

# **Penn Staters for Responsible Stewardship Review of the Freeh Report**

**September 13, 2012**

## FOREWORD

The members of Penn Staters for Responsible Stewardship (“PS4RS”) watched in horror as the allegations against, and trial of, Jerry Sandusky unfolded. We, like all others following these tragic events, were and are repulsed by the actions of Jerry Sandusky. Prior to those events, Jerry Sandusky was viewed as a hero by many across the nation and revered for his work with under-privileged youth. To learn the atrocities of his actions was simply revolting.

In this tragedy, which has now reached and impacted thousands of people, the victims of Jerry Sandusky should be first to be considered. Those young men were the victims of a monster. The criminal justice system has punished Sandusky, but no level of punishment against him will restore what was lost by those children, and for that, we all grieve.

Members of PS4RS, like all Penn Staters and people across the nation, most certainly have a heightened understanding of child abuse as a result of these horrific crimes. While there can be no positives from this tragedy, it is our sincere hope that the publicity of these events will lead our members, and the public at large, to be more vigilant than ever in taking steps to recognize, report, and prevent child abuse.

Unfortunately, the resultant actions of the Board of Trustees of the Pennsylvania State University (the “University” or “Penn State”), its agents and representatives, and now the National Collegiate Athletic Association (“NCAA”), have resulted in a compounding of this tragedy. Instead of moving forward to prevent abuse of this nature from ever occurring again, the University and the NCAA have foisted responsibility for the acts of Sandusky upon thousands and thousands of innocent people -- young and old, student and alumni, parent and child.

The University has cast blame upon four individuals (Tim Curley, Joe Paterno, Gary Schultz, and Dr. Graham Spanier), three of whom were unable to defend themselves. However, rather than pointing the proverbial finger at individuals with limited or no training in the recognition and prevention of child abuse, the University’s investigation should have focused on why and how **trained professionals** at the following entities failed to stop Sandusky, despite being placed on notice of his alleged actions in 1998 and/or 2001:

- (1) Pennsylvania Department of Public Welfare;**
- (2) Centre County Children and Youth Services;**
- (3) State College Borough Police Department;**
- (4) Centre County District Attorney's Office; and**
- (5) The Second Mile.**

Each of these law enforcement or child welfare agencies were placed on official notice, along with the University Police Department, of the events of 1998 and/or 2001. It is beyond comprehension how the public has been led to believe that there was a "cover-up" or "concealment" by representatives of the University. That assertion is wholly unsupported by evidence and, in fact, the evidence is completely to the contrary.

This critical point is worth noting again: in 1998, the Pennsylvania Department of Public Welfare, Centre County Children and Youth Services, the State College Borough Police Department, and the Centre County District Attorney were involved in an investigation of Sandusky's alleged activities in showering with a minor. The University fully cooperated with that investigation, including reporting the incident to the District Attorney. Yet, somehow, the fact that trained professionals were alerted to this possible inappropriate activity in 1998 and conducted a full investigation has been completely ignored and blame has been diverted to the University's football program on an alleged conspiracy of silence.

However, by diverting the attention and creating a frenzy directed at the Penn State football program -- which had no connection to the events of 1998 and 2001 -- the Board of Trustees, through the report issued by the law firm of Freeh, Sporkin & Sullivan ("FSS") (the "Freeh Report" or "Report"), has prevented a full and complete review of what actually went wrong and why trained professionals failed to recognize, intervene, and prosecute Sandusky years earlier. It is our sincere hope that, by drawing attention to the gross inaccuracies of the Freeh Report, the public at large will step forward and demand that the true facts be discovered, and that the true entities and individuals who failed in their law enforcement or child welfare positions will be identified and asked to answer for their inaction.<sup>1</sup>

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<sup>1</sup> It should be noted that PS4RS is not taking any position regarding the assignment of blame or responsibility. Such determination can only be made after a full investigation of why the various law enforcement and child welfare agencies failed to act in 1998. With the benefit of hindsight, of course it was an error. However, until the full facts and circumstances of 1998 are known, such conclusions are simply impossible to make.

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. KEY FAILURES OF THE FREEH REPORT ..... 3

III. SUMMARY OF PS4RS REVIEW OF FREEH REPORT ..... 5

IV. ANALYSIS ..... 15

    A. Specific Failures of the Freeh Report ..... 15

    B. General Failures of the Freeh Report ..... 19

    C. 1998 Incident ..... 32

    D. 1999 Retirement of Sandusky ..... 38

    E. 2001 Incident ..... 38

    F. 2001-2011 ..... 46

V. IMPACT OF UNIVERSITY’S PURPORTED ACCEPTANCE  
OF REPORT ..... 47

VI. CONCLUSION ..... 50

## **I. INTRODUCTION**

The purpose of this review and analysis is not to provide definitive answers into the actions of any person or entity from 1998 through 2011. Such a task would, of course, be impossible. Moreover, the purpose is not to evaluate or challenge the issues related to the Clery Act (Chapter 8 of the Freeh Report), internal University policies for protection of children (Chapter 9), or recommendations for University governance (Chapter 10) offered in the Freeh Report; those determinations are left for Penn State's leadership, after a full evaluation of the current policies and procedures, and the propriety of the recommendations.<sup>2</sup> Finally, the purpose of the PS4RS Review is not to "clear" the name of Tim Curley, Joe Paterno, Gary Schultz, or Graham Spanier.

Rather, the purpose of is to examine the Freeh Report critically -- to differentiate between facts supported by documented evidence, facts without evidentiary support, opinions of the author, and wholly unsupported conclusions reached by the author. The purpose of the PS4RS Review is to identify the shortcomings, inaccuracies, and perhaps more important, the gross incompleteness of the Freeh Report. In the view of PS4RS, this critical review should have been conducted by the University before the Freeh Report was released publicly.

Such a review would have allowed the University to recognize that FSS had either misunderstood the nature of an internal investigation, or chosen a path to achieve a desired -- albeit wholly unsupported -- result. Further, such a review would have enabled the University to direct that FSS should not substitute its personal speculation for fact, or report as "facts" certain items that were not so established.

We are compelled at this point, however, to raise a significant issue relative to the Report itself. At all times, it was been the assumption of the public, and of course

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<sup>2</sup> We do, however, have grave concerns regarding the NCAA's requirement -- and the University's apparent agreement -- that the University accept and implement **all** of the Freeh Report's recommendations as part of the Consent Decree executed by the NCAA and the University. As noted by a statement of past Chairs of the University's Faculty Senate,

[W]hat were suggested by the Freeh Group as possible corrective actions now are required by the NCAA. In our view, many of these seem to make good sense, but others misjudge the nature of academic institutions and may well be counterproductive. In any event, policy changes such as these should be made with careful deliberation and not by precipitous and heavy-handed fiat.

[Faculty Senate Statement, August 28, 2012].

has been reported by the media, that FSS was engaged by the University to conduct an independent investigation. According to Louis Freeh himself, that assumption was false.

During his press conference on July 12, 2012, Mr. Freeh made a stunning admission regarding the identity of his client: “[w]e have shown no favoritism toward any of the parties, *including the Board of Trustees, our client.*” [July 12, 2012, Freeh Opening Remarks at 2 (emphasis added)]. Thus, according to FSS, its client was the Board of Trustees, and not the University. This is not a difference without distinction, nor is it a matter of semantics.

If FSS was hired as counsel to the University, it owed its fiduciary duty to the University (and not to the Board of Trustees). If, however, FSS was hired as counsel to the Board of Trustees (albeit at the expense of the University), it owed its duty to the Board of Trustees (and not the University). This is a critical distinction, as the Report has been used by various third-parties as an indictment on the University. However, if as Mr. Freeh stated, his firm’s client was the Board of Trustees (and not the University), the entire context and goal of FSS in conducting the review and producing the Report would be altered.<sup>3</sup>

The PS4RS Review will outline, specifically, those areas of the Report that are not supported by fact or evidence. In particular, PS4RS will discuss the 1998 and 2001 Incidents, along with the purported findings by FSS. Next, the PS4RS Review will examine the ramifications of Penn State’s acceptance of the Freeh Report, including the imposition of draconian sanctions on the University by the NCAA, based, in substantial part, on the University’s purported acceptance of the findings of the Freeh Report. Finally, the PS4RS Review will conclude with a summary and a recommendation.<sup>4</sup>

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<sup>3</sup> As one example, counsel for the Board of Trustees might have an affirmative duty to its client, even to the detriment of the University. This would, of course, explain some of the incredible statements in the Report directed to the University itself. At a minimum, FSS and the Board of Trustees should produce all of the documents related to the engagement of FSS.

<sup>4</sup> Presently, the Freeh Report is available for purchase online at Amazon: [http://www.amazon.com/Penn-State-Report-Investigative-ebook/dp/B008R0DLNS#reader\\_B008R0DLNS](http://www.amazon.com/Penn-State-Report-Investigative-ebook/dp/B008R0DLNS#reader_B008R0DLNS) (last visited September 13, 2012). The fact that this report is being sold for profit is itself indicative of the problems associated with the entire investigation by FSS. PS4RS **condemns** any attempts by FSS, or others, to profit from this tragedy through the sales of this alleged investigative report.

## **II. KEY FAILURES OF THE FREEH REPORT**

PS4RS has conducted a review of the Freeh Report despite limited resources and limited access to documents and witnesses. However, even in light of those limitations, through a review of the Report, available documents and transcripts, and available witness interviews, PS4RS has identified the following substantial deficiencies in the Report:

- Failure to disclose the fact that FSS' client was the Board of Trustees, not the University, and, as such, FSS had a duty to act in the best interests of the Board of Trustees relative to the investigation and preparation of the Report;
- Failure to disclose that FSS sub-contracted a substantial portion of the investigation to the law firm of Pepper Hamilton, LLP, and to disclose the relationship between Pepper Hamilton and individual members of the Board of Trustees and their employers, including but not limited to Merck & Co., employer of Penn State Trustee Kenneth Frazier, Chairman of the Special Investigations Task Force;
- Failure to report the relationship between FSS and Pepper Hamilton, including August 2012 announcement that FSS had been acquired by Pepper Hamilton;
- Failure to consider inherent conflict of interest involving members of the Board of Trustees and Special Investigations Task Force in light of the Pennsylvania Department of Public Welfare's investigation of the 1998 Incident;
- Failure to report on written threat by the brother of an influential member of University Board of Trustees to publicly disgrace Mr. Paterno as evidence of bias;
- Failure to follow basic investigative and reporting procedures for an internal investigation;
- Failure to interview nearly every critical witness to the 1998 and 2001 Incidents before rendering the Report;
- Failure to properly address the facts and circumstances associated with the investigation of the 1998 Incident by the Pennsylvania Department of Public Welfare, the Centre County Children and Youth Services, the State College Borough Police Department, and the Centre County District Attorney;
- Misstatement of facts and complete lack of evidence in support of conclusion that Dr. Graham Spanier and Messrs. Tim Curley, Joe Paterno, and Gary Schultz concealed 1998 and 2001 Incidents;

- Failure to acknowledge that the University’s investigation of the 1998 Incident with multiple child welfare and law enforcement authorities, while Sandusky was still employed by the University, weighed heavily against a conclusion that these individuals intentionally concealed the 2001 Incident from authorities, when Sandusky was not employed by the University;
- Improper reliance of unauthenticated, incomplete, and out of context emails from 1998 and 2001;
- Misstatements of facts and unsupported conclusions regarding the knowledge of Mr. Paterno relative to the 1998 Incident;
- Failure to acknowledge that, within days of the 2001 Incident, at least 13 individuals, many of whom were outside the University, had knowledge, in whole or in part, of the incident that Mike McQueary reported;
- Failure to acknowledge that there was not a single witness interviewed who stated that there was an intent to conceal the 2001 Incident by anyone at the University;
- Failure to acknowledge that there was not a single document that indicated an intent to conceal the 2001 Incident by anyone at the University
- Failure to acknowledge that the decision by Mr. Curley to report the 2001 Incident to The Second Mile was wholly inconsistent with the idea of an intentional concealment, as alleged in the Report;
- Failure to consider the role of The Second Mile and failure of The Second Mile to act upon report of 2001 Incident;
- Failure to address information, including testimony of Dr. Dranov, which casts serious doubt on the credibility of Mike McQueary in connection with the 2001 Incident;
- Failure to consider that Mike McQueary’s statements to his father and Dr. Dranov, immediately after the incident, were likely to have greater reliability than statements made over 10 years later;
- Failure to acknowledge the fact that all email records of the University prior to 2004 were unavailable as the result of a computer system change;
- Failure to consult a psychologist or other medical professional for assistance in seeking to interpret the acts of various individuals in response to allegations of improper actions by Sandusky;
- Failure to acknowledge that FSS made personal findings and credibility determinations of witnesses who FSS did not even interview; and
- Failure to identify who waived the attorney-client privilege and authorized Mr. Freeh to conduct a nationwide press conference announcing the “findings” of the Report before presenting those findings to the University.

### III. SUMMARY OF PS4RS REVIEW OF FREEH REPORT

As set forth in detail below, PS4RS has concluded that the Freeh Report is replete with errors and has little to no credibility or reliability in its present form, for any purposes, as it relates to the background of the incidents in 1998 and 2001. A mere seven days after issuance of the Freeh Report, a court outright **nullified** the findings of another investigative report by Mr. Freeh's firm regarding the FIFA presidential nominee on the basis that the Mr. Freeh's report was "not complete or comprehensive enough to fill in the gaps in the record."<sup>5</sup> Likewise, the instant investigation was neither complete nor comprehensive, and most certainly failed to fill in the gaps in the record.

As aptly stated by the Honorable Timothy K. Lewis, who previously served as a Judge for the United States District Court and the United States Court of Appeals, regarding his view of the Freeh Report:

I know the difference between a balanced, fair and judicious assessment of evidence, on the one hand, and a flat-out distortion of facts so infused with bias and innuendo that it is, quite simply, unworthy of the confidence that has been placed in it, let alone the reported \$6.5 million the University paid for it. . . . There is nothing "full or complete" about the Freeh Report. Nor am I aware of any court in the land that would accept such unsupported and outrageous conclusions as "independent", or any judge who would put his or her name behind them. It is now apparent that Judge Freeh was not an "independent investigator", but a self-anointed accuser, who in his zeal to protect victims of wrongdoing from a monster, recklessly and without justification created victims of his own.

[August 22, 2012, Remarks of The Honorable Timothy K. Lewis at 2]. The comments of Judge Lewis are wholly consistent with the findings of PS4RS.

First, the manner in which the investigation was undertaken was altogether inconsistent with standard practice for conducting an internal investigation of this nature. Rather, it appears that the "investigative team" commenced and conducted

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<sup>5</sup> [*Bin Hammam Wins Appeal of Lifetime Ban in FIFA Bribery Case*, July 19, 2012, <http://www.usatoday.com/sports/soccer/story/2012-07-19/Mohamed-Bin-Hammam-wins-appeal-in-FIFA-bribery-case/56347494/1>].

this investigation in the manner of a criminal investigation.<sup>6</sup> Such a decision was simply erroneous and, as a result, the entire process presented a grossly flawed report.

In addition, where an investigator is faced with multiple potential outcomes based on disputed facts, the investigator should always advise its client of all possibilities and, if making a factual or credibility determination, advise the client of such, while fully exploring the basis for that determination and providing any alternate conclusions. There is no question that such a process was not undertaken in the Report and there is no explanation for this refusal to implement this most basic tenet of an internal investigation of this nature.

Second, there is no question whatsoever that the Report is incomplete. Only a few of the critical witnesses were even interviewed by the investigative team. Moreover, the investigative team made findings of credibility and intent without even interviewing witnesses who would have been necessary to any such findings. Instead of reaching such conclusions without any support, the Report should have advised the University that the unavailability of the vast majority of the necessary witnesses made that portion of the Report impossible to complete. By representing the investigative team's opinions as "fact," the Report has the effect of misleading the University, the public, and, as set forth below, the NCAA.

Third, the report is filled with errors of facts, misstatements of documents, unsupported conclusions, and rank speculation. As noted above, much of this is

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<sup>6</sup> According to the Report, none of the members of the investigative team "had any past or present professional relationship with the University." [Freeh Report at 11]. But less than six weeks after FSS released the Freeh Report, the Philadelphia-based law firm of Pepper Hamilton, LLP announced its acquisition of FSS. Pepper Hamilton lawyers serve or served as counsel to Merck & Co., whose CEO is Kenneth C. Frazier. In addition to being a member of the University's Board of Trustees, Mr. Frazier is the head of the Special Investigations Task Force, which retained FSS. Pepper Hamilton's August 2012 acquisition of FSS -- coupled with its ties to certain members of the Board of Trustees -- certainly calls into question the independence of FSS' investigative team.

Further, for months, the planned release of the Freeh Report had been August 2012. This was the position of FSS until early July 2012. Then, with no warning, and for no discernible reason, the release of the Report was rushed forward to July 12, 2012. A fair question arises whether the release of the Report was moved forward in an effort to have the Report released prior to the announcement of the acquisition of FSS by Pepper Hamilton, thereby avoiding the inevitable questions and concerns about the investigation being conducted by a law firm that has represented companies affiliated with individual Trustees.

because it was impossible to complete such an investigation and arrive at the conclusions reached by the investigative team, given the lack of availability of nearly every critical witness. Again, the Freeh Report should have acknowledged that it was impossible and advised the University that a further investigation would be appropriate once the criminal proceedings were closed and additional witnesses could be interviewed.

Furthermore, the Report's refusal to identify the witnesses it did interview, and those upon whose statements it relied, again is wholly inconsistent with a final report to be relied upon by a client. For example, it is quite possible that the University itself would have reason to disbelieve certain witnesses due to bias or other reasons; yet, by citing "unnamed" individuals and releasing these statements to the public, FSS allowed the public -- and as set forth below the NCAA -- to believe that the statements were accurate and accepted by the University. Similarly, the Freeh Report never identified whether other witnesses had provided conflicting information and upon what basis the investigative team made credibility determinations.

Next, the report is divided into "chapters" with certain "key findings" highlighted at the beginning. Incredibly, in many instances, the "key findings" are not supported by documented evidence within the Report itself, and worse yet, often represent the unsupported conclusions of the author. These "key findings" are neither "key" nor "findings", and should not have been represented as such. Instead, to the extent a summary was offered, each and every "finding" should have been supported by evidence, and the specific evidence in support should have been expressly identified. The average reader of the Freeh Report would simply review the "key findings" and treat them as fact. In reality, these "findings" were - - by the Report's own admission -- not based on documented evidence.

Additionally, the Report attempts to treat Dr. Spanier, Mr. Curley, Mr. Schultz, and Mr. Paterno as though they were a single person, each having the full knowledge of the other. In fact, there is no evidence to support such a finding. To the contrary, the evidence contained within the Report is just the opposite: each played a very different role and each had varying degrees of knowledge and involvement.

To ascribe the knowledge of all of them collectively to each of them individually was inappropriate. Rather, if FSS was insistent upon examining each individual, the Report should have considered each separately, as would be done in a proper internal investigation. However, to do so would have exposed the incredible lack of support for FSS' "findings". As a result, and since no other rational basis exists,

it stands to reason that the Freeh Report elected to lump the four individuals together as one to make it appear as though there was some evidence of a concerted effort on the part of the four individuals when, in fact, there was no such evidence.

Further, the Report placed undue and misplaced reliance on four emails from 1998 and 2001 that included Dr. Spanier and Messrs. Curley and Schultz. While the Report characterized those emails as the “most important documents in this investigation”, their value was, at best, limited, since the investigative team did not interview either Mr. Curley or Mr. Schultz and the emails in question were impossible to place into context, were incomplete in that portions were missing, and were wholly lacking in authentication. For FSS to rely so heavily on ambiguous emails represented a substantial departure from good practice and common sense.

A proper investigation would have considered the emails, discussed all possibilities relative to the emails, acknowledged the questionable authenticity of certain emails, recognized that the emails were incomplete and potentially out of context, and advised the University that, as a result of the above, and the fact that Messrs. Curley and Schultz were not interviewed, no determination could be made relative to those emails.

Finally, and perhaps most egregious, the Report reaches conclusions that are, at best, not supported by facts and, at worst, a deliberate attempt by the author to create a media frenzy designed to castigate four individuals. The Report bases its repeated accusations on the following conclusory statement:

Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders of the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.

[Freeh Report at 16]. This statement by FSS is, in a word, outrageous.

The Freeh Report does not offer even a shred of evidence to support such a damning allegation of intentional concealment and motive, and the actual facts and evidence set forth in the Report itself provide absolutely no basis for such a

conclusion.<sup>7</sup> Each and every part of the above passage is: (1) unsupported by actual evidence; and (2) impossible to conclude based upon the failure to interview critical witnesses. Incredibly, FSS did not even attempt to identify any support for such a statement.

The Report apparently rejects the testimony of Messrs. Schultz, Curley and Paterno and Dr. Spanier, in favor of conclusions FSS finds “more reasonable.” However, the Report never identifies the basis for those conclusions. A review of the Report, in its entirety, reveals no such basis, nor does FSS provide insight to its client into how it reached those conclusions, what it relied upon to do so, and why it rejected the testimony of the four individuals.

Undoubtedly, the clear intent of the Report was to suggest that Messrs. Curley, Paterno, and Schultz, and Dr. Spanier orchestrated a “cover-up” of the 1998 and 2001 Incidents. However, not only is there no evidence whatsoever in the Report to support such a conclusion, the evidence of record reveals the complete opposite.

As to 1998, it is beyond dispute that the matter was fully investigated by law enforcement and child welfare officials after it was reported by the University. The following law enforcement and child-welfare entities were involved in the investigation of the 1998 Incident: (1) University Police Department; (2) Centre County Children and Youth Services (“CYS”); (3) State College Borough Police Department; (4) Centre County District Attorney; and (5) Pennsylvania Department of Public Welfare (“DPW”).

After a complete investigation, these trained child welfare professionals and law enforcement officials concluded that the 1998 Incident did not warrant the filing of criminal charges against Sandusky. This decision was made **after** comprehensive interviews of two alleged victims, the mother of an alleged victim, and Sandusky, as well as evaluations of an alleged victim by trained professionals.

Moreover, several law enforcement officials were privy to a conversation wherein Sandusky admitted to showering with the victim and touching the victim while showering. Despite these admissions, a conclusion was made -- with absolutely no involvement by the University or any of its officials -- that criminal charges were

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<sup>7</sup> For instance, the Freeh Report did not even attempt to explain how it reached the conclusion that there was a concealment to “avoid the consequences of bad publicity.” The Report did not identify a single document, single statement, single comment, or single suggestion of **anyone** as to the “intent.” To make such an allegation and place it into the public domain as “fact” -- without a scintilla of support -- is simply shocking.

not proper.<sup>8</sup> It is simply beyond dispute that there was nothing alleged, or even suggested, that any of the four University officials “concealed” the events of 1998 given the involvement of **five different law enforcement and child welfare entities**.

As to 2001, the incident was reported by Mike McQueary to Mr. Paterno the day after he witnessed it. But within minutes of the incident, Mike McQueary reported it to his father, John McQueary, and to a family friend, Dr. Jonathan Dranov.<sup>9</sup>

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<sup>8</sup> Moreover, a decision was apparently made by DPW not to report the 1998 Incident to The Second Mile. This is significant because the victims were introduced to Sandusky through that charity. Thus, the state entity charged with protecting the welfare of children concluded that the events were not sufficient to warrant alerting The Second Mile. Despite this fact, which is ignored in the Report, the investigative team concluded that Mr. Paterno was derelict in not warning his other coaches as to Sandusky, notwithstanding the findings of law enforcement and child welfare agencies.

<sup>9</sup> As indicated below, just minutes after the 2001 Incident, Dr. Dranov met with Mike McQueary and has testified that he specifically asked McQueary multiple times what he “saw.” In response, McQueary never stated that he “saw” anything sexual but instead went back to what he “heard.” It was upon this statement that Dr. Dranov did not recommend McQueary report the matter to police, and instead, report it to Mr. Paterno. The Freeh Report does not even address its incomprehensible failure to interview Dr. Dranov or to review and cite his sworn testimony from the Sandusky trial. It is beyond question that the Freeh Report should have identified the fact that McQueary’s statements to Dr. Dranov (*i.e.*, that he “heard” something he thought was sexual) may well be at odds with what he purports to have told Messrs. Curley and Schultz. Similarly, McQueary’s statements to Dr. Dranov immediately after the incident were wholly consistent with what Messrs. Curley and Schultz have testified was relayed to them by McQueary approximately ten days later. Certainly, Dr. Dranov’s testimony would cast doubt upon the testimony of McQueary relative to what he told Messrs. Curley and Schultz.

At a minimum, the Freeh Report should have advised the University of this very significant inconsistency, to enable the University to weigh the prospects of whether McQueary has testified accurately as to what he advised Messrs. Curley and Schultz. Stated differently, the **entire prospective of the Report’s alleged concealment changes dramatically if it is determined that McQueary never told Messrs. Curley and Schultz that he saw something of a sexual nature**. Again, while impossible to establish one way or another, such a possibility is most real, particularly in light of Dr. Dranov’s testimony.

Moreover, the Freeh Report failed to address other significant issues related to Mike McQueary that will undoubtedly raise significant questions as to his credibility and the veracity of any statements he made under oath. This includes information from McQueary’s cell phone and/or computer. Since, according to the Report, the investigative team had “unfettered” access to University data, it most certainly would have been aware of any information contained on University-issued cell phones or computers related to McQueary. As such, if it is determined that

John McQueary and Dr. Dranov both advised Mike McQueary that, because he told them that he did not see anything of a sexual nature, he should report the matter to Mr. Paterno, as opposed to law enforcement officials.

After meeting with Mike McQueary, Mr. Paterno, in accordance with University policy, reported it to his superior, Mr. Curley, the following day. Mr. Curley immediately reported the matter to Mr. Schultz. On that same day, Mr. Schultz sought legal advice from the University's longtime outside legal counsel, Wendell Courtney. The following day, Mr. Curley and Mr. Schultz reported the matter to Dr. Spanier. Hours later, Mr. Schultz also contacted Thomas Harmon, former Chief of the University Police Department, regarding Sandusky.<sup>10</sup> Subsequently, Messrs. Curley Schultz met with Mike McQueary.

As a result, within 72 hours of the 2001 Incident, the following individuals had knowledge, in part, of the incident: (1) Sandusky; (2) alleged Victim 2; (3) Mike McQueary; (4) Dr. Dranov; (5) John McQueary; (6) Mr. Paterno; (7) Mr. Curley; (8) Mr. Schultz; (9) Attorney Courtney; (10) Dr. Spanier; and (11) Chief Harmon. Subsequently, an administrative assistant of Mr. Schultz, Joan Coble, was copied on emails outlining the plan for the University to confront Sandusky and report the matter to his employer, The Second Mile. Additionally, Mr. Curley reported the incident to Jack Raykovitz, Executive Director of The Second Mile.

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there was information on McQueary's cell phone or computer that raises serious concerns about his character for truth, the failure of FSS to advise the University of that fact is unconscionable. Similarly, if the investigative team failed to examine McQueary's University-issued cell phone or computer, such failure is inexcusable.

<sup>10</sup> The Freeh Report contained a single email from Chief Harmon to Mr. Schultz, dated February 12, 2001, wherein Chief Harmon stated, "Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged achives [sic]." [Freeh Report at Exhibit 5D]. No context is offered for this Exhibit within the Report. This is yet another dramatic example of the shortcomings of the Report: the issue of what Mr. Schultz told Chief Harmon about what he was seeking and the purposes for his request would absolutely bear significantly on the very issue that FSS was engaged to investigate.

In other words, if Chief Harmon was advised that there was another incident involving Sandusky (which is without question a reasonable conclusion), the entire suggestion of a "cover-up" would be eviscerated, since Chief Harmon was the highest ranking law enforcement official within the jurisdiction. However, by electing to release the Report without interviewing Chief Harmon and Mr. Schultz, FSS prevented those facts from being discovered and addressed. This failure was simply inexcusable. The Report should have noted that this was a paramount issue and that, until Messrs. Harmon and Schultz could be interviewed, no conclusion could be reached on the issue.

Thus, within several weeks of the 2001 Incident, it is undisputed that at least 13 people, and perhaps additional individuals, were aware of some incident involving Sandusky. Of all of those individuals with some knowledge of the 2001 Incident, the investigative team interviewed only one -- Dr. Spanier, who himself has condemned the Report as wholly inaccurate.

Yet, despite not interviewing a single other critical witness, the Report somehow reached the conclusion that Dr. Spanier and Messrs. Curley, Paterno, and Schultz engaged in some form of “concealment” or cover-up of that incident. Such a finding is wholly unsupported by the facts or common sense. It strains all credulity to suggest a cover-up when it is undisputed that many people outside of the University were aware of the 2001 Incident and not a single person stated that there was a plan or directive not to discuss the 2001 Incident.

It strains credulity to suggest a cover-up by Mr. Paterno when he contacted Mr. Curley and met with Messrs. Curley and Schultz to share what Mike McQueary told him. It strains credulity to suggest a cover-up by Mr. Schultz when he contacted outside legal counsel, Mr. Courtney, for advice.<sup>11</sup> It strains credulity to suggest a cover-up by Mr. Schultz when he contacted Dr. Spanier to advise him of the 2001 Incident and contacted the Chief of the University Police Department. It strains credulity to suggest a cover-up by Mr. Curley when he contacted Dr. Raykovitz to alert him as to the incident and advise him that Sandusky had been banned from bringing Second Mile children on campus. It strains credulity to suggest a cover-up by Messrs. Curley, Paterno, and Schultz when each met with Mike McQueary and, at no point, directed or suggested he not discuss the matter with anyone.<sup>12</sup>

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<sup>11</sup> It is significant to note that, although the investigative team did not interview Attorney Courtney, they were aware that Attorney Courtney had advised that, if he believed the 2001 Incident was “reportable,” he would have insisted that Mr. Schultz report it. Again, the Freeh Report completely omits this information, presumably because it would not support the suggestion that there was an intended concealment. The issue of what advice was provided by Attorney Courtney to Mr. Schultz is paramount to the crux of the issue. The fact that Attorney Courtney refused to be interviewed most certainly is significant and should have been much more prominently addressed in the Report. In sum, Attorney Courtney’s statements will be critical in assessing the propriety of the actions of the University in response to the 2001 Incident. Stated differently, the entire Report fails as to 2001 if the various individuals were acting consistent with the advice of the University’s counsel.

<sup>12</sup> Further, shortly after the 2001 Incident, Mr. Schultz met with John McQueary and Dr. Dranov on an unrelated matter. During the meeting, the 2001 Incident came up. However, at no point

In short, **there was simply not a shred of evidence to suggest any concealment or cover-up.** In hindsight, there was certainly an error in judgment by one or more individuals. Such an error -- when viewed with the knowledge that existed in 2001, as opposed to 2012 -- is far different than any deliberate attempt at concealment, as the Report suggests.

Additionally, before accusing Dr. Spanier and Messrs. Curley, Paterno and Schultz of concealing these allegedly horrific crimes, FSS should have engaged the services of a trained psychologist or other medical professional to provide guidance on this issue. For example, one question that should have been considered was this: is it likely that four highly-respected individuals, who in their entire lives had never been accused of a crime of any nature, would intentionally conceal a known crime against a child to protect the reputation of the University (or the University's football program)? Another question would be if there was an intent to conceal the events, would these individuals have contacted outside counsel, the police, and representatives of the The Second Mile? Moreover, would these individuals engage in such concealment when, less than three years earlier, some or all of the same individuals were aware of an outside investigation of Sandusky by law enforcement and child welfare professionals when Sandusky was actually employed by the University and the football program at the time? Consultation with a medical professional would undoubtedly shed light on these questions and others, and most certainly would have been invaluable to a true investigation where the individuals accused by FSS were not interviewed. The Report does not even address FSS' failure to conduct this most basic analysis.<sup>13</sup>

Simply put, the Report is flawed and incomplete as it relates to the 1998 Incident and the 2001 Incident. FSS should have advised the University that, because of an inability to access critical witnesses and evidence, it was impossible to reach any conclusions regarding the 1998 and 2001 Incidents at this time. Instead, by drawing unsupported conclusions and reporting them as facts, the Report has tainted the University, as well as Dr. Spanier and Messrs. Curley, Schultz, and Paterno. The resulting frenzy will impact the University and the upcoming trials of

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was there any suggestion or direction by Mr. Schultz for John McQueary or Dr. Dranov not to discuss the 2001 Incident. Again, these facts suggest the complete opposite of a cover-up.

<sup>13</sup> A trained psychologist or other medical professional could also have provided insight into the difficulties of individuals being told that someone well-known to them, who had been widely recognized for his work with children and his charity to aid disadvantaged children, may have been engaged in improper conduct with a child.

Messrs. Curley and Schultz, along with tens of thousands of students, alumni, and supporters of the University.

Worse yet, the Report has diverted attention from the real issue of why multiple law enforcement and child welfare agencies failed to take action upon being placed on notice and conducting a full investigation of Sandusky in 1998. It is incredible to believe that the Report vilified four individuals with no training in law enforcement or child welfare, while those professionals and entities who were so trained, and did investigate Sandusky, are ignored. There is, simply, no logical or rational explanation for the failure of the Report in this regard, other than an effort to reach a pre-determined outcome.

## **IV. ANALYSIS**

### **A. Specific Failures of the Freeh Report**

#### **1. Failure to Address The Second Mile**

Before addressing the substance of the Freeh Report, PS4RS believes it is important to discuss The Second Mile, the charity founded by Sandusky and the entity which is at the heart of this entire issue.

There has been some misunderstanding as to the scope and size of The Second Mile. Contrary to certain misconceptions, The Second Mile was a multi-million dollar charity that, according to its publications, served nearly 100,000 children throughout the Commonwealth of Pennsylvania through a variety of programs and services. The Second Mile had many employees, including trained professional counselors and psychologists. The Executive Director of The Second Mile was Dr. Jack Raykovitz. Dr. Raykovitz' wife, Katherine Genovese, was its Executive Vice-President. Many well-known business and political figures were members or honorary members of its board of directors.

Given the nature of the Freeh Report, it would have been prudent for the investigative team to contact current and former members of The Second Mile board of directors and employees for interviews. Such individuals most certainly could have provided significant background information on Sandusky and on The Second Mile and its operations. The failure to do so was without question an error.

Similarly, the investigative team should have reviewed closely the members of The Second Mile board of directors and the executives of The Second Mile. This is particularly true in light of the suggestion in the Report, albeit wholly unsupported, that decisions in 2001 were made for the benefit of the football program at the University. In fact, had Sandusky been charged criminally in 2001, the most direct and detrimental impacts would have been to The Second Mile. This is because, at the time of the 2001 Incident, Sandusky was retired from the University, had not been a coach for the football program for several years, had no role in the University or the football program, and was employed by The Second Mile. Moreover, the child in question had, apparently, been introduced to Sandusky via his role with The Second Mile. Thus, as the entity with much more at stake and which would have been responsible for his actions as its employee, The Second

Mile had far more reason than the University (and most certainly the football program) to be concerned about the ramifications of Sandusky's actions.<sup>14</sup>

It is, simply, inexcusable, for FSS not to have interviewed Dr. Raykovitz. There is no question that Dr. Raykovitz was told of the incident in 2001 by Mr. Curley.<sup>15</sup> Moreover, it does not appear that Dr. Raykovitz told his board of directors, nor reported the matter to CYS or DPW. The question of "why" most certainly is directly relevant to this investigation and the conclusions reached by FSS. If Dr. Raykovitz refused to be interviewed, FSS should have addressed that fact in more detail and acknowledged that such refusal prevented completion of the Report or prevented certain determinations to be made.

## 2. Failure to Investigate the University Board of Trustees

The Freeh Report spent some time addressing, in general fashion, the actions and failures of the University Board of Trustees in connection with the incidents in question.<sup>16</sup> However, the Report failed to address or even consider any potential

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<sup>14</sup> While PS4RS does not suggest that there was a "cover-up" at The Second Mile, it is worth noting that various former board members of The Second Mile have raised public concerns about the fact that Dr. Raykovitz was notified by Mr. Curley of the 2001 Incident and that Sandusky was barred from bringing children onto University property, but that Dr. Raykovitz failed to alert members of his board. [*See Ex-Second Mile officials: CEO to Blame?*, December 19, 2001, [http://espn.go.com/college-football/story/\\_/id/7368256/ex-second-mile-board-members-level-blame-jerry-sandusky-scandal](http://espn.go.com/college-football/story/_/id/7368256/ex-second-mile-board-members-level-blame-jerry-sandusky-scandal).].

At a bare minimum, the Report should have explored the issue of why the matter was not reported by The Second Mile to its board or authorities and, if FSS did believe there was an intentional concealment, it should have explored the possibility that any concealment was for the benefit of Sandusky's charity and employer The Second Mile (and its board members or employees), as opposed to Sandusky's then former-employer, the University. Instead, the Report offered a wholly unsupported conclusion of concealment to protect the University and the football program.

<sup>15</sup> It should also be noted that, according to the Report, Dr. Raykovitz had a consulting contract with Centre County Children and Youth Services ("CYS") at the time of the 1998 Incident. This was identified in the Report as a "conflict" which, among others, caused CYS to refer the investigation to DPW. [Freeh Report at 43]. However, according to the Report, the counselor utilized by DPW also performed services for CYS at the time. [*Id.*].

<sup>16</sup> Although the Freeh Report quotes Trustee Frazier as stating "[n]o one is above scrutiny" [Freeh Report at 11], it appears members of the Board of Trustees received special consideration. For example, Dr. Spanier advised FSS that he told four Trustees about the status of the Sandusky investigation at a dinner the evening before the May 12, 2011 Board meeting. [Freeh Report at

conflicts of interest, whether legal or personal, involving the individual members of the Board of Trustees<sup>17</sup>, The Second Mile, Board Members of The Second Mile, and Messrs. Curley, Paterno, Schultz, and Spanier. Such analysis should have been paramount to the investigative team.

As merely one glaring example, the Report failed to address in its findings that, in 2007, the brother of an influential member of the Board of Trustees made email threats to publicly disgrace Mr. Paterno before Mr. Paterno died. The individual was clear with the threats and provided specific details on how he intended to accomplish his goal. Within months of that email, the brother of that individual was appointed to a position on the Board of Trustees and was instrumental in the termination of Mr. Paterno in November 2011.

There was, simply, no reason that the investigation would not have disclosed that fact, and the investigators most certainly should have considered it, reported it to the University, and included it within the Report to evidence potential bias. This is particularly true if the individual making the threats had any connection to Sandusky. There is no evidence contained within the Report that the investigative team even interviewed the Board Member, or the brother of the Board Member, regarding this issue. Such failure, if true, was a gross error in connection with this investigation.

Moreover, and as noted above, Pepper Hamilton was sub-contracted by FSS to perform a substantial portion of the work associated with the investigation. It is unclear whether this information was disclosed to the University or withheld, but in either event it should have appeared in the Report, particularly to the extent that any members of the Board of Trustees, or the entities with whom they are affiliated, received legal services from the law firm of Pepper Hamilton.

Another issue that should have been examined was the relationship between the Commonwealth of Pennsylvania, the Board of Trustees, and the 1998 Incident. As discussed above, the Commonwealth's Department of Public Welfare -- the statewide agency charged with investigation of allegations of abuse against children -- assumed control of the investigation of the 1998 Incident, concluded

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87]. However, the Report failed to name the four Trustees who dined with Dr. Spanier on May 12, 2011.

<sup>17</sup> Since as Mr. Freeh stated, FSS viewed the Board of Trustees as its client, as opposed to the University, this should come as no surprise. [Freeh Opening Remarks at 2].

that no crime occurred, presumably concluded that Sandusky was not a risk, and elected **not** to inform The Second Mile of the investigation.

The Governor of Pennsylvania is a member of the Board of Trustees. The Governor also appoints six members of the Board of Trustees. Further, pursuant to the Charter of the University, the Secretary of Education of the Commonwealth, the Secretary of Agriculture of the Commonwealth, and the Secretary of Conservation and Natural Resources are ex-officio members of the Board of Trustees. Ronald J. Tomalis, who is the Commonwealth's Secretary of Education and a member of the University Board of Trustees, was the Vice-Chairman of the Special Investigations Task Force.

Clearly, therefore, an inherent conflict exists between the Commonwealth of Pennsylvania and the University as it relates to the events of 1998 and 2001 and, specifically, any responsibility or liability as a result. Moreover, there is a wholly inexplicable failure of the Freeh Report to address, consider, and make conclusions regarding the Commonwealth's potential failures (via the Department of Public Welfare) related to the 1998 Incident (and instead casting blame for 1998 on the University officials who were not involved in nor made determinations regarding, the investigation).<sup>18</sup>

Stated differently, certain members of the Board of Trustees had, via their direct employment with and relationship to the Commonwealth, an inherent conflict in any review of failures associated with the 1998 and 2001 Incidents. Specifically, such members of the Board of Trustees most certainly would have a vested interest in blame (and liability) for failures post-1998 being foisted upon the University instead of the Commonwealth of Pennsylvania. At a minimum, the Report should have disclosed this conflict and insured that no member of the Board of Trustees who had such an inherent conflict was, in any way, involved in the Report.<sup>19</sup>

PS4RS is unable to determine whether additional examples of conflicts of interest or failure to disclose exist as related to the remaining members of the Board of

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<sup>18</sup> Again, this failure may be explained, in part, by the fact that FSS viewed the Board of Trustees as its client, instead of the University, thereby rendering its duty of loyalty to the Board and not the University.

<sup>19</sup> The same holds true for the law firms (FSS and Pepper Hamilton) conducting the investigation and drafting the Report. If either of those firms had any connection to the Commonwealth of Pennsylvania as Counsel, or were financial supporters of any statewide elected position, such information most certainly should have been disclosed to the University and in the Report.

Trustees. Only a formal investigation by a truly independent outside investigative agency with appropriate subpoena powers will discover and bring those issues to light. That said, there can be no doubt that the Report failed to fully disclose, consider, address, and weigh these critical issues related to the Board of Trustees.

## **B. General Failures of the Freeh Report**

### **1. Failure of FSS to Disclose Relevant Information**

On November 21, 2011, a Special Investigations Task Force of the University retained the private law firm of Freeh, Sporkin & Sullivan (“FSS”) as “Special Investigative Counsel.” According to the Freeh Report, the law firm was asked to: (1) investigate the alleged failure of University personnel to respond to and report sexual abuse by Sandusky; (2) investigate circumstances under which such abuse could occur in University facilities or under University youth programs; (3) provide recommendations regarding University governance, oversight and administrative policies and procedures to assist in the prevention and response to such activities in the future. [Freeh Report at 8].

While this was the outline identified by FSS, neither FSS nor the University has produced the applicable engagement letter that described the duties of FSS. Moreover, neither the University nor FSS has made available the materials submitted by FSS in response to a request for proposals or statement of qualifications. FSS does not, in the Report, outline its qualifications to conduct the investigation, nor does it identify who actually conducted the interviews and prepared the report. The identity and experience of the individuals conducting the interviews of witnesses, review of documents, and drafting of the Report would and should be of paramount importance to the University.<sup>20</sup>

Moreover, PS4RS has become aware that a substantial portion of the work performed in this investigation was not completed by FSS. Instead, FSS sub-contracted work to another private law firm, Pepper Hamilton. Initially, it is unclear whether this decision was shared with, and approved by, the University. Of equal importance, however, is why this law firm was involved in the investigation, its role in the investigation, and the experience and background of

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<sup>20</sup> There has been a misconception that, because Louis Freeh was previously employed by the Federal Bureau of Investigation, that entity was, somehow, involved in the investigation. **That is wholly inaccurate.** Mr. Freeh is a lawyer in private practice and was involved in this matter as such.

the attorneys involved. At a minimum, the Report should have made clear that a significant portion of the work was the product of contracted lawyers, as opposed to representatives of FSS.

It is particularly troubling that, in light of FSS' attempts to classify itself as "independent" from the University, it failed to disclose the involvement of Pepper Hamilton, and the relationship of that law firm to Merck. As noted, Pepper Hamilton attorneys have served as legal counsel to Merck. The CEO of Merck is Kenneth Frazier, a member of the University Board of Trustees and Chair of University's Special Investigations Task Force, which engaged FSS. At no point was that relationship disclosed in the Report.

Instead, the Report stated that "[n]one of the Special Investigative Counsel's attorneys or investigators attended The Pennsylvania State University or had any past or present professional relationship with the University." [Freeh Report at 11]. By confining this statement to "Special Investigative Counsel", which it unilaterally defined as "Freeh, Sporkin & Sullivan", the Report avoided disclosure of the role of Pepper Hamilton and that firm's connection to individual members of the Board of Trustees and the entities with whom they are affiliated. Similarly, by confining the statement of "professional relationship with the University", the Report avoided disclosure of any relationship between FSS and Pepper Hamilton and members of the University's Board of Trustees or their representative employers.

More recently, but equally troubling, it was announced on August 28, 2012, that Pepper Hamilton had agreed to acquire the law firm of Freeh, Sporkin & Sullivan. While the details were not shared, it is unclear whether FSS withheld this information from the University in connection with the issuance of the Report or whether it was disclosed prior to issuance.

In addition, the University has not disclosed the manner in which FSS was selected. Specifically, the University has not identified who recommended FSS, what other private law firms were considered, who considered whether FSS had the necessary qualifications, expertise, and manpower to conduct an internal investigation of this nature, and why FSS was selected. Moreover, the University has never confirmed the scope of the relationship.<sup>21</sup>

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<sup>21</sup> While the University has refused requests for information regarding the contract with FSS, according to the Report someone purportedly waived the attorney-client privilege and gave authority for a partner at FSS to hold a national press conference at the same time that the Report

## 2. Failure to Conduct a Proper Internal Investigation

It is important to outline that the investigation undertaken by FSS was not, in any way, a criminal investigation. Rather, the investigation by FSS was an internal investigation regarding the actions of various University employees in response to alleged reports of incidents in 1998 and 2001. This is a critical distinction, as internal investigations differ substantially from criminal investigations.

A proper internal investigation requires, at its core, the interview of every relevant witness. Many times such interviews are the starting point of the investigation, but in every instance, a full and complete report mandates the interview of relevant witnesses.

In those circumstances where a relevant witness cannot be interviewed, the investigation must disclose that fact. If that witness is critical to the investigation, such fact must be outlined in the investigation and any conclusions must be with the caveat that the investigation is not complete, and cannot be completed, because of the unavailable witness.

Moreover, where an investigator is faced with multiple outcomes based upon either credibility determinations or factual determinations, it is imperative that the investigator set forth, in detail, each possibility and the support for each. In the event that the investigator is making a credibility determination, such finding must be specifically noted, including the identification of the specific basis for the finding. Similarly, if the investigator is making a factual finding, such finding must set forth the reasons for the finding.

Here, the Report is replete with evidence and suggestion that it was not completed as an appropriate internal investigation. In such investigations, the individuals conducting the investigation and reporting findings would not normally use inflammatory or suggestive language. Instead, such a report would largely outline the issues, set forth the facts, identify the possible outcomes, and discuss the basis for each. There would be no reason for a true investigation to utilize words like “total and consistent disregard”, “saddening”, and “striking lack of empathy.”

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was released, to announce FSS’ conclusions. Such action is simply unprecedented in connection with an internal investigation. FSS’ failure to identify who waived that privilege, the scope of the waiver, and the reasons for the national press conference are telling. In addition, the timing of the press conference prevented any attendees from reviewing the Report in detail, raising substantive questions, or challenging the basis for the Report’s conclusions.

Such words, while appropriate in a legal brief or argument, or in a critique, are wholly inappropriate and unnecessary in an investigative report.

Unlike a criminal investigation, where a determination **must** be reached (*i.e.*, either an individual is charged with a crime or not), there are often instances where an internal investigation cannot reach a final determination. This is true where, for example, witnesses are unavailable or refuse to cooperate, or where information and records are simply not available. In those circumstances, which occur regularly in internal employment-based investigations, the only prudent conclusion is that the investigation simply cannot make a final determination. Such a conclusion is not wrong; it is the only possible outcome.

In the instant matter, it is beyond question that FSS was not able to make a final determination as it relates to the first stated task of the Report: to investigate the events of 1998 and 2001. Put simply, the investigators did not have access to **any** of the relevant and critical witnesses. The Freeh Report, instead of offering the unsupported conclusions of the authors, should have noted that determinations could not be made based upon the lack of information and lack of availability of witnesses absolutely crucial to the investigation.<sup>22</sup> Not only would this have been an acceptable outcome, it most certainly would have been the only proper conclusion.

### 3. Failure to Interview Key Witnesses

In his Opening Remarks offered simultaneously with the issuance of the Report, Mr. Freeh stated that his law firm was “retained . . . to conduct a full, fair and completely independent investigation into the facts and circumstances raised by the Grand Jury report and the criminal charges against former Assistant Coach Gerald Sandusky.” [Freeh Opening Remarks at 1]. Mr. Freeh further proffered that his investigative group took steps to insure “the thoroughness of our investigation”, and that “[w]e analyzed over 3.5 million email and documents. . . .” [Freeh

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<sup>22</sup> In addition to its unsupported conclusions, FSS has already made multiple amendments to the Freeh Report. Typographical errors, while not preferred, can happen. Substantive errors are **absolutely unacceptable** in an investigation of this nature, given the time and expense involved. The most glaring error related to an email exchange between Mr. Schultz and Attorney Courtney. The Freeh Report stated that Mr. Schultz denied any knowledge of the 1998 Incident in an email to Attorney Courtney. [Freeh Report at 28, 52]. In fact, it was Attorney Courtney who denied any knowledge of the 1998 Incident in an email to Mr. Schultz. [Freeh Report Errata Sheet at 1].

Opening Remarks at 1]. The Report also championed the fact that it conducted over 430 interviews.<sup>23</sup>

However, the most striking deficiency associated with the Freeh Report was the failure of the investigators to interview many, if not all, of the key witnesses as it relates to the University.<sup>24</sup> The Freeh Report recognized this fact, noting that, in perhaps the single biggest understatement in the sad history of this event, “the information these individuals could have provided *would have been pertinent to the investigation. . .*” [Freeh Report at 12 (emphasis added)]. In reality, it was **impossible** to complete the investigation without the interviews of such witnesses.

Rather than concluding that as a result of its inability to obtain critical information, no conclusions could be definitively reached, FSS offered its own opinions, without support, of the events. In doing so, FSS characterized its report, despite its admitted shortcomings, as a “fair, objective and comprehensive analysis of the facts.” [Freeh Report at 12]. Such a self-serving conclusion, in addition to being wholly unsupported by the facts, was impossible given the admitted inability to obtain “pertinent” information and statements.

With respect to the 1998 Incident, FSS failed to interview any of the following individuals, to our knowledge:

1. Jerry Sandusky – former University Assistant Football Coach

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<sup>23</sup> It is more than significant to note that, of the 430 interviews conducted as related to the University’s response to the 1998 and 2001 Incidents, only one (Dr. Spanier) had any direct knowledge of the University’s role. As is well-documented, Dr. Spanier vehemently denied the Report’s allegations, recitation of facts, and statements of intent. Since Dr. Spanier was the **only** witness interviewed with knowledge, it is incomprehensible that the Freeh Report could have reached the precise opposite conclusions as to the factual events. This unsupported leap in logic is rendered even more unconscionable by the fact that the Freeh Report refused to identify the individuals upon whom it relied in making these conclusions. Undoubtedly, the University was entitled to know the basis of FSS’ findings and opinions, and the failure of FSS to report that basis once again casts serious doubt on the credibility of the investigation as a whole.

<sup>24</sup> The Report also stated that “[n]o party interfered with, or attempted to influence, the findings in this Report.” [Freeh Report at 12.] However, the Report acknowledges that FSS did not interview certain individuals at the request of the Pennsylvania Attorney General. [Freeh Report at 12.] Although the Attorney General’s request may have been reasonable, such request is an attempt to influence the findings of the Report since it resulted in many key individuals not being interviewed by FSS. This was, of course, an additional reason to avoid a rush to issue the Report.

2. Gary Schultz – former University Senior Vice President, Business and Finance
3. Tim Curley – former University Athletic Director
4. Mother of 1998 Victim – mother who reported 1998 Incident to police
5. 1998 Victim – victim whose mother reported 1998 Incident to police
6. Second 1998 Child – friend of 1998 Victim who was interviewed by police in 1998 and described shower incident with Sandusky nearly identical to 1998 Victim
7. Thomas Harmon – former chief of University Police Department
8. Ray Gricar – former District Attorney of Centre County who concluded that no criminal charges were appropriate for 1998 Incident
9. Karen Arnold – former Assistant District Attorney for Centre County who was initially assigned to 1998 Incident
10. Alycia Chambers – Psychologist of 1998 Victim who prepared report in 1998 on Sandusky
11. John Seasock – Pennsylvania Department of Public Welfare Counselor who evaluated 1998 Victim
12. State College Police Department Police Officer – member of State College Police Department was present and hiding in closet of room of 1998 Victim when Sandusky met with mother of 1998 Victim
13. John Miller – Centre County CYS Caseworker involved in 1998 investigation
14. Wendell Courtney – outside counsel to University, 1980-2011
15. Joe Paterno – former University Football Coach

16. Jack Raykovitz, Ph. D – former Executive Director of Second Mile and Psychologist

17. Katherine Genovese – Executive Vice President of Second Mile; spouse of Dr. Raykovitz<sup>25</sup>

With respect to the 2001 Incident, FSS failed to interview any of the following individuals, to our knowledge:

1. Jerry Sandusky – former University Assistant Football Coach

2. 2001 Victim – referred to as “Victim 2” in the Grand Jury Presentment; upon information and belief is and was known to prosecutors and the FSS investigative team

3. Mike McQueary – former University Assistant Football Coach and witness to 2001 Incident

4. John McQueary – father of Mike McQuery; first person contacted by Mike McQueary after 2001 Incident

5. Jonathan Dranov, M.D. – close family friend of McQueary who was present for meeting with Mike McQueary and John McQueary on February 10, 2001 immediately after 2001 Incident

6. Joe Paterno – former University Football Coach

7. Tim Curley – former University Athletic Director

8. Gary Schultz – former University Senior Vice President, Business and Finance

9. Thomas Harmon – former chief of University Police Department

10. Wendell Courtney – outside counsel to University, 1980-2011

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<sup>25</sup> It also is unclear whether FSS interviewed Jerry Lauro, the DPW representative who took over the investigation from CYS due to a conflict of interest, or Detective Schreffler of the University Police Department.

11. Joan Coble – Assistant to Gary Schultz; copied on February 2001 emails
12. Jack Raykovitz, Ph. D. – former Executive Director of Second Mile and Psychologist
13. Katherine Genovese – Executive Vice President of Second Mile and spouse of Dr. Raykovitz
14. Chairman and all members of The Second Mile Board of Directors – knowledge of incident and information related by Dr. Raykovitz to Board

Some of these individuals declined to be interviewed on the advice of counsel or otherwise (Schultz, Curley, Sandusky, Courtney, and Raykovitz). According to the Report, “[a]t the request of the Pennsylvania Attorney General, [FSS] did not interview former Pennsylvania State University Director of Public Safety Thomas Harmon or former coach Michael McQueary, *among others*.” [Freeh Report at 12 (emphasis added)]. The Report does not identify the “others” who were not interviewed at the request of the Attorney General, nor does it offer reasons why they were not interviewed.<sup>26</sup> Moreover, the Report does not offer any explanation for the apparent failure to interview John McQueary and Dr. Dranov.<sup>27</sup>

Moreover, Graham Spanier was interviewed on July 7, 2012, only five days before issuance of the Freeh Report. While PS4RS is not aware of the content of that interview, Dr. Spanier issued a detailed letter condemning the Freeh Report for failing to address issues raised by Dr. Spanier, ignoring information provided, and failing to consider additional evidence.<sup>28</sup>

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<sup>26</sup> If the reason proffered by the Attorney General was the impending trials of Messrs. Schultz and Curley, it is incomprehensible why those same impending trials, and therefore the unavailability of those critical witnesses, would not have caused FSS to conclude that its investigation must also await completion of the criminal proceedings.

<sup>27</sup> The word “apparent” is used because there is no indication in the Report that FSS interviewed John McQueary or Dr. Dranov, each of whom were significant to the events that transpired in 2001. If, in fact, neither was interviewed, the Report should have provided detailed reasons why that was the case. If they were interviewed, the nature of their responses would undoubtedly be important to determining the first stated goal of the investigation: to determine whether there was an alleged failure to report suspected child abuse in 2001.

<sup>28</sup> Dr. Spanier advised the investigative team that, in connection with his federal security clearances, the federal government had conducted a comprehensive review and analysis of Dr. Spanier related to the 1998 and 2001 Incidents. He further advised the investigative team to

It is simply impossible that the Freeh Report could reach the conclusions that it reached regarding the 1998 and 2001 Incidents without interviewing nearly every key witness. This was the equivalent of conducting an investigation into an automobile accident, knowing there were multiple witnesses to the accident, and not interviewing those witnesses, yet reaching a definitive conclusion on the cause of the accident. To suggest that such an investigation has any semblance of credibility is preposterous; the same is true here.

There can be no dispute that FSS erred when it failed to advise the University that it could not reach all determinations in its investigation. It would have been prudent, and expected, for FSS to reach such a conclusion, given the complete inability to interview the only witnesses who could possibly cast light on the very issue being investigated. Instead of proceeding in a manner consistent with standard practice, FSS elected to manufacture conclusions, many times with limited or no factual support whatsoever. Such an approach neither comports to even basic internal employment investigations, nor with common sense. On that basis alone, the University should have rejected this portion of the Freeh Report in full.

The only reasonable determination that could have been reached by FSS would have been: (1) that the investigative team was unable to reach any conclusions regarding the 1998 and 2001 Incidents because of an inability to interview any of the key witnesses; (2) that the investigative team was unable to draw any conclusions regarding any of the 1998 and 2001 emails because they had only hard copies of the emails, had only limited portions of emails, had no way of verifying the accuracy or authenticity of the emails, had no access to the electronic versions of the emails or any of the raw data related to the emails, and had no way of confirming the intent and meaning of the emails; (3) that all relevant University emails prior to 2004 are irretrievable as a result of a change to the University computer system; and (4) that any conclusions regarding the 1998 and 2001 Incidents would necessarily have to await completion of all pending criminal proceedings in the hope that more information and more access to the critical witnesses would become available.

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contact the federal investigators regarding their findings, as they bore directly on the issues involved in the Report. Inexplicably, FSS failed to explore that issue, failed to seek the benefits of those findings, and failed to consider that issue as part of the Report. There simply can be no doubt that information discovered during the federal government's investigation would have shed light on many of the issues presented in the Freeh Report.

Put simply, the investigative team should have advised the University that, because of the gross incompleteness of the information available and the paucity of available witnesses, no conclusions or determinations could reasonably be drawn as to the 1998 and 2001 Incidents. The failure to do so, and instead to present opinion and supposition as fact, was wholly improper to say the least.

#### 4. Improper Reliance Upon Grand Jury Presentment

The Freeh Report relied upon the grand jury presentment issued on November 4, 2011. However, the Report fails wholly to examine the gross inaccuracies of, and the inherently untrustworthy nature of, Pennsylvania grand jury proceedings for anything other than determining whether to pursue criminal charges.

Perhaps most important, the Freeh Report failed to address the fact that a grand jury presentment is not evidence and is not a transcription of testimony. In fact, a grand jury presentment is not even admissible in judicial proceedings. There is no opportunity for cross-examination, nor any ability of a witness to object to an improper or misleading question. Moreover, the grand jury presentment is drafted by the prosecutor, who is merely seeking to have the grand jury recommend the indictment of a target.

In the instant matter, the grand jury process, and the presentment that was issued, was terribly flawed, and the Freeh Report, at a minimum, should have considered that fact.

First, the grand jury presented grossly misstated the testimony of Mike McQueary. The grand jury presentment stated as follows: “He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky. . . . The next morning, a Saturday, the graduate assistant telephone Paterno and went to Paterno’s home where he reported what he had seen.” [Grand Jury Presentment at 6-7].

Mike McQueary himself testified at the preliminary hearing for Messrs. Schultz and Curley that “I have never used the word anal or rape in this – since day one.” [December 16, 2001, Preliminary Hearing Transcript at 72]. Moreover, he specifically testified that, contrary to the suggestion in the grand jury presentment, he had never told Mr. Paterno any of the specifics of what he believed he saw. [*Id.*].

Additionally, the grand jury that issued the presentment was not the same grand jury that heard Messrs. Schultz, Curley, and McQueary testify. It simply strains credulity and good reason that a grand jury that did not hear or see those individuals testify could make such unbelievable credibility determinations. How, for example, could the grand jury find McQueary “extremely credible”, [Grand Jury Presentment at 8], when, in fact, they never once saw or heard him testify.<sup>29</sup>

Again, the Freeh Report should have identified that fact and, at a minimum, made clear under no circumstances would such credibility determinations serve as the basis for any work in the Freeh Report. Not only did the Freeh Report fail to make such statement, it purported to rely upon the grand jury presentment. Such reliance was wholly misplaced.<sup>30</sup>

## 5. The Press Conference

On July 12, 2012, Mr. Freeh held a press conference where he purported to summarize the investigation and report the findings. Such an event was, without question, wholly inconsistent with the conduct of an appropriate internal investigation.

Notwithstanding the various misstatements of fact in the press conference, the concept of releasing the written report, and a written summary, immediately prior to a press conference where FSS’ client had not even had an opportunity to review the Report, was misguided.

Initially, Mr. Freeh made the following statement: “To be absolutely clear, this public release is the first time anyone outside of our investigation team has seen

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<sup>29</sup> As related to Mike McQueary, the Report failed to consider repeated inconsistencies in his testimony related to the 2001 Incident, most particularly his initial testimony that the incident occurred in March 2002, as opposed to February 2001, and the varying explanations of what he saw or heard. The Report should have addressed those issues and raised them for the University to consider relative to making credibility determinations regarding what information was provided to Messrs. Schultz and Curley by Mike McQueary regarding the 2001 Incident.

<sup>30</sup> Equally misplaced was the Report’s reported reliance on “statements” of an attorney for The Second Mile regarding what Dr. Raykovitz allegedly told the attorney. For FSS to even include statements made to an attorney by a witness who refuses to be interviewed is absurd; for FSS to rely upon such statements as a factual basis for its Report is **inexcusable**. [Freeh Report at 78 (“Counsel for the Second Mile told the Special Investigative Counsel. . .”).]. The same is true with respect to the Report’s reliance on statements from Sandusky’s counsel regarding a meeting between Curley and Sandusky in March 2001. [Freeh Report at 77].

the report.” [Freeh Opening Remarks at 2]. He went on to state, however, in addressing the various leaks that had arisen relative to the report, that “[l]et me assure you that none of these leaks came from the Special Investigating Counsel team.” [Freeh Opening Remarks at 3].

It is impossible to reconcile these two statements -- there were clearly leaks, something even Mr. Freeh acknowledged, yet Mr. Freeh says that: (1) no one outside his team had ever seen the report; and (2) no one on his team was responsible for the leaks. Both of those statements simply cannot be true. Stated differently, since there were acknowledged leaks, either: (1) the report was shared with someone outside the Special Investigating Counsel team, and that person was responsible for the leaks, thereby rendering Mr. Freeh’s statement on Page 2 of the Opening Remarks false; or (2) a member of the Special Investigating Counsel team was responsible for the leaks, thereby rendering Mr. Freeh’s statement on Page 3 of the Opening Remarks false.

Worse yet, Mr. Freeh made several misstatements in his opening remarks, which themselves were transcribed for the public. As but one example, Mr. Freeh completely misrepresented one of the few emails that, in FSS’ words, comprised “the most important evidence in this investigation.” [Freeh Report at 11]. Specifically, in referring to the February 27, 2001 email from Mr. Curley to Mr. Schultz and Dr. Spanier, Mr. Freeh’s Opening Remarks indicated that the email provided that:

“After Curley consulted with Mr. Paterno, however, *they changed the plan* and decided not to make a report to the authorities.”

[Freeh Opening Remarks at 3 (emphasis added)]. The actual language of the email in question provides as follows:

I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe on yesterday – *I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and and [sic] maybe the other one about the*

situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. *I need some help on this one.* What do you think about this approach?

[Freeh Report at Exhibit 5G (emphasis added)].

At best, and providing Mr. Freeh with every possible benefit of the doubt, his statement constituted gross negligence. As is clear from the above language, Mr. Curley himself was promoting the manner in which the matter was to be handled, and he has so testified that the decision was made by him. [December 16, 2001 Preliminary Hearing Transcript at 188].

Mr. Freeh's comments, reckless or intentional, made it appear that Mr. Curley and Mr. Paterno changed the plan. In fact, there is nothing at all within that email to suggest that Mr. Paterno was involved in any change of plans. Rather, the sole reference in the email is that Mr. Curley spoke to Mr. Paterno in the interim. Nothing contained above suggests or provides any guidance whatsoever on what Mr. Curley and Mr. Paterno discussed, or what, if anything, was recommended by Mr. Paterno. In fact, Mr. Curley is specifically seeking assistance from Mr. Schultz and Dr. Spanier in determining how best to proceed -- should they confront Sandusky directly before they report it to his employer, The Second Mile. Once again, had FSS interviewed Mr. Curley, or waited until after the upcoming criminal proceedings where this very issue will undoubtedly arise, the matter could have been addressed without rank speculation.<sup>31</sup>

It is beyond dispute that the Board of Trustees (or University) erred in allowing FSS to conduct a public "press conference" at any point, much less before the University had even had an opportunity to review the Report. It is also beyond dispute that, as counsel, to the extent FSS recommended that the University waive its attorney-client privilege, and provide FSS with the right to hold such a press conference, such action was erroneous.

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<sup>31</sup> For instance, it would be just as reasonable to conclude, based solely on the language of the email above, that Mr. Paterno was concerned about the fact that the entire investigation being conducted by Messrs. Curley and Schultz did not involve confronting Sandusky himself. In fact, such a conclusion appears even more reasonable when the entire email is read in context.

Instead, the University should have been afforded the opportunity to review the Report for purposes of insuring that its counsel understood its obligations and that the Report accurately portrayed facts, as opposed to the opinions of the author.

### **C. 1998 Incident**

According to the Report, the first time anyone at the University had notice of an allegation against Sandusky was in May 1998. The Report purports to outline the 1998 Incident and reach certain conclusions. However, the timeline of the 1998 Incident contained within the Report is incomplete. Moreover, the conclusions, opinions, and recommendations of the author regarding the 1998 Incident are, simply, not grounded in fact.

First, and most important, the 1998 Incident was investigated by multiple law enforcement and child welfare agencies. This investigation commenced with a May 4, 1998 report to the University Police Department that Sandusky had showered with a child the previous evening. The report came from the mother of the child after she had consulted Alycia Chambers, the psychologist for the child. An investigation was immediately commenced and the Centre County District Attorney's office was notified. Assistant District Attorney Karen Arnold, and the then-District Attorney, Ray Gricar, participated in the investigation. Ultimately, that same day, the matter was referred to Centre County Children and Youth Services ("CYS"), which was the child welfare agency charged with the responsibility of investigating claims of child abuse.

According to the Report, however, CYS referred the investigation to the Pennsylvania State Department of Public Welfare ("DPW") because of a conflict of interest between CYS and The Second Mile. [Freeh Report at 43]. And because of Sandusky's "high profile", representatives of DPW in Harrisburg took the lead in the investigation. [Freeh Report at 43].

After a detailed investigation -- which included interviews of the alleged victim, the family of the alleged victim, a second child who was purportedly another victim of Sandusky, and Sandusky himself, as well as various psychological evaluations of the alleged victim and a covert operation that involved representatives of the University Police Department and the State College Borough Police Department hiding inside a closet and listening to a conversation between Sandusky and the alleged victim's mother -- DPW concluded that there was no evidence of child abuse or criminal activity by Sandusky. Specifically, the DPW representative concluded that "there seems to be no incident which could be

termed to be sexual abuse, nor did there appear to be any pattern of logic and behavior which is usually consistent with adults who have difficulty with sexual abuse of children.” [Freeh Report at 44 (citing Police Report at 88)]. Moreover, the Centre County District Attorney determined that there was not criminal activity, and therefore, no criminal charges were filed. [Freeh Report at 46].

None of the four individuals from the University (*i.e.*, Messrs. Curley, Paterno, Schultz, and Spanier) were alleged to be part of the investigation, and the Report makes clear that none of those individuals interfered in any way with the investigation being conducted by child welfare and law enforcement officials. [Freeh Report at 52]. For the Report to suggest, as it does, that either the University or Messrs. Spanier, Curley, Schultz, or Paterno should have taken **any** action against Sandusky in 1998 after completion of that investigation -- irrespective of their knowledge or lack of knowledge of the facts -- is outrageous.

While, in hindsight, Sandusky has been determined to be a pedophile, at the time there was a single incident reported by a child’s mother, which admittedly did not involve any alleged sexual conduct, and which was investigated by law enforcement officers, CYS, DPW and the District Attorney. Taking negative action against Sandusky at that time would not only have been improper, it would undoubtedly have been illegal under Pennsylvania law.<sup>32</sup> There was, at the time, no basis for the University or the individuals to take any action against Sandusky, nor is there any evidence as to the level of knowledge of the allegations and investigation by the University in light of restrictions under Pennsylvania law.

Of equal concern is the Freeh Report’s failure to advise the University of a litany of issues and concerns related to the investigation of the 1998 Incident by the child welfare and law enforcement authorities outside of the University. It simply cannot be disputed that there are myriad open questions regarding the handling of the investigation in 1998 by law enforcement and child welfare authorities.

Some of these questions include, but are not limited to: (1) why CYS continued to be involved after DPW assumed control of the investigation due to a conflict of interest between CYS and The Second Mile; (2) did Lauro (DPW) or Seasock (DPW) have the report of Chambers (child’s psychologist) and if they did not, why

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<sup>32</sup> The Report’s failure to address the law of Pennsylvania in 1998 as related to child abuse allegations is shocking. Under then-existing Pennsylvania law, it would have been illegal (and the subject of both civil and criminal penalties) for the investigative bodies to report the details of the investigations. [See 55 Pa. Code §3490.91; see also *McClary v. Smalls*, 28 Pa. D. & C.4th 9, 10-11 (C.P. Del., 1996)].

was it not provided to them; (3) why was Assistant District Attorney Arnold's request to delay a second evaluation of the victim ignored by DPW; (4) why did DPW conclude there was no evidence of criminal activity or grooming, despite the Chambers report and despite the statements made by Sandusky himself; (5) who at DPW made the final determination not to notify The Second Mile of the investigation and why; (6) did anyone from CYS advise The Second Mile of the allegations and investigation; (7) did either of the alleged victims or their families advise anyone from The Second Mile of the allegations or investigation; (8) what specific information regarding the investigation was relayed to the University and to whom; (9) what specific information, if any, regarding the 1998 Incident was provided to Messrs. Curley, Schultz, Paterno and Dr. Spanier; (10) what were the specific legal limitations on University representatives in disclosing the details of the investigation under Pennsylvania law in 1998 to individuals inside the University; (11) was a psychological evaluation considered after Sandusky was covertly monitored by law enforcement officials making allegedly incriminating statements and wishing that he was "dead"; (12) was consideration given to the fact that a second victim was interviewed and allegedly provided a similar story regarding Sandusky; and (13) why did the District Attorney ultimately elect not to prosecute Sandusky.

While the investigative team could not possibly have answered those questions, in light of its inability to subpoena records or interview many of the critical witnesses, it was incumbent upon FSS to advise the University of these open issues. At a minimum, in the face of the inevitable civil suits by victims against the University, FSS most certainly should have been providing information to the University regarding the failures or potential failures of DPW and CYS. Instead, the Report casts blame upon four individuals at the University for not taking some "action" against Sandusky, despite the decisions by DPW and the Centre County District Attorney, that there was no sexual abuse or criminal activity and therefore no action could be taken.<sup>33</sup>

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<sup>33</sup> As noted in more detail below, perhaps the most egregious error of the Report was the overarching suggestion of a University-planned concealment of the 2001 Incident. FSS failed to even address the fact that, in 1998, the University (and if the Freeh Report is to be believed, with the knowledge of these same four individuals) received a report, contacted the District Attorney, and participated in a joint investigation of Sandusky involving multiple law enforcement and child welfare agencies. To suggest a cover-up in 2001, when Sandusky had been retired for several years from the University, makes little or no sense when the University itself caused an investigation to be launched in 1998 when Sandusky was still employed. In short, it made far less sense for a "cover-up" in 2001 than in 1998. Yet, FSS never addressed this quite logical conclusion in reaching its determination that there was a concealment in 2001. At a minimum,

Moreover, the Report ignores the very real possibility that the various individuals had limited, or even no, knowledge of the 1998 Incident. For example, there is no evidence whatsoever that Mr. Paterno was told of the investigation, let alone given the “details” of the allegations. There is likewise no evidence that Dr. Spanier or Messrs. Curley or Schultz were provided any details of the allegations by the law enforcement officials.

However, whether those individuals were provided details is not relevant in light of the outcome of DPW and the District Attorney’s investigation: having concluded that no crime was committed and that charges were not appropriate, there would have been no reason for anyone at the University to have taken any action whatsoever against Sandusky.

Simply put, there are many unanswered questions related to the 1998 Incident and the ensuing criminal investigation. Even so, none of those questions relate, in any way, to the University or Messrs. Curley, Schultz or Paterno, or Dr. Spanier. Instead of focusing on why the investigation failed, the Report diverts attention, and blame, to the above individuals and the University. In doing so, the Report wholly ignores the outside investigation and conclusion not to prosecute Sandusky in 1998.

#### 1. The 1998 Emails

In the Report, FSS advised that, in the course of its investigation, it “discovered the most important documents in this investigation -- emails among former President Graham B. Spanier, former Vice President-Finance and Business Gary C. Schultz and former Athletic Director Timothy M. Curley from 1998 and 2001 -- relating to Sandusky’s crimes.” [Freeh Report at 11]. It was upon these “most important documents” that the Report reached its flawed conclusion of a concealment by the University. While it is impossible for anyone to fully understand the emails, given that neither Mr. Schultz nor Mr. Curley were interviewed as part of the FSS investigation, certain aspects of those emails should have been addressed.

First, the Report is drafted in a manner to suggest that these emails were somehow “concealed” from FSS. In fact, the emails were left in the office of Mr. Schultz

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FSS should have addressed this issue and noted that it weighed against the finding of an intentional concealment in 2001.

upon his retirement. Thus, far from being “concealed”, the emails in question were provided to FSS by Mr. Schultz.

Second, as noted, the emails were “hard” copies. Thus, there is no mechanism to authenticate the emails, determine whether they are real, determine whether there were additional or explanatory emails, or confirm receipt of those emails. In other words, because there is no ability to access the raw data associated with the emails, there is no way to insure they are authentic. Moreover, the Report fails to recognize that all University emails prior to 2004 are unavailable as the result of a computer system change at the University.<sup>34</sup>

Third, the Report attributes knowledge of the 1998 Incident to Mr. Paterno based upon two emails: Report Exhibit 2A and 2B. The first, which bears the subject “Joe Paterno”, is a partial email chain between Mr. Curley and Mr. Schultz. In it, at 5:24 pm on May 5, 1998, Mr. Curley writes, “I have touched base with the coach. Keep us posted. Thanks.” In response, at 2:04 pm on May 6, 1998, Mr. Schultz writes, “Will do. Since we talked tonight I’ve learned that the Public Welfare people will interview the individual Thursday.”

Initially, it is clear that this email is incomplete, as Mr. Curley’s email to Mr. Schultz was obviously in response to an earlier email. Further, the Report fails to address the inconsistency of Mr. Schultz allegedly stating, at 2:06 pm, that “[s]ince we talked tonight”, given that “tonight” had not yet occurred at 2:06 pm. Third, the only reference to Mr. Paterno was the “Subject” line -- there is no specific discussion of Mr. Paterno; instead, FSS concludes, without support, that Mr. Curley’s reference to “the coach” was Mr. Paterno. There is nothing in the email to so suggest and, in fact, it could just as easily be deduced that “the coach” was referring to Sandusky, who, at that time, was an assistant coach. In addition, nothing in this email suggests that Mr. Curley provided any level of detail regarding the investigation (assuming Mr. Curley had such details). This is not surprising, since Pennsylvania law prevented the disclosure of such details.

Likewise, there are significant concerns with the veracity of Report Exhibit 2B based solely on the dates and times therein. Specifically, the document, which has

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<sup>34</sup> In light of 2004 computer system change, the reference to FSS analyzing over 3.5 million of “pertinent electronic data and documents” [Report at 9] is rendered almost meaningless given the fact that the primary objective of FSS related to incidents that occurred in 1998 and 2001. The failure to disclose this fact is concerning.

as its Subject “Jerry”, contains various emails listed below in the chronological order that they appear in the document:

Wednesday, May 13, 1998, 2:21 pm – email from Mr. Curley to Mr. Schultz stating “Anything new in this department. Coach is anxious to know where it stands.”

Thursday, May 14, 1998, 4:11 am – email from Mr. Schultz to Mr. Curley in response.

Wednesday, May 13, 1998, 4:48 pm – email from Chief Harmon to, presumably, Mr. Schultz

Thursday, May 14, 1998, 8:55 am – email from Mr. Schultz to Chief Harmon thanking him for the update

[Freeh Report at Exhibit 2B]. As is clear from its face, there are serious concerns about the authenticity of this email, based solely on the wholly inconsistent timeline. Moreover, there is nothing in the email that would suggest that the “coach” to whom Mr. Curley was referring was Mr. Paterno, as opposed to Sandusky, nor is there anything that details what information and what details were provided to the “coach”, if any, by Mr. Curley.<sup>35</sup>

It was reckless and improper for the Report to make conclusions based upon these emails given the above. Simply, the only appropriate conclusion was that it was impossible to make any determinations as to the nature, intent, and scope of these emails without more information, including but not limited to, an interview of the

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<sup>35</sup> In fact, upon review of the University Police Report of the 1998 Incident and investigation, it would appear that as of May 13, 1998, it was Sandusky who was “anxious.” By that time, he was aware of the investigation, aware of the report by the victim, and had contacted the victim on numerous occasions. It is absolutely logical to conclude that it was he, as opposed to Mr. Paterno, who was “anxious.” Furthermore, as set forth in the Report, at that precise time of the investigation in 1998, there was consideration of launching a football program at the Penn State Altoona Campus, pursuant to which Sandusky would potentially be involved as coach. [Freeh Report at 56]. It should also be noted that, during his appearance before the Grand Jury, Mr. Paterno was asked whether he was aware of prior instance of “inappropriate sexual conduct by Jerry Sandusky with young boys.” [December 16, 2011, Preliminary Hearing Transcript at 177-78]. In response, Mr. Paterno was unsure, but acknowledged that he may have heard a rumor regarding Sandusky. [*Id.*] No follow-up questions were asked but if the reference to “coach” did mean Mr. Paterno, this would be wholly consistent with his testimony before the grand jury.

authors and recipients. To even suggest that a third party could make the types of determinations the Report purports to make without interviewing the individuals involved completely belies logic.

#### **D. 1999 Retirement of Sandusky**

Sandusky executed a retirement package with the University in 1999. The package appears to have been the product of negotiations between Dr. Spanier and Sandusky, with involvement of Mr. Curley and then-Provost, Rodney Erickson.

The package outlined specific provisions which permitted Sandusky access to the University's recreational facilities, as well as provided for Sandusky to maintain an office at the University. [Freeh Report at Exhibit 3H]. In addition, Dr. Erickson approved the granting of the title of Assistant Professor Emeritus of Physical Education/Assistant Coach to Sandusky. The agreement between the University and Sandusky was dated June 29, 1999.

The Report specifically noted that the decision for Sandusky to retire was made in 1998, before the 1998 Incident, and that the 1998 Incident had no connection whatsoever to the retirement of Sandusky or the execution of his retirement agreement. [Freeh Report at 61]. This issue is significant because there has been speculation that the decision by Sandusky to retire after the 1998 season was somehow related to the allegations of May 1998. The Report concludes that the incidents were not related, as the discussions of Sandusky's departure preceded the 1998 Incident.

#### **E. 2001 Incident**

The Freeh Report concludes that, in 2001, Tim Curley, then-University Athletic Director, Joe Paterno, then-Head Coach of the Penn State football team, Gary Schultz, then-Senior Vice President-Finance and Business for the University, and Dr. Graham Spanier, then-University President, acted in concert to conceal Jerry Sandusky's actions from law enforcement officials and child protective services (the "2001 Incident"). [Freeh Report at 16, 72-77]. But like its discussion of the 1998 Incident, and as discussed in more detail below, the Freeh Report's account of the 2001 Incident and the events that followed is replete with critical omissions, numerous assertions unsupported by existing facts, and other deficiencies, thereby undermining, if not eviscerating, the Report's credibility.

First, in providing its analysis of the 2001 Incident, the Freeh Report omits key information which would have assisted the University and the public at large in evaluating the reliability of the Report. For example, although the Report states that FSS conducted over 430 interviews of “key University personnel and other knowledgeable individuals,” [Freeh Report at 9], it fails to mention that FSS apparently interviewed only one person who had any knowledge of the 2001 Incident around the time at which it occurred.

As noted, at least 13 individuals had knowledge of the 2001 Incident: (1) Joan Coble, an administrative assistant to Mr. Schultz, who was copied on various emails outlining the plan for the University to confront Sandusky and report the matter to his employer, The Second Mile; (2) Wendell Courtney, then-outside legal counsel for the University, who Mr. Schultz consulted for legal advice within hours of learning of the event; (3) Mr. Curley, who learned of the episode on February 11, 2001; (4) Dr. Jonathan Dranov, a longtime family friend of the McQuearys, who Mike McQueary confided in moments after witnessing the incident; (5) Tom Harmon, then-University Police Chief, who Mr. Schultz contacted a day after learning of the event; (6) John McQueary, who, like Dr. Dranov, spoke to Mike McQueary moments after the incident; (7) Mike McQueary, then-graduate assistant for the Penn State football team; (8) Mr. Paterno, who Mike McQueary informed of the episode on February 10, 2001; (9) Dr. Jack Raykovitz, Executive Director of The Second Mile, who learned of the incident on March 19, 2001; (10) Sandusky; (11) Mr. Schultz, who learned of the incident on February 11, 2001; (12) Dr. Spanier, who learned of the event on February 12, 2001; and (13) alleged Victim 2. [See Freeh Report at 66-78].

But of these 13 individuals -- many of whom played a significant role in determining the University’s response to the allegations that Mike McQueary lodged against Sandusky, a central focus of the Freeh Report -- it appears that the investigative team **only interviewed one of them**, Dr. Spanier.<sup>36</sup> The Report, however, makes no mention of this fact. Instead, the Report gives the impression that its “findings” relative to the 2001 Incident are the product of an extensive investigative process. To the contrary, the “findings” are nothing more than FSS’s

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<sup>36</sup> Parenthetically, FSS released the Freeh Report, a 267-page document, just five days after interviewing Dr. Spanier. This fact strongly suggests that, at the time of Dr. Spanier’s interview, FSS had already completed the vast majority of the Report -- without ever speaking to the four men who were the apparent focus of the investigation.

opinions, as determined by its reading of the grand jury presentment, transcripts of various criminal proceedings,<sup>37</sup> and other documents.

Equally troubling, the Freeh Report omits the testimony of Dr. Dranov. By way of background, the Report quotes, at length, the testimony of Mike McQueary. [Freeh Report at 66-68]. In an apparent effort to support McQueary's contention that he witnessed Sandusky "having some type of intercourse" with an unnamed child in the showers of the Lasch Building and so advised Messrs. Curley and Schultz of that fact, the Report references various portions of Mr. Paterno's grand-jury testimony, especially his remark that McQueary advised him on February 10, 2001, that Sandusky's conduct was of a "sexual nature." [Freeh Report at 66-67 (citations omitted)].

But inexplicably, the Freeh Report makes no mention of the conflicting testimony proffered by Dr. Dranov.<sup>38</sup> As discussed above, Mike McQueary spoke to his father and Dr. Dranov just minutes after allegedly witnessing the 2001 Incident. Dr. Dranov testified that he asked McQueary what he saw, and that each time, McQueary went back to what he "heard."<sup>39</sup> Dr. Dranov never testified that

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<sup>37</sup> While such transcripts certainly merit consideration, the problem is that much of the testimony between and among key witnesses remains in dispute, particularly on the issue of whether Mike McQueary, in fact, told University officials that he witnessed Sandusky sexually assaulting an unnamed child in the showers of the Lasch Building on February 9, 2001. The upcoming criminal trials of Messrs. Curley and Schultz will undoubtedly provide further information to assess the veracity of Mike McQueary's sworn statements, along with those of other individuals. However, and for reasons which are not apparent from the face of the Freeh Report, FSS thought it prudent to render its opinions without the benefit of this additional testimony.

<sup>38</sup> Curiously, the Freeh Report does not even identify Dr. Dranov by name and relegates its discussion of him to a single footnote. [Freeh Report at 67 n.x ("John McQueary and his *supervisor* (a medical doctor) heard Mike McQueary's initial report of the Lasch Building events the evening it happened. John McQueary advised his son to report the matter to Paterno, and neither John McQueary nor his *boss* advised him to immediately call the police." (citation omitted; emphasis added))]. This raises a fair question as to whether FSS sought to minimize the impact of Dr. Dranov's testimony, especially since it conflicts with the central premise of the Freeh Report -- that, unlike other witnesses, Mike McQueary has testified truthfully and consistently throughout the various criminal proceedings.

<sup>39</sup> If Mike McQueary had reported to Dr. Dranov that he witnessed Sandusky engaging in intercourse with a child, Dr. Dranov potentially committed a crime by failing to report that incident to the authorities. Under then-existing Pennsylvania law, a licensed physician was required to report allegations of child abuse, both orally and in writing, when he or she had "reasonable cause to suspect, on the basis of their medical, professional or other training and

McQueary told him that he “saw” anything sexual. In other words, just minutes after the incident and in the presence of his father and a close family friend, **Mike McQueary never said that he observed Sandusky engaging in sexual intercourse with a young boy.**

It is beyond question that the Freeh Report should have included Dr. Dranov’s testimony and identified the fact that Mike McQueary’s statements (or lack of statements) to Dr. Dranov about what he saw were **entirely at odds** with what Mike McQueary purports to have told Messrs. Curley and Schultz (*i.e.*, that he witnessed something “extremely sexual”). The Report does not even address its failure to interview Dr. Dranov or to review and cite his sworn testimony from the Sandusky trial. In light of such a glaring omission, it simply defies logic to contend, as the Report does, that it represents a “fair, objective and comprehensive analysis” of the 2001 Incident. [Freeh Report at 12].<sup>40</sup>

Simply put, the completion of this portion of the Freeh Report was impossible without interviews of Mike McQueary, John McQueary, and Dr. Dranov, and without awaiting the trials of Messrs. Curley and Schultz. FSS should have recognized this fact, acknowledged that it could not complete the Report, and advised the University of that fact. Instead, it presented an incomplete and misguided Report.

Unfortunately, the Freeh Report’s flaws are not limited to omitting critical information pertaining to the 2001 Incident; they also include numerous assertions unsupported by existing facts. Chief among them is the Report’s contention that Messrs. Curley, Paterno, Schultz, and Spanier did not notify “law enforcement” of

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experience, that a child coming before them in their professional or official capacity is an abused child.” [23 Pa.C.S. §§6311(a), 6313(a) (West 2001)]. Thus, Dr. Dranov’s testimony has far-reaching consequences -- both to himself and to the veracity of Mike McQueary’s sworn statements.

<sup>40</sup> Once again, the trials of Messrs. Curley and Schultz, where the veracity of McQueary and a detailed examination of the conversation between McQueary and Dr. Dranov will ensue, will undoubtedly shed substantial light on this issue. FSS most certainly should have recognized this fact and advised the University as such. Moreover, since the investigation did not involve the interviews of Mike McQueary, John McQueary, or Dr. Dranov, FSS should have consulted a psychologist or other medical professional in an effort to determine whether Mike McQueary would be more likely to be more open in his recitation of what he saw in the presence of his father and a close family friend, or in the presence of Messrs. Curley and Schultz.

the allegations that Mike McQueary raised against Sandusky in 2001.<sup>41</sup> [Freeh Report at 75; *see also* Freeh Report at 63 (“Without ever speaking to McQueary, Schultz and Curley had already decided that not reporting Sandusky’s conduct to *authorities* may be an option.” (emphasis added))]. But given the available information, which indisputably is incomplete, it is difficult to comprehend how the Report could make such a definitive statement.

Aside from the fact that FSS did not interview Messrs. Curley, Paterno, or Schultz, each of whom could have provided pertinent information on this issue, FSS did not interview Thomas Harmon, who, in 2001, served as University Police Chief. As explained in the Freeh Report, on February 12, 2001, Mr. Schultz “asked” Chief Harmon if a police file still existed for the 1998 Incident. [Freeh Report at 71]. In response, Chief Harmon sent Mr. Schultz an email, writing, “Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged achives [sic].” [Freeh Report at Exhibit 5D]. The email contains no further remarks.

From the face of the email, it is unclear whether Mr. Schultz previously informed Chief Harmon of the 2001 Incident. Nor is it clear whether Mr. Schultz and Chief Harmon engaged in any follow-up communications on the matter. But what is clear from the face of the email is that -- one day after learning of an incident

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<sup>41</sup> In offering this remark, the Report strongly implies, among other things, that Messrs. Curley, Paterno, Schultz, and Spanier all had the **same** understanding of the 2001 Incident -- that Mike McQueary observed Sandusky sexually abusing a young boy in the showers of the Lasch Building. Stated otherwise, the Report contends that Messrs. Curley, Paterno, Schulz, and Spanier all knew that Sandusky had raped an unnamed child on campus, and nonetheless, failed to report his conduct to law enforcement authorities. But the sworn statements of Messrs. Curley and Schultz directly contradict this assertion, as each testified that the information reported to him did not indicate that Sandusky had sexually abused the boy. Moreover, McQueary has testified, under oath, that he never provided any details of the incident to Mr. Paterno and, at no point, did he utter the words “anal” or “rape.” [December 16, 2011, Preliminary Hearing Transcript at 77-78].

This is yet another example where FSS rendered credibility determinations based upon a “cold record,” *i.e.*, a record derived from the transcripts of criminal proceedings and other documents, rather than one based upon firsthand observations. Such a practice has been roundly criticized by appellate courts, because, unlike trial courts, appellate courts are unable to observe the demeanor of witnesses and cannot engage in an on-the-scene evaluation of the evidence. [See, *e.g.*, *McElwee v. SEPTA*, 948 A.2d 762, 773 (Pa. 2008) (per Saylor, J.)]. In light of this well established principle and the fact that FSS did not interview Messrs. Curley, McQueary, Paterno, or Schultz, one would think that Judge Freeh and the attorneys at FSS would refrain from making credibility determinations with respect to those four men.

involving Mr. Sandusky and an unnamed child -- Mr. Schultz contacted Chief Harmon, **the highest ranking law enforcement official in the jurisdiction**, and sought information about Sandusky.

Nonetheless, and without ever speaking to Mr. Schultz or Chief Harmon, FSS somehow states that Mr. Schultz never notified “law enforcement” of the allegations that Mike McQueary raised against Sandusky in 2001. However, and as illustrated above, the existing facts do not support this proposition. Moreover, had the investigative team interviewed either Chief Harmon or Mr. Schultz, this issue could have been resolved without the need for speculation.

The same is true of the Freeh Report’s not-so-subtle assertion that Mr. Paterno heavily influenced, if not directed, Mr. Curley’s decision to change the University’s response to the 2001 Incident, as originally agreed upon by Messrs. Curley, Schultz, and Spanier. In its “Key Findings,” the Report states, in relevant part, as follows:

- At a February 25, 2001 meeting, Spanier, Schultz, and Curley discussed an action plan for addressing the Sandusky incident. . . .
- On February 26, 2001 Schultz emailed Curley, confirming the plan from the prior day’s meeting. . . .
- On February 27, 2001, however, *after discussing the matter with Paterno the day before*, Curley recommended a different course of action to Spanier and Schultz . . .

[Freeh Report at 63 (emphasis added)].

The Report then proceeds to describe the supposed relationship between Messrs. Curley and Paterno, remarking,

*A senior Penn State official referred to Curley as Paterno’s “errand boy.” Athletic Department staff said Paterno’s words carried a lot of weight with Curley, who would run big decisions by Paterno. Others interviewed described Curley as “loyal to a fault” to University management and the chain of command, someone who followed instructions regardless of the consequences, and someone who avoided confrontation.”*

[Freeh Report at 75 (emphasis added)]. Taken together, the Report clearly implies that Mr. Paterno -- and not Mr. Curley -- made the decision to recommend a different plan of action to Messrs. Schultz and Spanier.

But, as noted above, the plain terms of the email that Mr. Curley sent to Messrs. Schultz and Spanier do not support this assertion. That communication reads:

I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday -- *I am uncomfortable* with what we agreed were the next steps. *I am having trouble* with going to everyone, but the person involved. *I think* I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and and [sic] maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. *I need some help on this one*. What do you think about this approach?

[Freeh Report at Exhibit 5G (emphasis added)].

By its clear text, the email gives no indication that Mr. Paterno directed Mr. Curley to revise the University's proposed course of action against Sandusky. Nor does it even offer Mr. Paterno's purported opinion of the proposed plan. It simply states that, "[a]fter giving it more thought and talking it over with Joe yesterday -- *I am uncomfortable* with what we agreed were the next steps." [*Id.* (emphasis added)]. Since FSS did not interview Messrs. Curley or Paterno, it is inconceivable that FSS would disregard the unambiguous language of the email, and instead, base its assertion upon unnamed sources **who were not privy to the conversation between Messrs. Curley and Paterno**. Moreover, a review of Mr. Curley's Grand Jury testimony from January 12, 2011, which was read into the record at his Preliminary Hearing on December 16, 2011, is consistent with the clear text of the emails: it was Mr. Curley who made the decision to confront Sandusky and report the incident to The Second Mile. [December 16, 2011, Preliminary Hearing Transcript at 188].

But of all the problems associated with this portion of the Freeh Report, arguably the most egregious one is the Report's complete unwillingness to acknowledge that the existing information could be read to support a different conclusion than the one reached by FSS. Again, the entire premise of the Report as it relates to the 2001 Incident is that Mike McQueary -- and not Messrs. Curley and Schultz -- is telling the truth, *i.e.*, that McQueary told the two men that he witnessed something "extremely sexual" between Sandusky and the unnamed child. But the Report never explores the alternative possibility (which, at this point, is equally plausible) that Messrs. Curley and Schultz, and not Mike McQueary, accurately testified as to what McQueary reported to them, *i.e.*, that McQueary said Sandusky and the boy were merely "horsing around in the shower."<sup>42</sup>

If the latter were true, it would dramatically alter the manner in which the subsequent actions of Messrs. Curley and Schultz, along with those of Dr. Spanier, are viewed. It would strongly suggest that Messrs. Curley, Schultz, and Spanier did not conceal or "cover-up" Sandusky's sexual abuse from law enforcement and child welfare authorities in 2001. Rather, it would imply that they acted under the belief that, as in 1998, Sandusky had been showering with a child -- conduct which numerous state and local agencies had investigated and determined not to be criminal just three years earlier. A fair and objective analysis of the 2001 Incident would have addressed this alternative, equally reasonable possibility.<sup>43</sup>

As with the 1998 Incident, there remain many unanswered questions with respect to the 2001 Incident that bear directly on the very issues that the Report purported

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<sup>42</sup>At this juncture, the available information is inconclusive on this point. Messrs. Curley and Schultz are awaiting trial for charges of lying to a grand jury and failing to report an allegation of suspected child abuse, and those counts are premised upon, in large part, Mike McQueary's grand-jury testimony. Although Messrs. Curley, McQueary, and Schultz all testified before the grand jury, the attorneys for Messrs. Curley and Schultz did **not** get the opportunity to cross-examine Mike McQueary or present **any** evidence; the grand jury that indicted Messrs. Curley and Schultz is **not** the same grand jury that heard the three men testify; and the burden of proof needed to indict someone of a crime is **far lower** than that needed to convict him or her of the same.

<sup>43</sup> A fair and objective analysis also would have explored the possibility that, given Mr. Schultz's conversation with then-outside counsel Mr. Courtney on February 11, 2001, that Mr. Schultz, along with Messrs. Curley and Spanier, acted under the advice of counsel. Again, this remains a possibility, since Messrs. Courtney and Schultz declined to be interviewed by FSS. As noted above, if the individuals were acting on the advice of Attorney Courtney's advice, the entire premise of the Report fails.

to resolve. These include, among many others: (1) what did Mike McQueary see or hear in the shower that evening; (2) did Mike McQueary see anything of a sexual nature or did he hear something that he believed sounded like something of a sexual nature; (3) what specifically did Mike McQueary tell his father and Dr. Dranov; (4) what specific questions did Dr. Dranov raise with Mike McQueary; (5) what advice was given to Mr. Schultz by Attorney Courtney immediately after the 2001 Incident; (6) why did Mr. Schultz contact Chief Harmon and what were the specific discussions or communications between them; (7) did Chief Harmon take action on the 2001 Incident and, if not, why; (8) what did Mike McQueary tell Messrs. Schultz and Curley when he met with them; (9) why did Mr. Curley ultimately decide to confront Sandusky and alert The Second Mile; (10) did Dr. Raykovitz share the information provided to him by Mr. Curley with anyone from The Second Mile and, if not, why; (11) did Dr. Raykovitz report the matter to child welfare authorities; and (12) did Dr. Raykovitz have any conversations with the alleged victim.

In sum, as with the 1998 Incident, the inability to interview any of the key witnesses, and lack of critical documents, prevents any full investigation and conclusion. Simply put, FSS should have advised the University that, despite its efforts, the lack of available witnesses and documents prevented any final determination as to the events of 2001 and that further review and investigation would be appropriate upon conclusion of the criminal proceedings. Most certainly, however, the inability to interview Messrs. Curley, Paterno, or Schultz prevented any finding or conclusions related to the state of mind of those individuals.

## **F. 2001-2011**

The Report goes to lengths to criticize Dr. Spanier and Messrs. Curley, Schultz, and Paterno because Sandusky was permitted access to University facilities from 2001 through 2011. Specifically, the Report states that “[d]espite Spanier’s, Schultz’s, Paterno’s and Curley’s knowledge of criminal investigations of Sandusky regarding child abuse as early as 1998, they failed to control Sandusky’s access to the University’s facilities and campuses.” [Freeh Report at 106].<sup>44</sup>

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<sup>44</sup> The basis upon which FSS made conclusions regarding Mr. Paterno as it relates to Sandusky’s post-retirement activities is not clear. Mr. Paterno was not a party to the retirement agreement and, from the evidence outlined in the Report, was not involved in its negotiation. Moreover, there is nothing in the Report that suggests that Mr. Paterno had the authority to limit Sandusky’s access to University facilities or campuses once he retired as a football coach in 1998. The same is true with respect to Messrs. Schultz and Curley and Dr. Spanier: a written agreement afforded Sandusky a contractual right to use the facilities as professor emeritus.

However, as noted, FSS did not speak to Messrs. Curley, Schultz, or Paterno regarding Sandusky's access to the University facilities and campuses. Furthermore, and as noted above, Sandusky's retirement agreement provides that he was granted professor emeritus status and, as such, had access to those facilities. The matter was raised with then-General Counsel Cynthia Baldwin, who advised University officials that, because Sandusky had not been charged with a crime, he could not be barred from University property. [Freeh Report at 106]. Thus, the Report's criticism of the four University employees was wholly misplaced.<sup>45</sup>

## V. IMPACT OF UNIVERSITY'S PURPORTED ACCEPTANCE OF REPORT

As noted above, the NCAA acted upon the alleged blind acceptance of the Report by the University and imposed draconian sanctions upon the University and its football program, without even launching an investigation of its own. **Never before in its history had the NCAA imposed sanctions without an investigation and without a violation of the rules governing intercollegiate athletics.**

However, in the words of the NCAA President, because the Freeh Report was "vastly more involved and thorough than any investigation we've ever conducted" and because the University purportedly accepted the Report in full, the NCAA was free to use the Report's conclusions and findings to impose crippling penalties upon the University and the University's football program. Unfortunately, in its rush to judgment, the NCAA failed to consider that the Report was not complete, was, in many instances, not grounded in fact, but in the opinion of the author, and was not evidence of anything as it related to the events of 1998 and 2001.

Had FSS made clear that the Report was not complete, that nearly every critical witness had not been interviewed, that critical documents had not been reviewed, and that the Board of Trustees (and not the University) was its client, it is entirely

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<sup>45</sup> There has been a misconception that Sandusky was permitted in the football facilities or football practices with children after 2001, yet there is no evidence of such. In fact, Mike McQueary himself testified that "there was never a period of time after that [2001] incident where I saw any kids with Jerry at all around our facilities or program." [December 16, 2011, Preliminary Hearing Transcript at 38-39].

possible the NCAA would not have acted precipitously in imposing the sanctions in the manner and scope which it did.<sup>46</sup>

PS4RS warned the NCAA prior to its imposition of the sanctions that the Report was neither complete nor accurate, and that the more prudent course of action would be to conduct an independent review and investigation after the criminal proceedings were complete and facts were known. The NCAA refused, opting instead to rely upon the University's perceived acceptance of the Report.

Since the imposition of sanctions, various members of the Board of Trustees have come forward to raise concerns about the purported blind acceptance of the Freeh Report. It is significant to note that the University has never come forward and stated (nor could it) that it was accepting the Freeh Report as fact, or to acknowledge that the Freeh Report is not, and cannot be, complete. This fact was, apparently, lost on the NCAA or was not properly communicated to the NCAA by the University.

Incredibly, the University and Board of Trustees sat silent while the Freeh Report was used by the NCAA to criticize the very core of the University. The University and Board of Trustees sat silent while the President of the NCAA made outrageous and blatantly false allegations regarding the culture of the University, based entirely on the incomplete and flawed Freeh Report. Rather than stepping forward and acknowledging the inaccuracies and lack of completeness in the Freeh Report, FSS, the University, and Board of Trustees stood frozen while the University as a whole was unfairly trampled.

In this regard, an article appeared in the Chronicle of Higher Education, dated July 27, 2012, which contained a series of statements from unnamed sources within the investigative team at FSS. The article, entitled "*Freeh Group Member Criticizes NCAA's Use of Investigative Report*", contains telling, and compelling, statements from the unnamed member of the investigative team. Specifically, according to the Article, the representative of the investigative team stated:

That document was not meant to be used as the sole piece, or the large piece, of the NCAA's decision making. . . . It was meant to be a

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<sup>46</sup> Given the near immediate imposition of sanctions by the NCAA, a fair question exists as to whether anyone affiliated with the FSS investigative team provided information of any kind to any representative of the NCAA during the course of the investigation.

mechanism to help Penn State move forward. To be used otherwise creates an obstacle to the institution changing.

*Freeh Group Member Criticizes NCAA's Use of Investigative Report*, July 27, 2012, <http://chronicle.com/article/Freeh-Group-Member-Criticizes/133213/>.

Moreover, according to article, the investigative team member admitted that the Report's findings were "circumstantial", and that "nothing is black and white. . . . No investigation can totally answer all the questions everyone has." [*Id.*].

Though FSS has denied the comments attributed to it in the Article, there is no doubt that they are accurate. There is no doubt that, as set forth above, FSS substituted its own opinions into the Report, presented those opinions as "fact", and caused the public, and the NCAA, to rely upon those unsupported opinions to the substantial detriment of the University.

**Under no circumstances should the University have permitted or condoned such a result.** It was inexcusable for the Board of Trustees to sit silent while the NCAA acted upon a fundamental misunderstanding of the true client of FSS, the nature and purposes of the Report, the manner in which the Report was to be utilized, the admitted incompleteness of the Report, and the unquestioned inaccuracies of the Report.

The results are far-reaching and affect the very core of the University. The impact far exceeds the irreparable damage to the football program. Instead, because the University permitted inaccurate, misleading, and simply false assertions to be leveled regarding the culture of the University, every student, alumni, and supporter of the University, as well as every resident and every business located within Pennsylvania, has been impacted. Such a result, which arose solely as the result of an admittedly incomplete and flawed Report, is itself a tragedy beyond words.

## **VI. CONCLUSION**

As noted at the outset, the purpose of this Review was to identify those areas where the Freeh Report failed in its stated objective and where the evidence in the Report did not comport to the summaries offered therein or comments by Mr. Freeh. Moreover, it was the intent to identify those circumstances where the authors of the Report made factual findings and witness credibility determinations. Such determinations, in the view of PS4RS, are wholly improper in an investigation of this nature, particularly where the investigators failed to interview nearly every key witness.<sup>47</sup>

Rather, the Report should have outlined, in much more detail, the fact that the investigators were unable to interview any of the key witnesses and review critical documents. Further, rather than making factual determinations where more than one outcome was possible, the Report should have outlined each possibility and the factors supporting each. Nowhere in its “Scope of Review and Methodology” did FSS state that it was asked by the University to make factual determinations. There is no question that there are many victims in this case. Most important, of course, are the victims of the crimes for which Sandusky was convicted.

However, in what can only be described as a misguided zeal to move on, the University, FSS, and the NCAA created many more victims. Wholly innocent people, from students, to alumni, to business owners, to citizens of Pennsylvania, were the victims of an incredible rush to judgment, while many questions about what went wrong in 1998 and 2001, and who is to blame, were left unanswered. What’s more, Messrs. Schultz and Curley have been effectively convicted in the eyes of the public as a result of the Report, yet neither has even had an opportunity to have their proverbial day in Court. Mr. Freeh, of all people, should have been aware of this most basic and fundamental right, yet in a rush to judgment, the issuance of the Report, and the purported findings therein, may well have impeded the ability of these individuals to present a defense to the charges lodged against them.

Contrary to what has been written, the Report is simply without value in its “findings.” While there is no question that the University should implement many

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<sup>47</sup> PS4RS does not suggest that it has identified every flaw in the Report, nor that this analysis is as detailed a review as is necessary. Resources and access simply prevent such a comprehensive review. However, the stated goal of this review was to draw attention to the inaccuracies of the Report and the resultant dangers in blind reliance and acceptance of a flawed document.

of the Recommendations of the Report, the background information regarding the investigation of the 1998 and 2001 Incidents is without value.

There is further no question that the FSS investigation should have focused far more significantly on why no less than five law enforcement and child welfare agencies had direct knowledge of Sandusky's behavior in 1998 yet, after an investigation, failed to pursue charges. Had any one of those agencies elected to file criminal charges, all of the events post-1998 could have been avoided. Incredibly, the Freeh Report attributes that failure to the law enforcement officials needing to be "better trained in the investigation of child sexual abuse." [Freeh Report at 45].

Perhaps more shocking was the Freeh Report's complete avoidance of the most significant question from the 1998 Incident -- why DPW and CYS did not take action. The Report does not even address this monumental failure, opting instead to blame four individuals who were neither law enforcement officials nor trained child welfare officials. In short, the Report defies logic: it blames the people who were not trained professionally at all nor had child welfare as part of their job, while wholly excusing the actions of the very people who had the training, duty, and obligation.

Stated differently, the Freeh Report castigates Messrs. Curley, Paterno, Schultz, and Spanier for not taking action in 1998 when trained professionals and law enforcement officials concluded that taking action was inappropriate. The only rational conclusion, therefore, is that author(s) of the Freeh Report had a predetermined goal and the identification of the 1998 failures of law enforcement and child welfare agencies undermined that goal.

As for the events of 2001, the Freeh Report blindly accepted the testimony of Mike McQueary as true in regard to what he advised Messrs. Curley and Schultz. Yet, the Report plainly ignores many facts which cast serious doubt upon the veracity of McQueary, most significantly the testimony of Dr. Dranov. Had the investigators interviewed Dr. Dranov, they would have been able to confirm what Dr. Dranov has already testified: that, immediately after the incident in question, Dr. Dranov asked Mike McQueary, numerous times, whether he had seen anything of a sexual nature and each time he talked about what he "heard." At no point did Dr. Dranov state that McQueary ever told him he "saw" anything sexual.

This testimony is directly at odds with Mike McQueary's testimony that approximately ten days later he told a markedly different story to Messrs. Schultz

and Curley, and ten years later told a completely different story in connection with the Sandusky criminal proceedings. Once again, instead of outlining all of these possibilities, FSS elected to ignore all facts which did not support its conclusions and opinions. Again, this is not indicative of a true internal investigation, but rather indicative of an attempt to reach a predetermined outcome.

Most significantly, however, the Report's primary theme (*i.e.*, that there existed an intent to conceal the 2001 Incident by Dr. Spanier and Messrs. Curley, Paterno, and Schultz), is not only wholly unsupported by the record evidence, but the evidence reveals absolutely no such intent. There were no witnesses or documents that discussed a "cover-up." There was no evidence that any of the many individuals who were aware of the 2001 Incident in whole or in part (at least 13 individuals), were told to maintain secrecy. There was no evidence that any effort was made to silence witnesses or withhold information. And, perhaps most significant, the Report wholly fails to examine why the same people who it accuses of a cover-up in 2001 (when Sandusky was no longer an employee of the University and no longer affiliated with the football program), were allegedly aware of the 1998 Incident and aware of that the University had referred the matter to the District Attorney and was working together with multiple child welfare and law enforcement agencies in investigating Sandusky, at a time when Sandusky was still employed by the football program, yet by the Report's own admission, never interfered or tried to stop the investigation. It defies logic that, having been aware of and not stopped a 1998 investigation when Sandusky was still employed, anyone at the University would have concealed a 2001 investigation when Sandusky was no longer employed by the University.

Put simply, for the reasons set forth in detail above, the Freeh Report is both unreliable and inaccurate in its conclusions relative to the event of 1998 and 2001. Most certainly, the University and the NCAA erred in relying upon it and in blindly accepting it as fact.

At this point, it would be prudent for FSS to state publicly that which it already knows: the Report is not complete (and cannot be complete), but is instead littered with the opinions and conclusions of the author. Further, the University should state publicly the reasons why the Report is not complete and confirm that, although it will implement those portions of the Recommendations that are appropriate, it does not accept the "findings" of the Report as fact.

In this regard, the University should consider fully supporting a true investigation into the failure of the various law enforcement and child welfare agencies in 1998

and 2001, as well as the failure of The Second Mile to act upon notice of Sandusky's actions. Any concealment or cover-up resides there, if at all, and not in the University's football program as the Freeh Report suggested (albeit without any factual support whatsoever).

Finally, the NCAA should recognize and acknowledge that it acted precipitously in imposing sanctions on the University and on the University's football program. It should revisit its condemnation of the University and its culture, and acknowledge that its reliance on the Freeh Report was misplaced. While the NCAA cannot "reverse" the damage already done, it should conduct a comprehensive review of the facts and circumstances. This incomprehensible tragedy has only been compounded by the NCAA's reliance on a flawed and incomplete report of the events of 1998 and 2001.

PS4RS firmly believes that if the University, the Board of Trustees, the NCAA, and FSS admit, acknowledge, and accept the various errors set forth above, and move forward collectively and cooperatively, the repair of the damage caused to the University, its students, educators, alumni, and supporters can begin. At the same time, PS4RS implores the University to demand an investigation into the failures of law enforcement and child welfare agencies in connection with the investigation of the 1998 Incident. Simply put, had law enforcement or child welfare agencies taken action against Sandusky in 1998, when they had the chance, all of the succeeding abuses of children, and the related destruction of the University, could have been avoided.