LYNNE ABRAHAM
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
CORNER OF JUNIPER AND S. PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

RECEIVED
FEB 11 2008
U.S. C.A. 3rd

February 11, 2008

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
601 Market Street, Room 21400
Philadelphia, Pennsylvania 19106-1790

Re: *Lusick v. Palakovich, Nos. 05-3408 & 05-4203*

Dear Ms. Waldron:

Opposing counsel filed a letter under F.R.A.P. 28(j) on February 6, 2008. It is unauthorized and unnecessary.

This Court did not grant opposing counsel permission at oral argument to file a letter on the issue of whether to expand the certificate of appealability. Rather, it granted permission to the Commonwealth, because opposing counsel had spent most of his oral argument focusing on uncertified (and thus unbriefed) claims, insisting that the Court should expand the certificate.

Opposing counsel's letter, moreover, adds nothing to the discussion. In it, he merely repeats arguments he made at oral argument. The cases he cites are not new, either—he has already cited them repeatedly in his briefs. Opposing counsel's letter is an improper attempt to have the "last word," and it is a redundant one at that.

Respectfully submitted,

ROBERT M. FALIN
Assistant District Attorney

cc: Clayton Sweeney, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID LUSICK	:	Nos. 05-3408
	:	& 05-4203
v.	:	
	:	
JOHN PALAKOVICH, et al.	:	

CERTIFICATE OF SERVICE

I, ROBERT M. FALIN, herby certify that on February 11, 2008, a copy of the foregoing letter was served by placing same, first class postage prepaid, in the United States Mail addressed to the following:

Clayton Sweeney, Esquire
P.O. Box 55441
Philadelphia, PA 19127-5441

ROBERT M. FALIN
Assistant District Attorney
District Attorney's Office
Three South Penn Square
Corner of Juniper and South Penn Square
Philadelphia, PA 19107-3499
(215) 686-5742

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
CORNER OF JUNIPER AND S. PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

February 11, 2008

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

RECEIVED
FEB 11 2008
U.S. C.A. 3rd

Re: ***Lusick v. Palakovich, Nos. 05-3408 & 05-4203***

Dear Ms. Waldron:

During argument on February 5, 2008, David Lusick insisted that this Court should expand the certificate of appealability to include his ineffectiveness claims relating to the alleged incompetency of the two child-victims of sexual abuse. This Court granted the Commonwealth permission to file a F.R.A.P. 28(j) letter to address that argument.

The Magistrate recommended denying a certificate *in toto*, and the District Court approved that recommendation. This Court granted Lusick a certificate, but expressly limited it to three issues. The Commonwealth respectfully requests that this Court, in accord with the District Court and the motions panel, deny an expanded certificate on additional, unbriefed claims.

Lusick's request is untimely. This Court will not consider uncertified issues unless an applicant first seeks, and the Court grants, certification of additional issues. An applicant seeking certification of additional issues must file a separate motion, along with a statement of reasons, "within 21 days of the docketing of the appeal." 3d Cir. LAR 22.1(b) (1997). Since Lusick waited over a year to request an expansion of the certificate, his request is untimely under the Court's rules.

Moreover, since Lusick essentially asks this Court to reconsider its April 20, 2006 order granting a certificate on three issues, and denying one as to all others, Lusick was required under F.R.A.P. 40(a)(1) to request reconsideration within 14 days of the date of the order. Lusick's request is untimely upon such grounds as well.

Lusick's failure to act in a timely manner prejudiced the Commonwealth. The briefing here was extensive, with Lusick filing a 64-page brief, an eight-volume appendix, and an overlong reply of 44-pages. Expanding the certificate now, after briefing and argument, would significantly harm the Commonwealth's ability to address the claim and defend the District Court's judgment. Lusick's procedurally improper request—which is a belated attempt to "move the goalposts"— should be denied. See Hubley v. Superintendent, 57 Fed. Appx. 927, *9 (3d Cir. 2003) (denying "eleventh hour" certificate due to prejudice to appellee) (unpublished).

In any event, an expanded certificate of appealability is unwarranted for the reasons discussed in the report and recommendation. App. 19-26.

Respectfully submitted,

ROBERT M. FALIN
Assistant District Attorney

cc: Clayton Sweeney, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID LUSICK	:	Nos. 05-3408
	:	& 05-4203
v.	:	
	:	
JOHN PALAKOVICH, et al.	:	

CERTIFICATE OF SERVICE

I, ROBERT M. FALIN, herby certify that on February 11, 2008, a copy of the foregoing letter was served by placing same, first class postage prepaid, in the United States Mail addressed to the following:

Clayton Sweeney, Esquire
P.O. Box 55441
Philadelphia, PA 19127-5441

ROBERT M. FALIN
Assistant District Attorney
District Attorney's Office
Three South Penn Square
Corner of Juniper and South Penn Square
Philadelphia, PA 19107-3499
(215) 686-5742