigation about the 1998 investigation was complete, the District Attorney's office declined to file charges against Mr. Sandusky.<sup>101</sup>

The Freeh Report's findings regarding Mr. Paterno's knowledge of or involvement in the 1998 incident suffer from the same deficiencies of process and lack of evidentiary support identified above. At the outset, the Freeh Report refers generally to "the record" when making certain assertions regarding the 1998 incident and investigation without ever describing what the

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<sup>98</sup> Freeh Report at 41-42.

<sup>99</sup> *Id.* at 42.

<sup>100</sup> *Id.* at 42-47.

<sup>101</sup> *Id.* at 46.



alleged “record” is based upon.<sup>102</sup> It is apparent, however, that “the record” is lacking because the SIC apparently failed to interview virtually all of the key witnesses from the 1998 incident and investigation including: (1) Mr. Sandusky; (2) Mr. Schultz; (3) Mr. Curley; (4) Mr. Paterno; (5) the 1998 victim; (6) the mother of the 1998 victim; (7) the second 1998 victim, interviewed by police during the 1998 investigation regarding a similar shower incident with Mr. Sandusky; (8) Mr. Harmon, former University Director of Public Safety; (9) Ray Gricar, former Centre County District Attorney; (10) Karen Arnold, former Centre County Assistant District Attorney; (11) Alycia Chambers, psychologist of the 1998 victim; (12) John Seasock, the CYS counselor who evaluated the 1998 victim; (13) John Miller, the CYS caseworker involved; and (14) Mr. Courtney, outside counsel to the University during the relevant time. It is also unclear whether the SIC interviewed Jerry Lauro, the DPW representative who handled the case, or Detective Ron Schreffler from the University Police Department—two of the individuals most intimately involved in the investigation of the 1998 incident. Any report of these events that excludes the primary witnesses is dramatically deficient and incomplete and should not form the basis for findings of the nature of those in the Freeh Report.

Despite the Freeh Report’s findings to the contrary, there is no credible evidence of what, if anything, Mr. Paterno was aware of concerning the 1998 incident or the investigation that followed. Mr. Paterno died without the opportunity to talk to the SIC about its allegations. However, in his testimony to the grand jury in January 2011 regarding the 1998 incident, Mr. Paterno was asked, “Other than the [2001] incident that Mike McQueary reported to you, do you know in any way, through rumor, direct knowledge or any other fashion, of any other inappropriate sexual conduct by Jerry Sandusky with young boys?” He responded:

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<sup>102</sup> *Id.* at 51.

I do not know of anything else that Jerry would be involved in of that nature, no. I do not know of it. You did mention—I think you said something about a rumor. It may have been discussed in my presence, something else about somebody. I don't know. I don't remember, and I could not honestly say I heard a rumor.<sup>103</sup>

Similarly, in his final news interview with Sally Jenkins of the *Washington Post*, Mr. Paterno was asked about his awareness of the 1998 incident and investigation. Mr. Paterno reiterated his lack of knowledge: “You know [the 1998 incident and investigation] wasn't like it was something everybody in the [football] building knew about. Nobody knew about it.”<sup>104</sup>

The scant evidence that is discussed in the Freeh Report does not contradict Mr. Paterno's testimony or interview that he was unaware of the 1998 incident or investigation. The SIC relies primarily on two e-mails to support its findings that Mr. Paterno had knowledge of the events in 1998. However, these e-mails, attached as Exhibits 2A and 2B to the Report, are ambiguous at best. First, as with the other e-mails appended to the Freeh Report as evidence concerning the 1998 and 2001 incidents, these e-mails were located in Mr. Schultz's files, which he retained as part of his own voluntary practice. Because all other e-mail from this time period apparently was not saved by the University when it migrated to a new e-mail system in 2004, it is impossible to know what other or related e-mails may have once existed regarding these matters. Second, because the SIC failed to interview the authors or recipients of Exhibits 2A and 2B, the contents and the context in which they were drafted and sent could not be verified.

In addition, when these e-mails are examined closely, it becomes even more clear that they do not support the SIC's findings with respect to Mr. Paterno. Exhibit 2A includes a May 5, 1998 e-mail from Mr. Curley to Mr. Schultz with the subject line, “Joe Paterno,” and states, “I

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<sup>103</sup> Preliminary Hearing Transcript at 177-78.

<sup>104</sup> Jenkins, *supra* note 6.

have touched base with the coach. Keep us posted. Thanks.”<sup>105</sup> There are a number of issues with this document that the Freeh Report wholly ignores in using it as support for its conclusions about Mr. Paterno’s knowledge of the 1998 incident. First, it is unclear what Mr. Curley was referring to when he said he “touched base with the coach.”<sup>106</sup> Second, it is also unclear who “the coach” referenced in the e-mail is. Other than the subject line, there is no specific mention of Mr. Paterno.<sup>107</sup> The Freeh Report, however, assumes without any supporting evidence, particularly given that the SIC did not speak to the author or recipient, that “the coach” is Mr. Paterno.<sup>108</sup> Third, there is no evidence cited in the Report to support the proposition that this initial e-mail relates to the 1998 investigation at all. Even assuming that the e-mail does relate to the 1998 investigation, there is no evidence of the level of information regarding the 1998 incident, if any, that Mr. Curley provided to “the coach.”

Exhibit 2B contains a May 13, 1998 e-mail from Mr. Curley to Mr. Schultz with a subject line, “Jerry,” and states, “Anything new in this department? Coach is anxious to know where it stands.” Exhibit 2B also cannot withstand the type of close scrutiny the Freeh Report chose not to give it. First, as with Exhibit 2A, from the face of the document, it is unclear who the “Coach” referenced in the e-mail is. The subject line, “Jerry,” suggests that the “Coach” could just as likely be Mr. Sandusky as Mr. Paterno. Unfortunately, neither the recipient nor the sender was interviewed and the Report offers no other direct evidence regarding it. Second, similar to Exhibit 2A, there is no evidence to support that this initial e-mail relates to the 1998 incident and could just as easily concern other topics. Around this time, for example, Mr. Sandusky had

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<sup>105</sup> Freeh Report at 48; *see also id.* at Ex. 2A.

<sup>106</sup> *Id.* at 48; *see also id.* at Ex. 2A.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 51.

proposed to the University administration the possibility of starting a football team at the University's Altoona campus where he could be the head coach.<sup>109</sup> Ultimately, the administration chose not to move forward with this proposal.<sup>110</sup> The Freeh Report, however, does not discuss this possible reading of the e-mail. Third, there is no indication in the later e-mails that Mr. Curley intended to or in fact did communicate any information regarding the 1998 investigation from Mr. Schultz to the "Coach."

For all these reasons, it is wrong for the Freeh Report to draw the conclusion that this e-mail somehow confirms that Mr. Paterno was "kept informed"<sup>111</sup> of the 1998 investigation without simultaneously acknowledging its deficiencies and other equally reasonable explanations. Because the vast majority of key witnesses, including the authors and recipients of these e-mails, were unavailable for interviews, there was no way for the SIC to confirm the documents' contents or context.

The Freeh Report makes further unsupported inferences and assumptions regarding the level of detailed knowledge that Mr. Paterno possessed relating to the 1998 incident and investigation. Even assuming that Mr. Paterno generally was aware of the 1998 incident, the Freeh Report presumes that Mr. Paterno was intimately aware of all the details of the investigation that followed. For example, the Freeh Report assumes and implies that Mr. Paterno was informed of the conclusion and result of the 1998 investigation. The Freeh Report states, "[T]he available record is not clear as to how the conclusion of the Sandusky investigation was conveyed to Paterno."<sup>112</sup> Embedded in that sentence is the implication that Mr. Paterno knew

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<sup>109</sup> *Id.* at 56.

<sup>110</sup> *Id.* at 57.

<sup>111</sup> *Id.* at 39.

<sup>112</sup> *Id.* at 51.

about the 1998 investigation and was made aware of the conclusion of the 1998 investigation by the Report's use of the word "how" instead of "whether." The "evidence" on which the Freeh Report relies to make such a conclusion is that "[w]itnesses consistently told the [SIC] that Paterno was in control of the football facilities and knew 'everything that was going on.'"<sup>113</sup> The Freeh Report does not explain which witnesses made these conclusory statements or upon what information the witnesses based their statements. Without more, such statements made during a supposed independent investigation should be given little-to-no credibility as it relates to Mr. Paterno's specific knowledge of the investigation of the 1998 incident or its conclusion.

The Freeh Report draws additional strained inferences regarding Mr. Paterno's knowledge of the 1998 incident.<sup>114</sup> The Freeh Report discusses Exhibit 2G, which is a handwritten note allegedly maintained by Mr. Paterno relating to Mr. Sandusky's proposed involvement with the University after his 1999 retirement, including "[a]ccess to training and workout facilities."<sup>115</sup> The handwritten note then states, "Is this for personal use or 2nd Mile kids. No to 2nd Mile. Liability problems."<sup>116</sup> The most obvious conclusion to be drawn from the note is Mr. Paterno's concern regarding the potential insurance liability associated with bodily injury to young children using University workout facilities. However, the Report does not make that logical conclusion and instead jumps to an extreme and unsupported finding that Mr. Paterno was referring to potential liability associated with Mr. Sandusky's abuse of children in the Lasch Building. Such inappropriate inferences once again call into question the accuracy, fairness and credibility of the Freeh Report's findings.

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<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 51 n m.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

The Freeh Report also wholly disregards then-current Pennsylvania law regarding the confidential nature of an investigation into child abuse allegations. Under these laws, it would have been illegal for the investigators to reveal details about the 1998 incident or investigation.<sup>117</sup> The existence of these laws weighs against the Report's inference that Mr. Paterno would have been aware of the 1998 investigation. Significantly, Mr. Sandusky was not charged with any crimes after the 1998 investigation.<sup>118</sup> It is wrong to claim that one should treat another as a suspected criminal even after he has not been charged with any crime subsequent to an investigation by multiple Pennsylvania law enforcement and child protective services agencies.

***b. The Report's Conclusions About Mr. Paterno's Actions with Respect to the 2001 Incident Suffer from Numerous Deficiencies and Are Not Supported by the Record***

As with many other parts of the Freeh Report, the SIC relies on sparse documents and few facts to draw wide-reaching conclusions with respect to child sexual abuse by Mr. Sandusky on February 9, 2001. The facts, as stated by the Freeh Report, are that Mr. McQueary observed and/or heard some sort of sexual activity occurring between Mr. Sandusky and a young boy in the showers at the Penn State Lasch Building, a facility used by the football program. Mr. McQueary then told his father, John McQueary, and Dr. Dranov. John McQueary and Dr. Dranov suggested to Michael McQueary that he report what he saw and/or heard to Mr. Paterno, rather than go directly to the police. Reportedly, Michael McQueary called Mr. Paterno the next

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<sup>117</sup> See, e.g., 55 Pa. Code § 3490.91, which reads: "(a) Reports, report summaries and other accompanying information obtained under the CPSL, Child Protective Service Law, and this chapter in the possession of the department, a county agency and a CPS, Child Protective Service, are confidential." Further, 23 Pa. Code § 6339 states:

[R]eports made pursuant to this chapter, including, but not limited to, report summaries of child abuse and written reports made pursuant to section 6313(b) and (c) (relating to report procedure) as well as any other information obtained . . . concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service shall be confidential.

See also *McClary v. Smalls*, No. 95-12600, 1996 WL 614630 (Pa. Com. Pl. Jan. 3, 1996).

<sup>118</sup> Freeh Report at 39.

day (Saturday, February 10, 2001) and arranged to visit Mr. Paterno at his home to inform him of the 2001 incident. Mr. Paterno then reported Mr. McQueary's disclosure about the 2001 incident to Mr. Curley and/or Mr. Schultz<sup>119</sup> on Sunday, February 11.

Similar to the 1998 incident, most of the key witnesses who were first made aware of the 2001 incident—Messrs. Sandusky, McQueary, Paterno, Curley, and Schultz—were not interviewed by the SIC.<sup>120</sup> In addition, the SIC reportedly did not interview Dr. Dranov or John McQueary, the first individuals to meet with Michael McQueary, to better understand what Michael McQueary saw and heard or to gather facts concerning whom Dr. Dranov or John McQueary spoke about the incident.<sup>121</sup> Instead, the SIC relied upon the grand jury testimony of the relevant witnesses involved.<sup>122</sup> As discussed above, such grand jury testimony is a poor substitute for actual interviews, especially when the Report draws such strong conclusions based upon the perceived credibility of particular witnesses.<sup>123</sup>

After reporting Mr. McQueary's observations to Mr. Curley and/or Mr. Schultz, there is no evidence that Mr. Paterno participated in determining Penn State's response to the 2001 incident. Mr. Paterno told the Attorney General he was not further involved during an interview concerning these matters in October 2011:

Q: And do you know what happened after that [reporting to Mr. Curley] with regards to Mr. McQueary and/or Mr. Curley?

A: Nope.

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<sup>119</sup> There is conflicting testimony as to precisely when, where, and whom Mr. Paterno informed. Certain testimony states that Mr. Paterno spoke with Mr. Curley over the phone, while other accounts indicate that Mr. Paterno met with both Mr. Curley and Mr. Schultz at his home on Sunday. *Id.* at 68. Due to the lack of clarity, this review and the Freeh Report use the phrase "Mr. Curley and/or Mr. Schultz" to avoid any ambiguity. *See, e.g., id.* at 63.

<sup>120</sup> The SIC did interview Dr. Spanier, *see id.* at 16, but there is no evidence that he was directly involved with the initial reporting. As a result, he would not likely offer much, if any, insight into these initial events.

<sup>121</sup> *Id.* at 67 n.x.

<sup>122</sup> *See generally id.*

<sup>123</sup> *See supra* at 16-18.

Q: Did Mr. Curley get back to you at some point in time after that to advise you what actions were taken . . .

A: No, no, I didn't, I had other things to do, we had . . . As I said, Jerry was not working for me.

. . .

Q: Subsequent, [sic] to that you're saying Mr. Curley never got back to you, correct, to advise you?

A: There was no need to get back.

Q: Did any police department ever get ahold of you about this?

A: Nope.

Q: Did anybody from the University, well, anybody from the University Police Department contact you?

A: Well, not till ten years later.<sup>124</sup>

Despite this assertion by Mr. Paterno that he had no further involvement, the SIC goes to great lengths in the Report to insert Mr. Paterno into the chronology and groups Messrs. Paterno, Curley and Schultz and Dr. Spanier into one collective unit to conclude that the four men conspired to cover up the incident to avoid bad press. To support these allegations about Mr. Paterno, the SIC relies upon two ambiguous documents.

First, Exhibit 5C is a page from Mr. Schultz's notes dated February 12, 2001, the first business day after Mr. Paterno reported the incident to Mr. Curley and/or Mr. Schultz.<sup>125</sup> The notes state in part, "agreed TMC will discuss w JVP and advise we think TMC should meet w JS on Friday." As the Report presumes, TMC likely stands for Timothy M. Curley, JVP likely stands for Joseph V. Paterno, and JS likely stands for Jerry Sandusky.<sup>126</sup> However, the SIC did not interview Mr. Schultz to obtain further confirmation or explanation about these notes. Nor did the SIC question Mr. Curley to determine whether he actually followed-up with Mr. Paterno.

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<sup>124</sup> Interview of Joseph V. Paterno, Commonwealth of Pennsylvania – Office of Attorney General (Oct. 24, 2011).

<sup>125</sup> See Freeh Report at Ex. 5C.

<sup>126</sup> See *id.* at 70.



This one page of unclear notes, without any explanation from the author or information as to subsequent follow-up from the participants, is not a reliable source in support of the Freeh Report's far-reaching conclusions.

The Freeh Report's findings with respect to Mr. Paterno also rest upon Exhibit 5G, which is an e-mail from Mr. Curley dated February 27, 2001. In the e-mail, Mr. Curley writes, "After giving it more thought and talking it over with Joe yesterday--I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. . . ." As with Exhibits 2B and 2C supporting the SIC's findings about Mr. Paterno's knowledge of the 1998 incident, Exhibit 5G was part of the e-mail retained voluntarily by Mr. Schultz. Other e-mails prior to 2004 apparently are no longer available for review because of the University's system conversion. For the reasons discussed above, these e-mails are ambiguous and unfortunately cannot be put into context by related messages or explained by the persons who drafted or received them. As a result, it is neither fair nor appropriate to draw any conclusions from them.

The Report characterizes Exhibit 5G as a damning piece of evidence proving Mr. Paterno conspired with Messrs. Curley and Schultz and Dr. Spanier to conceal the 2001 incident.<sup>127</sup> As further support for this finding, the SIC makes the extremely general statement that "several people" said that Mr. Curley was "Paterno's 'errand boy,'"<sup>128</sup> and thus Mr. Curley's knowledge or actions should be attributed to Mr. Paterno. The SIC never provided the identity of these people, nor any information to assess their credibility. Significantly, the Report also provides no evidence that Mr. Curley's decision was either known or agreed to by Mr. Paterno. The Report

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<sup>127</sup> *See id.* at 75.

<sup>128</sup> *Id.*

also contains no evidence that Mr. Paterno ever attended a meeting with Mr. Schultz or Dr. Spanier about the 2001 incident; that either Mr. Schultz or Dr. Spanier ever mentioned a conversation with Mr. Paterno on this matter; or that the files of either Mr. Paterno or Mr. Schultz<sup>129</sup> contained any instructions or questions posed by Mr. Paterno to the group.

The actual language in Exhibit 5G also does not support the SIC's contention that Mr. Paterno was part of any "decision" not to report the incident to a law enforcement or child protection authority. Exhibit 5G reads, "After giving it more thought and talking it over with Joe yesterday-- *I am uncomfortable* with what we agreed . . . ." <sup>130</sup> Mr. Curley uses the singular when discussing his proposed change in direction. If, as the SIC contends, Mr. Curley was so heavily influenced by Mr. Paterno then it would seem more likely that he would use the plural to demonstrate the fact that Mr. Paterno supported his proposal. Furthermore, there is no mention of what Messrs. Curley and Paterno discussed. The SIC's failure to interview any of the parties to the e-mail creates a gaping hole in its analysis. The Freeh Report fails to recognize or discuss this gap.

**c. *The Freeh Report's General Conclusions About Mr. Paterno Lack Support***

In addition to the specific allegations discussed above regarding the 1998 and 2001 incidents, several more general findings about Mr. Paterno permeate the entire Report. Unfortunately, many of the general conclusions made by the SIC regarding Mr. Paterno lack support and, as a result, raise significant questions as to their accuracy and credibility.

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<sup>129</sup> Mr. Schultz appears to have kept a rather extensive file labeled "Sandusky." See 2012 Grand Jury Presentment at 21-24. Many of the notes referenced in the Report appear to have come from that file. Freeh Report at 47, 70. One question raised by this file is, if Mr. Paterno was as involved in the collective group discussion as alleged in the Report, why would none of Mr. Schultz's notes reference Mr. Paterno's position or opinions. The Report never addresses this concern.

<sup>130</sup> Freeh Report at Ex. 5G (emphasis added).

**i. The Freeh Report's Conclusion That Mr. Paterno Wielded Excessive Influence at the University Is Not Supported by the Investigation Record**

The Freeh Report states without any credible evidence that Mr. Paterno wielded “excessive influence at the University.”<sup>131</sup> In support of this assertion, the Freeh Report replays an incident that occurred in the fall of 2000, where a temporary member of the Penn State janitorial staff allegedly witnessed Mr. Sandusky performing oral sex on a young boy.<sup>132</sup> This janitor, referred to in the Report as “Janitor A,” was a temporary employee and, though other janitors seem to have encouraged him to report the incident to authorities, Janitor A refused, saying, “No, they’ll get rid of all of us.”<sup>133</sup>

While fear of reprisal may be the reason why Janitor A did not report the incident to others at Penn State or state authorities, the Report makes the mistake of assuming that this impression of a temporary employee was an accurate assessment of what would have happened had the janitor reported the incident. The SIC offers no concrete evidence to support the Report’s contention that the janitor would have been fired. In actuality, the very facts reported by the SIC demonstrate the inaccuracy of Janitor A’s assessment. Mr. McQueary did report what he claimed he saw one year later and not only was he not fired, but he later received a full-time position as a coach for the Penn State football team.

The Freeh Report also relies on a University official’s perceived pressure from the Athletics Department during the discipline of certain football players in 2007. Again, the Freeh Report offers no specific evidence that Mr. Paterno was ever involved in actually reducing the discipline of any of his players, nor does the Report provide the identities of its sources. Other

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<sup>131</sup> *Id.* at 65 n.w.

<sup>132</sup> *Id.* at 65.

<sup>133</sup> *Id.*

than citing to generalized views of select, anonymous individuals who may or may not have had interactions with Mr. Paterno, the Freeh Report fails to support an overly broad conclusion about Mr. Paterno's influence at Penn State.

To the contrary, it is well known that Mr. Paterno was demanding of his players personally and academically and did not tolerate poor behavior.<sup>134</sup> This is best illustrated by the mantra he instilled over his many decades at the University of "Success with Honor."<sup>135</sup> This view of his football program was designed to shape young men into true student-athletes. During his tenure, Penn State annually had one of the highest graduation rates for its football players of any university in the country.<sup>136</sup>

**ii. The Freeh Report's Conclusion That Mr. Paterno Lacked Empathy for the Victims of Mr. Sandusky's Abuse Is Unfounded and Offensive**

The Freeh Report accuses Mr. Paterno and the other Penn State administrators of failing to demonstrate concern for the victims and placing the football program above all else.<sup>137</sup> The assertion that Mr. Paterno lacked empathy for children and/or victims of child abuse is contradicted by his long history of charitable work and dedication to the development of young men. Mr. Paterno dedicated his life to training student-athletes, and he spent his career trying to instill strong values and moral traits in those that went through his football program. He had a reputation for being dedicated to his players, even when it constrained the potential success of

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<sup>134</sup> Posnanski, *supra* note 57, at 107.

<sup>135</sup> Joe Paterno, Penn State Commencement Speech (June 16, 1973), *available at* <http://www.la.psu.edu/documents/Paterno1973CommencementSpeech.pdf>.

<sup>136</sup> Kayla Webley, *Paterno's Payback? Penn State Football is No. 1 in Academic Bowl*, TIME, Dec. 7, 2011.

<sup>137</sup> Freeh Report at 16; *see also* Freeh Remarks at 4 ("The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized. Messrs. Spanier, Schultz, Paterno and Curley never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest.").

his football team.<sup>138</sup> Mr. Paterno also committed himself to charitable activities, with a primary focus on children and young adults.<sup>139</sup> He gave more than \$4 million to charitable causes and helped raise an additional \$13.5 million to expand the Penn State library.<sup>140</sup> He made sure to participate in and support the Penn State dance marathon charity that raised money for children with cancer and his family remains active supporters of the Special Olympics program.<sup>141</sup> These examples do not point to a person who lacked any concern for children or who would simply choose to ignore the suffering of children. Instead, his professional dedication and charitable giving demonstrate that Mr. Paterno was deeply concerned with the welfare of children.

#### **4. Substantive Errors in the Freeh Report Call Into Question the Report's Accuracy and Credibility**

The Freeh Report's accuracy was further undermined by the SIC's issuance of an extensive errata report less than two weeks after the report was issued.<sup>142</sup> The errata sheet corrected not only several typographical errors, but also a substantive error that, in two instances, dramatically mischaracterized the meaning of an e-mail.<sup>143</sup> As originally written, the Freeh Report cited an e-mail to support the SIC's contention that Mr. Schultz was lying when he allegedly denied knowledge of the 1998 incidents in writing to Wendell Courtney, an outside lawyer to the University.<sup>144</sup> In fact, the SIC misquoted the e-mail: the document actually reflects

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<sup>138</sup> See Posnanski, *supra* note 57, at 103.

<sup>139</sup> *Id.* at 150, 204-05.

<sup>140</sup> *Id.* at 372.

<sup>141</sup> ESPN.com, *PSU Event Kicks Off Without Joe Paterno*, Feb. 21, 2012, available at [http://espn.go.com/college-football/story/\\_/id/7588755/penn-state-nittany-lions-dance-marathon-goes-joe-paterno](http://espn.go.com/college-football/story/_/id/7588755/penn-state-nittany-lions-dance-marathon-goes-joe-paterno).

<sup>142</sup> See Freeh, Sporkin & Sullivan LLP, *Errata Sheet* (July 24, 2012) [hereinafter *Errata Sheet*], available at <http://progress.psu.edu/assets/content/Louis-Freeh-Report-on-Penn-State-ERRATA-SHEET.pdf>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Mr. Courtney denying knowledge of the incident in an e-mail to Mr. Schultz.<sup>145</sup> Such significant substantive errors are indicative of a defective report.

**5. A Public Statement Made by Mr. Freeh Is Not Supported by His Report**

At the press conference releasing his Report, Mr. Freeh mischaracterized the content of a critical e-mail from February 2001.<sup>146</sup> This e-mail, as described by the Report, was one of the most important documents discovered during the investigation. As explained in more detail above,<sup>147</sup> Mr. Curley explains in the e-mail the plan regarding the possibility of reporting the 2001 shower incident.<sup>148</sup> At his press conference, however, Mr. Freeh uses the plural to join Mr. Paterno with Mr. Curley's actions: "After Mr. Curley consulted with Mr. Paterno, however, *they* changed the plan and decided not to make a report to authorities."<sup>149</sup> In actuality, the e-mail very explicitly uses the singular when referring to Mr. Curley's plan and does not state that Mr. Paterno joined in Mr. Curley's decision or that he was even aware of the decision.<sup>150</sup> The distinction is important because, without this connection, Mr. Freeh and his investigation fail to offer any evidence connecting Mr. Paterno to the decision not to report Mr. McQueary's observations to the authorities. Such a misstatement and use of "collective guilt" without foundation raise very serious concerns as to the credibility of the Report.

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<sup>145</sup> *Id.*; Freeh Report at 28, 52.

<sup>146</sup> Freeh Remarks at 4.

<sup>147</sup> *See supra* at 31-32.

<sup>148</sup> Freeh Report at Ex. 5G.

<sup>149</sup> Freeh Remarks at 4 (emphasis added).

<sup>150</sup> The e-mail states in part, ". . . I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. . ." Freeh Report, Ex. 5G. Unlike other errors made by Mr. Freeh at the press conference, this one was not corrected in the subsequent Errata Sheet. *See generally* Errata Sheet.

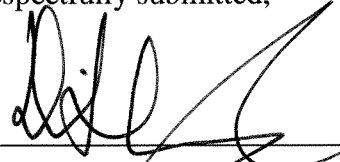
## V. Conclusion

When the evidence relied upon in the Freeh Report is considered in an objective manner, it is clear that findings in the Report are not accurate, supportable or fair. There is no direct evidence that Mr. Paterno was aware of the 1998 incident or the investigation that followed. Furthermore, there are no credible facts in the Freeh Report to support its principal finding against Mr. Paterno that he conspired with others to cover up the 2001 incident. A review of a chronology of relevant events shows this lack of support:

- Mr. McQueary witnessed a young boy and Mr. Sandusky in the shower in the locker room of the Lasch Building on the night of February 9, 2001. The SIC never interviewed Mr. McQueary.
- Mr. McQueary then described what he witnessed that night to his father, John McQueary, and McQueary family friend, Dr. Dranov. Neither was interviewed by the SIC. Both men testified that Mr. McQueary never told them that what he saw and heard in the locker room was sexual in nature. Both men also testified that they told Mr. McQueary to report the incident to Mr. Paterno.
- Pursuant to the elder McQueary and Dr. Dranov's suggestion, Mr. McQueary informed Mr. Paterno about the incident the next day. The SIC never interviewed Mr. Paterno.
- Mr. Paterno reported the matter to Messrs. Curley and/or Schultz, who both then spoke to Mr. McQueary. The SIC never interviewed either Mr. Curley or Mr. Schultz.
- Mr. Schultz then spoke to Mr. Courtney, an outside lawyer for the University, about the 2001 incident. The SIC did not interview Mr. Courtney.
- Mr. Schultz also spoke to Dr. Raykovitz at the Second Mile, who reportedly spoke to at least two other people affiliated with the charity. The SIC did not interview Dr. Raykovitz and there is no indication that the SIC interviewed the other two people he informed.

The fact that there is also no evidence that Mr. Paterno or anyone else ever instructed these individuals or others not to discuss the incident further undermines the finding that Mr. Paterno conspired with others to cover up the 2001 incident. This lack of evidence supporting the Report's most scathing findings and the serious flaws with respect to the process of the SIC's investigation cause me to conclude that the Report's findings concerning Mr. Paterno are unjust and wrong.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dick", written over a horizontal line.

Dick Thornburgh

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